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THE [TAKINGS] KEEPINGS CLAUSE: AN ANALYSIS OF FRAMING EFFECTS FROM LABELING CONSTITUTIONAL RIGHTS

DONALD J. KOCHAN

ABSTRACT

Did you know that the “Takings Clause” was not called the “Takings Clause” by any court before 1955? That was the first time that any court of any jurisdiction referred to the provisions regarding takings of private property in either the federal or state constitutions under the label “Takings Clause.” Did you know that justices of the U.S. Supreme Court did not use the moniker “Takings Clause” in any opinion before 1978? Given this history, the phrase “Takings Clause,” whether an apt descriptor or not, certainly cannot be justified as the dominant way to refer to these provisions by contemporaneous usage at the Founding nor by the weight of time. This Article gathers and analyzes originally compiled data sets on the usage of labels for this provision across time in court opinions, scholarship, and elsewhere. Acknowledging the fact that the label “Takings Clause” is of relatively modern invention, this Article questions its reign and evaluates the impact of such a “frame” for the rights protected.

In framing what is supposed to be a constitutional protection by referencing the power controlled, rather than the right granted, the rights component of the “Takings Clause” is diminished. For example, we do not label the rights to freedom of speech or press in the First Amendment as the “Censorship Clauses.” We call them—quite appropriately with deference to the rights and with a presumption against their infringement—the “Free Speech” and “Free Press” clauses.

This Article posits that the provisions regarding eminent domain concern respecting the means by which individuals can protect their “right to keep” property against a backdrop where individual owners normally retain a right to refuse to sell property. As such, it ponders whether the “Keepings Clause” might be a more suitable label. While doing so, this Article applies interdisciplinary insights regarding the power of “framing,” informing our understanding of law in new ways from the fields of psychology, linguistics (including semiotics and cognitive linguistics), and the study of consumer products labeling in marketing and advertising. (The last category is particularly unique; very little scholarship exists applying scholarly expertise in marketing to understand law and legal institutions.)

How we frame something affects our impressions of it, our expectations toward it, and our concept of its boundaries and scope. When we frame something in terms of power—like the “Takings Clause”—we provide greater legitimacy for that power and its exercise, and we are likely to tolerate more of it across a wider scope. Conversely, when we frame something in terms of protecting rights—like with the “Keepings Clause”—the presumption begins with an expectation of keeping and erects a higher bar for a deviation from that position. Anyone

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who cares about constitutional rights will find transferable lessons in this work. Seeing how framing operates with the property protections regarding eminent domain in the Fifth Amendment provides lessons on how framing choices for other constitutional rights might affect how those rights are perceived and how demanding the level of protection is for them.

I. INTRODUCTION

It will probably surprise most people that the label “Takings Clause” is a moniker of modern invention. In fact, the provisions in the U.S. Constitution’s Fifth Amendment that identify the rights and obligations associated with the eminent domain power—so often today labeled as the “Takings Clause”—had no label attached to them in any state or federal court opinion for more than a century past our Founding. “Takings Clause,” for example, was a label not used in an opinion of a court of any jurisdiction until 1955\(^1\) and was only first used by a justice of the U.S. Supreme Court (in a dissent by Justice Rehnquist) in the 1978 case of *Penn Central Transportation Co. v. New York City*\(^2\). Due, in part, to the fact that the phrase “Takings Clause” has no longstanding historical claim to legitimacy, and because the frame created by that phrase does not reflect the reality of the rights protected within the provisions it labels, this Article questions whether there might be a better way to label the relevant provisions of the Fifth Amendment and corresponding state protections.

\(^{1}\) Franco-Italian Packing Co. v. United States, 128 F. Supp. 408, 413 (Ct. Cl. 1955).


I. INTRODUCTION
Saliently, what most commonly and readily call the “Takings Clause” is less about the government’s power to take than it is about property owners’ rights to keep. Thus, this Article proposes that the “Keepings Clause” might be a more appropriate moniker, consistent with our choices to label other clauses in the Constitution by the rights protected.

Other parts of the Constitution that recognize personal rights are named for the rights they protect rather than the government power that might invade such rights. We do not call the First Amendment clause related to speech the “Abridgment of Speech Clause” or the “Suppression of Speech Clause,” yet the clause or its interpretation do in fact identify limits on the freedom and define how and when the government may sometimes abridge or suppress speech. Instead, we choose to call it the “Free Speech Clause.” We choose the “Press Clause” (or the “Free Press Clause”) as our label rather than the “Press Abridgment Clause” or the “Censorship Clause.” The “Press Clause” does not zoom in on the powers to abridge or censor or the procedures through which restrictions will be allowed. Although there are some proper procedures that allow for abridgment or censorship of press stories, our label for the clause broadcasts a presumption against such restrictions. When people want to gather, we say that they are protected by the “Free Assembly Clause” rather than describing it as an “Assembly Abridgment Clause,” notwithstanding the fact that the clause concerns both the right and the power and the right is subject to certain reasonable restrictions. The Second Amendment “Right to Bear Arms Clause” similarly is not plagued with a label as the “Gun Restriction Clause,” even though it has been interpreted to allow reasonable regulations of that right. The Due Process Clause could very well be tagged as the “Deprivation of Life, Liberty, or Property Clause”; after all, the purpose of the Due Process Clause is as much about deciding when and how the government can deprive the rights to life, liberty, or property as it is about defining some vague notion of “due process.” Yet, we focus our label on the rights-protective component rather than a rights-diminishing label that would call our attention to the coercive power elements.

These and other examples show that we often choose labels—particularly for rights listed in the Bill of Rights—that honor the rights to be protected rather than the limited powers available to the government to intrude upon them. This is more than merely an issue of semantic preference. This Article uses the “Takings Clause” as its case study to illustrate that these framing choices are important—they have consequences for the perception and operative strength of the rights protections involved.

The empirical claims in this Article are that the naming (or labeling) and framing of rights impacts how many individuals—including
property owners, the electorate judging the legitimacy and prudence of governmental actions, the governmental actors identifying the scope of their powers, the judges asked to evaluate the legality or constitutionality of the government’s acts, and others—perceive the content and quality of the rights. The normative arguments in this Article center on the benefits—in light of what we know about framing—of choosing an alternative label for the rights protections we today commonly refer to as falling under the umbrella label “Takings Clause.”

This Article engages in an interdisciplinary analysis—engaging law, psychology, linguistics (including semiotics, psycholinguistics, and cognitive linguistics) marketing, and to a certain extent economics—to study whether the manner in which we “frame” a constitutional right affects our perception of the right’s scope and the respect afforded to it. Advertising experts, Al Ries and Jack Trout, for example, opine that “[l]anguage is the currency of the mind. To think conceptually, you manipulate words. With the right choice of words, you can influence the thinking process itself.” By recognizing the importance of a right to keep one’s property by changing the frame from the lens of a “Takings Clause” to a “Keepings Clause,” we begin to re-inject the idea that takings of property should be a last resort; a true takings reform imperative should be to minimize the instances of takings in the first place, rather than simply trying to manage them as many reforms do.

The Supreme Court, in its June 2017 opinion in Murr v. Wisconsin, reinforced the idea that the right to keep (or retain) property is an integral part of the Fifth Amendment calculus in any takings case. The Court explained in Murr that “[a] central dynamic of the Court’s regulatory takings jurisprudence” requires “reconcil[ing] two competing objectives central to regulatory takings doctrine. One is the individual’s right to retain the interests and exercise the freedoms at the core of private property ownership. . . . The other persisting interest is the government’s well-established power to adjus[t] rights for the public good.” On the former, the Court stressed, “[p]roperty rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.”

6. Id. (emphasis added) (internal citations omitted).
7. Id.
Kennedy, who wrote the majority opinion in *Murr*, made similar statements, in an earlier case, about the “right to own and hold” and the “right to retain” property to describe the core rights involved in the Fifth Amendment’s takings provisions. In his concurring opinion in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, Justice Kennedy explained, “[t]he Takings Clause is an essential part of the constitutional structure, for it protects private property from expropriation without just compensation; and the right to own and hold property is necessary to the exercise and preservation of freedom.” He continued, while explaining the clause’s application to the states through incorporation, that it involves “[t]he right to retain property.”

What many call the “Takings Clause” is about recognizing and protecting the personal rights to private property. It is about limiting governmental power. So why should it be named for the power rather than the right? Perhaps a better name is the “Keepings Clause.” This reflects the dual nature of the protection found in the Fifth Amendment; the clause follows a property rule giving owners the right to exclude the government from some takings (those for non-public uses) and a liability rule giving owners the right to be made whole with compensation when eminent domain is necessary. A Colorado state court succinctly stated the matter: “the power to condemn private property is in derogation of the right to own and keep property,” meaning that the “exceptions” in the constitution that permit its derogation “must be interpreted narrowly.”

Some may argue that “Takings Clause” is more appropriate than “Keepings Clause” because the word “taken”—which shares the root “take” with “takings”—is at least in the words of the Fifth Amendment while no variation of the word “keep” is present in that text. This is a fair point. However, I do not find those facts compelling enough to rule out the superiority of choosing a “Keepings Clause” label. First, there are good reasons to focus the label on the right being protected and, as this Article will detail, the right at issue is the right to keep one’s property. Second, to say that “takings” flows as a derivative of something in the text ignores context. “Taken” exists, in context, with “nor shall . . . be taken” (or, as often reformulated,

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9. *Id.* at 733.
10. *Id.* at 734 (emphasis added).
11. *Id.* (citing Chi., B. & Q. R. Co. v. Chicago, 166 U.S. 226, 239 (1897)).
13. U.S. CONST. amend. V.
“shall [not] be taken”). Consequently, fidelity to words present in the text, in context, does not lead to the logical adoption of “Takings Clause.” Indeed, if we wanted to remain as rooted in the text as possible, we would need to come up with some way to label it the “Not Taken Clause”—and, the phrase “Not Taken” seems closer to “Kept” or “Keepings” than it does to “Taken” or “Takings” which are its natural opposite.

“Keepings Clause” is also better than other alternatives to the “Takings Clause” phrasing that have occasionally crept into the lexicon. It is superior to the “Just Compensation Clause,” which is a tag that minimizes the property rule component of the clause. It is also more apt than the “Eminent Domain Clause,” a label which focuses on the power. Incidentally, “Property Clause” has already been claimed in constitutional parlance to characterize Congress’s authority over “Territory or other Property belonging to the United States” in Article IV, Section 3 of the Constitution. Moreover, because several provisions of the Constitution deal with “property,” using that general term in the label would be less specific than an alternative like “keepings” that better reflects what type of property interest is at stake in the Fifth Amendment provisions governing when property is taken. In other words, using the term “keepings” better reflects when the “right to keep” must give way to public use and the government’s responsibilities to fill the confiscation fissure in the owner's keepings rights through compensation.

Part II presents extensive original data on the history of labeling the rights and powers associated with the Fifth Amendment provisions regarding eminent domain. It examines usage in state and federal court opinions, at the U.S. Supreme Court particularly, and in secondary sources. Part III surveys the usage of the phrases “right to keep” and “right to retain” in the courts and in scholarly commentary. It then positions those cases and supporting authorities within the constitutional framework surrounding enforceability of a “right to keep” and the critical importance of maintaining a focus on property under the Fifth Amendment’s rights-protective elements. Part IV conducts a breakdown of the component parts of the Fifth Amendment, articulating why the rights-protective elements of it are grounded in a “right to keep” and support a framework that creates a presumption for its protection. Part V provides the background interdisciplinary research to understand why framing matters. It presents substantial research to support the conclusion that the frames we create by the labels we choose have an impact on the substance of the objects they frame. Part VI applies interdisciplinary framing re-

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search to the Fifth Amendment and our expectations of it to illustrate that the content of the rights protected is impacted by using the label “Takings Clause,” and this Part discusses how consequences will flow if our footing is adjusted to consider it something else, such as a “Keepings Clause.”

Despite what some might think by observing the Supreme Court’s now (in)famous holding in *Kelo v. City of New London*—which unfortunately reinforced the notion that the power of eminent domain is wide in scope with a minimal role for the sanctity of dominion and control of ownership and sale—the Fifth Amendment is designed to protect a strong “right to keep.” In fact, it may be our framing of the Fifth Amendment provisions as a “Takings Clause” that allows decisions like *Kelo* to emerge as acceptable interpretations of the Constitution—in part because we are starting with an implied presumption favoring the power to take when the provisions are framed as governed by a power clause rather than a rights clause.

This Article examines whether individuals might tolerate broader interference with certain rights, such as property rights, if the frame for their protection is on the power granted to the government rather than the right held by the individual. By analogy, think what might happen if we called the Free Speech Clause the “Censorship Clause” or the “Abridgment of Speech Clause”; we might be more willing to start with an assumption that censorship is legitimate, so long as it meets certain criteria for constraining the power. However, that is not what we do. By framing the right as one to free speech, and as freedom from censorship or abridgment, we start, by our choice of words, with an infusion of the idea that the governmental interference is presumptively illegitimate and thereby the government is under a heavy burden to justify any intrusion.

Applying this reasoning to eminent domain power and private property, this Article asks whether a better “frame,” or label, for the “Takings Clause” might be the “Keepings Clause,” to reflect more clearly a presumption to be generally free from takings of private property rights and to be more consistent with how we label most other important rights in the Constitution. Even if one disagrees with that switch, there may still be something to learn from the framing discussion. One could decide, conversely, that such framing as the “Takings Clause” actually accomplishes an appropriate signaling of society’s priorities between powers and rights. Whatever the

15. *IRVING GOFFMAN, FORMS OF TALK* 128, 156-57 (1981) (describing footing as the way we align ourselves with a linguistic object and the capability to shift footing in the face of a new frame).

case may be, understanding the power of framing can help to identity different levels of balance based on the accepted frames we have placed on different rights. We must evaluate constitutional terminology—the use and choice of which has real world consequences in how the law defines the line between power and liberty. As James Madison cautioned, after all, the U.S. Constitution marked a change in approach.17 “In Europe, charters of liberty have been granted by power. America has set the example . . . of charters of power granted by liberty.”18

II. THE HISTORY OF LABELING THE RIGHTS AND POWERS ASSOCIATED WITH FIFTH AMENDMENT PROVISIONS REGARDING EMINENT DOMAIN

The Constitution and the Bill of Rights have few substantive headings or labels that characterize their provisions. The Fifth Amendment states, “[n]or shall private property be taken for public use, without just compensation.” Nonetheless, that label is so commonly used today to refer to those collected words that I suspect that few question its appropriateness, and most probably assume it has deep-rooted provenance. This Part challenges the common wisdom that the label “Takings Clause” has a long history. It evaluates the usage of the labels for the provisions of the Fifth Amendment governing when property is taken and what rights and powers are associated with such governmental actions. This Part has two primary goals. First, it intends to document the history behind labeling (and not labeling) these provisions of the Fifth Amendment, which, of course, therefore includes documenting the history of the usage of “Taking Clause” and “Takings Clause.” Second, it seeks to convince the reader that this labeling history illustrates that there are no long-stretching historical moorings for the usage of “Takings Clause” that are so entrenched as to be incapable of being unhooked. For those that might question whether a “Keepings Clause” label is too novel, it is important to recognize that not only does the label “Takings Clause” have no grounding as the Framers’ label, but also that the label we commonly use today is not very old nor long-established itself, at least in the grand scheme of time. Timespan of usage simply cannot be enough to make “Takings Clause” a label to which we are bound.

A literature review finds very little evidence of scholars questioning the label “Takings Clause.” Harrington comes close, but even his

17. JAMES MADISON, CHARTERS, NATIONAL GAZETTE (Jan. 19, 1792), reprinted in JAMES MADISON: WRITINGS 502-03 (Jack N. Rakove ed. 1999).
18. Id.
19. U.S. CONST. amend. V.
work does not conduct a historical review of usage. Harrington seems to implicitly acknowledge that there is no official name for the Fifth Amendment protections, calling it “[t]he so-called Takings Clause” while explaining his thesis on limiting takings protections to just compensation and seeing no room for interpreting “public use” as a substantive limit on eminent domain authority. In some ways similar to this article, Harrington’s claim is that the label “Takings Clause” is inapt for the substantive content covered by the rights associated with its usage. In that, I agree. However, as seen in Part IV, this Article reaches some distinct conclusions on the scope of Fifth Amendment protections. This Article posits that the “Public Use Clause” indeed is, and should be, a meaningful constraint on authority, and it argues that “Compensation Clause” is a label that does not adequately cover the nature of the rights protected in the Fifth Amendment’s provisions regarding takings. Nonetheless, this Article’s extended study of the history of labels and its demonstration that “Takings Clause” has no claim to superiority based in historic usage—research not covered in Harrington’s work—supports the view that a label other than “Takings Clause” might better describe the rights and powers at issue.

Using Westlaw, Lexis, and Ravel, I developed data sets for all judicial opinions within these relatively comprehensive databases that used the label “Taking Clause,” “Takings Clause,” “Just Compensation Clause,” or “Eminent Domain Clause.” All U.S. Supreme Court cases that used the phrase “eminent domain” were also scanned for other possible label permutations and none were found.

Indeed, there are many cases dealing with issues of property takings where the constitutional provisions are not given a label at all—they are referenced in relation to the Fifth Amendment generally with discussions about the acts, rights, and powers associated with eminent domain, takings, and property rights, but without a label frame. For most of this country’s history, courts quite simply did not see fit to put a moniker on the rights and powers at issue in the relevant portion of the Fifth Amendment.

20. See Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 HASTINGS L. J. 1245, 1248 (2002) (contending that what “is commonly thought to be a takings clause is in fact nothing more than a compensation clause” and that the government already had the power to expropriate; the so-called “Takings Clause” just created a limit on that power).

21. Id. at 1298-1301 (contending that “public use” in the “Takings Clause” is descriptive, not prescriptive, and that there was never an intended constitutional limit based on “public use” as modern courts have engrafted).

22. Id.

23. The charts and appendices inside this Article provide some of the information from the data sets. The complete data sets, with coding, are on file with the Author.
The data for all federal courts and all state courts reported below maps only the cases using one of the four labels listed above. It is a far bigger project for another day to catalog all of the takings cases in all of the courts where no label appears. Nonetheless, as explained in a moment, the data for “no label” was compiled and coded for U.S. Supreme Court cases.

