The Naked Fish

We Dare To Print The Naked Truth

A Publicaton of Citizens' Alliance for Property Rights and affiliates — January-February 2006

Is Local Referendum Illegal?

The nine justices of the Washington Supreme Court pictured here heard oral arguments in the case of *1000 Friends of Washington, King County, Center for Environmental Law and Policy v. Rodney McFarland* on January 26, 2006, and they must answer the question posed in the headline.

Left to right Justices
Fairhurst, Chambers, Owens, Alexander, Bridge, Madsen, C. Johnson, Sanders, J. Johnson

Mr. McFarland, who is president of Citizens' Alliance for Property Rights (CAPR), was sued by King County and the two environmental groups when he and members of CAPR gathered the signatures necessary to put the King County Critical Areas Ordinance, Clearing and Grading Ordinance, and Stormwater Ordinance to a vote in unincorporated King County. Mr. McFarland lost at summary judgement in King County Superior Court and, with the backing of CAPR Legal Fund, appealed the case to the Supreme Court. In a few months we should know if the referenda will go on the ballot.

The King County Council passed three ordinances dealing with land use in October of 2004. Executive Ron Sims and his staff argued that the ordinances were mandated by Revised Code of Washington 36.70A which is usually called the Growth Management Act (GMA). The GMA required King County to "review and revise, if needed" its critical areas protections by December 1, 2004. There is no way to know if King County would have been out of compliance with GMA without the several hundred pages of changes to the existing codes contained in the new ordinances, but it is unlikely. That question is really irrelevant because a no vote on the ordinances by the voters would be the functional equivalent of a veto by Executive Sims and even his own lawyer agreed that he could exercise his veto authority against these ordinances. Many cases such as this boil down to very narrow distinctions. This case hinges on whether or not the legislature intended to prevent local referendum on critical areas ordinances passed by local legislative bodies.

King County argued that local referendum, and initiative, are precluded on any subjects covered by the GMA. A quick review of the goals of the GMA [http://apps.leg.wa.gov/RCW/default.aspx?cite=36.70A.020] shows that GMA covers most of the aspects of civil society. When the Washington Constitution was approved the second legislative power retained by the people was the right of referendum. If King County prevails, we will have been stripped of that power on all but criminal laws.

CAPR has been the lead organization fighting King County's oppressive land use regulations since its creation in 2003. Getting this case heard by the Supreme Court is a significant milestone in that fight and your continued support of CAPR is needed.

Property Fairness Initiative I-933

A coalition of Washington groups, including CAPR and led by the Farm Bureau, has introduced an initiative (I-933) to re-establish fairness in government regulation of property use. Several decades of special interest pressure for central planning has removed any semblance of the fairness or justice once required of government regulation of private property.

As is true of so many issues in our state, the actions of the legislature don't map to the will of the people. Early polling shows that fully 79% of voters will support this initiative. Unlike their representatives, they understand the injustices being endured by most property owners. It has been left to the people of Washington to move us back to fairness for all via statewide initiative.

The Property Fairness Initiative will force government to consider the likely costs, benefits and the limitations to use of property affected by the proposed regulations. It recognizes that it is appropriate that uses that cause actual harm to others be regulated under the police powers of government with no compensation to the owner of the property. At the same time, it forces government to pay for elimination of traditional uses of property merely for what they may see as the betterment of society.

Don't be confused by the early arguments of opponents to fairness such as those advanced by Futurewise. They attacked this initiative months before anyone, including those who wrote it, knew what it included. By doing so they have clearly demonstrated their disregard for fairness and informed debate of this issue.

The full text of the initiative is at http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf. Read it and decide for yourself if it is worth putting to a vote of the people. If you believe it is worthwhile, ask your family, friends and neighbors to sign the petitions. CAPR volunteers will be collecting signatures at many convenient locations.

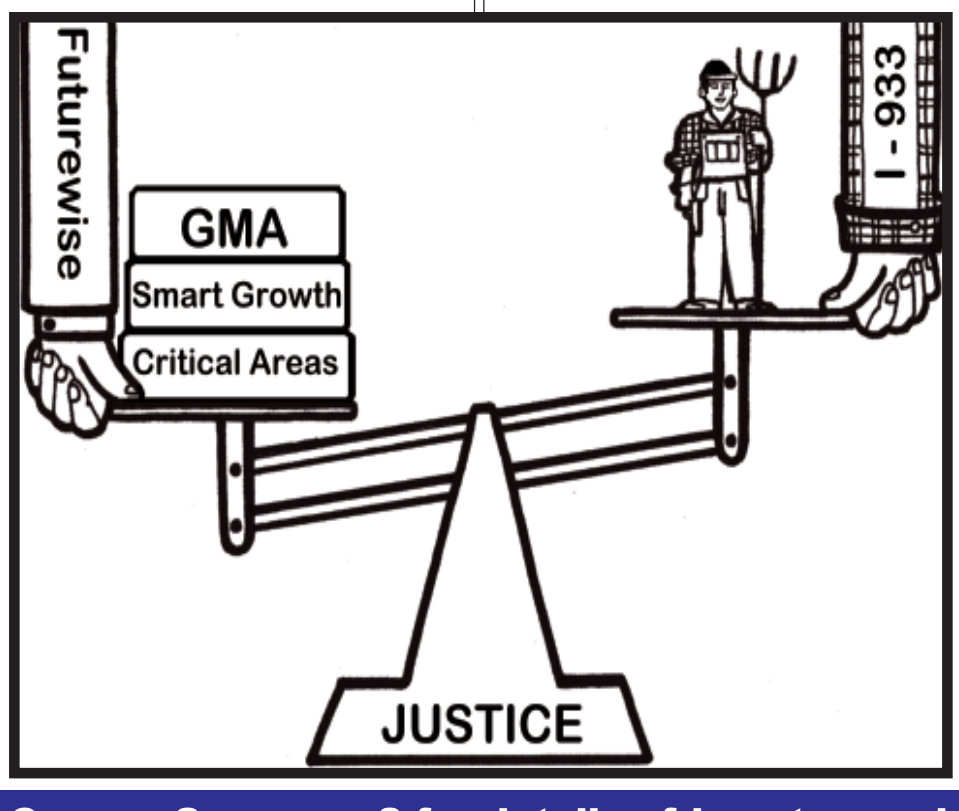
The more corrupt the government, the more numerous the laws
— Tacitus 56-117

County Choice Initiative I-932

A recently formed group, Yes for County Choice, has filed a County Choice Initiative (I-932) and will be seeking signatures to put the initiative on this fall's ballot. Their initiative would finally set up the formal rules for creating new counties. They are attempting to do what the Washington Constitution mandated but that 115 years of legislatures have been too busy to do.

This initiative would be the first step to enable areas of the state that need to reorganize to do so. There are several small counties in the state that are unable to pay their bills. They need to combine with neighbors in order to get the economy of scale needed to provide all the services mandated by the state. At the same time there are counties that are so large that they could reasonably be divided into several large counties that would more effectively provide the services required of the residents of those areas.

The residents of proposed Cedar County did everything that the Washington constitution calls for to form a new county. They were denied that right by the Supreme Court because the legislature had never put in place the details for creating new counties. Bills to do that have died in the legislature ever since that ruling so Yes for County Choice is spearheading the drive for the people to do it themselves.



In recent years the representatives to the Washington State legislature have applied their considerable intelligence to avoiding veto by the voters of the state of Washington. Controversial legislation that might trigger referendum is written so that counties and cities are responsible for the onerous details but their citizens have no referendum rights concerning that local legislation. See the Growth Management Act for a classic example.

Representatives to the state legislature are elected from districts that are roughly proportional in population. The counties and cities that are being forced to do the heavy lifting for our elected representatives have no such requirement. In the absence of "general law applicable to the whole state" required by Article XI, Section 3 of our constitution, there is no way for the people to apportion themselves into counties of a size

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Should Referendum Ever Be Allowed?

By Rodney McFarland

On January 26, 2006, the nine justices of the Washington Supreme Court heard oral arguments in the case of *King County, et al. v. Rodney McFarland*. I had sponsored three referenda to put changes to King County's Critical Areas Ordinance, Clearing and Grading Ordinance, and Stormwater Ordinance to a vote of the people affected by those changes. I was supported in the referenda effort by Citizens' Alliance for Property Rights, an organization of which I am currently president. King County, at the direction of Executive Sims, and two environmental organizations sued in King County Superior court and were able to stop the referendum process which is granted by the King County Charter. I appealed and the Supreme Court agreed to hear the case.

The briefs filed in the case are readily available on the CAPR website for those who want to explore the legal minutia that enter into such decisions by our highest jurists. I would like to address the more macro issues that overlay the subject that you won't see written about by any mainstream reporters.

The government of Washington was formed by the people of Washington creating the state constitution, which states in Article I, Section I:

> *"All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."*

The people created a legislative branch in Article II, Section 1:

> *"The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature. [emphasis mine] (a) Initiative: The first power reserved by the people is the initiative. ...[details of how initiatives are handled are omitted here] ... (b) Referendum. The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted: Provided, That the legislature may not order a referendum on any initiative measure enacted by the legislature under the foregoing sub Section (a)."*

The people specifically retained the power to overrule their representatives. The people in 1889 recognized that their representatives might well pass acts, bills, or laws that the people didn't agree with and made provisions to correct such acts, bills, or laws.

Many elected representatives chafe mightily at the audacity of those people who formed Washington to have retained initiative and referendum. SJR 8201 was proposed by Senator Jacobsen this year to take the vote away from the people.

When the Growth Management Act was passed in 1990, an end run may have successfully been made around initiative and referendum. The state legislature passed a bill that was full of worthy goals and directives to local governments. It was full of aroma and color but no meat or potatoes. The details of the impacts to real people were left to local government and touted as local control, unlike Oregon's central planning. The people didn't run a referendum on the Growth Management Act because its goals sounded worthy to many and Initiative 547 (very similar to the GMA but more restrictive and top down) was already on the ballot that fall. The people voted against 547 in droves but most of its provisions were added to the GMA by the legislature in 1991 despite the clear "no" vote by the people.

The dirty details of the central planners' lockup of land uses were left to local governments to devise. As you read the briefs in *King County v. McFarland* you will learn how the elitist planners and their attorneys view the voters of unincorporated King County. We are told that the ordinances passed by seven urban members of the King County Council are the only possible versions that could satisfy the mandates of the GMA and that those seven councilpersons are the only ones smart enough to balance all the requirements. We are told that the voters are simply incapable of making a correct decision because of the complex nature of the question. At the oral arguments we learned that Executive Ron Sims is the only human responsible enough to veto these ordinances if they are not the correct solution to the legislature's mandate.

All the attorneys argued that the state legislature can prevent referendum by just saying so. My own attorneys argued that. I understand legally why they had to do that and think they argued successfully that the legislature never intended to limit referendum under the relevant section of GMA. It is appalling that the will of those who consented to be governed in 1889 has been bastardized to the point of spending forty minutes in open court discussing whether ignoring their plain wording should be allowed.

It is appropriate that arguments for this case were moved out of the Hall of Justice in Olympia to the University of Washington Law School. No matter how this case is decided, it will be the law, not justice, which is served. Justice would **never** remove our right to consent to be governed.

Oregon Measure 37 Upheld

The Oregon Supreme Court has upheld Measure 37, a voter-approved property rights initiative, that requires governments to pay landowners for property value losses caused by regulations, or to waive the regulation and let the owner develop the property.

The Supreme Court unanimously reversed a decision issued in October by Marion County Circuit Judge Mary James, who said Measure 37 violates the state and federal constitutions. Judge James ruled that Measure 37 strips the Legislature of its power, gives long-time landowners an unfair advantage and fails to give their neighbors a voice in the process. The Supreme Court justices said, "we find none of these arguments persuasive."

The Oregon Supreme Court held that the measure does not (1) impede legislative plenary power; (2) violate the equal privileges and immunities guarantee of Article I, section 20, of the Oregon Constitution; (3) violate the suspension of laws provision contained in Article I, section 22, of the Oregon Constitution; (4) violate state constitutional separation of powers constraints; (5) impermissibly waive sovereign immunity; or (6) violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The high court said, "The people, in exercising their initiative power, were free to enact Measure 37 in furtherance of policy objectives such as compensating landowners for a diminution in property value resulting from certain land use regulations or otherwise relieving landowners from some of the financial burden of certain land use regulations. Neither policy is irrational; no one seriously can assert that Measure 37 is not reasonably related to those policy objectives."

