

SARASOTA ALLIANCE FOR FAIR ELECTIONS, INC. v. BROWNING: THE IMPLIED END TO IMPLIED PREEMPTION

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I. INTRODUCTION

For thirty-six days in the fall of 2000, an anxious nation focused on Florida's scattered efforts to determine the winner of the presidential election.¹ The unprecedented attention revealed an election process suffering inconsistent local administration and other problems.² Ultimately, local officials' inconsistent vote-counting methods were the basis on which the United States Supreme Court resolved the disputed election.³ In its controversial *Bush v. Gore*⁴ decision, the Supreme Court found that Florida's disparate standards in determining voters' intent violated the Equal Protection Clause.⁵

There was much to be learned from the spectacle of 2000, and both Congress and the state legislatures immediately set out to

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1. See Lance deHaven-Smith, *The Battle for Florida: An Annotated Compendium of Materials from the 2000 Presidential Election* 15–24 (U. Press Fla. 2005) (chronicling the 2000 election from election day—November 7, 2000—to the day Al Gore conceded—December 13, 2000).

2. See e.g. Erwin Chemerinsky, *How Should We Think about Bush v. Gore?* 34 Loy. U. Chi. L.J. 1, 10 (2002) (discussing the “butterfly ballot” debacle in Palm Beach County, where a “hole next to Gore’s name was actually a vote for Patrick Buchanan”); R. Bradley Griffin, Student Author, *Gambling with Democracy: The Help America Vote Act and the Failure of the States to Administer Federal Elections*, 82 Wash. U. L.Q. 509, 509–510 (2004) (stating that the presidential election of 2000 revealed “the states’ inability to properly administer federal elections”); Barry H. Weinberg & Lyn Utrecht, *Problems in America’s Polling Places: How They Can be Stopped*, 11 Temp. Political & Civ. Rights L. Rev. 401, 427–433 (2002) (discussing the various problems that occurred at polling places in the 2000 election, such as irregularities in ballot design, ballot box tampering, and insufficient training of poll workers).

3. *Bush v. Gore*, 531 U.S. 98, 105–110 (2000).

4. 531 U.S. 98 (2000).

5. *Id.* at 103.

make improvements.⁶ Congress passed the Help America Vote Act of 2002,⁷ which prohibited certain types of voting systems, established minimum election administration standards, and implemented other reforms.⁸ Florida enacted substantial election changes of its own,⁹ establishing uniform procedures for poll-worker training¹⁰ and recounts,¹¹ as well as uniform mechanisms for certifying election results.¹² Underlying each reform was the Florida Legislature's goal of ensuring statewide consistency in the manner in which votes were cast, canvassed, and counted.¹³

Despite the Florida Legislature's substantial efforts to ensure uniformity, a Sarasota County political action committee proposed a county-charter amendment that would guarantee the opposite.¹⁴ The proposed amendment (the "Amendment" or the "SAFE Amendment") would have changed the way votes were cast, canvassed, and counted—but only in Sarasota County.¹⁵ In

6. Griffin, *supra* n. 2, at 523.

7. See generally 42 U.S.C. §§ 15301–15545 (2006) (enacted under the Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002)) (establishing minimum election-administration standards).

8. See Audra L. Wassom, *The Help America Vote Act of 2002 and Selected Issues in Election Law Reform*, 29 Thurgood Marshall L. Rev. 357, 359–368 (2004) (providing an overview of the Help America Vote Act).

9. "Not surprisingly, Florida was quick to act. The Florida Election Reform Act of 2001 provided for voting equipment upgrades, as well as poll[-]worker training, voter education, and a voter[-]registration database." Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 696 (2006); see Clifford A. Jones, *Out of Guatemala? Election Law Reform in Florida and the Legacy of Bush v. Gore in the 2004 Presidential Election*, 5 Election L.J. 121, 127–128, 130–134 (2006) (describing the changes that resulted from the Florida Election Reform Act of 2001); see generally 2001 Fla. Laws. ch. 2001-40.

10. 2001 Fla. Laws. ch. 2001-40 at § 102.014.

11. *Id.* at § 102.166.

12. *Id.* at § 102.111.

13. See Dana Canedy, *Florida Leaders Sign Agreement for Overhaul of Election System*, N.Y. Times A1 (May 4, 2001) (stating that, with the Florida Election Reform Act of 2001, the Florida legislature agreed to "ban punch-card ballot machines, give counties money for equipment[,] and set guidelines for recounts" in order "to avoid ever again becoming a national embarrassment"); see also Fla. Sen. Comm. Ethics & Elections, *CS/SB 1118: Florida Election Reform Act of 2001*, in *2001 Session Summary: Major Legislation Passed* 143–147, <http://archive.flsenate.gov/publications/2001/senate/reports/summaries/pdf/sesssum01.PDF> (accessed Jan. 19, 2012) (providing a brief summary of the provisions of the Florida Election Reform Act of 2001).

