

The following op-ed on Gale Norton's views on property rights and federalism appeared in the January 22, 2001 *National Law Journal*.

Nominee's Interior Stress

By John D. Echeverria

The ongoing debate over Gale Norton's controversial nomination as Secretary of the Interior, whatever its outcome, should shed some light on the contradiction running through the heart of the legal philosophy that Ms. Norton would bring to environmental and natural-resource issues.

As recent press accounts confirm, Ms. Norton has long espoused two basic beliefs. The first, rooted in the constitutional doctrine of federalism, is that the national government's regulatory authority in environmental matters should be delegated to state and local governments. Government that is closer to the people, according to her view, is more competent than the national government to address environmental problems in a way that responds to the needs and wishes of affected citizens.

Her second strongly held belief relates to the sanctity of property rights under the federal Constitution, and the Takings Clause of the Fifth Amendment in particular. Government regulation restricting private exploitation of land and other resources, according to her view, too often tramples on these rights. Federal courts should permit such regulations to go forward only if the public pays 'compensation' for the economic burden such regulations allegedly impose on land owners.

Each of these positions, widely embraced in conservative circles, is contestable on its own terms. The problems of species loss from over-development or coal mining (both issues within the purview of the Interior Department) transcend municipal and state boundaries and are best assigned (at least in the first instance) to the national government, as federal law now provides.

As to property rights, most scholars have concluded that the founding fathers did not intend to immunize private property from regulations that safeguard the public welfare. The extreme property rights views Ms. Norton has expressed in the past therefore have little legal support.

As a policy matter, an expansive view of private property rights would tend to undermine government's ability to protect the environment by imposing burdensome new costs on regulatory programs, and could enrich the already well-to-do at taxpayer expense, or both.

Confusion of issues.

The most striking point, however, is that Ms. Norton's publicly expressed legal philosophy is at war with itself. Promotion of federalism celebrates the idea that different communities will adopt different solutions to environmental and natural-resource problems. But an expansive judicial interpretation of property rights would undermine federalism by creating a legal strait jacket for state and local regulators.

If the responsibility for endangered species were delegated to the states, but an expansive view of private property rights sharply constrained the scope for state regulation, the ostensible federalism benefits of delegation would be defeated. Likewise, if the federal government assigned responsibility to regulate coal mining to the states, an expansive interpretation of private property rights would simultaneously immunize coal mine operators from effective state regulation.

Broad protection for private property rights under the federal Constitution would also constrain state and local governments from addressing environmental problems in which neither the Department of the Interior nor any other federal agency has much involvement. Sprawling development patterns are a pressing issue for many states and localities. A strict judicial standard for protection of private property would limit the tools for managing growth.

There is, of course, at least one consistent thread that runs through Ms. Norton's publicly stated positions: a hostility to the exercise of government regulatory authority, at any level, to protect the environment. A broad delegation of federal power advances that position in part by disabling the federal government from enacting strong regulatory polices. The property rights position delivers the coup de grace by disabling state and local governments from doing so either.

The position that representative government should be stripped of authority to protect the environment would most assuredly be rejected by a majority of the American people, as confirmed by much polling and other data. Ms. Norton's advocacy of irreconcilable ideas about federalism and property rights protection only serves to frustrate public understanding of her fundamental agenda.