Oregonians in Action, the group that sponsored Measure 37 hailed today's ruling as a victory for property owners. "We hope the lawsuits end, the delaying tactics stop and that the claims can proceed. These people have waited for years to get back the use of their property," said Dave Hunnicutt, executive director of Oregonians in Action. Although the law has been in legal limbo, more than 2,000 claims have been filed across Oregon.

Counties have taken different approaches since James ruled against the measure on Oct. 14. Some counties are continuing to accept and process claims for compensation by landowners, while others put them on hold pending a final resolution to the legal case. Without money to compensate claimants, many counties and state agencies instead waived regulations.

In 1973 Oregon adopted land-use policies that are often regarded as a model for protecting America's farmland and other open space. The combination of local, county and state regulations has confined most new housing to already built-up areas. Those laws sparked a property rights revolt that led to voter passage of Measure 37 after proponents argued that it was only fair to compensate property owners for losses caused by land use regulations.

Sara C. Galvan in her article "Gone Too Far: Oregon's Measure 37 and the Perils of Over-Regulating Land Use," examines why Oregon voters took the dramatic step of passing Measure 37, despite longstanding support for the state's strong approach to growth control. Although economic and demographic shifts may have been partly responsible, she argues that the answer is more straightforward and far less inevitable: the legislature and the courts stopped listening to the people of Oregon.

> "Oregon's two-actor system did little to protect landowners from regulatory takings. The legislature set up one of the most far-reaching land use systems of any state and added more regulations each legislative session, yet failed to give landowners the opportunity to meaningfully challenge the regime in court. The courts, working within the legislature's system, rarely limited the legislature's power, and their inconsistent regulatory takings analysis frustrated landowners. Moreover, prior to the introduction of Measure 37, the courts struck down another ballot measure involving regulatory takings. The actions of both the legislature and the courts furthered the perception that they thwarted the public will."

Legislators in Washington state have followed Oregon's lead and are now facing I-933.

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The Naked Fish is mailed to subscribers and members of groups affiliated with Citizens' Alliance for Property Rights (CAPR). We also distribute a large number of complimentary copies. If you are a member of an affiliated group or subscriber, don't worry, you will continue receiving *The Naked Fish* until your subscription runs out or you fail to renew your membership. If you have received a complimentary copy, the way to get more issues is to either join a CAPR affiliated group or subscribe ($10 per year). You may subscribe by calling 206.335.2312 or sending a check and your mailing info to:

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We hope you enjoyed this issue and will join us in our attempt to bring some sense and sanity to environmental issues in Washington.

Back issues of *The Naked Fish* are available at:

www.maycreek.com

Thinking cannot be carried on without the materials of thought; and the materials of thought are facts, or else assertions that are presented as facts. A mass of details stored up in the mind does not in itself make a thinker; but on the other hand thinking is absolutely impossible without that mass of details. And it is just this latter impossible operation of thinking without the materials of thought which is being advocated by modern pedagogy and is being put into practice only too well by modern students. In the presence of this tendency, we believe that facts and hard work ought again to be allowed to come to their rights: it is impossible to think with an empty mind.

— J. Gresham Machen

The Naked Fish is published by Citizens' Alliance for Property Rights, a Washington state organization. Articles in *The Naked Fish* cover subjects of concern both to local and national readers. We try to provide environmental information not commonly found in the major media. Articles with by-lines reflect the research, views and opinions of the author which may not reflect positions on the issues adopted by CAPR or its affiliates.

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King County Mounts Quick Response to May Valley Flooding

The folks in May Valley were really appreciative of the prompt county response to the record-setting flooding they had on January 11.

DOT got the road closed signs up on 148th Avenue in record time in response to the water over the road there. It is obvious that DOT should add another foot or so of asphalt to that low spot since Washington Department of Fish and Wildlife won't let them put in the culvert residents of the valley have asked for. They have raised that spot about three feet over the years; another foot of elevation might keep the water from going over the road. The people that commute to Seattle from Stone Gate are really inconvenienced when that road is closed and there are still a couple acres of the valley available to store water. The May Valley property owners will have to figure out where to put all the livestock, though, when the water comes up another foot.

DOT also had a crew working most of January 11, clearing culverts on May Valley Road so that the water coming off the hills could get down into the valley without flooding May Valley Road. The many people who commute along May Valley Road from the Renton plateau are especially appreciative, as are all the Canada geese.

DNRP was able to mobilize and get a crew out January 10, to plant a hundred or so new cottonwoods at the May Valley Flood Control Project near 164th Avenue. Before King County purchased that property, May Valley residents always had to buy and plant their own trees to provide the logjams and beaver dams to increase the flood levels. King County has planted hundreds of trees on that two-acre parcel, but, unfortunately, that property still isn't backing up much water. The illegal dredging that Chuck Pillon did at that site has prevented the water from flooding over 164th Avenue as it did in the past. Perhaps King County could force Mr. Pillon to put in another 200 or so trees this spring. The residents of May Valley have every confidence that with just a few more trees they can get the water back over 164th Avenue. Cottonwoods just shed limbs into the creek; willow would be better since they send roots into the channel which trap the sediment better. The beaver do prefer the cottonwoods, though.

May Valley has been a real struggle for King County ever since Executive Revelle started Surface Water Management to fix the flooding there in 1983. DNRP and DDES have been plugging away diligently. The SAO was a good first step. The CAO has gotten us yet another year of record flooding. Perhaps they could dust off the original draft of the CAO and get it passed. That should just about finish the job. When there is no one left in May Valley, flooding will cease to be an issue.

Democracy's Road to Tyranny

By Erik von Kuehnelt-Leddihn

[*first published in* The Freeman: Ideas on Liberty - *May 1988*]

Plato, in his *Republic*, tells us that tyranny arises, as a rule, from democracy. Historically, this process has occurred in three quite different ways. Before describing these several patterns of social change, let us state precisely what we mean by "democracy."

Pondering the question of "Who should rule," the democrat gives his answer: "the majority of politically equal citizens, either in person or through their representatives." In other words, equality and majority rule are the two fundamental principles of democracy. A democracy may be either liberal or illiberal.

Genuine liberalism is the answer to an entirely different question: How should government be exercised? The answer it provides is: regardless of who rules, government must be carried out in such a way that each person enjoys the greatest amount of freedom, compatible with the common good. This means that an absolute monarchy could be liberal (but hardly democratic) and a democracy could be totalitarian, illiberal, and tyrannical, with a majority brutally persecuting minorities. (We are, of course, using the term "liberal" in the globally accepted version and not in the American sense, which since the New Deal has been totally perverted.)

How could a democracy, even an initially liberal one, develop into a totalitarian tyranny? As we said in the beginning, there are three avenues of approach, and in each case the evolution would be of an "organic" nature. The tyranny would evolve from the very character of even a liberal democracy because there is, from the beginning on, a worm in the apple: freedom and equality do not mix, they practically exclude each other. Equality doesn't exist in nature and therefore can be established only by force. He who wants geographic equality has to dynamite mountains and fill up the valleys. To get a hedge of even height one has to apply pruning shears. To achieve equal scholastic levels in a school one would have to pressure certain students into extra hard work while holding back others.

The first road to totalitarian tyranny (though by no means the most frequently used) is the overthrow by force of a liberal democracy through a revolutionary movement, as a rule a party advocating tyranny but unable to win the necessary support in free elections. The stage for such violence is set if the parties represent philosophies so different as to make dialogue and compromise impossible. Clausewitz said that wars are the continuation of diplomacy by other means, and in ideologically divided nations revolutions are truly the continuation of parliamentarism with other means. The result is the absolute rule of one "party" which, having finally achieved complete control, might still call itself a party, referring to its parliamentary past, when it still was merely a part of the diet.

It does not require a majority to prevail, but rather an irate, tireless minority keen to set brush fires in people's minds.
—Samuel Adams

A typical case is the Red October of 1917. The Bolshevik wing of the Russian Social Democratic Workers' Party could not win the elections in Alexander Kerenski's democratic Russian Republic and therefore staged a coup with the help of a defeated, marauding army and navy, and in this way established a firm socialistic tyranny. Many liberal democracies are enfeebled by party strife to such an extent that revolutionary organizations can easily seize power, and sometimes the citizenry, for a time, seems happy that chaos has come to an end. In Italy the Marcia su Roma of the Fascists made them the rulers of the country. Mussolini, a socialist of old, had learned the technique of political conquest from his International Socialist friends and, not surprisingly, Fascist Italy was the second European power, after Laborite Britain (and long before the United States) to recognize the Soviet regime.

The second avenue toward totalitarian tyranny is "free elections." It can happen that a totalitarian party with great popularity gains such momentum and so many votes that it becomes legally and democratically a country's master. This happened in Germany in 1932 when no less than 60 per cent of the electorate voted for totalitarian despotism: for every two National Socialists there was one international socialist in the form of a Marxist Communist, and another one in the form of a somewhat less Marxist Social Democrat. Under these circumstances liberal democracy was doomed, since it had no longer a majority in the Reichstag. This development could have been halted only by a military dictatorship (as envisaged by General von Schleicher who was later murdered by the Nazis) or by a restoration of the Hohenzollerns (as planned by Bruning). Yet, within the democratic and constitutional framework, the National Socialists were bound to win.

How did the "Nazis" manage to win in this way? The answer is simple: being a mass movement striving for a parliamentary majority, they singled out unpopular minorities (the smaller, the better) and then rallied popular support against them. The National Socialist Workers' Party was "a popular movement based on exact science" (Hitler's words), militating against the hated few: the Jews, the nobility, the rich, the clergy, the modern artists, the "intellectuals," categories frequently overlapping, and finally against the mentally handicapped and the Gypsies. National Socialism was the "legal revolt" of the common man against the uncommon, of the "people" (Volk) against privileged and therefore envied and hated groups. Remember that Lenin, Mussolini, and Hitler called their rule "democratic"—demokratiya po novomu, democrazia organizzata, deutsche Demokratie—but they never dared to call it "liberal" in the worldwide (non-American) sense.

Carl Schmitt, in his 93rd year, analyzed this evolution in a famous essay entitled "The Legal World Revolution": this sort of revolution-the German Revolution of 1933-simply comes about through the ballot and can happen in any country where a party pledged to totalitarian rule gains a relative or absolute majority and thus takes over the government "democratically." Plato gave an account of such a procedure which fits, with the fidelity of a Xerox copy, the constitutional transition in Germany: there is the "popular leader" who takes to heart the interest of the "simple people," of the "ordinary, decent fellow" against the crafty rich. He is widely acclaimed by the many and builds up a body guard only to protect himself and, of course, the interests of the "people."

In the Name of the People

Think of Hitler's SA and SS and also of the tendency to apply wherever possible the prefix Volk (people): Volkswagen (people's car), Volksempfänger (people's radio set), des ge-sunde Volksempfinden (the healthy sentiments of the people), Volksgericht (people's law court). Needless to say that this verbal policy continues in the "German Democratic Republic" where we see a "People's Police," a "People's Army," while

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Environmental Law 101

By Richard A. Epstein

[*This essay was originally presented as a speech at the Hoover Institution on October 27, 1998.*]

The best way to protect the environment? Consult common sense—and common law. To think clearly about property rights and the environment, we must expose the false conflict that is said to separate them. Our initial query should ask how the cause of environmental protection would fare if all we had at our disposal were the traditional principles of property law. How well would the faithful application of these principles protect the environment?

THE LAW OF NUISANCE

My first point is that every owner of property must worry about the actions of his neighbors. To the extent that one person, as an owner of property rights, insists that he have unlimited rights to use his property just as he pleases, then, under the principle of parity, he must concede to his neighbors the same unlimited use of their property. Stated bluntly, nothing in the theory of property rights says that my property is sacred while everybody else's property is profane. That single constraint of parity among owners should lead every owner to think hard. The more usage rights he claims for himself, the more usage rights he must allow to others. The more he limits the uses of others, the more he must limit his own uses. This system of parallel restrictions on the use of property will rarely lead to the toleration of any and all uses of property. For example, if you woke up in the morning and took a deep breath of a mixture of carbon monoxide and sulfurous acid, you would be prompted to say, "You know, I'm willing to stop that kind of activity even if it follows that I can no longer inflict the same misery on my neighbors."

This recognition of the noxious uses of private property is the source of the common law of nuisance. That law dates from medieval times, certainly by 1215, at the time of the Magna Carta. It is no new socialist or environmentalist creation for the twentieth century. When the common law of nuisance restricts the noxious use of property, it benefits not only immediate neighbors but the larger community. If I enjoin pollution created by my neighbor, others will share in the reduction of pollution. Simply by using private actions, we have built a system for environmental protection that goes a long way toward stopping the worst forms of pollution.

