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FEDERAL TAXATION AND POPULATION CONTROL

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The world population boom has aroused great interest in the academic and popular presses. Not all observers are sure that the problem is as serious as the number of books and articles on growth would indicate.¹ Nevertheless, a consensus has emerged that eventual stabilization of world population is essential.² Although the United States does not suffer from the same intensity of population expansion as some nations, and its growth rates have now almost reached a point of stability,³ any reasonable world strategy must include attention to population gains in this country. Even the non-alarmists on the Commission on Population Growth and the American Future conclude that stabilization of United States population is necessary.⁴

Federal tax laws take into account many factors that relate to family size.⁵ Some of these are obvious. Others may not be. This

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1. Among the naysayers are some Third World spokesmen who feel that their problems arise from reasons other than too many mouths, such as lack of available funds, limited health services, a shortage of skilled workers, cultural and religious traditions, and others. See, e.g., Percy, *Implementation of the World Population Plan of Action*, 10 J. INT'L L. & ECON. 37, 49-50 (1975).

2. The World Population Plan of Action was adopted by the U.N. World Population Conference at Bucharest in August 1974, U.N. Doc. E/CONF.60/19 (1974), and later by the U.N. Economic and Social Council. U.N. Doc. E/DEC/57 (1975). See generally Percy, *supra* note 1, at 37-39. But see generally K. VONNEGUT, *WELCOME TO THE MONKEY HOUSE* 27-28 (1968) (envisioning population of 17 billion, with both birth control and sexual pleasure prohibited).

3. The rate of growth of United States population was about 0.8% in 1974, as contrasted with 1.2% in 1964. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES*, No. 75, at 11, table 9 [hereinafter cited as *STAT. ABSTRACT*]. Extrapolations made 10 years ago of U.S. population in the year 2000 were on the order of up to 322 million. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *CURRENT POPULATION REPORTS, POPULATION ESTIMATES AND PROJECTIONS*, Series P-25, No. 493, at 20 (1972); Schaffer & Berman, *Tax Exemptions and the Birth-rate: The Singleminded Approach to Public Policy*, 3 ENV'T'L AFF. 687, 687 (1974). See also Dileo, *Directions and Dimensions of Population Policy in the United States*, 46 TUL. L. REV. 184, 210 (1971).

4. COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, *POPULATION AND THE AMERICAN FUTURE* 1 (1972) [hereinafter cited as *COMMISSION REPORT*]. But see *Separate Statement of Paul B. Cornely, M.D.*, in *id.* at 263.

5. See text accompanying notes 19-46 *infra*. See also M. HARRIS, *BANG THE DRUM*

paper inquires whether existing federal tax laws have encouraged families to bear more children, and whether those same laws can be amended to encourage families to bear fewer children in the future.⁶ The conclusion is tentative, but affirmative: even so personal a decision as the one to have children is greatly affected by societal attitudes, and tax laws can play a substantial part in changing those societal attitudes.

I. BIRTHRATE—THE CRITICAL FACTOR

No one can even list, let alone discuss, in one short article, all of the factors that influence national population trends. Some of the more obvious can be noted though. Life expectancy, long a factor in population increase, has lost its significance in this country because the trend toward increased longevity has flattened out.⁷ Immigration has a significant impact upon United States population,⁸ but does not affect total world population.

Apart from life expectancy and immigration, the most visible factor in population change is birthrate. Birthrate is one of the most difficult factors to analyze, and it is certainly one of the most politically delicate to manipulate. Birthrate may be affected by many factors, e.g., presence or absence of information about contraceptives, availability of medical care and availability of abortion. Whatever its influence, tax law falls low on the list when compared to the other factors listed.

SLOWLY 6 (1956), where the narrator's unborn child is referred to as "600 dollars" (the amount of the dependency exemption at the time).

6. Among the articles that have considered this question are: Cook, *Formulating Population Policy: A Case Study of the United States*, 3 ENV'T'L AFF. 47 (1974); Davis, *Population Policy: Will Current Programs Succeed?*, 158 SCIENCE 730 (1967); Dileo, *supra* note 3; Enke, *The Economics of Government Payments to Limit Population*, 8 ECON. DEV. & CULTURAL CHANGE 339 (1960); Montgomery, *The Population Explosion and United States Law*, 22 HASTINGS L.J. 629 (1971); Moore, *Legal Action to Stop Our Population Explosion*, 12 CLEV.-MAR. L. REV. 314 (1963); Noonan & Dunlap, *Unintended Consequences: Laws Indirectly Affecting Population Growth in the United States*, in 6 COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, RESEARCH REPORTS 115 (R. Parks & C. Westoff eds. 1972); Packwood, *Incentives for the Two-Child Family*, 6 TRIAL, Aug.-Sept. 1970, at 13; Rabin, *Population Control Through Financial Incentives*, 23 HASTINGS L.J. 1353 (1972); Schaffer & Berman, *supra* note 3; Spengler, *Population Problem: In Search of a Solution*, 166 SCIENCE 1234 (1969); Note, *Legal Analysis and Population Control: The Problem of Coercion*, 84 HARV. L. REV. 1856 (1971); Comment, *Population Policy Making*, 42 U.M.-K.C. L. REV. 201 (1973).

7. See COMMISSION REPORT, *supra* note 4, at 12. See also Pedrick, *Larger Bore Canons of Taxation for Federal Estate and Gift Tax Revision*, 54 TAXES 205, 206 (1976) (suggesting that increases in longevity since 1915 were for purposes of estate tax avoidance). Age distribution has a role in population growth, but it will result in a flattening out of the population curve eventually. See COMMISSION REPORT, *supra* note 4, at 94-95.

8. COMMISSION REPORT, *supra* note 4, at 199-201.

The most important factor affecting a nation's birthrate, however, may not be among those listed; the most important factor may be community attitude.⁹ And a country's attitude toward birthrate and family size is shaped by many things. A manifestation of this country's attitude is the fact that parents of large families still receive applause from a studio audience when a master of ceremonies elicits the number of children.¹⁰ Tax laws also applaud large families and reward them with tax reductions that have both symbolic value and financial benefit. Just as a country's tax laws are a product of the country's attitudes, they help shape the country's attitudes. And as long as they applaud the large family, they act as an incentive for more births.