This Article’s data collection is also not attempting to control for other factors like docket size, number of case opinions of any type in a given year, all takings cases in a given year, or other interesting variables. Such controls are not relevant here, because the data is not presented to show trends demonstrating a usage in any percentage of overall cases on the docket or total eminent domain cases. Instead, the data is meant only to reveal the recent provenance of each label’s usage. Despite these limited goals, this Article’s data compilation still tells an important story—it shows the relatively recent emergence of labels (see Figure 1).
Figure 1: "Taking Clause" or "Takings Clause"
All Federal & State Cases
Usage of Labeling Phrase in Cases of Any Type*

*Data compiled by searching Westlaw and retrieving cases retrieved, verification searches completed on Lexis and Babel.
All commercial databases produced the same result for the first known judicial opinion—in any federal or state court—to use the phrase “Taking Clause” or “Takings Clause” to label the rights and powers in either the federal or various state constitutions that today we so commonly associate with those phrases. That first case using “Taking Clause” (without an “s”) was in the U.S. Court of Claims’ 1955 opinion in *Franco-Italian Packing Co. v. United States*, which involved takings claims associated with the U.S. Navy’s seizure and impoundment of tuna boats during World War II. The first state court to use the label “[T]aking [C]lause” (also without an “s”) was the South Dakota Supreme Court in *Hurley v. State* in 1966. The first U.S. Supreme Court opinion using the phrase “Taking Clause” (without an “s”) was in the 1978 dissenting opinion in *Penn Central Transportation Co. v. New York City* (discussed further below).

In 1889, the California Supreme Court was the first state court to use the label “[E]minent [D]omain [C]lause” in an opinion in the case of *Callahan v. Dunn*. The first federal court to use the label “[E]minent [D]omain [C]lause” was the Circuit Court for the Eastern District of Missouri in the 1905 case of *Johnson v. City of St. Louis*. The first U.S. Supreme Court opinion to use “Eminent Domain Clause” came in the 1977 case of *Nixon v. Administrator of General Services*, but that case did not require resolving Fifth Amendment takings issues. The first usage in a U.S. Supreme Court opinion, in a true takings issues case, was in the *Penn Central* dissent in 1978 (in a dissenting opinion that used both “Eminent Domain Clause” and “Taking Clause”).

The first federal case of any type to use the label “[J]ust [C]ompensation [C]lause” was in the U.S. Supreme Court opinion in the 1923 case of *Albert Hanson Lumber Co. v. United States*, although that case did not require the resolution of takings issues. The first U.S. Supreme Court opinion that required resolving Fifth Amendment takings issues and used the label “[J]ust [C]ompensation [C]lause” was in the

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24. 128 F. Supp. 408, 413 (Ct. Cl. 1955) ("The [T]aking [C]lause of the fifth amendment [sic] is only a limitation on the exercise of a preexisting power. The defendant, as the sovereign, possesses the power of eminent domain; i.e., the power to take property for private use without the owner's consent. This is an inherent power requiring no constitutional recognition.").
27. 20 P. 737, 739 (Cal. 1889).
28. 137 F. 439, 422 (E.D. Mo. 1905).
1969 case of *YMCA v. United States*. The first state court to use the label “[J]ust [C]ompensation [C]lause” was from a lower court in New York in the case of *Watkinson v. Hotel Pennsylvania*.

Additionally, to focus insight on U.S. Supreme Court usage, I started with the Congressional Research Service’s (CRS) published study by Meltz listing all “takings” cases in the history of the U.S. Supreme Court, eliminating those cases that did not actually deal with takings (as the author of the CRS study acknowledged, the list was slightly over-inclusive, incorporating some substantive due process cases). The “takings” cases from the CRS list were then examined and coded as (1) using no label and referring generally to the substantive elements of the Fifth Amendment and its words; (2) using “Taking Clause” or “Takings Clause”; (3) using “Just Compensation Clause”; or (4) using “Eminent Domain Clause.” The full results of that coding are listed in a spreadsheet in Appendix A.

As Appendix A and the pie charts in Figure 2 display, “Eminent Domain Clause” and “Just Compensation Clause” have seen sporadic usage in recent decades at the U.S. Supreme Court level but received little traction, while almost every takings case before the U.S. Supreme Court in the past three decades has used the label “Takings Clause” alone (or a few times in conjunction with other labels) when discussing issues in cases resolving takings claims.

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As previously mentioned, the first reported usage of the label “Taking Clause” in a U.S. Supreme Court opinion was in Justice Rehnquist’s dissent in *Penn Central*, joined by Chief Justice Burger
and Justice Stevens.\textsuperscript{35} Thus, for the first 202 years of this country’s history and for 108 years after the Supreme Court heard its first case truly requiring resolution of property takings issues, neither “Taking Clause” nor “Takings Clause” ever appeared in the pages of a U.S. Supreme Court opinion.

In fact, the Rehnquist dissent in \textit{Penn Central}—arguing that there should have been a finding of a taking in the case—can be identified as the first usage of “Taking Clause” (without an “s”) in a U.S. Supreme Court opinion to describe the Fifth Amendment provisions. Further, Rehnquist made clear that he was using the label to collectively describe all aspects of the provision.\textsuperscript{36} That dissenting opinion used “Taking Clause” four times, including stating, among other things about it, that there are “three key words in the Taking Clause—‘property,’ ‘taken,’ and ‘just compensation.’”\textsuperscript{37} In the closing paragraph of the \textit{Penn Central} dissent, the authors chose to also call the relevant Fifth Amendment provisions the “Eminent Domain Clause”—the first usage of that label in any opinion in a case requiring the resolution of takings issues at the U.S. Supreme Court.\textsuperscript{38} The majority opinion in \textit{Penn Central} (written by Justice Brennan)—which held that there was not a taking resulting from the refusal to approve plans for an expansion of Grand Central Terminal in light of historic landmark concerns—did not use a label.\textsuperscript{39}

The first time that “Takings Clause” (with an “s”) was used in a U.S. Supreme Court opinion was in the 1979 case of \textit{Andrus v. Allard}, the Court’s very next takings case after \textit{Penn Central}.\textsuperscript{40} In fact, \textit{Andrus v. Allard} also marks the first time either “Taking Clause” or “Takings Clause” was used in a majority opinion at the U.S. Supreme Court, this one authored by Justice Brennan (who, incidentally, you will recall wrote the majority opinion in \textit{Penn Central} that used no label).\textsuperscript{41} In \textit{Andrus}, the Court held that there was no violation of Fifth Amendment property rights resulting from the prohibition of commercial transactions involving avian artifacts under the Migratory Bird Treaty Act and the Eagle Protection Act.\textsuperscript{42}

\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 153.
\textsuperscript{39} See id. at 138.
\textsuperscript{41} Id.; Penn Cent., 438 U.S. at 104.
\textsuperscript{42} Andrus, 444 U.S. at 67-68.
While the move toward including “taking” as part of a label for these Fifth Amendment provisions started with the singular “taking” in “Taking Clause,” over time the dominant usage has morphed to “Takings Clause” (with an “s”). The first federal court opinion to use “Takings Clause” (with an “s”) was in *South Terminal Corp. v. E.P.A.* from the U.S. Court of Appeals for the First Circuit in 1974.43 The first state court opinion to use the label “Takings Clause” (with an “s”) was a 1974 Colorado Supreme Court opinion in the case of *Ossman v. Mountain States Telephone & Telegraph Co.*44

43. *S. Terminal Corp. v. E.P.A.*, 504 F.2d 646, 678 (1st Cir. 1974).
44. 520 P.2d 738, 742 (Colo. 1974) (en banc).
Figure 3: All Cases, All Clauses
Usage of Labeling Phrase in Cases of Any Type

*Data compiled by searching Westlaw and reviewing cases retrieved; verification searches completed on Lexis and Ravel.
How and why the phrase “Takings Clause” (or “Taking Clause”) became popular is a subject for further research and analysis for another day. Perhaps it is as simple as individuals naturally gravitating toward a variant of “taken” from the text (even if that is contextually-deficient as discussed in the introduction because taken is preceded by the negative “Nor” or “[not]”). But, with a skeptical eye, we may need to investigate beyond assuming that it emerged spontaneously from people looking for a label and thinking “Takings Clause” was a linguistically logical one. We should wonder whether there is a conscious effort to use the label to impact meaning and content. For example, can we explain the emergence of the label as reflective of a shift in court doctrine or treatment of takings or property rights more generally? Or, can we connect the use of the label as a driving force that changed the course of doctrine and treatment? Are there correlations or causations to discover, or did the label emerge spontaneously, with any surrounding changes in doctrine being merely coincidental?

No doubt, a number of possible explanations might exist for the emergence of the label, and a number of possible answers might apply for these and other questions. Those categories of inquiry and determinations of possible answers, however, are beyond the scope of this Article. Nonetheless, it might be useful to briefly ponder some possible explanations to get the conversation started. For example, one might speculate that the rise of “Takings Clause” could be linked to an increased recognition of broader powers to take—which would be consistent with the idea that a label might reflect the dominant values being advanced by the choice of words. Here, that could reflect an increased tolerance for governmental power and a lessened sensitivity to the rights side of the power-rights balance inherent in the Fifth Amendment protections. Another possible explanation might be the rise in so-called “regulatory takings” challenges, which involved cases that came with a need to identify what it means to “take” and “not take” property, because only actual “takings” are included within the scope of the protection.\(^5\) Within the jurisprudential space where challenges to regulations that affect property values are adjudicated, there has been a heightened need over the past century to distinguish between (1) regulations of ownership that must be tolerated or else government could hardly go on (which do not trigger the so-called “Takings Clause,” because only takings trigger it), and (2) actual interferences with property rights that rise to the level of constitutional takings (and thus trigger the Fifth Amendment protective formula).

\(^5\) For an understanding of the field of regulatory takings, see generally Steven J. Eagle, Regulatory Takings (5th ed. 2012).
Further research might also be done to determine when and how the phrase was used outside of judicial opinions, such as in scholarship, case notes, briefs, and popular press. Perhaps such extrajudicial usage of the phrase influenced its usage in the courts. When conducting such research, one might also ponder whether authors who initially used the frame “Takings Clause” chose that usage with an intended purpose, or whether they had a value-laden bias for a particular substantive scope for the content of the clause. This Article does not plow the field in these categories of sources, but it can provide some initial findings. One notable observation is that most (of the small set of) authors using a label through the 1970s chose “Taking Clause”—without an “s”—rather than “Takings Clause” to describe the Fifth Amendment provisions. To signify the novelty or uncertainty of the usage, many of these early articles also put the word taking in quotation marks, such that their usage was often printed as “‘[T]aking’ [C]lause.”

A search in HeinOnline’s “Law Journal Library,” which is quite comprehensive, but not exhaustive of all historic legal scholarship, generates results identifying the oldest discoverable use in a legal journal of “Taking Clause.” (At least, HeinOnline produced the oldest known journal article that this Author could find from scanning a variety of repositories.) The label “Taking Clause” first appears in a case note from 1936 in the Michigan Law Review. The case note was written by “R.E.T.” who, from examining the list of the board members, appears to be a student named Royal Edwin Thompson. The case in the note was about Oklahoma City’s liability for a nui-

46. Like so-called “scare quotes,” the technique draws attention to a unique or new usage of a term or phrase.


48. Note that a search of Westlaw’s “Journals and Law Reviews” database did not turn up any hits before 1964. Thus, HeinOnline was the best source identified for the earliest usage.


50. Case Note, supra note 49. This case note was also reprinted in Current Survey, 2 LEGAL NOTES ON LOCAL GOVT 202 (1936-1937).

sance. However, the student chose to discuss various theories of liability not covered in the Oklahoma case for why the city might be liable for damages, including the “‘Taking’ Clause.” Thompson stated, “[s]ome courts, . . . would assert that the injury is only consequential, and not within the ‘Taking’ Clause.” To support that proposition, Thompson cited to a case that was indeed a takings case, but one that never used the label “Taking Clause”; instead, it simply discussed takings issues by general reference to the Fifth Amendment protection rather than a label. It appears the choice to use the label was his own rather than dictated by the cases he was discussing.

The search in HeinOnline returns a spattering of hits for the use of “Taking Clause” between that case note in 1936 and 1964. Case notes published in 1953 and 1961 each used “Taking Clause” once. In that same time period, the label “Taking Clause” was also used in single passing references in two comparative law articles in 1958 and 1961 to refer to similar protections in documents other than the federal or state constitutions. An Illinois attorney used the label once in a footnote parenthetical in a 1963 University of Chicago Law Review article.

The first three discovered usages in articles devoted to scholarly analysis of the Fifth Amendment’s provisions on takings came in one article published in 1962 and two articles published in 1964. Emerson G. Spies and John C. McCoid II—a professor of law and associate

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54. Id.
55. Id. (citing City of Valparaiso v. Hagen, 54 N.E. 1062 (Ind. 1899)).
56. Gerald Krupp, Case Note, Constitutional Law: Taking Private Property for Public Use: Diminution of Value of Land as a Taking, 1 UCLA INTRAMURAL L. REV. 36, 74 (1953) (“The jurisdictions having only a ‘Taking’ Clause in their constitutions are not in agreement concerning the meaning of the provision.”).
57. Henry J. Price, Recent Decision, Constitutional Law—Eminent Domain — Extension Of Fifth Amendment “Taking” To Include Destruction Of Lien Right By The Doctrine Of Immunity Of Government Property From Attachment, 59 Mich. L. Rev. 957, 968 (1961) (“In its first consideration of the fifth amendment ‘Taking’ clause, the Supreme Court in the Legal Tender Cases held that ‘taking’ referred ‘only to a direct appropriation, and not to consequential injuries resulting from the exercise of a [sic] lawful power.’ ” (quoting 79 U.S. (12 Wall.) 457, 451 (1870)).
professor of law, respectively, at the University of Virginia School of Law—used “Taking Clause” several times in their 1962 *Virginia Law Review* article on “Recovery of Consequential Damages in Eminent Domain.” In 1964, Joseph Sax, then an associate professor of law at the University of Colorado Law School, published the seminal article, “Takings and the Police Power,” in the *Yale Law Journal*, in which he used the label “[T]aking [C]lause” several times. (Notably, Professor Sax changed his usage to “[T]akings [C]lause”—with an “s”—in another oft-cited 1971 *Yale Law Journal* work, “Takings, Private Property, and Public Rights,” at which point he was a professor of law at the University of Michigan Law School.) Also in 1964, Professor Daniel Mandelker of the Washington University (St. Louis) Law School published an article—discussing inverse condemnation in proceedings published from the American Bar Association—wherein he used “[T]aking [C]lause.”

60. Emerson G. Spies & John C. McCoid II, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L. REV. 437, 442 n.20, (1962) (“both cases denying recovery under the [T]aking [C]lause”); id. at 444 (mentioning “[T]aking [C]lauses”); id. at 450 (“Thus some states have expressly refused to append the more liberal damage provision to the traditional [T]aking [C]lause.”). In one of their usages, McCoid and Spies explained:

Throughout most of the Nineteenth Century both federal and state governments operated under constitutions which made no mention of damages but required compensation only if property were actually taken. In determining what constituted a taking and what was property the underlying philosophy was at first quite restrictive. The courts were concerned with the benefit to the government rather than the loss of the individual. It followed that consequential losses almost always were noncompensable. This narrow and restrictive approach was suggested in part by the natural connotation of the word “taking,” and in part by the tendency of courts in developing any new concept to emphasize concrete objects rather than abstract rights. Thus, time and again courts denied compensation, despite obvious loss, on the ground that there was no physical invasion of the property, no taking of possession, or no substantial interference with a clearly defined property interest or estate. Helping, too, to curtail the scope of what otherwise might have been recovered under these 'Taking Clauses' was the pervasive force of the then well-entrenched doctrine of sovereign immunity. If the sovereign were completely immune for its wrongs, then surely in condemnation where governments committed no wrongs at all, awards could properly be limited to the beneficial value of property which the government physically appropriated for its own use. Id. at 443.


The result is continuing tension and conflict between the immunity principle, which bars suits against the sovereign for damages, and the constitutional
A quick note on usage in briefs: The scope of coverage for briefs in available databases does not lead one to have a high level of confidence that they have found the first brief on any subject or phrase. However, I can report that the first usage inside the Westlaw briefs’ database to show the usage of “Taking(s) Clause,” for example, was filed in 1945 by the United States.64 The federal government submitted a brief to the U.S. Supreme Court that used the label “'[T]aking [C]lause” in Lichter v. United States, a case involving takings and other challenges to the Renegotiation Act governing excessive profits from procurement contracts during World War II.65 No other briefs of any parties available in Westlaw’s databases used the label again until 1974.66

Finally, to get a glimpse at the larger societal usage of the mix of possible labels, consider some observations on usage of the labeling terms “Takings Clause,” “Taking Clause,” “Just Compensation Clause,” and “Eminent Domain Clause,” as they appear in books available in GoogleBooks. Some informative results are generated by examining the corpus of books collected in Google’s Ngram function.67 This Google function

command to pay compensation. Either the court relies on the addition of a “damaging” amendment to the [E]minent [D]omain [C]lause, or it construes its “[T]aking [C]lause to include an interference with the use of land, which is a damaging because it affects less than the full title. Either way, tort doctrines have been able to filter into inverse condemnation decisions . . . .”

Id. This article was also reprinted as Daniel R. Mandelker, A Review of Inverse Condemnation, in 3 L. NOTES FOR THE YOUNG LAW. 23, 24 (1966). Prof. Mandelker increased the frequency of his usage in a longer law review article on inverse condemnation in 1966. See Daniel R. Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility, 1966 Wis. L. REV. 3, 14, 38-39.

64. WESTLAW, http://westlaw.com (follow “Briefs” hyperlink; then search “Takings Clause” and filter results by date).


66. In the case of City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974), an amicus brief and the respondents’ brief filed on March 22 and March 23, 1974, respectively, together used the language “Takings Clause,” “the Due Process and Takings Clauses,” and “the Due Process and Takings clauses.”

has been described as “the first tool of its kind, capable of precisely and rapidly quantifying cultural trends based on massive quantities of data.” The tool enables users “to examine the frequency of words . . . or phrases . . . in books over time.” The database accesses “over 5.2 million books: ~4% of all books ever published” when conducting a search and producing an Ngram. Even if this tool is a bit raw and elementary, we can use it to observe some patterns in the relative frequency of usage for particular words and phrases.

The figure below presents the Ngram results for the terms listed above from 1800 to 2008 (the last available date in the program). As the graph shows, all terms have emerged only recently, and “Takings Clause,” in particular, is of relatively recent origin.

