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Can Localities Use Ballot Power To Ban Oil And Gas Drilling?

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Can Localities Use Ballot Power To Ban Oil And Gas Drilling?

Election season is right around the corner. The local ads touting the merits of this ballot issue or highlighting the deficiencies of that ballot issue surround our daily lives. Some of us change the channel, others find inspiration, and yet, most residents are unaware of the flurry of litigation that ensues over which initiatives will make it onto the ballot.

Local initiatives to ban and, in some cases, criminalize oil and gas activities have been appearing on ballots in towns from Oregon to New England, Ohio to New Mexico. These grassroots-initiatives are based on a desire to assert the rights of nature and restore the ability of the people to govern themselves at the local level, free from state and federal supremacy. These initiatives have been litigated in jurisdictions across Ohio, and they may be coming to a state near you sooner than you think. [1]

In Ohio, like many states, in the state constitution the people have delegated legislative power to the state government, while reserving for themselves certain rights and powers to amend, enact, propose, and repeal constitutional provisions, statewide laws and local legislation. When local initiative efforts to ban and even criminalize oil and gas operations are challenged prior to reaching the ballot box, however, they raise interesting constitutional issues.

A recent spate of election cases in Ohio teach us that there is a difference between evaluating the authority to enact a particular law and the constitutionality of the particular law enacted. In mid-

September, the Supreme Court of Ohio released two election decisions concerning ballot initiatives in Athens County, Fulton County, Medina County and the city of Youngstown. The ballot initiatives at issue in these cases sought to prohibit oil and gas drilling and operations within each locality, even though the Supreme Court of Ohio ruled in *State ex rel. Morrison v. Beck Energy Corp.*, in early 2015, that local ordinances regulating oil and gas drilling and operations are invalid and unenforceable to the extent they conflict with the state's sole and exclusive authority to regulate the oil and gas industry.

The Supreme Court of Ohio invalidated the counties' ballot initiatives, while validating the city of Youngstown's ballot initiative. So, the voters of the city of Youngstown get to decide whether to enact a local law that bans oil and gas drilling and operations, even though it is virtually certain that such a local law is unconstitutional.

The County Ballot Initiatives

The ballot initiatives in Athens, Fulton and Medina counties attempted to accomplish two things: (1) establish a charter-form of county government in each of the counties;^[2] and (2) prohibit, in whole or in part, oil and gas drilling and operations within the respective counties. The initiatives in each of the three counties were strikingly similar, and closely resembled "Community Bill of Rights" language that is available on the Internet. After the respective county boards of elections certified the ballot initiatives, voters in each county challenged the ballot initiatives for a variety of reasons.

The Ohio Secretary of State was faced with ruling on the validity or invalidity of the respective ballot initiatives to determine whether they would appear on the ballot in November. The secretary concluded that the proposed ballot initiatives exceeded each county's initiative authority under the Ohio Constitution and were, therefore, invalid. First, the secretary determined the proposed alternative forms of county government did not satisfy the statutory requirements for establishing an alternative form of county government. Second, the proposed bans on oil and gas drilling and operations would be unconstitutional under the Ohio Supreme Court's ruling in *Morrison*. Because none of the counties were permitted to enact a nonconforming type of alternative government, nor could they enforce laws banning oil and gas drilling or operations, the secretary determined that the proposed initiatives would not appear on the ballot in November.

The Youngstown Ballot Initiative

A group of local residents of the city of Youngstown circulated a petition to enact an amendment to the city charter banning all oil and gas operations and drilling within the city, and subjecting the oil and gas industry, its supporting industries, and even the Ohio Department of Natural Resources to civil and criminal liability if they did not comply. The proposed charter amendment proclaimed that the city's initiative was not subject to preemption by either state or federal law. Although this was the fifth time the amendment was proposed, it was the first time since the Ohio Supreme Court's ruling in *Morrison*.

At a meeting of the Mahoning County Board of Elections, the members debated whether the proposed charter amendment should appear on the ballot. Discussion turned to the ruling in *Morrison*, and the concern that if enacted, the charter amendment would be unconstitutional and thus, unenforceable. The board unanimously voted to invalidate the petition.

Generally, the People Can Propose and Enact Laws Even Though They Are Unconstitutional

Expedited mandamus actions were filed in the Supreme Court of Ohio, seeking to require both the secretary and the Mahoning Board of Elections to allow the ballot initiatives to appear on the November ballot. The Ohio Supreme Court released its decisions within 24 hours of one another. When read together, the opinions highlight the subtle, yet important distinction between the authority to enact laws and the constitutionality of the law seeking to be enacted.

