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# THE CONSTITUTIONALITY OF SELECTED FERTILITY CONTROL POLICIES

LARRY D. BARNETT†

Contrary to widespread belief, the population of the United States is still growing, and although the rate of increase is small, the number of people added annually is substantial. In 1975, an excess of births over deaths caused population to grow by 0.58%, representing approximately 100,000 more births than deaths every month.<sup>1</sup> There seem to be two major reasons for the belief that the population of the United States is now stable. First, there has been a marked decline in the growth rate since the time when the population control movement was the focus of considerable attention and publicity. In 1970, when the movement was at its zenith, the excess of births over deaths caused population to increase by 0.89%<sup>2</sup> or 1,810,000.<sup>3</sup> Between 1970 and 1975, there was a decline of one-third in the number of people added to the population annually and in the rate at which they were added. However, the decline in *rate* occurred almost entirely prior to 1973. Subsequently, there has been little change in the growth rate, with the result that the constantly expanding base to which the rate is applied has been generating an increasing excess of births over deaths. The excess of 1,810,000 in 1970 fell to 1,162,000 in 1973 but increased in 1974 and again in 1975, reaching 1,239,000 in the latter year.<sup>4</sup>

The second major reason for the public belief that the United States has reached a point where the number of births equals the number of deaths lies in a misunderstanding of the demographic measure known as the total fertility rate and a failure to appreciate the nature of the age distribution of the population. The total fertility rate is a hypothetical predictor of completed family size, but it has been widely

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1. 24 HEALTH RESOURCES AD., PUB. HEALTH SERV., MONTHLY VITAL STATISTICS REP., No. 13, at 1, 2 (1976) (vital statistics of the United States) [hereinafter cited as VITAL STATISTICS].

2. Calculated from data given in *id.* at 1.

3. 22 *id.*, No. 11, Supp., at 1 (1974); *id.*, No. 12, Supp., at 1.

4. Calculated from 24 *id.*, No. 13, at 1, 2 (1976); 23 *id.*, No. 13, at 1, 2 (1975); *id.*, No. 8, Supp., at 1 (1974); *id.*, No. 8, Supp. 2, at 1; *id.*, No. 3, Supp., at 1; *id.*, No. 3, Supp. 3, at 1; 22 *id.*, No. 11, Supp., at 1; *id.*, No. 12, Supp., at 1.

defined as actual completed family size. The total fertility rate predicts the ultimate completed family size of women entering their childbearing period in the year the rate is calculated, but it is an accurate predictor of this group's completed family size only if the then-existing birth rates for women already in their childbearing years remain unchanged while the group for which the rate is calculated passes through its childbearing years. These birth rates can and do change substantially over the three decades the group is exposed to childbearing, making the total fertility rate a hypothetical measure of completed family size. For example, women who were 45 to 49 years of age in 1975 had borne an average of 3.03 children each,<sup>5</sup> but the total fertility rates in 1940 and 1945 when they were entering their childbearing period were 2.30 and 2.49, respectively.<sup>6</sup> For this group of women, then, the total fertility rate was significantly lower than actual completed family size.

In 1977, the total fertility rate was 1.8 children per woman, and the fact that it declined from 2.48 in 1970<sup>7</sup> and had fallen below the "replacement level" of 2.1 helped convey the impression that population was no longer growing in the United States. A rate of 2.1 would immediately equalize the number of births and deaths if it were not for the large proportion of adults currently in their childbearing years, a result of the post-World War II baby boom. Because these adults generate births but have a relatively low incidence of deaths—because they add to the size of the population and also remain in it for a considerable length of time afterward—a rate of 2.1 would result in the expansion of the United States' population from 212 million in 1974 to 262 million in the year 2000 and 318 million in the year 2050. A rate of 1.7 will result in a population of 245 million in the year 2000 and 250 million in the year 2025, with a decrease to 227 million in 2050.<sup>8</sup> Only a total fertility rate of 1.2 will halt population growth immediately.<sup>9</sup>

Since few women currently expect to have fewer than two

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5. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REP., Series P-20, No. 288, at 8 (1976) [hereinafter cited as CURRENT POP. REP.].

6. *Id.*, Series P-23, No. 49, at 17 (1974).

7. 24 VITAL STATISTICS, *supra* note 1, No. 11, Supp. 2, at 7 (1976).

8. CURRENT POP. REP., *supra* note 5, Series P-25, No. 601, at 36 (1975). The projections assume a slight reduction in future mortality and a continuation of net immigration of 400,000 annually.

9. Frejka, *Reflections on the Demographic Conditions Needed to Establish a U.S. Stationary Population Growth*, 22 POPULATION STUDIES 379, 382 (1968).

children,<sup>10</sup> the population of the United States is not likely to stabilize or decline in the near future unless there is either an appreciable increase in the death rate or a drastic threat to the standard of living that is clearly traceable in the public mind to continued population growth, leading to the adoption of fertility control measures that go beyond the mere provision of family planning services.<sup>11</sup> A threat sufficient to generate such laws seems to be a distinct possibility. In 1975, a committee of the National Research Council examined mineral resources and concluded that "man faces the prospect of a series of shocks of varying severity as shortages occur in one material after another, with the first real shortages perhaps only a matter of a few years away."<sup>12</sup> At approximately the same time, the Council on Environmental Quality observed:

The United States is one of the more resource-rich nations in the world. However, . . . the United States does not have sufficient reserves of 47 . . . commodities . . . to satisfy cumulative demands to the year 2000. . . . In fact, the United States now imports from 90 to 100 percent of its needs in 8 important materials . . .; from 50 to 90 percent in another 12 materials . . .; and 15 to 50 percent of its needs in 14 more materials . . . .<sup>13</sup>

This article will examine a number of possible fertility control measures and their validity under the United States Constitution. The

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10. In 1975, the percentage of wives in various age categories under 40 years who expected to have fewer than two children ranged from 13% to 17%. CURRENT POP. REP., *supra* note 5, Series P-20, No. 288, at 5 (1976). Moreover, there is evidence that recent birth expectations may understate future fertility. Blake, *Can We Believe Recent Data on Birth Expectations in the United States?*, 11 DEMOGRAPHY 25 (1974). The fact that the total fertility rate has fallen below 2.0 appears to be due to a postponement of childbearing and to be temporary. Sklar & Berkov, *The American Birth Rate: Evidence of a Coming Rise*, 189 SCIENCE 693 (1975); C. Gibson, *Changes in Marital Status and Marital Fertility and Their Contribution to the Decline in Period Fertility in the United States: 1961-1973*, at 6-8 (Apr. 17-19, 1975) (paper presented at 1975 annual meeting of Population Association of America).

11. Davis, *Population Policy: Will Current Programs Succeed?*, 158 SCIENCE 730 (1967).

12. COMMITTEE ON MINERAL RESOURCES AND THE ENVIRONMENT, COMMISSION ON NATURAL RESOURCES, NATIONAL RESEARCH COUNCIL, MINERAL RESOURCES AND THE ENVIRONMENT 26 (1975).

13. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 314 (5th annual report, 1974). The United States thus appears vulnerable to severe resource shortages within the foreseeable future. The social and individual consequences of such shortages are rarely considered but are serious. Catton, *Can Irrupting Man Remain Human?*, 26 BIOSCIENCE 262 (1976). Contrary views that there are no resource shortages facing the United States that can severely and permanently damage its economy appear in *Hearings Pursuant to S. Res. 269 Before the Subcomm. on Investigations of the Senate Comm. on Government Operations*, 93d Cong., 2d Sess., pt. 1, at 40, 74-76, 113 (1974).

laws chosen are those likely to appear attractive to a public committed to population control.<sup>14</sup> Certainly, however, these laws do not exhaust all possible measures. Indeed, one that will undoubtedly be seriously considered—a tax surcharge on parents for excessive fertility—will not be considered here, since its constitutional aspects have been treated elsewhere.<sup>15</sup> However, it should be noted that a surcharge is probably constitutional.<sup>16</sup>

### FEES FOR EDUCATION

Given the financial problems facing education and the reluctance of taxpayers to spend larger amounts of money on public schools and universities, a system in which parents pay most or all of the cost of educating their children may appear an attractive means for regulating fertility. The economic burden on parents could be expected to reduce family size, and taxes could be expected to fall; both benefits would in all likelihood be substantial. The cost of educating a child would be such that family size would inevitably decline. In 1975, the average annual expenditure per pupil by state and local governments was \$1250.<sup>17</sup> This was almost twice as much as in 1968, when the expenditure was \$658,<sup>18</sup> and if the rate of increase prevailing in the 1968-1975 period continues, approximately \$4500 will be spent annually per pupil by 1990. Requiring parents to pay educational costs would not only create strong pressures on fertility but also would allow substantial relief for taxpayers, because at present approximately one-third of all

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14. Fertility regulation measures cannot be justified unless childbearing is completely voluntary and unplanned pregnancies can be avoided or terminated. Assuming that abortion remains legally available, such a situation appears likely to exist within a few years. "It seems highly probable that by the end of the 1970s, almost all married couples at risk of unintended pregnancy in the United States will be using contraception, and almost all contraceptors will be protected by the most effective medical methods. We are rapidly approaching universal, highly effective contraceptive practice." Westoff, *Trends in Contraceptive Practice: 1965-1973*, 8 *FAMILY PLANNING PERSPECTIVES* 54, 57 (1976).

15. See Rabin, *Population Control Through Financial Incentives*, 23 *HASTINGS L.J.* 1353, 1370-99 (1972). A system of payments designed to motivate couples to restrict their fertility does not appear to be financially feasible. Barnett, *Population Policy: Payments for Fertility Limitation in the United States?*, 16 *SOCIAL BIOLOGY* 239, 246-48 (1969). It will thus not be considered here.

16. See Rabin, *supra* note 15, at 1399.

17. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES*: 1975, at 133 (96th ed. 1975) [hereinafter cited as *STATISTICAL ABSTRACT*].

18. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970*, at 373 (1975).

expenditures by state and local governments are devoted to education.<sup>19</sup>

A system requiring parents to pay for the educational services rendered their children would presumably have the following features:

- (1) Minors would be required to attend school to age 16 or 17 as at present. Without a compulsory attendance requirement, the benefits of education to society would be lost and the fertility-inhibiting effect of the fees charged parents would be diminished to the extent that children were not sent to school.
- (2) Governmental subsidies would be made available to the indigent to pay the charge imposed for education.
- (3) The charge would be imposed only for children conceived after enactment of the legislation creating the charge. Children conceived and children born at the time the legislation is enacted would not be subject to the fee, since there would be no fertility-inhibiting effect on the parents as far as such children were concerned.

*San Antonio Independent School District v. Rodriguez*,<sup>20</sup> decided by the United States Supreme Court in 1973, is the leading case on the constitutional aspects of financing educational services. Plaintiffs there attacked the use of property taxes to finance local schools, arguing that poor school districts were able to spend less per student than rich districts and that the classification based on wealth that was thereby established violated the equal protection clause of the fourteenth amendment. The central problem facing the Court was the test to be used in assessing the constitutionality of the system of financing education. Should it carry a presumption of constitutionality and be judged only in terms of whether it possesses a rational relationship to a legitimate governmental purpose, or should the state bear the burden of justifying the system by demonstrating that it is necessary to meet a compelling governmental interest? If wealth is a "suspect" classification or if education is a fundamental constitutional right that the system penalizes, then the stricter test must be employed.<sup>21</sup>

*Rodriguez* holds that a law creating a classification based on wealth is subject to the stricter compelling governmental interest test

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19. STATISTICAL ABSTRACT, *supra* note 17, at 258.

20. 411 U.S. 1 (1973).

21. *City of New Orleans v. Dukes*, 96 S. Ct. 2513, 2516-17 (1976); *Dunn v. Blumstein*, 405 U.S. 330, 335-36 (1972).

only if the individuals and groups negatively affected by the classification possess two distinguishing characteristics:

- (1) Because of their economic circumstances, they are "completely unable" to pay for the desired benefit; and
- (2) They consequently sustain "an absolute deprivation" of that benefit.<sup>22</sup>

In *Rodriguez*, there was no absolute deprivation of educational services. Students in poorer school districts were perhaps receiving an education of lower quality than students in rich districts, but this was held by the Court to be insufficient to invoke the compelling governmental interest test: "[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."<sup>23</sup>

Accordingly, it appears that state and local governments may charge parents for educating their children as long as financial assistance is provided to those parents unable to pay the charge so that their children are not deprived of educational services. This conclusion is supported by footnote 60 in the *Rodriguez* opinion:

If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of 'poor' people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today.<sup>24</sup>

Thus, while a charge may be levied by government for the educational services it provides, financial assistance to indigents is necessary. However, even without the threat of judicial coercion, the benefits of primary and secondary education to society appear to be such that government would want to make provision for pupils from indigent families unable to pay the charge imposed.

A system of charging parents for educating their children will not necessarily require a compelling governmental interest because it creates a classification based on wealth, but such an interest will be required if education is a fundamental constitutional right. The Court in *Rodriguez* concluded that the standard for determining this question is not the importance of education to society but, rather, whether educa-

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22. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973).

23. *Id.* at 24.

24. *Id.* at 25 n.60.

tion is a right explicitly or implicitly guaranteed by the Constitution. Under this standard, the Court held that education was not a fundamental constitutional right.<sup>25</sup>

The Court's discussion of whether education is a fundamental right suggests that a state need not provide free public education and that imposing fees on parents to finance the educational system is constitutional as long as the conditions under which the financed services are offered are the same for all individuals and groups, for example, by making the charge the same for all students in a particular grade. Specifically, the Court said: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, *where the State has undertaken to provide it*, is a right which must be made available to all on equal terms."<sup>26</sup>

This language is consistent with another line of cases. The Supreme Court has clearly stated that a state may limit expenditures for education in order to preserve the fiscal integrity of its programs, though in order to curb expenditures it may not intentionally bar a particular class of individuals (*e.g.*, indigent children) from utilizing educational services.<sup>27</sup> *Johnson v. New York State Education Department*, a case in which a state refused to provide free textbooks to students in grades one to six while providing them to students in grades seven to twelve, reflects this reasoning.<sup>28</sup> Plaintiffs were recipients of public assistance and parents of children attending public schools in grades one to six. Unable to pay the \$7.50 charge levied on each student for textbooks, plaintiffs claimed a denial of equal protection. The court rejected the claim and added that the legislature could constitutionally refuse to provide free textbooks to all children in all grades in order to conserve the state's fiscal resources. By extension this reasoning could support a holding that the state could refuse to provide free education in any form without violating the Constitution.

