

# State Question 777 Analysis

## *FAQs (or FREQUENTLY ASKED QUESTIONS)*

Right to farm or right to harm? It’s a confusing issue, so we’ve presented here a few of the most frequently asked questions surrounding this proposed amendment to the Oklahoma Constitution.

### 1. What is State Question 777?

SQ 777 is a proposed amendment to the Oklahoma Constitution that voters will have the opportunity to reject or approve at the general election on November 8, 2016.

### 2. What will the amendment actually do?

If enacted, SQ 777 would ban the Oklahoma Legislature from passing laws abridging citizens’ and residents’ “right” to employ agricultural technology and livestock production and ranching practices. The legal effect would leave any farming or ranching measures enacted by the Legislature—or the people of Oklahoma, or counties, cities, or towns—vulnerable to litigation challenging their constitutionality. Moreover, a challenge under 777 would subject any such measures to “strict scrutiny,” the same legal standard that’s used for laws that discriminate on the basis of race, or that deprive people of fundamental rights like free speech, gun ownership, or religious freedom.

Because those rights of freedom and equal protection are essential to American democracy and American values, laws that deprive people of them are held to the highest possible standard. Most of the time, this means those laws get struck down.

In fact, an academic study of strict scrutiny cases by UCLA found that, on average, measures challenged under strict scrutiny get struck down 70% of the time. (And that’s for laws passed by Congress. Laws passed by state legislatures get struck



down 77% of the time under strict scrutiny; local ordinances fare even worse—they get struck down 85% of the time.)

Therefore, because SQ 777 borrows its legal standard from cases involving equal rights and fundamental liberties, the deck would be strongly stacked against Oklahoma’s Legislature, its voters, and the citizens of its counties, cities, and towns.

What’s more, the amendment could have a chilling effect on legislators, dissuading them from proposing legislation related to farming or ranching because of the strong potential for litigation. By the same token, the amendment could have a chilling effect and dissuade citizens from engaging in the initiative and referendum process, because of fears that subsequent litigation would undo all their hard work. Worst of all, the amendment could have a chilling effect on counties, cities, or towns, who might wish to enact ordinances to prevent agricultural pollution, but be concerned not only with the prospect of litigation, but with the tremendous costs litigation can impose on already cash-strapped local governments. In fact, under 777, a town could enact an ordinance to curtail agricultural pollution, get drawn into a court battle with polluters, lose, then be forced to pay the polluters attorneys’ fees.

### 3. What does the amendment actually say?

Here’s the full text:

*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.*

*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 first part is a statement of purpose that names agriculture as “a vital sector of Oklahoma’s economy” and further as its “foundation and stabilizing force.” While agriculture is an essential part of Oklahoma’s cultural heritage, it is not the foundation of the state’s economy. It contributes less than 2% of Oklahoma’s GDP and is not considered a driver of economic growth. However, this amendment would give this one sector of the state’s economy priority rights over other sectors that are considered by some more critical to the income, employment, and security of Oklahomans.

Providing this protection to citizens and lawful residents gives the highest level of constitutional protection possible to both individuals and corporations, whether domestic or foreign-owned. Corporations are legally defined as “persons” through United States Supreme Court decisions interpreting the Fourteenth Amendment. Furthermore, a lawful resident can be anyone, whether a person or corporation, and whether they’ve been in Oklahoma five generations or five months.

The final sections limit the scope and provide a cutoff date for the amendment’s effect on laws that have already been passed.

### 4. What does “compelling state interest” mean?

This is one of the most important questions involved in the debate over 777, for several reasons. First, this language was not included in either the North Dakota or Missouri amendments, so Oklahoma would be embarking on untested ground. Second, the phrase “compelling state interest” is basically a legal code word that tells courts to analyze challenges to laws at the highest level of scrutiny, and the least deference to the democratic outcome.

The way modern American courts process claims that a law is unconstitutional is through a tiered system of tests, where the level of scrutiny given to the law, and the level of deference given to the democratic process, varies based on the kind of law in question.

Generally speaking, if a law does not involve a fundamental right—like free speech—or if it doesn’t discriminate among people on the basis of race, it will receive the least scrutiny, and the most deference. Likewise, if a law does involve a fundamental right, or does discriminate on the basis of race, it receives the most scrutiny, and the least deference.