Each of these terms have only appeared in a relatively small percentage of the overall books in Google’s digitized collection, but Figure 4 at least shows interesting trends in usage. Each line in this Ngram represents what is called a “unigram” for each term. The y-axis shows what percentage of all the unigrams contained in Google’s sample of books, written in English, includes the phrase or term tested. “Usage frequency is computed by dividing the number of instances of the n-gram in a given year by the total number of words in the corpus in that year.”

Compensation Clause” and “Eminent Domain Clause”; restrict year range from 1800 to 2008) https://books.google.com/ngrams/graph?content=just+compensation+clause%2C+takings+clause%2C+taking+clause%2C+eminent+domain+clause&year_start=1800&year_end=2008&corpus=15&smoothing=3&share=&direct_url=t1%3B%2Cjust%20compensation%2C%3B%2Ctakings%2C%2Ctaking%2C%2Ceminent%2Cdomain%2C+unigram%3B%2C0%3B%2Ct1%3B%2Ctakings%2C%2Ctaking%2C%2Ceminent%2Cdomain%2C+unigram%3B%2C0%3B%2C0 [https://perma.cc/PMA4-WBDX].


69. Google Labs Ngram Viewer, supra note 67.

70. Id.

71. John Bohannon, Google Opens Books to New Cultural Studies, Sci., Dec. 17, 2010, at 1600 (describing the Ngram project and its initial critics). The creators warn, “[b]asically, if you’re going to use this corpus for scientific purposes, you’ll need to do careful controls to make sure it can support your application. Like with any other piece of evidence about the human past, the challenge with culturomic trajectories lie in their interpretation.” CULTUROMICS, available at http://www.culturomics.org/Resources/A-users-guide-to-culturomics (last visited May 15, 2018) (operated by some of the creators). Suggestions for controls are available in the main paper supporting the application. See also Michel et al., supra note 67, at 181-82. “Culturomic results are a new type of evidence in the humanities. As with fossils of ancient creatures, the challenge of culturomics lies in the interpretation of this evidence.” Id. (giving a few examples searches with interpretations).

72. Michel et al., supra note 67, at 176. The Google Ngram data is “normalize[d] by the number of books published in each year.” What’s All This Do?, GOOGLE BOOKS, http://books.google.com/ngrams/info [https://perma.cc/HRL9-HMDP] [hereinafter What’s All This Do?].
justable and simply permits a consideration of the trends as a moving average.\footnote{Google Books describes “smoothing” as follows: Often trends become more apparent when data is viewed as a moving average. A smoothing of 1 means that the data shown for 1950 will be an average of the raw count for 1950 plus 1 value on either side: (“count for 1949” + “count for 1950” + “count for 1951”), divided by 3. So a smoothing of 10 means that 21 values will be averaged: 10 on either side, plus the target value in the center of them. At the left and right edges of the graph, fewer values are averaged. With a smoothing of 3, the leftmost value (pretend it’s the year 1950) will be calculated as (“count for 1950” + “count for 1951” + “count for 1952” + “count for 1953”), divided by 4.}

Once individuals understand that the “Takings Clause” has no claim to authority by reference to official name or even longstanding provenance, the possibility that an alternative label could be appropriate seems less extraordinary. The next Part begins to set the groundwork for considering the possibility that “Keepings Clause” is a label that better frames the rights and power limitations in the critical words of the Fifth Amendment. Part III explains the existence of a “right to keep” property in our jurisprudence, and it surveys the authorities that have expressly recognized a “right to keep” property, or, as sometimes phrased, a “right to retain” property or at least retain ownership rights that include the “right to refuse consent to sell” or otherwise refuse to part with property.

\footnote{What’s All This Do?, supra note 72. In addition to providing the graphed results, searches for terms and phrases also produce hyperlinks appearing below the graph, allowing one to browse through the books available that contributed to the data set. \textit{Id. (“Below the graph, we show ‘interesting’ year ranges for your query terms. Clicking on those will submit your query directly to Google Books.”).}
Figure 4

Google Books Ngram graph
III. THE UNDER-APPRECIATED “RIGHT TO KEEP” PROPERTY

If you own something, you expect that part of what it means “to own” is that you get “to keep” what you own. There is, or at least should be, a legal presumption that a property owner has the “right to keep” her property. It should be presumed that another private individual could almost never take property away from an owner without consent—no matter how much they are willing to pay. That is called theft (and other derivative terms). Moreover, it should be presumed that, while the government might get to take property from an owner without consent because it is the sovereign, even the government may only do so upon satisfying certain conditions and when operating within certain constraints and limitations. Unless the government can satisfy those strict conditions, it cannot overcome this presumption and override the fundamental “right to keep” property.

Despite the intuitive appeal of recognizing a “right to keep”—or derivative terms for the same substantive right, such as the “right to retain” or the “right to refuse to sell”—it is strikingly used quite sparingly in case law and scholarly literature. It may be that keeping and retaining is so engrained into the concept of ownership, and seemingly so obviously or subconsciously acknowledged as a part of what it means to “own” something, that people seldom see a need to separately and expressly announce its existence as a component of the ownership package. To own is to control the disposition of the property.

Sections B and C of this Part discuss the treatment of the “right to keep” in the courts and scholarly literature. Along any of these metrics, it appears that the “right to keep” is grossly underappreciated even if it is likely widely recognized as a constant but silent backdrop to the meaning of property ownership. We begin in Part A with an explanation of the omnipresence of the “right to keep” within ownership and some opinions on the strength of the right that makes the paucity of express mention of the right puzzling.

74. Jeffrey J. Rachlinski & Forest Jourden, Remedies and the Psychology of Ownership, 51 VAND. L. REV. 1541, 1560 (1998) (“Ownership of a right protected by a damages remedy is not full ownership because the right is, in a sense, shared with any potential interloper.”).

75. Abraham Bell & Gideon Parchomovsky, A Theory of Property, 90 CORNELL L. REV. 531, 555 (2005) [hereinafter Bell & Parchomovsky, Theory] (“[L]egal enforcement of property rights should increase the property owner’s probability of retaining possession of her property . . . . The heightened protection effected by legal enforcement makes it less likely that current owners would involuntarily lose their assets.”).

76. The ability to control the fate of one’s property is reflected in a variety of rights associated with property, like the “right to destroy.” See, e.g., Lior Jacob Strahilevitz, The Right to Destroy, 114 YALE L.J. 781 (2005). One might say that the greater right to destroy includes the lesser right to control disposition as well.
A. **The Meaning, Presence, and Value of the “Right to Keep”**

The “bundle of sticks” is a useful metaphor for describing elements of property ownership, and it seems logical to include the “right to keep” as one of the sticks. Each “stick” in “the bundle” represents some specific attribute of such ownership. Guzman lays out what the bundle of sticks means—focusing on several of the sticks, but like so many explications of ownership, not directly mentioning retention:

Legal theory divorces the term “property” from the item itself to instead describe relative rights vis-a-vis that item. “Property” thus means things one can do with Blackacre (entitlements) including its use, possession, and consumption, as well as enjoying its fruits, the ability to exclude others from its use, and the ability to transfer it. Although ownership suggests the assemblage of all such rights in one person who then totes the full “bundle of sticks,” one may properly speak of “owning” a lone entitlement or stick . . . . Legally, the right itself is the property. Although Guzman and many others who discuss ownership seldom mention keeping or retaining what one owns, the things they do mention lend support. One cannot fully consume if they cannot keep. Possession seems less powerful if it is not presumed infinite—or that one can keep and possess forever what they own. Furthermore, the right to refuse to sell is a logical extension of the right to exclude. And, the ability to transfer property should include the power to choose not to transfer it—in other words, to keep it.

In previous work, I have catalogued a variety of legal doctrines in which, what I call, “keepings” elements exist—where the “right to keep” is impliedly recognized by the way we have constructed a variety of legal doctrines, presumptions, principles, and the like. It is not necessary to revisit that survey and analysis in this Article. However, it is worth reiterating that,


79. Bell & Parchomovsky, *Theory, supra* note 75, at 598 (“[T]he right to exclude protects the owner’s ability to preserve idiosyncratic values, such as her subjective attachment to the property. In other words, the right to exclude defends the owner’s ability to extract the full value of ownership right before departing with it.”).

We generate the legal rules of acquisition of property as a means of (1) incentivizing desired action and investment; and (2) rewarding those who engage in certain behaviors and activities with the product of their investment. If we determine that someone owns something, then we generate rules and build the legal architecture to protect that ownership...to allow people to keep what they own as long as they so desire. Keepings is a theme that helps us understand the formulation of these components of the property law system.81

In his influential treatise on property law, Joseph Singer alludes briefly to the general proposition that the law reflects the “right to keep” property. In a passage introducing adverse possession, he writes that “[o]wners generally have the power to transfer their property rights, and the obverse seems to be the right not to give up your rights until you wish to do so.”82 Singer’s observations here are one of the rare places in the literature where the idea of a “right to keep” is expressly discussed. Singer continues, positioning “[t]he right to keep your property until you want to part with it”83 as something that is “as important, or more important, than the right to exclude or the privilege to use property.”84

The existence of the “right to keep” is further evidenced by the way owners value what they own. One impressive study by Jeffrey Rachlinski and Forest Jourden on that matter concludes that the premium value that individuals place on items they own—often called the “endowment effect”—can best be explained by those individuals placing a price on their “right to refuse.”85

Before turning to their findings, a bit of background on the endowment effect is useful. Behavioral experts Daniel Kahneman, Jack Knetsch, Richard Thaler, and Amos Tversky have, over time, conducted various studies that have inspired substantial research on the tendency of individuals to value items they already own more than they would the same item if purchasing it for the first time—the “endowment effect.”86 In other words, “[t]he price people are willing to

81. Id. at 358.
82. JOSEPH WILLIAM SINGER, PROPERTY §4.1 (3d ed. 2010).
83. Id.
84. Id.
85. Rachlinski & Jourden, supra note 74, at 1542, 1544.
pay for a particular good is often significantly less than the price they are willing to accept to give up the same good.” The owners—or sellers “endowed” with a good—have some reason to give the item in their possession this higher value, which is seemingly related to some characteristics now attached to the item as a result of possession or ownership.

While many studies demonstrate the existence of this “endowment effect,” a definitive answer regarding why it occurs has yet to be settled upon. The leading justification is “loss aversion”; in other words, owners have an aversion against losing things (and feel pain when they must give something up), which is separate and apart from the feeling before one acquires something, when there is nothing to lose.

Rachlinski and Jourden conducted an empirical study aimed at isolating why individuals demand higher prices, and would be willing to accept such price, in order to part with things they own. Their research was also focused on identifying why individuals react differently to property rules versus liability rules. Their study counsels how the law can reduce the endowment effect when desired to avoid inefficient exchanges that it may create or when the effect otherwise acts as a barrier to exchange. The study lays out their conclusions that property rules can sometimes impede trade, because they allow owners to refuse efficient deals, while liability rules do not. The consequences of those conclusions are beyond the scope of this Article.

However, in the process of reaching those larger conclusions and settling on certain prescriptions, Rachlinski and Jourden’s research revealed something very important about the “right to keep,” or, as they framed it, the right to refuse to sell. Their findings provided “evidence that people do not regard rights protected by damages remedies as being owned in the same way as rights protected by injunctive relief. The former can be taken by another without the right holder’s permission, whereas the latter cannot be taken without the right.

88. Id.
89. Kahneman & Tversky, supra note 86; Thaler, supra note 86.
90. See generally Rachlinski & Jourden, supra note 74.
91. Id.
92. Id.
holder's permission." Consequently, “[t]he power to refuse to sell a right is a critical psychological component of ownership, and damages remedies do not include this power.” In cases where the courts apply a liability rule as a property owner’s remedy—in other words, disregard the “right to keep” or at least marginalize it to a right with only a damages remedy to owners—the courts “[take] away their power to refuse to sell their rights . . . thereby undermining their status as owners.” Bell and Parchomovsky reach a similar conclusion that “the probability of retention and the use value are variables that positively correlate with the owner’s utility.”

Thus, if owners equate status with the right to refuse, they will place a separate value on their “right to keep.” Rachlinski and Jourden explain, “an important component of [the endowment effect] might be that ownership usually includes the ability to refuse to sell a possession.” “In other words, the endowment effect might depend upon whether the law protects an ownership interest with a property rule or a liability rule.” Similarly, they explain that the right to refuse to sell—in other words, a right governed by a property rule and enforceable by an injunction—gives owners (and those to whom they might transfer the property who will receive the same rights package) a sense of certainty that adds value to the property. Presumably, purchasers in a free exchange who wish to obtain the same level of certainty will pay more for property that comes with that additional characteristic. For this reason, Bell and Parchomovsky explain their preference for property rules; they argue “property rule protection enables the entitlement holder to set the price at which the item will be used or transferred. A fortiori, it also empowers the holder to refuse to deal altogether and keep the object.”

These concepts surrounding the “right to keep” justify its recognition and value; they are reflected in court opinions and legal com-

94. Rachlinski & Jourden, supra note 74, at 1542.
95. Id.
96. Id.
97. Bell & Parchomovsky, Theory, supra note 75, at 554.
98. Rachlinski & Jourden, supra note 74, at 1545 (“The remedy is likely to have a strong influence on the size of the endowment effect. A right that is protected by a damages remedy might convey less of a sense of ownership than does a right that is protected by an injunctive remedy.”). Id. at 1560.
99. Id. at 1545.
100. Id. at 1560 (rights protected by damages remedies alone have a “potential for interference [that] undermines the certainty that an injunctive remedy conveys. . . . Injunctive remedies convey a sense of certainty and security that damages remedies do not.”).
101. Bell & Parchomovsky, Theory, supra note 75, at 589 (“Property rule enforcement is therefore instrumental in the blocking of nonconsensual takings that may substantially deplete the value assets generate for their owners.”).
mentary, but not always with express mention of a “right to keep,” “right to retain,” or “right to refuse to sell.” Nonetheless, a few sources have directly invoked these terms from time to time. The next two Sections survey many of the places where these terms are expressly employed.

B. The “Right to Keep” or “Right to Retain” in Court Opinions: An Obvious Stick in the Bundle with a Surprisingly Small Set of Cases Discussing It

There is strikingly little attention given to the phrase “right to keep” in the literature or case law on property generally, or on takings particularly, notwithstanding the fact that protecting owners’ ability to keep property rests at the foundation and in the background of the development of many legal rules. This Section looks at case citations to these concepts.

Although the phrase “right to keep” or “right to retain” has been recognized in the substance of many judicial dispositions, surprisingly, these words have been expressly used in only a small number of opinions. No doubt, the ideas and concepts associated with keeping or retaining property are often part of the discussion in takings cases, but the “right to retain” or “right to keep” often lurks in the background of these opinions rather than being directly discussed.

As mentioned in this Article’s introduction, the “right to retain” has been expressly mentioned in the most recent takings decision by the Court in Murr v. Wisconsin, and the “right to retain” language expressly appeared also in Justice Kennedy’s concurring opinion in Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection. A New York state court succinctly pronounced in 1953 that, “An individual under our constitution has always been guaranteed the right to retain his property unless the Legislature felt the public interest to be paramount.” One federal district court explained that an owner has “a right to retain his exclusive claim to the property” and that right will be presumed to be constant and something “which can only be taken from him under the power of eminent

102. See Kochan, Keepings, supra note 80 (describing the prevalence of rules in the property system that are designed to help owners keep what they own).

103. See, e.g., Kansas ex rel. St. Joseph & Denver City R. Co. v. Nemaha Cty. Comm’rs, 7 Kan. 542, 546 (1871) (“Every person has a vested right to retain his own property for his own use, subject to the right of taxation for public use, and to the right of eminent domain, neither of which is called into requisition, so far as any question in this case is concerned.”).


domain.”106 In other words, the court was explaining that, even if a portion of property is taken for the public good, the presumption toward retention plays a role. Whatever was not taken or is not necessary for the public use remains with the property owner.107

The Colorado Court of Appeals, in a 2007 case, explained the role of “the right to keep” in commanding narrow interpretations of the condemnation power—“[b]ecause the power to condemn private property is in derogation of the right to own and keep property, the exceptions in art. II, section 14 must be interpreted narrowly, with any uncertainty in the ambit of the power to condemn resolved against the person asserting that power.”108 A longstanding line of Colorado cases use this “right to own and keep property” language.109

In one takings case, the Michigan Supreme Court stressed the autonomy of individuals to use their property as they wish, with the “right to keep” being a default rule that could only be overcome by compensation. In the 1889 case of City of Detroit v. Beecher, the court explained: “What he intends to do with this land, if certain contingencies occur, is not material. He has a right to keep his property, or to receive full compensation for it if it is taken on the ground of public necessity.”110

The Massachusetts Supreme Court has made a very strong pronouncement about the “right to keep” in its 1917 opinion in Riverbank Improvement Co. v. Chadwick.111 The context of the court’s inquiry surrounded the issue of whether an easement holder’s rights could be extinguished—against the will of the easement holder—“for the benefit of the servient estate upon the payment of money.”112 The court emphasized that the existence of compensation should not end the matter—money does not always cleanse an otherwise forceful and illegitimate extinguishment of one’s property rights.113

107. See, e.g., Hudson v. City of Shawnee, 790 P.2d 933, 940 (Kan. 1990) (“The landowner retains the right to use condemned property for any purpose not inconsistent with the public right.” (citing Kan. Gas & Elec. Co. v. Winn, 605 P.2d 125 (Kan. 1980))); Thompson v. City of Osage, 421 N.W.2d 529, 532 (Iowa 1988) (“Although the condemnor is entitled to exclusive use of the land condemned, the owner retains the right to use the property for any purpose not inconsistent with the public right.”).
111. 117 N.E. 244 (Mass. 1917).
112. Id. at 249.
113. Id. at 246 (“If the use for which the property is taken is not public, it is of no consequence that ample provision is made for compensation to the owner.”).
The court in *Riverbank Improvement Co.* also explained that it did not matter if, objectively, it could be proven that the owner would be better off with compensation than retaining control of the easement property. The court exclaimed that the purpose of the property protections found in the “[T]akings [C]lause” in Massachusetts’ Constitution is grounded in a “right to keep,” without others deciding what is best for the owner or insisting that one coercively part with her property simply because she is paid:

By article 10 of the Bill of Rights of the [Massachusetts] Constitution, the right is guaranteed to ‘each individual of the society’ ‘to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws.’ In the continued enjoyment of these three rights when defined and established by law the individual is not obliged to submit to the judgment of court or Legislature that he ought to hand them over for compensation to some one or more of his fellows in their private interest. *He is secure under the Constitution in his right to keep what is his own, even though another wants it for private uses and may be willing to pay more than its value.*

The protection of property rights necessitates protecting the owner’s control over whether, and by what means, those property rights are disposed.