ENTER THE GOVERNMENT

Yet before we leap for joy, we must recognize that private actions are not universally effective in curbing nuisances. Sometimes pollution is widely diffused—waste can come from many tailpipes, not just one—so that no one can tell exactly whose pollution is causing what damage to which individuals. Under those circumstances, private enforcement of nuisance law can no longer control pollution. Now the task of the lawyer and system builder is to find a coherent way for government action to pick up the slack in environmental protection. The governing principle is simply this: Wherever it's hard to organize private actions against admitted wrongdoers, then it is permissible to resort to direct government regulation, either to stop the pollution before it begins or to fine the perpetrators when and where it occurs. We do not change the substantive standards of right and wrong, but we do use state regulation to fill in the gaps in private enforcement. So, with tailpipe emissions, a believer in property rights should say, "Look, if it is practical to use private actions against all drivers on the Santa Monica freeway, by all means do so. But since we all know that's an administrative impossibility, state regulation of tailpipe emissions is clearly a noncontroversial use of government power." Public enforcement of antipollution norms should take into account the severity of the harm just as private rights of action should.

WIDE-OPEN SPACES

These simple arguments use a set of common-law property rights to allow for both private and public enforcement of the nuisance law. But often when individuals worry about their local environments, they're not particularly happy to treat the nuisance law, however enforced, as the upper bound of their personal protection. They want (especially as their wealth increases) more by way of aesthetics and open spaces. Fortunately, our legal system has a way to accommodate these newer demands. One of our most important land-use control devices is the system of covenants by which all the holders of neighboring lands agree among themselves and for their successors in title (that is, for anybody who takes their land by sale, gift, or will) that they will abstain from certain kinds of behavior in exchange for imposing parallel restrictions on other owners. So if members of a homeowners' association want to keep, for example, open spaces for the benefit of all subdivision residents, they can use contracts and deeds to make sure that each owner dedicates a portion of his land for open space. Or they could acquire in their common name some open spaces. Or they could form a governance structure that allows for future provision for open spaces. These possibilities for the development of, as it were, a private sort of environmental protection are not simply hypothetical devices. They are routinely used with great success throughout the United States. The richer our population, the greater its willingness to spend resources on environmental protection. Most people want to equalize the benefits that they provide for themselves privately in their houses and publicly in their open and our shared spaces. For many years our legal system has provided them with devices to achieve these results in a perfectly coherent fashion.

ENTER THE GOVERNMENT (AGAIN)

In addition, it is possible to identify at least one other device to advance the cause of environmental protection: government purchase or, if necessary, condemnation. Let us suppose that some valuable natural landmark is of no particular value to its owner but of great value to the public at large. However unfashionable it may sound to some people, that natural landmark could be purchased in one of two ways. A private nature conservancy group could decide to buy this resource in its natural condition to prevent any rival from doing so. That approach falls squarely within the classical property rights system, for the nature conservancy is just as legitimate a bidder as an industrial plant. In contrast, if no private bidder is available, a strong popular sentiment in favor of acquisition could lead the state to buy or condemn that property for public use, which includes its preservation for environmental ends. Specifically, the state can purchase or condemn at a fair valuation any valuable form of habitat for the benefit of some endangered species. There is both a private consensual means and a public coercive means to preserve the environment. Compensation—but only when it is fully calculated—is the lubricant that prevents government abuse from taking place.

In sum, the system of public and private enforcement of nuisances and public and private purchases of environmentally sensitive sites is the way that sound environmental policy should proceed. Here the state can stop wrongful conduct without compensation but cannot limit the ordinary use of property unless it is prepared to provide compensation. Requiring compensation in the second class of cases has the added benefit of introducing some democratic responsibility into the process of state regulation; it helps make the costs visible to the public at large. That in turn will require environmentalists to make the benefits visible as well. Once both costs and benefits are on the table, it becomes possible to enter into an intelligent public debate as to whether the anticipated benefits justify their associated costs.

THE MODERN SYSTEM: FROM SENSE TO NONSENSE

Ironically, the environmental work done today in the United States often takes a very different form. The tension between property rights and the environment invites a titanic struggle because the traditional rules of nuisance, restrictive covenants, and purchase and condemnation are regarded as only minimal first steps for dealing with the problems we face. But what does this alternative legal system look like? What drives it?

To place these issues in perspective, let me mention a couple credos of the modern environmental movement. One holds that any change in the external world involves the commission of some form of environmental harm. The movement thus builds into the calculus an extraordinary preference in favor of the status quo. Sometimes this preference goes beyond the odd to the grotesque. Much environmental litigation has taken place over the question of whether a landowner is entitled to clean up a mess on his property that was left by some industrial plant decades ago in order to facilitate useful development. The system simply doesn't trust private people to behave in a responsible fashion even when they will both incur the costs of the cleanup and derive many of the benefits that it produces.

From this initial point comes the further claim that it is always possible to harm the environment even if one does no harm to one's neighbors. We now have a set of rules that allows us all to become busybodies in the lives of one another whenever there is any alteration of land, be it building or parking pad or removing old vegetation and putting new plants in its place. The threshold for government intervention is sharply lowered. Any alteration in land will do it, even if it is "harm" to your own property. The upshot is that each owner starts to have powerful veto rights over all her neighbors—rights that are sometimes exercised for bad reasons as well as good ones. The law thus encourages perpetual conflict between neighbors over every use or alteration. Ownership no longer provides a zone of freedom. Instead it simply marks out the person who must first obtain a government permit to initiate change. And if one permit can be required, why not a thousand?

THE POWER SHIFT

The upshot is a massive shift of the political center of gravity from the individual to the state. The traditional view of property allowed an owner to do something on his land until a neighbor could show tangible harm from his activities. That rule has been displaced by one that says no action can take place until approvals have been obtained and that these will not be allowed until you have ruled out all possibility of environmental harm, not only to your neighbors' but to your own land. The government's ability to issue permits, and to issue them on onerous conditions, institutes an odd form of tyranny that will both hamper the cause of environmental protection and give rise to vast antagonistic political struggles that produce much heat but little light.

Ultimately, then, the modern system fails because it does not trust that private incentives will work. In the end, it cannot believe that property owners will act in a rational fashion to protect their own property.

MADNESS AS USUAL: THE DEL MONTE DUNES CASE

One recent illustration of the problem is the California case that is right now before the United States Supreme Court: Del Monte Dunes Corporation v. City of Monterey, which examines the conditions that the city is entitled to impose on building permits. The case represents a pattern of conduct that is far too usual. A valuable plot of land located along the coast had previously been used as a petroleum tank farm; signs of industrial use were still scattered about the premises. A developer announced that he would like to build a 344-unit development on this littered dump site. But for this asocial act he needs to get a permit. Now, a permit would make sense (as would a private action for injunction) if the new construction threatened to create a landslide on neighboring property. But here the only worries the city could flag didn't come close to that kind of adverse negative impact. What the city could show was worry about a potential habitat for the Smith's blue butterfly, which is found elsewhere in California but which has never been observed on the Del Monte Dunes site. The site merely contained some growth of buckwheat plant that could host the Smith's blue butterfly if it were present. So the landowner was told that to build on this site he had to protect the buckwheat. It was therefore an absurd case of habitat preservation for an absentee species.

Today such habitat preservation is an obligation that is imposed, without compensation, on the landowner for the benefit of the public at large. Yet common sense makes it clear that you cannot have a stable political regime by telling individuals that they must always make personal sacrifices for social gain. That strategy will naturally provoke resistance and resentment. After all, the Smith's blue butterfly was in some sense a matter of convenience for antidevelopment forces; if it hadn't been there to serve their purposes, then they would have sought some other reason to stop the development in its tracks. The truth was that the city and the antidevelopment forces didn't want development at all.

Such matter is seldom stated in so blunt a fashion because candor has its price. Whenever the state tells a landowner that her property must remain worthless for all time—in order

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Environmental Law 101

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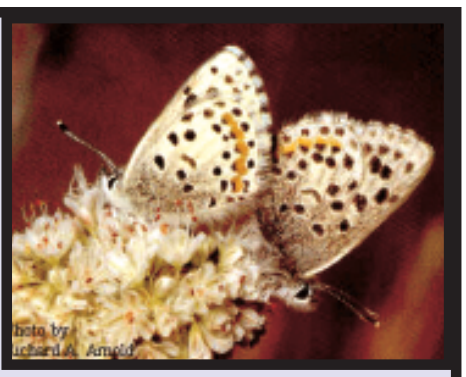
to protect butterflies, of course—then it might be caught by the constitutional prohibition against taking property without just compensation. But this legal rule kicks in automatically only in that extreme circumstance in which all development is flatly prohibited. The law is far grayer when that same end is achieved through delay and dissimulation. The current constitutional position invites the government agency to drown the landowner in due process. Never just turn the applicant down; string the process out. Bounce the permit approval process back and forth endlessly, involving city, county, state, and federal regulators. Back it goes, again and again, with more delays and costs—but no finality. To some, this description of the process may sound like an amiable exaggeration. But consider that the initial application to develop the site in Del Monte Dunes was made eighteen years ago, in 1981, and only now is winding its way up to the Supreme Court. [*The property owner eventually won $1.45 million for a "temporary taking" but was not able to build. The property was eventually sold to the state of California. The Supreme Court decision created more questions than it answered. – Ed.*]



The Smith's Blue Butterfly (*Euphilotes enoptes smithi*) lives near coastal dunes, chaparrals, and grasslands and is only found in the Central Coast. This species spends its entire life near two types of buckwheat: the Coast buckwheat (*Eriogonum latifolium*) and seacliff buckwheat (*Eriogonum parvifolium*). The buckwheat serve as the butterfly's nursery and food source. The butterfly has a very short adult life-span (one week) during which it has to find and court, mate, and lay eggs. It can also only fly in the daytime in above 60 degrees temperature when the wind isn't strong and can't fly more than eight hours a day. The butterfly never flies more that 200 feet from where they were born and usually jump from plant to plant. Therefore invasive plants, like iceplant, take over the dunes, destroying buckwheats and making impossible gaps between the plants for the butterflies to travel. Also man-made structures like Highway 1 in Sand City have isolated the species. As a result of the Highway 1 isolation there is now a sub-species of Smith's Blue Butterfly called the Marina Blue Butterfly that lives on the Coast buckwheat while the Smith's one lives on the Seacliff buckwheat.

WHERE DO WE GO FROM HERE?

In Del Monte Dunes, the Supreme Court must address two questions. First, was this a total wipeout of the value of the land? Second, was there any realistic environmental justification for imposing these restrictions on development?

Requiring governments to pay compensation for imposing these restrictions helps encourage political responsibility. It forces democratic bodies to weigh not only the benefits of their actions but also the costs. And compensation encourages transparency, forcing government officials to address this hard question: "Who benefits by refusing to allow new people to live in Del Monte Dunes?" Can anyone identify millions of dollars in gains from giving Smith's blue butterfly a habitat it will never use?

CHANGING THE INCENTIVES

Now let's suppose that we were to change the incentive structures a little bit. Suppose the government is willing to back off on regulation without compensation. One consequence would be that owners might continue to protect the habitat because they would not thereby forfeit all development rights for nothing. After all, most people who live in the wild are attached to the land even if they are also attached to their pocketbooks. They like the wild, which is why they're there. And if the government wants to preserve the habitat, well and good, it can buy it. At this particular point, the habitat is no longer a liability to the landowner; it's now an asset. By virtue of shifting the government role from coercion to cooperation, the new legal rule makes the target of government action—the landowner—an ally. Instead of encouraging the willful destruction of property, the law now encourages its systematic preservation.

At this point it is possible to find a creative role for government in environmental preservation. But it only arises because we limit its coercive powers over private individuals. Yet, ironically, the creative role is one others can assume as well, for nothing prevents private groups from buying habitat for preservation. Because of their flexibility and independence, these organizations could well do a better job than state agencies, who have to work through the cumbersome eminent domain process. Ordinary contracts now work, and the increased domain of choice for private landowners should reduce hard feelings as these markets are better developed. Money becomes the lubricant that makes hard transactions move more easily.

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Greater Maple Valley Area Council

meets the first Monday of each month at 7:00 p.m.

King County Police Precinct #3
22300 SE 231st, Maple Valley

See their web site at
http://www.metrokc.gov/dchs/uac/uac_gmv.htm

Democracy's Road to Tyranny

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Moscow's satellite states are called "People's Democracies."