This conclusion appeared expressly in an Eighth Circuit case contesting an annual enrollment fee of eight dollars for students in a

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25. *Id.* at 33-34.

26. *Id.* at 30 (quoting *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)) (emphasis added).

27. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

28. *Johnson v. New York State Educ. Dep't*, 319 F. Supp. 271 (E.D.N.Y. 1970), *aff'd*, 449 F.2d 871 (2d Cir. 1971), *vacated and remanded to determine mootness*, 409 U.S. 75 (1972).



public high school.<sup>29</sup> A challenge to the validity of the fee was rejected on the ground that the Constitution provides no federal right to a free education by the state.<sup>30</sup> The court held that the Constitution guarantees only that, where the state has decided to provide education services, the services must be available to all its citizens on the same terms.

In short, a system of fees imposed on parents to cover the costs of the education of their children will bear a presumption of constitutionality and will violate the equal protection clause of the fourteenth amendment only if it is not rationally related to a legitimate state purpose, because the United States Constitution provides no fundamental right to education and wealth will not be a suspect criterion unless there is a clearly definable indigent class whose children are absolutely deprived of an education. There is, moreover, another reason a system of fees will be evaluated only in terms of whether it bears some rational relationship to a proper state purpose, namely, the subject matter is that of taxation.

"[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes."<sup>31</sup>

In order to avoid a challenge to a system of fees that will be tested under the equal protection clause in terms of whether it satisfies a compelling governmental interest and in order to provide the economic and social benefits of universal education, the charges imposed on indigent parents will have to be paid by government. The financial assistance provided indigents, however, must not be permitted to subsidize education in religiously oriented schools. In order to avoid the prohibition of the first amendment against the establishment of religion, the subsidy for indigents must be used for education in and paid directly to secular schools. This restriction derives from a 1973 decision by the Supreme Court in a case involving a tuition reimbursement plan provided by the State of New York for low-income parents sending their

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29. *Byrd v. Sexton*, 277 F.2d 418 (8th Cir.), *cert. denied*, 364 U.S. 818 (1960).

30. *Id.* at 425. The Tenth Circuit has also adopted this view. *Flemming v. Adams*, 377 F.2d 975, 977 (10th Cir.), *cert. denied*, 389 U.S. 898 (1967). However, one federal district court recently suggested that there is a constitutional right to a minimal level of education. *Fialkowski v. Shapp*, 405 F. Supp. 946 (E.D. Pa. 1975).

31. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 41 (1973) (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940)).

children to private schools.<sup>32</sup> The annual reimbursement was limited to \$100 or fifty percent of the actual tuition paid, whichever was lower. Since the vast majority of non-public schools in New York were church-related, the Court held the plan unconstitutional on the ground that it had the direct and immediate effect of advancing religion by relieving the financial burdens on parents sufficiently to provide them with the option of sending their children to religiously oriented schools. It was unimportant to the Court that the state law at issue did not require the money received to be spent on education and that the parents could spend the money on other items.

The preceding discussion has examined the constitutionality of fees imposed by a state on parents for educational services provided their children. To have a nationwide effect in reducing the birth rate, the fee system would have to be adopted by most or all states. This raises the question whether the federal government could require the adoption of a fee system by the states, and the answer is probably negative. An argument could be made that the power of the federal government under the commerce clause<sup>33</sup> to regulate interstate commerce is sufficient to permit a federal requirement that states adopt a fee system inasmuch as the effect of educational services on interstate commerce can undoubtedly be shown to be substantial. However, the 1976 Supreme Court decision in *National League of Cities v. Usery* suggests that such reasoning will not be accepted.<sup>34</sup> That case involved the validity of the extension of federal minimum wage and maximum hour provisions to state and local governments under the Fair Labor Standards Act. The Court held that the commerce clause does not provide the federal government with the authority to alter or displace the ability of state and local governments to structure relationships with their employees in services they traditionally perform. Public health, recreation, and police protection

are typical of those [activities] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, ser-

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32. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). Parents cannot be required, however, to send their children to secular schools but must have the option to send them to church-related schools if they so wish. *Pierce v. Society of Sisters*, 268 U.S. 510, 518-19 (1925). Indigent parents exercising this option would not, of course, be eligible for financial assistance.

33. U.S. CONST. art. I, § 8.

34. *National League of Cities v. Usery*, 96 S. Ct. 2465 (1976).

vices such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence."<sup>35</sup>

The provision of education is clearly a traditional function of states and their political subdivisions,<sup>36</sup> and thus the means by which educational services are financed would seem to be within their purview. Education financing appears to be as much within the traditional powers of state and local governments as the wages paid to and the hours worked by their employees. Thus, the federal government could not compel the adoption of a fee system for financing education, though it could apparently make enticements available to this end.

In conclusion, a state is under no obligation by the United States Constitution to provide free public education to its citizens, and it may charge parents to pay the cost of educating their children. Because a state may require parents to send their children to school,<sup>37</sup> the impact on fertility would be substantial if parents were required to pay most or all of the actual cost. Whatever system of fees is adopted will be tested under the equal protection clause only in terms of whether it rationally furthers a legitimate state purpose. The serious economic and ecological problems that are likely to exist by the time a commitment is made to regulate fertility will constitute a threat to the public health and welfare, the protection of which is clearly a valid state purpose,<sup>38</sup> and a system of fees which is the same for all persons similarly situated should have little difficulty being upheld as rationally related to that purpose inasmuch as it cannot help but reduce fertility and alleviate the population pressures behind economic and ecological problems.

#### RAISING THE AGE OF MARRIAGE

Fertility regulation may well be combined with an attempt to attain other desired ends. In particular, measures may appear attractive that seem likely to reduce not only family size but also the incidence of divorce. The divorce rate in the United States is currently at its highest

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35. *Id.* at 2474.

36. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

37. *See id.* at 233; *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

38. *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1905).

point in history and is continuing to increase; in 1974, almost two percent of all married women became divorced.<sup>39</sup> Individuals marrying under age twenty have been found by a number of studies to have a substantially higher rate of marital dissolutions than those marrying after reaching twenty,<sup>40</sup> yet thirty-one percent of all brides and fourteen percent of all grooms in 1974 married before their twentieth birthday.<sup>41</sup> Consequently, raising the minimum age for a marriage license to at least twenty years might markedly reduce the divorce rate.<sup>42</sup>

An increase in the minimum age for entering marriage has seemed to a number of observers a likely means for reducing fertility.<sup>43</sup> In the words of one:

Since the female reproduction span is short and generally more fecund in its first than in its second half, postponement of marriage to ages beyond 20 tends biologically to reduce births. Sociologically, it gives women time to get a better education, acquire interests unrelated to the family, and develop a cautious attitude toward pregnancy. Individuals who have not married by the time they are in their late twenties often do not marry at all.<sup>44</sup>

The evidence from survey research supports the argument that an increase in the minimum marriage age will reduce fertility. The latest *Current Population Survey* on fertility by the Bureau of the Census found that expected lifetime births fell substantially as age at first marriage

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39. 25 VITAL STATISTICS, *supra* note 1, No. 1, Supp., at 1; see *id.*, No. 6, at 2.