Sometimes tax laws offer direct applause, as with the dependency exemption. Often, however, the influence is so subtle as to pass largely unnoticed. Consider the case of "working wives." One cause of the decline in birthrate in this country has been an increase in the number of working wives.¹¹ Their entry into the job market has been necessitated by higher family costs for housing, food and transportation, not by a desire to have fewer children.¹² But one is less likely to have a large family if one is expected to be a significant wage earner for that family, and working wives do, in fact, have fewer children than non-working wives.¹³ Tax policies that encourage wives to work would tend to reduce the birthrate. Tax policies that discourage wives from working would tend to increase the birthrate. Tax policies that make it easier for working wives to have children would also tend to increase the birthrate by reducing the effect of the "working wives" factor.

Current tax laws combine with economic factors to mitigate the population-reducing influence of working wives. Years of political activity for women's liberation have not brought women's income up to the level of men's. The proportionate contribution of working wives to family income is, in fact, declining.¹⁴ As inflation causes nominal

9. Individual attitudes are important. Women of childbearing age who are concerned about population growth intend to have on the average significantly fewer additional children than those not concerned. Rindfuss, *Recent Trends in Population Attitudes*, in 6 COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, RESEARCH REPORTS 465, 467 (R. Parks & C. Westoff eds. 1972).

10. See Richard Heffner Associates, Inc., *American Network Television's Population Content: Spring 1971*, in *id.* at 515, 517.

11. STAT. ABSTRACT, *supra* note 3, at 346, table 563.

12. *Id.* at xvii.

13. See Westoff, *Population and the Family: Overview*, in 2 THE POPULATION DEBATE: DIMENSIONS AND PERSPECTIVES 316, U.N. Doc. E/CONF.60/SYM.II/11 (1975) (Papers of the World Population Conference, Bucharest, 1974).

14. STAT. ABSTRACT, *supra* note 3, at 397, table 648.

income to go up, progressive income tax rates begin to reduce the value of the wife's financial contribution, and the benefit derived by working wives may go from marginal to negative.¹⁵

The "working wives" thesis is even more complicated. It is becoming easier for wives to work and to have as many children as they want.¹⁶ Inclusion of maternity leave in general health care insurance programs as a fringe benefit makes pregnancy a much less costly prospect. Child care is developing into a positive benefit, with "head-start" educational potential. Again, income tax law and policy are involved. Medical insurance premiums are tax deductible.¹⁷ Child care costs are deductible.¹⁸ But does child care for working mothers influence them to have more children or fewer children? Arguably, if child care is available and encouraged, even subsidized by the tax laws, the mother of one child can go back to work and not be left at home to undertake continued active childbearing.

Enough has been said to point up the intricate relationship between tax laws and birthrate. It is now time to look more carefully at some of the specific provisions that may affect birthrate and family size decisions.

II. THE PRO-NATALIST STRUCTURE OF THE PRESENT TAX LAW

Present federal tax laws encourage population growth by providing subsidies to families with children. This policy does not reflect deliberate choice, but instead is a product of a series of decisions, discretely made, each of which has had as an unstated premise the desirability (or at least acceptance) of high birthrates.

A. *The Dependency Exemption*

The most direct pro-natalist provision of United States tax law is

15. See Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1431-33 (1975). See also Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFFALO L. REV. 49 (1972).

16. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (mandatory maternity leave for school teachers violates due process). But maternity payments need not be available under general health care insurance programs. See *General Elec. Co. v. Gilbert*, 97 S. Ct. 401 (1976).

17. I.R.C. § 213(a)(2).

18. I.R.C. § 44A (Tax Reform Act of 1976); see text accompanying notes 30-33 *infra*. But note the Treasury position that the fair market value of employer-furnished child care facilities constitutes gross income to the employee-parent. *Discussion Draft of Proposed Treasury Regulations* § 1.61-16(f), example 19, [1975] 7 FED. TAXES (P-H) ¶ 65,668.13 (withdrawn).

the dependency exemption. The taxpayer is allowed under current law to subtract \$750 for each dependent from income before tax is calculated.¹⁹ The more dependents, the lower the tax.

The first post-sixteenth amendment income tax law did not have a dependency exemption.²⁰ The exemption originated in the Revenue Act of 1917, which set the dollar amount at \$200.²¹ In keeping with a general upward movement in the amount, the Tax Reform Act of 1969 provided a series of increases in the personal exemption that (with subsequent legislative modification) has resulted in the present \$750 exemption per dependent.²² President Carter, however, may seek to replace the exemption with a tax credit.²³

The reason for the exemption and its increase was described in the House Report to the Revenue Act of 1921 in these terms: "The equity of these increased exemptions is self-evident. It relieves the taxpayers least able to bear tax burdens."²⁴ The House Report points up an essential problem. What was passed as a measure to provide progressivity in the income tax and to exclude the poor from taxation²⁵ has the symbolic effect of encouraging children without limitation.

B. Joint Return Rates

Single taxpayers pay taxes at an established rate, and the tax rate increases as the income goes up. Married taxpayers were traditionally able to avoid higher rates by income splitting, *i.e.*, the income for marriage partners is split and half is allocated to each. Until 1969, a single person who earned \$40,000 per year could have reduced his or her tax rate substantially by marrying a non-working spouse. After marriage, both marriage partners would have been taxed as if they had separate \$20,000 incomes.²⁶

Any policy that encourages marriage is likely to have the companion effect of encouraging childbirth. Moreover, the tax advantages of

19. I.R.C. §§ 1, 61, 63, 151(e). Section 63 defines taxable income (upon which a tax computed pursuant to the rate schedules of section 1 is arrived at) as gross income (section 61) less deductions, including the section 151 dependency exemption.

