Guest Editorial

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"Right to Farm"

More Questions than Answers

In the 2016 legislative session, the legislature considered a constitutional amendment that is commonly referred to as the "Right-to-Farm Amendment." As the name implies, it would create a state constitutional right to farm. Many expect the same, or a very similar, measure to be proposed in the 2017 session. If such a measure were to pass the legislature, it would be presented to voters in a subsequent general election. If a majority of votes cast on the question were to favor adoption, it would amend the Nebraska Constitution.

To evaluate whether or not one should support this measure, one must consider what the amendment is likely to do. That, in turn, depends upon the language it uses and, more importantly, the likely legal impacts of the language. Those impacts are also affected by the legal context in which it will operate. Below, I offer my thoughts on the language of last year's proposal in light of its apparent purpose. Briefly, however, one must consider this provision's purpose.

At its broadest level, this amendment is meant to ensure that the legislature cannot interfere with farming and ranching unless the legislature has a very good reason for doing so. In other words, it is designed to protect farming and ranching from the Nebraska Legislature. It does not appear to protect farming and ranching from local governments, and it does nothing to protect farming and ranching from further state constitutional amendments proposed through ballot initiatives, like those passed in California and proposed in Massachusetts.

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The most fundamental question facing the amendment is whether or not this protection is necessary. One can reach differing conclusions on that question, but history seems to indicate that it is not. In my decade-long study of agricultural law, I have not seen the Nebraska Legislature act in a way that is fundamentally anti-agriculture. Sometimes, of course, the legislature must balance the needs of farmers and ranchers with the needs of other stakeholders. Indeed, the legislature sometimes makes difficult tradeoffs. Sometimes those tradeoffs benefit farmers and ranchers, but sometimes they do not.

This makes sense. After all, we are all fans of agriculture. But we are also fans of our children's education, the availability of health and elder care, clean water, clean air, a robust and diverse economy, a fair and just employment setting, open markets that lack unjust bargaining disparities and a whole host of other legitimate public-policy concerns. We all have these concerns and we often try to deal with these problems together through government, which, at its core, is the best means that we've come up with to achieve what we cannot achieve individually.

The legislature is the main cog in this effort and its job is incredibly difficult. For its effort to be successful, compromise is necessary. Agricultural interests may have to give some to make headway on other fronts, and other fronts may have to yield to agricultural ends. This measure would disrupt that process substantially. To say in all cases that agriculture shall have the upper hand is to grossly and dangerously oversimplify the difficult practice of policymaking.

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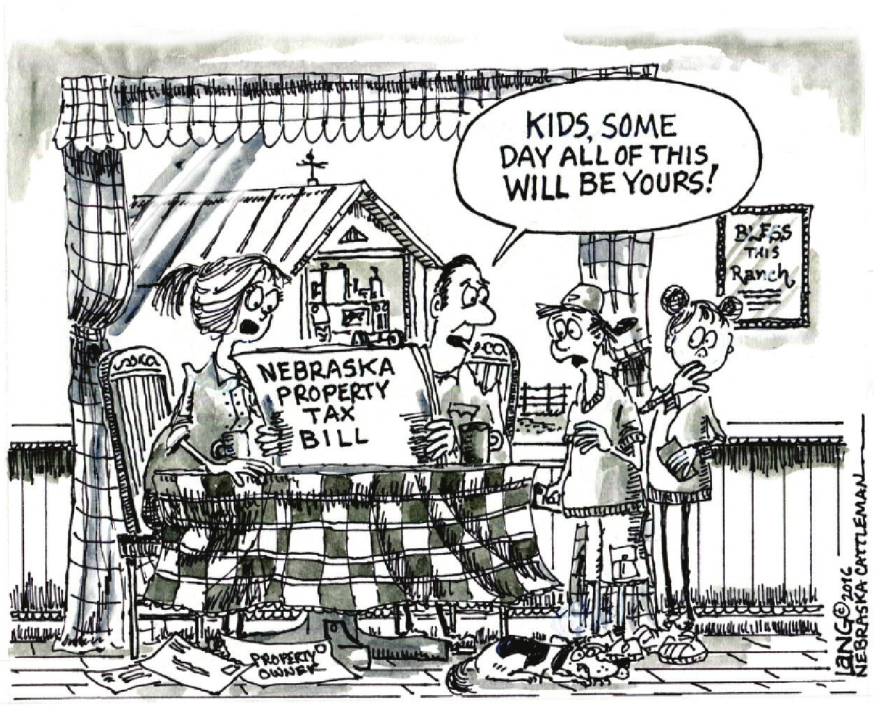
Consider This



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One should also seriously consider the practical consequences of an amendment like this to the legislative process. It could ultimately harm agriculture. It could mean that agriculture will have little room to ask others to compromise on those laws that would benefit agriculture. Why would those other stakeholders give, after all, if agricultural interests seldom give anything?