40. Bumpass & Sweet, *Differentials in Marital Instability: 1970*, 37 AM. SOCIOLOGICAL REV. 754, 755, 759 (1972); Glick & Norton, *Frequency, Duration, and Probability of Marriage and Divorce*, 33 J. MARRIAGE & FAMILY 307 (1971); Rosenwaike, *Differentials in Divorce in Maryland*, 6 DEMOGRAPHY 151 (1969).

41. Calculated from 25 VITAL STATISTICS, *supra* note 1, No. 2, Supp., at 3.

42. To the extent that such a measure delayed childbearing until women reached their twenties, there would also be a reduction, though limited, in the incidence of maternal and infant mortality. Nortman, *Parental Age as a Factor in Pregnancy Outcome and Child Development*, in REPORTS ON POPULATION/FAMILY PLANNING 7, 8, 15, 30, 33, 37 (Population Council No. 16, 1974).

It is possible that a higher minimum marriage age will promote cohabitation among young adults and thus have an effect inconsistent with current public policy. See *Bell v. Lone Oak Indep. School Dist.*, 507 S.W.2d 636, 638 (Tex. Civ. App. 1974), *vacated as moot*, 515 S.W.2d 252 (Tex. 1974). However, between 1960 and 1970, the minimum age evidently remained constant but the numerical increase in cohabitation among those 18-24 years of age was 50-fold for men and 16-fold for women. P. Glick, *Living Arrangements of Children and Young Adults 8-9* (Apr. 17-19, 1975) (paper presented at 1975 annual meeting of Population Association of America). If the 1960-1970 trend persists, it is doubtful that a higher minimum marriage age by itself would appreciably foster cohabitation.

43. Berelson, *Beyond Family Planning*, in STUDIES IN FAMILY PLANNING 2, 10 (Population Council No. 38, 1969).

44. Davis, *supra* note 11, at 737 (footnote omitted).

increased. For example, the mean number of children expected to be born to wives 25 to 29 years of age in 1975 was 2.7 among those married before they were 18 years old, 2.4 among those married when they were 18 or 19 years old, 2.1 among those married when they were 20 to 24 years old, and 1.9 among those married when they were 25 to 29 years old.<sup>45</sup> A more sophisticated analysis of data from three nationwide surveys found that expected family size declined with an increasing age at first marriage except among individuals having attended college.<sup>46</sup>

However, raising the minimum marriage age to at least twenty years will lower the birth rate only if the births that would have occurred prior to the twentieth birthday never take place. If they occur outside marriage or are simply delayed until marriage, the higher minimum age may reduce divorce but will not significantly affect the volume of births.<sup>47</sup> By itself, raising the minimum age for a marriage license may not have the desired effect on birth rates, and the increase in marital age may well have to be supplemented by sanctions directly affecting fertility, for example, a tax surcharge. Certainly, raising the age for a marriage license will have to be accompanied by sanctions on illegitimacy. In 1974, 13.2% of all births in the United States were illegitimate, a percentage that has risen steadily for the past quarter century. On the other hand, illegitimate births are the responsibility of a relatively small fraction of unmarried women—in 1974, just 2.4%.<sup>48</sup> Since the proportion of all births which are illegitimate is substantial and increasing but the proportion of unmarried women having illegitimate births is small, it is clear that sanctions against illegitimacy are a desirable if not necessary correlate of an increased age at

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45. CURRENT POP. REP., *supra* note 5, at 7.

46. Bumpass, *Age at Marriage as a Variable in Socio-Economic Differentials in Fertility*, 6 DEMOGRAPHY 45, 51 (1969). Since a college education appears to neutralize the effect on family size of age at marriage, it is important to note that 40% of all persons 25 to 29 years of age and 34% of all persons 30 to 34 years of age had completed at least one year of college in 1974. STATISTICAL ABSTRACT, *supra* note 17, at 119. As a fertility control measure, raising the age of marriage would thus be ineffective for a large segment of the childbearing population.

47. A lower divorce rate among Caucasians would have no appreciable effect in and of itself on the completed family size of whites, but a lower divorce rate among nonwhites would substantially increase nonwhite family size. A. Thornton, *The Effect of Marital Disruption on Childspacing and Family Sizes: Black-White Differentials* 5 (Apr. 17-19, 1975) (paper presented at 1975 annual meeting of Population Association of America). Since nonwhites are only a small portion of the total population, however, the overall impact on fertility of a lowered divorce rate would not appear to be significant.

48. STATISTICAL ABSTRACT, *supra* note 17, at 57; 24 VITAL STATISTICS, *supra* note 1, No. 11, Supp. 2, at 11.

marriage and that such sanctions need be imposed on only a small segment of the childbearing population.<sup>49</sup>

If raising the minimum age for a marriage license to twenty years or higher averts all or most of the births that would have otherwise occurred among younger women, a substantial reduction in births can be effected. In 1974, women nineteen years of age and younger were responsible for one in every five births.<sup>50</sup> However, such an increase in the minimum marriage age might well face a constitutional challenge.

The Supreme Court has long held that a state possesses the power to regulate the conditions under which marriage may occur within its borders. As early as 1888, the Court said:

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. *That body prescribes the age at which parties may contract to marry*, the procedure or form essential to constitute marriage, the duties and obligations it creates, . . . and the acts which may constitute grounds for its dissolution.<sup>51</sup>

The power to regulate marriage is an aspect of the state's police power, but it is not absolute. Marriage is a fundamental constitutional right which may be denied or penalized under the due process and equal protection clauses of the Constitution only when necessary to advance a compelling governmental interest. A law prohibiting interracial marriage is thus unconstitutional,<sup>52</sup> as are regulations prohibiting married high school students from participating in extracurricular, school-sponsored activities or regulations prohibiting marriage among cadets at the United States Merchant Marine Academy.<sup>53</sup> There is no

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49. It is too early to ascertain the long-term impact on illegitimacy of the 1973 abortion decision of the United States Supreme Court, *Roe v. Wade*, 410 U.S. 113 (1973). It has been estimated that, in 1975, only 56% of all women in need of an abortion were able to secure one. Weinstock, Tietze, Jaffe, & Dryfoos, *Abortion Need and Services in the United States, 1974-1975*, 8 FAMILY PLANNING PERSPECTIVES 59 (1976). Universally available abortion services appear capable of arresting the upward trend in the proportion of all births that are illegitimate. Sklar & Berkov, *Abortion, Illegitimacy, and the American Birth Rate*, 185 SCIENCE 910 (1974).

50. Calculated from 24 VITAL STATISTICS, *supra* note 1, No. 11, Supp. 2, at 10.

51. *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (emphasis added).

52. *Loving v. Virginia*, 388 U.S. 1 (1967).

53. *O'Neill v. Dent*, 364 F. Supp. 565 (E.D.N.Y. 1973); *Hollon v. Mathis Indep. School Dist.*, 358 F. Supp. 1269 (S.D. Tex. 1973), *vacated as moot*, 491 F.2d 92 (5th Cir. 1974); *Moran v. School Dist. #7*, 350 F. Supp. 1180 (D. Mont. 1972); *Holt v. Shelton*, 341 F. Supp. 821 (M.D. Tenn. 1972); *Bell v. Lone Oak Indep. School Dist.*, 507 S.W.2d 636 (Tex. Civ. App.), *vacated as moot*, 515 S.W.2d 252 (Tex. 1974).

compelling governmental interest sufficient to justify the denial of or penalty upon marriage in such situations.