All this implies that in earlier times only the elites had a chance to govern and that now, at long last, the common man is the master of his destiny able to enjoy the good things in life! It matters little that the realities are quite different. A very high-ranking Soviet official recently said to a European prince: "Your ancestors exploited the people, claiming that they ruled by the Grace of God, but we are doing much better, we exploit the people in the name of the people."

Then there is the third way in which a democracy changes into a totalitarian tyranny. The first political analyst who foresaw this hitherto-never-experienced kind of evolution was Alexis de Tocqueville. He drew an exact and frightening picture of our Provider State (wrongly called Welfare State) in the second volume of his Democracy in America, published in 1835; he spoke at length about a form of tyranny which he could only describe, but not name, because it had no historic precedent. Admittedly, it took several generations until Tocqueville's vision became a reality.

He envisaged a democratic government in which nearly all human affairs would be regulated by a mild, "compassionate" but determined government under which the citizens would practice their pursuit of happiness as "timid animals," losing all initiative and freedom. The Roman Emperors, he said, could direct their wrath against individuals, but control of all forms of life was out of the question under their rule. We have to add that in Tocqueville's time the technology for such a surveillance and regulation was insufficiently developed. The computer had not been invented and thus his warnings found little echo in the past century.

Tocqueville, a genuine liberal and legitimist, had gone to America not only because he was concerned with trends in the United States, but also on account of the electoral victory of Andrew Jackson, the first Democrat in the White House and the man who introduced the highly democratic Spoils System, a genuine invitation to corruption. The Founding Fathers, as Charles Beard has pointed out, hated democracy more than Original Sin. But now a French ideology, only too familiar to Tocqueville, had started to conquer America.

This portentous development lured the French aristocrat to the New World where he wanted to observe the global advance of "democratism," in his opinion and to his dismay bound to penetrate everywhere and to end in either anarchy or the New Tyranny—which he referred to as "democratic despotism." The road to anarchy is more apt to be taken by South Europeans and South Americans (and it usually terminates in military dictatorships in order to prevent total dissolution), whereas the northern nations, while keeping all democratic appearances, tend to founder in totalitarian welfare bureaucracy. The lack of a common political philosophy is more conducive to the development of outright revolutions in the South where civil wars tend to be "the continuation of parliamentarism with other (and more violent) means," while the North is rather given to evolutionary processes, to a creeping increase of slavery and a decrease of personal freedom and initiative. This process can be much more paralyzing than a mere personal dictatorship, military or otherwise, without an ideological and totalitarian character. The Franco and Salazar regimes and certain Latin American authoritarian governments, all mellowing with the years, are good examples.

Slouching Toward Servitude

Tocqueville did not tell us just how the gradual change toward totalitarian servitude can come about. But 150 years ago he could not exactly foresee that the parliamentary scene would produce two main types of parties: the Santa Claus parties, predominantly on the Left, and the Tighten-Your-Belt parties, more or less on the Right. The Santa Claus parties, with presents for the many, normally take from some people to give to others: they operate with largesses, to use the term of John Adams. Socialism, whether national or international, will act in the name of "distributive justice," as well as "social justice" and "progress," and thus gain popularity. You don't, after all, shoot Santa Claus. As a result, these parties normally win elections, and politicians who use their slogans are effective vote-getters.

The Tighten-Your-Belt parties, if they unexpectedly gain power, generally act more wisely, but they rarely have the courage to undo the policies of the Santa parties. The voting masses, who frequently favor the Santa parties, would retract their support if the Tighten-Your-Belt parties were to act radically and consistently. Profligates are usually more popular than misers. In fact, the Santa Claus parties are rarely utterly defeated, but they sometimes defeat themselves by featuring hopeless candidates or causing political turmoil or economic disaster.

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May Valley Environmental Council

meets every Monday at 7:00 p.m.

in the basement of Leonard's

at the corner of SR 900 & 164th Avenue NE

www.maycreek.com

Four Creeks Unincorporated Area Council

meets the third Wednesday of each month at 7:00 p.m.

May Valley Alliance Church
16431 SE Renton-Issaquah Rd
See their web site at **council@fourcreeks.org**

Average Americans vs. Environmentalists

By Walter E. Williams

A few years ago American Enterprise magazine carried an article by Karl Zinsmeister, titled "Environmentalists vs. Scientists." It's mostly a report on research published by two academics Stanley Rothman and Robert Lichter in their book titled Environmental Cancer: A Political Disease. The authors surveyed a cross-section of environmental leaders at organizations such as National Resources Defense Council, the Sierra Club, the National Wildlife Federation, Ducks Unlimited, the Environmental Defense Fund, the Nature Conservancy and the National Audubon Society. Identically worded survey questions were administered to different groups of scientists. Among the groups surveyed was the American Association for Cancer Research, whose members are specialists in carcinogenesis or epidemiology.

It turns out that scientists and environmentalists hold markedly different views. Sixty-seven percent of cancer specialists believe there's no cancer epidemic while only 27 percent of environmental activists hold the same view. Only twenty-seven percent of cancer specialists agree with the statement "industry causes rising cancer rates", while 64 percent of environmentalists do. The scientists didn't trust the media. Only 22 percent of cancer specialists consider the New York Times' reporting on cancer topics to be trustworthy and only six percent found the TV network news to be so.

When 400 climatologists, oceanographers and atmospheric scientists were asked whether evidence supports the "greenhouse effect" theory, 41 percent agreed compared to 66 percent of environmentalists. Similarly, 51 percent of energy scientists say nuclear power plants are safe compared to only 10 percent of environmentalists.

Environmentalists not only differ from scientists but are markedly different from the general public as well. Environmental activists are a narrow elite: 76 percent are male, 97 percent are white and a third have incomes over $100,000. They are unrepresentative of America politically as well. Sixty-three percent describe themselves as liberals compared to 18 percent of the general public. Only six percent are Republicans; ten times as many are Democrats. To the question, "I'd fight for my country, right or wrong," 57 percent of all Americans answered yes while only 9 percent of environmentalists said yes.

Environmentalists support causes like race quotas, abortion-on-demand and homosexual rights at rates of 70 to 80 percent, versus 34 to 40 percent of the general public. Rothman and Licther summarized, "Although most Americans are willing to describe themselves as environmentalists, from these data it seems clear that environmental activists do not speak for the public. . . . The perspective and background of this movement's leadership are considerably removed from those of the majority."

The authors of the study don't quite reach a conclusion that I've reached about environmental activists, whose agenda calls for private property confiscation and control over the lives of ordinary citizens. Back in the 60s and 70s, America's leftists called themselves socialists and communists. They were the people who paraded around college campuses singing praises of support to tyrants like Mao Zedong, Ho Chi Minh, Fidel Castro and Pol Pot. Today, the communist system and its promises have been revealed as both a miserable failure and a system of unprecedented brutality. Thus, communism and socialism have become an embarrassment, so environmentalism is the name for an old agenda.

It is not hard to understand how radical environmentalists sympathize with tyrants who have little regard for human life. One need not go further than some of their statements, such as those cited in Cris Horner's article "In Gaia We Trust", in Competitive Enterprise Institute's Monthly Planet newsletter (February 2003).

- "To feed a starving child is to exacerbate the world population problem." - Lamont Cole
- In response to the implications of millions dying of malaria from a global ban on DDT, Charles Wursta, of the Environmental Defense Fund said, "**This is as good a way to get rid of them as any**."
- Paul Watson, founder of Greenpeace, said, "**I got the impression that instead of going out to shoot birds, I should go out and shoot the kids who shoot birds**."

Then there are statements like those of David Brower, founder of Friends of the Earth, and former executive director of Sierra Club: "**While the death of young men in war is unfortunate, it is no more serious than the touching of mountains and wilderness areas by humankind.**" David M. Graber, research biologist with the National Park Service wrote, "**Human happiness, and certainly human fecundity, are not as important as a wild and healthy planet**." John Davis, editor of Earth First Journal, says, "**Human beings, as a species, have no more value than slugs**." Davis also opined, "**I suspect that eradicating small pox was wrong. It played an important part in balancing ecosystems**."

These people have an abiding contempt for humankind. They seek to accomplish their agenda with useful idiots in and out of government and make use of what H.L. Mencken warned us about, "The whole aim of practical politics is to keep the populace alarmed, and hence clamorous to be led to safety, by menacing it with an endless series of hobgoblins, all of them imaginary."

Walter Williams is the John M. Olin Distinguished Professor of Economics at George Mason University in Fairfax, Virginia.

Central Puget Sound Transit Authority v. Kenneth R. Miller

The Washington Supreme Court on February 16, 2006, upheld Sound Transit's arbitrary condemnation of private property for the South Tacoma Sounder Rail Station in Central Puget Sound Transit Authority v. Kenneth R. Miller. A bare majority of the Court eviscerated constitutionally protected property rights in a different, but equally devastating manner as the United States Supreme Court in the recent and much maligned Kelo case. The dissent thought otherwise (Chief Justice Alexander and Justices James Johnson, Sanders, and Chambers).

This case challenges Sound Transit's, and every other government agency's, power to ignore the facts, ignore public input, and take property based on nonsensical reasons. Prior to this case, citizens could look to the Courts to fairly review an agency determination of condemnation, and require a showing of public use and necessity, but no longer. The State Constitution specifically promises that the issue of public use and necessity in a condemnation case "shall be a judicial question" "without regard to any legislative assertion" in Article I, Section 16.

The key point is that by making it a "judicial question," the State Constitution ensures judicial review to prevent arbitrary and capricious agency condemnation decisions. Yet, the majority opinion by Justice Fairhurst never even recognizes that this Constitutional language exists and instead rules that the courts are bound by, "the high level of deference we accord legislative bodies in making necessity determinations." The majority by only five of the nine justices refuses to follow the State Constitution and in doing so completely eliminates decades of judicial precedent requiring the courts to ensure that the taking of people's property is necessary for the constitutionally required public use. The Supreme Court majority abdicates the constitutionally required responsibility of the courts in favor of a "high level of deference" to government agencies. As concisely put by Justice James Johnson in dissent, "Only by adopting a rubber-stamp standard of review at odds with article I, section 16 and relevant case law can the majority look the other way. To rely upon clearly erroneous factual information of such magnitude amounts to arbitrary or capricious conduct."

Justice James Johnson also quoted an earlier case in pointing out that without proper judicial review and adequate agency evidence, the condemnation decision, "would amount to oppression and abuse of the power." The unrebutted evidence in this case was so overwhelming that it is clear no property owner can expect the courts to stop any condemnation decision in the future. The facts at trial were unrebutted by Sound Transit and largely accepted by the trial court. As a result, the trial court ruled that Sound Transit, "negligently omitted and missed some facts and evidence which ideally should have been considered, and if considered could have reasonably led to a different result." Yet, the trial court in following complete deference to Sound Transit refused to throw out the condemnation decision, and the majority of the Supreme Court agreed.

Yet, Sound Transit's process was so full of erroneous facts and improprieties that the decision would have been thrown out under prior case law: (1) Sound Transit made false statements to the public that other alternative sites had prohibitive contamination problems; (2) Sound Transit did not even know that a change in the project would require the demolition of a historic house on the Miller property listed by the City of Tacoma as a historic structure; (3) Sound Transit threatened a community activist into ending complaints about the process and the failure of Sound Transit to choose a better alternative, and this threat came directly from the Chair of the Sound Transit Board and Pierce County Executive John Ladenburg and Sound Transit Board Member and Tacoma City Council Member Kevin Phelps; and, (4) Sound Transit never even considered a better site immediately adjacent to the proposed station that would not require dangerous pedestrian crossings over the tracks. The majority ignores the facts, or worse misstates the facts, and otherwise brushes the facts off as no big deal. As a result, the constitutionally protected right of citizens to stop massive government power grabbers like Sound Transit or any government agency is destroyed.

> Government can take your private property even when the condemnation process is corrupted by falsehoods, threats to community leaders, and other arbitrary and capricious actions.
> — Charles Klinge, Miller's attorney

The first issue in the case is also resolved by the majority in a manner destroying previously held rights. Sound Transit was required to give public notice before making the condemnation decision and the majority rules that merely placing a meeting agenda on its website is the same as furnishing notice to newspapers as required by its own rules, and is otherwise the same as publishing notice in newspapers, posting notice on the property and in public places. The decision is the first in the United States to say that Internet notice is sufficient alone without requiring any of the traditional forms of notice practiced for decades. The majority said that Internet notice is the same as publication in the newspapers even though newspapers reach hundreds of thousands of people every day, while there was no showing of any traffic to the exact page on the Sound Transit website. The majority also said the notice was sufficient to apprise the property owners and interested persons even though the notice only mentioned a condemnation in the South Tacoma area generally.

