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THE CONSTITUTIONAL ASPECTS OF A NATIONAL POPULATION POLICY

PROFESSOR MEANS†

I HAVE INTERPRETED my mission, as the only lawyer on this panel, as one of exploring the constitutional aspects of a national population policy. Before I get into that, I note that two of the previous speakers have said that the United States government is a newcomer in the science or art of population policy. This assertion I rather think is belied by the fact that our national birth certificate — the Declaration of Independence — is the first American public document to announce a population policy. In Jefferson's rough draft which, in this passage, was not altered in the final redaction of that instrument, the last and least beloved of our Kings was accused of the following act of tyranny:

[H]e has endeavored to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migrations hither; & raising the conditions of new appropriations of lands.¹

In this quaint and, for us, ancient text we find lurking aspects of population policy which are with us still; a numerical goal and the use of economic motivation to attain it. Policy then was the opposite of what it is now; then it was "more"; now it is "no more." At that time a nation's problem was to get as many people as it could from wherever it could get them. Any sovereign who obstructed the laws for naturalization of foreigners, etc., put his country at a disadvantage in competing in the international market for migratory population. The reason why the states of the world were so busily competing for all the people they could get is plain enough. It has been calculated that the rate of natural increase of the population of Europe between the reign of Augustus and A.D. 1650 was only one-tenth of one per cent per year. That was at a time when the birth rate was much higher than it is now. In those centuries, indeed, the birth rate approached the biological maximum. The reason why the rate of increase was so small was because the death rate was so high. This high death rate did not substantially diminish until the latter half of the nineteenth century.

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1. HAZELTON, *THE DECLARATION OF INDEPENDENCE: ITS HISTORY* facsimile

Thus, when we commenced as a nation, our policy was — and so remained for many, many years — to get as many people as we could by whatever means were available. To this end we encouraged both natural reproduction and immigration.

When the nineteenth century drew to a close, however, other sentiments began to make a timid and tentative appearance in our public documents, as we shall shortly see.

I shall consider the constitutional problems apposite to the kind of population policy that is desired today — *i.e.*, one of limiting population, rather than increasing it — from the point of view of two antitheses. One is the contrast between voluntary and involuntary measures. The second is the situs, in our federal system, of governmental power to deal with this problem, *viz.*, federal *versus* state exercise of such power.

The voluntary measures, as the previous speakers have pointed out, are three: Contraception, sterilization, and abortion. Possibly others will be invented which will defy classification by this neat trichotomy, but these three are all we have today. So far as existing voluntary measures are concerned, we have a growing body of recent judicial precedents to guide us.

Contraception, as we know from the case of *Griswold v. Connecticut*,² decided by the United States Supreme Court in 1965, is a federal constitutional right, at least of married couples.

That sterilization is at least a legal right of married couples is the teaching of the case of *Jessin v. County of Shasta*,³ decided in 1969 by a California district court of appeal. Since the defendant county, which lost, took no further appeal, no ruling in that particular case will be forthcoming from a higher court. There, Mr. and Mrs. Jessin requested the county hospital to perform a vasectomy on the husband and the hospital refused. In California, as in nearly all the states, there is no law prohibiting voluntary sterilization. Nevertheless, the hospital, using the same committee which also decides what abortions may be performed, refused to permit a vasectomy in this case. The couple then sued the county, and the district court of appeal held that voluntary sterilization was their legal right. Although the briefs had urged upon the court the constitutional questions, it contented itself with declaring existing California law. Since the ruling was in favor of the Jessins, there was no need to consider the question of whether their right was not merely legal, but also constitutional, in character. I have no doubt, however, that if ever a court is

2. 381 U.S. 479 (1965).

3. 271 Cal. App. 2d 810, 79 Cal. Rptr. 459 (3d Dist. 1969).

compelled to decide that question, the decision will be in favor of the constitutional character of the right to voluntary sterilization.