In short, the phrase “compelling state interest” tells Oklahoma courts they have to treat laws regulating agricultural technology, livestock production, or ranching practices the same way they would treat laws that discriminate on the basis of race, or deprive people of gun rights, or tell people what they can and can’t say.

In American constitutional law, claims of gender discrimination are given less protection than claims of racial discrimination. So since 777 would give agricultural producers the same level of protection as victims of race discrimination, they would receive more protection than victims of gender discrimination. Not to put too fine a point on it, but a legal argument could be made that 777 values tractors more than women.

#### **5. I’ve heard SQ 777 called “Right to Farm.” Does it give Oklahomans the right to farm?**

No, because Oklahomans already have the right to farm, just as they have the right to engage in any other industry or livelihood. What’s more, every state in the Union already has a “Right to Farm” law on the books, which protect preexisting farms and ranches from nuisance lawsuits.

In this context, Right to Farm is a marketing term for the political campaign proposing passage of 777. Similarly, Right to Harm is a phrase used by some opposition groups.

#### **6. Is SQ 777 bad for swine, poultry, and other farm animals?**

Yes. SQ 777 would prevent the Legislature from updating or enacting reasonable regulations to protect or improve conditions for animals unless the laws meet the highest level of scrutiny demanded by the “compelling state interest” phrase. Meanwhile, there are no federal laws governing the way farm animals are raised. In Oklahoma, hogs, pigs, and chickens suffer the most in terms of extreme confinement (i.e., sow stalls and battery cages) at the 266 concentrated animal feeding operations

statewide. More than 220 million chickens are slaughtered annually in the state. At just one Guymon facility, 5.5 million hogs are slaughtered each year for domestic and international markets. The consumer marketplace is demanding change for farm animal welfare. However, while some North American fast-food restaurants and grocery retailers like McDonald’s, Sonic, and WalMart have committed to purchasing eggs and pork from producers who use more humane efforts, the global

marketplace—where many of these meat proteins are headed—do not have such consumer or cultural requirements. This is particularly true of China, where the demand for meat products is steadily growing.



#### **7. What do the terms “agricultural technology, livestock production, or ranching practices” mean?**

Those terms aren’t defined in the amendment, so it’s difficult to answer this question. But under 777, the Oklahoma Supreme Court would be the final authority on what counts

as “agricultural technology, livestock production, or ranching practices,” and only once challenges to the amendment reach that level of adjudication, which could take years.

#### **8. Could “agricultural technology” protect cloning?**

Yes. Use of cloning by agricultural businesses is more advanced than most people might think. In July 2015, ABC News ran a story on Infigen, a Wisconsin company that uses cloning technology to produce milk. The same story quoted a representative of the Dairy Farmers of America, who said, “If you have the ability to produce a cow, a good cow, that has tremendous potential. The dairy farmer in this country, when [cloning technology] is viable, will use it.” The technology is close enough that the U.S. Food and Drug Administration published A Primer on Cloning and Its Use in Livestock Operations in July 2014. In fact, one of the first cloned horses in America was a foal born on an Oklahoma farm in February 2006.

### 9. Could “livestock production” protect puppy mills?

Yes. Oklahoma’s legal definition of “livestock” means, simply, “animals,” and includes “any animal or bird in captivity.” It also includes exotic animals such as tigers. In fact, Oklahoma has one of the largest tiger-in-captivity breeding operations in North America.

### 10. Could “ranching practices” protect the blunt-force euthanasia of piglets?

Yes. There are currently no laws that prohibit the use of blunt-force trauma as a means of euthanizing piglets. To be sure, when a video of an Oklahoma pig farm showed workers engaging in this practice, there was public outrage, including from the Oklahoma Pork Council, and the workers were fired. Although, on the other hand, the American Veterinary Medical Association considers the use of blunt-force trauma as a means of piglet euthanasia to be an acceptable practice.

So if the Legislature or the people of Oklahoma voted to prohibit the blunt-force euthanasia of piglets, the owner of a pig farm could sue to overturn that law on the ground that it “abridged” his right to employ “ranching practices.” (There are no federal laws governing the way farm animals are raised, only transported and slaughtered.)

### 11. Could 777 give people the right to grow marijuana in their backyard?

Probably not—although if you look up to Question 3 of this FAQ, you’ll see that 777 says “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.”