20. Revenue Act of 1916, ch. 463, § 7(a), 39 Stat. 761.

21. Revenue Act of 1917, ch. 63, § 1203(I), 40 Stat. 300.

22. I.R.C. § 151(b). See also Bittker, *supra* note 15, at 1444.

23. TIME, Feb. 21, 1977, at 66. President Ford had proposed a \$1,000 exemption. N.Y. Times, Sept. 24, 1976, § A, at 20, col. 2.

24. H.R. REP. No. 350, 67th Cong., 1st Sess. (1921), reprinted in 1939-1 (pt. 2) C.B. 168, 173.

25. See Schaffer & Berman, *supra* note 3, at 691-93.

26. This was changed by the Tax Reform Act of 1969 to a system of rate schedules whereby single taxpayers pay no more than 20% more than a married couple with the

joint filing are greatest when only one marriage partner earns income. This is usually the husband. If the other marriage partner (the wife) works, the advantages of income splitting decrease. As the wife begins to earn the same income as the husband, the advantages of income splitting disappear and may even become negative.²⁷ Thus, the tax rate system offers a financial incentive for couples to marry and a disincentive for the wife to work—a situation likely to produce children.

C. *Head of Household*

Arguably, tax laws even encourage unmarried women to have children. Current tax rates for "head of household" taxpayers are lower than those for single persons.²⁸ A single person can qualify as head of household by having a child or other dependent live with him or her.²⁹ If child-bearing decisions were made for purely financial reasons, a tongue-in-cheek argument could be made that a single woman would be encouraged to have an illegitimate child to get a lower tax rate. That reasoning would not carry to a later child, because additional births do not result in additional benefits under the head of household provision.

D. *Tax Credit for Dependents*

The Tax Reduction Act of 1975 added a \$30 tax credit for each exemption, including dependents. This was increased to \$35 by the Tax Reform Act of 1976, which also allows, alternatively, a general tax credit of two percent of income (up to a maximum credit of \$180). Taxpayers claiming more than five exemptions get more credit than those with more than \$9,000 of income who claim fewer exemptions.³⁰

The earned income credit introduced by the Tax Reduction Act of 1975 added another theoretical encouragement for child-bearing. It is a credit of ten percent of income up to \$4,000³¹ that is phased out when income reaches \$8,000.³² To qualify for the credit, a taxpayer must have a dependent child.³³

same income. Tax Reform Act of 1969, Pub. L. No. 91-172, §§ 801-803, 83 Stat. 487, 675 (codified at I.R.C. § 1).

27. I.R.C. § 1(a), (c), (d); see Bittker, *supra* note 15, at 1429-31.

28. I.R.C. §§ 1(b) & 2(b).

29. *Id.* § 2(b)(1)(A).

30. *Id.* § 42(a)(1).

31. *Id.* § 43(a)(1).

32. *Id.* § 43(b)(1).

33. *Id.* § 43(c)(1).

The influence of either of these provisions on actual child-bearing decisions is probably nil. Nevertheless, it is noteworthy that Congress in a tax reduction effort uses strategies that reinforce the policy that applauds the large family.

E. Deductions for Child Care

The complexities of the child care deduction have been mentioned in the introduction, and it is not clear whether the overall impact is positive or negative on childbearing. Arguably, if child care costs were not deductible, working parents would face increased costs with each child and would be discouraged from childbearing. Present tax law eases the burden.

The child care provision came into the Code in 1954³⁴ after taxpayers unsuccessfully attempted to deduct the costs of raising children as a business expense³⁵ and as a medical deduction.³⁶ The 1954 provision allowed a \$600 deduction. This was increased to \$900 in 1966 and to \$4,800 in 1971. In 1976, the child care provision was converted to a credit, equivalent to a \$4,000 deduction at twenty percent marginal rates.³⁷

F. Incentives for the Rich

The income tax laws offer subtle incentives for affluent families to have children. For example, it is possible for a taxpayer to assign some income within his or her family to reduce the tax rate on such income. If a parent receives investment income that is taxed at seventy percent, a substantial tax saving can be achieved by shifting the income to other members of the family.³⁸ The more children a family has, the more opportunities there are for attempting such shifting.³⁹

Federal estate and gift tax policy also encourages an affluent family to have more children. Gifts may be made within a family unit, with a

34. S. REP. No. 1622, 83d Cong., 2d Sess. 35-36 (1954).

35. Mildred A. O'Connor, 6 T.C. 323 (1946).

36. See, e.g., *Ochs v. Commissioner*, 195 F.2d 692 (2d Cir. 1952).

37. The original child care deduction section 214 was replaced by new section 44A of the Internal Revenue Code.

38. However, use of the standard deduction is not available for dependent children's investment income. I.R.C. § 141(e). Earned income is taxable to the child, even if the parent is entitled to it as a matter of law. I.R.C. § 73(a).

39. But see *Tinkoff v. Commissioner*, 120 F.2d 564 (7th Cir. 1941), in which use of a family partnership of which a newly born child was a member for income shifting was disallowed.

donor allowed a \$3,000 per donee exclusion from the gift tax.⁴⁰ Moreover, generation-skipping trusts may be excluded from the chapter 13 tax in the amount of \$250,000 per child.⁴¹ And the orphan's exclusion from the estate tax may be available, based upon the number of minor children of the decedent multiplied by the number of years each has to reach the age of twenty-one.⁴²

G. Home Ownership Deductions

In addition to direct tax benefits accruing to families with children, tax law subsidizes a substantial portion of the cost of owner-occupied housing. Such housing is undoubtedly conducive to large families. The home mortgage interest and taxes deductions⁴³ have encouraged Americans to become the most over-housed people in the world.⁴⁴ The allowance of deductions for interest and taxes paid by homeowners, coupled with government refusal to tax the fair rental value of owner-occupied housing as imputed income,⁴⁵ has discouraged apartment construction and has led to construction of larger houses occupied by taxpayers.⁴⁶ Based upon Parkinson's third law, empty houses tend to become filled with children and the population boom is further accelerated.