In 1974, the Indiana Supreme Court cited the *Riverbank Improvement Co.* case favorably in *Pulos v. James*, stressing that the burden for justifying the taking of property against the will of the owner is extremely high. Property rights in the nature of real estate, the court explained, are “different in kind” from other types of deprivations, and money damages cannot always be considered an adequate substitute for the extinguishment of the rights because such property rights include an owner’s “right to keep what is his own.”

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114. *Id.* (“It may be that it would be wiser for the respondents to receive money damages and submit to the extinguishment of their other property right. But that fact, if it be a fact, is wholly irrelevant.”).

115. *Id.* at 246 (emphasis added); see also *Blakeley v. Gorin*, 313 N.E.2d 903, 920 (Mass. 1974) (Quirico, J., dissenting) (quoting the “right to keep” language from *Riverbank Improvement Co.* in arguing that the court should have found a defect in the condemnation at issue because of a “total absence of . . . public use”; an incidental benefit for the public or the “public interest” is not enough to justify a taking).

116. 302 N.E.2d 768, 774 (Ind. 1973) (quoting the holding in *Riverbank Improvement Co.*, including its language on the “right to keep what is his own”).

117. *Id.* (“It was said in *Atty. Gen. v. Williams*, 174 Mass. 476, 480 . . .: ‘If the statute is merely for the benefit of individual property owners, the purpose does not justify the taking of a right in land against the will of the owner.’ (emphasis ours) [That principle is precisely applicable to the statute at bar. If the use for which the property is taken is not public, it is of no consequence that ample provision is made for compensation to the owner.”).
This means any compensation award is an imperfect substitute for allowing the owner to keep the property and consume its value for herself. The Indiana Supreme Court returned to its *Pulos* precedent again in 1990, making a statement in *Clem v. Christole, Inc.*, that “a property owner ‘is secure under the Constitution in his right to keep what is his own, even though another wants it for private uses.’”

While there is no doubt that one can find countless property rights and takings cases which might allude to concepts related to the “right to keep” idea, the cases discussed above largely exhaust the available reported cases to use the specific phrase “right to keep” or “right to retain” as used in this property rights context. Surely, it is an effusive concept, but one with unjustifiably restrained specific articulation.

C. A Few Notes on the “Right to Keep” or “Right to Retain” in Academic Literature

A similar scarcity of the use of the phrases “right to keep” or “right to retain” exists in the scholarly literature on property rights. References to the exact phrase “right to keep” are sparse in the literature, but one can find a few examples. Singer has notably posited that “[a] corollary of the right to exclude is the right to keep your property. Others cannot take your property away from you without your consent no matter how much they want it.” Of course, Singer follows this observation with an analysis on why there “have always been exceptions to this principle,” and many legal doctrines have emerged that constrain owner’s rights—doctrines that, he explains, serve as “traditional limitations on the right to keep what one owns.” Richard Epstein, too, has used the phrase when discussing the unconstitutional conditions theory and recognizes the importance of voluntary exchange, explaining his view that “[p]ersons have a constitutional right to keep property, yet they surrender it all the time in order to

118. *Id.* at 773-74 (“A property right in the nature of real estate incident to the ownership of land, even though it cannot be enforced specifically in equity, is a property right different in kind from money damages assessed for the extinguishment of that property right.”).


121. *Id.* (“Owners have long lost their property by adverse possession and eminent domain and equitable doctrines have conferred informally-created rights to property through doctrines like easement by estoppel, necessity, and implication, and exceptions to the statute of frauds such as the part performance doctrine. The law of mortgages emerged when the equity courts granted borrowers relief from the strict rules of the law courts, denying lenders their contractually-established rights to possession.”).
obtain alternative goods that they value more highly.”

Frank Michelman briefly ponders, in a 2016 article, whether the “right to keep” might exist and have particular consequences for our understanding of eminent domain. In doing so, he does not himself draw any strong conclusions, but he does acknowledge the dearth of literature on the subjects of the existence and meaning of the “right to keep.”

Anita Bernstein has observed the existence of the “right to keep” and its limitations, explaining that “[u]nder the contemporary rule of law everywhere, the right to keep one’s property exists, but is partially defeasible.” Boudewijn Bouckaert has opined that “the Spanish Jesuit Vazquez and the French jurists François Hotman and Hugues Donneau... define property as the right to keep a good, to use it, to benefit from its yields, to exclude anybody else from its use, to alienate it, and even to destroy it.” Another author has explained a perception during English colonization to be that “[t]he basic legal protection afforded to the free Englishman was the right to keep his own property” when describing the struggles by early settlers in the West Indies to secure “the rights of Englishmen.” Robert McNamara has opined that a public hearing process and some kind of adversarial proceeding in eminent domain cases is necessary because the question asking “whether it would be legal to use eminent domain in the given circumstances” is “the question that determines a property owner’s legal right to keep her property.”

Much of the literature that uses the phrase “right to keep” focuses on the positive right to affirmative protection from losing something one owns, such as through forfeiture or foreclosure—as contrasted with the negative right against interference with one’s ability to keep, which is the principal focus on this Article. Nonetheless, it is

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122. Richard A. Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 102 HARV. L. REV. 4, 48 (1988); see also Amy L. Peikoff, Beyond Reductionism: Reconsidering the Right to Privacy, 3 N.Y.U. J.L. & LIBERTY 1, 10 (2008) (explaining from the objectivism perspective that “the right to property includes the right to keep those things that one has produced or acquired . . . .”).


124. Id.


126. Boudewijn Bouckaert, What is Property?, 13 HARV. J.L. & PUB. POL’Y 775 (1990) (emphasis added). Bouckaert cautioned though that “[t]his is not to say that these jurists propagated a liberal, individualist property system.” Id.


worthwhile to look at some instances of this type of positive rights usage.

Audrey McFarlane, for example, has quite an extensive use of the phrase, although not always in the same manner as this Article intends. In a 2011 article, McFarlane counsels that we “should begin to pay attention to an under-theorized stick in the bundle of property rights: ‘the right to keep.’” In her primary work on the concept, however, McFarlane focuses on owners keeping their property against others who might have a legal claim to it, largely focusing on predatory private behaviors that result in an owner being dispossessed of property.

She claims that an owner should have a “right to keep” that is capable of being asserted against others seemingly engaged in predatory behavior (for example, lenders). “In order to rebut this predatory behavior,” McFarlane asserts, “we need to theorize a more precise and robust notion of an under-theorized stick in the metaphorical bundle of property rights: the right to be free from expropriation.” Then, she explains, “[b]uilding on the existing but underdeveloped recognition of this stick allows us to consider when and where and under what circumstances a property owner should have a protected ‘right to keep’ their land.” McFarlane further explains that her “right to keep” is associated with a “right to be free from [exploitation],” which she finds to be of broad concern in the property sphere. She certainly does not approach the idea of the “right to keep” from the same classical liberal viewpoint presented in this Article.

In this Article, I do not intend to analyze or comment on this particular formulation of a “right to keep” as articulated by McFarlane. Nonetheless, McFarlane’s work includes some valuable discussions regarding the underlying assumptions about what it means to have a “right to keep” one’s property—regardless of the debate over when the “right to keep” should be actionable or to whom it can be asserted against. For example, she highlights the facilitation of stability and predictability as important consequences of the confidence one gets when she believes that she has the ability to assert a “right to keep” against would-be takers. This is a consequence of relevance to this

130. Id. at 855.
131. See id.
132. Id. at 861.
133. Id.
134. Id.
135. Id. at 867. “[L]egal enforcement of property rights should increase the property owner’s probability of retaining possession of her property . . . . The heightened protection
Article's thesis as well. "Perhaps the key component of the utility of stability's predictability," she counsels, "is the ability to retain ownership as long as the property owner desires."\(^{136}\)

The relationship between an owner's "right to keep" and the ability to resist being dispossessed certainly exists as a concern in governmental takings. Therefore, when McFarlane discusses similar dispossession from predatory lenders, again the values expressed in the "right to keep" are instructive to this Article's application of the retention concept. In fact, it is notable that, in a separate 2009 article, McFarlane remarked that "[e]minent domain involves the claim of taking the right to keep one's property."\(^{137}\) In her 2011 article, McFarlane similarly explains characteristics of ownership that should be implicated in both positive-rights and negative-rights settings—"ownership explicitly promises or suggests a right not to be unwarrantedly dispossessed," and we must recognize the need to give "attention to the factors that contribute to interfering with one's ability to retain possession of one's property."\(^{138}\)

McFarlane's policy prescriptions include restrictions on alienability of property and limits on private transactions that are beyond the scope of this Article.\(^{139}\) However, she nonetheless makes a persuasive case that stability in investment of property requires governmental recognition of, and willingness to protect, the "right to keep."\(^{140}\) Essential to McFarlane's understanding is that "a right to keep is . . . an implied yet necessary aspect of all of the other sticks in the bundle . . . . The ability to continue to own property until one is ready to part with it reflects and maintains fair and sustainable social relations among people."\(^{141}\)

The "right to keep" solidifies the notion that an owner will only part with her property when willing to do so and only upon terms ac-

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136. McFarlane, Instability, supra note 129, at 867.


139. Id. at 916 ("This right to keep could be secured by legislation, but also should be explored by critically examining ways for the courts to use common law equitable principles to refuse to recognize transactions and instruments that involve exploitation and develop robust notions of quasi-fraud.").

140. Id. at 869 ("[T]he central value and assumption of stability in any country desiring investment is that if an ‘owner’ is unlawfully dispossessed, the system will, in theory at least, reinstate you.").

141. Id. at 927.
ceptable to her as owner. That assurance of one’s ability to keep property helps to facilitate bargaining. The law’s recognition of such keeping rights makes property more valuable and thereby encourages trade and investment in property because the law sets rules that create a respect for property rights and “protect[] private expectations to ensure private investment.” The discussion of these and other features of the “right to keep,” including its presence at the foundation of the Fifth Amendments’ protections and limitations on power, is expanded upon below.

IV. TAKINGS VERSUS KEEPINGS: EXAMINING THE FIFTH AMENDMENT

When we think of the provisions in the Fifth Amendment to the U.S. Constitution (or an equivalent provision in a state constitution) that deal with allocating the division between power and rights over private property and eminent domain, we usually refer to the provision stating, “nor shall private property be taken for public use, without just compensation,” as the “Takings Clause.” The so-called “Takings Clause” is more about keeping than it is about taking. This Part will examine each provision of the Fifth Amendment relevant to when property is taken, showing that the details and structure of such provisions are designed to reinforce owners’ rights to keep what they own.

A breakdown of the relevant words is instructive. “[N]or” is an indication of prohibition and sets the tone that the clause’s primary purpose is to serve a power-limiting (rather than power-conferring or power-legitimizing) function. “[S]hall” connotes that the limitations on power that follow are mandatory, and the government is obligated to adhere to them. “[P]rivate property” is the scope of protected interests. “Shall [not] be taken” refers to the act of property being “taken” that triggers coverage of the provision and the subject of actions to which the limitations apply. “[F]or public use” is the “property rule,” meaning owners have a right to exclude the government if the taking is for anything other than a public use. Lastly, “without just compensation” is the “liability rule” meaning that, if the government has cleared the threshold hurdle of establishing that its exercise of power will be for a public use, then the property owner does not have a right to exclude the government for public use takings so long as the government compensates justly. To round out our terminology, “eminent

142. Bell & Parchomovsky, Theory, supra note 75, at 540 (“Exclusion preserves owners’ idiosyncratic values and bargaining position.”).
144. U.S. CONST. amend. V.
domain” is the power in question; “condemnation” is the exercise of that power; and “takings” are the effect of the exercise of the power.

Thus, if we call this collection of words a “Takings Clause,” we are describing the limitation on eminent domain by its exercise and adverse effects on rights, rather than describing the rights to be protected by restraint in the exercise of eminent domain. In so defining the clause by the types of acts it seeks to restrain rather than by the effects of restraint and the nature of the rights protected, we are also tacitly creating a presumption favoring takings. The label makes the critical reference point the power. When one calls something the “Takings Clause,” it sounds more in the nature of conferring a power rather than constraining authority or recognizing a right. For that reason, “Keepings Clause” is at least one possible superior moniker in the sense that it conveys information about the rights to be protected rather than seeming to validate a power that, in the letter and spirit of the clause, is meant to be exercised sparingly. The critical reference point shifts to the right protected.

This Part provides a basic introduction to this understanding of the Fifth Amendment as structured to protect the “right to keep.” As the Colorado Supreme Court stated in a 1956 opinion in Town of Eaton v. Bouslog, for example, when discussing the relationship between the eminent domain power to take private property with the keepings rights held by the private property owners to be dispossessed, “[t]he authority to exercise such power [to condemn private lands], being against the common right to own and keep property, must be given expressly or by clear implication; it can never be implied from doubtful language.” Owners and purchasers expect that the government will respect that ownership, will not confiscate property once acquired or expropriate investments once made, and will not otherwise disrupt or interfere with the sanctity or enforceability of the exchange.

The Framers of the Constitution structured a government of limited powers—with the essential purpose of protecting private proper-

145. At least when individuals call it the “Eminent Domain Clause,” for example, the label for the Clause is a category of powers to be affected. Still, that label lacks the pronouncement of the limitations on eminent domain inside the Clause. Nevertheless, this “Eminent Domain Clause” alternative is at least somewhat value-neutral because it identifies the category to be considered.


ty. They were no doubt inspired by John Locke’s contention that “[t]he great and chief end, therefore, of men’s uniting into commonwealths, and putting themselves under government, is the preservation of their property. To which in the state of nature there are many things wanting.” James Madison acknowledged the same necessity of the state to protect property and the need for owners to have their property protected from the state. In his essay, Property, Madison wrote, “[g]overnment is instituted to protect property of every sort . . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.” Thus, “protection” and “preservation,” not merely “compensation,” must be the focus in constitutional interpretation of what it means to adhere to just governance.

Constitutional safeguards to protect against the temptations toward abuse of power were embedded in the governmental structure in a variety of ways, including being placed in the Fifth Amendment. James Madison, in the famous “if men were angels” passage of The Federalist No. 51, observed the necessity of governmental accountability when he wrote:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.

The Fifth Amendment is a prime exemplar of this balance, guaranteeing rights to check the eminent domain power. The government is given the power to take property for public use when it is necessary

148. See Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 29 (1985); see also Robert Brauneis, Eastern Enterprises, Phillips, Money, and the Limited Role of the Just Compensation Clause in Protecting Property “in its Larger and Juster Meaning,” 51 Ala. L. Rev. 937, 939 (2000) (“We all know that the prevailing view of the founding generation was that, as Gouverneur Morris, echoing Locke and others, put it at the Constitutional Convention, ‘property [is] the main object of [s]ociety,’” (citing The Records of the Federal Convention of 1787, at 533 (Max Farrand ed. 1911))).


151. The Federalist No. 51, at 349 (James Madison) (Jacob E. Cooke ed. 1961).
to control the governed, but it is obliged to control itself by taking only for public use and only upon compensating property owners harmed by its actions.

The power of eminent domain was seen at the Founding as an inherent attribute of sovereignty, and the Constitution is meant as a means to control it. In particular, the Fifth Amendment provisions inserted in the Bill of Rights were a means to constrain that sovereign power—in other words, to stress the counterbalancing rights individuals have vis-à-vis that power. As stated before, it is odd that we have chosen (mind you, only relatively recently) to label a rights provision—that is specifically designed to control powers that the Founders felt were ideal candidates for abuse unless checked—with a name based on the powers meant to be controlled. The frame is upside down and inside out.

Given its placement in the Bill of Rights and its purpose to guarantee that rights constrain powers, it is appropriate to focus on what rights the Fifth Amendment meant to protect. Once we do so, it is clear that there is a relationship between the substance of those rights in the Constitution and what this Article has been calling the "right to keep."

As mentioned earlier, the provisions governing eminent domain in the Fifth Amendment include a "property rule" component and a "liability rule" component. Although we think of property rules and liability rules in the traditional structure delineated by Guido Calabresi and Douglas Melamed in their seminal work, Epstein is correct to point out that what most term the "Takings Clause" does not operate within these clean theoretical constructs. It involves components of a

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152. We should remember that the Preamble to the U.S. Constitution helps mold a frame when it states that the document is intended to "secure the blessings of liberty." U.S. CONST. pmbl.

153. See Epstein, Takings, supra note 148, at 29 ("It is very clear that the founders shared Locke's and Blackstone's affection for private property, which is why they inserted the eminent domain provision in the Bill of Rights.").


property rule (the “Public Use Clause”) and a liability rule (the “Just Compensation Clause”), but both also operate within an overall governance system that includes “institutional structures and safeguards” that even further constrain the governmental power. This means that analysis of the rules and compliance with them cannot stop at simply calculating which type of rule is more efficient.

Together, all of the conferrals, power limitations, and institutional-structure restraints on rights were designed to minimize the occurrence of takings by (1) constraining the scope of available purposes for seizing property, and (2) creating financial, institutional, and electoral consequences for those that acted ultra vires or otherwise overused the eminent domain power. As Abraham Bell and Gideon Parchomovsky explain generally, regarding protecting assets from forced transfers, “legal enforcement of property rights is designed to keep assets in the hands of legally recognized owners by deterring nonconsensual takings by making them prohibitively costly.”