The economic and ecological conditions that will exist when fertility control measures such as an increased minimum marriage age are adopted should easily be held to constitute a compelling governmental interest. However, since marriage age is not related to fertility among the college-educated and since this is a substantial segment of the child-bearing population,<sup>54</sup> an increased age is of questionable necessity in promoting that interest. That is, the relationship which exists between low marriage age and high fertility may not sufficiently reduce fertility to justify an increased marriage age as necessary to promote the compelling governmental interest in alleviating economic and ecological problems. Thus, if a higher minimum age is to be constitutional under the due process and equal protection clauses, the test may have to be one of reasonableness. A distinction exists between laws that merely delay the exercise of a fundamental constitutional right and those that entirely prohibit or permanently penalize it. In the cases cited in the preceding paragraph, the compelling governmental interest test was applied in situations where marriage was prohibited among certain individuals or where public facilities made available to the unmarried were permanently prohibited to the married, penalizing the latter for entering into legally valid marriages. However, the minimum marriage age appears to be of a different nature inasmuch as its effect is merely to delay rather than to prohibit or permanently penalize marriage. Accordingly, while the minimum marriage age may have to be the same for males and females,<sup>55</sup> a challenge to a minimum age that is the same for both sexes may be conceptualized as involving only an age classification. Such a classification does not bring forth the compelling governmental interest test; its constitutionality is evaluated only in terms of whether it is rationally related to a legitimate governmental interest.<sup>56</sup> An increased minimum marriage age would probably be constitutional under the latter test. States already prescribe a minimum age for, and hence delay, marriages "[i]n keeping with the increasing complexity of our

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54. See note 46 *supra*.

55. *Phelps v. Bing*, 58 Ill. 2d 32, 316 N.E.2d 775 (1974); *Berger v. Adornato*, 76 Misc. 2d 122, 350 N.Y.S.2d 520 (Onondaga County Sup. Ct. 1973); *cf. Stanton v. Stanton*, 421 U.S. 7 (1975) (different age of majority for males and females for purpose of child support statute violates equal protection). *Contra, Friedrich v. Katz*, 73 Misc. 2d 663, 341 N.Y.S.2d 932 (N.Y. County Sup. Ct. Spec. T. 1973), *rev'd as moot*, 34 N.Y.2d 987, 318 N.E.2d 606, 360 N.Y.S.2d 415 (1974).

56. *Massachusetts Bd. of Retirement v. Murgia*, 96 S. Ct. 2562 (1976).

modern civilization and the absolute necessity of a certain amount of maturity and knowledge on the part of each member thereof . . . ."<sup>57</sup> The economic and ecological problems leading to an increase in the minimum age should readily constitute a legitimate governmental interest, and the relationship between marriage age and fertility, though limited, should be sufficient to justify a higher age as a reasonable means of furthering that interest, especially if a lowered divorce rate is included in the interest.

Whether an increased minimum marriage age will be seen as simply an age classification or as an infringement upon the fundamental right of marriage is thus vital in determining the standard of review and the constitutionality of the legislation. A recent challenge to a statute setting six years as the minimum age for admission to public schools helps clarify the issues in how an increased marriage age will be viewed.<sup>58</sup> Plaintiff, whose child was five years old, claimed that the statute's classification worked a denial of equal protection. A three judge federal district court, ruling against plaintiff, held that the reasonable basis test was the appropriate standard for three reasons: public education is not a fundamental constitutional right, age is not a suspect classification, and the statute is within the realm of economic and social welfare legislation. In a challenge to a minimum marriage age, however, a fundamental constitutional right—namely, marriage—is potentially involved, but of the three cases found on the constitutionality of different minimum marriage ages for males and females, only one held that the fundamental right was affected.<sup>59</sup> Thus, statutes setting a higher minimum age for marriage may well be treated as creating age classifications and as constituting legislation of a social welfare-economic nature and thus be constitutionally evaluated only in terms of their reasonableness.

Subject to limitations imposed by the United States Constitution, each state is responsible for regulating the conditions under which marriages may take place within its borders.<sup>60</sup> If there is to be a nationwide reduction in fertility from an increase in the minimum marriage age, all of the states would have to adopt a higher minimum. The fed-

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57. *State v. Gans*, 168 Ohio St. 174, 179, 151 N.E.2d 709, 712 (1958), *cert. denied*, 359 U.S. 945 (1959).

58. *Hammond v. Marx*, 406 F. Supp. 853 (D. Me. 1975).

59. *Phelps v. Bing*, 58 Ill. 2d 32, 316 N.E.2d 775 (1974). The other cases are cited in note 55 *supra*.

60. See *Loving v. Virginia*, 388 U.S. 1 (1967); *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877).



eral government evidently cannot impose a minimum, since the regulation of marriage is a traditional state function.<sup>61</sup> However, the federal government appears to be constitutionally capable of adopting inducements to later marriage, for example, determining Social Security benefits according to the insured's age at marriage. In a recent case, the Supreme Court faced an equal protection challenge to a provision of the Social Security Act under which widows of wage earners covered by the Act were denied benefits unless their marriages had existed for at least nine months prior to the wage earner's death.<sup>62</sup> The Court did not find that the right of marriage was affected but, rather, that the statute fell in the area of social welfare. The Court thus used the rational basis test and upheld the statute, saying, "a noncontractual claim to receive funds from the public treasury enjoys no constitutional protected status, . . . though of course Congress may not invidiously discriminate among such claimants on the basis of . . . criteria which bear no rational relation to a legitimate legislative goal."<sup>63</sup>

Turning to a final problem, an increase in the age at marriage will reduce fertility if illegitimacy does not rise substantially. A higher marriage age, however, will tend to foster illegitimacy, and thus sanctions against such births seem to be a logical corollary of a higher marriage age. Even if the proportion of all births that are illegitimate was likely to remain unchanged, the proportion is appreciable, as indicated earlier, permitting sanctions against illegitimacy to have a significant effect on fertility.

Such sanctions must be carefully constructed, however, in order to be constitutionally valid. The Supreme Court has laid down the principle that, even though differences between legitimate and illegitimate children are to be tested for equal protection under the reasonable basis standard,<sup>64</sup> "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."<sup>65</sup> Consequently, sanctions against illegitimacy will have to be directed toward the parents; penalizing the illegitimate child for the sins of his parents will not survive constitutional evaluation.<sup>66</sup>

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61. See text accompanying notes 51-53 *supra*. See also *National League of Cities v. Usery*, 96 S. Ct. 2465 (1976).

62. *Weinberger v. Salfi*, 422 U.S. 749 (1975).

63. *Id.* at 772.

64. *Mathews v. Lucas*, 96 S. Ct. 2755 (1976).

65. *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (*per curiam*).

66. See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972).

Sanctions against the parents of illegitimate children must, however, be designed with a great deal of care. School districts have been held constitutionally unable to exclude from school female students who have had an illegitimate child<sup>67</sup> or to refuse to hire or to discharge any teacher found to have had an illegitimate child<sup>68</sup> unless such students or teachers can be shown to have a harmful effect on the educational process. Moreover, the Supreme Court has stated that "if the right of privacy means anything, it is the right of the *individual, married or single*, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>69</sup> Thus, courts will look closely at any scheme to deter adults from having illegitimate children, requiring that the scheme be necessary to advance a compelling governmental interest.

