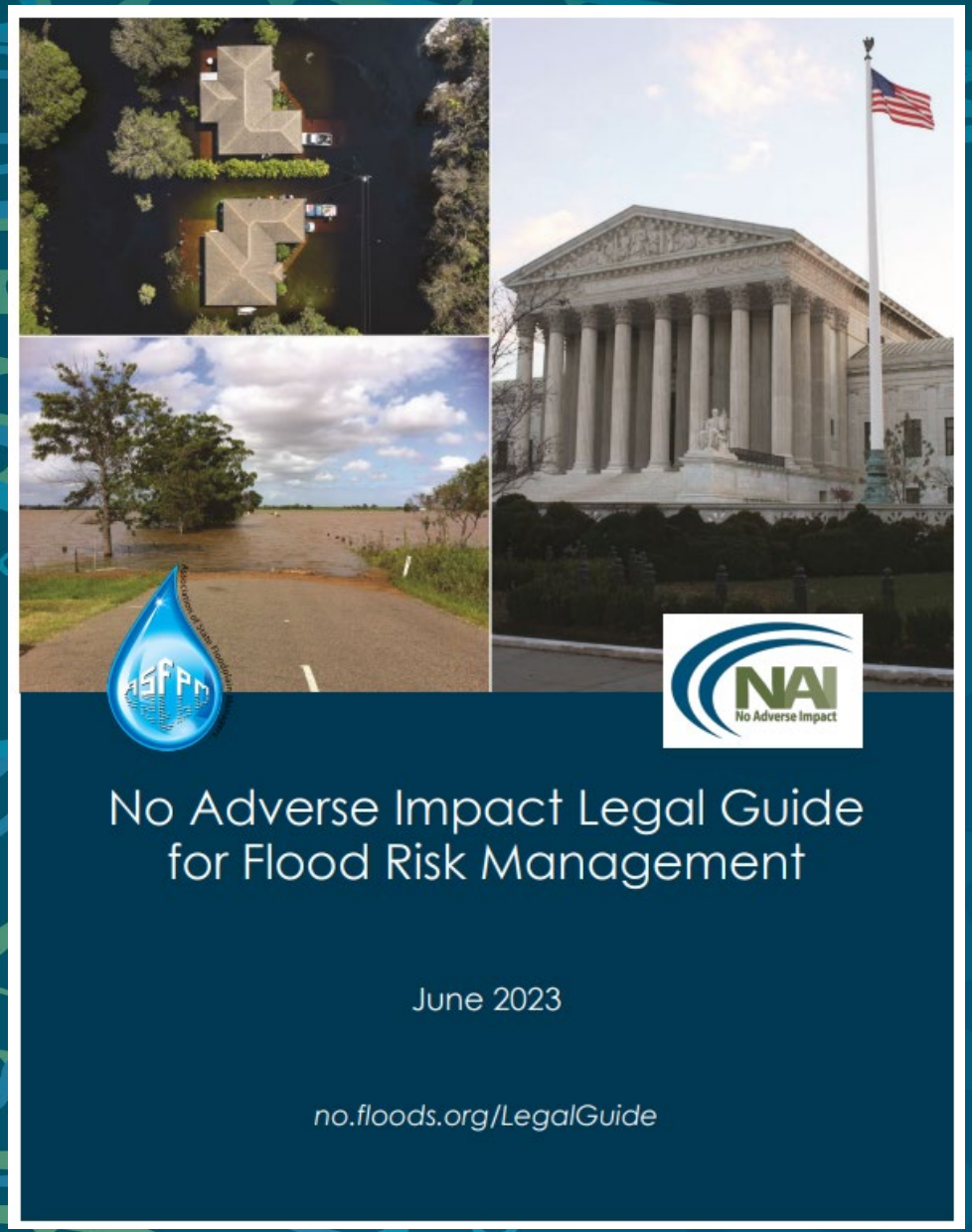



# Liability and Adverse Impacts - How Communities Can Protect Themselves by Adopting Higher Standards

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ASSOCIATION OF STATE FLOODPLAIN MANAGERS

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# A Caveat:

This presentation is neither intended to be, nor may it be taken as legal advice. For legal advice, consult with an attorney licensed to practice in your jurisdiction and demonstrating expertise in applicable subject matter.

Statements of fact and opinions expressed are those of the presenter and are not the opinions or positions of ASFPM, Florida Sea Grant, the University of Florida, or Purdue University.

# No Adverse Impact (NAI)

**No Adverse Impact (NAI) is an approach that ensures that the action of any community or property owner, public or private, does not adversely impact the rights of others.**

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# WHY NAI?