Charlie Klinge, attorney for Ken and Barbara Miller, said, "Today, the State Supreme Court majority destroyed a previously held Constitutional right. Government can take your private property even when the condemnation process is corrupted by falsehoods, threats to community leaders, and other arbitrary and capricious actions. For over a century, the Washington courts protected the citizens from arbitrary government condemnation actions, but no more."

How Many Are Enough?

By Rodney McFarland

A question often asked by common folks about the maze of salmon recovery efforts is, "How many salmon constitute recovery?" You never get an understandable answer. The following excerpts from the Draft Recovery Planning Guidance for Technical Recovery Teams (NOAA Fisheries), dated Sept 1, 2004, show the subjective and illusive definition of "salmon recovery" that drives the process:

> "Definitions of recovery and recovery goals - It is useful to recognize that there are at least two concepts of salmon recovery: 'ESA' recovery, which deals with statutory requirements under the federal ESA, and 'broad-sense' recovery, which may be concerned with a wider range of societal interests. As defined by NMFS and the US Fish and Wildlife Service (USFWS), 'ESA recovery' is 'improvement in the status of a listed species to the point at which listing is no longer appropriate.' This occurs when the species is no longer threatened or endangered in 'all or a significant portion of its range.' Accordingly, we can define 'ESA delisting criteria' as conditions that must be satisfied before the species can be delisted. These delisting criteria include both 'biological delisting criteria' and 'administrative delisting criteria.'
>
> "Biological delisting criteria describe population and ESU characteristics that provide adequate assurance that the species will persist into the future. Another factor essential to ensuring that the species will persist into the future at viable population levels is assurance that all factors for decline have been addressed. "Administrative delisting criteria" are used to establish this certainty.
>
> "Although determining what corrective measures to take to reverse factors for decline will be largely a policy task undertaken in Phase II, TRTs can provide valuable technical information about the factors for decline, and about whether proposed corrective measures are likely to be adequate.
>
> "In contrast to ESA recovery, 'broad-sense' salmon recovery is a more open-ended concept that does not have a single definition; rather, it can mean different things to different people. 'Broadsense recovery goals' thus may reflect societal values in addition to biological ones. For example, different visions of 'broad-sense recovery goals' might include a desire to have robust populations that a) can support tribal, commercial, and sport harvest; b) promote fully functioning aquatic and marine ecosystems; or c) provide opportunities for the public to appreciate salmon in the wild.
>
> "Using the terminology introduced above, Phase I tasks encompass the analyses and planning needed to develop biological delisting criteria, and Phase II tasks include developing and evaluating administrative delisting criteria, as well as considering all of the necessary factors for developing a broad-sense recovery plan. Neither concept of salmon recovery is intrinsically 'better.'
>
> "Furthermore, the two concepts are not inconsistent; in fact, they share a common vision of ensuring that naturally sustainable salmon populations persist into the future. The degree to which the concepts overlap will vary across species and ESUs, depending on the biological attributes of the populations and the societal values encompassed in 'broad-sense' salmon recovery. For example, a population whose abundance is just above the viable level may satisfy many of society's 'needs' for salmon, and populations at this level may also be productive enough to be able to support some harvest by humans, at least in years of relative abundance. However, in many cases the level of abundance and productivity that would achieve viability criteria would not provide for all the commercial, recreational, and tribal harvest opportunities that might be encompassed by 'broad sense' recovery goals."

So the best case scenario would be one that would provide for "all the commercial, recreational, and tribal harvest opportunities that might be encompassed." Once again, how many salmon is that? What if we are already there?

Many of the numbers used in this article are based on the work of Dr. Leonid Klyashtorin of the Russian Federal Research Institute of Fisheries and Oceanography. He has been studying salmon ranching and wild stock fluctuations since 1980.

It is helpful to think of the North Pacific as the "pasture" for pacific salmon. Just like any pasture it has a maximum carrying capacity which varies from year to year. The carrying capacity of the North Pacific for salmon evaluates at 1.4 to1.7 million tons in periods of maximum production and 600 to 800 thousand tons in the minimum periods. We harvest about 70% of the fish so the harvestable amount will vary from 1.2 million tons to 420 thousand tons.

Reliable data on worldwide Pacific salmon harvests is unavailable prior to 1920. Data from that point until 1995 is shown in the accompanying Fig. 1. The charts clearly show the change from minimum production in 1920 and 1950-1970 to maximum production in 1940 and again in 1995. Data since 1995 that is not reflected in the chart shows 1995 as a peak with decreased production since.

The catch of Asian-originated wild salmon in the 90s decreased by about 350 thousand tons while the catch of American-originated wild salmon increased by about 110 thousand tons. The difference was made up of farmed salmon.

North Pacific salmon production shows a clear correspondence with both Japanese and California sardine production. Data on sardine numbers is available for much earlier time periods. Sardine peaks happened about 1825, 1870, 1938, and 1995. Maximum sardine harvest is about 6 million tons.

Why were Puget Sound Chinook salmon listed in 1999 just as North Pacific salmon production peaked at 1930s era highs of about 1 million tons or just under the theoretical maximum salmon production? It undoubtedly had much more to do with the breakdown of the Pacific Salmon Treaty with Canada than with any decline of the salmon stocks. That same run had rebounded greatly when the treaty was signed in 1985 and Canadian fishermen quit catching them as they came by Vancouver Island.

I worked up some numbers derived from several sources to give us some perspective. My numbers are estimates calculated from total catch or consumption, average weight, etc. They are not exact but are certainly indicative of relative amounts. Worldwide we consume about 2.7 million Chinook, 10 million coho, 21.5 million chum, 90 million sockeye, and 250 million pinks annually for a total of the main salmon species of 375 million. We consume about 122 million cows annually. Perhaps we should add cows to the endangered species lists. Contrast our consumption of these food species with 10,000 total Northern Spotted Owls or 55,000 total Bald Eagles.

The salmon scam boils down to money and politics, not endangered species.

The dockside value of salmon caught by Washington fishermen in 1995 (that was a maximum production year for North Pacific salmon) was $9.5 million. Prices were up in 2003 and the catch was worth $11.8 million. Compare that to the $290 million income for Washington's farmers.

William D. Ruckelshaus and his Washington Salmon Recovery Funding Board have doled out $39 million of taxpayer dollars yearly for the last five years to support the bureaucratic/enviro-consultant complex that has embraced the salmon scam.

One little department—Water and Land Resources Division—of King County Department of Natural Resources and Parks consumes $35 million of surface water management fees and other taxes to support 350 bureaucrats who pretend to save the salmon.

The federal government dishes out some $575 million per year for salmon recovery efforts.

A graph accompanying an article on page 9 shows that environmental regulations and zoning in the Seattle area added over

$200,000 to each developed one-quarter acre in 2002 before King County's 2004 Critical Area Ordinance added hundreds of new pages of regulation. There were 6,865 new single family homes built in King County in 2004. At $200,000 each the regulatory costs were $1.373 billion without counting the regulatory costs of the 4,711 multifamily units built that year. Does it really make sense to spend over one third of the King County budget to pretend to save $10 million worth of salmon?

The dockside value of salmon caught by Washington fishermen in 1995—a maximum production year for North Pacific salmon—was $9.5 million.

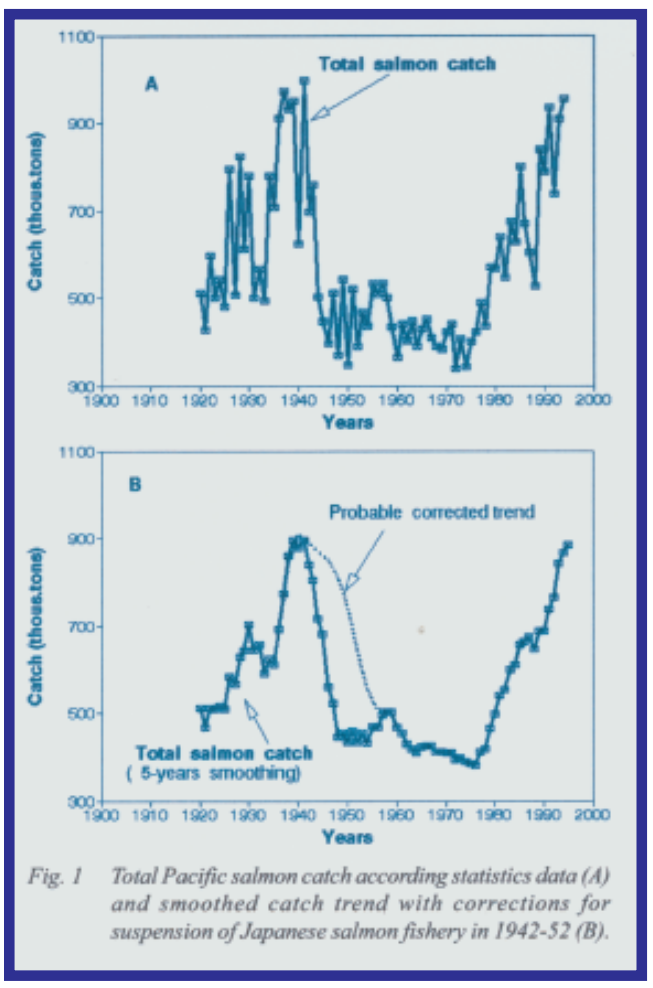


Fig. 1 Total Pacific salmon catch according statistics data (A) and smoothed catch trend with corrections for suspension of Japanese salmon fishery in 1942-52 (B).

Housing in 'Smart Growth' Cities: Is It Really Worth The Cost?

By Randal O'Toole

[Originally published in 2002]

Stringent land use regulations in "Smart Growth" areas such as Portland and San Jose translate into higher housing prices. Do these costs reflect greater livability or limited opportunity?

On August 12, 2002 the *Wall Street Journal* described a 350-square-foot former public toilet in south London that developers are turning into a "stylish apartment." They expect to sell it for around $200,000. "Believe me," a developer told the Journal, "there will be a lot of interest."

"In the past decade, the U.K. has been building fewer houses than at any time since World War II," says the Journal. The resulting housing shortage is reflected in the fact that people spend an average of just 18 minutes looking at a house before making an offer.

The *Wall Street Journal* attributes the housing shortage to "bureaucratic difficulties in getting planning permission — especially in protected areas of greenery surrounding cities." As a result, "houses are so scarce that people will buy anything."

This seems likely to be the future of housing in Portland and other "smart-growth" cities. It is increasingly clear that housing affordability is strongly influenced by the level of government planning and regulation.

On August 9, *USA Today* printed a housing index developed by Coldwell Banker for scores of U.S. cities. The index is based on the median price of a mid-level, 2,200-square foot, four-bedroom, two-bath home. Table 1 below presents mid-level home prices for selected cities along with the growth rates of the city and urban area from 1990 to 2000.

A scan of the numbers suggests there is little correlation between home prices and growth rates. In the fastest growing urban area in America, Las Vegas, the mid-level home sells for $182,000. Despite slow growth and the dot-com collapse, housing prices in the San Francisco-Oakland and San Jose areas remain several times that amount.

On the other hand, there appears to be a strong correlation between land-use regulation and housing prices. Land-use regulations are strong in the San Francisco-Oakland and San Jose areas, in Oregon, Boulder, Massachusetts, and Maryland. Cities in these states and urban areas have the highest housing prices. Land-use rules are weak in Nevada, Arizona, Idaho, and Wyoming, and cities in these states have some of the lowest housing prices.

Of course, housing price is only part of the affordability equation. The other part is income. If incomes in Seattle are double those in Las Vegas, then Seattle housing (which costs slightly less than twice as much as in Las Vegas) may actually be the more affordable. Alas for Seattlites, Seattle household incomes are less than 50 percent greater than those in Las Vegas.

The National Association of Home Builders regularly compares median incomes with median home prices for nearly two hundred metropolitan areas. The "housing opportunity index" is the percentage of homes affordable to a family of median income in each metropolitan area. I compared the latest edition of the index (first quarter 2002) with the 1990s growth rates for those areas. These numbers are included in Table 1.

The r-squared (a statistical measure of correlation) between the index and growth was less than 0.007, which is no better than random (i.e., two random number sets easily score r-squareds higher than 0.007). Thus, housing affordability has little relationship with growth. Instead, other factors such as land-use regulation are determining affordability.

According to the latest edition of this index, the nation's least affordable housing markets are almost all in California, Massachusetts, and Oregon, which are all heavily regulated states. Affordable fast-growing regions are in Arizona, Florida, Georgia, Nevada, and Texas. Except for Florida, all of these are lightly regulated.