14. *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 884 (Fla. 2010).

15. See *id.* at 884–885 (providing the text of the SAFE Amendment). In this Article, the term SAFE is referenced in several different contexts: SAFE (unitalicized) refers to the political action committee; the italicized case name *SAFE* refers to *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 884 (Fla. 2010); the case name *Browning*

*Sarasota Alliance for Fair Elections, Inc. v. Browning*¹⁶ the Florida Supreme Court considered whether a county could adopt this type of disparate local regulation.¹⁷

II. FACTS AND PROCEDURAL HISTORY

A political action committee calling itself Sarasota Alliance for Fair Elections (“SAFE”) sponsored the Amendment, which contained three provisions.¹⁸ First, Sarasota County could only use voting systems that produced voter-verified paper ballots, which would be the “official record for purposes of any audit conducted with respect to any election in which the voting system [wa]s used.”¹⁹ Second, within twenty-four hours of poll closings, “a reputable, independent[,] and nonpartisan auditing firm” would conduct audits by “publicly observable hand counts.”²⁰ The audits would examine a percentage of ballots from certain precincts and *all* ballots from precincts with “highly unusual results or events”—a phrase left undefined.²¹ Third, election results could not be certified “until the mandatory audits [were] complete and any cause for concern about [the] accuracy of results ha[d] been resolved.”²²

SAFE collected the necessary signatures to submit its proposed amendment to the electorate.²³ Concerned that the Amendment was impermissible under state law, the Board of County Commissioners of Sarasota County sought guidance through a declaratory judgment action.²⁴ SAFE initiated a separate action to compel the Amendment’s ballot placement.²⁵ The two actions were consolidated, SAFE joined Florida Secretary of

refers to *Browning v. Sarasota Alliance for Fair Elections, Inc.*, 968 So. 2d 637 (Fla. 2d Dist. App. 2007), which is the district court of appeals decision immediately preceding the *SAFE* case; and the term “SAFE Amendment” or the “Amendment” refers to the proposed Sarasota County Charter Amendment.

16. 28 So. 3d 880 (Fla. 2010).

17. *Id.* at 883.

18. *Id.* at 884.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 884–885.

23. *Browning v. Sarasota Alliance for Fair Elections, Inc.*, 968 So. 2d 637, 640–641 (Fla. 2d Dist. App. 2007), *approved in part and quashed in part*, 28 So. 3d 880 (Fla. 2010).

24. *SAFE*, 28 So. 3d at 885.

25. *Id.*

State Kurt Browning and the local Supervisor of Elections as parties,²⁶ and the trial court held an evidentiary hearing shortly before the 2006 general election.²⁷ One week later, the trial court issued its final judgment and ordered the Amendment's ballot placement.²⁸

The trial court did not uphold the entire Amendment²⁹ but allowed it on the ballot after finding it at least partially valid.³⁰ In November 2006, before any review on appeal, Sarasota County voters approved the Amendment.³¹ Therefore, the question in the ensuing appeal was not whether the Amendment should have appeared on the ballot (then a moot issue), but whether the Amendment was valid, in whole or part.³²

III. THE DECISIONS ON APPEAL

The principal issue on appeal was whether Florida law permitted local regulation of the casting, counting, and canvassing of ballots.³³ Counties generally have authority to regulate broadly,³⁴ but when county regulation conflicts with state law, state law prevails.³⁵ Local regulation conflicts with state law if it is incon-

26. *Id.*

27. *Browning*, 968 So. 2d at 642.

28. *Id.*

29. *Id.* at n. 3.

30. *Id.* ("The trial court was correct in noting that it could issue an injunction against submission of the proposed amendment to the electorate only if it found the amendment unconstitutional *in its entirety*." (emphasis in original)) (citing *Dade Co. v. Dade Co. League of Municipalities*, 104 So. 2d 512, 515–516 (Fla. 1958)).

31. *Id.* at n. 4.

32. *Id.* at n. 3.

33. *See id.* at 642–644 (examining the provisions of the Florida Election Code to address argument that "the Election Code preempts the entire field of elections" and "the amendment conflicts with the Election Code" put forth by the Board, Secretary of State Browning, and Supervisor of Elections Dent). No party argued that the Amendment was unconstitutional under the federal or state Equal Protection Clause. In *Bush v. Gore*, the United States Supreme Court expressly stated its "consideration [was] limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." 531 U.S. at 109. Later, the Eleventh Circuit upheld Florida's differing recount standards for different voting equipment: "Indeed, 'local variety [in voting systems] can be justified by concerns about cost, the potential value of innovation, and so on.'" *Wexler v. Anderson*, 452 F.3d 1226, 1233 (11th Cir. 2006) (alteration in original) (quoting *Bush*, 531 U.S. at 134 (Souter, J., dissenting)). *SAFE* turned strictly on state law. 28 So. 3d at 885.

34. *See* Fla. Const. art. VIII, § 1(g) (stating that counties "may enact county ordinances not inconsistent with general law").

