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The Population Explosion and United States Law

By Johnson C. Montgomery*

The Population explosion is the unique problem of our age. Its magnitude has only recently been recognized, and consequently, there is no existing body of law dealing with the questions raised by the necessity of instituting population control measures. That there is a "right" to found a family and have children cannot be seriously questioned. What limitations can be imposed on that right, however, is one of the most serious problems that will confront our courts in the future. Its resolution will require a critical analysis of the governmental powers that might be used to deal with the problem, and the limitations on the exercise of those powers.

Reasonable men differ as to the seriousness of the population problem, and the legal solution adopted necessarily depends on a factual determination of the degree of crisis overpopulation represents. Before discussing the various means with which we might try to curb population growth, therefore, it may be helpful to examine briefly the extent of the problem.

I. The Problem

A. The Population Explosion

1. The World Population

Man has been present on the earth for only a small fraction of the planet's existence. If the 4.5 billion-year history of the earth were likened to a day, man has been here for well under 1 minute.1

During the first few million years of man's history the human population did not exceed three million persons. It did not reach five million until about 8,000 B.C., and did not grow to 500 million until around 1650. Since then growth has continued unabated; the population doubled to 1 billion by 1850, doubled again by 1930 and by 1970 it had nearly reached 4 billion. The doubling time is now less

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than 37 years.\(^2\)

Most intelligent people are aware that there is a population problem,\(^3\) but few comprehend its suddenness or its magnitude. Consider figure 1 below:

The suddenness of the problem can be understood by extending the base line beginning at 8,000 B.C. back for the full period of man's existence. Were the graph drawn to scale to show the entire base line, it would be more than 150-feet long to the left. Similarly, the magnitude of the problem can be visualized if the curve were extended forward in time; the entire world from core to outer atmosphere would be solid people in 1,000 years and the mass of humanity would be expanding outward at the speed of light by the year 5,700.

The present pattern of man's growth obviously will not continue indefinitely; the laws of physics and biology make it impossible.\(^4\) The

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2. P. EHRlich & A. EHRlich, POPULATION RESOURCES ENVIRONMENT 5-23 (1970) [hereinafter cited as EHRlich & EHRlich].

3. From the late 1700s when Thomas Malthus first published his AN ESSAY ON THE PRINCIPLE OF POPULATION (1798) until the mid-twentieth century, little attention was given to the population problem. Recently there have been a number of excellent publications which prove conclusively that the population problem is not merely a Malthusian notion made irrelevant by technological advances. See, e.g., G. BORGSTROM, Too MANY (1969); P. Cloud, Mineral Resources From the Sea, in RESOURCES AND MAN (1969); R. DUMONT & B. ROSIER, THE HUNGRY FUTURE (1961); P. EHRlich, THE POPULATION BOMB (1969); EHRlich & EHRlich, supra note 2; K. SAX, STANDING ROOM ONLY (1955); PRESIDENT'S SCIENCE ADVISORY COMMITTEE, THE WORLD FOOD PROBLEM, vols. 1-3 (1967). For additional sources, see the extensive bibliography in EHRlich & EHRlich.

4. Fremlin, How Many People Can the World Support?, 24 NEW SCIENTIST 285, 286-87 (1964). It has been persuasively argued that man's recent history constitutes a mere, brief moment in the sun—a short period of tremendous production and considerable affluence which cannot continue because it involved a looting and polluting
only question is what will bring it to a halt. There appear to be only two alternatives: an increase in the death rate, or a reduction in the birth rate.

2. Population in the United States

Many believe that, regardless of the world population problem, the United States itself is not overpopulated. The optimum population size for the United States, however, has been given little attention. It is hoped this problem will be considered by President Nixon's Commission on Population Growth and the American Future.

The United States presently has about 6 percent of the world's population and yet accounts for about 30 percent of the world's consumption of nonrenewable resources. There is a national pollution problem which in part results from having to produce too much, too fast for too many. It is generally recognized that the nation as a whole does not at present adequately feed, clothe or care for its existing population, and the situation is apparently deteriorating rather than im-

of the planet and a raping of nonrenewable natural resources. See R. Reinow & L. Reinow, Moment in the Sun (1967). Certainly if a major catastrophe occurs it will not be possible for human survivors simply to start over again. All easily usable natural resources have already been depleted. Land has been denuded; the tin of Britain, the iron ore of the Mesabi and the tar on the surface of the ground at La Brea are gone. The rise of a new industrial civilization, starting from scratch, is impossible.

5. It may well be famine. See W. Paddock & P. Paddock, Famine 1975 (1967). The most recent Food and Agricultural Organization reports on 1969 food production fully support the pessimistic view of the world food problem presented by the Paddocks, although the precise time of the onset of catastrophic famines remains an open question. See N.Y. Times, Oct. 4, 1970, at 10, col. 1. People unrealistically believe that science and technology can solve our food problems—in spite of detailed analyses showing it cannot. Ehrlich & Holdren, Population and Panaceas: A Technological Perspective, 19 Biol. Science 1065 (1969). It involves great risk to rely on science's ability to continue to pull technological rabbits out of hats. The world is finite and magic would be required to make it otherwise.

6. Pub. L. No. 91-213 (Mar. 16, 1970) requires the Presidential Commission to "sponsor . . . studies and research and make such recommendations . . . regarding a broad range of problems associated with population growth and their implications for America's future." The statutory mandate of the commission is broad enough to require study of world population-resource problems. It is the specific duty of the commission to make recommendations by "various means appropriate to the ethical values and principles of this society by which our Nation can achieve a population level properly suited for its environmental, natural resources, and other needs." The composition of the commission gives rise to considerable optimism that sound recommendations will be made. The fate of previous reports from Presidential Commissions makes it questionable whether such recommendations will be followed.

7. Ehrlich & Ehrlich, supra note 2, at 61.

8. See note 12 infra.
proving. 8

The optimum population for the United States, or for the world, depends upon value judgments. The number of people the nation can support increases as each individual decides to accept less comfort, privacy and environmental amenity. Few are willing to accept less, however; most want more. Merely to retain the existing amenities, therefore, ultimately depends upon having fewer people to support.

Furthermore, the United States cannot separate itself from the global population-resource-environment problem. The earth is a closed system. Each nation depends on the rest of the world and on the functioning of the planetary ecosystem for its resources. The population problem cannot be dismissed by any nation simply by relegating the undesirable effects of overpopulation to its less fortunate neighbors.

B. The Effects of Overpopulation

An authoritative analysis of the undesirable effects of the population explosion is beyond the scope of this article. It is, however, an area that has received increasing attention in recent years. Although there is still much to learn, convincing evidence now exists for many of the potentially catastrophic problems that scientists and analysts are presently attributing to overpopulation. Among these problems are: (1) malnutrition, starvation and the possibility of world-wide famine; 10 (2) anti-social behavior and the disintegration of established social orders; 11 (3) environmental pollution of staggering proportions; 12 and (4) increasing economic costs to every segment of the society, including


10. See note 5 supra.


the individual taxpayer.\textsuperscript{13}

These are only a few of the more obvious problems resulting from the population explosion, and each of them is manifest in varying degrees to even the most casual observer of today's cultural and physical environment. Even if it is conceded that each of these social maladies has contributory causes other than rampant population growth, it nonetheless remains true that effective population control measures will contribute to their reduction or elimination, and that continued, indiscriminate growth in the population can only lead to their reaching crisis proportions beyond man's ability to rectify.

