The Constitution and Governmental Response to Declining Population in the United States: A Macro-Sociological Perspective

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LARRY D. BARNETT*

The reluctance of legal scholars and educators to recognize the potential utility of the social sciences has been widely criticized in recent years. The reluctance has been particularly manifest with regard to sociology largely because of limitations in the research techniques and data of the discipline. However, since 1970, sociology has made impressive advances, and as a result, its acceptance by the legal profession seems to have increased. Both sociology and law can

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2. Indicative of the greater acceptance of the social sciences generally are the following: the appearance in 1985 of SOCIAL SCIENCE IN LAW (1985) by J. Monahan and L. Walker, a book produced by one of the major publishing houses for the law student market; and the symposium in the same year on Social Science and Legal Education in 35 J. LEGAL EDUC. 465 (1985), a symposium that emanated from the “1984 Workshop on the Role of Social Science in Legal Scholarship and Legal Education” sponsored by the Association of American Law Schools.
be expected to benefit from this change, since interdisciplinary efforts historically appear to promote growth in knowledge.\(^3\)

Legal scholars and educators will find collaboration with empirically-oriented sociologists to be useful both for investigating the behavior of individuals (micro-sociology) and for investigating societal-level phenomena (macro-sociology). Studies of the social factors determining the conduct of juries, judges, and police officers are illustrative of micro-sociological concerns in the field of law; studies of the social causes and effects of the structure of the civil and criminal justice systems are illustrative of macro-sociological problems. Research on these questions and others can yield information of value to practicing lawyers and to policymakers, for powerful statistical techniques and increasingly rich sources of data have become available in sociology. In the pages to follow, the results of some of this research will be employed and a macro-sociological perspective on constitutional law will be developed. The focus will be on a demographic issue that has already attracted some public attention in the United States\(^4\) and that may attract much more in the future.

The specific purpose of this article is to deal with the questions that seem likely to arise under the United States Constitution if Congress-legislates certain types of policies to deal with declining population numbers. In Europe, an excess of deaths over births is an actuality or distinct prospect for several countries, and governmental policies to arrest the situation have been considered if not implemented.\(^5\) Should such a demographic phenomenon be the subject of federal legislation in the United States, there are constitutional constraints on Congress that will need to be considered. A discussion of those constraints is important not only for its own sake, however, but also because it illuminates the close and inextricable link that exists between legal thought and society, a link that is not widely appreciated by social scientists and the legal profession.

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It is necessary to recognize that my analysis of legal issues is unavoidably general and tentative rather than detailed and definitive. Constitutional philosophy reflects social structure and values, and we are considering a point that is some distance in the future. Natural decrease is unlikely to occur in the United States for at least several decades, and the nature of societal attributes cannot be specified with precision for the time when Congress might act. Accordingly, the legal issues to be discussed are painted only with a broad brush. Nonetheless, they help in understanding the premise on which this paper rests—namely, that the acceptability of governmental action under the Constitution is determined by societal characteristics and change in those characteristics. The premise suggests that a macrosociological perspective is essential to an explanation of constitutional law, but it is a premise that has been almost totally neglected.

The premise may be illustrated by a statute that undoubtedly did not offend the Constitution when enacted by Congress but that over the course of time came into conflict with new constitutional philosophy as the result of societal change and the emergence of different social values. Under the statute, a federal program automatically made benefits available to the wife of a deceased husband but paid benefits to the husband of a deceased wife only if he had been receiving at least one half of his support from her. Benefits were created for widows in 1939 and extended to widowers (with the eligibility condition noted) in 1950. In 1977, the United States Supreme Court concluded that the gender-based distinction for the receipt of benefits violated the guarantee of equal protection, a

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Three members of the U.S. Supreme Court recently observed in another case that: Courts . . . do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a ‘natural’ and ‘self-evident’ ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom. (citations omitted). Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3268-69 (1985) (Marshall, Brennan, and Blackmun, JJ., concurring in part and dissenting in part).
guarantee that limits the ability of government to distinguish between types of people.\textsuperscript{10} Significantly, both the plurality and concurring opinions of the Court found that the distinction rested on sex role stereotypes, viz., the belief that husbands are and should be the principal if not exclusive source of family income, with wives dependent upon them. At the time (1939) that benefits were made available to widows and even at the time (1950) that they were extended to widowers, the different role expectations for husbands and wives were accurate reflections of reality.\textsuperscript{11} However, by the 1970s social structure and values had changed,\textsuperscript{12} and the Supreme Court found that the gender disparity in benefit eligibility offended the Constitution. In the words of the concurring opinion, the discrimination involved in the program “is merely the accidental by-product of a traditional way of thinking about females.”\textsuperscript{13}