35. *Rinzler v. Carson*, 262 So. 2d 661, 668 (Fla. 1972) (explaining that local regulations

sistent with a particular state statute or if the legislature has preempted the area in which the local government seeks to regulate.³⁶ In this case, the Amendment's individual provisions conflicted with provisions of the Florida Election Code, but the primary issue was—and the primary focus of this Article is—whether the Florida Legislature preempted local regulation of the casting, counting, and canvassing of ballots.³⁷

There are two types of preemption in Florida: express and implied.³⁸ Express preemption exists when the legislature specifically and expressly states it is preempting an area of law from local regulation.³⁹ For example, the Florida Legislature has expressly stated that “[a]ll matters relating to the operation of the state lottery are preempted to the state, and no county, municipality, or other political subdivision of the state shall enact any ordinance relating to the operation of the lottery.”⁴⁰ The Legislature, however, need not include such express language to preempt local regulation, “so long as it is clear that the [L]egislature has clearly preempted local regulation of the subject.”⁴¹ Instead, the Legislature impliedly preempts local regulation when its “legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature.”⁴² Courts must be cognizant of whether local legislation would disrupt that pervasive scheme and must consider “the provisions

“are inferior in stature and subordinate to the laws of the state”).

36. *Browning*, 968 So. 2d at 644.

37. *Id.* at 644, 649. Florida courts do not always employ consistent terminology, and most agree that “conflict” invalidity is a form of “preemption.” See e.g. *Cloyd v. State*, 943 So. 2d 149, 159 (Fla. 3d Dist. App. 2006) (“There are three types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption.”); *E.I. Du Pont de Nemours & Co. v. Aquamar S.A.*, 881 So. 2d 1, 4 n. 3 (Fla. 4th Dist. App. 2004) (“Preemption can occur in three ways: (1) the federal statute contains express language of preemption, so-called express preemption; (2) the scheme of federal regulation is so pervasive that there is no room for state regulation, known as field preemption; and (3) compliance with federal and state law is impossible, conflict preemption”). In *SAFE*, however, the Florida Supreme Court characterized the conflict issue “[a]s an alternative to the preemption issue.” 28 So. 3d at 888. This Article will follow the terminology used in *SAFE* and use the term “preemption” to refer to field preemption.

38. 28 So. 3d at 886.

39. *Id.*

40. Fla. Stat. § 24.122(3) (2011).

41. *SAFE*, 28 So. 3d at 886 (quoting *Barragan v. City of Miami*, 545 So. 2d 252, 254 (Fla. 1989)).

42. *Id.* (internal quotations omitted).

of the whole law[] and . . . its object and policy.”⁴³ As the majority in *SAFE* recognized, “[t]he nature of the power exerted by the Legislature, the object sought to be attained by the statute at issue, and the character of the obligations imposed by the statute are all vital” to determining if implied preemption exists.⁴⁴

Therefore, whether the Legislature preempted local regulation of casting, counting, and canvassing ballots depended on the nature of the Florida Election Code, which provides comprehensive regulation for virtually every component of the election process.⁴⁵ The Election Code comprises ten chapters and fills more than 125 pages of the Florida Statutes.⁴⁶ It controls voter eligibility and registration,⁴⁷ establishes the duties of local supervisors of elections,⁴⁸ sets rules for candidate eligibility and qualification,⁴⁹ and comprehensively regulates campaign financing and expenditures.⁵⁰ It also designates the Secretary of State as “the chief election officer of the state” and outlines the Secretary’s duties.⁵¹

Most importantly, the Election Code extensively and pervasively regulates the *conduct* of elections, including voting, canvassing of votes, recounts, audits, and certification—all of the areas the *SAFE* Amendment sought to regulate.⁵² State law dictates when elections will be held,⁵³ when the polls open and close,⁵⁴ how ballots must appear,⁵⁵ what equipment must be

43. *Id.* (internal quotations omitted).

44. *Id.*

45. *Browning*, 968 So. 2d at 646.

46. *Id.*

47. *Id.* at 643; see Fla. Stat. §§ 97.041, 97.052, 97.053 (providing rules for voter qualification and registration).

48. *Browning*, 968 So. 2d at 643; see Fla. Stat. § 98.015 (providing rules for the election of supervisors of elections, and outlining their duties).

49. *Browning*, 968 So. 2d at 643; see Fla. Stat. §§ 99.012, 99.061 (providing the requirements for election candidates).

50. *Browning*, 968 So. 2d at 643; see Fla. Stat. §§ 106.011–106.36 (providing campaign finance rules).

51. Fla. Stat. § 97.012.

52. See *Browning*, 968 So. 2d at 647 (stating that the Florida Election Code “comprehensively regulate[s] all subjects related to elections in Florida, from the qualifications of electors to the counting and certifying of votes to procedures for challenging election results,” and also noting that, “if the *SAFE* amendment were upheld, a dual system of regulating the counting, recounting, auditing, and certifying of votes would exist in Sarasota County”).