In conclusion, a higher minimum marriage age will lower fertility only if the births that would have occurred with a lower age are permanently averted. Thus, an increase in the minimum age may have to be accompanied by more direct sanctions on fertility, including illegitimacy. The constitutional authority to raise the minimum age rests with the states, not the federal government, though the latter can undoubtedly offer inducements to later marriage. A challenge to a higher age under the due process and equal protection clauses may or may not succeed, and a major factor in the outcome will be whether the new age is seen as affecting the right of marriage or as simply an age classification and thus whether the standard for evaluating its constitutionality will be the compelling governmental interest test or the less strict reasonableness test. Federal government inducements will probably be tested only as to their reasonableness. However, sanctions against illegitimacy, whether imposed by a state or by the federal government, will be seriously questioned. If directed toward the children, the sanctions seem unlikely to be held valid even though only the reasonable basis test is to be employed; if directed toward the parents, the sanctions must be shown necessary to promote a compelling governmental interest.

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67. *Perry v. Grenada Mun. Separate School Dist.*, 300 F. Supp. 748 (N.D. Miss. 1969).

68. *Andrews v. Drew Mun. Separate School Dist.*, 371 F. Supp. 27 (N.D. Miss. 1973), *aff'd*, 507 F.2d 611 (5th Cir. 1975), *cert. dismissed*, 96 S. Ct. 1752 (1976).

69. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (some emphasis added, some in original).

## LIMITING SPACE IN HOUSING

Evidence from scientific research indicates that limited space reduces fertility among lower animal species as well as humans. Perhaps the clearest evidence for humans comes from a study of a community in South America containing two types of dwellings; namely, individual houses and multiple-unit apartment buildings.<sup>70</sup> The former (but not the latter) were capable of expansion at the initiative of the occupants through the addition of rooms; a tight housing market drastically limited the ability of residents of the apartments to move to more spacious quarters outside the community. Thus, a situation existed where those moving into apartments faced living space that could not be expanded while those moving into individual houses were not so constricted. The consequences for fertility were apparent and substantial. After moving into the community, the birth rate among the residents of houses did not change while the birth rate among the residents of apartments fell. "Not a single apartment dweller had more than one child after moving, and 21 out of 30 had no children at all while living in . . . [the community], despite the fact that apartment dwellers tended to be younger than house dwellers."<sup>71</sup> Statistical controls were introduced for characteristics, for example, age, education, and fertility prior to moving into the community, on which the residents of houses and apartments differed and which might account for the discrepancy in birth rate. The conclusion remained unchanged that living in an apartment inhibited fertility.

When economic and ecological conditions force the American public to regulate fertility, limitations on living space thus may be considered as one means to stabilize or reduce population size. Such limitations are likely to appear attractive because of the benefits they will have for retaining land in agricultural production. Between 1960 and 1970, approximately 2,000 acres shifted from rural to urban use daily,<sup>72</sup> a loss that the United States can no longer afford. North America is

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70. Felson & Solaun, *The Fertility-inhibiting Effect of Crowded Apartment Living in a Tight Housing Market*, 80 AM. J. SOCIOLOGY 1410 (1975). There is evidence that space limitations have no effect on fertility. D. Johnson & A. Booth, *Crowding and Reproduction* 11 (1975) (unpublished paper at University of Nebraska, Lincoln). In isolating causal relationships, however, the Felson-Solaun study is superior, because the same type of living conditions continued for and were studied over a substantial period of time. See H. ZETTERBERG, *ON THEORY AND VERIFICATION IN SOCIOLOGY* 134-35 (3d ed. 1965).

71. Felson & Solaun, *supra* note 70, at 1422.

72. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 13, at 5.

now the only major exporter of grain in the world, and the United States accounts for the vast majority of North American grain exports.<sup>73</sup> Preliminary estimates for the fiscal year ending in mid-1976 indicate the following levels of net exports (indicated by a +) and net imports (indicated by a -) in millions of metric tons:<sup>74</sup>

North America	+94	Latin America	- 3
Australia and		Africa	-10
New Zealand	+ 8	Western Europe	-17
		Eastern Europe and	
		USSR	-27
		Asia	-47

The demand for North American grain is likely to continue, yet the United States no longer has any idle cropland.<sup>75</sup> Thus, the continued reduction in rural land is impeding this nation's ability to deal with its balance of payments and to influence the policies of other nations, including their willingness to supply raw materials essential to the economy of the United States.

There already exists statutory precedent for limitations by the federal government on dwelling unit living space. Federal savings and loan associations are restricted in the amount of money they may loan on single family houses.<sup>76</sup> In regulating the amount of loans, the size of dwellings is limited. Unfortunately, there does not appear to have been a challenge to the constitutionality of such legislation, and it is therefore difficult to evaluate the validity of an extension of the legislation to a proscription of loans for housing with more than a specified amount of space.

The Solar Heating and Cooling Demonstration Act of 1974<sup>77</sup> is perhaps even more significant, because its goal of promoting solar

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73. L. BROWN, *BY BREAD ALONE* 61 (1974). There appears to be a growing consensus among scientists that the world is experiencing a cooling trend. If it continues, a deleterious effect on grain production can be expected in virtually all parts of the world. However, the United States is likely to escape adverse effects, with the result that world dependence on this country will be considerably greater than today. CENTRAL INTELLIGENCE AGENCY, *POTENTIAL IMPLICATIONS OF TRENDS IN WORLD POPULATION, FOOD PRODUCTION, AND CLIMATE* 27-31 (1974). See generally L. PONTE, *THE COOLING* (1976).

74. L. BROWN, *THE POLITICS AND RESPONSIBILITY OF THE NORTH AMERICAN BREADBASKET* 11 (Worldwatch Inst. Paper No. 2, 1975).

75. *Id.* at 7, 8.

76. 12 U.S.C. § 1464(c) (1970).

77. 42 U.S.C. §§ 5501-5517 (Supp. V 1975). Shortly thereafter Congress also passed the Solar Energy Research, Development, and Demonstration Act of 1974, 42 U.S.C. §§ 5551-5566 (Supp. V 1975).

energy<sup>78</sup> is the result of a recognized shortage of energy-producing resources<sup>79</sup> and resource shortages will probably be a major factor compelling the adoption of fertility control measures. The Act provides that, in structures furnished with solar energy under the demonstration program established, the Secretary of the Department of Housing and Urban Development is to consider designated factors "[i]n determining the . . . floor area limitation of any federally constructed housing . . . where the law establishing the program under which . . . the housing is constructed specifies such . . . floor area limitation . . . ."<sup>80</sup> A first step has been taken, then, to restrict living space in dwelling units constructed under the auspices of the federal government. Are such restrictions constitutional? The answer appears to be affirmative.

The federal government has long been involved in the housing field, and the sole challenge to the constitutionality of a federal housing program that has reached the Supreme Court was rejected.<sup>81</sup> Moreover, there is no constitutional requirement that federal or state governments provide their citizens with housing of a particular quality.<sup>82</sup> Accordingly, the federal government has considerable latitude in the housing fields; it may or may not enter the field, and when it does, it may provide housing of the quality it chooses. Presumably the amount of living space is an aspect of quality that the federal government can constitutionally control in the housing for which it provides financial assistance or that is financed through federally chartered savings and loan associations.