The constitutionality of the federal statutes to be considered here will also be determined by societal characteristics. However, identification of those characteristics is limited by the state of sociological knowledge on the subject matter of each of the statutes, and that state varies markedly. Nonetheless, the discussion can suggest the importance of social structure and values for legal thought. In so doing, it will hopefully stimulate research.

**THREE POSSIBLE FEDERAL POLICIES**

The pages to follow will deal with three policies that might be developed by Congress in response to a declining population size. The first, which is directed toward raising fertility, would mandate the payment of compensation for some period of employment leave by a woman bearing a child but would not require compensation for leave by the father. Because of the economic cost of paid leave—regardless of whether the federal government or the employer is responsible for the cost—its length is likely to be markedly restricted. Given the physical implications of reproduction for women, Congress might well

\textsuperscript{10} The Constitution contains an implicit equal protection guarantee in the fifth amendment that is applicable to the federal government and an explicit equal protection guarantee in the fourteenth amendment that is applicable to state (and local) government. See Schweiker v. Wilson, 450 U.S. 221, 226 n.6 (1981).

\textsuperscript{11} I BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at table D29-41 (1975).


\textsuperscript{13} Califano v. Goldfarb, 430 U.S. at 223 (Stevens, J., concurring).
conclude that the limited time should be available only to mothers and that the opportunity for paid leave should be restricted to them by implementing legislation. In this regard, it is relevant to note that the three states that presently possess statutes requiring employers to grant (unpaid) leave for reasons related to reproduction have confined the right of leave to female employees.¹⁴

The second measure, which would probably be enacted as a supplement to a pronatalist incentive, would be motivated by a desire to improve the quality of the social environment for children whose birth Congress is hoping to induce and would be directed toward strengthening marriage as the basis for family structure. The measure would provide a financial reward for the birth of a legitimate child but not for the birth of an illegitimate one and could be incorporated into the federal income tax system as a tax credit or deduction.

The third, and final, measure that might be enacted is concerned not with natural increase but with population distribution. It would attempt to deal with population numbers that are insufficient for the cost-efficient operation of such public services as schools and mass transit. Given a substantial number of communities with such a problem, Congress might decide to direct migration away from areas that are densely populated and toward those that have inadequate inhabitants.¹⁵ This could be done through, for instance, a federal fee on transfers of title to homes and/or on moving services and equipment (such as rental trucks), a fee that varied in amount according to whether migration to a population-deficient area was involved.

MATERNITY LEAVE

Turning first to a federal law that would provide mothers but not fathers with the right to be compensated while on leave from their jobs for the birth of children, we find that only one federal district court has explored any of the constitutional issues inherent in such a statute.¹⁶ In the case, employers were required by state law to allow

¹⁵. In the 1970s, low-density (i.e., nonmetropolitan) areas experienced an increase in population numbers through migration. Richter, Nonmetropolitan Growth in the Late 1970s: The End of the Turnaround?, 22 DEMOGRAPHY 245 (1985). Even if this generally continues, individual communities in such areas can lose population. Guest, Patterns of Suburban Population Growth, 1970-75, 16 DEMOGRAPHY 401 (1979).
female employees an unpaid leave of reasonable duration for pregnancy but were not required to provide a leave to males who suffered a temporary disability. The court concluded that there was no violation of the equal protection guarantee of the Constitution because there was no discrimination. The statute was seen as equalizing the economic positions of men and women, positions that differed as the result of biologically-based dissimilarities in reproductive roles.

Men and women are not treated unequally when pregnancy is the one physical condition given preferential treatment. Rather, by removing pregnancy-related disabilities as a legal grounds for discharge from employment, [the statute] places men and women on more equal terms . . . [The statute] merely makes it illegal for an employer . . . to burden female employees in such a way as to deprive them of employment opportunities because of their different role.  