C. Alternative Solutions

Many who concede the existence of the population problem nevertheless insist that its solution lies in less drastic measures than limiting the permissible population growth. The solutions proposed to date, however, are unrealistic and in some cases simply ignore the unalterable fact that many of the earth's life-sustaining resources are in limited supply and are nonrenewable.

The availability of untapped resources and technology's capacity to utilize them has received much speculative attention, but intensive scientific study has indicated that the deserts, jungles and oceans on the earth's surface will fall far short of popular expectation in meeting the resource demands of an expanding population.\textsuperscript{14} Nor do the other planets in the solar system pose a realistic solution, either as a source of vital resources or as the object of interplanetary migration.\textsuperscript{15} Similarly, population redistribution can be at best only a temporary solution. There are already too many people for the life-support systems of the planet to accommodate on a sustained basis,\textsuperscript{16} and dispersal does not diminish demand.

One of the most widely advocated solutions to population growth


\textsuperscript{15} Hardin, Interstellar Migration as an Answer to the Population Problem, 50 Heredity 68-69 (1959); see von Hoerner, The General Limits of Space Travel, 13 SCIENCE 18, 23 (1962).

is the adoption of family planning techniques. Family planning, however, will not necessarily curtail the rapid expansion of the population or the demands of the population on the earth's resources. The population of the United States will double before the end of the next century, even without the birth of an unwanted child, and will still reach 300 million by 2045 if each living woman gives birth to only one female child who survives to reproductive age. Consumption of natural resources will increase accordingly.

The goal of population control is not merely to limit the growth of population, but also to reduce the enormous demands that human populations make on the earth's nonrenewable resources. If family planning cannot solve the population problem in the United States, its failure can only be more pronounced in those areas of the world where resources and education are limited and where there is a greater cultural impetus to reproduce.

D. How the Problem Has Been Ignored

The legal profession has largely ignored the problems posed by the population explosion. While legal literature is replete with articles dealing with the Rule Against Perpetuities, there is not a single article analyzing the obvious problem which is making perpetuities impossible.

The legal issues are complex. In the United States they involve sources of constitutional power—the general welfare clause, the commerce clause and the 14th amendment. Also involved are limitations on the exercise of such power—due process, equal protection, separation of church and state, reserved powers of the states and retained rights of the people.

Since Ricardo published his classic Principles of Political Economy

19. A number of articles have recognized the problem but have not treated the specific legal issues. See Blaustein, Arguendo: The Legal Challenge of Population Control, 3 L. & SOC. REV. 107 (1968); Clark, Law as an Instrument of Population Control, 40 U. COLO. L. REV. 179 (1968); Moore, Legal Action to Stop our Population Explosion, 12 CLEV.-MAR. L. REV. 314 (1963); Falk, World Population and International Law, 63 AM. J. INT'L L. 514 (1969). Legal issues involved specifically in abortion have been well analyzed. Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N.C.L. REV. 730 (1968).
and Taxation in 1817, little attention has been given to the problems involved in a stable, nongrowth economy. Few authors have treated the subject of a stable economy, and while it may be possible to have an expanding economy which is not based on growth,20 most of our economic theory has been based on the impossible assumption of infinite growth.

If the patterns of man's growth are to change, there must be a concomitant change in the basic assumptions underlying that growth. A fundamental revision is necessary in our present growth-oriented economy, and new economic theories must be developed that are more in harmony with the concept of a stable population. The production and distribution mechanisms comprising the existing economic processes may have to be restructured, and cost-benefit analyses used to analyze the economic feasibility of a social development must be expanded to include the costs and benefits to our environmental resources.

Implementation of revised economic processes will require comparable reevaluation of many existing legal institutions and concepts. Laws relating to commerce, taxation and land use controls already deserve serious scrutiny, and it is not improbable that in the future, the law will require society to hold all of the earth's resources in trust for future generations.21 Similarly, laws relating to domestic relationships may well require revamping. The family has always been child-oriented, and while human sexual drives are clearly distinguishable from the urge to reproduce, they have nevertheless contributed to the population explosion. The law must become flexible enough to promote the formation of new social institutions and inter-personal relationships whose principal functions do not include the reproduction and raising of children. This may require not only greater tolerance of homosexuality and non-child-oriented communes, but also specific measures designed to encourage their proliferation.22

Ours is an age of contingency planning. Yet little has been done


21. It may also be necessary to abandon the legal concept of the commons—a resource such as grazing land, water or air which is available to all—and to substitute for that concept a system of coercive limitation on all resource utilization. See Hardin, The Tragedy of the Commons, 162 SCIENCE 1243, 1247-48 (1968).

22. Four communes known to the author in wealthy areas of the San Francisco Peninsula presently contain 42 adults, including 20 females between the ages of 20 and 35, and only 7 children. No children have been born to members of these communes within the last 2 years.
to plan for those contingencies which inevitably will either interrupt our rampant population growth or follow as its consequence. That so little has been done in an area having such far-reaching implications for the future of mankind borders on reckless irresponsibility.

II. Solutions to the Problem

A. Voluntary Methods of Population Control

There is a wide variety of measures available to reduce birth rates. A number of them involve additional social benefits that make them desirable apart from their value as population control techniques; the repeal of anti-abortion laws, for example, would terminate "compulsory" pregnancy and provide an increased measure of freedom for women.

Generally, the methods to control population growth can be classed as either voluntary or involuntary. Economic incentives, subsidies and comparable devices can properly be characterized as voluntary, while the licensing of births, enforced by criminal sanctions, must be characterized as compulsory. The distinction between voluntary and compulsory methods is sometimes blurred, but among the methods which can generally be characterized as voluntary are the following:

1. The repeal of all laws limiting the advertising, dissemination and use of birth control information, devices and drugs. Although existing laws are probably unconstitutional under the holding in *Griswold v. Connecticut*, the mere fact that such laws exist probably tends to discourage many persons who might otherwise be actively involved in making effective birth control techniques available.

2. The repeal of all laws limiting the right to abortion. While it is not presently clear whether existing state anti-abortion laws are constitutional, *People v. Belous,* *United States v. Vuitch* strongly suggest that they are not. The United States Supreme Court has yet to rule on the questions involved, but it seems likely there will be left to the legislatures some power to regulate abortion.


3. The repeal of all laws limiting sterilization. It has recently been held that there is no public policy forbidding voluntary sterilization, but many doctors and hospitals are nevertheless reluctant to perform sterilization procedures. One reason for reluctance on the part of the medical community is the ever-present risk of malpractice actions in the event of an unwanted pregnancy. This problem is particularly acute when male sterilization is involved since a properly sterilized male provides no guarantee that the female will not become pregnant through other sexual relationships. One solution to the malpractice problem could involve legislation relieving doctors from responsibility for pregnancies claimed to have occurred subsequent to sterilization procedures.

4. The subsidizing of contraception, sterilization and abortion for all persons, including minors by: (a) requiring group and individual health insurance policies to cover the costs of such procedures; (b) authorizing direct payment of such costs through government welfare and medicare programs; and (c) enacting emancipated minor laws to remove the requirement that parents consent to such procedures for their minor children.