53. Fla. Stat. § 100.031.

54. *Id.* at § 100.011(1)–(2).

55. *Id.* at § 101.151.

used,⁵⁶ when recounts take place and how they are administered,⁵⁷ how post-election audits proceed,⁵⁸ how election results are canvassed and certified,⁵⁹ and how winners and losers are determined.⁶⁰ Additionally, it unambiguously provides that “no vote shall be received or counted in any election, except as prescribed by this code.”⁶¹

The Florida Election Code therefore constitutes a substantial, detailed, and comprehensive set of election regulations designed to promote uniformity in the election process.⁶² Indeed, the Secretary of State’s first enumerated statutory duty is to “[o]btain and maintain uniformity in the interpretation and implementation of the election laws.”⁶³

A. The District Court Correctly Found Implied Preemption

After carefully analyzing the Election Code, the district court found that the Legislature intended to preempt local regulation like that included in the Amendment.⁶⁴ The scope of “the Election Code’s pervasive regulatory scheme,” among other things, led the district court to conclude that the Election Code impliedly preempted the Amendment.⁶⁵ In addition to thoroughly examining the Election Code, the district court noted the lack of any tradition of local control in this area of regulation and found no public-policy justification for allowing differing local regulations.⁶⁶

56. *Id.* at § 101.015.

57. *Id.* at § 102.166.

58. *Id.* at § 101.591.

59. *Id.* at §§ 102.131–102.151.

60. *Id.* at § 102.071.

61. *Browning*, 968 So. 2d at 643 (quoting Fla. Stat. § 101.041 (2006)). In addition, “Article VI, section 1 of the Florida Constitution . . . provides: ‘Registration and elections shall . . . be regulated by law.’” *Id.* at 642–643 (quoting Fla. Const. art. VI, § 1). “Under this provision, the Legislature is directed to enact laws regulating the election process.” *Id.* at 643 (quoting *AFL-CIO v. Hood*, 885 So. 2d 373, 375 (Fla. 2004)).

62. *Id.* at 646; *cf. Palm Beach Co. Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1282 (Fla. 2000) (stating that “the Florida Legislature in 1951 enacted the Florida Election Code, contained in chapters 97–106, Florida Statutes (2000), which sets forth *uniform criteria* regulating elections in this state” (emphasis added)).

63. Fla. Stat. § 97.012.

64. *Browning*, 968 So. 2d at 646.

65. *Id.*

66. *Id.* at 647–648. “The proposed SAFE amendment serves no significant local interest relating to voting that may differ from one county to another.” *Id.* at 648.

Moreover, the court found substantial policy justifications for *prohibiting* local regulation.⁶⁷ The court was rightfully mindful of Florida's history of election problems, and it recognized that unlike many other types of local regulations, election laws have statewide and nationwide consequences.⁶⁸ As observers learned in *Bush v. Gore*, votes should not be counted differently based on the county where they were cast.⁶⁹ If just one county enacted a local regulation like the Amendment, "a dual system of regulating the counting, recounting, auditing, and certifying of votes would exist Such a two-tiered process would invite chaos and confusion."⁷⁰ This chaos and confusion would multiply as still other counties enacted their own local election rules.⁷¹ Indeed, the importance of uniformity in election regulations "cannot be over-emphasized,"⁷² and "[i]t is difficult to imagine an area with stronger public policy reasons for finding preemption."⁷³

B. In Finding No Preemption, the Supreme Court Misinterpreted the Legislature's Intent

The Florida Supreme Court disagreed with the district court, finding no preemption.⁷⁴ It did not overlook the Code's pervasiveness; indeed, it acknowledged that the Election Code constituted "a detailed and extensive statutory scheme."⁷⁵ Instead, the Court relied on the fact that the Election Code expressly granted "power to local authorities in regard to many aspects of the election process"⁷⁶ As examples, it noted that the Election Code gave boards of county commissioners express authority to select voting systems among those approved by the state, and it authorized local officials to create and modify voting precincts.⁷⁷ Therefore,

67. *Id.* at 647.

68. *Id.*

69. *Cf. id.* ("The regulation of voting cannot be given unequal application in different parts of the state.").

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *SAFE*, 28 So. 3d at 886–887.

75. *Id.* The Court recognized that the Election Code spanned ten chapters of the Florida Statutes and acknowledged the Legislature's comprehensive treatment of the subject. *Id.* at 886.

76. *Id.* at 887.