- Even if we perfectly implement current federal floodplain management standards, damages will increase.

- Current approaches deal primarily with how to build in the floodplain rather than how to minimize future damages.



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# WHY NAI?

## NFIP Limitations:

- Few Restricted Areas
  - Seaward of mean high tide
  - Floodways
- No requirement to protect natural functions of floodplains
- No limits on siting of critical facilities
- Fill in floodplain is allowed and facilitated





# No Adverse Impact (NAI)

- Long-running program of the Association of State Floodplain (ASFPM) Managers to increase flood protection through preservation of the natural and beneficial functions of floodplains
- ASFPM supported development of the NAI Legal Guide to support local efforts to implement NAI policies

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# Overview

- Preview of the BIG takeaways
- Higher standards (maps, elevation, fill limits, etc.)
- Tort law
- Constitutional law and private property protections

# The BIG Takeaways

- You CAN—and *SHOULD*—use higher standards than NFIP
- *Successful c*laims of a "taking" of private property rights due to well-drafted floodplain regulations are exceedingly rare
- Failure to adequately maintain drainage infrastructure will likely result in tort (civil) liability for damages
- You may suffer liability for allowing development that causes or contributes to flooding

# More BIG Takeaways

- Future potential for claims for allowing development that floods
- Support ordinances with broad comprehensive plan policies
- Exercise caution when accepting drainage infrastructure
- Need to examine the ways we think about “property rights”

# Higher Standards

- Local governments *can* and *SHOULD* adopt higher standards to protect themselves and the health, safety, & welfare of people.
- Columbia Venture, LLC v. Richland County, 776 S.E.2d 900 (S.C. 2015) ), reh'g denied (Oct. 9, 2015), cert. denied, 136 S. Ct. 1458 (2016).
  - Dramatically expanded floodway prevented planned development due to higher local standards than federal minimums
  - Intentional decision of Richland County to protect public health and safety

# Tort Law and Sovereign Immunity



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# A Civil Wrong for Which the Law Provides a Remedy

**Intentional Torts**

Not our focus

(exception: trespass)

**Negligence**

- **Duty of Care**
- **Breach**
- **Causation**
- **Damages**




**But, SOVEREIGN IMMUNITY**



# Common Law Liability—CAUSES OF ACTION

- Under common law, no landowner—public or private—has the right to use their land in a manner that substantially increases flood or erosion damages on adjacent lands; if so, liability.
- Liability lawsuits are commonly based upon one (1) or more of four (4) causes of action in Tort:
  - Negligence
  - Nuisance
  - Trespass
  - Law of Surface Water

# Common Law Causes of Action—NEGLIGENCE

What is the "standard of care" for reasonable conduct?

Evolving from a Floodplain Management perspective:

The standard of conduct is that of a reasonable person in the circumstances.

This is the primary legal basis for public liability for:

- Improperly designed flood control structures
- Improperly prepared or issued warnings
- Inadequately processed permits



# Ill. Farmers Insurance Co. v. MWRD of Greater Chicago

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# NUISANCE



No landowner, public or private:

has a right to use his/her land in a manner that substantially interferes, in a physical sense, with the use of adjacent lands.

"Reasonable conduct" is usually not a defense against a nuisance suit.

McIntyre v. Guthrie, 596 N.E.2d 979 (Ind. Ct. of App. 1992)

# Governmental and Sovereign Immunity

The government/sovereign (=crown) cannot be sued without its consent.

Courts will typically use one (1) of four (4) tests:

1. Governmental v. Proprietary Function Test
2. Ministerial/Operational v. Discretionary Functions/Acts Test
3. Planning v. Implementation
4. Non-justiciable v. Justiciable

# Common Law Causes of Action—TRESPASS




## Landowners can succeed in trespass suits for:

- certain types of public and private actions
- that result in physical invasion of private property
- Including increased flooding or drainage.

