In Support of Education: An Examination of the Parental Obligation to Provide Postsecondary Education in California

Terry L. Thurbon

Follow this and additional works at: https://scholarlycommons.pacific.edu/mlr

Part of the Law Commons

Recommended Citation
Terry L. Thurbon, In Support of Education: An Examination of the Parental Obligation to Provide Postsecondary Education in California, 18 Pac. L. J. 377 (1987).
Available at: https://scholarlycommons.pacific.edu/mlr/vol18/iss2/5

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.
In Support of Education: 
An Examination of the Parental 
Obligation to Provide Postsecondary 
Education in California

Education has come to play an increasingly important role in modern society.\textsuperscript{1} The California Supreme Court has established that education is a fundamental interest under the California Constitution.\textsuperscript{2} In contemporary society, postsecondary education is far more important than in the past.\textsuperscript{3} Postsecondary education is especially

\begin{itemize}
  \item See, e.g., Plyler v. Doe, 457 U.S. 202, 221 (1982) (recognizing that education is a matter of supreme importance); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (concluding that education is perhaps the most important function of state and local government); Finn v. Finn, 312 So. 2d 726, 731 (Fla. 1975) (asserting that education is needed by individuals seeking to be competitive).
  \item Serrano v. Priest, 18 Cal. 3d 728, 766 n.45, 557 P.2d 929, 951 n.45, 135 Cal. Rptr. 345, 367 n.45 (1976), \textit{cert. denied}, Clowes v. Serrano, 432 U.S. 907 (1977) (affirming earlier holding that education is a fundamental interest under California's equal protection clause). Admittedly, characterizing education as a fundamental interest under article I, section 7 of the California Constitution affords greater educational benefits to the citizens of California than those dictated by the United States Constitution, for the United States Constitution neither explicitly nor implicitly guarantees education. \textit{See} San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1972). Nevertheless, the United States Supreme Court has repeatedly recognized the importance of education. \textit{Id. See also Plyler}, 457 U.S. at 221; \textit{Brown}, 347 U.S. at 493.
  \item Finn, 312 So. 2d at 731 (concluding that in an age of sophisticated technology and economic complexity, individuals may need advanced education to be competitive). \textit{Cf.} Streitwolf v. Streitwolf, 58 N.J. Eq. 573, 576, 43 A. 904, 907 (1899) (implying that education beyond common school is a mere luxury).
\end{itemize}
important in California, where higher education has contributed greatly to economic and cultural growth.\(^4\)

The growth in the importance of higher education in California has been accompanied by an increase in the cost of higher education.\(^5\) Although parents generally assist their children with the costs of postsecondary education,\(^6\) children from families that have suffered a marital dissolution are less likely to receive assistance with educational expenses from their parents.\(^7\) The trend in child support awards, therefore, has been toward including support for postsecondary education.\(^8\)

The average student enrolled in a postsecondary institution is over eighteen years of age and thus beyond the statutory age of majority in most jurisdictions.\(^9\) The widespread reduction in the statutory age of majority that occurred during the mid-1970s,\(^10\) therefore, undermined the authority of many courts to enter support orders covering postsecondary education.\(^11\)

In response to this problem, several states

---

\(^4\) See T. Hayden, A New Vision for Higher Education in California: Beyond the Master Plan I (1986) ("[h]igher education has been a strategic industry in the climb of California to pre-eminence in innovation, economic growth, and cultural creativity").

\(^5\) See Cal. Student Aid Comm'n, Fourteenth Biennial Rep. I (1984). Between July 1982 and June 1984, the average cost of college, including fees and living expenses, rose by an average of $1,176 at University of California campuses, $1,011 at California State University campuses, and up to $2,887 at independent colleges. Id. In 1983-84, the costs of attending an independent college in California ranged from a low of $5,662 for students living at home to a high of $14,546 for students living in dorms. Id. at 2.

\(^6\) See Esteb v. Esteb, 138 Wash. 174, 184, 244 P. 264, 267 (1926) (the law presumes a custodial parent will provide for child's education).