5. Cash payments to individuals who are willing to undergo sterilization procedures.

6. Payment of an annual subsidy to each woman of childbearing age who does not give birth during a given year. A subsidy program coupled with free contraception and abortion would clearly be a proper expenditure of federal funds under the general welfare provision of the Federal Constitution and probably would accomplish much toward solving the domestic population problem. The wisdom of such a program would depend in part upon a detailed cost-benefit analysis, but

Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969). Dicta in both cases indicates a judicial reluctance to totally deprive the states of some power in this area. See text accompanying notes 116-19 infra. The Supreme Court does not appear likely to reach this question in the immediate future.


Laws should also be enacted to permit nurses and other specially trained para-medical personnel to perform birth control, sterilization and possibly even abortion procedures. There is an acute shortage of doctors in the United States, and it does not require a doctor with broad training to perform the rather simple procedures involved in the population control field.

Such a subsidy could be increased for each successive year in which no child was born and could also involve the deprivation of all or part of the subsidy in years following the birth of a child.

preliminary examination strongly suggests that its costs would be far less than the tax dollar expense of raising children.\textsuperscript{32}

7. Revising the tax laws by: (a) removing the exemption for children or for all children after the first two;\textsuperscript{33} (b) eliminating the present federal tax rate disadvantage of single individuals; (c) granting tax deductions for all monies spent for contraception, sterilization and abortion, or by granting a direct credit against the taxpayer's liability for such expenditures; (d) giving tax exempt status to organizations whose purpose is to encourage population limitation; or (e) conferring tax-deductibility status to gifts to organizations whose purpose is to encourage population limitation.

8. Raising the age at which people can marry.

9. Allocating funds for research on: (a) the technology of contraception,\textsuperscript{34} sterilization and abortion, or (b) the development of methods to encourage population control.\textsuperscript{35}

10. Requiring that radio and television stations devote a specified period of time to encouraging people to limit the size of their families.\textsuperscript{36}

11. Providing women with fulfilling activity unrelated to child-bearing; this necessarily encompasses an end to de facto sexual discrimination in education, employment, promotion and compensation.

12. Legalizing homosexuality and providing the legal framework to define personal and property rights between persons desiring to form living groups not patterned after the traditional, child-oriented family.

In addition to specific changes in its laws, the nation needs courageous leadership from its government officials. Although he


\textsuperscript{34} Development and testing of a fertility inhibiting compound which could be added to the public water supply presents serious practical as well as legal difficulties. See Djerrasi, \textit{Birth Control After 1984}, 169 Science 941, 948-49 (1970). But if such a compound could be developed, there seems to be no constitutional impediment to its actual use. See Krause v. City of Cleveland, 55 Ohio Op. 36, 39, 121 N.E.2d 311, 315 (Ct. App. 1954) (floridation held not to violate first amendment); Dowell v. City of Tulsa, 273 P.2d 859, 864 (Okla. 1954), \textit{cert. denied}, 348 U.S. 912 (1954); Kaul v. City of Chehalis, 45 Wash. 2d 616, 625, 277 P.2d 352, 357 (1954).

\textsuperscript{35} There is also a need for research into a process which will permit us to control the gender of offspring. One excuse often given for existing large families is the desire after several girls to try "one last time" for a boy. It may soon be possible to control gender. See Rorvik & Shettles, \textit{You Can Choose Your Baby's Sex}, Look, Apr. 21, 1970, at 88, 93-94.

\textsuperscript{36} This could be justified under the existing Federal Communications Commission "fairness" or "public interest" doctrines. Some media are willing voluntarily to provide free time for this public service. See Growald, \textit{Free Radio and TV for ZPG}, ZPG Nat'l Rep. Oct. 1970, vol. 2, at 22.
subsequently modified his position, President Eisenhower once said that family planning was not a proper sphere of activity for the government. President Johnson made numerous statements which peripherally recognized the seriousness of the population problem, but at no time did he publicly come out squarely in favor of population control.

Public officials and leaders should lend their support to voluntary means of achieving population stabilization, since it is clearly a more workable and politically expedient method than compulsion. A strong statement from the President would accomplish a great deal in alleviating the national population problem.

**B. Compulsory Methods of Population Control**

In the event that voluntary methods are unsuccessful, compulsory programs will be necessary. Whether compulsory programs are constitutional is doubtful today. It has been argued that the major significance of [*Griswold v. Connecticut*] is that it establishes a principle of voluntarism. This principle recognizes and protects the right of parents to "choose the number of children within the dictates of individual conscience." Assuming the principle of voluntarism is presently accepted by the courts, changing facts can produce changing constitutional results.

Compulsory programs of population control may be unconstitutional today, but they will become constitutional as the population explosion continues. The Constitution is undoubtedly flexible enough so that it will not be an instrument of extinction.

In order of increasing undesirability, the various compulsory methods of population control are as follows:

1. Issuing every woman a non-assignable license to have two natural children, with a fine or imprisonment as sanctions for giving birth without a license.

2. Requiring women to use effective contraceptive techniques.


This method is not presently technologically feasible, but presumably advances in technology could result in compounds which could be administered monthly or annually, perhaps by subcutaneous drug capsule insertion or by inoculation.

3. Compulsory abortion.
5. Infanticide.

III. Power to Control Population

Some power to control population composition and growth has always existed. Rapid technological progress in contraception, sterilization and abortion, however, has created new regulatory potential, and such potential will undoubtedly continue to increase as research and development continue.

In the United States, the question of what governmental entities have the right to regulate the population growth is crucial. National governments have always purported to have the power to preserve them-

41. See note 34 supra.
42. It may be argued that compulsory abortion is even more extreme than compulsory sterilization since abortion may be considered a more repugnant invasion of the physical person than simple sterilization. Compare Rochin v. California, 342 U.S. 165 (1952) (pumping the stomach incident to a narcotics search held unconstitutional) with Blackford v. United States, 247 F.2d 745 (9th Cir. 1957), cert. denied, 356 U.S. 914 (1958) (searching the rectum incident to a narcotics search at the border held constitutional). Since female sterilization presently involves major surgery inside the body cavity, whereas male sterilization is minor and external, it might be constitutional to require male sterilization but not female sterilization. Since sterilization (male or female) is presently a more permanent medical procedure than abortion, sterilization clearly presents a greater diminution of the right to procreate than does a single abortion.
44. Infanticide would require a constitutional amendment because infants are undoubtedly "persons" whose lives are protected by the 14th amendment. A fetus, even a viable, quickened fetus, is probably not a "person" within the meaning of the 14th amendment. See notes 94-106 & accompanying text infra.
45. Until relatively recent times, wars have played a significant role in limiting the population growth. Governments and societies have also employed slavery, execution, infanticide and genocide as means to accomplish social objectives, all of which have had a marked influence on population growth and composition.
46. The pre-existence of such technological potential is a requisite for the exercise of the power to regulate population by the state and Federal Governments. Properly analyzed, the conferral of enumerated powers on the Federal Government is an allocation of right to exercise such powers.
selves and their people, and such power is often claimed as a matter of right.\footnote{\textit{Cf.}} It involves a basic biological concept—survival. The Constitution of the United States, however, imposes severe limitations on the exercise of power by the Federal Government; the federal system, involving both enumerated\footnote{\textit{U.S. Const.} art. 1, § 8;} and reserved powers\footnote{\textit{see U.S. Const.} art. I, § 9;} and retained rights,\footnote{\textit{U.S. Const.} amend. XIV, § 5.} further complicates the analysis of governmental power to regulate population growth.

