BUSH v GORE

531 U.S. 98 (2000)

Chief Justice Rehnquist, with whom Justice Scalia and Justice Thomas join, concurring.

We join the *per curiam* opinion. We write separately because we believe there are additional grounds that require us to reverse the Florida Supreme Court's decision.

I

We deal here not with an ordinary election, but with an election for the President of the United States. In *Burroughs* v. *United States,* 290 U.S. 534, 545 (1934), we said:

> "While presidential electors are not officers or agents of the federal government (*In re Green*, 134 U.S. 377, 379), they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated."

Likewise, in *Anderson* v. *Celebrezze,* 460 U.S. 780, 794—795 (1983) (footnote omitted), we said: "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation."

In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns. Cf. *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938). Of course, in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. See U.S. Const., Art. IV, §4. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, §1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct," electors for President and Vice President. (Emphasis added.) Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent

significance.

In *McPherson* v. *Blacker,* 146 U.S. 1 (1892), we explained that Art. II, §1, cl. 2, "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment. *Id*., at 27. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.

3 U.S.C. § 5 informs our application of Art. II, §1, cl. 2, to the Florida statutory scheme, which, as the Florida Supreme Court acknowledged, took that statute into account. Section 5 provides that the State's selection of electors "shall be conclusive, and shall govern in the counting of the electoral votes" if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the electoral college. As we noted in *Bush* v. *Palm Beach County Canvassing Bd., ante,* at 6.

> "Since §5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law."

If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the "safe harbor" provided by §5.

In Florida, the legislature has chosen to hold statewide elections to appoint the State's 25 electors. Importantly, the legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of State (Secretary), Fla. Stat. §97.012(1) (2000), and to state circuit courts, §§102.168(1), 102.168(8). Isolated sections of the code may well admit of more than one interpretation, but the general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies. In any election but a Presidential election, the Florida Supreme Court can give as little or as much deference to Florida's executives as it chooses, so far as Article II is concerned, and this Court will have no cause to question the court's actions. But, with respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate.

In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the

action of the court. Though we generally defer to state courts on the interpretation of state law–see, *e.g.*, *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975)–there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.

For example, in *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958), it was argued that we were without jurisdiction because the petitioner had not pursued the correct appellate remedy in Alabama's state courts. Petitioners had sought a state-law writ of certiorari in the Alabama Supreme Court when a writ of mandamus, according to that court, was proper. We found this state-law ground inadequate to defeat our jurisdiction because we were "unable to reconcile the procedural holding of the Alabama Supreme Court" with prior Alabama precedent. *Id*., at 456. The purported state-law ground was so novel, in our independent estimation, that "petitioner could not fairly be deemed to have been apprised of its existence." *Id*., at 457.

Six years later we decided *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), in which the state court had held, contrary to precedent, that the state trespass law applied to black sit-in demonstrators who had consent to enter private property but were then asked to leave. Relying upon *NAACP*, we concluded that the South Carolina Supreme Court's interpretation of a state penal statute had impermissibly broadened the scope of that statute beyond what a fair reading provided, in violation of due process. See 378 U.S., at 361—362. What we would do in the present case is precisely parallel: Hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.[1]

This inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

II

Acting pursuant to its constitutional grant of authority, the Florida Legislature has created a detailed, if not perfectly crafted, statutory scheme that provides for appointment of Presidential electors by direct election. Fla. Stat. §103.011 (2000). Under the statute, "[v]otes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates." *Ibid*. The legislature has designated the Secretary of State as the "chief election officer," with the responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." §97.012. The state legislature has delegated to county canvassing boards the duties of administering

elections. §102.141. Those boards are responsible for providing results to the state Elections Canvassing Commission, comprising the Governor, the Secretary of State, and the Director of the Division of Elections. §102.111. Cf. *Boardman* v. *Esteva,* 323 So. 2d 259, 268, n. 5 (1975) ("The election process . . . is committed to the executive branch of government through duly designated officials all charged with specific duties … . [The] judgments [of these officials] are entitled to be regarded by the courts as presumptively correct . . . ").

After the election has taken place, the canvassing boards receive returns from precincts, count the votes, and in the event that a candidate was defeated by .5% or less, conduct a mandatory recount. Fla. Stat. §102.141(4) (2000). The county canvassing boards must file certified election returns with the Department of State by 5 p.m. on the seventh day following the election. §102.112(1). The Elections Canvassing Commission must then certify the results of the election. §102.111(1).

The state legislature has also provided mechanisms both for protesting election returns and for contesting certified election results. Section 102.166 governs protests. Any protest must be filed prior to the certification of election results by the county canvassing board. §102.166(4)(b). Once a protest has been filed, "the county canvassing board may authorize a manual recount." §102.166(4)(c). If a sample recount conducted pursuant to §102.166(5) "indicates an error in the vote tabulation which could affect the outcome of the election," the county canvassing board is instructed to: "(a) Correct the error and recount the remaining precincts with the vote tabulation system; (b) Request the Department of State to verify the tabulation software; or (c) Manually recount all ballots," §102.166(5). In the event a canvassing board chooses to conduct a manual recount of all ballots, §102.166(7) prescribes procedures for such a recount.