The Supreme Court of Ohio reaffirmed that simply because a local law would be unconstitutional, if enacted, is not sufficient to keep an issue from appearing on the ballot. As such, neither the secretary, nor a board of elections has the authority to invalidate a ballot initiative based *solely* on the fact that it would be unconstitutional if enacted by the people. But, if other reasons also compel an election official to invalidate an initiative, it may be appropriate to keep an unconstitutional initiative off the ballot.

In *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, the Ohio Supreme Court found that the Board of Elections based its decision *solely* on the fact that if enacted, the Youngstown ballot initiative would be unconstitutional. Although the Board of Elections argued alternative grounds in its briefing, the court confined its ruling to the reasons expressed by the Board of Elections during its debate prior to the vote to invalidate the ballot initiative. The Supreme Court of Ohio granted the writ of mandamus, and the Board of Elections' decision was overturned.

In contrast, the court upheld the secretary's decision in *State ex rel. Walker v. Husted*. The secretary's decision relied, in part, on the fact that if enacted, the county ballot initiatives would be unconstitutional. But, unlike the Board of Elections' decision, the secretary's analysis did not end there. Rather, the secretary ultimately concluded that the county ballot initiatives exceeded the counties' respective legislative authority because they failed to comply with the constitutional and statutory requirements necessary to establish an alternative form of county government. Such reasoning was proper, within the secretary's authority, and a valid basis for invalidating the county ballot initiatives.

Whether a law would be constitutional if enacted is an entirely different question than whether the locality has the constitutional authority or has complied with particular legal requirements to enact a particular piece of legislation. While the former is not a permissible basis for invalidating a ballot petition, the Supreme Court of Ohio's opinions in *Walker* and *Youngstown* make clear that the latter is acceptable. Therefore, a ballot initiative must (1) fall within the scope of the locality's constitutional power of referendum or initiative — i.e., the power to propose, amend and repeal legislation; and (2) satisfy all statutory prerequisites necessary to accomplish what the ballot measure seeks to enact. If it does, whether the proposed ballot initiative puts forward a constitutional proposal or not does not matter.

Authority vs. Constitutionality: Future Challenges to Local Bans of Oil and Gas Drilling and Operations

What makes these cases interesting moving forward is the issue the Ohio Supreme Court failed to address. To ban oil and gas operations within the municipality, the Youngstown ballot initiative — like similar ballot initiatives in Ohio — proposes to exempt the municipality from all forms of state, federal and international preemption. The doctrine of preemption formed the basis of the Ohio Supreme Court's opinion in *Morrison* and is the principle reason why these ballot initiatives would most likely be unconstitutional if enacted.

Preemption is a constitutional principle in Ohio: “Municipalities shall have authority ... to adopt and enforce within their limits such local police, sanitary and other similar regulations **as are not in conflict** with general laws.”^[3] By invalidating the constitutional principle of preemption, these municipal ballot initiatives effectively seek to amend the Ohio Constitution as it applies to them.

Do municipalities have the legislative authority to amend the Ohio Constitution through local legislation? By purporting to exempt the city of Youngstown from the Ohio Constitution, that is what the proposed Youngstown charter amendment seeks to do. The Ohio Constitution, like other state constitutions, outlines the process and procedures for its amendment. Those procedures do not include amendment by enactment of local, municipal legislation. Therefore, it would appear as though these types of ballot initiatives should fall outside the scope of the locality’s constitutional power of referendum or initiative.

The Board of Elections presented that issue to the Supreme Court of Ohio. But, the court chose not to address it in the *Youngstown* decision.

Given the rulings in *Walker* and *Youngstown*, practitioners, local governments and election officials considering challenges to local, ballot initiatives banning oil and gas drilling and operations should consider whether the particular municipality has the legislative authority to exempt itself from the constitutional principle of preemption, rather than whether the ban would be constitutional if enacted.

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[1] For more information concerning the Community Environmental Legal Defense Fund, the organization spearheading the grassroots effort, visit their website at www.celdf.org.

[2] For those unfamiliar with Ohio’s system of local governments, the Ohio Constitution grants “home-rule” authority to municipalities, but not counties. This “home-rule” authority allows municipal governments to: (1) govern their internal governmental affairs without enabling legislation from the General Assembly; and (2) enact local police regulations that do not conflict with general state laws. See Art. XVIII, Section 3, Ohio Constitution. Counties in Ohio, however, can subsume municipal home-rule authority through the enactment of a county charter form of alternative government. To be valid, however, the charter must comply with the minimum requirements found in Ohio Revised Code Chapter 302. To date, only Cuyahoga and Summit counties have established valid county charter governments.

[3] (Emphasis added.) Art. XVIII, Section 3, Ohio Constitution.