It is possible to analyze the enumerated and reserved powers as if the Constitution divided all the power existing at the time of its enactment among the various levels of the federal system. Of that power, only some was expressly granted to the Federal Government. Other powers were reserved to the states, while some then-existing rights were purportedly left to the people themselves. Neither the population problem nor the contemporary potential to deal with it existed when the Constitution was enacted, however, and it therefore becomes necessary to determine who obtained the right to exercise this newly-achieved potential. Such a determination requires an analysis of the powers of the Federal Government under the welfare clause, the commerce clause and section 5 of the 14th amendment. The powers of the states must also be examined, as must the limitations imposed on the exercise of governmental power by the Bill of Rights and the 14th amendment.

A. Power of the Federal Government

1. Spending Power

Pursuant to article I, section 8 of the Constitution:

\textit{The Congress shall have Power To lay and collect Taxes . . . and provide for the common Defense and general Welfare of the United States} . . .

The welfare clause has been construed not as an independent grant of regulatory power, but as a limitation on the power to tax and to spend.\footnote{\textit{Id.} amend. X.} Congress has the power to spend for any project which promotes the national, as opposed to merely local welfare,\footnote{\textit{Id.} amend. IX.} and it has been held that the concept of general welfare is not static;\footnote{\textit{Id.} at 641.} the power

expands as national needs expand. Furthermore, the Federal Government, unless barred by some constitutional prohibition, may impose terms and conditions upon its disbursement of money to the states and any state law or regulation inconsistent with such federal terms is to that extent invalid.\textsuperscript{54} Federal spending for projects involving environmental problems such as flood control, prevention of soil erosion and the establishment of game refuges has been held to be proper under the welfare clause.\textsuperscript{55} It has even been suggested that Congress could, under the welfare clause, enact national divorce laws.\textsuperscript{56}

Since the balance between population and resources is a national (indeed a global), as distinguished from a local problem, Congress quite clearly has the power to enact legislation to subsidize population-related research and development; to pay for family planning, contraception, abortion and sterilization; to change tax laws to provide incentives for the exercise of reproductive responsibility; and even to pay direct subsidies, on an equal basis, to women not giving birth to children. Congressional power under the welfare clause is extremely broad and pursuant to its spending power Congress can enact any of the voluntary programs suggested in this article.

2. \textit{Commerce Clause Power}

Section 8 of article I provides:

\begin{quote}
The Congress shall have power . . .
\end{quote}

. . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Section 9 of article I provides:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year [1808], but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The history of the expansion of federal power under the commerce clause is well known to the legal profession. \textit{Gibbons v. Ogden}\textsuperscript{57} established that the Federal Government has paramount jurisdiction over

\textsuperscript{55} See \textit{In re} United States, 28 F. Supp. 758 (D.C.N.Y. 1939).
\textsuperscript{56} Adler v. Adler, 192 Misc. 953, 81 N.Y.S.2d 797 (Dom. Rel. Ct. N.Y. City 1948) (dictum). This view is based on Hamilton's belief that the Federal Government obtained an independent grant of power under the welfare clause; the view has had strong proponents, Helvering v. Davis, 301 U.S. 619, 640 (1937), and might yet be resurrected in an hour of national need.
\textsuperscript{57} 22 U.S. (9 Wheat.) 1 (1824).
interstate commerce. It was Mr. Justice Johnson's view in the *Gibbons* case that the power was exclusive and that the states could not regulate even in the absence of federal regulation.\(^{58}\) Chief Justice Marshall found a "double aspect" whereby the states could exercise some power over commerce.\(^{58}\) Where the states acted under their reserved powers relating to health, it was early settled that absent a federal-state conflict, the states could regulate.\(^{60}\) In *The License Cases*\(^{61}\) and later in *The Passenger Cases*,\(^{62}\) Chief Justice Taney developed the theory that the states and the Federal Government had concurrent jurisdiction over commerce.

The case of *Cooley v. Board of Wardens*\(^{63}\) resulted in a compromise which generally represents the situation as it exists today. Over matters which require uniform regularity, the Federal Government has exclusive power.\(^{64}\) Over lesser matters which do not require uniform regulation, the states have concurrent power and may, in a non-discriminatory manner, regulate until Congress has occupied the field.\(^{65}\)

Congress has the power under the commerce clause to take those actions it deems necessary to effectuate population control, since it definitely appears that population is a matter which directly affects commerce. Commerce is the process through which the production, distribution and consumption of goods and services occur. Since national population size and geographic distribution determine the total flow of goods and services between the states, population directly affects interstate commerce and the Federal Government has power to regulate it.

It was early settled that some regulation of population is properly within the commerce clause. In *Gibbons v. Ogden*,\(^{66}\) it was stated by Chief Justice Marshall that section 9 of article I—the "immigration" clause—is an exception from the power to regulate commerce\(^{67}\) granted under section 8. In *The Passenger Cases*\(^{68}\) it was held that the clause

\(^{58}\) *Id.* at 227.

\(^{59}\) *Id.* at 222.


\(^{61}\) 46 U.S. (5 How.) 504 (1847).

\(^{62}\) 48 U.S. (7 How.) 283, 464 (1849) (dissenting opinion).

\(^{63}\) 53 U.S. (12 How.) 299 (1851).

\(^{64}\) *Id.* at 319.

\(^{65}\) *Id.* at 319-21 (dictum).

\(^{66}\) 22 U.S. (9 Wheat.) 1 (1824).

\(^{67}\) *Id.* at 103.

\(^{68}\) 48 U.S. (7 How.) 283 (1847). *See* Edye v. Robertson, 112 U.S. 580 (1884), popularly called the *Head Money Cases.*
applied to others than slaves; that it applied to prohibition as well as to regulation; and that the kind of commerce involved in population policy extended to interstate commerce as well as to foreign commerce.

The fact that a birth occurs in only one state does not prevent human reproduction from being within the ambit of the interstate commerce clause. Wholly intrastate activities may be federally regulated if they have an impact on commerce beyond the state's boundaries. If Congress has power to regulate local production and consumption, there should be no bar to the exercise of congressional power to regulate the reproduction of people—who are, after all, the ultimate producers, distributors and consumers.

An important question is whether the existence of federal power bars the states from regulating population. The Cooley case did not determine whether it is the commerce clause itself which prevents the states from acting on matters of national concern, or whether the intent of Congress is the limiting factor. If it is the commerce clause which prevents the states from regulating commercial matters of national concern, the states presently have no power to regulate population size since population size, locally as well as nationally, is a matter of the utmost national importance and, for fairness, requires uniformity of treatment. On the other hand, if the states' power over commerce is limited only by the intent of Congress, the states may have power to regulate population size directly since the acts of Congress to date suggest no intent to limit the states in this regard. As a matter of general population policy, the conclusion should be that federal power is concurrent, and that the states may experiment with population limitation policies until such time as the Federal Government occupies the field.

