What's in a Name? Apparently a Lot

Author : Carol Necole Brown

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Donald L. Kochan, *The [~~Takings~~] Keepings Clause: An Analysis of Framing Effects From Labeling Constitutional Rights,* 45 **Fla. St. U. L. Rev.** __ (forthcoming), available at SSRN.

> "What's in a name?
> That which we call a rose
> By any other name would smell as sweet."

These words might ring true for William Shakespeare's tragic lovers, *Romeo and Juliette*, but not so much so for the takings clause in the Fifth Amendment of the United States Constitution. In his compelling new article, The [~~Takings~~] Keepings Clause: An Analysis of Framing Effects From Labeling Constitutional Rights, Professor Donald L. Kochan employs interdisciplinary research from the fields of linguistics, psychology, and business product advertising to remind his reader that the words we use to label (or frame) constitutional rights do, in fact, matter.

The majority of regulatory takings challenges are brought under either the categorical takings test articulated by the Supreme Court in *Lucas v. South Carolina Coastal Councilor* or the three-part balancing test the Court applied in Penn Central Transportation Co. v. New York City. Property owners hardly ever win takings claims under either of these regulatory takings frameworks.[1]

Against this backdrop of the proverbial cards stacked against property owners who resist government's forced acquisition of their private property through eminent domain, Kochan reminds us that James Madison, "The Father of the Constitution" viewed the role of a just government as predominantly "'protection' and 'preservation,' [of private property rights] not merely 'compensation'. . . ."

Kochan convincingly argues that the framing of the "'Takings Clause'" wrongly emphasizes the power of government to weaken constitutionally protected rights. Instead, we should choose a label that strengthens property owners' constitutionally protected rights to *keep* their property, hence, the "'Keepings Clause.'"

To make his case, Kochan does the challenging work for the reader of detailing the history of labeling other rights and entitlements related to the Fifth Amendment and the government's eminent domain powers. Using multiple data collection tools, he documents the first usages of the term "Taking Clause" or "Takings Clause" (hereinafter "The Takings Clause"). His painstaking research reveals that the phrase emerged relatively recently, more than 100 years after the United States Supreme Court heard its first case dealing with the Fifth Amendment and the use of eminent domain. Kochan's research is important because it shows use of the "Takings Clause" is not justified by any longstanding practice or constitutional imperative. Hence, what is the harm in replacing The Takings Clause with one that is more constitutionally accurate in its emphasis on what the Framers of the Constitution valued, constitutional safeguards for private property owners against the government?

Kochan next does a deep dive into the literature and study on framing, importing valuable lessons from other disciplines to show the power of framing and why labels matter. If the Fifth Amendment's integrity is aimed at protecting property owners' right to keep their property, then The Takings Clause could be "an irresponsible frame" to the degree that it emphasizes the government's right to take through the exercise of eminent domain.

To help prove his point, Kochan explores the framing research of psychologists Amos Tversky and Daniel Kahneman, among others, whose work led them to the conclusion that "'the adoption of a decision frame . . . [is] an ethically significant act.'" In other words, as Kochan explains, the way we frame constitutional text will affect the way in which the meaning of that text, and the rights it affords, are perceived even relative to other constitutional rights. For example, the First Amendment clause that protects speech is framed as the Free Speech Clause. This framing emphasizes the right that is protected, freedom of speech. In contrast, it could have been framed as the "'Abridgment of Speech Clause'" or as the "'Suppression of Speech Clause.'" These alternative frames are more akin to the "Takings Clause" frame in their emphasize, not on the right that is protected, but rather on when the government can limit, invade, and intrude upon the important constitutional right of freedom of speech.

Marketing and advertising research further support Kochan's claim that framing matters and that the framing of important constitutional rights matters a lot. Marketing experts understand that how we label goods, services, and rights, is important to the framing of those same goods, services, and rights. Kochan points to branding literature as additional support for his claim that the "Keepings Clause" is a more accurate label for the Fifth Amendment because it sends a strong signal of a rights-oriented approach to the Fifth Amendment rather than doubling-down on what is already a strong government power-oriented approach to the Fifth Amendment. Kochan notes that recent Supreme Court decisions confirm that the Court is predisposed against finding constitutional takings, à la: Kelo v. City of New London, *Stop the Beach Renourishment Inc. v. Florida Dep't of Environmental Protection*, and Murr v. Wisconsin. Changing the label could change the perception of the Fifth Amendment.

Kochan acknowledges that his ideas are going to be met with formidable resistance as he makes the case for stripping the Takings Clause label and replacing it with a label that conveys the message that the constitutional protections guaranteed by Fifth Amendment "should be to maximize keepings and minimize takings." And certainly, while he would be pleased if we replaced what we have come to know as the Takings Clause with the "Keepings Clause" or something else, Kochan's goals are broader and more far-reaching. He wants to provoke the reader to think ?to think about the labels we use and their impacts. He wants us all to be more circumspect as we approach the Constitution and go about attaching labels to constitutional protections and entitlements. If labels send important signals that affect behavior, attitudes, and outcomes, then more attention needs to be given to our framing of the Constitution.

Kochan's work is important and interesting. For those of us who spend our professional lives thinking quite a bit about Fifth Amendment protections, his work refreshes some of the debates surrounding the critical importance of private property rights in our constitutional order and its fundamental role in our economy.

1. Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 **Iowa L. Rev.** 1847, 1891 (2017).

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