Another line of reasoning supports the proposition that the federal government may directly limit the amount of space in housing, even that for which it and federal savings and loan associations do not supply financing. The Supreme Court has upheld local government regulation of the maximum heights of buildings and the minimum sizes of lots on the basis of the police power possessed by states and their political subdivisions.<sup>83</sup> The police power has been used by a state court to validate an ordinance prescribing a minimum amount of floor space.<sup>84</sup> By

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78. 42 U.S.C. § 5510(a).

79. *Id.* § 5501(a)(1).

80. *Id.* § 5511(a)(1).

81. *City of Cleveland v. United States*, 323 U.S. 329 (1945). The state also has substantial authority in developing housing programs. See *Berman v. Parker*, 348 U.S. 26 (1954).

82. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

83. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *Welch v. Swasey*, 214 U.S. 91 (1909).

84. *Lionshead Lake, Inc. v. Wayne Township*, 10 N.J. 165, 89 A.2d 693 (1952).

analogy, these cases provide at least an argument that regulation of the maximum amount of space is within the police power. The question remains, however, whether the federal government possesses a police power. The answer appears to be that it does—or at least that it has the equivalent—for dealing with whatever affects or moves in interstate commerce. The Supreme Court has held that, under the commerce clause, Congress can prohibit the shipment in interstate commerce of items produced by workers whose wages and hours of employment fail to conform to congressionally imposed standards, suggesting that Congress can ban building materials from interstate commerce if they are to be used in dwelling units of a size larger than specified.

Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals, or welfare, even though the state has not sought to regulate their use. . . .

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the state of destination; and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.<sup>85</sup>

However, Congress need not ban an item from interstate commerce in order to control its use under a police-type power, for the power deriving from the commerce clause permits a direct regulation of use. Thus, the First Circuit upheld a federal plan to reduce the number of parking spaces in a city below that required by local zoning ordinances for the purpose of minimizing air pollution. Since air pollution and motor vehicles cross state lines, the commerce clause was held to give the federal government authority to control such pollution, and as a result it "was free to promulgate rules that resemble local zoning ordinances; this does not constitute 'usurpation of the police power' . . . . The Federal Government may use the same tools as may the state when in pursuit of an objective lawfully within the power of either."<sup>86</sup> The commerce clause, in short, appears to authorize federal regulation of space in dwelling units through control over the movement of building materials in interstate commerce.

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85. *United States v. Darby*, 312 U.S. 100, 114 (1941).

86. *South Terminal Corp. v. EPA*, 504 F.2d 646, 677-78 (1st Cir. 1974).

In conclusion, it should be noted that a property owner unable to build a dwelling larger than the prescribed maximum will almost certainly not be entitled to damages under the fifth amendment prohibition against the taking of private property for public use without just compensation. The amendment does not cover property deprived only of its most beneficial use<sup>87</sup> or property that suffers only an indirect encroachment from regulations necessary to protect the public health and welfare.<sup>88</sup>

#### FAMILY SIZE RESTRICTIONS FOR GOVERNMENT EMPLOYMENT

Government employees account for a substantial portion of the labor force in the United States. In 1974, they constituted eighteen percent of all non-agricultural employees,<sup>89</sup> with approximately one-fifth working for the federal government and four-fifths working for state and local governments.<sup>90</sup> Given the magnitude of government employment and the direct control that legislatures exert over such employment, a fertility control measure likely to be considered is a limitation on family size (to one or two children) for those employed by government.<sup>91</sup> Since it is the regulation of future fertility that is the goal, current and prospective employees who had or exceeded the maximum family size prior to the implementation of the policy would presumably not be discharged or refused employment unless they had children after implementation; all other current or prospective employees would have their employment made contingent upon having no more than the specified maximum number of children.

Would such a fertility control policy be constitutional? Discharging current employees or refusing to hire applicants who had exceeded the maximum permissible family size prior to the adoption of the policy is probably unconstitutional as a violation of the proscription against ex post facto laws;<sup>92</sup> in any event, such action would not permit control over the future fertility of these persons, a goal of the policy. Assuming that discharge or refusal to hire was limited only to those persons whose childbearing continued and was excessive after adoption of the

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87. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

88. *Gibson v. United States*, 166 U.S. 269 (1897); *Chicago v. Taylor*, 125 U.S. 161 (1888); *Transportation Co. v. Chicago*, 99 U.S. 635 (1878).

89. STATISTICAL ABSTRACT, *supra* note 17, at 353.

90. *Id.* at 357.

91. India is now requiring government employees to limit the size of their families to three children. *N.Y. Times*, Sept. 7, 1976, at 3, col. 4 (city ed.).

92. *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866).

policy, would there be a constitutional violation? The answer appears to be affirmative, though there is some basis for believing otherwise.

The argument that it is constitutional to place restrictions on family size as a condition of government employment can begin with the recent challenge to a statute prohibiting federal employees from taking an active role in political affairs, for example, campaigns.<sup>93</sup> The statute was attacked on the ground that it violated the rights of association and political involvement guaranteed by the first amendment. However, the Supreme Court responded that these rights were not absolute<sup>94</sup> and, since "the government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general,'"<sup>95</sup> the question of the constitutionality of the statute involved balancing the interests of the employee against those of the public. Given the interest of the public in a government work force free from political interference, the Court upheld the statute.

Individuals do not have a right to public employment on their own terms, and government may impose reasonable conditions on those it hires.<sup>96</sup> It is reasonable for a city to require its employees to be city residents, and the question is simply one of the rationality of the condition as long as a fundamental constitutional right is not involved.<sup>97</sup> Will a family size restriction on government employment infringe on the fundamental right of procreation, requiring that the restriction be necessary to satisfy a compelling government interest?<sup>98</sup> The Supreme Court has held that, in determining the amount of welfare benefits, a classification by family size which discriminated against large families "neither impinged upon a fundamental constitutional right nor employed an inherently suspect criterion."<sup>99</sup>

Public employment, like welfare, appears to be a form of governmental benefit,<sup>100</sup> and thus a classification on the basis of family size

93. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973).

94. *Id.* at 567.

95. *Id.* at 564 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)).

96. *Adler v. Board of Educ.*, 342 U.S. 485 (1952).

97. *McCarthy v. Philadelphia Civil Serv. Comm'n*, 96 S. Ct. 1154 (1976) (per curiam).

98. *See Roe v. Wade*, 410 U.S. 113 (1973). *See also Dunn v. Blumstein*, 405 U.S. 330 (1972).

99. *Graham v. Richardson*, 403 U.S. 365, 376 (1971); *see Ward v. Winstead*, 314 F. Supp. 1225 (N.D. Miss. 1970), *appeal dismissed*, 400 U.S. 1019 (1971).

100. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972), in which employment by a state was at issue and the Court spoke generally in terms of "a governmental benefit."



for determining employment may simply be required to possess a reasonable relationship to a legitimate governmental interest, a test that may be satisfied inasmuch as some direct and indirect impact on fertility will exist. However, if the right of procreation is held to be infringed, the classification scheme will be subject to the more stringent test of constitutionality under the equal protection guarantee. Since government employees account for only one out of five workers and since many current and prospective employees will be past their child-bearing years, it is difficult to accept the argument that the classification is *necessary* to attain the goal of reducing the fertility of the nation as a whole. The infringement on constitutional rights by restrictions on political activity by government employees, while valid, is unlikely to be useful precedent to uphold a family size classification for hiring. The limitation on political involvement is justifiable by an interest in regulating the conduct of government employees as government employees in order to increase the efficiency and effectiveness of public workers. Family size as a criterion for employment, however, is directed toward influencing the birth rate of the nation as a whole, but inhibiting the fertility of government employees will not in and of itself make a major contribution toward this goal.