Even if the Congress does not choose to regulate population directly as part of commerce, the regulation of abortion, and probably of contraception and sterilization as well, is clearly within the scope of its powers. Since the enactment of liberalized abortion laws in some states, many persons have traveled across state lines to procure abortions. Such travel clearly constitutes interstate commerce. The Federal Government, therefore, has commerce clause power to enact legislation which would declare national policy to be in favor of abortions

and against compulsory pregnancy, and which would render ineffective the attempts of the states to deny, or even to regulate, abortions. The Senate Bill introduced by Senator Packwood in the 91st Congress\textsuperscript{72} can be viewed as a bill to regulate commerce by invalidating those state laws which presently act as a depressant to the commercial activities involved in providing abortion services.\textsuperscript{73}

3. \textit{Fourteenth Amendment Power}

The 14th amendment protects persons against state action which abridges the privileges or immunities of citizens or which denies due process or equal protection. Section 5 of the 14th amendment provides:

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.\textsuperscript{74}

Section 5 has been construed to create in Congress power separate from and additional to the enumerated powers of article 1.\textsuperscript{75} In \textit{Katzenbach v. Morgan}\textsuperscript{76} it was stated:

Correctly viewed, section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

In legislating pursuant to the provisions of section 5, congressional power is not limited by the ability of the Supreme Court to find a denial of 14th amendment rights. Legislation will be held appropriate and constitutional if the Court is able to perceive some basis upon which Congress might have thought there was a denial of due process or equal protection.\textsuperscript{77} Under the authority of \textit{United States v. Guest},\textsuperscript{78} section 5 may justify congressional action which purports to affect wholly private, as distinguished from state action.\textsuperscript{79} It has even been suggested that section 5 creates a vast area of power pursuant to which Congress might abolish most state regulatory powers.\textsuperscript{80}

\textsuperscript{72} S. 3746, 91st Cong., 2d Sess. (1970).
\textsuperscript{73} Since the present diversity of state laws covering abortion practice tends to deny abortions to the poor and poorly educated, the bill, and others having to do with contraception and sterilization, can also be sustained under the provisions of section 5 of the 14th amendment. See text accompanying notes 84-86 infra.
\textsuperscript{74} U.S. Const. amend. XIV, § 5.
\textsuperscript{76} 384 U.S. 641, 651 (1966).
\textsuperscript{77} Id. at 648-49.
\textsuperscript{78} 383 U.S. 745, 784 (1966).
\textsuperscript{79} See Cox, The Supreme Court 1965 Term, 80 Harv. L. Rev. 91, 173 (1966).
\textsuperscript{80} Comment, Fourteenth Amendment Enforcement and Congressional Power to Abolish the States, 55 Calif. L. Rev. 293, 315 (1967).
Commentators have noted that the combined effects of the Morgan and Guest decisions may permit Congress to take broad legislative action in areas hitherto thought to rest exclusively within the power of the states. Although the lower federal courts have not yet been willing to extend the ambit of the Morgan and Guest cases, it is reasonable to expect the Supreme Court cautiously, on a case-by-case basis, to permit Congress to pass statutes under section 5 to meet the national problems that involve all the broad areas generally thought of as human rights. The Morgan case is soundly rooted in established constitutional principles, yet it clears the way for a vast expansion of congressional legislation promoting human rights.

Population control measures are not usually viewed as promoting human or civil rights; however, many existing laws which relate to the population problem presently abridge constitutionally protected rights. Statutes which tend to deny a woman the right to choose whether or not to bear children are unconstitutional, and statutes to prevent the dissemination and use of birth control information are probably unconstitutional.


82. In Brown v. State Realty Co., 304 F. Supp. 1236, 1240-41 (1969) the court noted that section 5 does not yet permit Congress directly to regulate the sale or disposition of private property. However, the federal anti-blockbusting statute was upheld under the 13th amendment and an injunction was issued against purely private action. In Griffin v. Breckenridge, 410 F.2d 817 (5th Cir. 1969) it was stated: “While we . . . certainly do not disparage the prognostications of numerous commentators who read in Guest the eventual demise of the state action requirement, we cannot subscribe to the view that Guest has fulfilled this promised potential.” Id. at 820.

83. Cox, The Supreme Court 1965 Term, 80 Harv. L. Rev. 91, 107 (1966). In the light of recent appointments to the Court it may be that this prediction will prove false. In United States v. Arizona, 91 S. Ct. 260 (1970), the Burger, Blackman wing of the Court was unwilling to find power in Congress under section 5 to lower the voting age in state elections. Id. at 260. On the other hand, a careful reading of all the opinions in the Arizona case makes it clear that the ambit of section 5 has not yet been expressly restricted. The Burger, Blackman and Stewart view of section 5 as expressed in the Arizona case is not comprehensive; Justices Douglas, Brennan, White and Marshall clearly favor the broader view of section 5.

State statutes limiting contraception, sterilization and abortion involve a denial of equal protection since the practical effect of the statutes is to deny population control to the poor and uneducated while leaving such control available to the wealthy. Pursuant to the powers conferred upon it by section 5 of the 14th amendment, Congress can enact legislation to invalidate all state laws which limit the application of these population control measures. In addition to invalidating state legislation, the Federal Government may also have power under the enabling clause to enact affirmative population control laws. Under the doctrine of *Katzenbach v. Morgan*, Congress has the power to establish national standards with which the states must comply where adoption of a different standard by the states might result in discriminatory state action against a class of individuals. Thus, a state might be required to make population control measures lawfully available to any person requesting them on the basis that a failure to make them available would constitute a denial of equal protection. Such laws could provide criminal sanctions against private individuals and agencies who refused to make population control devices and techniques available, provided that the private conduct were not specifically protected by some other constitutional right—such as the possible right of a Catholic doctor to refuse to perform abortions for personal religious reasons.

In the event that voluntary population control proves ineffective, Congress probably has the power, pursuant to section 5, to regulate reproduction directly. When the population becomes so great that the demand on natural resources exceeds the available supply, it would seem to be a clear denial of equal protection to allow continued, indiscriminate reproduction by those persons having the wherewithal to provide for their offspring, to the detriment of those who do not. This conclusion is supported by the fact that the entire present membership of the Supreme Court grants that the ambit of the 14th amendment extends at the very least to matters in which there is a component of racial

89. Where the constitutional right of a woman to an abortion conflicts directly with the constitutional right of a doctor not to be required to act contrary to his religious beliefs, the balancing should favor the doctor, provided the doctor makes effective efforts to obtain from some other source the medical services to which the woman has a right.
Inequality. In any event, to assure due process and equal protection, the regulation of population growth should be applied to genetically identifiable groups as well as to individuals. National population policy cannot, in the long run, be administered fairly on a state or local level. In the event that it becomes necessary to license births and to punish excessive reproduction, section 5 embodies the grant of power necessary to sustain direct federal regulation of human reproduction and to ensure its responsible application at every level of society.

IV. Limitations on the Power to Control Population

A. The Fourteenth Amendment

It is immediately apparent that, although Congress unquestionably has some power to regulate population growth, there are constitutional limitations on the exercise of that power. Implementing effective population control measures while safeguarding the individual freedoms guaranteed by the Bill of Rights and by the Civil War amendments will be one of the most challenging tasks with which Congress will be confronted in the future. The courts will undoubtedly be called upon to delineate those areas of individual freedoms upon which Congress may not impinge, regardless of the degree of crisis, although it is probably true that the protected freedoms will diminish as the crisis increases.

1. Persons Protected by the Fourteenth Amendment

A crucial question with respect to population control measures is who is a "person" for purposes of the 14th amendment.