Defenders of land-use planning argue that planning makes cities more livable, so naturally they would be more desirable and thus housing would be more expensive. But is Portland really more livable than Albuquerque? Or Oakland more livable than Las Vegas? San Francisco is a fun place to visit, but is it really four times more livable than Phoenix?

Attempts to make housing more affordable through "inclusionary zoning" — an ordinance requiring developers to offer a certain percentage of their homes at prices affordable to low-income buyers — will only make the problem worse. The "affordable housing" provided by this ordinance will make up a tiny percentage of the entire housing market. But developers will have to increase the cost of the other homes they build in order to cross-subsidize the affordable units. This will drive up overall market prices as resellers take advantage of higher new home costs.

I suspect the main beneficiaries of inclusionary zoning won't include many of the low-income people who are most hurt by housing regulation. Instead, recent college graduates, whose incomes are low enough to qualify for low-income housing but whose lifetime earnings are likely to be high, will probably snap up much of the low-income housing required by inclusionary rules.

Further research should develop an index of regulation that could be directly compared with, say, the NAHB housing opportunity index. The highest level of regulation might be found in cities such as Boulder or some parts of the San Francisco Bay Area that strictly limit the number of new building permits issued each year.

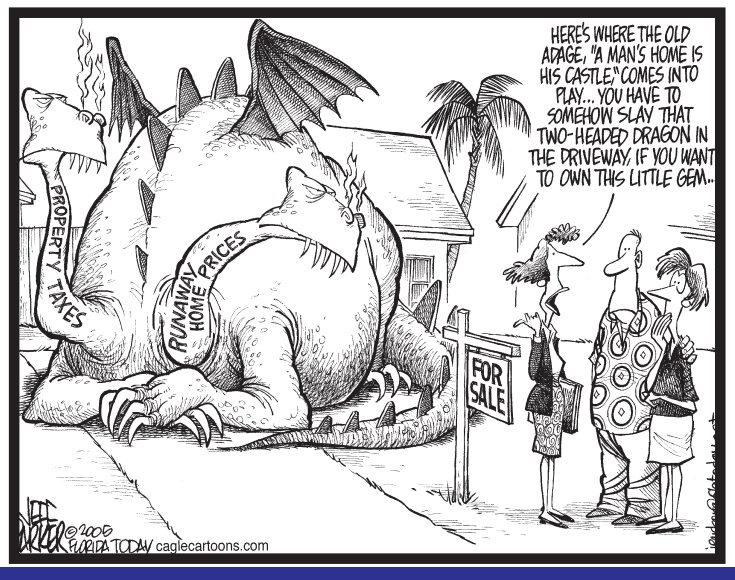
The most important thing homebuilders and realtors can do, however, is to put a human face on unaffordable housing. The South Carolina Landowners' Association is a coalition of realtors and low-income, often minority, landowners that is fighting land-use regulation in that state. This group provides a model that people in other regions should emulate.

Randal O'Toole is senior economist with the Thoreau Institute and author of The Vanishing Automobile and Other Urban Myths: How Smart Growth Will Harm American Cities.

Table 1. Mid-Level Home Prices and City and Urban Area Growth

			Percent Growth 1990-2000	
City	Mid-Level	HOI	City	Urban Area
Albuquerque	$190,000		17	20
Anchorage	$237,988	62.9	15	2
Atlanta	$269,780	70.4	6	62
Baltimore	$243,500	73.5	-12	10
Boise	$173,500		48	62
Boston	$628,333	45.8	3	45
Boulder	$462,000	49.5	11	14
Cheyenne	$177,000		6	11
Denver	$251,600	52.0	19	31
Houston	$162,480	63.4	20	32
Las Vegas	$181,800	65.4	85	89
Madison	$197,790		9	35
Mesa	$180,133		38	45
Milwaukee	$222,633	71.7	-5	7
Minneapolis	$301,566	69.8	4	15
Oakland	$649,333	25.2	7	6
Palo Alto	$1,263,250		5	7
Phoenix	$209,283	66.5	34	45
Portland	$275,725	29.5	21	35
Raleigh	$203,166	62.2	33	77
Reno	$239,205	61.3	35	42
Salt Lake	$234,725	57.8	14	12
San Francisco	$891,000	6.9	7	6
Seattle	$335,317	45.8	9	56

HOI represents the percentage of homes in each region that is affordable to a family of median income in that region.



Smart Growth Begets LA

From all over the world, people visit Portland, Oregon, to learn the wonders of "smart-growth" planning. City officials ooh and ah over Portland's light rail; reporters photograph the region's urban-growth boundary; and planners exclaim over the city's high-density, transit-oriented developments.

Smart growth is less exciting to local residents. They have discovered that smart growth's promises to reduce congestion, provide affordable housing, and protect valuable open spaces are phony. Many now realize that smart growth's true goals are to increase congestion, drive housing prices up, and develop as much urban open space as possible.

In 1992, planning advocates argued that only regional planning could save Portland from becoming like Los Angeles, the most congested, most polluted city in America. So Portland-area voters agreed to create Metro, a regional planning authority with near-dictatorial powers over land use and transportation planning in three counties and twenty-four cities.

Although Metro estimates that Portland's population will grow by 80 percent in the next few decades, it decided not to expand the region's urban-growth boundary by more than 6 percent. To accommodate everyone else, Metro gave population targets to each local city and mandated the construction of scores of high-density, mixed-use developments. To handle growing transportation demands, Metro proposed a 125-mile rail transit network, while it reduced roadway capacities through so-called "traffic calming."

To meet their population targets, local governments rezoned neighborhoods to much higher densities and promoted the development of farms, golf courses, and other open spaces. When voters turned down the construction of new light-rail lines, Metro decided to build them anyway, using various tax districts to fund the lines without a public vote.

Planners soon learned that developers wouldn't build high-density housing along transit corridors because there was little market for such housing. So Metro, Portland, and other local governments now offer tens of millions of dollars in subsidies to such developments.

The results are spectacular and nearly all negative. The tightness of the urban-growth boundary has sent land prices skyrocketing, and Portland went from being one of the nation's most affordable housing markets before 1990 to one of the five least affordable by 1996. The region's largest homebuilder recently announced that it was reducing its operations by one-half because the region was running out of buildable land.

At the same time, the construction of heavily subsidized high-density housing has soured the rental market. So many apartments are on the market that vacancy rates are at near-record levels and one development along the light-rail line that received $9 million in subsidies has already gone bankrupt.

Congestion is rapidly increasing, which turns out to be a part of Metro's plan. "Congestion," says Metro, "signals positive urban development." Metro wants congestion in

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Land-use Regulation Makes Housing Less Affordable

By Randal O'Toole

[*Originally Published by The Heartland Institute 11/01/2002*]

A March 2002 study published by the Harvard Institute of Economic Research at Harvard University demonstrates the effects of zoning and other regulation on housing affordability. "The Impact of Zoning on Housing Affordability," by Edward Glaeser and Joseph Gyourko, uses census data to compare the effects of zoning on housing prices in 26 U.S. cities.

Glaeser and Gyourko, who are with the Wharton Business School of the University of Pennsylvania, used data from the Census Bureau's American Housing Survey to estimate the value of a quarter-acre of land in two different ways. First, they compared the sales prices of homes on quarter-acre lots with the prices of similar homes on half-acre lots. This represented the value of the extra quarter-acre.

Second, they subtracted the cost of constructing a home from the sales prices of homes on quarter-acre lots. This represented the value of a buildable quarter-acre.

Put another way, the first value is the amount people are willing to pay for an extra quarter-acre of land in their yard. The second value is the amount it costs to own a quarter-acre of land on which you can build a house.

Without zoning and land-use regulation, the two values would be nearly identical. If someone had a house on a half-acre, and the value of developing the extra quarter-acre grew to be more than it was worth to the owner as a part of their yard, they would subdivide and develop it.

However, zoning and regulation can increase the cost of such subdivisions, or prevent them from taking place at all. In this case, the second valuation will be more than the first, and the difference represents an "implicit tax on new construction."

In some cities, the difference between these two values is small. In Kansas City, the first value is about $18,000, while the second is about $21,000. This suggests it costs only about $3,000 to get a permit to subdivide your half-acre and build in Kansas City. The difference was also less than $30,000 in Baltimore, Cincinnati, Houston, Milwaukee, Philadelphia, Pittsburgh, and St. Louis.

In many other cities, however, the difference is large. In San Francisco, having an additional quarter-acre in your yard is worth $85,000, but a buildable quarter-acre lot is worth nearly $700,000. The value of buildability on a quarter-acre lot is more than $200,000 in Anaheim, Los Angeles, New York City, San Diego, and Seattle. In these areas, only a small percentage of the value of the lot comes from an intrinsically high land price; the rest is due to restrictions on construction.

Unfortunately, Portland (the nation's model for smart growth) and Las Vegas (the nation's fastest-growing yet still affordable urban area) were not among the cities studied by the researchers.

Glaeser and Gyourko checked to see if other factors, such as densities, incomes, and climate, could account for these differences in values. But density and income had little effect on the analysis, while warm winters did not raise the value of land by very much.

In the October issue of Environment & Climate News, I suggested someone should develop an index of land-use regulation. (See "Land Use Regulation Makes Housing Less Affordable.") Glaeser and Gyourko relied on a 1989 "Wharton Land-Use Control Survey" to develop such an index for 45 urban areas.

The index was the length of time required to get a permit to rezone an area of land for a subdivision of less than 50 homes. An index of 1 equaled less than three months, 2 = 4-6 months, 3 = 7-12 months, 4 = 13-24 months, and 5 = more than 24 months.

Even after controlling for regional growth and median incomes, they found a strong correlation between this index and the share of homes in an area selling for more than 140 percent of the construction cost of those homes. Increasing the index by 1—going from 1 to 2, 2 to 3, etc.—increased the share of high-cost homes by 15 percent.

The researchers admit zoning may have some benefits. But if affordable housing is the goal, they say, zoning reform is the place to start. "Building small numbers of subsidized housing units is likely to have a trivial impact on average housing prices," they say. "However, reducing the implied zoning tax on new construction could well have a massive impact on housing prices."

Implicit Zoning Tax on a Quarter-Acre Lot

City	Zoning Tax
Anaheim	$385,942
Atlanta	38,115
Baltimore	-8,494
Boston	137,323
Chicago	149,955
Cincinnati	24,067
Cleveland	43,362
Dallas	56,737
Detroit	50,639
Houston	29,948
Kansas City	2,940
Los Angeles	303,178
Miami	116,414
Milwaukee	22,760
Minneapolis	92,129
New York City	334,432
Newark	191,664
Philadelphia	26,463
Phoenix	54,450
Pittsburgh	14,919
Riverside	68,825
San Diego	270,399
San Francisco	608,533
Seattle	200,703
St. Louis	18,186
Tampa	59,133

Calculated by Randal O'Toole from Glaeser and Gyourko, Table Four, by taking the difference between the "imputed land cost from means data" and the "hedonic price of land log-log specification." The prices in Table Four are in dollars per square foot; for this table, O'Toole multiplied them by 10,890

LA — Highest Density Urban Area in US with the Fewest Road Miles per capita

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most areas to reach near-gridlock levels because relieving congestion "would eliminate transit ridership."

Metro spends more than half the region's surface transportation dollars on rail transit even though rails will carry only 1 percent of travel. In 1990, 92 percent of all passenger travel in the region was by auto. After its plans are all put into effect, Metro predicts that autos will still carry 88 percent of travel. With more people and driving than ever, Metro says, the time people waste sitting in traffic will more than quadruple by 2020. Since cars pollute more in stop-and-go traffic, Metro says its plan will increase smog by 10 percent.

Urban open spaces are rapidly disappearing as cities rezone thousands of acres of farmlands, golf courses, and even city parks for high-density development. But when voters agreed to give Metro $135 million to buy parks and open spaces, more than 80 percent of the land it purchased was outside the urban-growth boundary.

In 1994, Metro looked at other U.S. urban areas to see which one was closest to its plan for Portland: a high-density region with few roads and lots of rail transit. It turned out that the highest density urban area in America also has the fewest miles of freeway per capita and is building one of the most expensive rail transit networks. What city is that? Believe it or not, it was Los Angeles, which turns out to be the epitome of smart growth. Metro concluded that Los Angeles "displays an investment pattern we desire to replicate" in Portland.

Oregonians are beginning to revolt against this form of social engineering. In 1998, they firmly rejected any further funding for light rail. In 2000 and again in 2004, Oregon voted to force local government to compensate landowners when their zoning rules reduce property values. And in May 2002, nearly two out of three Portland-area voters passed a measure to limit neighborhood densification.