\(^7\) See, e.g., In re Marriage of Vrban, 293 N.W. 2d 198, 202 (Iowa 1980) (recognizing that even well-intentioned parents, when deprived of the custody of their children, react by refusing to support them as they would have if the family unit had been preserved); Esteb, 138 Wash. at 184, 244 P. at 267 (concluding that parents deprived of custody often refuse to do for their children what they ordinarily would do); S.B. 1129, 1985-86, 1st Reg. Sess., sec. 1 (Cal. 1985) (introduced March 7, 1985) [hereinafter cited as S.B. 1129]; S.B. 2065, 1985-86, 2nd Reg. Sess., sec. 1 (Cal. 1986) (introduced February 19, 1986) [hereinafter cited as S.B. 2065].

\(^8\) See infra text accompanying notes 63-103 (describing the trend in educational support awards).

\(^9\) See infra text accompanying notes 72-74. Generally, courts are empowered to order parents to pay child support only for minor children except in cases of extraordinary need. See, e.g., Cal. Civ. Code § 4700 (West Supp. 1986) (court may order parent to pay support

---

378
have passed legislation empowering courts to order support for adult children who pursue postsecondary education.\textsuperscript{12}

In the last several years, the judiciary in California has tacitly endorsed the creation of a postsecondary support obligation for parents whose marriages are dissolved by using indirect methods to secure postmajority support in some cases.\textsuperscript{13} In addition, the California Legislature has manifested a desire to foster postsecondary education by enabling certain classes of children to obtain parental support for education beyond the age of majority.\textsuperscript{14} Two bills designed to give courts authority to continue parental child support obligations beyond majority for children pursuing postsecondary education have been introduced in the California Senate.\textsuperscript{15}

The purpose of this comment is to examine the parental obligation to provide postsecondary education in California.\textsuperscript{16} This examination will focus on the legislation recently proposed in California\textsuperscript{17} as a medium for analysis of potential challenges to the effort to impose a postmajority child support obligation upon parents whose children pursue higher education.\textsuperscript{18} Next, this comment will discuss some practical problems inherent in the efforts of California legislators.\textsuperscript{19} Finally, this comment will propose an alternative to the solutions contained in the proposed legislation.\textsuperscript{20} First, however, the pattern of postmajority educational support must be placed in historical perspective.

for minor child or for adult child who is unable to be self-sufficient). Consequently, the reduction in the statutory age of majority left courts without authority to order support for postsecondary students, who are usually beyond the age of majority.

\textsuperscript{12} See, e.g., HAW. REV. STAT. § 580-47 (1984) (provision may be made for the support, maintenance, and education of an adult or minor child); ILL. ANN. STAT. ch. 40, para. 513 (Smith-Hurd Supp. 1986) (court may make provision for education of children, whether of minor or majority age); IOWA CODE ANN. § 598.1 (West 1981) (support obligations may include support for child who is between 18 and 22 years of age, who is a full-time student in a college or university). See also infra notes 76-102 and accompanying text (discussing the trend in statutory development of postmajority educational support obligations).

\textsuperscript{13} See, e.g., In re Marriage of Paul, 173 Cal. App. 3d 913, 918, 219 Cal. Rptr. 318, 320-21 (1985) (permitting increase in spousal support due to voluntary contributions to child's college education).

\textsuperscript{14} See S.B. 1129, supra note 7; S.B. 2065, supra note 7. Both S.B. 1129 and S.B. 2065 died in committee at the end of the 1985-86 legislative session. Id. Since either bill may be reintroduced in a later session, or a similar measure may be proposed, consideration of the two bills has not been rendered moot by virtue of the fact that neither bill passed.

\textsuperscript{15} S.B. 1129, supra note 7, at sec. 1; S.B. 2065, supra note 7, at sec. 2. See also infra text accompanying notes 145-66 (description and analysis of the recent senate bills).

\textsuperscript{16} See infra text accompanying notes 145-211.

\textsuperscript{17} See infra text accompanying notes 145-66.

\textsuperscript{18} See infra text accompanying notes 108-44.

\textsuperscript{19} See infra text accompanying notes 167-99.