It may readily and convincingly be argued that childbearing decisions are not made after potential parents read the tax law. But the overall emphasis upon family size as a tax reducing measure undoubtedly adds to the attitudinal acceptance of large families.

III. A LOOK AT SOME PROPOSED CHANGES

This article does not deal with a new topic. Many articles have been written that link economic considerations with the population boom. Many recommendations for change have been made. Admitting

40. I.R.C. § 2503(b).

41. *Id.* § 2613(a)(4), (b)(5), (b)(6).

42. *Id.* § 2057.

43. *Id.* §§ 163(a), 164(a)(1). The tax dollar costs of these deductions were estimated at \$6.5 billion and \$5.27 billion, respectively, for 1976. H.R. REP. NO. 94-145, 94th Cong., 1st Sess. 55 (1975).

44. This has resulted in a 20.4% to 34.8% overinvestment in housing, varying with income class. A. HARBERGER & M. BAILEY, *THE TAXATION OF INCOME FROM CAPITAL* 60-63 (1969). See also Aaron, *Income Taxes and Housing*, 60 AM. ECON. REV. 789 (1970).

45. See Marsh, *The Taxation of Imputed Income*, 58 POL. SCI. Q. 514 (1943).

46. See *id.* at 517, 536; cf. Barnett, *The Constitutionality of Selected Fertility Control Policies*, 55 N.C.L. REV. 357, 374-78 (1977) (constitutionality of limiting housing space).

the pro-natalist bias of United States tax laws, an observer may be properly skeptical about some proposals that have been made to limit population growth. Some fine screening is in order.

A. General Approach

Proponents of birth limitations advocate strategies that range from downright coercive to voluntary. At the coercive extreme, laws have been suggested that would prohibit families from having more than two children,⁴⁷ the number commonly regarded as falling below the critical mass of population explosion. This method is not likely to find political acceptability unless there is complete agreement about failure of other birth limitation methods.⁴⁸ Purely voluntary strategies, such as greater access to birth control and abortion, are now being implemented.⁴⁹ Most strategists recognize the legitimacy of economic incentives to influence birthrate.⁵⁰ Economic incentives, including tax law changes, fall between the extremes of pure coercion and pure voluntarism.

B. Pohlman's Plan

Among the proposed economic carrots are cash bonuses for sterilization,⁵¹ which is a fundamental aspect of foreign population control techniques, at least for underdeveloped countries.⁵² Edward Pohlman suggests a less coercive (or less irreversible) bonus plan for non-pregnancy. Pohlman's plan would provide women with a small bonus for each month of non-pregnancy, with a large bonus for completing a prescribed number of years with no births.⁵³

C. Spengler's Suggestion

Economics professor Joseph Spengler notes that children are often viewed as a means for support of parents in old age. He therefore

47. Comment, *Population: The Problem, the Constitution and a Proposal*, 11 J. FAM. L. 319 (1971).

48. See Schaffer & Berman, *supra* note 3, at 689.

49. COMMISSION REPORT, *supra* note 4, at 167-78.

50. See articles cited note 6 *supra*.

51. E. POHLMAN, HOW TO KILL POPULATION 67 (1971); see E. Pohlman, Incentives and Compensations in Birth Planning 53 (1971) (monograph 11, UNC-CH Population Center).

52. See, e.g., E. Pohlman, Incentives, *supra* note 46, at 1-2. See also Warwick, *Ethics and Population Control in Developing Countries*, 4 HASTINGS CENTER REP., June 1974, at 1, 3.

53. E. POHLMAN, HOW TO KILL POPULATION 98, 99, 105-06 (1971).

suggests a social security system to be financed by proportional contributions from income (much as the American social security system is), with benefits payable only to those parents with fewer surviving children than the replacement number of births under existing mortality conditions.⁵⁴ (For the United States, that number would be slightly over two.) Spengler feels it essential that the system reward beneficiaries highly.

D. Calabresi's Market System

Yale professor Guido Calabresi formulated a market system for limiting childbirth.⁵⁵ He would allow each couple to place a value upon additional children in a system of sliding scale incentives and disincentives. The cash subsidy for low income families not having children would shift toward progressively increasing taxes for high income families that have additional children. The levels of such subsidies and taxes would be set at societally determined levels in order to achieve replacement fertility. This would result in a tradeoff of material benefits for extra children.

Calabresi's Yale colleague, Boris Bittker, on the other hand, writes that some view children as just another consumer good that ought to be paid for by the parents.⁵⁶ If a system of pure bidding for additional children were allowed, presumably the wealthy would snap up all the children, and the poor would be excessively penalized. Moreover, if the rich set the fashion and if the fashion were to have children, lower income families might demand that they be allowed to participate.⁵⁷ Any economic system that places its primary impact upon the poor of the nation and denies them choice may raise serious constitutional issues. Certainly, the current level of black sensitivity to such proposals would make such an approach politically unacceptable. Bonus systems in general are subject to the criticism that, whatever their practicality and "microeconomic elegance," they are quixotic, because of the supposition that if America ever redistributes wealth so radically, it will not be for population control.⁵⁸

54. Spengler, *supra* note 6, at 1237.

55. Calabresi's plan is reported in Note, *Legal Analysis and Population Control*, 84 HARV. L. REV. 1856, 1904-06 (1971).

56. Bittker, *supra* note 15, at 1445-47.

57. Analysis of statistics by income level and by educational level does not demonstrate such a trickle-down effect whereby shifts at upper levels are followed by shifts in lower levels. The data seem to indicate that childbirth rates shift in tandem for upper and lower levels. It is felt, however, that fashions are set by "leaders" and the rest of the potentially childbearing population takes its attitudes from the leaders.

58. See Schaffer & Berman, *supra* note 3, at 701.

After wandering imaginatively through the fantasy world of "what if," proponents of population control eventually return to the tax system as a handy device for limiting the number of births and join population popularizers Garrett Hardin⁵⁹ and Paul Erlich⁶⁰ in calling for changes in the tax laws to limit childbirth.