In regard to abortion, there have been three recent cases. The first, *People v. Belous*,⁴ was decided in 1969 by the Supreme Court of California. The second, *United States v. Vuitch*,⁵ was decided by a single judge in the United States District Court for the District of Columbia, later in 1969. The third, *Babbitz v. McCann*,⁶ was decided in 1970 by a three-judge federal court in the Eastern District of Wisconsin. In all three of these cases long existing antiabortion statutes — two of them state statutes and one an act of Congress — were held to be unconstitutional. The two federal decisions, *United States v. Vuitch* and *Babbitz v. McCann* will probably be before the United States Supreme Court for argument in the October Term 1970; the California decision will not.⁷ In addition, there are four more federal cases pending before a three-judge court in the Southern District of New York.⁸ If the New York legislature does not make them moot by enacting a law⁹ similar to the legalization bill that has just become law, without the Governor's signature, in Hawaii,¹⁰ they will doubtless also be before the United States Supreme Court in the

4. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

5. 305 F. Supp. 1032 (D.D.C. 1969).

6. 310 F. Supp. 293 (E.D. Wis. 1970).

7. Certiorari denied *sub nom.* California v. Belous, 397 U.S. 915 (1970). In the *Vuitch* case, after the Solicitor General docketed the appeal of the United States, the Court requested briefs on the question whether a decision holding unconstitutional an act of Congress territorially limited to the District of Columbia was directly appealable to the Supreme Court, bypassing the Court of Appeals for the District of Columbia. The Solicitor General submitted a brief contending that it was. The Court thereupon set the case on the calendar, but postponed to the argument on the merits this jurisdictional question. 397 U.S. 1061 (1970). On the final day of term, the Court propounded three additional questions, all strongly suggestive of further jurisdictional doubts. 399 U.S. —, 26 L. Ed. 2d 789, 90 S. Ct. 2235 (1970). The upshot may well be that the Supreme Court will not consider the *Vuitch* case until it has first been heard by the Court of Appeals for the District of Columbia Circuit.

A similar fate — intermediate consideration by various Courts of Appeal for several Circuits prior to hearing by the Supreme Court — may also await the *Babbitz* case and other three-judge court decisions which have held unconstitutional State abortion laws, but have not enjoined their enforcement, by reason of Rockefeller v. Catholic Medical Center, 397 U.S. 820 (1970), and Mitchell v. Donovan, 398 U.S. 427 (1970), both decided after the Symposium. Thus the statement in the text that such cases "will doubtless . . . be before the United States Supreme Court in the October Term 1970" cannot now be confidently made; the October Term 1971 would now (September 1970) seem safer odds.

8. Lyons v. Lefkowitz, 305 F. Supp. 1030 (S.D.N.Y. 1969) (granting motion for a three-judge court).

9. Subsequently to the Symposium, such a law was indeed enacted by the New York legislature and approved by Governor Rockefeller. N.Y. Laws 1970, ch. 127 (approved April 11, 1970, effective July 1, 1970). On July 1, 1970, the three-judge court held that this new law has made all of these four cases moot.

A third State, Alaska, has also legalized abortion in 1970. After the Governor vetoed a legalization bill, his veto was overridden by the required majorities in both houses, and became law. Alaska Laws 1970, ch. 103 (veto overridden April 30, 1970, effective July 29, 1970).

10. Hawaii Laws 1970, Act 1 (became law March 11, 1970, without the governor's

October Term 1970. Thus, it is possible that in the very near future, conceivably before this calendar year is out, there will be a decision at the highest level in regard to voluntary abortion as a federal constitutional right.

Thus we find ourselves virtually at the stage where there no longer is — or at least it seems there will no longer be — any impediment to the free use of voluntary measures throughout the country.

In the case of abortion this will make some difference of a quantitative kind, in addition to the obvious improvement in quality of service. Though the antiabortion laws are honored far more in the breach than in observance, doubtless there are a substantial number of pregnancies that are not terminated by abortion simply because these laws exist. Passage of laws legalizing abortion, or achievement of the same end by a decision that the old laws have become unconstitutional, would therefore increase the total number of abortions as well as legalize them.