On the other hand, the future may not hold what the past has held. Some may think that agriculture is in a dangerous position in which it needs to be protected from the democratic process. A carefully crafted constitutional restraint on the legislature is one of the few ways to rein in a dangerous legislature. However, to ensure that the limits are appropriate, one must pay close attention to the language it uses and have some understanding of the limits facing the effort.

There are three sorts of objections to the language that last year's proposal used. Some of it was outright unlawful. Some of it was incoherent, or at least unclear. Some of it appeared under-inclusive. Below I provide a few examples, but there are a number of others that I don't have room to discuss here.

The measure purported to create a right to farm and ranch for "citizens and lawful residents of Nebraska." There are two objections to this language. First, it doesn't appear to cover business entities. So an LLC or a Corporation would not be protected by this measure. More importantly, however, it is clearly unlawful. Nebraska cannot enact any law that provides a benefit to in-state interests, while refusing to extend that benefit to out-of-state interests doing business within the state. This limit is imposed as a result of our federal constitution, which the U.S. Supreme Court has concluded prohibits states from purposefully or effectively discriminating against out-of-state economic interests. It was this limit, you may recall, that ended I-300 in Nebraska.

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The second category of objections relates to the uncertainty surrounding the language the drafters proposed. Uncertainty is a problem with all law, including legislation and constitutional amendments. So this objection is not as significant as many of the others. But it raises fundamental questions about whether or not this measure will deal with any of the problems facing farmers and ranchers. For example, as anyone who has been involved in farming can attest, identifying farmers is a difficult task. Those who own agricultural land may be farmers. Those who do farm labor may be farmers. Those who do farm management may be farmers. Or it may take all of those things to distinguish farmers from those who are investors, laborers or managers. Ranching is subject to the same definitional problems. This measure, of course, used terms like farming and ranching. But it did not define them. As a result, it is not at all clear whom this measure would protect.

Assuming we can identify farmers and ranchers, it becomes important to figure out how much protection their pursuits are given. There are two aspects of this that are important. The first is the scope of the agricultural industry that would need protecting in order to protect farmers and ranchers. Farmers and ranchers are part of a larger system, dependent upon input suppliers (including financiers) and purchasers. Would the protection afforded farmers and ranchers impact those who sell goods and services to them and those who buy goods and services from them? Which way would that protection cut? That is, would these suppliers and buyers be protected from outside non-farmer, non-rancher interests? Or would these suppliers and buyers be forced to bear the weight of agricultural regulation that farmers are protected from? Or, perhaps, would both result?

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The second aspect of protecting farmers and ranchers that is important is a consideration of what, precisely, this measure would protect farmers and ranchers from. The measure proposed last year protected farmers and ranchers from legislation that would "abridge" the right to farm and ranch. This term could mean that only those laws that absolutely prohibit farming or ranching would be unconstitutional. This seems a minor risk. The term could also mean that all laws raising the costs of production would be unconstitutional unless justified. That would, perhaps, tip too far in the direction of agriculture, to the detriment of all of those other policy goals that conflict with agriculture on the margins.

The final major objection to the language of last year's proposal lies in the exclusion of many areas of great importance to the agricultural sector. For instance, local governmental regulation (from counties, NRDs and the like) was excluded from the proposal's coverage. Water regulation was excluded. Concerns for property rights resulted in an exclusion. In other words, as legislators started to consider the areas in which agriculture should not be elevated above the interests of others, exceptions and exclusions developed. This, perhaps, sheds some light on the thoughts I opened with. In the end, the very effort at cabining the scope of this measure seems to reveal that it is not the right tool for the job in many, if any, instances.

There was language in last year's proposal that suggested that animal production practices and biotechnology are the hot-button issues driving this effort at agricultural protectionism. If that were true, then we would do well to take up those issues with the statutory tools we have. Framing these issues as involving risks that necessitate binding our legislature's hands has more far-reaching consequences than may first appear. We can do better. ▪ NC ▪