E. *Specific Assaults on the Tax Laws*

A recent article advocates allowing unmarried couples the income splitting benefits of joint return filing.⁶¹ One may guess that couples living together as unmarried partners are less inclined to procreate than if vows had been taken.

Writers usually single out the dependency exemption for criticism because it specifically and blatantly deals with children. This exemption drew attention before the current alarm about the population crisis judging from the comment that "[e]ven before the advent of the Pill, it was argued that couples who preferred action to abstinence should not be rewarded by the Treasury."⁶²

A well-publicized proposal introduced by Senator Packwood in 1970 would limit each family to two exemptions for children with exceptions for uncontrollable circumstances such as multiple births.⁶³ Packwood saw the bill as a symbolic measure that would probably have little or no effect on couples desiring children, but would put the United States government on record as supporting a "positive commitment to population stability." There is some dispute as to how merely symbolic such a plan would be. Schaffer and Berman discuss the plan at some length and conclude it could have enormous effect.⁶⁴ They estimate the undiscounted value of each exemption as roughly five percent of the cost of raising the child. This is comparable to the historical investment credit of seven percent on some types of machinery.⁶⁵ If Senator

59. See, e.g., Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

60. See, e.g., P. EHRLICH, *THE POPULATION BOMB* 131-32 (rev. ed. 1971).

61. Cook, *Formulating Population Policy*, 3 ENV'T'L AFF. 47, 66 & n.71 (1974) (discussing S. 898, 92d Cong., 1st Sess. (1971), introduced by Senator Ribicoff).

62. Bittker, *supra* note 15, at 1446.

63. S. 3632, 91st Cong., 2d Sess. (1970), discussed in Packwood, *Incentives for the Two-Child Family*, 6 TRIAL, Aug.-Sept. 1970, at 13.

64. Schaffer & Berman, *supra* note 3, at 691. The direct undiscounted cost of raising a child through college as of 1969 was estimated at a moderate level of \$39,924 in Reed & McIntosh, *Costs of Children*, in 2 COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, RESEARCH REPORTS 337, 341 (1972). The direct cost of raising a child in somewhat better circumstances was once estimated at \$65,251.13. G. TRUDEAU, *THE DOONESBURY CHRONICLES* 40 (1975).

65. I.R.C. § 46(a)(1)(C).

Packwood's proposed change caused one wife in ten to have one less child, five million births would be prevented by the year 2000.⁶⁶ A major criticism of the Packwood plan is that it has regressive tax impact. A family with four children and an income of \$10,000 would have an increase in income tax of \$285, or 2.85% of income. The same family of four with the good fortune to be at the \$100,000 level would find its bill increased by \$900, or 0.9% of income.⁶⁷

Operating under the theory that a limit of two exemptions is too weak a plan, Edward Rabin has suggested eliminating the dependency exemption altogether and adding a tax surcharge for each child. His mechanics call for a charge of ten percent of normal income tax for the first child and five percent for each child thereafter. A one child family that pays a normal tax of \$1,000 would pay \$1,100; with two children it would pay \$1,150, etc. The larger surcharge on the first child and continuing surcharge on additional children would presumably have the maximum effect on population growth by affecting one, two and three child families as well as the "culpable" family that has four or more. The goal would be to encourage couples to delay having children, thus preventing births by putting some couples past the childbearing age. An increase in childless and single-child couples should offset the population effect of the inevitable three or more child family.⁶⁸ The criticism of the plan is that it would not place the heaviest burden on the rich since the birth charge would not depend on disposable income amount, but on the type of income a taxpayer held. A taxpayer who holds tax-exempt municipal bonds would feel no effect from the surcharge, and one who has long term capital gains would feel only a diluted effect.⁶⁹

Alternative ideas for juggling the exemption abound. Some writers have suggested the exemption should be done away with outright.⁷⁰ This would produce a tax structure similar to that of Denmark with regard to children, albeit without the accompanying government support allowance.⁷¹ Rabin suggests a compromise: no exemptions for the first three children and small ones for the fourth and subsequent children.⁷²

66. Schaffer & Berman, *supra* note 3, at 691.

67. *Id.* at 693.

68. Rabin, *supra* note 6, at 1370.

69. Schaffer & Berman, *supra* note 3, at 696.

70. *E.g.*, Rabin, *supra* note 6, at 1368.

71. See Koch-Nielson, Schmidt & Ussing, *Law and Fertility in Denmark*, in 1 *LAW AND FERTILITY IN EUROPE* 199, 207, 210 (M. Kirk, M. Livi Bacci & E. Szabady eds. 1972).

72. Rabin, *supra* note 6, at 1368-69.

This represents an attempt at control and tax equity. It takes into account the fact that large families are less able to pay tax. Yet it deters births: who is going to climb three trees to get a bite at a small apple in the fourth?⁷³ Another solution would grant a large, double exemption for the first child, none for the second and regular exemptions for the third and fourth. Every couple could have their first child, but with the second, they're on their own.⁷⁴ The problems, according to the authors, are that the system represents a windfall to the one child family that has lower costs than the family with two children and that it would cost the Treasury at least a billion dollars a year in revenue.⁷⁵

One final parting shot is offered by Boris Bittker: let's be honest and admit we're penalizing the culpable parent:

Perhaps the dependency allowance, at least for children, is more important as a symbol of national policy than as an influence on the birth rate. If so, denial of the deduction for a year or two after the birth of an "excess" child may be symbol enough, and if the allowance might thereafter be restored to the antisocial parents in order to measure their tax paying capacity more adequately. After all, even convicted criminals get some of their civil rights back after they have paid their debt to society.⁷⁶

Although I suspect a tongue firmly implanted within a cheek, there is some merit to the proposal. After all, once the taxpayer has been hit between the eyes with the new system, is there any need to make the family continue forever with a reduced standard of living? The proposal has the appeal of causing a minimal amount of symbolic annoyance to childbearers without any real dislocation of the present tax structure.