The view that reproduction, and the differences between the two sexes in that process, can be the basis for legislation treating men and women differently has emerged in another context. A state statute that penalized a male for sexual intercourse with a female who was under eighteen years of age and not his wife, but did not punish the female partner, was held by the United States Supreme Court not to violate the equal protection guarantee. The primary basis of the decision appears to be that, by preventing pregnancies among unmarried minor females, the legislation was protecting the group that, because of the unique role of the female in the reproductive process, is most likely to suffer severe consequences from the conduct prohibited. As a result, the classification by gender inherent in the statute did not discriminate invidiously and was constitutional.

17. 515 F. Supp. at 1266.

In a recent case, the United States Supreme Court considered a state statute that required employers to provide a maximum of four months of unpaid leave to female employees who requested it for pregnancy, childbirth, or associated medical conditions but that did not provide temporarily disabled males with a right to leave. However, the constitutionality of the statute was not at issue. Rather, the question was whether the statute was in conflict with and hence pre-empted by Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. §§ 2000(e)-(e)(15)), which makes it illegal for employment-related decisions to be based on sex. No conflict was found, because the state measure was seen by the Court as possessing the same goal as Title VII, namely, promotion of equal employment opportunities for men and women. Accordingly, the statute was held not to be superseded by federal law. California Federal Savings & Loan Ass’n v. Guerra, 107 S. Ct. 683 (1987).


19. It has also been held that, because of biological differences, a high school volleyball team can be composed solely of females and that males can be excluded even though no team is
A statute providing maternity but not paternity leave may be upheld, then, on the ground that it creates no sex discrimination—that it is gender-based but not gender-biased. However, there is an additional approach that can be used to find the statute constitutional—viz., that gender is simply not implicated. The statute may be construed as providing a benefit to a limited group of people—those who bear children—and not providing a benefit to all others. Only women of course can be recipients of the statutory benefit, but they also will appear among non-recipients. Indeed, their prevalence among the latter will be substantial, since American women are increasingly likely to remain childless and as many as three out of ten are now expected to forego motherhood. Thus, the criterion for employment leave may be conceptualized as a physical condition, not gender. The United States Supreme Court in 1974 utilized this approach in deciding that the exclusion of normal pregnancy from a State-mandated disability insurance program was constitutionally acceptable. The Court was at least consistent with, if it did not indeed reflect, the growing separation of childbearing from the female role in its conclusion that

...absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

While a policy of maternity-only leave may be upheld, the probability that it will encounter constitutional difficulties will increase as the duration of the leave provided exceeds the time necessary for a female to recover physically from childbirth. Paid leave that is not necessary in this regard will reflect the assumption that child care and rearing should be the responsibility of the the female. While such an assumption generally exists in our society, constitutional philosophy is hostile to government policy that is

provided for them. Since males generally possess greater physical ability for volleyball, their exclusion has been viewed as helping to equalize athletic opportunities for females. Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982), cert. denied, 464 U.S. 818 (1983).

designed to promote it.\textsuperscript{24} Moreover, even though females appear to possess biologically-based skills that are advantageous for rearing young children, those skills constitute an advantage that is neither dramatic nor irreversible.\textsuperscript{25} Accordingly, there will be a constitutional question regarding maternity leave the duration of which is substantially longer than necessary for recovery from childbirth, and the question will be intensified to the extent that fathers assume full responsibility for the care of their children. In June 1982, 12.8 percent of mothers in the United States who had children under five years of age, who were married and living with their husbands, and who were employed full-time were relying primarily upon the father to take care of the child; five years earlier the proportion had been 11.9 percent.\textsuperscript{26} To the extent that the prevalence of primary child care by the father increases over the next several decades, constitutional philosophy is likely to become antagonistic to leave for mothers only.

