

Memo:
To: Chuck O'Neal
From: Clay Henderson
Re: Right to Fish and Hunt Amendment
July 30, 2023

The Florida Legislature recently passed CS/HJR 1157, which places a proposed constitutional amendment to establish a "Right to Fish and Hunt" on the 2024 General Election ballot. The language of the proposed amendment is as follows:

ARTICLE I DECLARATION OF RIGHTS

SECTION 28. Fishing, hunting, and the taking of fish and wildlife.—Fishing, hunting, and the taking of fish and wildlife, including by the use of traditional methods, shall be preserved forever as a public right and preferred means of responsibly managing and controlling fish and wildlife. This section does not limit the authority granted to the Fish and Wildlife Conservation Commission under Section 9 of Article IV.

The following ballot question is what voters will see on the ballot as explanation of the proposal.

RIGHT TO FISH AND HUNT.—Proposing an amendment to the State Constitution to preserve forever fishing and hunting, including by the use of traditional methods, as a public right and preferred means of responsibly managing and controlling fish and wildlife. Specifies that the amendment does not limit the authority granted to the Fish and Wildlife Conservation Commission under Section 9 of Article IV of the State Constitution.

The staff analysis of the resolution reports there is already a "right to fish and hunt" in Florida:

In 2002, the Legislature recognized that hunting, fishing, and the taking of game are a valued part of the cultural heritage of Florida, and as such, should be preserved for Floridians. The Legislature also recognized that such activities play an important part in the state's economy and in the conservation, preservation, and management of the state's natural areas and resources. The Legislature intended that the citizens of Florida have the right to hunt, fish, and take game, subject to rules and regulations prescribed by general law and FWC. FWC regulates hunting and fishing seasons, means of take, bag limits, and areas authorized for hunting or fishing. With certain exceptions, individuals who wish to hunt or fish in Florida must obtain the appropriate license or permit from FWC.

As noted in the staff analysis, the right to hunt and fish is spelled out in state statute:

379.104 Right to hunt and fish.—The Legislature recognizes that hunting, fishing, and the taking of game are a valued part of the cultural heritage of Florida and should be forever preserved for Floridians. The Legislature further recognizes that these activities play an important part in the state’s economy and in the conservation, preservation, and management of the state’s natural areas and resources. Therefore, the Legislature intends that the citizens of Florida have a right to hunt, fish, and take game, subject to the regulations and restrictions prescribed by general law and by s. 9, Art. IV of the State Constitution.

With this in mind, it’s important to point out the differences between the statutory right and the proposed constitutional right:

First, the proposal establishes a “public right” to hunt and fish and places it in the Declaration of Rights section of the Florida Constitution. As a matter of constitutional law any future decision by the Fish and Wildlife Conservation Commission would have to take this “public right” into consideration. Obviously, some future decision on whether to hunt bears or fish for red snapper would require consideration of whether it violated this “right to fish and hunt.” Ultimately there is the question of what is a “public right,” in any event?

It also raises a separate constitutional issue of how this effects the Net Ban Amendment. Beleaguered commercial fishermen continue to file challenges to the Net Ban Amendment. If the proposed Right to Fish amendment is ratified it will certainly give rise to new arguments that the subsequent expression of the will of the people to create a “right to fish” overrides the constitutional ban on gill nets. Net fishing, they will argue, is a “traditional means” to catch fish.

Next, the proposed constitutional right goes beyond the existing statutory right by including a new clause declaring hunting and fishing is the “preferred means of responsibly managing and controlling fish and wildlife.” This is a significant departure for a century of evolving conservation law and policy. More often than not the preferred method to manage fish and wildlife is to prevent it from being harvested or over-harvested. There are many instances where the FWCC or previous GFC restricted harvest of fish or wildlife to manage the recovery of a species.

Another vague and troubling issue is what does “traditional methods” actually mean? There is no explanation of the intent of this language. Is it a nod to traditional methods of Native Americans to take wildlife, such as a right to hunt panthers as some have asserted? Or is this a right to use spears, bows and arrows, gill nets, poison, or steel jaw traps? Indeed, steel traps were the preferred method to take wildlife in early America. Is that a traditional method? Again, I think the

establishment of a constitutional right to hunt or fish by traditional methods will require and decision by the FWCC to weigh restrictions on hunting and fishing against this new constitutional right.

Lastly, here's an interesting comparison. This proposal did not just pop out of the blue but part of a multi-state campaign by the NRA. Here's the text of their model language:

The citizens of this State have the right to hunt, fish, and harvest wildlife, including the use of traditional methods, subject only to statutes enacted by the Legislature and regulations adopted by the designated agency [or "fish and game commission" or state-specific term] to promote wildlife conservation and management and to preserve the future of hunting and fishing. Public hunting and fishing shall be a preferred means of managing and controlling wildlife. This section shall not be construed to modify any provision of law relating to trespass or property rights.

The last sentence is missing from the Florida proposal. This raises another question: Does the establishment of a constitutional "public right to hunt and fish" override trespass laws or property rights? How is a "public right" different from other constitutionally protected rights of individuals?

The supporters of the amendment will no doubt cite the language of the amendment that says it does not "limit the authority" of the Fish and Wildlife Conservation Commission, which has both the "regulatory and executive powers of the state" regarding fish and wildlife. Nevertheless, the addition of a public right in the Declaration of Rights article of the Florida Constitution will require nearly every proposed regulatory action to be balanced against the "right to fish and hunt." There is a level of discretion applied to this balancing that one could imagine would balance in favor of a right to fish or hunt over conservation of the species.

The proposed constitutional right to hunt and fish raises numerous questions for which there is no definitive answer. However, there can be no doubt that the proposal, if ratified, will be further justification to approve new bear hunts, challenge net bans and closed fishing seasons, and restrict other conservation measures.