IV. CONSTITUTIONAL PROBLEMS OF ANTI-NATALIST PROPOSALS

Present federal tax laws are pro-natalist in nature. This was not, however, the result of deliberate design; they just worked out that way. The question now is whether deliberate anti-natalist amendments to the tax laws would survive constitutional challenge. This question goes beyond whether a Code originally written without pro-natalist provisions would be constitutional; it clearly would. The reason for the difficulty is that anti-natalist changes would not merely "happen"; they would be deliberately injected for population-limiting motivations. The very

73. *Id.*

74. Schaffer & Berman, *supra* note 3, at 697-98.

75. *Id.*

76. Bittker, *supra* note 15, at 1449.

deliberateness adds a dimension of constitutional challenge that does not apply to results that "just happened."

Constitutional challenges would vary, depending upon the particular anti-natalist strategy adopted. All strategies, however, are subject to two basic questions: (1) how far, generally, can Congress intrude into what are traditionally state functions and matters for individual discretion; and (2) how far, specifically, can Congress go by means of its taxing and spending powers of the Constitution?

A. *The Fundamental Documents*

Article I, section 8 of the Constitution grants Congress the power to tax and spend for the public welfare. The sixteenth amendment specifically authorizes Congress to impose an income tax without having to apportion it among the various states, as was thought to be required by article I, section 2. Congress has virtually unlimited power to regulate business activities under the commerce clause. In dealing with individual rights, Congress has substantial power to pass laws implementing the equal protection and due process clauses of the fourteenth amendment.

As one might expect, there is no constitutional provision specifically granting Congress power to control family size. To the contrary, family law has long been almost exclusively a matter of state concern. Some ingenious arguments have been made that Congress has sufficient power to regulate family size by implication from the commerce clause and from its power to enforce the equal protection and due process clauses of the fourteenth amendment.⁷⁷ Even if the Supreme Court were to accept such arguments, it is probable that Congress would feel uncertain about its power to control births under the commerce clause or its power to limit individual freedom to procreate under the fourteenth amendment.⁷⁸

The taxing authority contained in article I, section 8 requires that direct or per capita taxes, which are not income taxes, be apportioned among the states. (Therefore, a federal poll tax would be unconstitutional.) Arguably, the various exemption and surtax proposals would amount to a direct per capita tax based upon the number of people in a

77. See Montgomery, *supra* note 6, at 634; Rabin, *supra* note 6, at 1372-90; Comment, *supra* note 6, at 205-09.

78. Cf. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 211-17 (9th ed. 1975) (senatorial debate on relative merits of supporting civil rights legislation on the basis of the commerce clause or the fourteenth amendment).

family. One writer, however, concludes that they are not capitation taxes because they are levied without regard to circumstance.⁷⁹

B. *The Power of the Sixteenth Amendment*

The modern income tax is specifically authorized by the sixteenth amendment. This amendment was passed after *Pollock v. Farmers' Loan & Trust Co.*⁸⁰ held the income tax of 1894 unconstitutional on the ground that Congress did not have power to impose a direct tax without apportionment among the states. The amendment states that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment"

Congress has used its sixteenth amendment power extensively, establishing an enormously complicated taxing system. There have been few successful constitutional challenges to specific tax provisions.⁸¹ To the extent that the amendment conflicts with earlier constitutional provisions, the amendment would prevail as the later fundamental statement. Accordingly, unless there is some feature of a tax revision that goes beyond a mere tax on income, it should withstand challenge.

Congress has used the tax laws to accomplish certain policy goals. Tax laws have been used, for example, to stimulate small political contributions.⁸² These tax incentives did not "just happen"; they were the product of conscious decision. Yet, no one seriously suggests that they are unconstitutional.

C. *The "Penalty" Problem Cases*

It is clear that Congress could regulate by taxation any activity that it could regulate directly. But there is a definite limitation on the regulatory power: Congress could not exact a penalty in the guise of a tax, and the Court would invalidate such "mere pretexts" if Congress attempted to regulate what it could not control otherwise.⁸³

The limitation is spelled out in the *Child Labor Tax Case*.⁸⁴ Congress in 1916 had tried to regulate child labor, and the Court had

79. Rabin, *supra* note 6, at 1381.

80. 157 U.S. 429, *on rehearing*, 158 U.S. 601 (1895).

81. Among the few cases in which an income tax provision was held unconstitutional is *Moritz v. Commissioner*, 469 F.2d 466 (10th Cir. 1972) (1966 version of § 214 held unconstitutional as applied to single men who had never married).

82. See, e.g., I.R.C. §§ 41 & 218.

83. See G. GUNTHER, *supra* note 78, at 230-42.

84. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36 (1922).

declared the effort unconstitutional.⁸⁵ Congress then passed a tax measure that imposed punitive taxes upon companies using child labor. The Court held that the tax was really a penalty designed to coerce states to do congressional bidding in a matter that was completely the business of the state government and declared the tax to be unconstitutional. The Court admitted that tax measures could have legitimate regulatory consequences, but required a reasonable and substantial connection with the raising of revenue. If a revenue goal were present, the regulatory impact could be viewed as incidental. This principle was applied in *United States v. Constantine*,⁸⁶ striking down a federal excise tax levied on a violator of state liquor law.

The "mere pretext" doctrine retains some validity, but the Court has preferred a deferential treatment of congressional tax measures. The current view is that if a measure produces revenue, it is a tax measure and within congressional authority.⁸⁷ The gambling tax in *United States v. Kahriger*⁸⁸ and the marijuana tax in *Minor v. United States*⁸⁹ were upheld despite the traditional view that these matters lay in the states' bailiwick. Although the federal taxes on gambling and marijuana had clear regulatory aims, they raise less troubling constitutional issues than would a tax on children. The activities regulated in *Kahriger* and *Minor* are assumed to have little or no redeeming social value, and therefore they enjoy no constitutional protection.⁹⁰ Likewise, such federal tax laws usually help in enforcement of existing state laws, and the result is state-national cooperation, not antagonism. In view of longstanding pro-natal policies of states,⁹¹ it is hard to foresee such a cooperative milieu for a population tax measure.