# Cause of Action: LAW OF SURFACE WATER



In most states landowners cannot substantially damage other landowners

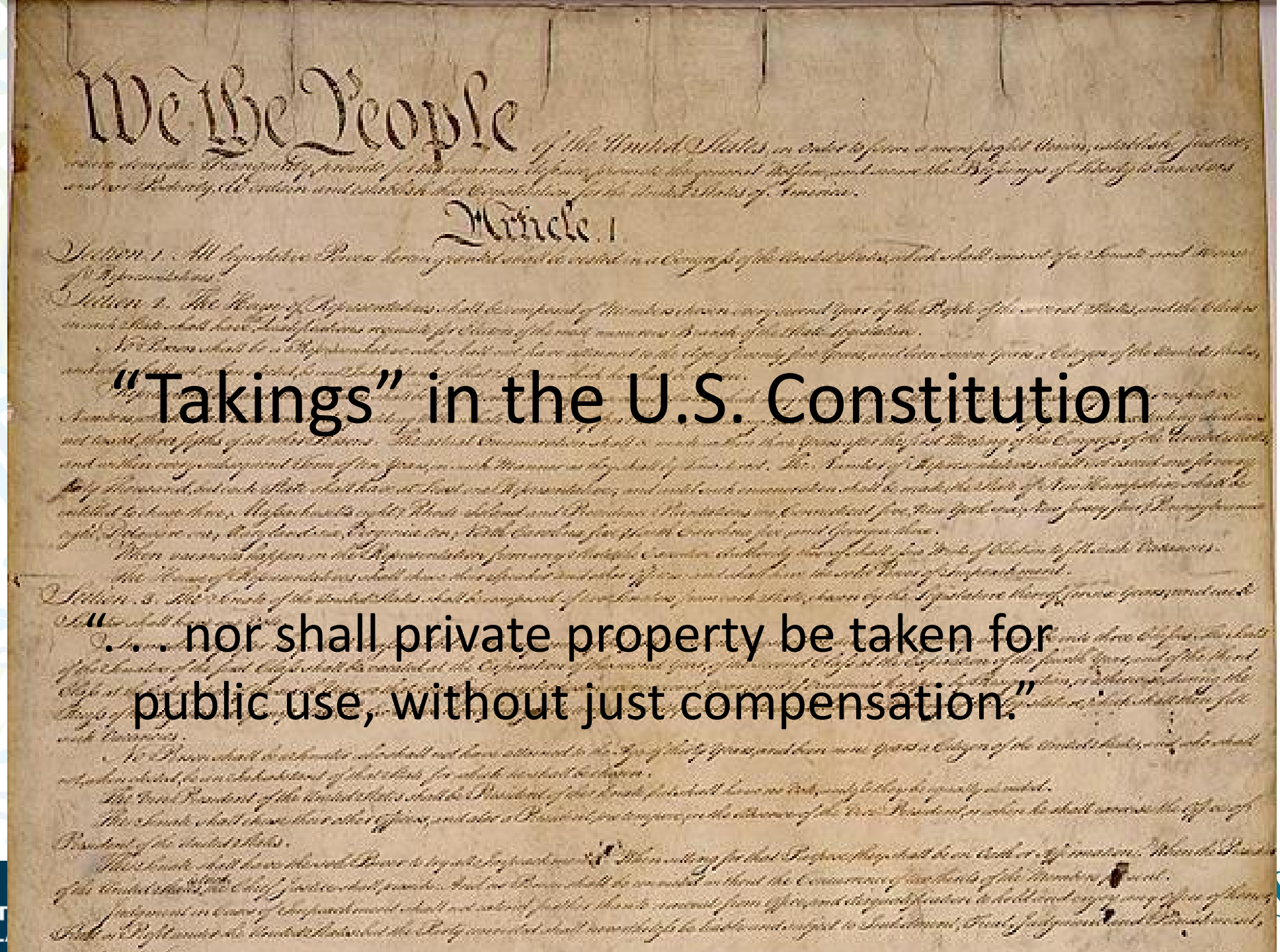
by blocking the flow of diffused surface waters, increasing that flow, or channeling that flow to a point other than the point of natural discharge.

Landowners are liable for damages caused by interference with the natural flow of surface water when their actions are ‘unreasonable’.

# Takings Law & Private Property Rights



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# "Takings" in the U.S. Constitution

"... nor shall private property be taken for public use, without just compensation."