\textsuperscript{20} See infra text accompanying notes 200-11.
THE EVOLUTION OF EDUCATIONAL SUPPORT OBLIGATIONS IN CALIFORNIA

California courts may order parents to support their minor children to the extent necessary for maintenance and education. The level of support ordered for educational purposes varies according to the circumstances of a given case. California courts, however, are not expressly empowered to order child support specifically for postsecondary education.

In the past, at least one California appellate court was reluctant to recognize a parental obligation to provide postsecondary education to children. Gradually, however, courts began characterizing postsecondary education as a "necessary" under some circumstances. Support orders for college education in divorce actions were affirmed routinely as being within the proper exercise of trial court discretion. Consistent with the statutory limitations placed on the power of

---

21. CAL. CIV. CODE § 4700 (West Supp. 1986). "In any proceeding where there is at issue the support of a minor child . . . the court may order either or both parents to pay any amount necessary for the support, maintenance, and education of the child." Id. See also Jenkins v. Jenkins, 110 Cal. App. 2d 663, 665, 243 P.2d 79, 81 (1952) (court may order support for minor child).  
22. CAL. CIV. CODE § 196 (West 1982) (father and mother have an equal responsibility to support and educate child in manner suitable to child's circumstances, taking into account respective earning capacities of parents). See also In re Marriage of Aylesworth, 106 Cal. App. 3d 869, 878, 165 Cal. Rptr. 389, 394 (1980) (ordering parent to pay private school tuition).  
23. At present, the California Civil Code contains no provision expressly authorizing courts to order parents to support their children during postsecondary education apart from whatever authority might be implied from the provisions of Civil Code § 4700, which applies only to support of minor children or adult children incapable of being self-sufficient. See supra note 21 (text of Civil Code § 4700).  
24. See, e.g., Boens v. Bennett, 20 Cal. App. 2d 477, 482, 67 P.2d 715, 718 (1937). In Boens, the court concluded education beyond that provided by the state is a matter of parental discretion, and that a father is under no legal duty to give a child over 16 years of age a college education. Id.  
25. Necessaries are "[t]hings indispensable, or things proper and useful for sustenance of human life ... includ[ing] not only those services which are proper and required to sustain life but also those suitable for the individual involved according to his circumstances and condition in life." BLACK'S LAW DICTIONARY 927 (5th ed. 1979). Accord Daubert v. Mosley, 487 P.2d 353, 356 (Okla. 1971) ("necessaries" is a relative, somewhat flexible term, depending upon social position, and the child's fortune and situation in life); In re Ricky H., 2 Cal. 3d 513, 521, 468 P.2d 204, 208, 86 Cal. Rptr. 76, 80 (1970) (minor is entitled to be maintained in a style and condition consonant with parent's financial ability and position in society).  
courts to order child support, these educational support orders were confined to the duration of the minority of the children involved.

The change in the age of majority in California has had a profound impact on the ability of courts to require parents to provide their children with postsecondary education. Effective March 4, 1972, the age of majority in California was reduced from twenty-one to eighteen years of age. Most children attain the age of eighteen about the time they commence postsecondary study. The reduction in the statutory age of majority, without a corresponding adjustment of the support obligations of parents, virtually eliminated the authority of courts to enter support awards for postsecondary education.

The reduction in the age of majority also created confusion over the effect of the new age on preexisting support orders. The California Supreme Court, in *Ganschow v. Ganschow*, resolved this confusion. In *Ganschow*, contempt proceedings had been brought against a father who ceased making support payments for his twenty-year-old child once the statutory age of majority was reduced to eighteen years. The court determined the legislature had intended that the statutory reduction in the age of majority should have no effect on orders for child support entered prior to March 4, 1972. The court also indicated that a preexisting order subject to amendment could refer to the reduced age of majority in subsequent modifications. Although the order requiring the father to continue

28. Cal. Civ. Code § 4700 (West Supp. 1986). California courts are empowered to enter orders of support under § 4700 only for minor children or adult children who are unable to be self-sufficient. *Id.*
   The Legislature intends that any use of or reference to the words "age of majority," "age of minority," "adult," "minor," or words of similar intent in any instrument, order, transfer, or governmental communication whatsoever made in this state: . . .
   (b) On or after March 4, 1972, shall make reference to persons 18 years of age and older, or younger than 18 years of age.