If you want to replicate Los Angeles in your community, then by all means follow Portland's smart-growth example. If your idea of a livable city is something other than Los Angeles, then you had better find something besides "smart growth" to follow.

Democracy's Road to Tyranny

Continued from page 5

A politicized Saint Nicholas is a grim taskmaster. Gifts cannot be distributed without bureaucratic regulation, registration, and regimentation of the entire country. Countless strings are attached to the gifts received from "above." The State interferes in all domains of human existence—education, health, transportation, communication, entertainment, food, commerce, industry, farming, building, employment, inheritance, social life, birth, and death.

There are two aspects to this large-scale interference: statism and egalitarianism, yet they are intrinsically connected since to regiment society perfectly, you must reduce people to an identical level. Thus, a "classless society" becomes the real aim, and every kind of discrimination must come to an end. But, discrimination is intrinsic to a free life, because freedom of will and choice is a characteristic of man and his personality. If I marry Bess instead of Jean, I obviously discriminate against Jean; if I employ Dr. Nishiyama as a teacher of Japanese instead of Dr. O'Hanrahan, I discriminate against the latter, and so forth. (One should not be surprised if an opera house that rejects a 4-foot tall Bambuti singer for the role of Siegfried in Wagner's "Ring" is accused of racism!)

There is, in fact, only either just or unjust discrimination. Yet, egalitarian democracy remains adamant in its totalitarian policy. The popular pastime of modern democracies of punishing the diligent and thrifty, while rewarding the lazy, improvident, and unthrifty, is cultivated via the State, fulfilling a demo-egalitarian program based on a demo-totalitarian ideology.

Democratic tyranny, evolving on the sly as a slow and subtle corruption leading to total State control, is thus the third and by no means rarest road to the most modern form of slavery.

Dr. Kuehnelt-Leddihn is a European scholar, linguist, world traveler, and lecturer.

Letter to the Editor

[*This was received on February 20, a government holiday.*]

I heard on the radio that traffic was flowing in King County with no problems whatsoever.

Given that most workday commutes are nightmares over there — except on government holidays — what does this say about the size of government in King County?

Perhaps the I-5 corridor's traffic problems could be taken care of if government employees were all required to leave their cars at home and use mass transit to commute to and from their jobs?

Norm MacLeod
Port Townsend, WA

The very powerful and the very stupid have one thing in common. Instead of altering their views to fit the facts, they alter the facts to fit their views ... which can be very uncomfortable if you happen to be one of the facts that needs altering.

Memorandum on Takings

By Martha Parker

Thanks to a concerned citizen, I have a copy of an advisory memorandum, issued December 2003 by the then Attorney General of Washington, Christine Gregoire. This memorandum is required by the Growth Management Act, RCW 36.70A.370. It advises Washington state agencies and local governments how to avoid unconstitutional takings of private property. So here I start to quote from the memorandum.

The advice of the Attorney General is "on an orderly, consistent process that better enables government to evaluate proposed regulatory or administrative actions to assure that the actions do not result in unconstitutional takings of private property".

"This process must be used by state agencies and local governments that are required to plan, or that choose to plan, under RCW 36.70A.040 – Washington's Growth Management Act. The process used by state agencies and local government agencies is protected by attorney-client privilege, and a private party does not have a cause of action against a state agency or local government for failure to utilize the recommended process. RCW 36.70A.370(4)".

Get that? It means citizens cannot use the Public Disclosure Act to find out exactly what did happen between an attorney for a local government and that government on whether proposed legislation does imply an unconstitutional taking of private property.

So, even though we have a U.S. Constitution 5th and 14th Amendments, and a Washington State Constitution which protects private property, we are left questioning the status of local government actions. This, in spite of the fact that Article I, Section 16, Eminent Domain, says, "No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner". Citizens seem to be without any recourse except lengthy, expensive legal action, even though prospective King County Council persons swear a solemn oath to uphold the Washington State Constitution.

Let's continue with the memorandum. "Where state agencies or local governments exercise regulatory authority impacting the use of private property, they must be sensitive to the constitutional limits on their authority to regulate private property rights. The failure to recognize these constitutional limits may result in the judicial imposition of an obligation to pay compensation where regulatory activity is found to have taken private property. In other cases, state agency or local government regulations may be invalidated, and there may be liability for actions taken under those regulations if they are found to exceed applicable constitutional limitations."

The document has an "Executive Summary", which includes the following paragraphs. "The government also may limit the use of property through land use planning, zoning ordinances and development regulations, setback requirements, environmental regulations, and similar regulatory limitations. Land uses may be limited through conditions such as the granting of easements and exactions of private property for public use that are addressed to identifiable impacts from land use activities." "Nevertheless, courts have recognized that if government regulations go 'too far,' they may constitute a taking of property. This does not necessarily mean that the regulatory activity is unlawful, but rather that the payment of just compensation may be required. The rationale is based upon the notion that some regulations are so severe in their impact that they are the functional equivalent of an exercise of the government's power of eminent domain (i.e., the formal condemnation of property for a public purpose that requires the payment of 'just compensation')."

After the "Executive Summary", the memorandum goes on to list 5 "warning signals" which may indicate a constitutional issue should be considered. Then there is discussion of constitutional principles, which includes regulatory takings as in Eminent Domain. Item 2 in this category is headed "Balancing the Severity of Regulatory Activity". Here we find: "In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, the courts weigh the public purpose of the regulatory action against the impact on the landowner's vested development rights. Courts also consider whether the government could have achieved the stated public purpose by less intrusive means. One factor used to assess the economic impact of a permit condition is the extent to which the condition interferes with a landowner's reasonable investment-backed development expectations."

If you wish to examine this document for yourself, access the internet at www.balancedrights.org. Scroll down partway and select on left Bainbridge Citizens United. When there, select at top right Attorney General's Advisory.

Government gobbles landowners' rights

By Paula Easley

When it comes to protecting property rights — that pesky constitutional principle that underlies all freedoms — sometimes people get it and sometimes they don't. When the U.S. Supreme Court ruled against Susette Kelo in the now-famous Connecticut eminent domain case, people got it.

That the 5-4 decision generated such a national outcry was astonishing. People perceived eminent domain as a last-resort tool when land was needed for public roads, schools and the like. But the Constitution's "public use" definition has changed by recent practice to mean "public benefit," a term akin to defining a wetland, which is anything the government says it is.

Virtually the only unabashedly favorable editorial support for the decision came from The New York Times, which one would expect to vigorously denounce Big Business's trampling of the little guy, as occurred in Kelo. I wondered why. Lo and behold, I read that The New York Times coveted some nearby Manhattan land for a new 52-story headquarters, land occupied by 30 companies in 11 buildings. Rather than purchase the properties, the Times and its partner got a state development corporation to condemn them and notify the tenants to relocate.

The parcels were acquired at a steep discount ($85 million) from the agency that seized the buildings. Taxpayers would foot the difference if acquisition costs exceeded that amount. Government agencies also provided some $20 million in tax breaks and authorized building 40 percent more space than zoning limits allowed. Aside from the victimization of the 30 businesses, it was easy to see how a short-sighted assault on property rights could become a long-term threat to democracy.

I talked to Michael Pattinson, a land developer in Carlsbad, Calif., about the ruling. He commented, "For 30 years (government agencies) have been begging, borrowing and stealing trillions of dollars of private property with little or no compensation and little outrage. But in Connecticut, the Supreme Court allows a city to take a few homes — even when it pays for them — and the anger falls like acid rain."

Pattinson said in an editorial that more private land in California had been "reallocated" to frogs, sheep, shrimp, snails and grasshoppers than was used by every urban community in the state. "The wholesale destruction of our property rights means that only 6.4 percent of San Diego residents can afford an average-priced home. In Orange County it's 3.8 percent. The rest of the state is not much better off. Yet no one seems to notice."

He's right. Americans seem oblivious of government's confiscating private property through regulation; yet it happens repeatedly. The biggest culprits have been punitive endangered species and wetlands regulations. Speaking to a University of Alaska class about this, I explained why regulatory takings of private land without compensation should be outlawed. Still, the students argued it was justified for the "greater welfare of the community." Their collectivist logic would have government decide the public interest and allocate resources, with no regard for the plans of individuals who happened to own those resources.

So I posited: Suppose the Anchorage Assembly declared it in the community's interest for certain property owners to provide shelter for the homeless. You are arbitrarily selected to construct and maintain a dwelling in your back yard for a homeless family. To assure the family's privacy, you are prohibited from entering that part of your property. Oh, and your costs can't be reimbursed, and you can't sue the city because you still own the land. Would you comply?

Presented in those terms, they got it. Not one student would comply (and a new Assembly would likely be elected). So what is the difference between being conscripted into public service for human caretaking or being named guardian of a red-legged frog? Or being prohibited from disturbing your private wetlands? There is no difference. In each case someone is being forced to provide a public good that the community as a whole should willingly fund if the cause is that valued.

Congress and 30 states are now addressing legislation to "take back the Fifth." You can help. One organization that has long advocated restoring basic property rights is Pacific Legal Foundation. Just last month the foundation was back before the Supreme Court defending John Rapanos in his pseudo-wetlands case. The address is: Pacific Legal Foundation, 3900 Lennane Drive, No. 200, Sacramento, CA 95834. It's a good way to make a difference.

Paula Easley, an Anchorage public policy consultant, is vice chairwoman, Nationwide Public Projects Coalition; president, Alaska Land Rights Coalition; and board member, Resource Development Council of Alaska and Arctic Power.

The Bureaucrat in Your Shower

By Jeffrey Tucker

The Department of Energy may soon be paying a visit to a certain showerhead manufacturer in Arizona. The company is Zoe Industries Manufacturing. It runs Showerbuddy.com, a popular site that sells amazing equipment for bathrooms.

Consumers love the company but one man doesn't. He is Al Dietemann, head of conservation for the Seattle Water Board. Al ordered some products and sent them to BR Laboratories in Hungtington, California, according to the Seattle Post-Intelligencer. And sure enough, Bureaucrat Al gained enough data to report Zoe to the feds, accusing Zoe of "blatant violations of environmental protection laws." Now the heat is on.

What's the big deal? What critical matter of American public life is at stake? It's all about water flow and gallons per minute.

You might have some vague memory from childhood, and perhaps it returns when visiting someone who lives in an old home. You turn on the shower and the water washes over your whole self as if you are standing under a warm-spring waterfall. It is generous and therapeutic. The spray is heavy and hard, enough even to work muscle cramps out of your back, enough to wash the conditioner out of your hair, enough to leave you feeling wholly renewed — enough to get you completely clean.

Somehow, these days, it seems nearly impossible to recreate this in your new home. You go to the hardware store to find dozens and dozens of choices of showerheads. They have 3, 5, 7, even 9 settings from spray to massage to rainfall. Some have long necks. Some you can hold in your hand. Some are huge like the lid to a pot and promise buckets of rainfall. The options seem endless.

But you buy and buy, and in the end, they disappoint. It's just water, and it never seems like enough.

Why? As with most things in life that fall short of their promise, the government is involved. There are local regulations. Here is one example of a government regulation on the matter, from the Santa Cruz City Water Conservation Office: "If you purchased and installed a new showerhead in the last ten years, it will be a 2.5 gpm [gallons-per-minute] model, since all showerheads sold in California were low consumption models beginning in 1992."

You mean they regulate how much my shower sprays? Yes indeed they do. Government believes that it has an interest in your shower? Yes it does.

And it is not just crazy California. The Federal Energy Policy Act of 1992 mandates that "all faucet fixtures manufactured in the United States restrict maximum water flow at or below 2.5 gallons per minute (gpm) at 80 pounds per square inch (psi) of water pressure or 2.2 gpm at 60 psi."

Or as the Department of Energy itself declares to all consumers and manufacturers: "Federal regulations mandate that new showerhead flow rates can't exceed more than 2.5 gallons per minute (gpm) at a water pressure of 80 pounds per square inch (psi)."

As with all regulations, the restriction on how much water can pour over at once while standing in a shower is ultimately enforced at the point of a gun.

Manufacturers must adhere to these regulations under penalty of law, and to be on the safe side, and adjust for high-water pressure systems, they typically undershoot. If you try your showers right now, you will probably find that they dispense water at 2 gallons per minute or even less. Together with other regulations concerning water pressure, your shower could fall to as low as 1.5 gallons per minute!

This creates a rather serious problem for nearly everyone in the country. America is the land of the shower. Popular lore holds that Americans are some of the most showered people in the world, and this stands in contrast to, well, to lands of the less showered. (Not naming any names!)