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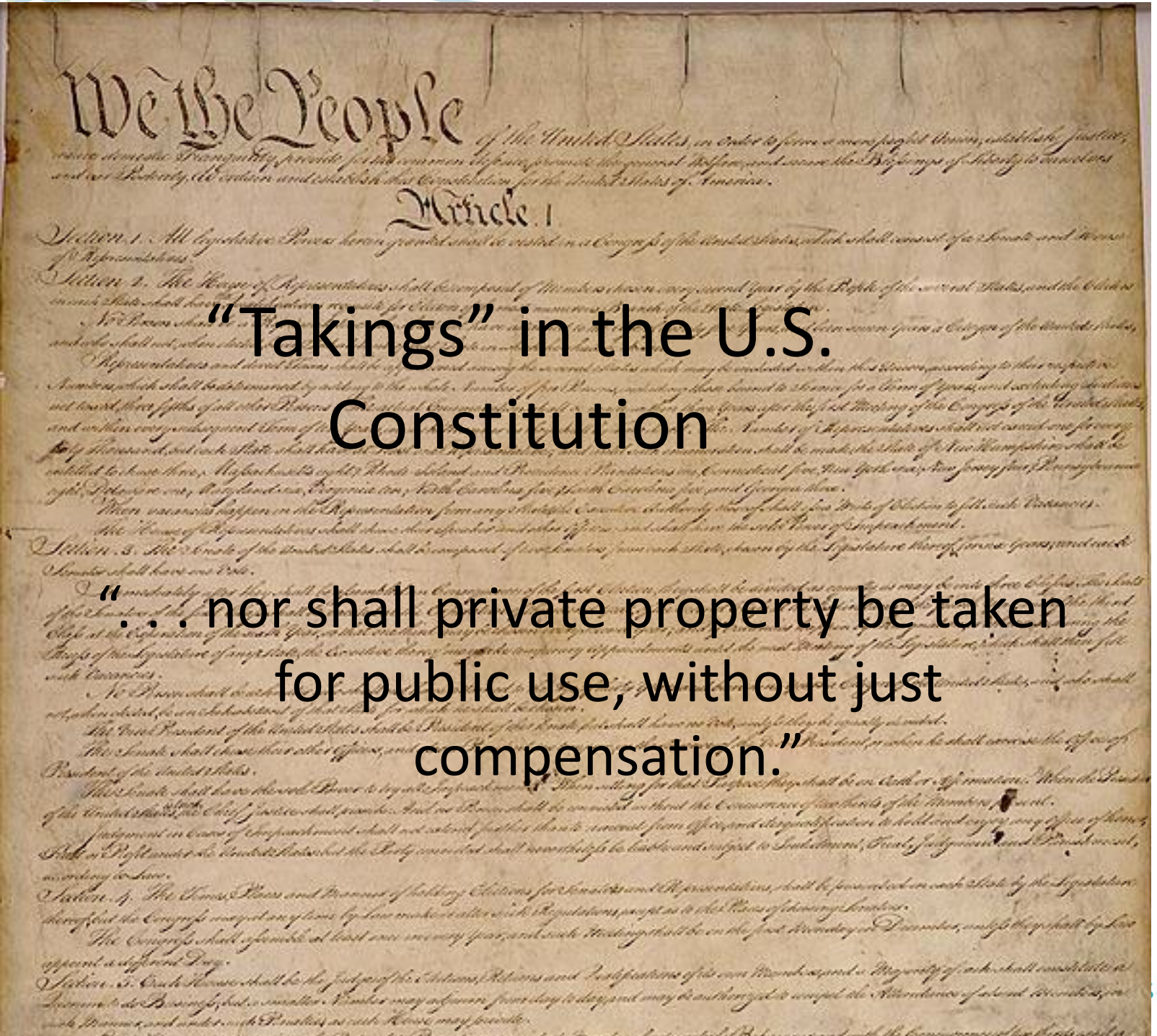
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# "Takings" in the U.S. Constitution

"... nor shall private property be taken for public use, without just compensation."

Invasion without intent to take title = inverse condemnation

Regulation going "too far" = regulatory taking

*All* regulatory takings = inverse condemnation, but not all inverse condemnation = regulatory taking

# Analysis of Most Regulatory Takings: The *Penn Central Case*

- 1978 case established key 3-part test:
  1. Economic impact of the regulation on the property owner
  2. The "reasonable investment-backed expectations" of the property owner
  3. The nature of the government action

- Each of these over the past decades has developed its own series of factors and aspects; extreme complexity in some cases

# The Good: Lots of Case Law Supporting NAI

- ***Beverly Bank v. Illinois Department of Transportation***
  - Illinois Supreme Court upheld state regulation prohibiting residential structures in regulatory floodway

State's argument focused on protecting health, safety, and welfare including

  - Risk to first responders
  - Risk to property owners who would be stranded
  - Increased expenditure of public funds

- Foreman v. State, 180 Ind. App. 94, 102 (Ind. App. 1979)
  - "It is clear that the purpose of the Act and those means used to reach the purpose are rationally related and therefore within the police power of the State to promote order, safety, health and welfare of society. An uncontrolled river may at flood stage become a destroyer of life and property. Controlling the use of rivers and adjoining property is of great importance to the welfare of society."

# The Good

- Columbia Venture, LLC v. Richland County, 776 S.E.2d 900 (S.C. 2015) ), reh'g denied (Oct. 9, 2015), cert. denied, 136 S. Ct. 1458 (2016).
  - Court emphasized the "**important public purposes of mitigating the social and economic costs of flooding that are served by the County's ordinances**."
  - Also highlighted the "**safety-enhancing character of the government action**" of regulating the floodway, even beyond minimum NFIP standards.