Contests to the certification of an election, on the other hand, are controlled by §102.168. The grounds for contesting an election include "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." §102.168(3)(c). Any contest must be filed in the appropriate Florida circuit court, Fla. Stat. §102.168(1), and the canvassing board or election board is the proper party defendant, §102.168(4). Section 102.168(8) provides that "[t]he circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances." In Presidential elections, the contest period necessarily terminates on the date set by 3 U.S.C. § 5 for concluding the State's "final determination" of election controversies."

In its first decision, *Palm Beach Canvassing Bd.* v. *Harris*, ___ So. 2d, ___

(Nov. 21, 2000) (*Harris I*), the Florida Supreme Court extended the 7-day statutory certification deadline established by the legislature.[2] This modification of the code, by lengthening the protest period, necessarily shortened the contest period for Presidential elections. Underlying the extension of the certification deadline and the shortchanging of the contest period was, presumably, the clear implication that certification was a matter of significance: The certified winner would enjoy presumptive validity, making a contest proceeding by the losing candidate an uphill battle. In its latest opinion, however, the court empties certification of virtually all legal consequence during the contest, and in doing so departs from the provisions enacted by the Florida Legislature.

The court determined that canvassing boards' decisions regarding whether to recount ballots past the certification deadline (even the certification deadline established by *Harris I*) are to be reviewed *de novo*, although the election code clearly vests discretion whether to recount in the boards, and sets strict deadlines subject to the Secretary's rejection of late tallies and monetary fines for tardiness. See Fla. Stat. §102.112 (2000). Moreover, the Florida court held that all late vote tallies arriving during the contest period should be automatically included in the certification regardless of the certification deadline (even the certification deadline established by *Harris I*), thus virtually eliminating both the deadline and the Secretary's discretion to disregard recounts that violate it.[3]

Moreover, the court's interpretation of "legal vote," and hence its decision to order a contest-period recount, plainly departed from the legislative scheme. Florida statutory law cannot reasonably be thought to *require* the counting of improperly marked ballots. Each Florida precinct before election day provides instructions on how properly to cast a vote, §101.46; each polling place on election day contains a working model of the voting machine it uses, §101.5611; and each voting booth contains a sample ballot, §101.46. In precincts using punch-card ballots, voters are instructed to punch out the ballot cleanly:

AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.

Instructions to Voters, quoted in *Touchston* v. *McDermott*, 2000 WL 1781942, *6 & n. 19 (CA11) (Tjoflat, J., dissenting). No reasonable person would call it "an error in the vote tabulation," Fla. Stat. §102.166(5), or a "rejection of legal votes," Fla. Stat. §102.168(3)(c),[4] when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify. The scheme that the

Florida Supreme Court's opinion attributes to the legislature is one in which machines are *required* to be "capable of correctly counting votes," §101.5606(4), but which nonetheless regularly produces elections in which legal votes are predictably *not* tabulated, so that in close elections manual recounts are regularly required. This is of course absurd. The Secretary of State, who is authorized by law to issue binding interpretations of the election code, §§97.012, 106.23, rejected this peculiar reading of the statutes. See DE 00—13 (opinion of the Division of Elections). The Florida Supreme Court, although it must defer to the Secretary's interpretations, see *Krivanek* v. *Take Back Tampa Political Committee*, 625 So. 2d 840, 844 (Fla. 1993), rejected her reasonable interpretation and embraced the peculiar one. See *Palm Beach County Canvassing Board* v. *Harris*, No. SC00—2346 (Dec. 11, 2000) (*Harris III*).

But as we indicated in our remand of the earlier case, in a Presidential election the clearly expressed intent of the legislature must prevail. And there is no basis for reading the Florida statutes as requiring the counting of improperly marked ballots, as an examination of the Florida Supreme Court's textual analysis shows. We will not parse that analysis here, except to note that the principal provision of the election code on which it relied, §101.5614(5), was, as the Chief Justice pointed out in his dissent from *Harris II*, entirely irrelevant. See *Gore* v. *Harris*, No. SC00-2431, slip op., at 50 (Dec. 8, 2000). The State's Attorney General (who was supporting the Gore challenge) confirmed in oral argument here that never before the present election had a manual recount been conducted on the basis of the contention that "undervotes" should have been examined to determine voter intent. Tr. of Oral Arg. in *Bush* v. *Palm Beach County Canvassing Bd.,* 39—40 (Dec. 1, 2000); cf. *Broward County Canvassing Board* v. *Hogan*, 607 So. 2d 508, 509 (Fla. Ct. App. 1992) (denial of recount for failure to count ballots with "hanging paper chads"). For the court to step away from this established practice, prescribed by the Secretary of State, the state official charged by the legislature with "responsibility to … [o]btain and maintain uniformity in the application, operation, and interpretation of the election laws," §97.012(1), was to depart from the legislative scheme.