77. *Id.* (citing Fla. Stat. §§ 101.001, 101.002, 101.293, 101.5604 (2006)).

the Court determined, “the Legislature clearly did not deprive local governments of all local power in regard to elections.”⁷⁸

The Supreme Court correctly observed that “[t]his statutory scheme undoubtedly recognizes that local governments are in the best position to make *some decisions* for their localities.”⁷⁹ Local governments, however, may only make decisions in the areas that the Legislature *specifically* authorized local governments to act. Rather than demonstrating an absence of preemption as the Supreme Court found, the specific grants of authority to local governments fully demonstrate that the Legislature *did* intend to preempt. In fact, absent preemption, the Legislature would have had no need to grant local governments authority in these areas. That authority would already have existed because local governments maintain the authority to regulate in any area not inconsistent with state law.⁸⁰ So if the Election Code did not preempt election regulation, local governments could have freely established precincts and chosen voting equipment without the Legislature’s grant of authority. The fact that local governments needed such express grants of power demonstrates the Legislature’s intent to preempt the field.

Moreover, the Supreme Court looked at the preemption issue too broadly. In finding that “the Legislature clearly did not deprive local governments of *all local power in regard to elections*,”⁸¹ the Court overlooked the fact that the Legislature *did* deprive local governments of all local power with respect to the narrower issues of casting, counting, and canvassing votes.⁸² None of the Court’s examples of local authority related to those issues. Indeed, the Legislature authorized local regulation only where it

78. *Id.* at 887–888.

79. *Id.* at 888 (emphasis added).

80. *See e.g.* Fla. Const. art. VIII, § 2(b) (“Municipalities . . . may exercise any power for municipal purposes except as otherwise provided by law.”); Fla. Stat. § 166.021 (“[M]unicipalities . . . may exercise any power for municipal purposes, except when expressly prohibited by law.”); *City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066, 1068 (Fla. 3d Dist. App. 1981) (acknowledging the power of municipalities to regulate providing there is no conflict or preemption by the state); *see generally* Steven L. Sparkman, *The History and Status of Local Government Powers in Florida*, 25 U. Fla. L. Rev. 271 (1973) (chronicling the history of the 1968 Florida constitutional amendment granting home rule power to municipalities).

81. *SAFE*, 28 So. 3d at 887–888 (emphasis added).

82. *Id.*

was appropriate, such as drawing precinct lines.⁸³ In other areas, such as the selection of voting equipment, the Legislature substantially limited local authorities' choices, requiring that they choose among systems approved by the Florida Department of State.⁸⁴

When courts find implied preemption, the field is usually narrowly defined and “limited to the specific area where the Legislature has expressed [its] will to be the sole regulator.”⁸⁵ Thus, in *Tribune Company v. Cannella*,⁸⁶ the Supreme Court found preemption in the area of the Public Records Act, but only “relating to any delay in producing records for inspection.”⁸⁷ Yet in *SAFE*, the Supreme Court did not consider the narrow field of casting, counting, and canvassing votes; instead, the Court broadly examined the “local power in regard to elections.”⁸⁸ In doing so, the Court overlooked a clear legislative intent to preempt local regulation in the narrower—and most critical—area: casting, counting, and canvassing votes.

The Florida Supreme Court also understated the public-policy considerations. It dismissed the seriousness of disparate local election regulations by analogizing the issue to local fireworks regulations.⁸⁹ This comparison fails because there is no strong public policy need for statewide uniformity in fireworks regulations. Differing local rules might be inconvenient for firework vendors, but differing local treatment of votes can have disastrous effects, as evidenced in 2000.⁹⁰

83. Fla. Stat. § 101.001(1) (2011).

84. *Id.* at § 101.5604.

85. *Phantom of Clearwater, Inc. v. Pinellas Co.*, 894 So. 2d 1011, 1019 (Fla. 2d Dist. App. 2005) (quoting *Tallahassee Mem'l Reg'l Md. Ctr. V. Tallahassee Med Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. 1st Dist. App 1996).

86. 458 So. 2d 1075 (Fla. 1984).

87. *Id.* at 1079.

88. *SAFE*, 28 So. 3d at 888.

89. Compare *Phantom of Clearwater*, 894 So. 2d at 1019 (finding the statutory scheme not pervasive because the chapter consisted of only three pages and a lack of public policy concerns regarding the sale of fireworks) with *SAFE*, 28 So. 3d at 886 (finding the statutory scheme not pervasive despite the fact the chapter encompassed one hundred twenty-five pages and the content related to election law, arguably a public policy issue of grave importance).

90. See generally Mitchell W. Berger & Candice D. Tobin, *Election 2000: The Law of Tied Presidential Elections*, 26 Nova L. Rev. 647 (2002) (analyzing Florida's election law and its application in the 2000 presidential election); Richard D. Friedman, *Trying to Make Peace with Bush v. Gore*, 29 Fla. St. U. L. Rev. 811 (2001) (criticizing the Supreme Court's decision halting the recount of certain Florida counties in the 2000 presidential election);

In his separate opinion, Justice Lewis considered public policy and acknowledged Florida's "many difficulties with elections in recent years."⁹¹ Rather than viewing those difficulties as evidence of the Legislature's intent to preempt, Justice Lewis alluded to the potential benefits of the SAFE Amendment:

