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## Policy Brief: 2013 Legislative Session

### **Senate Joint Resolution 7: Creating an Enhanced Constitutional Right to Commercially Produce Meat, Poultry, Fish and Dairy Will Limit State's Ability to Regulate the Livestock Industry**

#### **Background:**

Today, four corporations control over 85% of beef packing in the United States.<sup>1</sup> Two corporations -- Tyson and Smithfield -- control over half of pork production.<sup>2</sup> Forty percent of milk production is controlled by Dean Foods.<sup>3</sup> With this much of food production controlled by so few people, monolithic farming operations are now standard across the country with devastating effects on local economies and rural communities.<sup>4</sup> Indiana is no different. Indeed, the former administration made good on its promise to double pork production in Indiana, and paved the way for Tyson, Smithfield, Cargill and Swift to produce 5.5 million pigs in our state last year.<sup>5</sup>

Due to this corporatization of agriculture, small-scale, family farms in Indiana have increasingly disappeared or transformed into enormous livestock factories with lagoons of liquid manure, urine and super-concentrated smells that make living conditions unbearable for people who live nearby.<sup>6</sup> These livestock operations have polluted our rivers with millions of gallons of spilled manure, killed tens of thousands of fish, and caused strife and unrest in our rural communities.<sup>7</sup>

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<sup>1</sup> Hendrickson & Heffernan, *Concentration of Agricultural Markets*, University of Missouri, Dept. of Rural Sociology (2007)(identifying Tyson Foods, Cargill Meat Solutions Corp., Swift & Co., and National Beef Packing Company).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> National Associations of Local Boards of Health, *Understanding Concentrated Animal Feeding Operations and their Impacts on Communities* (2010) available at [http://www.cdc.gov/nceh/ehs/Docs/Understanding\\_CAFOs\\_NALBOH.pdf](http://www.cdc.gov/nceh/ehs/Docs/Understanding_CAFOs_NALBOH.pdf); Pew Commission on Industrial Farm Animal Production, *Impact on Rural Communities* available at [http://www.ncifap.org/issues/rural\\_communities](http://www.ncifap.org/issues/rural_communities).

<sup>5</sup> Indiana Pork Producers Page - SwineWeb.org at <http://www.swineweb.com/regional-pages/indiana-pork-producers> accessed Feb. 17, 2013.

<sup>6</sup> Center for Disease Control and Prevention, Environmental Health Services, *Concentrated Animal Feeding Operations (CAFOs)* (listing several studies and articles about public health and quality of life impacts for communities near CAFOs) available at <http://www.cdc.gov/nceh/ehs/Topics/CAFO.htm>; *Factory Farm Nation: How America Turned its Livestock Farms into Factories*, Food & Water Watch (2010), available at <http://www.factoryfarmmap.org/wp-content/uploads/2010/11/FactoryFarmNation-web.pdf>.

<sup>7</sup> PorkNetwork, *Indiana Hog Farmer Cited for Spraying Manure* (Nov.29, 2010) available at <http://www.porknetwork.com/pork-news/latest/indiana-hog-farmer-cited-for-spraying-manure-113109389.html>; Slabaugh, Seth, *Millions of Gallons of Hog Manure Spilled*, Muncie Star Press (May 12, 2009); Slabaugh, Seth, *Pork Farmer Pays for Randolph County Fish Kill*, Muncie Star Press (Sept. 8, 2009); Slabaugh,

Consequently, impacted citizens have been calling on their state and local leaders to take action and some have had no alternative but to turn to the courts.<sup>8</sup>

Yet, preferring to have even fewer rules on how farm animals are treated, waste is managed, or waterways and landowners impacted, lobbyists for agri-business are pushing for legislation this year, to stealthily decimate the legal rights and ability of citizens to protect their homes and families. Probably the most concerning effort to de-regulate factory farming is SJR 7, which would create a fundamental right to "engage in the agricultural or commercial production of meat, fish, poultry, or dairy products." This amendment has already passed out of both chambers in a prior legislative session, and has passed out of the Indiana Senate in the 2013 legislative session, as of this writing.

SJR 7, the "Constitutional Right to Hunt and Fish," reads:

*The people have a right to hunt, fish, harvest game, or engage in the agricultural or commercial production of meat, fish, poultry, or dairy products, which is a valued part of our heritage and shall be forever preserved for the public good, subject only to laws prescribed by the General Assembly and rules prescribed by virtue of the authority of the General Assembly. Hunting and fishing shall be the preferred means of managing and controlling wildlife. This section shall not be construed to limit the application of any provision of law relating to trespass or property rights.*

(emphasis added).

## **I. The proposed "right" to commercially produce meat is obscured by the title of the proposed resolution.**

As an initial matter, the true nature of SJR 7 is obscured with the title, "Right to Hunt and Fish." Consequently, some Indiana legislators – and potentially Hoosier voters -- may not realize they are voting on a measure that will also create a constitutional right to commercially produce meat. More importantly, however, many voters will not understand the implications of passing SJR 7 on the state's ability to regulate the livestock industry.