The Fifth Amendment provisions regarding takings, then, should be seen as principally conferring, or recognizing, two distinct rights that help accomplish this restraint on the occurrence of takings. The first is housed in the words “public use,” which gives individuals a right to exclude the government entirely if a use is for something other than a public one. To use the terminology by Calabresi and Melamed, this is the “property rule” component of the takings protections. The “public use” provision concerns preserving one’s “right to keep” her property (at least against certain kinds of governmental demands) no matter what level of compensation is offered. The “Public Use Clause” establishes a property rule precisely because, if a taking is for anything other than a public use, then consent is required and surrendering one’s property for compensation, no matter

157. Id.
158. Bell and Parchomovsky, Theory, supra note 75, at 571.
160. Calabresi & Melamed, supra note 155.
161. See Lia Sprague, Note, Kelo v. City of New London, 32 OHIO N.U. L. REV. 381, 389 (2006) (without elaborating, this note very briefly identifies the connection when stating that “the public policy benefit favoring governmental takings needs to be balanced against the public policy favoring a citizen’s right to keep his property. With this in mind, the Framers added the Public Use Clause . . . ”). But see Nadia E. Nedzel, Reviving Protection for Private Property: A Practical Approach to Blight Takings, 2008 MICH. ST. L. REV. 995, 1017 (contending that “[w]hat individuals really want, even more than the right to keep their property, is fair proceedings and just compensation.”).
how large, cannot be compelled. The "right to keep" is the presumption and the public use clause establishes the (intended) high bar for rebutting it.

The second right is housed in the words "just compensation," which guarantees that individuals who must sacrifice their rights to a public use are made as whole as possible. To the extent that the government does take private property, owners at least have their keepings rights compensated. With such takings, the government must admit that, but for its actions, the owner would have the "right to keep" the property, and that the owner is therefore entitled to the value of the property as compensation for the taking. This latter right is best described by the U.S. Supreme Court in Armstrong v. United States: "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 borne by the public as a whole." The just compensation guarantee is the "liability rule" component of the takings protections. If a taking is for a proper end, then the owner cannot prevent the taking, but they can demand payment. The public then, as a whole, bears the burden by compensating an owner who has lost her "right to keep" so that she is not required to alone sacrifice her rights to serve the public need.

Both rights—the exclusion right from the "public use" limitation and the damages right from the "just compensation" limitation—can be seen as reinforcing what Wesley Hohfeld would describe as immunity rights associated with ownership. In Hohfeld's seminal work on the nature of rights, he sought to refine and distinguish the core elements of rights, privileges, immunities, and liabilities. Hohfeld explained that an immunity is the freedom from the control of another, which can be analogized to the freedom that an owner has from the attempt by others to take that ownership away. Hohfeld sets out the definitions and distinctions as follows:

[A] power bears the same general contrast to an immunity that a right does to a privilege. A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of

162. Epstein, A Clear View, supra note 156, at 2112-13 (describing the traditional view of the "Public Use Clause" as a restraint on government power fashioned as a property rule, so that "where the taking is not for a public use (whatever its precise content) then the individual property owner is once again protected by a property right, so that what can be taken can only be taken with consent").


another. Similarly, a power is one's affirmative “control” over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or “control” of another as regards some legal relation.\textsuperscript{165}

To see the connection between the “right to keep” and Hohfeld's definition of immunities, it is useful to follow the examples Hohfeld provides. Consider the first example:

X, a landowner, has, as we have seen, power to alienate to Y or to any other ordinary party. On the other hand, X has also various immunities as against Y, and all other ordinary parties. For Y is under a disability (i.e., has no power) so far as shifting the legal interest either to himself or to a third party is concerned; and what is true of Y applies similarly to every one else who has not by virtue of special operative facts acquired a power to alienate X's property.\textsuperscript{166}

In identifying the owner's control over alienability and all others' lack of power (or disability) to take away (or shift) that interest to anyone else, Hohfeld claims that the owner is thereby usually the holder of immunities against all others. These immunities are freedoms from the actions, wants, or demands of others—including from others' attempts to take property away from the owner. The consequences of these immunities and owner controls over alienability can be characterized as a generally-held “right to keep” one's property (even though Hohfeld does not use those terms). This is why Singer posits that the “right to keep” one's property should be characterized as “an example of what Wesley Hohfeld called an 'immunity' right”—which, as previously described, is a type of right that entitles its holder to be immune from the demands (or claims) made by others concerning his property, regardless of whether those demands are to control how the property is used or to demand that ownership be given over altogether to the demander, including the government.\textsuperscript{167}

So long as someone has not lost their immunity in some way, they have the “right to keep” their property. The rest of the world is under a disability vis-à-vis that property and can normally only overcome that disability through voluntary exchange and consensual trading of rights. The various rules supporting the “right to keep” in our laws assign these immunities and disabilities between owners and “others” that give us a baseline against which bargaining over the property can occur.

Of course, eminent domain anticipates occasional coercion and transfers of property outside normal consensual bargaining condi-

\textsuperscript{165} Id. at 55.
\textsuperscript{166} Id.
\textsuperscript{167} SINGER, supra note 82, §4.1.
tions. Applying the “Hohfeldean” understanding of immunities and disabilities to the property provisions in the Fifth Amendment reveals important insights on how those rights—to be free from takings for private use and to just compensation for takings for public use—both stem from the meta “right to keep.” The government is always at a disability from exercising eminent domain power to coercively seize the property of an otherwise lawfully possessing private owner for anything other than a public use. The owner has an absolute immunity in that sense and, consequently, can enforce it through injunctive relief. The government is also at a disability even for takings for justifiable public use ends unless and until it pays just compensation. Unless and until it does, the property owner retains the immunity. Once the government establishes a public use as the ends for the taking and pays just compensation, however, the parties’ positions shift. The government has used the liability rule portion of the Fifth Amendment to escape its disability and transformed the owner’s immunity into only a right to damages for what is essentially a lawfully-authorized sovereign confiscation of the immunity right.168

The frame “Takings Clause” implies that takings are the norm rather than the exception. When we focus too much on the liability rule components of the “Takings Clause,” we risk encouraging more force.169 Eric Claeys explains that “[l]iability rules, as construed by law and economics scholars, legitimate forced transfers of rights.”170 Thus, when the “Takings Clause” terminology reinforces the legitimacy of an essentially unconstrained liability rule vision for Fifth Amendment protections, we start to lose the deterrent effect that should come with viewing the “Takings Clause” as the “Keepings Clause,” with a rebuttable presumption that coerced transfers are illegitimate. After all, the takings provisions in the Fifth Amendment are anomalous; in the ordinary course of affairs outside of it, “[t]raditionally, rights such as the ownership of real property are


169. Abraham Bell & Gideon Parchomovsky, Taking Compensation Private, 59 STAN. L. REV. 871, 873 (2007) (“Undercompensation is . . . unfair because it deprives property owners of part of the value of the property taken,” and it is inefficient because “undercompensation may induce excessive takings because it allows the government to ignore part of the cost it imposes on private property owners through its land use policies.”).

generally protected by injunctions, while tort and contract rights are enforced by means of compensatory damages."\(^7\)

Exclusion is critical to property rights because it protects the owner's ability to refuse to sell except for the price that makes her whole; this "reserve price" may very well be higher than the fair market value typically offered as just compensation for coerced transfers like those effected through eminent domain.\(^7\) To retain the value of the "right to keep" in any transaction transferring the property, an owner must be able to set the price for the property in a manner that includes her own subjective value of the property.\(^7\) Bell and Parchomovsky posit that "[t]hese gaps between reserve and market prices should be widely observed, and the value reflected by the higher reserve price can often be protected only by an in rem right that includes the right to exclude nonconsensual users."\(^7\) This problem of undercompensation is discussed further in Part VI.C.

As to the scope of "public use," one of the reasons why we do not talk about what is called the "Takings Clause" as the "Keepings Clause"—or at least why we do not more often explore the idea of a "right to keep" at the foundation of that clause—might be because the courts have abandoned any role as guardians of this "Public Use Clause," which acts as the strongest keepings vehicle in the Fifth Amendment. The judicial failure to observe such a frame for these rights is perhaps most visibly evidenced by the 2005 U.S. Supreme Court decision in *Kelo v. City of New London*\(^7\).

The government cannot take for the purely private use of another.\(^7\) There is little debate on that point, even in the words of the *Kelo* opinion. Very few would claim a greater utilitarian role for the eminent domain power. However, despite relatively universal agreement on the existence of the limitation, there are strong constraint versions and weak constraint versions of interpretation of the "Public

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172. Bell & Parchomovsky, *Theory*, supra note 75, at 587 ("Often, owners develop sentimental relationships with assets protected by property rights, such that their 'reserve price' (the price at which they would be willing to sell the object) is substantially in excess of the market price.").

173. Id. ("An important aspect of the value enabled by the right to exclude is sentimental or other idiosyncratic value not reflected in the market price.").

174. Id.

175. 545 U.S. 469, 480 (2005).

176. See, e.g., U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); MICH. CONST. ART. X, § 2 ("Private property shall not be taken for public use without just compensation therefore first being made or secured in a manner prescribed by law."); see also Kochan, "Public Use," *supra* note 159, at 49 n.5 (1998) (footnote discussing the "Public Use Clauses" in state constitutions).
Use Clause.” Over the years, courts have more often than not adopted an interpretation of “public use” that supports the weak version, and very few governmental actions have been deemed outside the public use constitutional limit. This has been accomplished due to two major facets of the “public use” jurisprudence. First, modern courts, on a regular basis, have expansively interpreted the scope of what counts as a “public” use. Second, the courts have regularly adopted a position of deference to the legislature to decide what is a “public use” (or, as accepted within the definition of that term, a public benefit or in-service-of-the-public-good result and thereby a legitimate exercise of eminent domain). Not surprisingly, the legislature usually believes that the state action in question does indeed serve those public goals, thus leaving little room for courts to check the power.

The now (in)famous Kelo decision provides some insights on these points. In Kelo, the U.S. Supreme Court explained: “Without exception, our cases have defined [public use] broadly, reflecting our longstanding policy of deference to legislative judgments in this field,” and “[f]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.” Finally, the Court broadly stated that: “Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose,” and “[q]uite simply, the government’s pursuit of a public purpose will often benefit individual private parties.” Each of those statements illustrates that, while the “Public Use Clause” might operate as a property rule that protects the “right to keep” in theory, the weak judicial oversight makes enforcement of the property rule less likely.

Coupled with a frame that actually encourages takings rather than a frame that helps support a presumption of constraint—a presumption that owners should be allowed to keep rather than that the government should be allowed to take—this lack of judicial examination is especially dangerous. In fact, the Kelo Court even seemed to

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178. Id.
179. Id. at 483.
180. Id. at 485.
181. Although the full extent of the impacts from a relatively toothless “public use” doctrine are largely beyond the scope of this Article, one such impact—a disproportionate loss of rights for the poor—should receive mention. As Carol Brown notes, “[t]he exercise of eminent domain in the United States has victimized politically disadvantaged groups like minorities and the poor the most,” making the protection of constitutional property rights
recognize that something more was needed to protect property rights in light of its interpretation. For example, the Court cited amici who “raise[d] questions about the fairness of the measure of just compensation” when going out of its way to state that “[i]n affirming the City’s authority to take petitioners’ properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation.” There, the Court acknowledged the limitations of its powers to consider such possibilities for unfairness when interpreting the scope of “public use,” largely because it felt constrained by precedent on the “Public Use Clause.” The Court even invited the states to increase the protective floor if they wished to provide greater property rights protections.

Anything that steers us toward restraint and a preference for negotiated bargaining rather than forced transfers should be encouraged. Any structure or ethos that leads to a keepings-presumptive mentality rather than a takings-presumptive one is particularly important in light of the practical flaws seen in the “Just Compensation Clause” and “Public Use Clause” components of the larger Fifth Amendment property protection. First, just compensation often fails to fully make individual owners whole because fair market values do not account for individualized values lost as a result of the inability to refuse to sell. Second, the “public use” constraint has become highly diluted as the courts increasingly recognize an almost unlimited scope of acceptable purposes for which exercises of eminent domain will be deemed legitimate.

Beyond expanding the protective floor through state constitutional protections as the Court suggested in Kelo, we might find other ways to change the narrative around takings. We might alter the frame so

perhaps most important to these groups because they have less access to political power to protect their interests; for these groups, a narrow definition of “public use” that might be generated from a shift in thinking from takings to keeping would be particularly important. Carol Necole Brown, Justice Thomas’s Kelo Dissent: The Perilous and Political Nature of Public Purpose, 23 GEO. MASON L. REV. 273, 273, 281 (2016) (citing often Kelo v. City of New London, 545 U.S. 469, 506-21 (2005) (Thomas, J. dissenting)).

182. Kelo, 545 U.S. at 489 n.21.
183. Id. at 489-90.
184. Id.
185. Id. at 489 (“We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”).
186. Bell & Parchomovsky, Theory, supra note 75, at 587.
187. Donald J. Kochan, Chapter 3: Eminent Domain Law and Reform in Illinois: A Brief Overview, in AN ILLINOIS CONSTITUTION FOR THE TWENTY-FIRST CENTURY (Joseph E. Tabor ed. 2017) (explaining the broad scope courts give to the term “public use” and the deference to legislative declarations of public use as nearly dispositive); see also generally Kochan, “Public Use,” supra note 159.
that the expectation moves toward keepings.\textsuperscript{188} A label change could help; so long as the *Kelo*-like standards exist, it is ever more important to change the label away from “Takings Clause” and thereby hopefully push us away from the effects that frame creates in an otherwise weakly-constrained world of government officials and their sense of authority. The choice of label affects the explanation, evaluation, expectation, and perception of the quality of the product; here, the quality of the clause to protect property rights. The next Part explains what we can learn from a variety of disciplines about the impact of frames and labels and their power to affect the meaning, content, expectations, presumptions, and perceptions of the rights to which they attach.

V. THE STUDY OF FRAMING: LESSONS FROM PSYCHOLOGY, LINGUISTICS, AND THE BUSINESS OF PRODUCT ADVERTISING, AMONG OTHER FIELDS

This Article uses the so-called “Takings Clause” as a case study of the power of framing (and choosing labels for) constitutional rights. There is nothing inherent in the Fifth Amendment that requires that we use the words “Takings Clause” to denote the set of language we identify as dealing with takings of private property. In fact, by naming a clause for the right protected we are making an important statement about the importance of the right. If we name a clause instead for the power authorized, though constrained, then we lose some of the weight that should be laid upon the right at issue. The frame matters, as this Part aims to explain.

All of us, every day, engage in framing when we communicate, even if we do not consciously recognize it. How we say what we choose to say affects how it is heard and how what we have said is processed and interpreted by the listener (or reader). Those engaged in the art of persuasion for a living understand the power of framing more than most. The best lawyers, in particular, use framing as a way to wrap their arguments inside an appealing package in a manner designed to win a case. Leading wordsmith and legal lexicographer Bryan Garner regularly stresses the utility and power of language choices across a number of applications. One such area is the framing of issues and questions before a court—something every skilled advocate must master.\textsuperscript{189} According to Garner, as an advocate,

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\textsuperscript{188} R. Cookson, *Framing Effects in Public Goods Experiments*, 3 EXPERIMENTAL ECON. 55, 55 (2000) (“A framing effect is said to be present when different ways of describing the same choice problem change the choices that people make, even though the underlying information and choice options remain essentially the same.”).

the lawyer should “want to find the premises that will pull the court toward your conclusion, and then make your premises explicit.”

Why? Because it is about setting forth those premises; in essence, framing the case in a way that influences the court’s thinking on the subject. It is about “capturing the judicial imagination”; Garner posits that “[w]hoever does [this] well is most likely to win. Indeed, a well-framed issue can often become the starting point for the majority opinion.” In other words, “[i]f the court decides to answer the question you pose, then the court will probably reach the conclusion you urge.”

In reaching these conclusions on the importance of framing skills to effectively fulfill the advocates’ charge, borrowing insight from Karl Llewellyn, Garner concludes that “if your framing is accepted, you win.” Llewellyn very aptly explained that framing is a competitive sport:

Of course, the first thing that comes up is the issue and the first art is the framing of the issue so that if your framing is accepted the case comes out your way. Got that? Second, you have to capture the issue, because your opponent will be framing an issue very differently. . . . And third, you have to build a technique of phrasing of your issue which not only will help you capture the Court but which will stick your capture into the Court’s head so that it can’t forget it.

This passage from Llewellyn reminds us that the same issue, fact, condition, right, power, and the like may very well be susceptible to multiple means of framing. Further, those who understand this will choose among the menu of possible frames that which best matches their positional taste. The examples are endless and surround us every day. Surely, one such example of competitive positioning through framing and labeling is evidenced by the contrast between a “Takings Clause” and what I propose to call the “Keepings Clause.” This Part will look deeper into the interdisciplinary research on framing effects and apply some of its lessons to this Article’s subjects.

George Lakoff and Mark Johnson remind us that words form concepts that have consequences for the things to which the words at-
tach. Thus, we should understand the effects of the language choices we make, and we should make such choices carefully. Discussing the power of language to engage with concepts of the mind, including even those with which we are not generally aware, Lakoff and Johnson expound that “[t]he concepts that govern our thought are not just matters of the intellect. They also govern our everyday functioning” and they “structure what we perceive, how we get around in the world, and how we relate to other people. Our conceptual system thus plays a central role in defining our everyday realities.” The frame through which observations are made to form them often influences the content of these cognitively critical concepts. Dietram Scheufele and Shanto Iyengar explain that “framing effects refer to behavioral or attitudinal outcomes that are not due to differences in what is being communicated, but rather to variations in how a given piece of information is being presented (or framed) in public discourse.”

Scheufele and Iyengar provide a very easy way to start to understand framing—think of a literal frame placed around a painting. Our perception of the painting will change depending on what type of frame we put on it. A kindergartener’s watercolor placed inside a museum frame looks much different from when it is just stuck to the refrigerator with a magnet. One might confuse the former as something with a market value, while one observing the latter display would think it was cute but probably of only personal value to the parent and not likely to catch the attention of Sotheby’s. Of course, once one knows that the frame can change the price, one can fetch for the painting and employ framing to their own ends and literally manipulate perceived value. As Scheufele and Iyengar explain, “the art dealer can shape public reactions to the exact same painting based on fairly subtle variations in how she decides to present – or quite liter-

197. Id. at 454.
199. Id. at 20. The authors pose the following scenario:

Framing is equivalent to the choices that an art dealer or gallery owner may make about how to display a painting. Reactions among potential buyers to a painting displayed in a large, gold plated frame, for instance, will be distinctively different than they would be if the same painting was displayed in a simple aluminum frame.

Id.
ally ‘frame’ – that painting.”