What it doesn’t say is that nothing in this section shall be construed to modify any provision of common law or statutes relating to criminal offenses, so an argument could certainly be raised that the exclusion of “criminal offenses” from that list leaves the door wide open.

Interestingly, this argument has already been raised in Missouri, the second state to pass a version of SQ 777. Lisa Loesch, a marijuana farmer in Jefferson County, was charged with a felony for manufacturing a controlled dangerous substance after the Jefferson City police found about 90 potted marijuana plants in her basement. Her lawyer filed a motion to dismiss the case, arguing, “The amendment prohibits the Legislature from declaring what can and cannot be grown in Missouri.” (Ms. Loesch’s judge rejected this argument.)



### 12. How did SQ 777 get to Oklahoma?

In 1996, the American Legislative Exchange Council, or ALEC, a group that brings together corporations and state lawmakers to write pro-business bills, came up with model legislation that would expand existing right-to-farm laws to grant wide-ranging legal rights to farms of all sizes. ALEC’s bill, intended as a template for state politicians, voided local farm ordinances and made it harder to lodge complaints about animal mistreatment, pollution, and noise. The model was later adjusted to call for amending state constitutions in lieu of state legislation.

Ahead of the 2012 elections, the North Dakota Farm Bureau asked a local lawyer to prepare the basic language contained in SQ 777, and an organization called the North Dakota Feeding Families Committee pursued a signature-petition drive to put a constitutional amendment on the ballot that said, “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.” Opponents of the measure included the North Dakota Farmers Union, the state’s largest general farm organization, whose ranks include over 40,000 member families. The amendment passed with 66.89% support.

Ahead of the 2014 elections, Missouri State Representative Bill Reiboldt, a Republican, sponsored a version of SQ 777, and it was placed on the August 5 primary ballot rather than the November 4 general election ballot by Missouri Governor Jay Nixon, a Democrat. The measure said, “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." The state Farm Bureau once again supported the measure, and the state's Farmers Union once again opposed it. The measure passed, with 50.12% support, triggering a rare statewide recount (this was only the fourth such recount in twenty years).

In April 2015, Oklahoma State Representative Scott Biggs, a Republican, sponsored a resolution to place SQ 777 on the ballot. The resolution received support from a majority of the Oklahoma House of Representatives and the Senate, and was placed on the 2016 general election ballot. An identical measure is also pending in Nebraska.

### **13. Why do supporters of SQ 777 feel the amendment is needed?**

Supporters of Vote Yes are concerned that the Oklahoma Legislature, or the people of Oklahoma in a ballot initiative or legislative referendum, could pass laws that restrict agricultural businesses from using whatever technologies, livestock production techniques, or ranching practices they desire. Agribusiness proponents often point to Proposition 2 in California, which created standards for confining farm animals (primarily sows, chickens, and veal cattle), as a reason to protect farming and ranching operations from the interests of animal-welfare advocates. The California law, which went into effect on January 1, 2015, required that confined farm animals be able to lie down, stand up, turn around, and fully extend their limbs.

### **14. What are opponents saying?**

Opponents of 777 cite several areas that would have long-range implications. Concerns over water quality and rights, food quality and safety, environmental degradation, animal welfare, extreme market concentration and the destruction of the individual family farmer, and loss of representative government are chief areas of concern for the Vote No position.

### **15. Suppose 777 passed, and the voters of Oklahoma decided they wanted it removed from the Constitution. How could 777 be repealed?**

It's very difficult. Either a majority of both houses of the Legislature could refer another amendment to the people for a vote (as Scott

Biggs did for SQ 777); or, more costly and time-consuming, a citizen's initiative petition could be placed on the ballot for a vote. The process for a citizen's petition requires signatures from 15% of "legal voters," acquired during a narrow ninety-day window of time, and costing approximately \$457,000 in necessary expenses. According to the *Oklahoma Bar Journal*, "Since 1965, 113 initiatives have been filed with the Secretary of State. Of those, only twenty-one petitions withstood the requisite scrutiny to obtain placement upon the ballot. Ten of those twenty-one questions were passed by the majority of the voters."