*Id.*

31. See supra note 9.
34. *Ganschow*, 14 Cal. 3d at 153, 534 P.2d at 706, 120 Cal. Rptr. at 866.
36. *Ganschow*, 14 Cal. 3d at 157, 534 P.2d at 709, 120 Cal. Rptr. at 869.
paying support for his adult daughter who was in college was affirmed,37 the California Supreme Court did not decide whether parents can be compelled to provide postsecondary education to their adult children in the absence of a preexisting order to this effect.38

In Messier v. Messier,39 the California Court of Appeal avoided the question of whether the parental obligation to provide education extends beyond majority, even though the trial court had intimated that the obligation to pay educational expenses is not limited to the duration of the child's minority.40 No reported cases have been located in California in which the courts acknowledge the existence of a parental obligation to provide adult children with postsecondary education.41 Nevertheless, several California courts have imposed this obligation upon parents indirectly by altering spousal support arrangements to enable parents to assist adult children with postsecondary education.42

Since the age of majority was reduced, California courts have impliedly endorsed the notion that parents should provide postsecondary education for their children.43 In 1976, the California Court of Appeal permitted the father of a college-bound child to reduce the spousal support paid to his former wife, in part because of

37. Id. at 162, 534 P.2d at 712, 120 Cal. Rptr. at 872.
38. Ganschow, 14 Cal. 3d 150, 534 P.2d 705, 120 Cal. Rptr. 865. Nowhere in the opinion did the court specifically address this question. See id.
40. Messier, 62 Cal. App. 3d at 600, 133 Cal. Rptr. at 260 (quoting trial court's opinion that an order for educational expenses is not limited to the duration of minority).
41. An examination of the reported opinions in California reveals no cases in which parents have been required to provide their adult children with postsecondary education, absent an express agreement to do so, except when the child is still in high school. If the child is still in high school, unmarried, and under 19 years of age, the parental obligation to provide support continues. Cal. Civ. Code § 196.5 (West Supp. 1986). Accord Rebensdorf v. Rebensdorf, 169 Cal. App. 3d 138, 143, 215 Cal. Rptr. 76, 79 (1985) (incapacity of 18-year-old remaining in high school due to parents' decision to have him held back presents triable issues of fact).
42. See In re Marriage of Epstein, 24 Cal. 3d 76, 90, 592 P.2d 1165, 1173-74, 154 Cal. Rptr. 413, 421-22 (1979) (daughter's college expenses could be considered as factor affecting ability of father to pay spousal support); In re Marriage of Paul, 173 Cal. App. 3d 913, 921, 219 Cal. Rptr. 318, 322 (1985) (trial court abused its discretion by refusing to consider voluntary contributions to children's college expenses as factor in assessing request for modification of spousal support award); In re Marriage of Kelley, 64 Cal. App. 3d 82, 95, 134 Cal. Rptr. 259, 266 (1976) (permitting reduction in amount of spousal support owed due to anticipated expenses flowing from daughter's enrollment in college).
43. See, e.g., Epstein, 24 Cal. 3d at 90, 592 P.2d at 1173-74, 154 Cal. Rptr. at 421-22 (permitting consideration of college expenses in making spousal support award); Kelley, 64 Cal. App. 3d at 95, 134 Cal. Rptr. at 266 (permitting reduction in spousal support award due to college expenses).
additional expense anticipated from the child’s enrollment in college.\textsuperscript{44} Three years later, the California Supreme Court held that in determining the amount of spousal support to be awarded, the trial court had not abused its discretion by considering expenses incurred in meeting the cost of a college education for a child who was eighteen years of age.\textsuperscript{45} The California Court of Appeal recently came even closer to requiring a father to provide postsecondary education to his adult children in \textit{Marriage of Paul.}\textsuperscript{46}

In \textit{Paul}, the trial court failed to consider the mother’s expenditures on college tuition and related costs for her adult children as a factor in establishing her need for increased spousal support.\textsuperscript{47} The appellate court found that this failure was an abuse of discretion on the part of the trial court.\textsuperscript{48} Consequently, the appellate court effectively compelled the father to subsidize the postsecondary education of his adult children through payment of increased spousal support.\textsuperscript{49}