As for Zoe Industries, they set out to address this strange problem that has made our showers less functional than they ought to be.

They are not water anarchists; we aren't talking about shower-reg secessionists here. But the company did insightfully observe that the restriction applies on a per-shower-head basis.

Zoe Captain's Quarters Chrome Shower Head Model 520530

So Zoe sells full units that have three full heads per shower! What a solution — truly in the spirit of American enterprise in the best sense. These remarkable units are both brilliant and beautiful, and they comply with the letter of the law. The one that annoyed Bureaucrat Al is the "Nautilus II Chrome" — and what a piece of work it is!

If it turns out that the feds can't prove him in violation, Congress might have to go back to work. The regs might have to be changed to specify one head per shower space.

But then what can the government do about the length of showers? After all, there is no real way to regulate how much water we use (and pay for). Maybe the showerheads have to have timers on them. And maybe the feds need to put up little monitors in our showers to make sure that we have stopped and started them.

And what happens to shower offenders? One can see federal S.W.A.T. Teams screeching up to your house, black-clad men pouring out, securing the perimeter, and shouting through a bull horn: "Drop the soap and come out of the shower with your hands up!"

Most manufacturers adhere to the regulations. But savvy consumers know how to get around the problem.

Warning: The following section is for information purposes only; I am not advocating egregious violations of federal law as some trouble-making rebel might. Do not endanger your status as a law-abiding citizen who takes wimpy showers.

Many people now hack their showers — or customize them, if you prefer. You can take your showerhead down, pull the washer out with a screwdriver, and remove the offending intrusion that is restricting water flow. It can be a tiny second washer or it can be a hard plastic piece. Just pop it out and replace the washer. Sometimes it is necessary to trim it out using a pen knife.
Using such strategies, you can increase your water flow from 2 gallons per minute to 3 and even 4 gallons per minute. You can easily clock this using a stopwatch and a milk carton.

Using this method (just as an experiment for the sake of journalism — again, do not try this at home) I was easily able to expand my gallons per minute on each shower in my house to an average of 3.4 gpm, thereby recreating that childhood sense of gushes of water pouring down.

Now, that doesn't compare to the amazing 12.7 gallons per minute that BR Labs claims they were able to clock with the Nautilus II (wow wow wow!) but it still exceeds federal regulations.

Why would anyone want to do this? According to the head of Zoe Industries, people somehow have the sense that I described above. "Generally, they don't like the water savers," he says, "the flow of water is too weak and they feel as though they haven't gotten a shower."

The whole craziness here recalls the similar frenzy about toilet tank size that resulted from the same act of Congress. Eventually manufacturers figured out ways to make the toilets flush but, even today, you never want a plunger to be too far from the toilet. Thus has it spawned an entire industry of designer plungers!

You might say that water needs to be conserved. Yes, and so does every other scarce good. The peaceful way to do this is through the price system. But because municipal water systems have created artificial shortages, other means become necessary. One regulation piles on top of another, and the next thing you know, you have shower commissars telling you what you can or cannot do in the most private spaces.

Has central planning ever been more ridiculous, intrusive, and self-defeating?

If Zoe Industries is bankrupted by federal fines, who will stand up for our rights to take showers our own way and make our own judgments about how much water to use?

Jeffrey Tucker is editor of mises.org. A special thanks to all the colleagues with whom he discussed this subject obsessively for a couple of days, and from whom he took any valuable insights.

Environmental Law 101

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All this is not to say that state power should always give way to voluntary purchase. I have no doubt that if somebody wants to go out with a gun and exterminate all members of some rare bird species, the only appropriate response is to punish him. To buy him off is to invite a run on shotguns, for enough dubious characters would be willing to brandish a shotgun and yell, "Hey, pay me off too, buster!" That cannot be allowed to work. So long as new entrants can destroy the wildlife, then the only way to stop them is by the use of force. Alternatively, when only one person owns the habitat, the voluntary purchase of the habitat by the government does not invite the same reckless follow-on behavior by other persons. The government as owner now has title to the habitat—title that is good against the rest of the world.

THE MEN OF 1215

The lesson that we should take away from these examples is that good, rudimentary economic theory gives a clear view of the issue. It may well be that the men of 1215 did not understand the fine points of the common-law system they developed. But they surely built better than they knew. In large measure our job is not to dismantle the structures they put together but to explain why they rest on firm foundations that should be respected and applied to the problems of our time. In a free society we should always use our modern intellectual tools to explain and defend our ancient and honorable institutions. That proposition applies to environmental protection and property rights as much as it does to any other area.

Richard A. Epstein is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago.

From the President

Rodney McFarland

Hippodamus of Miletus was a Greek architect of the 5th century BC. He was the first practitioner of urban central planning. His first project was the city of Miletus, an ancient city on the western coast of Anatolia (in what is now the Aydin Province of Turkey), near the mouth of the Maeander River. The site had been inhabited since the Bronze Age. It is first mentioned in Hittite records as Millawanda. In the time of Hittite king Mursili II (ca. 1320 BC), Millawanda became a bridgehead for the expansion of the Mycenean Greeks in Asia Minor. Miletus was an important center of philosophy and science, producing such men as Thales (who Aristotle called the founder of natural philosophy), Anaximander and Anaximenes. It was where Hecataeus invented geography. It was destroyed by the Persians in 494 BC, after they had defeated the navy of the Ionian Greeks at Lade. Miletus was rebuilt on a promontory, north of the old town. The gridiron plan of the new town, designed by Hippodamus, became the standard for urban planning. One photograph that accompanies this article shows a model of the rebuilt city; the other shows how it looks now.

A cynic might say that the two photos are proof that good central planners can indeed reverse growth and recreate functioning wetlands.

Most central planners would have you think that their profession was recently created and has newly invented "smart growth" and "sustainable development" and "livable cities." The truth is that the problems that they would like you to think that only they can fix are the results of previous plans by central planners.

They wring their hands and beat their breasts because those who live in suburbia must drive long distances to work, shop, recreate, and worship. Do they think we are so dumb that we do not know it was the zoning forced by central planners and their political supporters that prevented all those types of use in suburbia? Perhaps it is they who are too dumb to be in charge of the current "smart growth" experiment that will cause all the problems for the next generation of central planners.

King County DDES is systematically removing all uses except housing and hobby farming (mostly horses) in the RA zones of rural King County and calling it growth management. King County staff routinely call the RA zones "residential area," not "rural agricultural." Homes on five-acre lots (the RA zone minimum) where people sleep and then commute to their job in the city is the definition of suburban sprawl. Rural to me (born in South Dakota) is where you can live and work on the same ground. If you don't want an "economy" sullying where you sleep, buy a home in a subdivision with strong covenants instead of moving to the country and trying to change your neighbor's uses.

Smart growth proponents cry endlessly about expensive infrastructure outside the Urban Growth Line while forcing the sales tax dollars of rural residents into the cities so they can afford their infrastructure. Meanwhile residents of unincorporated King County pay a property tax rate of 14.23585 compared to Kirkland at 9.99742 or Mercer Island at 8.60698 or Medina at 7.91028 or even Seattle at 12.18121.

The following quote is from an article "Smart Growth, Open Space & Farm Land" by Smart Growth America, a coalition of major Smart Growth organizations.

"Cost of Community Services (COCS) studies conducted in more than 83 communities show that owners of farm, forest and open lands pay more in local tax revenues than it costs local government to provide services to their properties. Residential land uses, in contrast, are a net drain on municipal coffers: It costs local governments more to provide services to homeowners than residential landowners pay in property taxes."

It turns out that "saving farms and forests" is just a Machiavellian scheme to reduce the taxes of city folks. We couldn't possibly provide rural folks some of the services for which they are taxed!

As the Property Fairness Initiative makes its way to the ballot, Futurewise et al. will carpet bomb Washington with the message that only they can save Washington from, well, them! When they talk about a "Developer's Initiative" go reread the amicus brief that their buddies at Master Builders wrote for them in *1000 Friends of Washington v. McFarland*. When they talk about managing growth remember the picture of modern day Miletus.

The right to life is the source of all rights — and the right to property is their only implementation. Without property rights, no other rights are possible. Since man has to sustain his life by his own effort, the man who has no right to the product of his effort has no means to sustain his life. The man who produces while others dispose of his product is a slave.

— Ayn Rand, The Virtue of Selfishness

Citizens' Alliance for Property Rights
Monthly Public Meeting

First Thursday of each month at IHOP
1433 NW Sammamish Road, Issaquah WA
Dinner at 6:00 p.m. — Business meeting at 7:00 p.m.

The Mis-Education of a Swedish Scientist

By Nima Sanandaji

As I walked through the corridors of the chemistry department at Chalmers University of Technology one last time, minutes after having completed my last assignment leading to a Masters Degree in biotechnology, I noticed a poster on the door:

SUSTAINABLE DEVELOPMENT
Win a printer, tickets to the European Championship in athletics.
Screening of the movie 'The Day After Tomorrow'.
Ecological wine-tasting with professionals from Systembolaget (the authorized distributor).
Free food!
Film room with documentaries.
Lectures on the environment, economy and gender equality.

I shook my head. The systematic indoctrination of students in Swedish universities keeps fascinating me even after five years of studies. Having been taught as a fact that global warming will destroy the planet in the science classes during high school I was, like most students that took an interest in the natural sciences, obsessed with saving the planet from the evil oil companies and the greedy Americans when I began my college studies.

Since the Swedish government has decided that every single education must include both an "ecological" and a "gender" perspective, the doomsday theories of global warming and the ideas of post-modern Marxist feminists were included in many courses. Perhaps the best example from my own studies was when I took a course in human ecology. During the first lecture the speaker proudly explained to us that the institution had been born out of the 1968 left-wing radical wave. And so the course went on explaining how socialism and an "ecological" society was the only solution for a planet soon to be exploited to death by the evil Americans, led by their conservative ideology and profits from oil companies.

One of the lecturers talked for more than one hour about the "ecological villages" that existed in Sweden, about how you could make your own hut out of natural materials and the morality of living in a society without modern technology. He had lived in almost all such villages in Sweden and frankly said that most people involved in this radical environmental movement were members of sects. Still, we were encouraged to learn how we could contact the various groups. The other lecturer was not much better, explaining the ideas of post-modern Marxism and talking hatefully about the US rather than teaching us a single fact in his supposedly scientific field.

It is not a matter of chance that the movie "The Day After Tomorrow" is screened to students on the day they are to learn about environmental issues. The scientific level of what is taught about global warming in Swedish colleges never rises higher than this movie, which is about as reality-based as "King Kong".

When I began working on a scientific study regarding bioethanol production I had to look at the actual science behind climate change, as this is the main motivation behind why the techniques of bioethanol production should be developed. Gradually, I began to realize that what we were told in college and high school was more or less a matter of indoctrination. Certainly, the release of greenhouse gases may affect temperature. But it appears likely that this effect will be negligible or at least manageable. In addition, there is absolutely no reason to rule out natural temperature variations as the dominating force behind the temperature variations our planet experiences. More importantly, the claims that everything from the hurricanes in the US to the tsunami in Asia were caused by global warming are clearly not supported by science.

The real problem is, nobody gives you the other side of the argument in an academic environment where the government has forced environmentalism and radical leftwing feminism into every education. Students are offered free food and free ecological wine from the government controlled alcohol distributor Systembolaget (a state monopoly controlled by the wife of the Prime Minister) while they watch ridiculous science fiction movies. This is the Swedish version of the indoctrination I saw as a young boy in an Iranian school named after a suicide bomber. Being forced to shout "Death to America" and "Death to Israel" in the school yard is at least an open form of propaganda. The Swedish version allows you to drink wine, feel intellectual and perhaps even win a printer, but is not much less biased.

The author is the president of the Swedish free market think tank Captus (www.captus.nu). He is also a PhD student in biochemistry at the University of Cambridge.

County Choice Initiative

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that will more appropriately represent them. This County Choice initiative would finally put that "general law applicable to the whole state" into place.

The smallest Washington county is Garfield County with a population of 2,397 so each commissioner represents 799 people. The largest Washington county is King County with a populations of 1,777,143 so each councilperson represents 197,460 people.

Thirteen states have populations less than King County. They all have multiple counties or county equivalents (boroughs, parishes, etc.) They average 31 counties.

The population of Washington is 6,203,788. There are 39 counties so the average county size is 159,071. If you take out King County, the average size is 116,491.

The population of the United States is 281,421,906. There are 3,141 county equivalents for an average county size of 89,596. Washington could be divided into 69 average size counties. King County could be divided into 20 average size counties.

Please sign the County Choice petition and ask your family, friends and neighbors to sign.