## **II. The proposed "right" to engage in the commercial production of meat does not rise to the level of a true unalienable right**

Specifically, SJR 7 will amend Article I of Indiana's Constitution. Article I, like the U.S. Constitution's Bill of Rights, serves to protect our natural or "unalienable" rights of life, liberty and the pursuit of happiness.<sup>9</sup> Indeed it has been long established that the fundamental rights embodied

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Seth, *What Killed 107,605 Fish?* Muncie Star Press (Aug. 11, 2010); Slabaugh, Seth, *IDEM: 200,000 Gallons of Manure Sprayed in Field Before Fish Kill*, Richmond Palladium-Item, (Sept. 15, 2010); Sharp, Pam, *Seething Crowd Sees Ordinance OK'd*, Richmond Palladium-Item (June 26, 2008).

<sup>8</sup> See e.g., *Stickdorn v. Lantz*, 957 N.E.2d 1014 (Ind.App. 2011).

<sup>9</sup> See Ind. Const. Art. I, Sec. 1 (stating, "WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of

in our Bill of Rights, i.e. freedom of speech, are those which have their origin in natural law.<sup>10</sup> Natural law stems from the view that certain rights or values are inherent in or universally cognizable by virtue of human reason or human nature and, therefore, not created by government.<sup>11</sup> Clearly, one's right to "engage in agricultural or commercial production of meat, fish, poultry, or dairy" is not on par with our true fundamental rights derived from natural law.

### III. The right to commercially produce meat is already protected under the Indiana constitution

Intrinsic to the right of liberty includes the economic freedom to acquire, use, transfer and dispose of private property without unreasonable governmental interference; the right to seek employment wherever one pleases; to change employment at will; and to engage in any lawful economic activity.<sup>12</sup> In other words, a person's "right" to engage in the "agricultural or commercial production of meat, fish, poultry, or dairy" is *already* protected under our federal and state constitutions, and is equal to the rights of people who engage in other occupations, trades, industries, and professions.

As succinctly stated in *Kirtley v. State*:

The personal liberty clause, Art. 1 Sec. 1, of the Constitution of Indiana, or the right to pursue any proper vocation, is regarded as an unalienable right and a privilege not to be restricted except perhaps by a proper exercise of the police power of the state. Liberty as used in the constitution not only means freedom from servitude and restraint, but embraces the right of every one to be free in the use of their powers in the pursuit of happiness in such calling as they may choose subject only to the restraints necessary to secure the common welfare.<sup>13</sup>

Thus, there is no need to create a separate fundamental right to engage in the commercial production of meat because such economic activity is already protected as a right all Hoosiers share equally; that is, to engage in the economic activity of their choosing. Moreover, creating a special right just for commercial meat production will serve only provide industrial companies with unusually large market share – like Tyson, Cargill, Monsanto, Swift, Dean Foods -- with enhanced constitutional protection and immunities that will restrict the state's ability to protect the public health, safety and welfare from bad actors known to exist in the industry, as in all industries.

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happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the People have, at all times, an indefeasible right to alter and reform their government.")

<sup>10</sup> Monrad G. Paulsen, *Natural Rights -- A Constitutional Doctrine in Indiana*, 25 Ind. L.J. 123 (1950).

<sup>11</sup> *Id.*

<sup>12</sup> *Kirtley v. State*, 227 Ind. 125 (1949).

<sup>13</sup> *Kirtley v. State*, 227 Ind. 125 (1949).

#### **IV. The ability to regulate a constitutionally protected activity is extremely limited, even if the regulation is intended to protect public health, safety and welfare**

The Indiana Supreme Court recently explained the limits of the state's police power (i.e. power to regulate) when applied to those constitutionally protected activities identified as "core values" in Art. I of our state constitution:

In Indiana, the police power is limited by the existence of certain preserves of human endeavor, typically denominated as interests not within the realm of the police power, upon which the State must tread lightly, if at all. Put another way, there is within each provision of our Bill of Rights a cluster of essential values which the legislature may qualify but not alienate. A right is impermissibly alienated when the State materially burdens one of the core values which it embodies.<sup>14</sup>

When is government regulation a prohibited, "material burden" on a core value? According to the Indiana Supreme Court, "when the right, as impaired [by the regulation], would no longer serve the purpose for which it was designed."<sup>15</sup> Furthermore, the "material burden" analysis looks only to the magnitude of the impairment and does not take into account the social utility of the state action at issue.<sup>16</sup> For example, when the right to own property is at issue, required adherence to regulations or statutes which promote order, safety, health and general welfare becomes a "taking" when it amounts to substantial interference with the owner's use and enjoyment, a core value protected by the right of property.<sup>17</sup>

In other words, regardless of whether a state law is meant to protect the public health and safety, the environment, or animal welfare from "the agricultural or commercial production of meat, fish, poultry, or dairy products," if the law is a "material burden" or a "substantial interference" on that "core value" then the law will be deemed unconstitutional. There is a long line of cases that support this conclusion.