# The Bad

- After the U.S. Supreme Court's *Koontz* decision (2013)
  - Conflicting decisions about its application:
  - *F.P. Development v. Charter Township of Canton*: All generally applicable fee-based mitigation permit requirements fail the extension of *Koontz* to monetary exactions
  - Contra:
  - *Knight v. Metropolitan Government of Nashville & Davidson County* and *Ballinger v. City of Oakland* both found *Koontz* did not apply, but for different reasons

# The *Really* Ugly

- Series of appellate state cases in NY encouraging and rewarding land speculation in long-classified and undevelopable wetlands
- *Ideker Farms* series of cases
  - USACE “channelized” Missouri River, creating valuable farmland
  - Due to ESA, USACE ordered to mitigate harms
  - Increased water levels after ESA-mandated work led to lawsuits
  - RESULT: Taxpayers must pay AGAIN

# LEGAL RESEARCH FINDINGS:

Almost no cases* of gov't liability in a takings claim against a community's denial of use where the proposed use would have had substantial offsite impacts or threatened public safety.

**Courts have broadly supported restrictive regulations for high-risk flood areas based upon public safety, nuisance prevention, public trust and other concerns.**

*The dramatic departure from this general rule: *Lucas v. South Carolina Coastal Com'n*, 505 US 1003 (1992) (NOTE: *very* limited holding & applicability in floodplain context; only 1.6% of *Lucas* claims successful)

# AVOIDING A SUCCESSFUL TAKINGS CLAIM BASED ON REGULATION

- Clearly relate regulation to preventing harm. (***Lingle***)
- Avoid interfering with owner's right to exclude. (***Loretto***)
- Avoid denial of all economic uses. (***Lucas***)
- Consider Transferable Development Rights, similar residual rights and uses, alternative development options to retain economic land use value. (***Penn Central***)
- Close relationship between permit conditions and harm avoided. (***Nollan-Dolan***)
- Do not propose anything or negotiate with permit applicants. (***Koontz***)
- **DO NOT** rush through land use changes or zoning changes in response to public opposition to a particular project *after* its proposal or acquisition of land for a project acceptable under current zoning without overwhelming evidence of the need to protect public health and safety or prevent a clear nuisance

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# What *IS* "Property"?

- To paraphrase Wesley Hohfeld: "Property is a set of relationships among people *with regard to things*."
- "Property" includes rights; such rights inherently also include duties (that protect others' rights)
- "Property rights" = decisions on how to allocate rights and duties

# Change is the Constant

- *"Sic utere tuo ut alienum non laedas"* and industrialization: conflict driving changes in property law
  - Shift from very strict "*sic utere*" to a standard that found no liability for "disturbances" from standard practices in industries deemed important to the public interest.
- Early U.S. law: no "takings" for mere regulation of available use of land. Only for legal taking, and physical impacts to actual property or recognized property rights.
- Demonstrates "elastic nature of property rights" (Justice Stevens' dissent in *Lucas v. South Carolina Cstl. Com'n.)*

- “all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community”
  - Mugler v. Kansas, 123 U.S. 623 , 665 (1887)
- Supreme Court noted that in Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667, (1878), it had upheld an ordinance that shut down a fertilizer plant operating in a location that was previously expressly authorized because the use “had become a nuisance to the community in which it was conducted, producing discomfort, and often sickness, among large masses of people”
  - Mugler v. Kansas, 123 U.S. 623 , 666-67 (1887)

# More Change

- ***Pennsylvania Coal Company vs. Mahon*, 260 US 393 (1922).**

VERSUS

- **Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (S.Ct., 1987)**
- Almost identical facts: subsidence from coal mining; regulations to prevent
- SCOTUS found taking in 1922 but not in 1987

# Overarching Conclusions on Takings

- Conflicting case law on takings; it's all over the place
- Extreme complexity has developed around *many* factors
- Provides opportunity—and *need*—to very carefully frame
- Courts can use complexity and framing to get where they want
- Good faith, careful, thoughtful regulation done through transparent, appropriate processes are quite safe, even when the impacts to property are severe
- **Bad facts make bad law!!!!!! <u>Don't give a court bad facts.</u>**



# “Floods are an act of God, but flood losses are largely an act of [people]”

**Gilbert F. White**


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Photo by Thomas Ruppert, Florida Sea Grant, 2018

- **More legal content is already on the way**
  What else should be included – coastal law, state law?
- **Content for floodplain managers…**
  Is on the way, but currently written for attorneys
- **How can the legal guide be improved?**
  Let us know – see contacts below

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