The California Supreme Court has recognized that at common law parents had no duty to support adult children.\textsuperscript{50} By statute, however, parents have a duty to maintain a child who is unable to be self-sufficient.\textsuperscript{51} California courts have yet to characterize those persons pursuing postsecondary education as “needy” within the statutory meaning.\textsuperscript{52} Instead, California is endeavoring to take a less radical approach to the lack of parental support for postsecondary education. Recently, legislation designed to lessen the perceived inequities between the educational support afforded children of intact families

\textsuperscript{44} Kelley, 64 Cal. App. 3d at 95, 134 Cal. Rptr. at 266. The court further reduced spousal support because of the former wife’s increased ability to be self-sufficient, but the anticipated college expenses were responsible for the initial reduction. \textit{id.}

\textsuperscript{45} Epstein, 24 Cal. 3d at 90, 592 P.2d at 1173-74, 154 Cal. Rptr. at 421-22.

\textsuperscript{46} 173 Cal. App. 3d 913, 219 Cal. Rptr. 318 (1985).

\textsuperscript{47} \textit{Paul}, 173 Cal. App. 3d at 916, 219 Cal. Rptr. at 319.

\textsuperscript{48} \textit{id.} at 921, 219 Cal. Rptr. at 322.

\textsuperscript{49} \textit{See id.}


\textsuperscript{51} \textit{CAL. CIV. CODE} \S \textit{206} (West 1982). “It is the duty of the father, the mother, and the children of any person in need who is unable to maintain himself by work, to maintain such person to the extent of their ability.” \textit{Id. Cf.} Bryant v. Swoap, 48 Cal. App. 3d 431, 437, 121 Cal. Rptr. 867, 872 (1975) (duty of support persists after majority if child is needy).

\textsuperscript{52} Although those who are pursuing postsecondary education may be in a poor position to maintain themselves as a practical matter, no reported California opinions have been located in which courts are willing to characterize postsecondary students as “needy” persons.
and that received by children from dissolved marriages has been proposed.\textsuperscript{53}

A senate bill designed to alter certain provisions of the California Civil Code, giving California courts discretion to order child support payments to continue past the age of majority for children pursuing postsecondary education, was introduced in the California Legislature on March 7, 1986.\textsuperscript{4} On February 19, 1986, a second bill dealing with postsecondary support was introduced in the California Senate.\textsuperscript{55} This bill was intended to achieve approximately the same result as its predecessor.\textsuperscript{56} The method employed differs considerably, however, in that the second bill does not require that courts ordering postsecondary educational support first find that parents would have assisted their children but for the marital dissolution.\textsuperscript{57}

The evolution of educational support obligations in California began with early reluctance to require parents to provide postsecondary education for their children, even during minority when basic support obligations continue.\textsuperscript{58} The trend eventually turned toward requiring parents to provide postsecondary education for minor children.\textsuperscript{59} Recent efforts to impose a statutory obligation upon divorced parents to provide postsecondary education to their adult children under certain circumstances have gained momentum.\textsuperscript{60} These efforts, however, invite considerable scrutiny of their constitutionality and practicality.\textsuperscript{61} Furthermore, the California Legislature has overlooked at least one preferable alternative employed by other jurisdictions that have legislated in this area.\textsuperscript{62}

\textsuperscript{53} S.B. 1129, \textit{supra} note 7, sec. 1. The California Legislature has found that "the children of parents whose marriage has been dissolved often face disadvantages with respect to the payment of educational expenses beyond the age of 18 not experienced by children in intact families." \textit{Id.}

\textsuperscript{54} S.B. 1129, \textit{supra} note 7, sec. 1. \textit{See infra} text accompanying notes 149-59 (discussing the ramifications of Senate Bill 1129).

\textsuperscript{55} S.B. 2065, \textit{supra} note 7.

\textsuperscript{56} \textit{See id.} at Legislative Counsel's Digest (copy on file at the \textit{Pacific Law Journal}).

\textsuperscript{57} \textit{Compare} S.B. 2065, \textit{supra} note 7 with S.B. 1129, \textit{supra} note 7. S.B. 1129 does require that courts make a finding that but for the parents separation or the dissolution of their marriage they would have assisted their child with postsecondary education. \textit{Id.} sec. 4.