The first clause of the 14th amendment makes it reasonably clear that to be a "person," one must already have been born; the first clause specifically protects only those "persons born or naturalized." A person conceived in but not born in the United States is not a "person" for purposes of citizenship, and it has never been held that a fetus is a "person" for purposes of the 14th amendment.

90. Justice Black's view in United States v. Arizona, 91 S. Ct. 260 (1970), is that the 14th amendment was not intended to protect against every discrimination between groups of people but that it does protect against "every distinction, however trifling, on account of race." Id. at 266. If the 14th amendment, including section 5 thereof, is interpreted to apply only to racial inequality, the effect of state legislation on the inevitable racial component of reproduction could bring the area of population control within even this restrictive view.


92. A fetus is not a person within the meaning of the federal tax laws. Wilson v. Commissioner, 41 B.T.A. 456, 457 (1940).
Children are clearly "persons" within the meaning of the 14th amendment. In *Levy v. Louisiana*, the Supreme Court stated:

We start from the premise that illegitimate children are not "nonpersons." They are humans, live, and have their being. They are clearly "persons" within the meaning of the Equal Protection Clause.

If the *Levy* case can be taken as establishing a test for the existence of a person as that word is employed in the 14th amendment, the criterion appears to be the simultaneous occurrence of the following characteristics: (a) human; (b) alive; and (c) "having its being." Every ovum and sperm is human and alive; however, the essence of the *Levy* test is in determining whether an organism of live, human cells has developed to the point where it "has its own being."

It is important to distinguish between the commencement of human life and the commencement of "human being." Scientists, theologians and moralists agree on this one point at least: human life does not begin. Rather, human life began at some time in the distant past, and every subsequent living human cell is a continuation of that life. The ovum or sperm is a continuation of the adult; the embryo a continuation of the sperm and egg; the fetus of the embryo, and so forth through the birth of an infant. The 14th amendment clearly was not intended to protect every single human cell, nor even every embryo. As indicated by the *Levy* case, the 14th amendment protects "human beings." It is therefore necessary to determine at what point in the process of human development a group of human cells becomes a human being, or a person.

A number of jurisdictions have held that a quickened, viable fetus is a person within the meaning of civil wrongful death statutes. Others have held that the unborn, fully developed and viable fetus is not a person. When the rights of the parents and the needs of society.

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95. *Id.* at 70.
96. "The term 'person' used in the Fifth Amendment is broad enough to include any and every human being within the jurisdiction of the republic." *Wong Wing v. United States*, 163 U.S. 228, 242 (1896) (concurring opinion of Field, J.) (emphasis added); *see Alexander v. Alexander*, 140 F. Supp. 925, 928 (W.D.S.C. 1956) (wife is a "person" within the meaning of the 14th amendment because she is a "human being").
97. *See, e.g.*, *Rainey v. Horn*, 221 Miss. 269, 283, 72 So. 2d 434, 440 (1954); *Hall v. Murphy*, 236 S.C. 257, 263, 113 S.E.2d 790, 793 (1960) (must be "capable of an independent life apart from its mother").
coincide with the interests of the fetus, as in wrongful death actions, there may be no serious objection to classifying a fetus as a person for that limited purpose. But where the "rights" of a fetus conflict with the rights of the mother and with the needs of society, the cases involving wrongful death are of little or no assistance.

In an exhaustive and well-reasoned opinion in Keeler v. Superior Court of Amador County,99 the California Supreme Court held that for the purpose of murder,100 "human being" has "the settled common law meaning of a person who had been born alive..."101 As a result of the Keeler decision, the California Legislature amended section 187 of its Penal Code to define murder as "the unlawful killing of a human being, or a fetus, with malice aforethought."102

While the fetus is still within the womb, it does not appear to satisfy the requirements of the Levy test, that there be a human, live being. Unless "being" is construed to mean actual independent physical existence, the requirement is superfluous. All human cells, including the unfertilized egg, are live and human, but certainly cannot be considered persons. Without the distinction between actual independent and potential independent physical existence, there is neither a means nor a need to distinguish between infant, fetus, embryo or ovum for the purposes of determining when a "person" exists. The drafters of the 14th amendment undoubtedly understood "person" to mean a live human being, existing independently after the moment of birth. Even the common law did not consider the fetus to be a human being.103

There are sound, pragmatic reasons why live birth should be the

(1884) (cited with approval on this point in National Council V.A.M. v. State Council, 203 U.S. 151, 161 (1906) (Holmes, J.)); Hogan v. McDaniel, 204 Tenn. 235, 244, 319 S.W.2d 221, 225 (1958) (9 1/2 month fetus capable of existence separate and apart from his mother held not a "person").


100. Since killing a fetus was not murder or manslaughter at common law, a fetus not having been considered a human being, some states passed statutes to create the crime of feticide. See, e.g., N.Y. Rev. Stat. 1829, pt. IV, ch. 1, tit. 2, § 8, quoted in 2 Cal. 3d at 628, 470 P.2d at 621, 87 Cal. Rptr. at 485.

101. 2 Cal. 3d at 628, 470 P.2d at 622, 87 Cal. Rptr. at 486 (1970).

102. Cal. Stat. 1970, ch. 1311, § 1, at 567. The drafters of our Constitution were well aware of different kinds of persons, e.g., citizens, freemen, slaves, indigents, fugitives from justice and the like. If they had intended "person" to include fetuses they would have said so.

103. Keeler exhaustively examines the common law as it existed at the time of the enactment of the 14th amendment. See Sands, The Therapeutic Abortion Act: An Answer to the Opposition, 13 U.C.L.A. L. Rev. 285, 305-06 (1966). "It is extremely difficult to justify the claim that an unborn child is constitutionally protected against abortion. . . ."
point in time at which 14th amendment protections attach to developing human cells.\textsuperscript{104} Until live birth occurs, the fetus is physically dependent on the mother, and its 14th amendment protection should be limited to those rights afforded to the mother. This will prevent constitutional conflicts from arising between the mother’s rights and the “rights” of the fetus. Furthermore, unlike the moment of fertilization or “quickening,” the moment of birth is a relatively precise moment, easily ascertainable, and is the time from which almost all other legal consequences are dated;\textsuperscript{105} the inception of constitutional guarantees should not depend on vague imprecisions. Perhaps the most compelling reason, however, is the population problem itself. At this late date, to extend the 14th amendment protections to the fetus would seriously impair man’s ability to solve the population problem.

Children and infants are entitled to 14th amendment protection. Less developed, physically dependent organizations of human cells are not. Without a constitutional amendment, infanticide cannot be used to ameliorate the population problem; but abortion has been and can be so used.\textsuperscript{106}

2. Due Process and its Penumbra

The right to due process does not conflict with population control even though such extreme measures as compulsory birth control and abortion are adopted. It has been held that the state can require vaccinations, physical examinations\textsuperscript{107} and can quarantine typhoid carriers.\textsuperscript{108} If the state can require vaccinations against communicable diseases, there should be no bar to the state’s requiring vaccination against excessive births, the consequences of which may be far more catastrophic than an epidemic. Since the state can perform compulsory sterilization procedures in at least some instances,\textsuperscript{109} compulsory abor-

\textsuperscript{104} Birth is a point at which many very significant biological changes occur. Heart, circulation, lung, liver and kidney changes occur abruptly at or about birth. 2 N. ASSAIL, BIOLOGY OF GESTATION 4 (1968). There is even a significant discontinuity in the overall growth curve which occurs at birth. See \textit{id.} at 3, fig. 1. Thus birth is a much more significant biological event than say the 20th or 24th week of gestation or than the moment of quickening.