At a more scientific level, framing is a phenomenon widely tested and analyzed across a number of fields, including linguistics, semiotics, cognitive linguistics, rhetoric and discourse studies, cognitive psychology, social psychology, sociology, anthropology, marketing, advertising, and other fields. Scheufele and Iyengar posit that, “[p]robably the most widely-cited and also all-encompassing defini-
tion of framing was provided by Gamson and Modigliani (1987) who see frames as ‘a central organizing idea or story line that provides meaning to an unfolding strip of events . . . [t]he frame suggests what the controversy is about, the essence of the issue.’” Of course, the frame need not surround a controversy—it can relate to a decision, a thing, an idea, or even a legal doctrine or rule, for example. When it comes to the Fifth Amendment, the frame can suggest whether the thing is about the power, or it could alternatively suggest that the thing is about property rights.

Research by Tversky and Kahneman that has driven the development of psychology literature on framing provides a good foundational starting point for understanding the subject. Their 1981 Science article explains that decisionmakers adopt frames to form conceptions of the “acts, outcomes, and contingencies associated with a particular choice.” Decisions, objects, concepts, and the like can often be framed in multiple ways. They present the idea of viewing the same mountain from different vantage points, for example, and coming away with different, sometimes mistaken, descriptions of it.

Similarly, their study, which has come to be known as the “Asian disease problem,” asked respondents to choose between adopting one of two identical programs to address an outbreak of disease—one framed in terms of how many will die, the other in terms of how many will be saved. The results showed respondents expressing different, inconsistent preferences, as well as different levels of risk.

200. Id.

201. See, e.g., Deborah Tannen, What’s in a Frame? Surface Evidence for Underlying Expectations, in FRAMING IN DISCOURSE 15 (Deborah Tannen ed. 1993) (surveying several fields covering the framing concept).


204. Id. at 453.

205. Id.

206. Id. (“[I]t is easy to see that the two problems are effectively identical. The only difference between them is that the outcomes are described in problem 1 by the number of lives saved and in problem 2 by the number of lives lost.”).
aversion versus risk taking. They concluded that the “inconsistencies were traced to the interaction of two sets of factors: variations in the framing of acts, contingencies, and outcomes, and the characteristic nonlinearities of values and decision weights.”  

Most importantly for this Article’s purposes, they summarized the general implications as follows:

[O]ne may discover that the relative attractiveness of options varies when the same decision problem is framed in different ways. Such a discovery will normally lead the decision-maker to reconsider the original preferences, even when there is no simple way to resolve the inconsistency. The susceptibility to perspective effects is of special concern in the domain of decision-making because of the absence of objective standards such as the true height of mountains.

Framing the same words of constitutional text in terms of property saved (kept) or property lost (taken) could similarly evoke inconsistent observations of an identically-worded clause.

Moreover, Tversky and Kahneman establish that the decision on which frame to adopt and apply to a particular concept actually changes one’s behavior, not just perception. This means that “the framing of an action sometimes affects the actual experience of its outcomes,” making “the adoption of a decision frame . . . an ethically significant act.” In other words, because frames can drive behavior, we should be careful to choose frames in a way that responsibly protects the integrity of the thing to be framed. If the integrity of the Fifth Amendment is in protecting the “right to keep” rather than encouraging exercise of the power to take, then “Takings Clause” may be an irresponsible frame.

Lastly, Tversky and Kahneman make an important observation about using frames to steer behavior. There is danger in such exercise, especially given that “framing influences the experience of consequences.” Tversky and Kahneman warn that “the deliberate manipulation of framing is commonly used as an instrument of self-
control.”212 How readers of judicial opinions that use the “Takings Clause” language experience the consequences of the exercise of eminent domain is affected by that frame. Tversky and Kahneman explain that the person or entity who sets the frame has the ability to influence those who are asked to view a thing through it.213 So too then should we expect that when judges or legal scholars build a frame around the Fifth Amendment provisions that call it the “Takings Clause,” they at least implicitly invite others to adopt that moniker in their own legal analysis of the text.

Two possible lessons for judges and legal commentators follow on this matter of setting frames and changing the perceived world of others. The first lesson is that, because framing has these effects and presents dilemmas regarding appropriateness of influence, those involved in framing legal doctrines and rules should be careful how they do so. However, the second lesson is about opportunity; those that wish to change the shape of the law might learn from the power of framing and consider how to use frames to advance an interpretive agenda. All in all, “framing effects are important in legal argumentation,” as Lawrence Solan concludes in his extensive studies of the power of language to impact legal interpretation.214 Legal anthropologists have described in considerable detail the ways in which word choice frames issues and the ways in which lawyers attempt to make choices to direct a case’s vocabulary in a direction beneficial to the lawyer’s client,” Solan explains.215 We regularly choose frames to influence reception of ideas because it has been proven that those choices are consequential.

A substantial subfield in the study of framing effects looks at “label framing,”216 particularly in the study of cooperation games where “the name of the game exerted a considerable effect on the partici-

212. Id.
213. Id.
214. Lawrence M. Solan, Patterns in Language and Law, 6 INT’L J. LANG. & L. 46, 63 (2017) (providing a number of illustrations of the influence of frames and how they are employed, such as how we label “alien,” “immigrant,” “undocumented [worker],” and “citizen”; how witnesses in rape cases are described as “the complaining witness” or “victims”; and others).
215. Id. (citing JOHN M. CONLEY & WILLIAM M. O’BARR, JUST WORDS: LAW, LANGUAGE, AND POWER (1998); GREGORY M. MATOESIAN, REDUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM (1993)).
216. See, e.g., Tore Ellingsen et al., Social Framing Effects: Preferences or Beliefs?, 76 GAMES & ECON. BEHAV. 117 (2012) (showing significantly different cooperation rates between players in games framed in different ways); see also Kimmo Eriksson & Pontus Strimling, Spontaneous Associations and Label Framing Have Similar Effects in the Public Goods Game, 9 JUDGMENT & DECISION MAKING 360 (2014); Varda Liberman et al., The Name of the Game: Predictive Power of Reputations Versus Situational Labels in Determining Prisoner’s Dilemma Game Moves, 30 PERSONALITY & SOC. PSYCH. BULL. 1175 (2004).
pants' choices" whether or not to initially cooperate and when and whether to defect. In these studies, the framing of the game affects how the players play it. One could, therefore, predict that regulators could play a takings "game" differently than how they might play a "keepings" game. Varda Liberman and her coauthors report that one interpretation of the results of differential game play based on framing "is that the name of the game altered the participants' perception of what constituted normative play in the game and, hence, both how they played and how they expected the majority of their peers to play." This gaming research is supported by other label framing research more generally, including those studies which find that "a label manipulates participants' 'subjective construal' of the situation"; those that explain that labels " 'may serve as a cue on comparable social situations' and that participants may 'infer others' behavior and expectations from their life experiences' of these comparable situations"; and those that "conceive of labels as 'activating a mental model of a situation, or frame, that seems to match the concrete situation at hand and that subsequently defines this situation.'

From the conclusion that labels are part of the framing process which affect perceptions, we can draw the inference that labels affect how individuals perceive the meaning and quality of constitutional text to which they are affixed.

Marketing and advertising experts are also keenly aware of the power of labels. The marketing and advertising industries are dependent on understanding how consumers form opinions. These experts know that consumers use labels as part of their mental process of judging the quality of the product; identifying its features and characteristics; assessing the product's purposes and uses; and in setting their own expectations regarding how the product is intended to perform. Consumers' subsequent post-purchase evaluation of the product often involves a comparison between the expectations generated by the marketing package—including its label—and the experi-

217. Liberman et al, supra note 216, at 1177.
218. Id. at 1176.
219. Id. at 1180.
221. Thomas J. Reynolds & Jonathan Gutman, Laddering Theory, Method, Analysis, and Interpretation, 1988 J. ADVERT. RES. 11, 17 (explaining the overlap of advertising with the fields of sociology and psychology for understanding consumer associations with product attributes).
222. Kevin Lane Keller & Donald R. Lehmann, Brands and Branding: Research Findings and Future Priorities, 25 MARKETING SCI. 740, 740 (2006) (discussing the "several valuable functions" served by brands, including sending information about product purpose and quality).
ence upon using the product. This Part supports the idea that consumers of law do the same thing.

The label or frame created for a product is part of its "brand," something defined by the American Marketing Association as "a name, term, sign, symbol, or design, or a combination of them, intended to identify the goods or services of one seller or group of sellers and to differentiate them from those of competitors."223 Branding is about communicating the attributes of a product and "says something about the producer's values," according to leading marketing scholar Phillip Kotler.224 "A brand is a complex symbol that can convey" multiple "levels of meaning."225 To complete the branding process, a company chooses a name (analogous to what this Article is calling a "label") for the product. Kotler explains that the "desirable qualities for a brand name" include "suggest[ing] something about the products benefits" and "suggest[ing] concrete, 'high imagery' qualities."226 The reason marketers focus on those metrics is because the name or label drives the consumer's perception of the product.227 As Ries and Trout conclude, "[t]he name is the hook that hangs the brand on the product ladder in the prospect's mind. In the positioning era, the single most important marketing decision you can make is what to name the product."228

So too do consumers of our laws reflect upon the names we give them to decide how they feel about those laws. Do we think that most congressional legislation is given an attractive and constituent-appealing name for no reason? In fact, what is particularly important in Kotler's full body of work on marketing is his insistence that the lessons within it have crossover application into more than just consumer products markets.229 He calls this the "generic concept" of

224. Id. at 418-19; see also David M. Boush, Brand Name Effects on Interproduct Similarity Judgments, 8 MKTG. LETTERS 419, 422 (1997) ("Brand names have been shown to convey a variety of information about the products with which they are associated such as the level of expected product quality, attributions about buyers of the products, and product origin.").
225. KOTLER, supra note 223, at 418-19.
226. Id. at 429 ("Once a company decides on its brand-name strategy, it faces the task of choosing a specific brand name.").
227. See id. One reason for the importance of getting the branding right is because they tend to be sticky. Rashmi Adaval, How Good Gets Better and Bad Gets Worse: Understanding the Impact of Affect on Evaluations of Known Brands, 30 J. CONSUMER RES. 352, 366 (2003) (noting that the implications from perception based on brand have long-lasting effects on memory and associations with a product).
228. RIES & TROUT, supra note 4, at 71.
229. Philip Kotler, A Generic Concept of Marketing, 36 J. MKTG. 46 (1972) (marketing principles apply broadly); Philip Kotler & Sidney J. Levy, Broadening the Concept of Marketing, 33 J. MKTG. 10, 10 (1969) ("The authors see a great opportunity for marketing peo-
marketing,\textsuperscript{230} where “[m]arketing analysis and planning are relevant in all organizations producing products and services for an intended consuming group, whether or not payment is required.”\textsuperscript{231} Marketing (including naming and labeling products) in this broad generic concept can include the selling of ideas and attempts to shape the receivers’ view of the thing.\textsuperscript{232} Ries and Trout, in their influential book, \textit{Positioning: The Battle for Your Mind}, reach a similar conclusion: “[T]he field of advertising is a superb testing ground for theories of communication. If it works in advertising, most likely it will work in politics, religion, or any other activity that requires mass communication.”\textsuperscript{233} When we choose a label for a legal right or power, we are communicating something about the meaning of that legal text to which the label attaches.

Although he does not speak directly to what I will call “consumers of law,” Kotler’s explanation of the manipulation of perceptions through marketing choices rings true for evaluating how the public might judge a right or power that is being described to them:

Marketing consists of actions undertaken by persons to bring about a response in other persons concerning some specific social object. A social object is any entity or artifact found in society, such as a product, service, organization, person, place, or idea. The marketer normally seeks to influence the market to accept this social object. The notion of marketing also covers attempts to influence persons to avoid the object, as in a business effort to discourage excess demand or in a social campaign designed to influence people to stop smoking or overeating. The marketer is basically trying to shape the level and composition of demand for his product. The marketer undertakes these influence actions because he values their consequences.\textsuperscript{234}

The choice of our label for the Fifth Amendment property-related provisions is the first step in the marketing of the constitutional product, an activity we do not often equate with jurisprudential

\textsuperscript{230} Kotler, \textit{Generic Concept}, supra note 229, at 53 (“Generic marketing takes a functional rather than a structural view of marketing.”).

\textsuperscript{231} Id. at 47.

\textsuperscript{232} Id. at 51 (discussing concepts of “idea marketing” and why “[u]nder the broadened concept of marketing, the product is no longer restricted to commercial goods and services.”).

\textsuperscript{233} \textsc{Ries \\& Trout}, supra note 4, at 2.

\textsuperscript{234} Kotler, \textit{Generic Concept}, supra note 229, at 49.
choices, but one that perhaps we should more often consider.235

"[M]arketing applies to any social unit seeking to exchange values with other social units,"236 and "[a]ll organizations must develop appropriate products to serve their sundry consuming groups and must use modern tools of communication to reach their consuming publics."237 Because marketing is "a social change process"238—for any organization and for any agenda (including a pro-takings or a pro-keepings one)—legal scholars should learn from the field of marketing to understand the way in which consumers of legal outputs perceive them.

A "Takings Clause" product branding probably sends signals of good quality for power but is likely signaling that it is a poor performer for rights, while a "Keepings Clause" product branding likely sends signals of quality for rights with less focus on power.239 The words chosen for the label to brand the clause are "quality [cues]."240 In fact, marketing research in normal consumer products markets demonstrates that brand-based quality cues are what consumers generally consider one of the more reliable heuristics for the actual quality of the product, crowding out the noise generated by other proxies.241 Each variation above—keepings versus takings—stresses different attributes, causing the reader of each to attach different expectations to the product.242 Each

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235. Kotler & Levy, supra note 229, at 15 (discussing how "[a]ll organizations are formed to serve the interest of particular groups: hospitals serve the sick, schools serve the students, governments serve the citizens, and labor unions serve the members.").

236. Kotler, Generic Concept, supra note 229, at 53.


238. Sidney P. Feldman, Creating Social Change, 39 J. MKTG. 116, 116 (1975) (book review) (endorsing ideas from marketing researchers that "marketing is basically a social change process subject to concepts applicable to all social institutions").

239. Keller & Lehmann, supra note 222, at 746 (explaining that brands are "signals of quality"); see also Kevin Lane Keller, Conceptualizing, Measuring, and Managing Customer-Based Brand Equity, 57 J. MKTG. 1, 3 (1993) ("The favorability, strength, and uniqueness of brand associations are the dimensions distinguishing brand knowledge that play an important role in determining the differential response that makes up brand equity.").

240. Niraj Dawar & Philip Parker, Marketing Universals: Consumers’ Use of Brand Name, Price, Physical Appearance, and Retailer Reputation as Signals of Product Quality, 58 J. MKTG. 81 (1994) (studying brands as quality signals and describing the impact of quality cues); see also Caglar Irmak et al., The Impact of Product Name on Dieters’ and Nondieters’ Food Evaluations and Consumption, 38 J. CONSUMER RES. 390, 391 (2011) (explaining that the "name of a food item . . . is likely to act as a cue for evaluating a food’s nutritional value. Such inferences are likely to lead to diet-appropriate decisions in cases where the product name is relatively unambiguous.").

241. Dawar & Parker, supra note 240, at 81; see also Durairaj Maheswaran et al., Brand Name as a Heuristic Cue: The Effects of Task Importance and Expectancy Confirmation on Consumer Judgments, 1 J. CONSUMER PSYCHOL. 317 (1992) (discussing the fact that brands are used as a heuristic for determining the content and quality of the product).

242. Keller, supra note 239, at 4 ("Attributes are those descriptive features that characterize a product or service—what a consumer thinks the product or service is or has and what is involved with its purchase or consumption. . . . Product-related attributes are de-
evokes a different image of the content and purposes of the same text.243

If it were the same jar of peanut butter branded and labeled in two distinct ways, marketing experts could predict different consumer responses based on the branding and labels used.244 Brands and labels generate attitudes toward the product that reflect consumer expectations about characteristics of the product245 and what the product symbolizes.246 Kotler’s theory of the generic concept of marketing highlights that such techniques for identifying consumer values— attribution are transferable beyond traditional consumer products. Consumers, or evaluators, of all types of things, including laws and legal tests, engage in this type of attribute-identification. We should expect that people will view the same Fifth Amendment in different ways depending on how it is labeled or branded.247 For example, researchers have demonstrated that, across a variety of foods studied, simply changing the name for food products has changed consumers’ perceptions of the acceptability of the food and willingness to purchase or consume it.248 Studying this concept, Caglar Im-
rak and his coauthors, for example, reported that their “findings ex-
tend prior research on perceptions of healthfulness and consumption
of food items (Chandon and Wansink 2007a, 2007b; Howlett et al.
2009) by demonstrating that merely altering the name of a food
item—without changing any additional information provided to con-
sumers—can affect the inferences that certain consumers make
about an item’s healthfulness.”

We should expect similar changes
in perceptions by readers of the Fifth Amendment regarding whether
it is designed to give us a healthy serving of keepings or a fatty platter
full of takings, depending on how we frame the meal.

Marketing experts routinely test consumer reactions to two differ-
ent brands for the same product or service and find differentials in
the consumers’ reactions to those identical products or services. It
seems that marketing researchers may in fact provide a good model
for testing the hypothesis this Article advances—something which I
hope might get accomplished in future work.

Kotler maintains, “[m]arketing is the attempt to produce the de-
sired response by creating and offering values to the market.”

When one labels a constitutional provision, she is (1) making a choice
of label that reflects her preferred content for the provision; in other
words, the interpretation the labeler desires that the consumer of the
label (the public, government officials, property owners, or others)
will make of the provision; and (2) selecting the label or phrase to
accompany (in other words, frame) the provision with a word or
words that reflect substantive values (in essence, the preferred iden-
tification of the appropriate allocation of power and rights) the la-
beler wishes to pack into the perception of the relevant rights and

bels showing, but not otherwise . . . preference for one’s favorite beer vanishes if
the labels on the beers being compared are removed . . . describing the protein
of nutrition bars as “soy protein” causes them to be rated as more grainy and
less flavorful than when the word “soy” is not included . . . bitter coffee seems
less so if consumers are repeatedly misinformed that it is not bitter . . . straw-
berry yogurt and cheese spreads are liked more if labeled “full-fat” than if la-
beled “low-fat” . . . and, intriguingly, people eat more vanilla ice cream if it is
accurately labeled “high fat” than if it is labeled “low fat.”

Leonard Lee, Shane Frederick & Dan Ariely, Try It, You’ll Like It: The Influence of Expec-
tation, Consumption, and Revelation on Preferences for Beer, 17 PSYCH. SCI. 1054, 1054
(2006) (internal citations omitted).