Will a family size criterion for employment be held to infringe the right of procreation? The answer is uncertain, but three cases in which sexuality was involved in employment decisions suggest that it will. In the first, plaintiff was an employee of the federal government who was discharged for living with a woman to whom he was not married.<sup>101</sup> The court held his dismissal a violation of his constitutional right of privacy—the right protecting procreation<sup>102</sup>—and required the government to show a compelling reason for the dismissal. In the second case, plaintiff was denied government employment solely because he was a nudist and a member of a nudist club.<sup>103</sup> The court held the ground of denial insufficient because it penalized plaintiff's constitutional right to associate without satisfying a compelling state interest. In the third case, plaintiff was transferred from a teaching to a nonteaching position and his contract was later not renewed after it was discovered that he was a homosexual.<sup>104</sup> The transfer and contract non-renewal were upheld

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101. *Mindel v. United States Civil Serv. Comm'n*, 312 F. Supp. 485 (N.D. Cal. 1970).

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

103. *Bruns v. Pomerleau*, 319 F. Supp. 58 (D. Md. 1970).

104. *Acanfora v. Board of Educ.*, 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

because of other actions of plaintiff, not his homosexuality per se. Indeed, the district court found that a homosexual/heterosexual classification is suspect under the equal protection clause.

When sexuality is involved in employment decisions, then, courts appear to require the more stringent test of constitutionality under the equal protection clause. This suggests that a family size classification in hiring will be viewed as infringing on the constitutional right of procreation.

Furthermore, another line of cases also provides reason for believing that a family size classification is unconstitutional. These cases require that there be a relationship between the criteria used for hiring and discharging public employees and the duties of the employees.<sup>105</sup> The requirement, which appears to be based on the due process clause, is that the criteria established for government employment must have a reasonable bearing on the duties of the position for which the individual is hired. It is difficult to perceive a relationship between family size and job performance, and without such a link, the family size classifications will fail.

### CONCLUSION

Four fertility control policies have been examined here on the assumption that they will be seriously considered if the American public commits itself to stabilizing or reducing the size of its population. As indicated earlier, the population of the United States is continuing to increase and, absent a marked upswing in the death rate, population growth will persist for fifty years even with the smallest completed family size that can reasonably be expected. At the same time, the United States is heavily dependent on foreign sources for supplies of raw materials essential to its economy. The dependence is likely to increase at the same time that competition for supplies can be expected to intensify as the result of rapid population growth in the world as a

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105. *Scott v. Macy*, 349 F.2d 182 (D.C. Cir. 1965) (homosexuality); *Andrews v. Drew Mun. Separate School Dist.*, 371 F. Supp. 27 (N.D. Miss. 1973), *aff'd*, 507 F.2d 611 (5th Cir. 1975), *cert. dismissed*, 96 S. Ct. 1752 (1976) (illegitimacy); *Doherty v. Wilson*, 356 F. Supp. 35 (M.D. Ga. 1973) (communal living); *Burton v. Cascade School Dist. Union High School No. 5*, 353 F. Supp. 254 (D. Ore. 1973), *aff'd*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975) (homosexuality); *Bruns v. Pomerleau*, 319 F. Supp. 58 (D. Md. 1970) (nudism); *McConnell v. Anderson*, 316 F. Supp. 809 (D. Minn. 1970), *rev'd on other grounds*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972) (homosexuality); *Mindel v. United States Civil Serv. Comm'n*, 312 F. Supp. 485 (N.D. Cal. 1970) (cohabitation). *Contra*, *Anonymous v. Macy*, 398 F.2d 317 (5th Cir. 1968), *cert. denied*, 393 U.S. 1041 (1969).

whole.<sup>106</sup> A collision between population size and resources seems inevitable for the United States, and it is the occurrence or clear imminence of that collision that is likely to lead to a fertility control policy.

Americans appear unable or unwilling to anticipate and attempt to avoid the collision. Evidence from social science indicates that population growth is generally not a problem that, when recognized, motivates individuals to change their own behavior. "[T]he weight of evidence favors the prediction that . . . [individuals] will express significantly greater support for statements that indicate that population is a problem than for statements calling for immediate action."<sup>107</sup> An impressive manifestation of the principle that population is an abstractly perceived problem appeared in a study of the membership of Zero Population Growth.<sup>108</sup> Among male members in their prime reproductive years who had no more than one child, those who recognized that couples must restrict themselves to one child in order to halt population growth immediately were as likely to intend to have two children as those who erroneously believed that two children would stop population growth. The lack of a relationship between knowledge and personal commitment persisted even among those feeling that the current size of the United States population was far above the optimum. Among female members in their prime reproductive years who had no more than one child, there was an association between the number of chil-

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106. World population increased by an estimated 62 million in 1965, 69 million in 1970, and 64 million in 1975. Thus, the annual numerical increment in 1975 was slightly larger than in 1965 but smaller than in 1970. Figures for 1970 and 1975 are found in L. BROWN, *WORLD POPULATION TRENDS: SIGNS OF HOPE, SIGNS OF STRESS* 7-8 (Worldwatch Inst. Paper No. 8, 1976). Figure for 1965 is found in POPULATION REFERENCE BUREAU, INC., *WORLD POPULATION GROWTH AND RESPONSE 1965-1975*, at 265 (1976).

107. McCutcheon & Vick, *Racial Differences in Attitudes toward Population Control and Overpopulation as an Abstract Problem*, 27 VA. J. SCI. 10, 11 (1976). See generally Kruegel, *Further Comment on J. Blake's "Can We Believe Recent Data on Birth Expectations in the United States?"*, 12 DEMOGRAPHY 157 (1975).

108. Barnett, *Zero Population Growth, Inc.: A Second Study*, 6 J. BIOSOCIAL SCI. 1 (1974) (undertaken in 1971).

It is noteworthy that the incentive for membership in Zero Population Growth is not primarily self-interest but an interest in promoting the public welfare and that "the most outstanding feature of ZPG members' incentives is the way self-interests are inextricably blended and made compatible with interests that go beyond self." H. Tillock, *Group Size and Contributions to Collective Action: A Test of Mancur Olson, Jr.'s Theory on Zero Population Growth, Inc.* 101 (1976) (unpublished Ph.D. dissertation, Michigan State University).

109. In this group, variation in the number of children thought necessary to halt population growth immediately explained 25% of the variation in the number of children personally intended. Barnett, *supra* note 108, at 15.

dren thought necessary to halt population growth immediately and the number personally intended; those who recognized the necessity of the one-child family were more likely than those who did not to intend to have no more than one child. The association was stronger among those who felt the United States had already exceeded its optimum population by a substantial margin, but even among these members, the association was of only moderate strength.<sup>109</sup>

Thus, the members of the most vocal organization working for population stabilization in the United States are not characterized by a strong link between knowledge of the action that is necessary to halt population growth and personal commitment to that action. In view of this, one cannot expect that the public generally will exhibit a strong link until severe external constraints such as resource shortages compel the realization that there is a dire threat to the American standard of living from a population problem at home.

