

INTRODUCTION: FEDERALISM IN CONSTITUTIONAL CONTEXT

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My name is Max Boot, and I am with the Wall Street Journal editorial page. I welcome all of you, for those who have not been formally welcomed, to the heart of the right-wing conspiracy.

This panel discussion, as I am sure all of you know, is on how to entrap the President into committing perjury. The one on how to plant nubile young interns in the Oval Office—that is the topic of the next panel. Actually, I suppose that, if Hillary Clinton, the conspiracy buff, or Sidney Blumenthal were here, they would be deeply disappointed to see us discussing such an academic issue as federalism. Mrs. Clinton would probably realize this was all a ruse for our true secret agenda, and no doubt seeing a member of the Wall Street Journal editorial page convening with the Federalist Society would only heighten her suspicions. But I would venture that if Hillary Clinton were to take off her conspiracy-buff hat and put on her lawyer hat, as a good graduate of Yale Law School, as are all the other members of this panel, she would be excited by the topic we are discussing. It has become evident that federalism really is one of the most exciting areas of law at the moment. There is much activity surrounding this topic, and I think it is fitting that it is being discussed in the Federalist Society. The interesting thing about federalism is that normally one would think of it as a real slam-dunk issue for those of us on the right, for those who are associated with the Federalist Society. What might not be so obvious, however, is that there are cleavages within the topic of federalism which raise some difficult questions about ends and means on issues that we have heard discussed, like partial-birth abortion, tort reform, and tough-on-crime measures.

These are issues where people on the right largely support

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the policy outcomes, but we have to ask ourselves whether we are being principled in supporting them. For instance do we support these decisions even if they are infringements on federalism? That is the difficult issue to wrestle with. It is an issue I wrestle with in my own writing. An example of this is a case like *BMW v. Gore*,¹ which imposes a very vague and hard-to-quantify cap on punitive damages. I support the policy outcome of capping punitive damages.² The reliance on substantive due process to achieve that policy outcome, however, really makes me suspicious. This is but one example of an issue that is extremely complicated to wrestle with, but at the same time is very interesting intellectually. We are fortunate that the learned participants of this panel have decided to turn their attention to this issue.

1. 517 U.S. 559 (1996).

2. *See id.* at 568.