By way of conclusion, it must be noted that the legal meaning of the term "sex discrimination" is central to the constitutionality of a statute providing maternity leave but not paternity leave. That meaning is determined by societal values. One manifestation of this is that a court is more likely to find sex discrimination as a penalty imposed on behavior as social acceptance of behavior increases. For example, Americans in the 1970s were considerably more tolerant of sexual activity between unmarried males and females, and of resulting out-of-wedlock pregnancies, than they were of homosexuality.\textsuperscript{27} Sex discrimination, prohibited by a statute,\textsuperscript{28} was accordingly found when an unmarried employee was discharged for a sexual liaison with a member of the opposite gender that resulted in pregnancy,\textsuperscript{29} but it was not found when an employee was discharged for sexual activity with a person of the same gender.\textsuperscript{30} It is the social implications of conduct

\begin{thebibliography}{9}
\bibitem{28} The cases cited here involved Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000(e)-(e)(15) (1982)), not the equal protection guarantee of the Constitution. However, there appears to be no difference between the statute and constitutional provision with regard to the conditions under which intentionally-applied penalties will be considered sex discrimination.
\bibitem{30} Desantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).
\end{thebibliography}
rather than the biological that establish the conditions under which the concept of sex discrimination is applied.31

In the case of a policy requiring compensation for maternity but not paternity leave, disagreement over the issue of sex discrimination is likely to arise from two fundamental ideals in American culture that will come into conflict.32 The first involves the belief that an individual who can choose a course of conduct should not expect others to underwrite its costs. Since contraception and abortion now make childbirth voluntary, women who choose to bear children are seen as receiving special treatment when they, but not men, are entitled to reproduction-related employment leave. From this perspective, leave for mothers only constitutes favoritism and, hence, sex discrimination. On the other hand, there is the cultural ideal that the individual should not be penalized for biological conditions and burdens over which (s)he has no control. In this view, the choice to bear a child imposes a burden that women alone can experience, and employment leave solely for mothers neutralizes a handicap they face in the labor force, creating equality of opportunity rather than sex discrimination.

The manner in which the clash of the two ideals is resolved will help influence gender roles in the future. Whatever the resolution of the conflict in the context of family life, the critical point is that courts reflect the nature of cultural values in ruling on the constitutionality of legislation (and in interpreting statutes). The judiciary defines the constitutional status of marriage, childbirth, and the family entity through the perceptual apparatus of society. Thus, it has been observed that in the United States the male role has generally been used as the prototype by courts, to which:

the fact that many more women than men leave careers for a time to raise children is seen to justify disparities in wages and promotion. Discontinuous employment, however, is a handicap only if the model worker is a man with a wife to look after his children so that he can be employed without interruption. If all parents left careers for roughly equal amounts of time to take care of their children, the man-with-wife model would collapse and discontinuous employment would not be a handicap.33

The primacy accorded by the courts to the traditional male role is not surprising or unalterable. It is a corollary of the general preference on

the part of Americans for male children and a mirror of the social system. Both judicial philosophy and childbearing preferences will lose their gender bias to the extent that gender distinctions are not inherent in social structure. The economic dominance of males is waning, and as a consequence, the societal priority given them can be expected to dissipate.

ILLEGITIMACY

While social scientists infrequently conduct research on illegitimacy, Americans generally appear to disapprove of bearing and rearing children outside of marriage. Only about two percent of all unmarried white women in the United States give birth to children in any given year; only one out of nine births to white women is illegitimate; and of white women who had a premarital birth between 1950 and 1969, one-half married within two years following the birth and three-fourths within four years. If the United States experiences falling population numbers, the situation may stem from the present trend toward declining marital and rising nonmarital fertility, a trend in which the decline in marital fertility exceeds the rise in nonmarital fertility. Assuming there is no change in the American ideal that a marital relationship is an important context for child rearing, Congress may decide that pronatalist measures should focus on those who are married.

The constitutionality of the policy adopted by Congress will apparently depend on whether it is designed to have a negative impact on illegitimate children. A measure that implicates only the parents will probably survive a constitutional challenge while a measure that causes direct harm to the children will not. Several decisions of the United States Supreme Court are illustrative. In the first, a statute limited financial benefits in a state welfare program for "the working poor" to households having two adults of opposite gender who were married to one another and who had a child by birth or adoption.

38. Espenshade, supra note 36, at 211-12.
The exclusion of families with an illegitimate child was found to violate the guarantee of equal protection, because the financial assistance provided by the state was seen as essential to the welfare of children regardless of their legitimacy. In the words of the Court:

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent.  