The claims and suggestions of equipment malfunctions undermine trust and confidence in the entire notion of democratic institutions. This process is an essential element of a democratic society and forms the essence and foundation of our constitutional structure and institutions. The importance of the accuracy of the process cannot be overstated nor can the need for accountability and credibility be overlooked.⁹²

The implied-preemption inquiry, though, is one of legislative intent. Local regulations cannot survive preemption simply because they are "better" than the preempting state law.⁹³ The issue is not which is preferable; the issue is what the Legislature intended, and "[a]llowing local governments to draft their own laws [regulating elections] would contradict the Election Code's stated goal of obtaining and maintaining 'uniformity in the interpretation and implementation of the election laws.'"⁹⁴

C. The Supreme Court's Incomplete Conflict Analysis Conflicted with Its Precedent

As an alternative to preemption, the district court found that each of the Amendment's three sections conflicted with the Election Code.⁹⁵ Even absent preemption, local regulations are invalid if they conflict with state law, and a conflict exists when two legis-

Robert Samuelson, *Intensity, Absurdity Threaten Lasting Damage*, Orlando Sentinel A19 (Dec. 12, 2000) (asserting that the 2000 election in Florida could result in lasting damage and a complete lack of faith in political parties).

91. *SAFE*, 28 So. 3d at 891 (Lewis, J., concurring in part and dissenting in part).

92. *Id.* at 891–892.

93. *Browning*, 968 So. 2d at 648 (explaining that "even if the SAFE amendment were arguably 'better' than state election laws, the need for uniformity and the potentially chaotic effect of local regulation in conjunction with state legislation outweighs any possible benefits of local laws on the same subject").

94. *Id.* at 647 (quoting Fla. Stat § 97.012(1) (2006)).

95. *Id.* at 649.

lative enactments “cannot co-exist.”⁹⁶ “[I]f any doubt exists as to the extent of a power attempted to be exercised which may affect the operation of a state statute, the doubt is to be resolved against the ordinance and in favor of the statute.”⁹⁷ Because the Supreme Court disagreed with the district court’s preemption conclusion, it went on to consider the conflict issues.⁹⁸

The Amendment’s first section mandated countywide use of voting machines that provided voter-verified paper ballots.⁹⁹ In other words, the Amendment prohibited touch-screen machines. The Election Code, though, expressly assigns to each board of county commissioners the selection of voting equipment, subject to “consultation with the supervisor of elections.”¹⁰⁰ The Election Code permits a board to choose “any” equipment approved by the state, including those without voter-verified paper ballots.¹⁰¹ Thus, the Election Code expressly permits what the Amendment expressly forbids. This creates an impermissible conflict, and the Election Code must prevail.¹⁰² The Supreme Court rejected this analysis.¹⁰³ It concluded that the Amendment was permissible because the Board of County Commissioners of Sarasota County could choose equipment that satisfied both the Amendment and the Election Code.¹⁰⁴ The Court’s solution, however, does not eliminate the impermissible conflict because the Election Code assigned the selection of voting equipment to the governing body’s discretion, and the Amendment would have removed that discretion.

In upholding this provision, the Supreme Court ignored its earlier decision in *Board of County Commissioners of Dade*

96. *SAFE*, 28 So. 3d at 888 (quoting *Laborers’ Int’l Union of N. Am., Local 478 v. Burroughs*, 541 So. 2d 1160, 1161 (Fla. 1989)); see generally James R. Wolf & Sarah Harley Bolinder, *The Effectiveness of Home Rule: A Preemption and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009) (analyzing legislative efforts by Florida municipalities and recent judicial trends applying the doctrines of preemption and conflict).

97. *Rinzler*, 262 So. 2d at 668.

98. *SAFE*, 28 So. 3d at 888.

99. *Id.*

100. Fla. Stat. § 101.5604.

101. *Id.* (emphasis added).

102. See *SAFE*, 28 So. 3d at 893 (Polston, J., concurring in part and dissenting in part) (“[The paper-ballot provision] and the Election Code conflict because [the paper-ballot provision] states that the Board may not choose any system approved by the Department of State, while the Election Code expressly authorizes the Board to do so.”).

103. *Id.* at 888 (majority).

104. *Id.*

County v. Wilson.¹⁰⁵ In that case, citizens supported a local initiative setting the county's millage rates.¹⁰⁶ The Supreme Court invalidated the initiative because it would have contradicted a statute providing that "the governing body of the county" was to set millage rates.¹⁰⁷ It was no defense that the governing body *could* have set the millage rate within the initiative's limit, satisfying both the local and state laws.¹⁰⁸ Likewise, it should have been no defense in *SAFE* that the Board of County Commissioners *could* choose equipment demanded by the Amendment.¹⁰⁹ Notably, the Supreme Court did not cite or distinguish its decision in *Board of County Commissioners of Dade County*, even though Justice Polston relied on it in his dissent.¹¹⁰ Had the Supreme Court followed this clear precedent, it would have invalidated the Amendment's paper-ballot provision.¹¹¹

The Amendment's second provision required certain post-election "mandatory, independent, and random audits' of the . . . voting system."¹¹² The Supreme Court found no conflict with the Election Code as it existed in 2006, but that law was no longer in effect at the time of the decision.¹¹³ The Legislature amended the Election Code in 2007, adding substantial, specific audit requirements.¹¹⁴ Under the Florida Supreme Court's well-established precedent, "an appellate court, in reviewing a judgment on direct

105. 386 So. 2d 556 (Fla. 1980).

