



State Question 777: A Proposed Constitutional Amendment

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Administrative Note: As with all political issues, OSU is not taking a stand on State Question 777. As appropriate research, based on sound science becomes available, it will be shared with the public.

Overview

There has been a growing concern on the part of some in Oklahoma agriculture and agribusiness, as well as a number of interest groups regarding the rights of Oklahomans to employ certain agricultural technologies and livestock production practices. That concern is part of a broader debate about the proper role of government and public opinion in regulating agriculture. In response, the Oklahoma Legislature proposed a ballot question for the 2016 fall general election that would amend the Oklahoma Constitution to limit the ability of the legislature to restrict agricultural practices.

Discussion

State Question 777 was placed on the November 2016 general election ballot by House Joint Resolution 1012 during the 2015 legislative session.¹ If voters approve the state question, it would create an amendment to the Oklahoma Constitution prohibiting the Oklahoma Legislature (and by implication, Oklahoma state agencies) from enacting laws restricting agricultural production unless such laws were needed to advance a “compelling state interest.” The actual amendment language states:

To protect agriculture as a vital sector of Oklahoma’s economy, which provides food, energy, health benefits and security and is the foundation and stabilizing force of Oklahoma’s economy, the rights of citizens and lawful residents of Oklahoma to engage in farming and ranching practices shall be forever guaranteed in this state. The Legislature shall pass no law which abridges the right of citizens and lawful residents of Oklahoma to employ agricultural technology and livestock production and ranching practices without a compelling state interest.

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Nothing in this section shall be construed to modify any provision of common law or statutes relating to trespass, eminent domain, dominance of mineral interests, easements, rights of way or any other property rights. Nothing in this section shall be construed to modify or affect any statute or ordinance enacted by the Legislature or any political subdivision prior to December 31, 2014.

The way the question will appear on the general election ballot is:

This measure adds Section 38 to Article II of the Oklahoma Constitution. The new section creates state constitutional rights. It creates the following guaranteed rights to engage in farming and ranching:

- The right to make use of agricultural technology,
- The right to make use of livestock procedures and
- The right to make use of ranching practices.

These constitutional rights receive extra protection under this measure that not all constitutional rights receive. This extra protection is a limit on lawmakers’ ability to interfere with the exercise of these rights. Under this extra protection, no law can interfere with these rights, unless the law is justified by a compelling state interest—a clearly identified state interest of the highest order. Additionally, the law must be necessary to serve that compelling state interest. The measure—and the protections identified above—do not apply to and do not impact state laws related to:

- Trespass,
- Eminent domain,
- Easements,
- Right of way or other property rights and
- Any state statutes and political subdivision ordinances enacted before December 31, 2014.

**SHALL THE PROPOSAL BE APPROVED?
FOR THE PROPOSAL**

Yes:

AGAINST THE PROPOSAL

No:

Existing Law

There are currently variations of “right to farm” laws in all 50 states.² These statutes generally provide protection against nuisance claims, with some specificity on what is considered a “nuisance.” Many such statutes provide protection from nuisance claims for farms, ranches and agricultural operations that have been in operation for a given number of years (with the number of years varying from state to state) prior to the nuisance claim, so long as the agricultural operations adhere to generally accepted farming practices and applicable laws. For example, Oklahoma’s current right to farm statute³ states:

- Agricultural activities conducted on farm or ranch land, if consistent with good agricultural practices and established prior to nearby nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse effect on the public health and safety.
- If that agricultural activity is undertaken in conformity with federal, state and local laws and regulations, it is presumed to be good agricultural practice and not adversely affecting the public health and safety.
- No action for nuisance shall be brought against agricultural activities on farm or ranch land which has lawfully been in operation for two (2) years or more prior to the date of bringing the action.

An amendment to a state constitution is different from a statute, though. State constitutions hold higher authority than state statutes. Additionally, constitutional amendments in Oklahoma can only be made through a statewide vote of the people; the Oklahoma Legislature alone cannot amend the constitution.

Two states have already enacted state constitutional provisions regarding agricultural practices. North Dakota passed its Constitutional Measure 3 in 2012 that states:

The right of farmers and ranchers to engage in modern farming and ranching practices shall be forever guaranteed in this state. No law shall be enacted which abridges the right of farmers and ranchers to employ agricultural technology, modern livestock production and ranching practices.⁴

Similarly, Missouri Amendment 1 passed in 2014 and states:

That agriculture which provides food, energy, health benefits and security is the foundation and stabilizing force of Missouri’s economy. To protect this vital sector of Missouri’s economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.⁵

While there may be some insights to be gleaned from these states’ experiences with such constitutional mandates, case law does not yet exist interpreting these constitutional provisions to provide guidance as to how courts will define and uphold their provisions. As of this writing, there have been no published cases citing the Missouri or North Dakota constitutional amendments.⁶

Legal Questions

“Compelling State Interest”

One frequently asked question with respect to the amendment proposed by State Question 777 is “what is a ‘compelling state interest?’”