Now, if Professor Charles Westoff and Dr. Wishik, who I believe took the same position, are right in saying that voluntary measures would eliminate all or nearly all of the unwanted or — following Professor Driver's distinction — unanticipated children that otherwise would be born, it seems likely that the United States would never experience a need to resort to involuntary measures. Indeed, I feel a bit like a character out of Alice in Wonderland discussing involuntary measures at this stage of our history because American public opinion (including my own) has been so little prepared for serious thought of them. Perhaps India is better prepared since there a cabinet minister can publicly discuss such a possibility. Nevertheless, our exploration of the American constitutional position would be incomplete if this question were left undiscussed.

So far as these three antinatality measures — contraception, sterilization, and abortion — are concerned, only sterilization has ever been imposed by law in the United States. Where involuntary sterilization has been imposed by law, the dominant motive has not been one of population policy at least in the quantitative sense.

The two famous cases concerning involuntary sterilization, both decided by the United States Supreme Court, are *Buck v. Bell*¹¹ in 1927 and *Skinner v. Oklahoma*¹² in 1942. *Buck v. Bell* dealt with hereditary epilepsy: "[t]hree generations of imbeciles are enough"¹³ is the famous exclamation wherein Justice Holmes put in a nutshell the reasoning

11. 274 U.S. 200 (1927).

12. 316 U.S. 535 (1942).

13. 274 U.S. at 207.

of the Court sustaining the Virginia statute in that case. In *Skinner*, however, where the Oklahoma legislature had imposed sterilization as a punishment for one (but not for other similar) crime, the Court's majority struck down the statute as a denial of equal protection, while concurring Justices voiced even deeper doubts of the constitutionality of sterilization as a punitive measure.

Only once have Justices of the United States Supreme Court considered the question whether involuntary sterilization would be constitutional as a measure of population policy. This was dictum in a concurring opinion written by then Justice Goldberg in which he was joined by Chief Justice Warren and Justice Brennan, in *Griswold v. Connecticut*.¹⁴ In this dictum, Justice Goldberg was endeavoring to refute a position taken by one of the dissenting Justices in that case. When Justices fall to arguing among themselves, of course, like most of us, they tend to overstate by way of emphasis. At any rate, this is the Goldberg dictum:

Surely the government, absent a showing of a compelling, subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. . . . [T]he personal liberty guaranteed by the Constitution does . . . include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts.¹⁵

I acknowledge the excellence of this rhetoric, but draw your attention to the saving clause: "absent a showing of a compelling, subordinating state interest." Clearly, the farthest thing from the minds of Justices Goldberg, Warren and Brennan in 1965 was a serious thought that ever in the United States there could be a reasonable showing of a compelling subordinating state interest of this kind. Now, five years later, would they still be so sure? Opinion about population policy has evolved rather rapidly in the past five years. I wonder whether today, if either of these three Justices were presented with the same opportunity, he would avail himself of it in quite the same language, or with quite the same enthusiasm. The Goldberg dictum is, of course, formally true. Only a showing of a compelling, subordinating state interest could constitutionalize involuntary sterilization; but if, in time, we were to drift into an era wherein mounting pollution and overpopulation were about to overwhelm us, surely *some* governmental authority in the United States ought to be held to have constitutional

14. 381 U.S. at 496-97 (1965).

15. *Id.*

power to meet the problem in that way, assuming there were no other less severe alternatives then available. By then there probably will be, because science is making rapid progress in this realm. Scientific friends have told me of experiments now in progress looking to the perfection of a substance which can be administered by injection that will make one sterile for considerable but limited periods, so that it will no longer be necessary to submit to an incisive and often irreversible operation such as vasectomy or salpingectomy. Should this come to pass, then, if involuntary measures were found necessary and constitutionally permissible, courts would doubtless insist that government resort to the less severe alternative rather than vasectomy or salpingectomy.

Passing from the voluntary *versus* involuntary antithesis to the situs of power in our system to deal with the problem of overpopulation, on either a voluntary or an involuntary basis depending on the needs of the times; I suppose that most of us shared (as initially I did) Professor Driver's instinctive reaction that this problem is, if any problem is, within the virtually exclusive competence of the states. Therefore, it would seem that the federal government would have a very difficult task making out a case for the constitutionality of its exercise of power in this sphere.