106. *Id.* at 558.

107. *Id.* at 560 (quoting Fla. Stat. § 200.191(c) (1980)).

108. *Id.*

109. *Contra SAFE*, 28 So. 3d at 888 (concluding that the County Commission could follow the amendment's additional standards without being in conflict with the Legislature's minimum statutory requirements).

110. *Id.* at 893 (Polston, J., concurring in part and dissenting in part).

111. After deciding the issue, the Court stated that even if there were conflict, "the issue would be moot" because the Legislature amended the Election Code in 2008 to require paper ballots statewide. *Id.* at 888 (majority). "The Legislature has spoken on the exact issue on which the SAFE amendment sought to legislate and thereby rendered any potential conflict moot." *Id.* at 889. Although the Legislature's amendment substantially reduced the significance of the conflict (and the importance of the issue) the issue was not moot because, unlike the SAFE Amendment, the Legislature's amendment provided an exception for persons with disabilities. *Id.* at 893 n. 3 (Polston, J., concurring in part and dissenting in part). The Collins Center estimates the Legislature spent \$24 million between 2004 and 2006 to provide voter systems for the state's disabled voters. The Collins Center for Public Policy, *Election Reform in Florida: After Bush v. Gore*, http://www.collinscenter.org/page/voting_cost (accessed Feb. 28, 2012).

112. *SAFE*, 28 So. 3d at 889.

113. *Id.*

114. *Id.* at n. 1 (citing 2007 Fla. Laws ch. 2007-30, § 8).

appeal, will dispose of the case according to the law prevailing at the time of the appellate disposition, and not according to the law prevailing at the time of rendition of the judgment appealed.”¹¹⁵ Nevertheless, and without explanation, the Court evaluated the Amendment under the *old* law.¹¹⁶ As to the law in place at the time of its decision, the Court noted only that “[t]o the extent that [the audit provision] of the SAFE amendment conflicts with [the revised Election Code], the state statutes would prevail.”¹¹⁷ The supremacy of state law was never disputed, so the parties were given no answer on this provision’s validity, despite years of litigation.¹¹⁸ Although the revised law was before the Court, the Court declined to evaluate it—or to pass judgment on the district court’s evaluation of it.¹¹⁹ Had the Supreme Court followed its established precedent, it would have examined whether the Amendment conflicted with the Election Code as currently enacted.¹²⁰

The Supreme Court did invalidate the Amendment’s third provision, which prohibited election certification until audits were complete and concerns about accuracy were resolved.¹²¹ That section conflicted with the Election Code, which specified how and when election results must be certified.¹²² Finding that provision severable, however, the Court upheld the Amendment’s first two provisions.¹²³ Thus, after the Court ruled in *SAFE*, the

115. *Fla. E. Coast Ry. Co. v. Rouse*, 194 So. 2d 260, 262 (Fla. 1967) (quoting district court); *accord Ingerson v. State Farm Mut. Automobile. Ins. Co.*, 272 So. 2d 862, 864 (Fla. 3d Dist. App. 1973) (“It is generally held that the law which is applicable to a case, as it exists at the time of trial and judgment, is controlling thereon.”).

116. *SAFE*, 28 So. 3d at 889.

117. *Id.* at n. 1.

118. *Id.*

119. *Id.* Writing separately, Justice Lewis appeared to criticize the majority for invalidating the audit provision, even though the majority upheld it: “The majority and those who challenge local audit functions here search for reasons to find conflict with general law and engage in misnomers to justify a conclusion which undermines local autonomy and the need and demand for accuracy at the local level.” *Id.* at 892 (Lewis, J., concurring in part and dissenting in part). The majority actually found no conflict between the Amendment’s audit provisions and the Election Code—at least not the 2006 version of the Election Code. *Id.* at 889 (majority) (“[A]t the time when the trial court and the district court considered the constitutionality of the amendment, there was no direct conflict with any audit provisions in the state Election Code.”).

120. *Rouse*, 194 So. 2d at 262.

121. *SAFE*, 28 So. 3d at 889.

122. *Id.* at 890.

123. *Id.* at 891.

Amendment's first provision was upheld but declared moot, the Amendment's second provision was left open, and the Amendment's third provision was invalidated.¹²⁴

IV. THE IMPACT OF THE SUPREME COURT'S DECISION: THE IMPLIED END TO IMPLIED PREEMPTION?

Because conflict issues are determined on a case-by-case basis, it is unlikely that the *SAFE* decision will have any substantial impact on this area of the law. But the Supreme Court's decision regarding implied preemption signals a retreat from any willingness to recognize preemption, absent explicit statutory language.