### **16. If the US Department of Agriculture reversed the ban on horse slaughter in the United States, could my town enact an ordinance to prevent a horse slaughter facility from locating there?**

Your town could enact that ordinance, but it would qualify as a law that abridged the right to employ livestock production (and possibly ranching practices, too). So a company that wanted to open a horse slaughter facility could sue your town under 777, and the town's lawyer would have to appear in court and prove that the ban could beat the strict scrutiny standard, which is extremely difficult.

### **17. Ractopamine, a controversial drug which is mixed with animal feed to cause a leaner meat, is used in livestock. The side effects in farm animals range from neurological tremors to death; the human health effects are a source of concern. More than 160 countries have banned its use, but it's still legal and used in the United States. If 777 passed, could Oklahoma ban Ractopamine?**

Oklahoma could enact a ban on Ractopamine, and give the Oklahoma Department of Agriculture, Food and Forestry (ODAFF) the power to enforce the ban. But if any agricultural producer, be they sole proprietor or multinational corporation, wanted to continue using Ractopamine, under 777 they could file a lawsuit against ODAFF to challenge the ban. And, since the lawsuit would assert that an Oklahoma law is unconstitutional, the state Attorney General would have to be served with notice.

ODAFF would have to respond and prove three things: First, that the danger posed by Ractopamine is a compelling interest of Oklahoma; second, that the ban on Ractopamine is necessary to alleviate that danger; and third, that there's no less-intrusive way to alleviate that danger.

Meanwhile, the Attorney General, as an interested party to the lawsuit, would either defend the constitutionality of the ban, or, theoretically, side with the plaintiff against the ban. (The Attorney General's purpose as an interested party when a law is challenged as unconstitutional has traditionally been to ensure the law's constitutionality receives a robust defense—however, the current Attorney General has come out strongly in favor of 777, which could complicate things for that office under this scenario.)

**18. Pollinators such as bees and monarch butterflies are suffering large declines in population, and scientists believe this is due largely to neonicotinoid pesticides. If 777 passed, could Oklahoma ban the use of these chemicals if they were proven to destroy pollinators?**

Again, Oklahoma could enact that ban, but the ban would certainly qualify as a law that abridges the right to employ agricultural technology, so an agricultural producer who wanted to continue using these chemicals could sue the state under 777, and just like with the Ractopamine example, the State would have to appear in court and prove that the danger posed by the chemicals is a compelling interest of Oklahoma, that the ban is necessary to alleviate that danger, and that there's no less-intrusive way to do it.



**19. Suppose current and unforeseeable technological advances in livestock production produced grave problems with waste management. If 777 passed, could the Oklahoma Legislature enact regulations to solve those problems?**

Again, Oklahoma could enact regulations to solve those problems, but the regulations would almost certainly qualify as

an abridgment of the right to employ livestock production, which would open the regulations up to a challenge under SQ 777.

**20. Does SQ 777 protect the family farmer?**

It depends on who you ask. Agribusiness leaders say that SQ 777 protects the farmer from unnecessary regulation. Opponents to the amendment say that corporate monopolies and vertical integration in the marketplace have already destroyed the Oklahoma family farmer's ability to compete. For example, from 1992 to 2012, coinciding with the hog industry explosion in Oklahoma, the number of hog farms shrunk by 43%.

**21. Does SQ777 allow foreign ownership of our agricultural lands, such as Chinese-owned agribusinesses like Smithfield?**

Actually, 325,605 acres of Oklahoma agricultural land are already owned by foreign investors. If Oklahoma lawmakers wanted to cap that level of foreign ownership of Oklahoma land at, say, 500,000 acres, a "lawful resident" could challenge that legislation, saying it infringed on his constitutional right. This isn't merely hypothetical, either. In November 2015, the country of Australia blocked the \$250 million sale of Australian farmland to China, saying the acquisition "would be contrary to the national interest." The proposed parcel—at 22 million acres roughly the size of Indiana—is situated near a military defense weapons testing installation. A month before, New Zealand rejected a \$57 million offer by a Chinese company for a 53-square mile sheep and cattle operation. The country's land information minister said the benefits of selling "were not substantial enough."

**22. Farm occupations have the second highest number of fatalities in the United States, according to the Bureau of Labor Statistics. Would SQ 777 prevent the enactment of labor laws to protect farming and ranching employees?**

Yes.

**23. Do any other Oklahoma occupations or industries enjoy the type of protections and exemptions from basic governance and regulation proposed by SQ 777?**

No.