In contrast, the Supreme Court has upheld a federal statute that denied benefits from a federal program to the surviving parent of an illegitimate child following the death of the other parent. Under the statute, the child received financial assistance, but the surviving parent did not. The goal of the statute was seen as that of assisting parents who were dependent on a deceased wage earner, and the Court concluded it was both constitutionally acceptable and reasonable for Congress to believe that, when a marital relationship had never existed, there was no dependence on the decedent by the surviving parent. Marriage could be used to establish eligibility for benefits because it was likely to denote economic dependence by the parent applying for the benefit.

In a final case, the Court confronted a state statute that allowed a mother to sue and recover financially for the wrongful death of an illegitimate child but prohibited the father from doing so unless he had legitimated the child, a procedure that required a court order and not necessarily marriage to the mother. Because only parents and not children were penalized, the statute was found to be constitutional. A four-member plurality of the Court expressed the view—which evidently received the approval of a fifth member and constituted a majority statement—that:

Unlike the illegitimate child for whom the status of illegitimacy is involuntary and immutable, the appellant here was responsible for fostering an illegitimate child and for failing to change its status. It is thus neither illogical nor unjust for society to express its
condemnation of irresponsible liaisons beyond the bounds of marriage by not conferring upon a biological father the statutory right to sue for the wrongful death of his illegitimate child.43

Even though sanctions can be applied to parents for having illegitimate children, the constraints of constitutional philosophy on legislative action in this area are substantial. A financial benefit to parents for legitimate births would appear to implicate the welfare of illegitimate children—children who, by reason of conditions associated with their illegitimacy, are more likely to suffer serious disadvantages.44 For this reason alone, the measure is of doubtful constitutionality. In addition, it is probable that marriage will continue to decline as a relevant criterion for social and legal assessments of the status of the individual.45 The earnings differential between women and men is rapidly shrinking in the United States; thus, full-time year-round female workers 20-24 years old earned seventy-six percent as much as their male counterparts in 1972 but eighty-six percent as much in 1983, while among female workers 25-34 years old, the increase was from sixty-five percent in 1972 to seventy-three percent in 1983.46 This trend seems likely both to erase further the social importance of marital status47 and to intensify individualism.48 For constitutional law, the result will probably be increasingly severe scrutiny and disapproval of government policies that carry penalties for illegitimacy.

MIGRATION

The final policy considered is one that deflects geographic migration toward communities that have an insufficient number of inhabitants to operate public services at an economically acceptable cost. If the population of the United States declines, the cost of public services will probably not fall commensurately.49 A point will come for some communities in low-density areas where the maintenance of

43. Id. at 353.
46. SMITH & WARD, supra note 35, at 24.
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those services will be an economically excessive burden.\textsuperscript{50} Assuming that Congress acts to encourage migration to such communities, what are the constitutional constraints on any policy that it might want to adopt?

The Constitution, through the Commerce Clause,\textsuperscript{51} authorizes Congress to regulate activities that are within or that affect interstate commerce. The power conveyed by the Clause has provided the foundation for an array of federal legislation. Three Supreme Court cases illustrate the breadth of the power. In the first, the Court faced a challenge to a federal statute that prohibited an individual from transporting liquor for personal use across a state line if consumption was illegal in the state of destination.\textsuperscript{52} The statute was upheld on the ground that the Commerce Clause provided Congress with the authority to ban from interstate commerce those activities it deems injurious and, indeed, would justify a statute that prohibited the transportation of liquor for personal use even though consumption was legal in both the state of origin and the state of destination. Congress, said the Court, possesses the power to regulate interstate commerce and may do so without regard to the policies of the states.\textsuperscript{53}

Under the Commerce Clause, then, Congress may establish the conditions under which individuals cannot cross state lines. It is also clear that the conduct of people within a state can be reached by federal regulation as long as that conduct affects interstate commerce.\textsuperscript{54} However, congressional authority over migration exists not only because people are within the purview of the Commerce Clause, but also because the facilities required for migration are within it as well. Those facilities were central to the second Supreme Court decision.

\textsuperscript{50} Economic pressures on public services from falling population numbers will be alleviated to the extent that real per capita income continues to grow. In part, such growth will reduce the burden on individuals from supporting public services. It will also promote economic activity in the private sector even though population size is declining. Johnson, Organization Adjustment to Population Change in Nonmetropolitan America: A Longitudinal Analysis of Retail Trade, 60 Soc. Forces 1123 (1982). In so doing, growth in per capita income will provide an expanded source of tax revenues from business to operate the public sector. Nonetheless, there is presumably a population level under which the expense of public services will generate consideration of ways to increase migration to communities with insufficient inhabitants.