D. Individual Rights—Tax Law Too Close to the Bedroom

If the Court places any major roadblock in the path of congressional action, it will probably be based on protection of individual rights. Any member of Congress engaged in soul searching over a prospective bill must look at the language the Court is using and the signals it is giving. A member of Congress may also assume that there

85. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

86. 296 U.S. 287, 294 (1935).

87. *United States v. Kahriger*, 345 U.S. 22, 28 (1953) (gambling tax); *Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937) (firearms tax).

88. 345 U.S. 22 (1953).

89. 396 U.S. 87 (1969).

90. See Rabin, *supra* note 6, at 1383.

91. See Cook, *supra* note 6, at 56.

will be substantial parallel treatment of state action under the fourteenth amendment and federal action as limited by the fifth amendment.

The fourteenth amendment rights of individuals are usually discussed in terms of due process "fundamental rights," equal protection from "invidious classifications" and equal protection of "fundamental interests." The criteria for evaluating the validity of any measure under the first two of these were quoted by Justice Goldberg, thus: "'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling' The law must be shown 'necessary, and not merely rationally related, to the accomplishment of a permissible state policy.'"⁹²

One could say that the due process and equal protection analyses have merged under the Burger court.⁹³ The difference lies only in the identity of the plaintiff: a member of the general public would complain that his or her fundamental right of marital privacy⁹⁴ or just plain personal privacy⁹⁵ has been unnecessarily violated, whereas a member of a group defined by race, sex or national origin would complain that his or her group has been singled out for unequal treatment in violation of the equal protection clause.⁹⁶ If the measure should be valid under both these analyses, a member of a fourth group, the poor, might argue an invidious classification based upon economic status and a violation of equal protection of a fundamental interest.⁹⁷

The Court has never decided whether family size or the right to determine family size is a fundamental right under the fourteenth amendment. There is instead a collision of dicta from Justice Goldberg's opinion in *Griswold*, speaking of "such totalitarian limitation of family size,"⁹⁸ and from Justice Blackmun's in *Graham v. Richardson*,⁹⁹ saying, "the classification involved in that case [*Dandridge v. Williams*] (family size) neither impinged on a fundamental constitutional right nor employed an inherently suspect criterion."¹⁰⁰ One can only guess whether Blackmun meant that no right was involved or that there was just no infringement of a right.

92. *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (concurring opinion) (citations omitted).

93. See, e.g., the Rehnquist dissent in *Roe v. Wade*, 410 U.S. 113, 173 (1973).

94. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

95. *Roe v. Wade*, 410 U.S. 113 (1973).

96. E.g., *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973).

97. Cf. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (poll tax).

98. 381 U.S. at 497 (concurring opinion).

99. 403 U.S. 365 (1961) (majority opinion).

100. *Id.* at 373.

If the fourteenth amendment issue is one of "fundamental interest," the test for validity is less strict. The accepted standard is whether the action has been "reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways."¹⁰¹ A fair assessment of the extent to which the Court will protect the individual's fundamental interest would be that, while the Court will not enforce absolute equality, it will enforce some basic minimum rights.¹⁰² The main advantage of tax incentives or disincentives is that they can be formulated to represent this minimum intrusion and allow at least minimal leeway for individual preferences.

It must be recognized that fourteenth amendment cases are not fifth amendment cases. In the civil liberties area, the Court has looked somewhat more suspiciously at state activity than at federal activity. Nevertheless, the Court has the same power to strike down federal action that it has to strike down state action. In many fourteenth amendment cases, the Court had to sift through the state action to find a real motive. If Congress decides to use tax or other economic incentives to influence the birthrate, it is likely that the goal will be fully debated and recorded. A federal record thus may lack the fog cover that could otherwise allow the Court to give the measure a safe presumption and regard the bedroom impact as incidental. Thus, in *Dandridge v. Williams*,¹⁰³ the Court upheld a state-imposed maximum limit on welfare grants that would discourage a recipient family from having additional children. Although the statute itself did not disclose an intent to limit family size, no observer could avoid speculation that this goal was certainly in the minds of many legislators who voted for the measure. While the present Court will not declare a law unconstitutional solely because of the motivations of its sponsors,¹⁰⁴ the Court in the past has found improperly motivated legislative actions unconstitutional.¹⁰⁵

E. Necessity

The Japanese exclusion cases of World War II¹⁰⁶ may offer some

101. *American Party v. White*, 415 U.S. 767, 781 (1974).

102. *Compare San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), with *Bullock v. Carter*, 405 U.S. 134 (1972).

103. 397 U.S. 471 (1970).

104. *See Palmer v. Thompson*, 403 U.S. 217, 224 (1971).

105. *See Griffin v. County School Bd.*, 377 U.S. 218, 231 (1964) (school closing); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (city annexation). *See Brest, Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 26-27 (1976).

106. *Ex parte Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

insight on the doctrine of necessity. They establish that when the interest is compelling the government may use the means necessary to accomplish its goal. But governmental intrusion must not exceed the minimum control necessary. Thus, a curfew was upheld in *Hirabayashi* and an order to report to a government center was upheld in *Korematsu*. But detention of an individual was construed to be outside the executive power and presumably totally unacceptable in *Endo*. While these cases may be aberrational, their doctrine remains.

The Court's perception of the intensity of the population problem is bound to affect its decision. If a potential disaster is perceived from overpopulation, the Court will uphold measures it would not approve if only slight inconvenience is perceived as the problem. Removal of preferences for childbearing persons will probably not cause any constitutional problems, nor will equalizing of tax rates to give essentially the same preferences to people who do not have children. Providing tax penalties for persons who do have children will not cause as much trouble to the Court as laws that strictly limit the number of births per family.

F. The Particular Impact on Poor Families and Racial Minorities

The emotional appeal for the current system is that people with children are not likely to get paid more than their co-workers without children, and it takes more for a family of five to live than for a family of two. Equal taxation would hurt the large family that has less spending money. And no one wants an anti-natalist policy to succeed totally; that would wipe out the human race.