\textsuperscript{58} \textit{See supra} text accompanying note 24.

\textsuperscript{59} \textit{See supra} text accompanying notes 26-29.

\textsuperscript{60} \textit{See supra} text accompanying notes 53-57.

\textsuperscript{61} \textit{See infra} text accompanying notes 149-99 (discussing the constitutionality and practicality of Senate Bills 1129 and 2065).

\textsuperscript{62} \textit{See infra} text accompanying notes 200-11 (discussing superiority of a dependency approach).
Selected Comparative Practices

In most jurisdictions, child support awards for purposes of post-secondary education evolved through a progression similar to the development that took place in California.\(^{63}\) At the turn of the century, courts in other states were hesitant to order payment of postsecondary educational expenses when issuing child support orders.\(^{64}\) The judiciary eventually began characterizing postsecondary education as a "necessary"\(^{65}\) under some circumstances.\(^{66}\) Consequently, a number of jurisdictions began including payment for postsecondary education in child support awards.\(^{67}\)

The judiciary used a variety of devices to insure that parents ordered to make child support payments for postsecondary education retained funds sufficient to meet these obligations after their marriages were dissolved.\(^{68}\) Noncustodial parents commonly were ordered to establish a trust fund for use by their children when the time came to commence postsecondary study.\(^{69}\) Courts in certain jurisdic-

---

63. See supra text accompanying notes 21-60 (evolutionary progression in California).
65. See supra note 25 (definition of "necessary").
66. See Esteb v. Esteb, 138 Wash. 174, 182, 244 P. 264, 267 (1926). See also Pass v. Pass, 238 Miss. 449, 458, 118 So. 2d 769, 773 (1960) (parent required to pay for minor child's college education when child qualified for college); Cohen v. Cohen, 6 N.J. Super. 26, 30, 69 A.2d 752, 754 (App. Div. 1949) (court could order payment of support for college in family for which college attendance would be usual); Hart v. Hart, 30 N.W.2d 748, 751 (Iowa 1948) (father required to provide college education to sons because college education was appropriate).
67. See, e.g., Lund v. Lund, 96 N.H. 283, 284, 74 A.2d 557, 558 (1950); Hart, 30 N.W.2d at 750; Cohen, 82 N.Y.S.2d 513, 514 (Sup. Ct. Spec. Term 1948); Esteb, 138 Wash. at 185, 244 P. at 268.
tions ordered parents to purchase insurance policies so that the availability of funds for education would be assured in the event of the death of the parent under order to provide postsecondary education.\(^7\) Other courts merely ordered parents to continue periodic support payments while their children pursued higher education.\(^7\)

The reduction in the age of majority following the ratification of the twenty-sixth amendment\(^7\) had a detrimental effect on support awards for postsecondary education.\(^7\) Courts in many states were forced to resort to incorporating voluntary agreements made by divorcing parents into divorce decrees to assure support for young adults pursuing higher education.\(^7\) In recent years, several state legislatures have proffered solutions to this judicial impotence by passing legislation empowering the courts to order that educational support payments continue beyond the age of majority.\(^7\)

Although many jurisdictions impose postmajority support obligations upon all parents of children who are indigent or handicapped,\(^7\) laws dealing with postmajority educational support obligations typically apply only in marital termination cases.\(^7\) Laws empowering

\(^{216}\) N.W.2d 25, 30 (1974) (reversing order requiring father to establish educational trust for daughter's college education); Kunc v. Kunc, 186 Okla. 297, 302, 97 P.2d 771, 776 (1939) (reversing dismissal of petition to vacate decree requiring payment into fund for use after child's majority).