\textsuperscript{51} Art. I, § 8, cl. 3.

\textsuperscript{52} United States v. Hill, 248 U.S. 420 (1919).

\textsuperscript{53} See also United States v. Darby, 312 U.S. 100 (1941).

Basic to the second case was the order of a state agency fixing the rates for passenger transportation by a railroad within the state at a level less than those established by a federal agency for interstate transportation of equal distance. An individual travelling a given distance solely within the state thus paid a lower fare than an individual going the same distance but crossing the state line. Acting under a statute, the federal agency increased the intrastate rates to be charged by the railroads, setting them at a level that it determined necessary to maintain an effective national transportation system. The displacement of state authority over intrastate rates, when challenged, was found not to violate the Constitution since the railroads crossed state lines and were embedded in interstate commerce, but even if the railroads moved solely within the state, federal authority over them would have been justified as long as interstate commerce was affected.

Once interstate commerce is implicated, accordingly, federal regulation of people and of transportation facilities is justified regardless of their location. However, there is a third subject to which congressional authority can be extended in order to influence migration. That subject is land use, and it could permit federal control over a variety of matters (such as issuance of building permits) that are now handled by local governments.

In 1977, Congress imposed federal regulation on the surface mining of coal because of the environmental consequences of such mining. Among the documented consequences were water pollution and soil erosion, loss of farmland and forests, and increased flooding and landslides. The statute was challenged on the ground that land use is and should be a local activity beyond the reach of federal authority. However, the Supreme Court rejected the argument and upheld the statute, saying:

The denomination of an activity as a “local” or “interstate” activity does not resolve the question whether Congress may regulate it under the Commerce Clause... [T]he commerce power extends to those activities intrastate which so affect interstate commerce... as to make regulation of them appropriate means to... the effective execution of the granted power to regulate interstate commerce.

Although the use to which land is devoted has traditionally been within the powers of state and local governments, it is a subject that is

56. The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871).
within the jurisdiction of Congress. The only prerequisite to federal regulation is that interstate commerce must be affected, a criterion that is easily satisfied since it does not require some minimum volume of commerce but, rather, a reasonable belief by Congress that the activity being regulated affects interstate commerce.\textsuperscript{58}

Interstate commerce will clearly be implicated by the economic problems of population-deficient areas and the role of migration in exacerbating those problems. If the political decision is taken to direct migration to areas requiring a greater number of inhabitants, Congress will have wide latitude in its choice of policy under the Commerce Clause. While a constitutional barrier might arise—for instance, from the due process guarantee of liberty—the likelihood of it will be reduced if the policy avoids direct regulation and instead employs a financial incentive/disincentive such as a fee on the transfer of title to homes in areas that do not need additional inhabitants, with no fee in areas that do. Such a measure, though adopted to influence behavior, does not threaten personal freedom as seriously as a prescription or proscription,\textsuperscript{59} and empirical research suggests that it will affect destination decisions among those who move. Individuals make migration decisions on the basis of both their economic and family contexts;\textsuperscript{60} migration to low-density areas will apparently be conducive to fertility\textsuperscript{61} and thus attractive to couples in their childbearing years. Since the incentive/disincentive will not severely intrude on an important social value (freedom of movement), will facilitate a socially-approved activity (childbearing), and will help to alleviate the problems of underpopulated areas, it is apt to be deemed constitutionally acceptable. Moreover, Americans favor living in areas of relatively low population density,\textsuperscript{62} a preference they have frequently been unable to fulfill when they move.\textsuperscript{63} A policy that promotes migration to such areas will thus be reinforced by social values, increasing the likelihood that it will be found constitutional.

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\item \textsuperscript{58} Hodel v. Indiana, 452 U.S. 314, 324 (1981).
\item \textsuperscript{59} Maher v. Roe, 432 U.S. 464 (1977).
\item \textsuperscript{61} See Curry & Scriven, \textit{The Relationship Between Apartment Living and Fertility for Blacks, Mexican-Americans, and Other Americans in Racine, Wisconsin}, 15 \textit{Demography} 477 (1978).
\item \textsuperscript{63} De Jong, \textit{Residential Preferences and Migration}, 14 \textit{Demography} 169 (1977).
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The premise of this paper has been that legal thought is a reflection of social structure and values. Accordingly, the decisions reached by courts, and the reasoning behind those decisions, have been viewed in terms of their societal context. Systematic attempts to assess empirically the societal foundation of legal philosophy have yet to begin, however. These attempts, if they are to yield conclusions of maximum accuracy, will necessarily involve precisely measured variables and quantitative data that are subjected to rigorous statistical analyses. The utility of such data can be illustrated at a very simple level.