When I began to ruminate amongst the authorities, I began to realize that the clause above quoted from the Declaration of Independence is more than an isolated historical curiosity. It illuminates certain later texts of which we are all aware, but to which perhaps few of us have given thought in this connection. Thus its word "migrations" is carried over — in the singular, to be sure — into that clause of the original Constitution which we commonly remember as the Slave Trade Clause:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . .¹⁶

The Supreme Court early noticed that the word "migration" was in this clause, and held that it applied to free persons, just as the word "importation" applied to slaves. This clause, being an exception to the general power granted to Congress over interstate and foreign commerce, was the basis for the conclusion that the migration of free persons, no less than the importation of slaves, was a part of

16. U.S. CONST. art. I, sec. 9, cl. 1.

foreign "commerce," and thus, after January 1, 1808, subject to Congressional control. The authorities for these propositions are *Gibbons v. Ogden*¹⁷ in 1824 and *The Head-Money Cases*¹⁸ in 1884.

In two later cases, both involving Orientals — *Chae Chan Ping v. United States*, commonly referred to as *The Chinese Exclusion Case*,¹⁹ in 1889, and *Nishimura Ekiu v. United States*,²⁰ in 1892 — the Court again returned to this theme. Now, however, it based the power of Congress to exclude aliens, not expressly on the commerce clause, which was scarcely mentioned, but upon the power inherent in every sovereign member of the society of nations to decide who shall enter the country. Indeed, in *The Chinese Exclusion Case*, the Court affirmed the right of every country to protect itself from the "vast hordes of . . . people crowding in upon us."²¹ This is the first note in our jurisprudence of a desire to limit our total population. Curiously, in both of these cases the commerce clause is not heavily relied upon and passes virtually unmentioned; yet, it must have been in the back of the Justices' minds. Nevertheless, the cases are significant as showing a recognition by the Court that population limitation is a legitimate object of the federal power to make international treaties which were involved in those cases.

If we had no more to go on than what has been said up to this point, however, it would be difficult if not impossible to make out a case for federal power to legislate a national population policy. The commerce clause will not assist us for, prostitution apart, it would be absurd to speak of the human fecundative act as "commerce," and even if it were not, such acts are rarely interstate.

There is, however, a later line of cases dealing once again with migration, but this time not of the migrations of men but of birds. These bird-migrations were held, contrary to what one would expect, not to be within the ambit of the commerce clause. This line of cases gave rise to the precedent which may yet prove to be our salvation in this field.

In 1896, in *Geer v. Connecticut*,²² the Supreme Court held that each state in the Union was the successor of the Crown as the owner of all migratory birds which happen to be flying over it. Just as the British Crown had a right of property in those birds before Independence, so now do, not the United States, but the several states.

17. 9 Wheat. (22 U.S.) 1, 216-17 (1824) (Marshall, C.J.).

18. *Edye v. Robertson*, 112 U.S. 580 (1884).

19. 130 U.S. 581 (1889).

20. 142 U.S. 651 (1892).

21. 130 U.S. at 606.

22. 161 U.S. 519 (1896).

Since this was so, the Court allowed Connecticut to prohibit anyone (even a state-licensed hunter) killing migratory birds within its borders from taking them to another state. Connecticut's power to prevent the movement of a migratory bird killed in Connecticut, across her borders, was based on the State's ownership of the bird. However, had the Connecticut law regulated private property in the same manner, the commerce clause would have invalidated it.

Notwithstanding *Geer v. Connecticut*, in 1913 Congress passed a migratory bird statute,²³ regulating the hunting of such birds and creating open and closed seasons in regard to them. In two cases, *United States v. Shawver*²⁴ and *United States v. McCullagh*,²⁵ federal district courts held the 1913 act to be unconstitutional on the basis of the *Geer* decision. They held that the commerce clause could not be invoked to justify the act of Congress because the birds were the property, not of the United States, but of the several states.