The term “compelling state interest” comes from constitutional law, and is most often used in discussing issues relating to the U.S. Constitution. Generally, a government body cannot restrict a fundamental right without a compelling state interest. Examples of fundamental rights in this context include constitutional rights such as First Amendment rights (freedom of speech, religion, press, assembly and petition), rights of due process and access to the courts, as well as familial rights such as child custody and marriage. In effect, the amendment proposed by State Question 777 would provide “the right of citizens and lawful residents of Oklahoma to employ agricultural technology and livestock production and ranching practices” with similar levels of protection.

The classification of a right as “fundamental” means that any government action restricting that right must be examined using “strict scrutiny.”⁷ In other words, when the Oklahoma Legislature enacts any restriction of a fundamental right, the state has the burden of proving not only (1) a “compelling state interest” was served by the restriction but also (2) the restriction enacted by the Legislature was the least restrictive way to protect the compelling state interest.

Thus, if State Question 777 is passed and the constitutional amendment is created, any legislation (and by implication, any agency regulations) affecting “the right of citizens and lawful residents of Oklahoma to employ agricultural technology and livestock production and ranching practices” would have to:

1. support a compelling state interest and
2. provide the least restrictive means of protecting that compelling state interest.

If State Question 777 is passed and later a law is enacted that is alleged to restrict the rights addressed in the amendment, the state would bear the burden (in any litigation regarding such a law) of establishing a compelling state interest exists to support the law.⁸ A single, specific definition of what is a “compelling state interest” is difficult, as courts generally need to weigh the specific government action in question against the goal it is meant to accomplish, but a number of cases have defined public safety as an example of such a compelling state interest.⁹ Additionally, the Oklahoma Legislature specifically defined protection of the waters of the state as a compelling state interest through legislation enacted in 2016.¹⁰ While a statute cannot override a constitutional provision, future courts may regard this as a statement of policy regarding the importance of water issues.

Other Legal Questions

A number of other legal questions have been raised about the potential consequences of the amendment proposed by State Question 777. For example, does the amendment create the possibility of an increase in litigation by people attempting to test its protection? Will the exemptions in the amendment (that is, the provisions that the amendment will not affect the common law or statutes relating to trespass, eminent domain, dominance of mineral interests, easements, rights of way or any other property rights) limit the impact of

the amendment? How will the federal government and courts view the amendment relative to the U.S. Constitution (that is, will federal courts interpret the amendment as consistent with the U.S. Constitution)? How will the amendment affect federal programs that have been delegated to state agencies (such as federal permitting programs delegated to agencies like the Oklahoma Department of Agriculture, Food and Forestry or the Oklahoma Department of Environmental Quality)? Given that there is relatively little experience with these issues for state constitutional amendments of this kind (as discussed above), it is difficult to predict how these questions will be answered.

Policy and Economic Questions

As with the legal issues, legislation with strong political agendas on either side are often difficult to evaluate. Little or no data or historical experience on which to base analysis further complicates the ability to conduct sound scientific analysis. Also, there are a number of policy and economic questions. A sample list of such questions includes:

- How differently will public grievances of claimed wrongdoing on farms and ranches be handled?
- Will the burden of proof and cost of pursuing redress shift?
- Will there be an acceleration of adoption of innovation and technology in agriculture?
- Will such adoption have an impact on farm size?
- Will limitations on future state regulations have an economic impact on agriculture?
- What are the long-term benefits and costs to the private and public sectors?

Assumptions and the basis for the conclusions reached are important when considering the answers to these questions. Policy analysts and economists can, depending on the assumptions, apply theory and sound scientific research in related fields to draw inferences. Scientific analysis of this specific proposal will have to wait on the passage of time to provide sufficient data.

Conclusions

A state law currently exists that says agricultural activities conducted on farm or ranch land, if consistent with good agricultural practices and established prior to nearby nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse effect on the public health and safety. However, this statute only relates to nuisance lawsuits.

SQ 777 is on the November 2016 ballot and would add an amendment to the Oklahoma Constitution guaranteeing agriculture can engage in farming and ranching practices without abridgement from the Legislature or public through court cases. The measure allows public intervention if there is a compelling state interest. The impact of the proposed amendment would be much broader than the impact of the current statute, but the exact extent of that impact is difficult to predict. Voters will benefit from examining the language of the proposed amendment carefully and seeking as much information as possible to help them make an informed decision.

Endnotes

- 1 Oklahoma House Joint Resolution 1012, 1st session, 55th Legislature (April 29, 2015).
- 2 National Agricultural Law Center, "States' Right-to-Farm Statutes," <http://nationalaglawcenter.org/state-compilations/right-to-farm/> (last accessed July 19, 2016).
- 3 50 OKLA. STAT. § 1.1 (B),(C)
- 4 North Dakota Constitution, Article XI, § 29.
- 5 Missouri Constitution, Article. I, §35.
- 6 There has been one case regarding the Missouri amendment, but it was in regard to the ballot title and not the amendment itself, See *Shoemyer v. Missouri Secretary of State*, 464 S.W.3d 171 (Missouri, 2015).
- 7 See *Jacobs Ranch, L.L.C. v. Smith*, 148 P.3d 842 (Okla. 2006).
- 8 See *Thayer v. Phillips Petroleum Co.*, 613 P.2d 1041 (Okla. 1980).
- 9 See, e.g. *Hendricks V. Jones*, 349 P.3d 351 (Okla. 2013).
- 10 82 OKLA. STAT. § 1E.

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