\textsuperscript{105} The date of birth is the legally relevant date which determines social security rights, driving privileges, power to contract, draft duties and the like.

\textsuperscript{106} From the point of view of the fetus, compulsory abortion is no different from voluntary abortion.

\textsuperscript{107} Zucht v. King, 260 U.S. 174 (1922); accord Jacobson v. Massachusetts, 197 U.S. 11 (1905).


\textsuperscript{109} Compare Buck v. Bell, 274 U.S. 200, 207-08 (1927) \textit{with} Skinner v. Oklahoma,
tion, with its far less serious consequences,\textsuperscript{110} should not be unconstitutional.\textsuperscript{111}

Recent cases have developed and expanded the notion that the 14th amendment protects the individual's right of privacy. The Court stated in dicta in \textit{Meyer v. Nebraska}\textsuperscript{112} that the 14th amendment protects "the right . . . to marry, establish a home and bring up children. . . ." In \textit{Griswold v. Connecticut}\textsuperscript{113} the Supreme Court held that a state statute prohibiting the use of birth control devices was unconstitutional. Justice Douglas, speaking for the Court in \textit{Griswold}, stated:

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See \textit{Poe v. Ullman}, 367 U.S. 497, 516-522 (dissenting opinion). \textit{Various guarantees create zones of privacy}. The right of association contained in the penumbra of the First Amendment is one . . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a \textit{zone of privacy} which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourth and Fifth Amendments were described in \textit{Boyd v. United States}, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred in \textit{Mapp v. Ohio}, 367 U.S. 643, 656, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." . . .

We have had many controversies over these penumbral rights of "privacy and repose." See, \textit{e.g.}, \textit{Breard v. Alexandria}, 341 U.S. 622, 626, 644; \textit{Public Utilities Comm'n v. Pollak}, 343 U.S.

\begin{footnotesize}
\textsuperscript{110} Abortion is less permanent in its procreative consequences than sterilization and is one of the very few medical procedures which can usually be reversed within a short period of time.

\textsuperscript{111} Compulsory abortion would not involve the objection of unreasonable classification found in \textit{Skinner v. Oklahoma}, 316 U.S. 535, 541 (1941), if every woman were required by law to terminate her pregnancies after giving birth to two children.

\textsuperscript{112} 262 U.S. 390, 399 (1923) (right to study German in a private school).

\textsuperscript{113} 381 U.S. 479 (1965).
\end{footnotesize}
451; Monroe v. Pape, 365 U.S. 167; Lanza v. New York, 370 U.S. 139; Frank v. Maryland, 359 U.S. 360; Skinner v. Oklahoma, 316 U.S. 535, 541. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."114

In a concurring opinion, Justice Goldberg stated:
Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them.116

People v. Belous,116 relying on the Griswold case, held a California anti-abortion statute to be unconstitutional, stating that absent a compelling interest the state could not infringe on a woman's constitutionally protected right to decide whether to have children. The reasoning was based on the woman's right not to accept the risk to her life involved in childbirth and on her inherent right to privacy.117

Neither Griswold nor Belous involved fact situations where there was a compelling state interest requiring protection. The decision in each case left open the possibility that the legislature might enact legislation reaching into the private lives of spouses and parents if there were a compelling, subordinating state interest.

Due process questions often involve balancing the interests of the individual against the needs of the state. It might be argued that the threat posed to the human race by the population explosion is not a sufficiently compelling state interest to justify the extreme measures of licensing births and compulsory abortion. Although there are those who do not agree that the population explosion is a serious and compelling problem,118 the weight of informed scientific authority119 compels a

114. Id. at 484-85 (emphasis added).
115. Id. at 496-97 (emphasis added).
119. See notes 1-20 supra.
finding that the population problem is indeed critical, i.e., compelling and subordinating. The state need is clearly demonstrable although the precise degree of urgency may be in some doubt.

Against the need of the state must be weighed the interests of the individual. These include one's interest in having his body left alone and the "right to found a family." Although the right to raise a family has been mentioned as if it were a single, unitary right, it in fact involves a number of different rights. First, there is the right to reproduce. This may be the right to have a child, or the right to replace oneself—which for a couple involves two children. There may be some right for couples to replace themselves with a boy and a girl. At one time there may have been a right to have as many children as desired. Since the exercise of an unlimited right to have a family may involve a denial of equal protection to all others, however, the courts and legal scholars must be careful to distinguish between the right to replace oneself and the highly questionable right to claim, through excessive reproduction, more than a fair and equal share of the world's resources.

There is presently a very fine balance between the individual interests in having a family and being let alone and the right of the race to survive. A continued population explosion will clearly tip the balance in the direction of the compelling, subordinating state interest

120. See note 42 supra; Griswold, The Right to be Let Alone, 55 NW. U.L. REV. 216 (1960).


122. Grandchildren may also be part of a person's family. Grandchildren are issue and as such have inheritance rights, and after parents and issue, grandparents are usually next in line for purposes of descent and distribution. See, e.g., CAL. PROB. CODE § 226. After the father and mother, the grandparent becomes the "guardian by nature." Lehmer v. Hardy, 294 F. 407, 410 (D.C. Cir. 1923); In re Guardianship of Lehr, 249 Iowa 625, 630, 87 N.W.2d 909, 912 (1958); In re Estate of Moore, 68 Wash. 2d 792, 797, 415 P.2d 653, 656 (1966). Grandparents may be permitted to have custody of the grandchildren instead of and over the objection of a legally appointed guardian, Ridgeway v. Walter, 281 Ky. 140, 133 S.W.2d 748, 752 (1940), and have visitation rights as to their grandchildren who reside with in-laws. Benner v. Benner, 113 Cal. App. 2d 531, 532, 248 P.2d 425, 426 (1952); Scott v. Scott, 154 Ga. 659, 660, 115 S.E. 2, 3 (1922); Lucchesi v. Lucchesi, 330 Ill. App. 506, 511, 71 N.E.2d 920, 922 (1947). A grandmother may be a "mother" within a statute saying the "mother" can bring bastardy proceedings against the real father. Commonwealth v. Abell, 75 Pa. Super. 267, 269 (Super. Ct. 1920). A grandparent can claim the grandchild as a dependent for purposes of the federal income tax, INT. REV. CODE OF 1954, § 152(a)(1), and a grandparent has an insurable interest in the grandchild, e.g., National Life & Accident Co. v. Alexander, 226 Ala. 325, 147 So. 173 (1933); Hilliard v. Sanford, 6 Ohio Dec. 449, 4 Ohio N.P. 363 (1897). The right to have grandchildren is part of the right to have a family, and that right may limit the right to overproduce children.
which will justify compulsory population control programs. This is perhaps the most persuasive reason why everything possible must be done immediately to ameliorate the problem through voluntary methods. If the problem is not solved voluntarily, there will be no constitutional bars to compulsory population control.

3. Equal Protection

There is an important limitation which the Constitution places on population control measures. Such measures must operate within the requirements of the equal protection clause. This clause has been construed to require de facto, as well as de jure, equal protection, even where economic disadvantage is the underlying cause. Thus, population control measures which operate particularly upon minority or disadvantaged portions of society are barred by the 14th amendment. Licensing provisions, however, that simply limit the number of children any one woman may have do not pose equal protection problems.