249. Irmak et al., supra note 240, at 391.

250. Keller, supra note 239, at 13 (explaining how marketing researchers test how
consumers react to competing “elements of the marketing mix” for one brand versus anoth-
er brand of the same product or service).

251. Kotler, Generic Concept, supra note 239, at 50.

252. RIES & TROUT, supra note 4 at 5 (“To be successful today at positioning . . . . You
must select the words which trigger the meanings you want to establish.”).
powers. This process is what Ries and Trout describe as “position[ing] the product in the mind of the prospect.” That explanation is consistent with the remainder of Kotler’s description of the marketing process, including that “[t]he marketer creates and offers value mainly through configuration, valuation, symbolization, and facilitation. (Configuration is the act of designing the social object. Valuation is concerned with placing terms of exchange on the object. Symbolization is the association of meanings with the object.]”

How we frame something can shape our expectations on how it is meant to operate or the kinds of outputs we should expect it to generate. The framing choice sets our expectations in a certain place for what should be anticipated, thereby normalizing certain effects. When we expect something, it is less likely to seem unusual or aberrant, which goes a long way toward legitimizing the effect. In the context of takings then, if the frame focuses on the power, it normalizes exercise of the power. We expect takings and they do not strike us as unusual. The desensitization effects influence our tolerance level for government-initiated, coercive transfers. A frame focused on a “right to keep” has the potential to flip all of those effects toward an expectation that takings will be rare, causing one to consider the existence of a taking unusual and susceptible to more probing scrutiny as to its legitimacy. If you expect a taking, you would judge a taking consistent with your expectation. If you expect a keeping, you would judge a taking as inconsistent with that expectation.

VI. FRAMING MATTERS

The labels with which we identify constitutional provisions focus our attention on what is supposed to be most important about it. Names (or labels) serve important messaging functions. When the

253. Kotler, Generic Concept, supra note 229, at 59 ("The core concern of marketing is that of producing desired responses in free individuals by the judicious creation and offering of values.").

254. RIES & TROUT, supra note 4, at 2 ("[P]ositioning is not what you do to a product. Positioning is what you do to the mind of the prospect.").

255. Kotler, Generic Concept, supra note 229, at 50.

256. Andrew L. Geers & C. Daniel Lassiter, Effects of Affective Expectations on Affective Experience: The Moderating Role of Optimism-Pessimism, 28 PERSONALITY & SOC. PSYCH. BULL. 1026, 1026-27 (2002) (noting that "a variety of studies have found that people often assimilate their affective reactions to affective expectations").

257. Eriksson & Strimling, supra note 216, at 361 (explaining how frames influence perceptions regarding what is "usual" and what to expect).

258. Lise H6roux et al., Consumer Product Label Processing: An Experiment Involving Time Pressure and Distraction, 9 J. ECON. PSYCH. 195 (1988) (explaining how labels function as communicative agents and as key components in product packaging); RIES & TROUT, supra note 4, at 99 ("The name is the first point of contact between the message and the mind.").
same constitutional provision can be labeled by the power that it limits or the right that it protects—the referent word drives the dominant perception of the provision.\textsuperscript{259} Labels matter. Word choices matter; they set (or reflect) priorities.\textsuperscript{260} The manner in which we choose to frame things matters. Part V is designed to provide support for the power of framing and set the general foundation for how choosing a frame of “Takings Clause” versus “Keepings Clause” might have some meaningful effects on the rights at play. This Part elaborates on just a few of the possible real-world outcomes we could see if the label for these Fifth Amendment provisions was changed to “Keepings Clause.”

The Fifth Amendment provisions regarding takings are especially apt for discussion of framing. According to Tonja Jacobi and her co-authors, James Madison wanted this clause to create “shared expectations over property rights and establishing what constitutes abuse by the government.”\textsuperscript{261} “Madison’s design of the Takings Clause,” Jacobi and her co-authors explain, included an intent for “the Clause to serve a broader ‘educative’ function; that is, he hoped the Clause’s inclusion in a new Constitution that represented supreme law would help educate and remind ordinary citizens of their rights, and spur greater federal and state protection of property rights.”\textsuperscript{262} What is the proper frame for accomplishing that rights-protective “educative function”? Surely, a “Keepings Clause” frame focused on rights does so more than a “Takings Clause” frame.

\textbf{A. Framing Effects and the Expressive Function of Law}

Far from being merely a semantic or academic difference, our word choices to express legal doctrines and rights protections matter. How we articulate the law has consequences.\textsuperscript{263} How people behave

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\item \textsuperscript{259} \textsc{Ries & Trout}, \textit{supra} note 4, at 202 (“Words are triggers. They trigger the meanings which are buried in the mind.”).
\item \textsuperscript{260} See, e.g., Harold Anthony Lloyd, \textit{Law as Trope: Framing and Evaluating Conceptual Metaphors}, 37 PACE L. REV. 89, 93 (2016) (discussing ways that language choices in communication can “highlight, downplay, and hide” meanings and consequences).
\item \textsuperscript{261} Jacobi et al., \textit{supra} note 154, at 620; see also Lloyd, \textit{supra} note 260, at 94 (while discussing how narratives only work if consistent with our experience, the author comments that allowing a condemnation of property without compensation “would not fit with moral experience: it is generally not right to take property without paying for it”).
\item \textsuperscript{262} Jacobi et al., \textit{supra} note 154, at 620.
\item \textsuperscript{263} See Sunstein, \textit{supra} note 3, at 2045. As Cass Sunstein explains in his work on the “expressive function of law”:
\begin{quote}
My basic proposition is that, at least for purposes of law, any support for “statements” should be rooted not simply in the intrinsic value of the statement, but also in plausible judgments about its effect on social norms and hence in “on balance” judgments about its consequences. Here we can bridge the gap between consequentialists and expressivists by showing that good expressivists are consequentialists too.
\end{quote}
\end{itemize}
and react to others can be influenced by how the law is expressed and how something like government power vis-à-vis rights is framed.\textsuperscript{264}

The law’s expressive function plays a key role in citizens’ relationships with and perceptions of the law and the strength or scope of its dictates.\textsuperscript{265} Individuals choose their appreciation for and determine their willingness to support legal doctrines because of what Sunstein describes as the “statements made by law,”\textsuperscript{266} and law’s “expression function” through making statements—including statements of priority of values and policy—that signal the purposes of law and affect the character of one’s view of particular laws.\textsuperscript{267} Specifically, as Jacobi and her coauthors posit, “[o]ne principal purpose of the Constitution—and particularly the Bill of Rights—is to create focal points that familiarize citizens about the appropriate powers of government and their limits and to coordinate citizen expectations.”\textsuperscript{268}

Applying these points to the issue at hand, it is not hard to posit that a “Takings Clause” label expresses something quite different from a “Keepings Clause” label, with a concomitant distinction in the values that each label expresses. Sunstein, after all, explains how “legal ‘statements’ might be designed to change social norms,”\textsuperscript{269} and how one “frames” law can influence citizens perceptions of the values the law wishes to further.\textsuperscript{270} Janice Nadler similarly contends that law “work[s] expressively . . . by shaping group values and norms, which in turn influence individual attitudes.”\textsuperscript{271} By reinforcing the idea that the law’s default is to allow individuals to keep what they own, citizens will start to develop an expectation of keepings (rather than be unalarmed by the existence of takings). According to Amitai Aviram, individuals are influenced by the “psychic effects” of law.\textsuperscript{272}

\textsuperscript{264} See id. at 2027 (“My point is only that human behavior is sometimes a function of expressive considerations.”).

\textsuperscript{265} Id.

\textsuperscript{266} See id. at 2022 (“Many people support law because of the statements made by law, and disagreements about law are frequently debates over the expressive content of law.”).

\textsuperscript{267} See id. at 2024-25 (describing the “the expressive function of law” as “the function of law in ‘making statements’ as opposed to controlling behavior directly”).

\textsuperscript{268} Jacobi et al., supra note 154, at 620.

\textsuperscript{269} See Sunstein, supra note 3, at 2025.

\textsuperscript{270} See id. at 2025-26 (explaining how recycling mandates, for example, send a different, stronger signal about a commitment to environmental values than would simply charging people for leaving otherwise recyclable materials in their trash).


Deviations from that expectation might cause them to question governmental decisionmakers, demand higher-level justifications for the takings they observe, and hold them accountable. When the label is takings-based, individuals are more likely to observe that condemnation is just a normal government action; they are more likely to believe that condemnation is what the clause is meant to authorize.

Moreover, a keepings norm—that is, a predisposition in the law against takings—could even possibly change the attitudes of the agents of condemnation, making them more inclined to refrain from a taking rather than initiating one. In fact, if we start with a presumption of keepings, there is an opportunity to expose the (government) takers to the risk of shame for their actions which constitute “defection” from the norm—a powerful force motivating against condemnation. At the very least, the label’s facilitation of heightened scrutiny of the governmental actors and its establishment of a keepings norm could cause those exercising the condemnation authority to more deeply reflect on the action and to question whether the act is defensible in the court of public opinion.

*Kelo*, for example, had an expressive effect. In expressing that the Constitution provides very little protection from private-property seizures to serve other private interests, the Court expressed that the “Takings Clause” itself imposes very few limits. It expressed that the “Public Use Clause” is toothless. Citizens and private owners observing courts’ rulings on “public use” have come to expect that broad takings for claimed public benefits are judicially acceptable. Moreover, governmental actors can presume from the *Kelo* opinion and the Court’s expression that their “public use” determinations are almost entirely immune (in substance, if not in form) from judicial scrutiny.

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273. *Cf.* Sunstein, *supra* note 3, at 2026 (“Prevailing norms, like preferences and beliefs, are not a presocial given but a product of a complex set of social forces, possibly including law.”).

274. *See id.* at 2029-30 (“When defection violates norms, defectors will probably feel shame, an important motivational force. The community may enforce its norms through informal punishment, the most extreme form of which is ostracism. But the most effective use of norms is ex ante. The expectation of shame—a kind of social ‘tax,’ sometimes a very high one—is usually enough to produce compliance.”).

275. *See id.* at 2032 (“People . . . Sometimes they act strategically in order to avoid other people’s opprobrium.”).


277. *See generally id.*
This kind of expression evidenced in *Kelo* is a particularly damaging form of expression of law, because, as Sunstein notes, “[w]hen the Court makes a decision, it is often taken to be speaking on behalf of the nation’s basic principles and commitments,” which “is a matter of importance quite apart from its consequences as conventionally understood.” The Court’s expression has proliferating effects precisely because its pronouncements help define society’s relationship with the law and society’s prioritization of commitments to values. A liberally-invoked condemnation power—that has very few limits—signals that the government’s power to take is vast and the citizens’ “right to keep” is weak.

As Sunstein aptly and succinctly puts it, “[t]he social meaning of law will constrain the legitimate or permissible content of law.” If the social meaning of the “Eminent Domain Clause” is shaped by expressions that underscore the notion that the “public use” constraint is weak and expressions that takings are simply a matter of government power to which we must submit under our system of government, then the perceived scope of legitimate or permissible takings is wide. More generally, even for legitimate “public uses” for which takings may be an option, if the social meaning of these Fifth Amendment provisions is given content by its label, and its label is defined by the power, then the power will drive the meaning.

If, however, there is an opposite presumption and stricter adherence to the property-rule component present in the “Public Use Clause,” then the legitimate or permissible exercise of the eminent domain power is identified as far more limited in scope. In such a legal environment, owners are empowered to more often say “no” and enjoin the government from a taking. Again, more generally, even for those takings that could be justified as serving a “public use,” if the social meaning of the Fifth Amendment is driven by a “keepings” label, then the rights will drive the meaning, and the expectations will be that takings, even when they might serve “public uses,” should be rare.

This conclusion—that a switch in the label to a rights-based word like “keepings” can help drive a more rights-based social meaning—is supported by Sunstein’s conclusions that the expressive function of law can be altered. He explains that shifts in norms are possible, positing that “the law might be enlisted as a corrective. . . . Here the goal

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278. *Id.* at 2028.

279. *See id.* at 2050; *see also id.* at 2048 (“[A]ny description of the effects of some legal rule is a product of expressive norms that give consequences identifiable social meanings—including norms that deny legal significance to certain consequences.”).

280. RIES & TROUT, *supra* note 4, at 202 (“In a sense, every product or service is ‘packaged goods.’ If it [is not] sold in a box, the name becomes the box.”).
is to reconstruct existing norms and to change the social meaning of action through a legal expression or statement about appropriate behavior.\textsuperscript{281} Consistent with the research on the ability of framing to affect function in Part V of this Article, reframing can shift the expressive message of the law when it chooses to attach a label to a particular constitutional right.\textsuperscript{282}

The choice of label creates the frame; the frame drives the expression; and the expression affects the respect given to the right and sets the expectations for governmental behavior associated with it. This Article’s proposal to shift our frame regarding eminent domain to one with a “Keepings Clause” label rather than a “Takings Clause” label might then have the same effect of reconstructing the existing norms that presume legitimacy for the exercise of the eminent domain power into norms that more often question its use. These norms could shift to more readily trigger questions like “why was this person not allowed to keep their property?” rather than “what did the government take this time?”

The language of law can have a signaling effect of what matters, even if the underlying legal dictates do not change. Remember that marketing experts have already figured out that naming and labeling products on your grocery shelves or those that pop up in your Amazon search is important. Similarly, Sunstein again has insight. In his work on the expressive function of law, he discusses the simple power of announcing a new law, such as littering is forbidden or owners must clean up after dogs.\textsuperscript{283} Even if neither law is accompanied by further enforcement, he describes how such a pronouncement of a law on the issue in and of itself, even if it does not create a different level of legal enforcement for a norm, can change perceptions and alter behavior toward greater appreciation for the value expressed (namely, people litter less and use baggies to collect dog poop during walks).\textsuperscript{284}

If we change our label from what is now almost universally considered the “Takings Clause” to the “Keepings Clause,” we might have the type of effect that Sunstein has identified in other areas of law, where “[o]ften law’s ‘statement’ is designed to move norms in

\begin{itemize}
  \item \textsuperscript{281} See Sunstein, \textit{supra} note 3, at 2031.
  \item \textsuperscript{282} Scheufele & Iyengar, \textit{supra} note 198, at 1 (“The concept of framing embodies a context-sensitive explanation for shifts in political beliefs and attitudes.”).
  \item \textsuperscript{283} See Sunstein, \textit{supra} note 3, at 2032-33.
  \item \textsuperscript{284} See id. (discussing the “important effect in signalling appropriate behavior and in inculcating the expectation of social opprobrium and, hence, shame in those who deviate from the announced norm” so that “[w]ith or without enforcement activity, such laws can help reconstruct norms and the social meaning of action.”).
\end{itemize}
That fresh direction could come from changes in policy, changes in constitutional understanding, changes in the expectations of the general public, changes in the public's willingness to accept particular condemnations without asking questions as to why some alternative was not available, or simply changes in the would-be condemners' reflective processes. Consider, for example, the consequences to a legislator if the expectation shifts towards more keepings and less takings. George Akerlof speaks of the means of retaliation available to consumers of products when the products do not meet the expectations of their branding. Accountability measures might also serve as a possible way to check nonadherence to the keepings brand and insure the brand is living up to its reputation. Furthermore, it would be far easier to learn that a keepings norm has been infringed (one need just learn that a taking has occurred) than it is to evaluate whether a presumptively-allowable takings norm has been abused. Therefore, a switch to a "Keepings Clause" brand deems governmental transgressions of such presumption even more transparent than if we were operating under a presumption of legitimacy of each taking. Each of the above-mentioned possible alternative states resulting from an adjusted frame might contribute to a system that is more sensitive to property rights; more understanding of the personal attachments we form with our property; more generous regarding the surplus values we associate with such property that can never be fully replaced with a monetary compensation system; and generally more respectful of the rights of property owners to keep what they own.

B. Other Systemic Effects on Stability of Possession and Owner Confidence

If we can accomplish a paradigm shift with a reframing of the Fifth Amendment's property protections under a new label like "Keepings Clause," then we might generate a greater sensitivity to property rights and a greater skepticism of the authority or necessity to use eminent domain, which would result in a lower frequency of takings. Instability of possession caused by excessive takings practic-

285. See id. at 2051.
286. George A. Akerlof, The Market for "Lemons": Quality Uncertainty and the Market Mechanism, 84 Q. J. ECON. 488, 499-500 (1970) ("Brand names not only indicate quality but also give the consumer a means of retaliation if the quality does not meet expectations. For the consumer will then curtail future purchases.").
287. Mary Sullivan, Measuring Image Spillovers in Umbrella-Branded Products, 63 J. BUS. 309, 310 (1990) ("The economics literature has long viewed brand reputation as a mechanism used by firms to insure quality to consumers." (citing Frederich A. Hayek, The Meaning of Competition, in Frederich A. Hayek, Individualism and Economic Order (1948))).
es is detrimental to the property system.\textsuperscript{288} If we lower the incidence of takings, the market will perceive less risk to property being taken (including less risk to condemnation awards not covering the investments made in the property or the long-term stability of ownership that could come from those investments).

Reframing as the “Keepings Clause” might contribute to a lower incidence of takings in a number of ways. Respect for the “right to keep” might increase, with accompanying restraint from governmental actors and higher expectations from property owners and the public that takings will be a true last resort. A keepings-based framework could deter governmental actors from aggressive use of takings out of fear of alienating an electorate that is increasingly informed by a presumption that takings-avoidance should be the norm, accordingly demanding restraint. A change in frame might also have the ability to precipitate a greater sensitivity to the “right to keep” in the courts, perhaps even causing them to rethink the presently near-impenetrable deference to legislative determinations of “public use,” for example. First, we change the label so that perceptions can begin to change, which might cause government officials to change attitudes, citizens to change expectations, and perhaps courts to revisit takings-empowering doctrines. Each of these possible individual categories of altered mindset and behavior would contribute to a gradual paradigm shift that ultimately could result in a more investment-friendly atmosphere.

Strong protections for the “right to keep” property motivate behavior, including instilling the feelings of confidence, security, and stability that motivate acquisition of and investment in property. In other words, the level of confidence one has in his ability to keep property once acquired affects his incentives, including his willingness to expend resources to acquire that property in the first place.\textsuperscript{289} Individuals will not make improvements or other investments in property if they do not have a high degree of certainty that they can keep the property they enhance.\textsuperscript{290}

Strengthening these property attributes not only encourages investment but also increases the market value of the property. Potential buyers will pay more for things they believe they get to keep; or

\textsuperscript{288.} Bell & Parchomovsky, Theory, supra note 75, at 552-59 (discussing generally the importance of stability in property ownership and policing mechanisms for the same).