The end product of a tax-based program, according to what has been considered to this point, would be financial disincentives that would discourage middle income families from having children. The affluent can afford the price and would not be deterred. Very low income families probably do not have general awareness of the financial implications of such basic acts and are unlikely to be affected one way or another. But they may be subjected to financial hardship, even punishment, if they procreate. Only the middle income families are likely to have the ability to analyze additional childbirths in terms of financial consequences. The net result could be that no change in birthrate would be noted among the poor, but they would be punished after the fact by economic sanction.

Racial minority groups make up a disproportionate percentage of

low income families.¹⁰⁷ Some black leaders see some political advantage in an increased black birthrate that may eventually give that group greater voting strength.¹⁰⁸ Arguments could certainly be made that anti-natalist taxation policies that either punish low income families for having children or discourage them from having children discriminate unjustly against minorities.

G. *A Role for Congress and Its Conscience*

Congress, with the legitimate intent of equalizing cost burdens of children on the government, might establish an excise tax on having children. This would have some regulatory effect on family size. Children cost money, to the country as well as to the taxpayer. If Congress were to let the costs fall where they originate, there is no constitutional problem. But if Congress attempts directly to regulate family size, it is getting on shaky ground, and even minimally intrusive measures through tax laws should be suspect.

The foregoing discussion assumes that a measure has first passed the congressional test of constitutionality. The first evaluator of the validity of any act must always be Congress. The Court serves as a backstop to catch gross deviations that slip through the congressional net.¹⁰⁹ Individual legislators must look to their own consciences.

Congress should set a tougher test than the Court demands as a minimum. For example, the Court would find no racial classification in a tax that effectively regulated births only among the poor: there just is not a close enough statistical correlation between race and wealth to warrant equal protection treatment.¹¹⁰ Congress on the other hand cannot ignore certain facts of life. Black median income is substantially lower than white, and on the whole, as a percentage of white median income, has fallen in the years 1970-1974.¹¹¹ This corresponds with a lower, though improving, average level of education attained and hence a lower *expected* income throughout life.¹¹² It adds up to the fact that

107. STAT. ABSTRACT, *supra* note 3, at 396, table 646.

108. Also, many black leaders view population control programs as a form of "genocide" directed at minority groups. COMMISSION REPORT, *supra* note 4, at 108-11.

109. See Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

110. Cf. *Jefferson v. Hackney*, 406 U.S. 535, 545-49 (1972) (payment of lower percentage of need in AFDC program than in other welfare programs does not violate equal protection, even though more minorities participate in AFDC).

111. STAT. ABSTRACT, *supra* note 3, at 390, table 631.

112. See *id.* at 119, table 192.

blacks would be disproportionately affected if the main impact of a tax were placed on the lower economic groups.¹¹³ There is a significant equal protection problem in that result whether the Court says so or not.

In the eyes of the average American, there is also a due process problem: the public sees the right to determine family size as a fundamental right whether the Court does or not.¹¹⁴ And the American public has voluntarily gone a long way toward solving the population problem, so the public may well doubt the overriding necessity of government action.

Finally, there is an argument that is neither fish nor fowl: the inertia syndrome.¹¹⁵ The present system and policy behind it have taken on a quasi-constitutional status. Violation of these unwritten constitutional provisions can probably raise as much furor as did the 1937 Court-packing crisis. Nominating conventions, the Sherman Antitrust Act and the dependency exemption are as firmly ensconced as the right to bear arms. Congress long ago decided on exemptions in order to avoid squeezing blood from turnips. The low income family, a sliding scale group determined by a matrix of family size and income factors, is kept out of the tax structure as a matter of equity and the practical difficulty of collection.¹¹⁶ If a tax incentive is to have some effect, this deeply entrenched policy will probably have to be uprooted.

V. A MODEST PROPOSAL

The glitter of most of the proposals to charge for children or take away exemptions for large families fades upon close examination. But it would still be worthwhile to take the applause for large families out of the tax laws. An amendment to the tax laws must be couched in terms of fairness to those who pay higher taxes, *i.e.*, the childless and unmarried taxpayers. For a time, tax laws may become even more complex than they are now, as equivalent deductions are extended to childless taxpayers. But at some time in the distant future, a campaigner may win the presidential election on campaign promises to revise and simplify the tax structure—which would mean removing all of the subsidies. Some may say that the “distant future” occurred during the presidential campaign of 1976, and that simplification is just around the corner. But

113. See also Comment, *supra* note 6, at 211.

114. See Dileo, *supra* note 3, at 209-10.

115. See Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

116. See Schaffer & Berman, *supra* note 3, at 691-96.

it is too much to ask that a Congress that produced the prolix and complex Tax Reform Act of 1976 turn out basic tax simplification in the near future. In this vein, there is presented in conclusion, a modest proposal.

In symbolic recognition of the virtues of restraint in childbearing, a deduction is proposed for those who have successfully curbed their urge to procreate in the past. This is similar to the Spengler proposal¹¹⁷ in that the deduction can be viewed as a governmental contribution in lieu of the support that children might otherwise provide in their parents' old age. It can be modest in amount to avoid great revenue impact, because its value is to be merely symbolic. In any event, it will be a reallocation of burdens, so it could be keyed to a time for selective tax cuts.

The deduction would be allowed, for example, at age forty-five for those with no children, age fifty-five for those with one child, and age sixty-five for those with two children. Further delays at ten year intervals for each additional child will make the deduction academic for those with more than three children.

There will be problems based upon determining the number of children a taxpayer has had, whether the deduction should be based upon children surviving, and whether in a split family both father and mother are to be denied the deduction at the earliest age. It could be keyed to past dependency exemptions allowable, *e.g.*, a half-year delay for each year of such exemption—a factor militating against simplicity but tending towards equity.

The proposal may be no more or less fanciful than any other. The "child restraint deduction" may even have some utility, if such tamperings ever do.

117. See text accompanying note 54 *supra*.