Looking to the Florida Legislature's intent, the Supreme Court should have agreed with the district court, which concluded that the "pervasive state control of the election process is a compelling indicator that the legislature did not intend for local governments to enact their own individual election laws."¹²⁵ If that pervasive statutory scheme is insufficient to establish implied preemption, it is hard to imagine what would suffice. And as the district court aptly observed, it is "difficult to imagine an area with stronger public policy reasons for finding preemption."¹²⁶ Yet the Supreme Court apparently needed more.

Having analyzed the legislative intent and found preemption, the district court actually found it "[surprising that] the Election Code does not contain explicit language setting forth express preemption."¹²⁷ To be sure, the Legislature could have used explicit language. Because of the doctrine of implied preemption, though, none should have been necessary. The Supreme Court has clearly said, "preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject."¹²⁸ Given that statement, it should not be surprising that the Legislature preempted without explicit language. What

124. *Id.*

125. *Browning*, 968 So. 2d at 647 ("The legislature has enacted the Election Code with such detailed depth and breadth that its intent to occupy the entire field is forcefully implied.")

126. *Id.*

127. *Id.* at 645.

128. *Barragan*, 545 So. 2d at 254; accord *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1244 (Fla. 2006) (finding express preemption).

is surprising is that the Court would refuse to recognize preemption absent explicit language after saying none is necessary.

Short of adding explicit language, there is little more the Legislature could have done to demonstrate its intent. Perhaps such an explicit statement is the only “more” the Supreme Court would have accepted. The Second District recently said that “if the legislature can easily create express preemption by including clear language in a statute, there is little justification for the courts to insert such words into a statute.”¹²⁹ Perhaps the Supreme Court will follow that path in the future. That would, of course, leave nothing of implied preemption. No longer would Florida law recognize “two types of preemption: express or implied.”¹³⁰ If preemption were accomplished only by explicit language, then the doctrine of implied preemption would no longer exist. And, perhaps, it no longer does.

V. THE LEGISLATURE’S RESPONSE

The danger of inconsistent local laws interfering with the Florida Legislature’s pervasive statutory scheme regulating the casting, counting, and canvassing of votes should have led the Florida Supreme Court to recognize the Legislature’s intent and to invalidate the Amendment. Notwithstanding the Supreme Court’s decision, however, the harm will be averted. Shortly after the Court’s ruling, the Florida Legislature reiterated its earlier intent and enacted Florida Statutes Section 97.0115, which explicitly states that “[a]ll matters set forth in chapters 97-105 are preempted to the state, except as otherwise specifically authorized by state or federal law.” Once that provision became effective, there was no question regarding the SAFE Amendment’s validity. The parties then returned to the trial court, which promptly invalidated the Amendment:

In *SAFE*, the Florida Supreme Court held: “[] the Election Code does not impliedly preempt the field of elections law.” Since the Florida Supreme Court’s decision in *SAFE*, the Legislature enacted Section 97.0115, Florida Statutes. As the Florida Supreme Court noted in *SAFE*, “[e]xpress

129. *Phantom of Clearwater*, 894 So. 2d at 1019.

130. *Lowe v. Broward Co.*, 766 So. 2d 1199, 1207 (Fla. 4th Dist. App. 2000).

preemption requires a specific legislative statement; it cannot be implied or inferred.” Section 97.0115, Florida Statutes, is such a “specific legislative statement.”¹³¹

Thus, the trial court found the Amendment entirely preempted.¹³² There was no further appeal, and the SAFE Amendment is no more.

VI. CONCLUSION

After more than four years of litigation, Supreme Court review, and legislative action, the matter ended where it should have begun—with recognition that local governments cannot threaten Florida’s delicate election process with disparate voting regulations. Statewide uniformity in the casting, counting, and canvassing of votes is of paramount importance. Florida must maintain that uniformity to ensure it does not return to the inconsistent election administration that forever will be associated with the infamous 2000 election. The Florida Legislature and others learned much from that election, and the Legislature acted to promote desperately needed uniformity. The Florida Legislature should learn from the Supreme Court’s *SAFE* decision, too. It should learn that the Court may accept no substitute for explicit preemption language, and that it should include that explicit language whenever preempting local regulation. Indeed, in *SAFE*, the Florida Supreme Court might have implied the end of implied preemption.

131. Final S.J. in Favor of Interim Sec. of St. Dawn K. Roberts and Sarasota’s Supervisor of Elections, Kathy Dent, *Bd. of Co. Comm’rs of Sarasota Co. v. Sarasota Alliance for Fair Elections, Inc.*, No. 2006-CA-007727-NC, at 3 (Fla. 12th Cir. Jul. 28, 2010) (citations omitted).

132. *Id.* at 3–4.