\(^{71}\) See, e.g., Mullen v. Sawyer, 277 N.C. 623, 626, 178 S.E.2d 425, 426 (1971) (support pursuant to consent decree ordered to continue during postsecondary education). In this type of case the obligation to continue child support during postsecondary education often was contingent upon whether the supporting parent shared control over the child's choice of school or curriculum.\(^7\)

\(^{72}\) U.S. CONST. amend. XXVI. The twenty-sixth amendment, ratified in 1971, provides in pertinent part that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."\(^7\)


\(^{76}\) Moore, Parents' Support Obligations to Their Adult Children, 19 AKRON L. REV. 183, 184 (1985). Thirty jurisdictions impose support obligations upon the parents of indigent adult children. Nineteen require support only when the child is physically or mentally handicapped.\(^7\) See HAW. REV. STAT. § 580-47 (1984); ILL. ANN. STAT. ch. 40, para. 513 (Smith-
courts, either explicitly or implicitly, to order support for adult children pursuing postsecondary education can be divided into two broad categories: statutes that impose an age ceiling and statutes that do not. Within these broad categories are subcategories containing conditions upon which the parental support obligations are contingent.

Among the laws imposing age ceilings, specific criteria may be required to give rise to the parental support obligation. The Iowa statute, for instance, conditions an award of educational support upon good-faith, full-time attendance at an appropriate school.

Similarly, the Oregon provision requires regular attendance at a school of a specific description. In contrast, the Massachusetts law requires only that the child be domiciled with and principally dependent upon a parent.

The laws that impose no age ceiling on the parental obligation to provide postsecondary education are rather circumspect about requiring specific criteria to be met. The Hawaii statute empowers courts to provide for the education of an adult or a minor child. Moreover, application for educational support need not be made before the child has attained majority. The first part of the Illinois statute is substantially identical to the Hawaii provision.

---


80. IOWA CODE ANN. § 598.1 (West 1981). The Iowa statute provides in pertinent part:

[Support] obligations may include support for a child who is between the ages of eighteen and twenty-two years who is regularly attending an approved school in pursuance of a course of study leading to a high school diploma or its equivalent, or regularly attending a course of vocational training . . . or is, in good faith, a full-time student in a college, university or area school . . . .

Id.

81. OR. REV. STAT. § 107.108 (1981). The Oregon provision applies to children between 18 and 21 years of age and requires regular attendance at a school, community college, college, or university or at a course of vocational or technical training designed to prepare the child for gainful employment. The Oregon provision also requires that the child be unmarried. Id.

82. MASS. GEN. LAWS ANN. ch. 208, § 28 (West Supp. 1986).


85. Id.


Illinois statute, however, goes on to require that courts consider all relevant factors in ordering support. Additionally, the Illinois statute has been applied by at least one court to require a father to pay the cost of his child's professional education, beyond the basic college education.

The Michigan and Washington support statutes are devoid of specific criteria upon which the parental support obligation rests. Case decisions, therefore, have provided the parameters within which postmajority educational support awards can be made in these two states. In cases involving exceptional circumstances, Michigan courts may require payment of support to a child who has reached the age of majority. Postsecondary education was characterized as an exceptional circumstance within the statutory meaning by a Michigan court in *Price v. Price*.

The Washington statute similarly lacks specific criteria upon which the postmajority support obligations rest. The statute provides for continuation of support past majority for children who are "dependent" upon either or both parents. The Supreme Court of Washington defined the term "dependent" in *Childers v. Childers*. In *Childers*, the trial court in a dissolution proceeding ordered the husband to pay support for his three sons during their college attendance, which extended four years beyond the age of majority. The 1973 Dissolution of Marriage Act had substituted "dependent children" for "minor children" in the Washington support statute. The Washington Supreme Court reasoned that through this substitution the legislature intended to change the rigid and arbitrary status of the child.

---

88. ILL. ANN. STAT. ch. 40, para. 513 (Smith-Hurd Supp. 1986). The statute specifically enumerates three factors: (1) the financial resources of both parents; (2) the standard of living the child would have enjoyed had the marriage not been dissolved; (3) the financial resources of the child. *Id.*


90. MICH. COMP. LAWS ANN. § 552.17a (West Supp. 1986).


92. See, e.g., *Price v. Price*, 395 Mich. 6, 11 n.5, 232 N.W.2d 630, 632-33 n.5 (1975) (college education comes within purview of support statute as "exceptional circumstances"); *Childers v. Childers*, 89 Wash. 2d 592, 601, 575 P.2d 201, 207 (1978) (en banc) (divorced parent may have duty of support for college education if duty works no significant hardship on parent and child shows aptitude for college work).