Thereafter, in 1916, the United States and Canada negotiated a migratory bird treaty,²⁶ in which both powers agreed to regulate the killing of migratory birds. In 1918 Congress passed a new migratory bird statute,²⁷ quite similar to the 1913 act, but now based, not upon its commerce clause power, but upon its treaty clause power. The great case of *Missouri v. Holland*²⁸ arose under this 1918 act. As you all know, Justice Holmes, speaking for the Court, conceded that the 1913 act had been unconstitutional for the reasons stated by the lower federal courts but held that the 1918 act must be upheld because the 1916 international treaty had been entered into which was a new and adequate source of congressional power.

Here, therefore, we discern a way whereby Congress can enter a field, such as population policy, which does not qualify as "commerce." What is required is that there be a legitimate subject for the exercise of the treaty-making power — something properly negotiable with foreign states.²⁹

23. Act of March 4, 1913, c. 145, 37 STAT. 847.

24. 214 Fed. 154 (E.D. Ark. 1914).

25. 221 Fed. 288 (D. Kan. 1915).

26. 39 STAT. 1702 (1916).

27. Act of July 3, 1918, c. 128, 40 STAT. 755.

28. 252 U.S. 416 (1920), *affirming* 258 Fed. 479 (W.D. Mo. 1919).

29. *Cf. Pierce v. State*, 13 N.H. 536, 576 (1843) (dictum), for an early attempt to list subjects not considered properly within the treaty-making power.

On reading this paper in galley, a learned non-lawyer friend (Christopher Tietze, M.D.) asked me, "Why is it necessary to fall back on the treaty making power . . . ? Wouldn't the General Welfare Clause do the trick?" His reference, of course, was to the general welfare subclause in the taxation clause (CONSTR. art. I, § 8, cl. 1). While that subclause grants no "power to provide for the general welfare independent of the taxing power," *United States v. Butler*, 297 U.S. 1, 64 (1936),

Until recently, I should have thought that this would still have left us pretty much at the end of a blind alley, because as pointed out by some of the previous speakers, whereas we have (or at any rate profess) a keen interest in seeing that the underdeveloped countries do not become overpopulated, what have we to give them, in return for their undertaking to limit their population? In our own eyes, we were not overpopulating our own country; so our promise to limit our own population would hardly qualify as a serious *quid pro quo*.

This objection, however, has now been met: studies have shown that the population of the United States consumes the resources of the world out of all proportion to its numbers.³⁰ So here, you see, we have a bargaining counter: Something which we, as a developed country, can offer to an underdeveloped country by way of treaty-negotiation. We can undertake to limit our population for the purpose of not overconsuming the natural resources of the world which developing countries need to become more developed. They will undertake to limit their population in order to prevent the consequences of overpopulation — disease and starvation — which would cause us great difficulties in meeting a moral obligation to keep them alive.

In this way, therefore, I believe that it would be possible, without an amendment to the Constitution, to create a valid basis for congressional legislation creating a national population policy. The desirability of nationwide uniformity, which could scarcely be achieved by the legislatures of fifty independent states, needs little argument. The existing authorities permit the attainment of this goal provided first a serious international treaty on the subject is entered into.

What the content of a congressionally enacted, treaty-based national population policy ought to be is a question of policy, as to which a constitutional lawyer is no better qualified to advise than any layman, and far less qualified than the experts who have spoken before me. They are the true counsellors to the policy-makers in this sphere.

In concluding that the constitutional problems in this area, while serious, are not insurmountable, I feel I have finished my task.

it would sustain such measures as Senator Packwood's proposal to abolish income tax exemptions for all children beyond two born after a fixed future date. To the extent that adjustment of the tax laws, and the grant of bounties for infertility under the appropriation clause (CONSR. art. I, § 9, cl. 7) — into which the Court in the same case read the general welfare subclause (297 U.S. 1, 65 [1936]) — will "do the trick," resort to the treaty power will, indeed, be unnecessary.

30. See Carter, *The Population Crisis: Rising Concern at Home*, 166 SCIENCE 722, 724-25 (Nov. 7, 1969).