\textsuperscript{289.} Id.

\textsuperscript{290.} Hernando de Soto, Law Connects, Remarks at the IBA Annual Conference (Oct. 12, 2008), in 62 No. 6 INT'L BAR NEWS 14, 16 (Dec. 2008) (“[G]lobally . . . the problem is that nobody’s going to invest unless they know who owns it, or that they own it. Nobody’s going to remove the rocks; nobody’s going to put in the irrigation systems or the roads, until they feel they own it.”).
rather own. Thus, the more confidence market participants have in the ability for every owner to keep their property until they voluntarily choose to dispose of it, the higher those market players will price property.

Government can provide certainty to market participants in the undisturbed ownership of the assets they exchange by providing a legal infrastructure with a particular frame that generates high levels of confidence that the government will respect ownership, will not confiscate property once acquired or make investments once made, and will not otherwise disrupt or interfere with the sanctity or enforceability of the exchange. In other words, when the government respects the “right to keep,” positive stability reactions follow. Epstein explains that, by setting the default in our legal system as one where a right to refuse is honored, we help keep the heart of a stable property system beating. Epstein asserts, “[w]hat makes this system work is the stability of possession that David Hume recognized as one of the dominant rules of society. Thus, transactions take place only if both sides agree to them, which means that all individuals keep their holdings until they agree to part with them.”

The easier it is to have ownership taken away, the less secure we feel. Behavior will adapt to the environment that is framed. If that atmosphere projects insecurity—such as sending signals that taking is liberally tolerated—investment will suffer. If, however, the frames we choose project that keeping is the norm, we should expect a positive effect. Security, stability, and certainty in ownership work to encourage transactions and movement of property in commerce.

C. A Presumption Toward Keepings Might Mitigate the Under-compensation Problem

A frame that draws a heightened focus on the “right to keep,” with the concomitant channeling of behavior toward less takings and more consensual transfer negotiations that respect it, has the benefit of avoiding the fraught calculation of “just compensation.” Thus, a change in our frame might mitigate the undercompensation problem in takings law.

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291. Bell & Parchomovsky, Theory, supra note 75, at 552 (“[A] property system with stable rights increases the value of assets to users (now owners) and decreases the costs of obtaining and defending those assets.”).

292. Epstein, A Clear View, supra note 156, at 2097.

293. Way, supra note 147, at 121 (“Security in ownership—the principle that an owner’s property rights cannot be taken away, except by the government with just compensation—is a fundamental attribute of American property ownership.”).
Even if courts work diligently to approximate fair market value, it is not a substitute for true value to an owner. People form attachments to property and assess what they own as having special, meaningful value. Oliver Wendell Holmes famously spoke of owners’ attachment to property in the context of adverse possession, describing such connections as reflecting "the deepest instincts of man" when "[a] thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it." Jill Fraley has described owners as developing a “foundational fear of dispossession” resulting from the feelings of connectedness, completeness, and control that humans associate with their property. This individualized value is sometimes called “reserve value” or “surplus value.” Because these subjective values are impossible to validate when determining damages, compensation awards are forced to use the “fair market value” standard, which is supposed to objectively look outward toward what a prospective buyer would pay, rather than the value the owner attaches and the price at which the owner would be willing to sell. The consequence, however, is that, when the government takes land and is only required to pay the diminished market value, the current owner may not be fully compensated. She may attach personal value to her property in excess of that fair market value calculation, or she may be able to find someone to whom she could sell her property rights that values the property more than the average person in the market may.


295. Oliver Wendell Holmes Jr., The Path of the Law, 10 HARV. L. REV. 457, 477 (1897); see also GREEN’S PHILOSOPHICAL WORKS 2, § N, 211, 214 (1886), reprinted in THOMAS HILL GREEN, LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION (1921) (discussing the appropriation of external things by fashioning them, making them thereafter “cease to be external as they were before,” and then making them “become a sort of extension of the man’s organs, the constant apparatus through which he gives reality to his ideas and wishes”).


297. Id. at 529-30 (generally discussing the concept of deep feelings of attachments by humans to property).


300. Daphna Lewinsohn-Zamir, Can’t Buy Me Love: Monetary Versus In-Kind Remedies, 2013 U. ILL. L. REV. 151, 151 (2013) (explaining why damages remedies might possibly "routinely fail to provide adequate compensation" because individuals "strongly prefer
In this light, the current “fair market value” standard for calculating “just compensation” in takings law is inadequate given the surplus value that many owners have in their properties. Part of the reason the “current compensation scheme is suboptimal,” as Bell and Parchomovsky posit, is precisely because the “types of value” considered in “just compensation” remedies fail to include owner utility associated with personal, emotional attachment to property. “Fair market value” fails to include individual utility from nonfinancial sources, meaning that the owner will often value the property more than the market price reflects. Different people value the same property differently based on a variety of factors that cannot be reduced easily to objective tests.

For example, Bell and Parchomovsky explain that, “[i]n cases of sentimental attachment, the owner finds in the asset emotional utility not accessible to other market participants and, therefore, not reflected in the market price.” Consequently, “the price at which the owner will agree to sell the asset (the reserve price) will exceed the price that ordinary market participants will pay (the market price).”

In the face of the price disparity between fair market price and reserve price, Epstein explains that the “risk of undercompensation” is “acute under the current law of eminent domain, in which the levels of compensation generated systematically ignore all elements of subject-
tive loss and consequential damages brought on by deliberate government action.”

Moreover, it is not just sentimental or other emotional value that is affected; it is also the value we get from durability of ownership. Bell and Parchomovsky remind us that a system with liberal powers to exercise eminent domain also adversely affects “the value of stability that lies at the property system’s heart.”

Epstein argues that it is possible for courts to adjust compensation upward to effect what would be a “de facto property rule,” because the consequences would be high enough to serve as a deterrent, and legislatures too might consider compensation premiums to deter takings. Yet, neither of these resolutions seem imminent.

Coerced transfers of property rights fail to guarantee a mutually beneficial exchange. The usefulness of contracts law is that it creates individualized determinations of value such that both parties to a contract benefit from the transaction. Only when the state or any other purchaser is forced to bargain with a property owner for acquir-

308. Epstein, A Clear View, supra note 156, at 2093; see also Merrill, Incomplete Compensation for Takings, supra note 294, at 111 (“The most striking feature of American compensation law—even in the context of formal condemnations or expropriations—is that just compensation means incomplete compensation. Compensation is strictly limited to ... fair market value of the property taken. Other consequential damages incurred by the property owner are ignored.”).

309. Consider, for example, this statement by Judge Richard Posner in a takings case:

[M]arket value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to his property. Many owners are “intramarginal” meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, they value their property at more than its market value (i.e., it is not “for sale”). Such owners are hurt when the government takes their property and gives them just its market value in return. The taking in effect confiscates the additional (call it “personal”) value that they obtain from the property.

Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988).

310. Bell & Parchomovsky, Theory, supra note 75, at 604 (“With fewer tools to defend her property rights [in the liability rule-based eminent domain scheme], the property owner enjoys less stability in her ownership, and presumably may extract less value.”).

311. Epstein, A Clear View, supra note 156, at 2096.

312. Id. at 2114 (describing a suggested reform of compensation premiums that are designed to deter takings).

313. Walgreen Co. v. Sara Creek Prop. Co., 966 F.2d 273, 275-76 (7th Cir. 1992) (explaining why bargaining is often most efficiently coordinated through injunctions because it allows for protection of individualized value, allowing a party to set her price, based on the “premise of our free-market system ... that prices and costs are more accurately determined by the market than by government”).
ing his land can a more balanced scheme of compensation occur.\textsuperscript{314} In a compensation scheme based on fair market value, the harm done to property owners by governmental takings may be diminished, but it will never be eliminated. Thus, rules or cultures that force the government back into a competitive market framework are likely to protect the concept of mutually-beneficial exchange.\textsuperscript{315} Moreover, individual owners might even be more likely to bargain with the state when not faced with a threat of a coerced transfer.\textsuperscript{316}

Because no system of compensation can perfectly replace the value owners attach to their property, it is clear that protection and preservation, not merely compensation, must be the focus if the system wants to maximize its respect for individualized property rights. Minimizing the number of takings that actually occur should be a goal—avoiding the problem of governmental undercompensation in the first place. The powerful impact of eminent domain on ownership and its displacement of property rights is, and always was, meant to be only a power of last resort.\textsuperscript{317} Re-framing the Fifth Amendment protections as the “Keepings Clause” better reflects the spirit of those guarantees as, at the very least, a quasi-property rule, enforced by self-restraint, in which the government employs its power of eminent domain only in situations of necessity; that is, when addressing concerns not susceptible to private solutions.\textsuperscript{318}

\section*{VII. Conclusion}

This Article has catalogued usage to demonstrate the relatively recent provenance of the label “Takings Clause.” Because this frame has no special status, there is no reason not to question whether another label could better reflect the values we wish to convey under

\begin{footnotesize}
\begin{enumerate}
\item[314.] Lewinsohn-Zamir, The Choice, supra note 93, at 221 (criticizing “the new trend favoring liability-rule protection for entitlements and vindicates the superiority of property rules,” concluding that property rules should be favored “when bargaining is feasible and highlight[ing] the shortcomings of bargaining in the shadow of liability rules”).
\item[315.] Id. at 255-56 (the findings regarding property rules as facilitating cooperation “bears important normative implications, all supporting the adoption of property rules whenever possible . . . [U]nder property-rule protection, there will be greater scope for potential efficient transactions and larger efficiency gains to be divided among the parties.”).
\item[316.] Id. at 253-54 (explaining studies that show why individuals may be more willing to bargain and more willing to sell if the starting position is one where they hold the property by a property rule; if they know that the property can ultimately be taken under a liability rule, they will be resistant to bargaining).
\item[317.] See Epstein, Takings, supra note 148, at 173-74 (discussing the concept of necessity).
\item[318.] Brauneis, supra note 148, at 938-39 (finding in Supreme Court jurisprudence a “substantive assertion . . . that the Just Compensation Clause is and always was understood to be a partial, incomplete protection of property rights in general”).
\end{enumerate}
\end{footnotesize}
the rights-protective language in the property provisions of the Fifth Amendment to the U.S. Constitution.

The true imperative of the constitutional protections guaranteed in the “Takings Clause” should be to maximize keepings and minimize takings. The stability of property rights is dependent upon having the scales tipped in that direction.\textsuperscript{319} Changing how we frame rights and powers, and how the government projects its understanding of them, can change perceptions, change expectations, and increase confidence, thereby motivating productive behavior.\textsuperscript{320} Framing can work to create a more stable property system with the added benefit of better protecting the rights demanded by the Fifth Amendment.\textsuperscript{321}

Finally, regardless of whether one supports reframing through the relabeling of the now-called “Takings Clause” to the “Keepings Clause” or something else, this Article had another, broader goal that is not dependent on being convinced of the wisdom of that change. The additional objective was to use the takings provisions as a case study, provoking further thought on how we do and should label, and thereby frame, constitutional rights. At the very least, this Article sought to provide a framework for understanding the impact and influence of frames and encourage continued discussion on whether we have chosen appropriate labels to create proper, effective, and accurate frames for important aspects of our legal system.

\textsuperscript{319} Bell & Parchomovsky, Theory, supra note 75, at 603 (“[T]he government’s ability to seize property directly undermines the stability of property rights.”); see also Madison, Property, supra note 150, at 266 (“[A]s a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.”).

\textsuperscript{320} Epstein, A Clear View, supra note 156, at 2120 (“The choice between property rules and liability rules should normally be resolved in favor of the former to preserve the stability of possession and social expectations that are necessary for the growth of any complex social order.”).

\textsuperscript{321} Bell & Parchomovsky, Theory, supra note 75, at 538 (explaining how our legal assumptions are often “predicated on the insight that property law as a legal institution is organized around creating and defending the value inherent in stable ownership”).
APPENDIX A:  
"Takings" Decisions of the U.S. Supreme Court: Language Used to Characterize the Right at Issue  

<table>
<thead>
<tr>
<th>Labeling Phrase</th>
<th>Taking / Takings Clause</th>
<th>Just Compensation Clause</th>
<th>Eminent Domain Clause</th>
<th>No Label / General Fifth Amendment</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1870)</td>
<td>X</td>
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<td>2</td>
<td>Pumphrey v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871)</td>
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<td>3</td>
<td>Transportation Co. v. Chicago, 99 U.S. 635 (1878)</td>
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<td>4</td>
<td>United States v. Great Falls Mill Co., 112 U.S. 465 (1884)</td>
<td>X</td>
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<td>5</td>
<td>United States v. Pacific R.R., 120 U.S. 227 (1887)</td>
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<td>6</td>
<td>Mugler v. Kansas, 123 U.S. 623 (1887)</td>
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<td>7</td>
<td>Gibson v. United States, 166 U.S. 269 (1897)</td>
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<td>8</td>
<td>Meyer v. Richmond, 172 U.S. 82 (1899)</td>
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<td>9</td>
<td>Norwood v. Baker, 172 U.S. 269 (1899)</td>
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<td>10</td>
<td>Scranton v. Wheeler, 179 U.S. 141 (1900)</td>
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<td>11</td>
<td>United States v. Lynah, 188 U.S. 445 (1903)</td>
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<td>12</td>
<td>Holdford v. United States, 192 U.S. 317 (1904)</td>
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<td>13</td>
<td>New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453 (1905)</td>
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<td>16</td>
<td>Union Bridge Co. v. United States, 204 U.S. 364 (1907)</td>
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<td>17</td>
<td>Sauer v. City of New York, 206 U.S. 536 (1907)</td>
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<td>18</td>
<td>Juragua Iron Co. v. United States, 212 U.S. 297 (1909)</td>
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<td>19</td>
<td>Welch v. Swasey, 214 U.S. 91 (1909)</td>
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<td>20</td>
<td>United States v. Welch, 217 U.S. 333 (1910)</td>
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<td>22</td>
<td>Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913)</td>
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2 This category collects cases with Fifth Amendment language, either by direct quotation or indirect reference.
<table>
<thead>
<tr>
<th></th>
<th>LABELING PHRASE</th>
<th>TAKING / TAKINGS CLAUSE</th>
<th>JUST COMPENSATION CLAUSE</th>
<th>EMINENT DOMAIN CLAUSE</th>
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<tr>
<td>55</td>
<td>United States v. Dickimov, 331 U.S. 745 (1947)</td>
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<td>58</td>
<td>United States v. P Kens Coal Co., 341 U.S. 114 (1951)</td>
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<td>59</td>
<td>United States v. Calix (Philippines), Inc., 344 U.S. 149 (1952)</td>
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<td>61</td>
<td>United States v. Central Eureka Mining Co., 357 U.S. 155 (1958)</td>
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<td>63</td>
<td>Greggs v. Allegheny County, 369 U.S. 84 (1962)</td>
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<td>64</td>
<td>Goldblatt v. Hempstead, 369 U.S. 590 (1962)</td>
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<td>65</td>
<td>Hogan v. Rank, 372 U.S. 409 (1963)</td>
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<tr>
<td>66</td>
<td>Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)</td>
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<td>69</td>
<td>Hurst v. United States, 410 U.S. 478 (1973)</td>
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<td>75</td>
<td>Kaiser Artila v. United States, 444 U.S. 164 (1979)</td>
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* "Just Compensation Clause" language used in court reporter-generated Syllabus only, but not in reported judicial opinion.
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<tr>
<th>No.</th>
<th>Case Name</th>
<th>Citation</th>
<th>Taking / Takings Clause</th>
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<td>100</td>
<td>United States v. Locke, 471 U.S. 84 (1985)</td>
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<td>109</td>
<td>First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)</td>
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<td>112</td>
<td>Pennell v. City of San Jose, 485 U.S. 1 (1988)</td>
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<td>121</td>
<td>Rabbitt v. Yoope, 519 U.S. 234 (1997)</td>
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<td>121 San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005)</td>
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<td>122 Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot., 560 U.S. 702 (2010)</td>
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<td>123 Arkansas Game &amp; Fish Comm'n v. United States, 133 S. Ct. 511 (2012)</td>
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<td>124 Horne v. Dep't of Agriculture (Horne I), 133 S. Ct. 2045 (2013)</td>
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<td>126 Horne v. Dep't of Agriculture (Horne II), 135 S. Ct. 2419 (2015)</td>
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</table>
APPENDIX B: Usage of Labeling Phrase in U.S. Supreme Court Cases Resolving Takings Issues

- Cases Using "Taking/Takings Clause" Label
- Cases Using "Just Compensation Clause" Label
- Cases Using "Eminent Domain Clause" Label
- No Label

1 Of 41 "Taking/Takings Clause" cases, 2 cases also use "Eminent Domain Clause" (1970-1979) & 12 cases also use "Just Compensation Clause" in the opinion (5 in 1980s, 4 in 1990s, 3 in 2000s).
2 The case which uses "Eminent Domain Clause" (1980-1989) also uses "Just Compensation Clause."

The case tallies depicted in this chart rely upon the cases identified as "takings cases" through 2015 in Robert Mikat, Takings Decisions of the U.S. Supreme Court: A Chronology, Congressional Research Service Rep. No. 97-122 (rev’d July 20, 2015), with original updates for years thereafter. For more information of data collection and coding methodology, see Appendix A supra.
APPENDIX C

Additional Illustrations of Labeling Usage in Court Opinions Across Time

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322. Data compiled by searching Westlaw and reviewing cases retrieved; verification searches completed on Lexis and Ravel.
"Taking Clause" or "Takings Clause"
All State Cases
Usage of Labeling Phrase in Cases of Any Type

First usage in state court opinion: Hurley v. State, 143 N.W.2d 722 (S.D. 1966)

"Taking Clause" or "Takings Clause"
All Federal Cases
Usage of Labeling Phrase in Cases of Any Type

"Just Compensation Clause"
All Federal & State Cases
Usage of Labeling Phrase in Cases of Any Type

"Eminent Domain Clause"
All Federal & State Cases
Usage of Labeling Phrase in Cases of Any Type
"Eminent Domain Clause"
All State Cases
Usage of Labeling Phrase in Cases of Any Type

"Eminent Domain Clause"
All Federal Cases
Usage of Labeling Phrase in Cases of Any Type