Other, less drastic measures of population control do involve real equal protection problems. Statutes have been introduced to limit the income tax exemption to two children. Sociological data may demonstrate that such statutes place a heavier burden on the poor—at least insofar as the economic incentive for the poor is greater than for the rich. Similarly, direct annual subsidies to women of child bearing age who do not have children would provide greater incentive to the poor than to the rich. Such provisions might successfully be challenged under the equal protection clause. On the other hand, economic incentives generally apply unequally—not all Americans, for example, derive benefit from capital gains or from oil depletion allowances.
The compelling nature of the population problem probably should justify some economic inequality of application, despite the special, private nature of the marriage and the child-parent relationships.

In assessing the applicability of the equal protection clause, the test should not be whether a particular measure tends to reduce the number of births in some groups as compared to others, but whether some groups are encouraged to have fewer children per couple than other groups. There should be no equal protection problem even if it is shown that high-birth-rate groups are encouraged or required to lower their birth rates more than low-birth-rate groups. Nor should it be an unreasonable classification to distinguish between groups having a high birth rate and those whose rates are low. The equal protection clause should apply only where a genetically identifiable group is encouraged or required to have a lower absolute birth rate than the national average; eliminating the abuses of the privilege to reproduce ought not be a denial of constitutional rights.

Although there appears to be no constitutional bar to any of the methods of population control mentioned in this article (except infanticide), there are sound social reasons why certain methods should be preferred. One compelling reason is to avoid exacerbating the nation's racial problems. Blacks believe that they are treated unfairly and many believe, perhaps accurately, that the only way they can obtain equal treatment is by increasing their population, thereby increasing their political power.\footnote{129} Until deprived minorities are given truly equal opportunity, it is probably unwise to attempt to induce them to lower their population growth to the level required by the nation as a whole.\footnote{130}

B. Separation of Church and State

Given that there is a particularly compelling public interest in controlling the population explosion, many well-established precedents suggest that the first amendment provision regarding the separation of

\footnote{129. Unfortunately, it is the poor and deprived who suffer most from the problems created by the population explosion. Minority groups do not consume as much on the average as whites, but they suffer more from urban pollution and decay—population-related phenomena. Informed blacks realize they have a direct interest in population control. When riots occurred in Detroit, one whole block was destroyed, except a black people's church and the birth control clinic. Recently in Philadelphia, the Black Panther Party drew up its Revolutionary People's Constitution, which calls for "Free abortion, sterilization and contraceptive devices for men and women." San Francisco Chronicle, Sept. 8, 1970, at 3, col. 4. \textit{See Birth Control and the Negro Woman}, EBONY, Mar. 1968, at 29-37.}

church and state do not bar the Government from enacting laws to license births and to require compulsory abortion and sterilization. It seems well established that laws requiring marriage licenses are valid, and it has been specifically held that laws prohibiting polygamy are constitutional in the face of first amendment objections. If the state may properly prevent a man from marrying or from having more than one wife, it should also have the power to regulate reproduction, either for the benefit of civilization or to improve the circumstances in which man lives.

It has already been held that the basic relationship between parent and child does not prevent the state from enacting laws requiring parents to treat their children in a manner contrary to the parent's religious beliefs. In Prince v. Massachusetts, it was held that the child labor laws could be enforced to prevent a parent from having his child distribute religious literature. The Amish have been required to educate their children, the Christian Scientists can be compelled to accept medical attention for critically ill children and apparently the state can even compel a pregnant woman to accept a blood transfusion to save her child. There appears to be no serious legal impediment to requiring religious minorities and other particularly fecund groups to limit their reproduction for the public good.

C. Ninth Amendment

When the Bill of Rights was adopted, its framers expressed concern that the enumeration of certain personal rights in the first eight amendments might be construed as a limitation on other rights which


133. E.g., CAL. CIV. CODE § 4401.


were not enumerated.\textsuperscript{138} The fear was that certain "natural" rights\textsuperscript{139} inhering in the individual could be destroyed by the Federal Government. Accordingly, the ninth amendment was added to the Bill of Rights to provide:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The right to have children may be protected under the ninth amendment, although the extent of and the limitations upon that right are not clear. The United Nations Declaration of Human Rights, article 16, expressly affirms the right of all men "to found a family," but does not indicate any limitations upon that right. Justice Goldberg, in the \textit{Griswold} case, stated that:

[T]he entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.\textsuperscript{140}

In assessing \textit{Griswold}, one writer has asserted:

[T]he freedom of the marital relationship is part of the bundle of rights associated with home, family and marriage—rights supported by precedent, history and common understanding.\textsuperscript{141}

The existing authorities suggest that the right to choose whether to have children is a fundamental right, at least to the extent that the state may not compel a woman to suffer compulsory pregnancy.\textsuperscript{142} The right also exists to have a family, but that right does not necessarily include the right to have an unlimited family. The ninth amendment should be interpreted to guarantee only so many children for each man as the world can sustain over an extended period of time—and only so many children as the world can sustain without destroying life, liberty, property and the pursuit of happiness.

\begin{enumerate}
  \item \textsuperscript{138} \textit{The Federalist} No. 84, at 537-44 (A. Hamilton) (H. Lodge ed. 1888) quoted by Redlich, \textit{Are There "Certain Rights . . . Retained by the People"?} 37 N.Y.U.L. Rev. 787, 805 (1962).
  \item \textsuperscript{139} Some "natural rights" older than the Constitution are protected by the ninth amendment. "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." \textit{Griswold} v. Connecticut, 381 U.S. 479, 486 (1965).
  \item \textsuperscript{140} \textit{Id.} at 495 (Goldberg, J., concurring opinion).
\end{enumerate}
The ninth amendment has been little used and the only ninth amendment case which involves population matters is the *Griswold* case. As demonstrated, *Griswold* stands for the proposition that the right to have children is a fundamental, constitutionally protected right. But the *Griswold* case also supports the proposition that given a "compelling, subordinating" state interest, the right to have children does not confer a right to have "too many" children.

V. Conclusion

Throughout most of man's history the rate of physical change was very slow. Man's population growth-rate was slow, and his cultural institutions, including the law, changed slowly. While the rate of physical change remained nominal, a slow rate of change in man's institutions was sensible since most changes, like most mutations, were likely to be detrimental rather than beneficial.

During the last two decades, however, it has become clear that the present patterns of population and pollution cannot continue without leading man to catastrophe and possible extinction. Because of the increasing rate of physical change in the world, the rate of change in man's most basic institutions must be similarly increased. This means changing the family structure to put less emphasis on child rearing and more emphasis on activities unrelated to reproduction; changing our basic economic institutions to provide for a sustained, stable economy instead of an unlimited growth economy; and changing our religious values.

The change from a rapidly increasing population to either a stable or declining population will mean at least as much dislocation in our basic institutions as occurred in the agricultural and industrial revolutions. The law must anticipate these dislocations, for nothing could be worse than leaving the present patterns to operate as they are now operating. The law must experiment and undertake population control measures whose efficacy has not been definitely established. It must have courage to take the unmeasured chances necessary to avoid the oblivion which man is rapidly approaching.
