

# Al Gore as John C. Calhoun?

by Max Schulz

The Sunshine State Spectacle has produced numerous instances of Democratic lying, fibbing, and dissembling, from the effort to disqualify legitimate military absentee ballots -- all the while screaming that "every" vote should count-- to the claim that an "angry mob" of Capitol Hill frat boys frightened canvassers into foregoing the legitimate counting of ballots.

Amid all this, though, the Gore camp set new records for disingenuousness with its claim that the Supreme Court shouldn't even be considering the argument it heard yesterday. It isn't the Supreme Court's business, they say. The state of Florida (and its courts) can handle the situation just fine. Butt out, in other words.

It is an argument Gore made before the Supreme Court last week, and one that he made again yesterday -- albeit with a different counsel (David Boies pinch-hitting for the benched Laurence Tribe). "We think it is unfortunate that Governor Bush's campaign has taken this to the courts," said Gore uberlawyer Boies at Sunday's press conference. "But certainly one argument that's very important is that there is no federal question here. This is a matter of state law....So I think one of the things we would be urging the United States Supreme Court is that this is a matter of state law, state law is deserving of deference, and that the United States Supreme Court ought not to step in and substitute its judgment as to what the intent of the voter was for the judgment of the state officials that, under law, have that obligation."

Fascinating, this seemingly new respect the Gore team has for the principles of federalism.

Let's leave aside the question of whether the Bush camp is being inconsistent in appealing to the federal Supreme Court. (As the *New Republic's* Andrew Sullivan noted in an exceptional Sunday *Washington Post* piece, Bush "could argue that he is playing defense -- with some cogency. When your opponent launches a scorched-earth legal strategy, you have little choice but to respond in kind.") What makes Gore and Co.'s display such an astonishing act of chutzpah is that for decades they have consistently rejected, stomped on, undercut, and otherwise abused basic notions of federalism, states' rights, and the idea that law is something produced by democratically selected bodies.

Whether it's the first or the last resort, the federal courts have always been viewed by Gore types as the best resort for enforcing and codifying liberal policies, particularly ones unlikely to be enacted democratically. Democracy is a serviceable principle as long as they are in the majority. If that doesn't work, go to court. Abortion serves as the prime example. The Supreme Court in 1973 announced that for all intents and purposes, abortion was to be treated as a fundamental human right. Virtually any and all democratic attempts to address the subject, even in the most oblique way, the Court later asserted, are forbidden.

*Roe v. Wade* was perhaps the most brazen power play in American political history, an end run around democracy based on legal "reasoning" so porous and faulty as to make Roger Taney's *Dred Scott* decision seem sensible. The practical effect was that the Court just made up its own idea of what the law should be. Deciding that the people and their legislative representatives are incapable of considering the question of abortion, the Court in effect told the country, "We know what's best for you."

Liberals cheered. It's not just abortion that's the cherished domain of the left, it's *Roe V. Wade*, hailed as an enlightened example of jurisprudence. The fact it has nothing to do with how law is supposed to be made is of little concern, which is why Gore's claim that we must trust the voters and democracy rings hollow. *Roe v. Wade*, the most sacrosanct of the left's sacred cows, is about as contemptuous of the idea of democracy as anything ever attempted by a tin-pot Latin American dictator.

The left has gone to the courts for other issues, too. Patriotism isn't the last refuge of a scoundrel these days; the federal courts are. In fact, the federal judiciary increasingly is expected to be the final arbiter of public policy issues as varied as the environment, civil rights for the handicapped, and the administration of local school districts. In the liberal imagination, law is something that starts out as legislation passed by Congress and signed by the president. But this is merely a rough draft, to be polished into final form by regulatory agencies and the courts.

According to this thinking, legislation merits little consideration as the will of the people demonstrated through the democratic process. The people, and their legislatures, might inform the process, but they don't define it. Judges -- smarter, more enlightened, more experienced than the rest of us -- are to be trusted for that.

Which is why it is shaping up as the supreme irony if the Supreme Court nails the final lid in the coffin of Al Gore's presidential hopes. The Boies Boyz rail against the specter of judicial activism they claim is represented by the Court's involvement in the election controversy. Even if that were the case (and I would argue that it's not, though that's a piece for another occasion), one would be hard-pressed to exhibit any sympathy for a group that has held judicial activism up as one of the greatest social goods of the past few decades. How deliciously ironic.

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