III

The scope and nature of the remedy ordered by the Florida Supreme Court jeopardizes the "legislative wish" to take advantage of the safe harbor provided by 3 U.S.C. § 5. *Bush* v. *Palm Beach County Canvassing Bd., ante,* at 6. December 12, 2000, is the last date for a final determination of the Florida electors that will satisfy §5. Yet in the late afternoon of December 8th–four days before this deadline–the Supreme Court of Florida ordered recounts of tens of thousands of so-called "undervotes" spread through 64 of the State's 67 counties. This was done in a search for elusive–perhaps delusive–certainty as to the exact count of 6 million votes. But no one claims that these ballots

have not previously been tabulated; they were initially read by voting machines at the time of the election, and thereafter reread by virtue of Florida's automatic recount provision. No one claims there was any fraud in the election. The Supreme Court of Florida ordered this additional recount under the provision of the election code giving the circuit judge the authority to provide relief that is "appropriate under such circumstances." Fla. Stat. §102.168(8) (2000).

Surely when the Florida Legislature empowered the courts of the State to grant "appropriate" relief, it must have meant relief that would have become final by the cut-off date of 3 U.S.C. § 5. In light of the inevitable legal challenges and ensuing appeals to the Supreme Court of Florida and petitions for certiorari to this Court, the entire recounting process could not possibly be completed by that date. Whereas the majority in the Supreme Court of Florida stated its confidence that "the remaining undervotes in these counties can be [counted] within the required time frame," ___ So. 2d. at ___, n. 22 (slip op., at 38, n. 22), it made no assertion that the seemingly inevitable appeals could be disposed of in that time. Although the Florida Supreme Court has on occasion taken over a year to resolve disputes over local elections, see, *e.g.*, *Beckstrom* v. *Volusia County Canvassing Bd.*, 707 So. 2d 720 (1998) (resolving contest of sheriff's race 16 months after the election), it has heard and decided the appeals in the present case with great promptness. But the federal deadlines for the Presidential election simply do not permit even such a shortened process.

As the dissent noted:

> "In [the four days remaining], all questionable ballots must be reviewed by the judicial officer appointed to discern the intent of the voter in a process open to the public. Fairness dictates that a provision be made for either party to object to how a particular ballot is counted. Additionally, this short time period must allow for judicial review. I respectfully submit this cannot be completed without taking Florida's presidential electors outside the safe harbor provision, creating the very real possibility of disenfranchising those nearly 6 million voters who are able to correctly cast their ballots on election day." ___ So. 2d, at ___ (slip op., at 55) (Wells, C. J., dissenting).

The other dissenters echoed this concern: "[T]he majority is departing from the essential requirements of the law by providing a remedy which is impossible to achieve and which will ultimately lead to chaos." *Id.,* at ___ (slip op., at 67 (Harding, J., dissenting, Shaw, J. concurring).

Given all these factors, and in light of the legislative intent identified by the Florida Supreme Court to bring Florida within the "safe harbor" provision of 3 U.S.C. §

5 the remedy prescribed by the Supreme Court of Florida cannot be deemed an "appropriate" one as of December 8. It significantly departed from the statutory framework in place on November 7, and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date.

For these reasons, in addition to those given in the *per curiam*, we would reverse.

Notes

1. Similarly, our jurisprudence requires us to analyze the "background principles" of state property law to determine whether there has been a taking of property in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights. See *Lucas* v. *South Carolina Coastal Council,* 505 U.S. 1003 (1992). In one of our oldest cases, we similarly made an independent evaluation of state law in order to protect federal treaty guarantees. In *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch 603 (1813), we disagreed with the Supreme Court of Appeals of Virginia that a 1782 state law had extinguished the property interests of one Denny Fairfax, so that a 1789 ejectment order against Fairfax supported by a 1785 state law did not constitute a future confiscation under the 1783 peace treaty with Great Britain. See *id.,* at 623; *Hunter* v. *Fairfax's Devisee*, 1 Munf. 218 (Va. 1809).

2. We vacated that decision and remanded that case; the Florida Supreme Court reissued the same judgment with a new opinion on December 11, 2000, ___ So. 2d, ___.

3. Specifically, the Florida Supreme Court ordered the Circuit Court to include in the certified vote totals those votes identified for Vice President Gore in Palm Beach County and Miami-Dade County.

4. It is inconceivable that what constitutes a vote that must be counted under the "error in the vote tabulation" language of the protest phase is different from what constitutes a vote that must be counted under the "legal votes" language of the contest phase.