##### A. Case Law: Example 1

For instance, a municipal zoning law that excluded churches from residential areas was deemed to infringe on the "core values" of Right to Worship and Freedom of Religion.<sup>18</sup> In that case, it was of no consequence that the zoning restriction was meant to protect residential areas from the "inconveniences . . . caused by influx into a neighborhood of vehicular or pedestrian

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<sup>14</sup> *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E. 2d 443(2001)(citing *Price v. State*, 622 N.E.2d 954 (Ind. 1993)).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Foreman v. State ex rel. Dept of Natural Resources*, 387 N.E.2d 455, 461-62 (Ind.App. 1979).

<sup>18</sup> *Church of Christ v. Metropolitan Bd. of Zoning Appeals.*, 371 N.E.2d 1331, 1334 (1978)(explaining, "denial by the City . . . of the use of residential property for religious purposes presents the classic confrontation between exercise of the police power and a fundamental constitutional right.")

traffic.<sup>19</sup> Regardless of the social utility, the Court held that the law violated the fundamental right of freedom of worship protected by Article I of the Indiana Constitution.<sup>20</sup>

### B. Case Law: Example 2

Similarly, the government power of eminent domain is weakened when it interferes with a constitutionally protected "core value."<sup>21</sup> In *City Chapel Evangelical*, the City of South Bend sought to condemn church property for a redevelopment project. Overturning the trial court's dismissal of the church's constitutional challenge, the Indiana Supreme Court explained that, "the police power of the State is limited and may not materially burden one of the core values embodied within each provision of the Bill of Rights of Indiana's Constitution. The power of eminent domain is a police power subject to this limitation."<sup>22</sup>

### C. Case Law: Example 3

In a case considering whether a law that prohibited public disorderly conduct infringed upon the Article I "core constitutional value" of political expression, the Indiana Supreme Court explained:

[P]olitical expression may be unreasonably noisy under [the at issue statute] when it constitutes a public nuisance. Whenever the state dictates the means by which political opinion may be voiced, however, it teeters on the edge of its authority. The machinery of democracy produces a sonorous cacophony, not a drone. . . . You cannot limit free speech to polite criticism, because the greater a grievance the more likely men are to get excited about it. . . . [Thus,] subjecting the political expression of Hoosiers to this standard of gentility would impose a material burden upon this core constitutional value.<sup>23</sup>

## **V. The limiting language in SJR 7 does not protect property rights of others beyond those already implied as limits on other constitutional rights**

Given the foregoing jurisprudence, the qualifying language in SJR 7 that the newly created right to "engage in the agricultural or commercial production of meat, fish, poultry, or dairy products" will not "limit the application of any provision of law relating to trespass or property rights" is of no consequence. That is because all "core values" are subject to the individual rights of

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1333.

<sup>21</sup> *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E. 2d 443(2001).

<sup>22</sup> *Id.* at 450.

<sup>23</sup> *Price v. State*, 622 N.E.2d 954 (Ind. 1993).

others, including property rights.<sup>24</sup> Unfortunately, the property rights of people who live next to industrial livestock facilities have already been drastically limited by legislation and state regulation.<sup>25</sup>

## **VI. Enshrining the right to commercially produce meat in the Indiana constitution risks an array of regulations from meeting the much more stringent “material burden analysis,” leading to wide constitutionality problems for existing and future regulations.**

Similarly, it is inconsequential that SJR 7 expressly states that the new right would be subject to laws passed by the General Assembly. Again, it is already recognized that "the state may exercise its police power to promote the health, safety, comfort, morals, and welfare of the public," and "may subject persons and property to restraints and burdens which impair natural rights."<sup>26</sup> However, when exercising that power to regulate a "core value" or "natural right," the state must have more than just a "rational basis" to do so.<sup>27</sup> That is because each provision of our Bill of Rights are "interests not within the realm of the police power"<sup>28</sup> and, therefore, it is irrelevant whether the state's decision to regulate is "rational." Currently, laws and regulations applicable to agriculture need only meet the "rational basis" test. If SJR 7 is enacted, those laws and regulations, all passed by the General Assembly, must satisfy constitutional muster under the "material burden" analysis.

## **Conclusion**

In sum, a state constitutional right or "core value" to produce meat, dairy and poultry products will further limit the rights of people who own land near large factory farms. It will vest corporate agricultural interests with the state's power to take away their neighbor's full use and enjoyment of their private property. A local community that is unhappy about groundwater pollution from a large industrial livestock facility or odor and health problems caused by untreated animal waste being spread on fields might try to pass a local ordinance that prohibits those practices but would not be able to do so because such an ordinance would be a "material burden" on those constitutionally protected practices.

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<sup>24</sup> *Gibson v. Kincaid*, 221 N.E.2d 834 (Ind.App. 1966)(expression will be curtailed only when it infringes another's rights).

<sup>25</sup> Referring to Indiana's Right to Farm Act which provides legal immunity to agricultural operations from nuisance suits. In addition, environmental regulations of CAFOs/CFOs only address water pollution, not air pollution, odors, or quality of life impairments caused by these facilities.

<sup>26</sup> *Price v. State*, 622 N.E.2d 954 (Ind. 1993).

<sup>27</sup> *Id.* (stating "courts defer to legislative decisions about when to exercise the police power and typically require only that they be rational.")

<sup>28</sup> *Id.*