The manner in which Americans have evaluated the growth of their population is available from national surveys for the years 1965, 1970, and 1975 for currently-married white women in the United States who were under 45 years of age, who had been married only once, and who had completed at least four years of college. In this group, the proportion believing that domestic population increase constituted a serious problem was as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Proportion</th>
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<tbody>
<tr>
<td>1965</td>
<td>49.7%</td>
</tr>
<tr>
<td>1970</td>
<td>74.8%</td>
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<tr>
<td>1975</td>
<td>64.2%</td>
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The dramatic rise in concern between 1965 and 1970 appears to have been manifested in the decision of the United States Supreme Court invalidating on constitutional grounds statutes that prohibited an abortion in the first two trimesters of pregnancy. The case was orally argued before the Court initially in December 1971 and was reargued in October 1972, with the decision announced in January 1973.

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65. Because judges of courts of record are college graduates, the actions of the judiciary should be most affected by the social values of Americans who have earned a baccalaureate degree. The data reported here were obtained from persons with a minimum of four years of higher education, and they are presumed typically to have received a degree.

1973. Early in its opinion the Court acknowledges that "population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem" of access to abortion, a view that is evidently reiterated in the concluding pages of the opinion by the statement that "[t]his holding, we feel, is consistent with . . . the demands of the profound problems of the present day.

The declining concern with domestic population growth that developed in the 1970s also seems to have been reflected in Supreme Court reasoning. In 1977, the Court held that a state was not required by the Constitution to provide funds for medically unnecessary abortions performed on indigents when it provided funds to cover the expenses of childbirth. Government could distinguish between abortion and childbirth in programs of financial assistance for medical care as long as its policy was rationally related to a legitimate public objective. Such an objective was found in protecting potential life and in influencing demographic trends: "In addition to the direct interest in protecting the fetus, a State may have legitimate demographic concerns about its rate of population growth. Such concerns are basic to the future of the State . . . ." The statement is particularly significant since the state had not indicated that an increase in population size was a motivation for its policy. The appearance of the statement is thus difficult to understand except as a manifestation of the impact of changing public values on constitutional reasoning.

**Conclusion**

This paper has employed a macro-sociological approach to constitutional law. The approach is not inconsistent with traditional legal analysis, but it nonetheless involves a marked difference in orientation. While unfamiliar in legal scholarship, this orientation is based on a relatively simple assumption—namely, that societal attributes are responsible for the fact that constitutional philosophy is characterized by a particular content at one point in time but not another. Both the issues that arise and the constitutional law that is fashioned for them stem, in this perspective, from the nature and needs of society, and the individuals who participate in the process by

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67. Id. at 116 (emphasis added).
68. Id. at 165.
70. Id. at 478 n.11.
71. Id. at 489 (Brennan, Marshall, and Blackmun, JJ., dissenting).
which legal thought develops—whether as judges, as lawyers, or as parties to litigation—are viewed as playing a marginal role.

Regrettably, empirical research methods have not been applied to test systematically hypotheses regarding possible relationships between social forces and legal philosophy, but the evidence that can be adduced suggests a macro-sociological approach possesses considerable promise. If the promise is fulfilled, the benefits accruing will be impressive, for the approach will not only explain the development of constitutional law in the past but, more importantly, will permit prediction of its future course with reasonable accuracy. Prediction is the major potential benefit of all endeavors in the social sciences, and if it proves feasible with regard to constitutional philosophy, the opportunity exists for more effective decisions by the practicing bar and the judicial, executive, and legislative branches of government.

Creation of the necessary knowledge base for predicting legal thought, however, will require a substantial investment of time and funds for research. The methodological tools now available in sociology appear to make such prediction an achievable goal. Lacking at this point is recognition of its feasibility and a willingness to commit research resources.