93. MICH. COMP. LAWS ANN. § 552.17a (West Supp. 1986).


96. 89 Wash. 2d 592, 575 P.2d 201 (1978) (en banc).

97. *Id.* at 594, 575 P.2d at 203.


99. *Childers*, 89 Wash. 2d at 595, 575 P.2d at 204.
embodied in the concept of minority, preferring instead a flexible fact-oriented status.\textsuperscript{100} The court found the determination that the Childers boys were in fact dependent was properly within the discretion of the trial court.\textsuperscript{101} Finally, the Washington court concluded that a divorced parent may owe a duty of support for postsecondary education, provided this duty does not work a significant hardship upon the parent, and the child shows an aptitude for higher education.\textsuperscript{102} The decision in Childers, therefore, has effectively transmuted the Washington dependency statute into a tool for providing support to adults during postsecondary education.

Case law in several other states also reflects the trend toward requiring divorced parents to provide their adult children with postsecondary education.\textsuperscript{103} Although a few states have steadfastly refused to recognize a parental duty to provide postsecondary education,\textsuperscript{104} California has contemplated legislation designed to impose this type of duty upon divorced parents.\textsuperscript{105} The California Legislature, however, must consider carefully the ramifications of a legislative scheme with this design, for the trend toward establishing a parental obligation to provide postsecondary education to adult children has been challenged on equal protection grounds.\textsuperscript{106} Moreover, the formulations recently proposed in California suffer from some inherent defects apart from the potential constitutional violations.\textsuperscript{107}

**CHALLENGING THE TREND**

The trend toward imposing an obligation on parents to provide postsecondary education to their adult children has met with consti-
tutional challenges founded upon equal protection grounds.\(^\text{108}\) The statutory formulations recently proposed in California, designed to impose such an obligation, invite similar challenges.\(^\text{109}\)

**A. Equal Protection**

Laws that discriminate on the basis of class distinctions invite constitutional challenges based on equal protection guarantees.\(^\text{110}\) Laws designed to impose an obligation upon parents to provide their adult children with postsecondary education have the potential to discriminate on three bases: the marital status of the parents,\(^\text{111}\) the affluence of the parents,\(^\text{112}\) and the intellect of the child.\(^\text{113}\) Two of the support statutes discussed earlier have been subjected to constitutional scrutiny as a result of assertions that they discriminate based on marital status.\(^\text{114}\)

In *Childers v. Childers*,\(^\text{115}\) the Washington Supreme Court found that the Washington statute imposing a duty on parents to support their dependent children, regardless of age, did not contravene the equal protection clause.\(^\text{116}\) Similarly, in *Marriage of Vrban*,\(^\text{117}\) the

---

108. See *Childers*, 89 Wash. 2d at 604, 575 P.2d at 209; *Vrban*, 293 N.W.2d at 202.

109. See infra text accompanying notes 154-66 (discussing the potential equal protection challenges to Senate Bills 1129 and 2065).

110. See U.S. Const. amend. XIV, § 1.

111. Most of the statutes reviewed that impose a parental obligation to provide child support during postsecondary education discriminate on the basis of marital status because they apply only to support obligations arising out of the termination of marital relationships. See * supra* note 77 and accompanying text.


113. The potential discrimination based on intellect results from the admission requirements of postsecondary educational institutions. Intelligence classifications, however, are not suspect within the context of equal protection and thus are entitled to an intermediate level of constitutional scrutiny only. See infra text accompanying note 128 (discussing intermediate level scrutiny). See also *Note, Equal Protection and Intelligence Classifications*, 26 STAN. L. REV. 647, 672 (1974).

114. *Childers*, 89 Wash. 2d at 605, 575 P.2d at 209 (challenging the constitutionality of Wash. Rev. Code § 26.09.100); *Vrban*, 293 N.W.2d at 202 (challenging the constitutionality of Iowa Code § 598.1).

115. 89 Wash. 2d 592, 575 P.2d 201 (1978) (en banc).

116. *Childers*, 89 Wash. 2d at 605, 575 P.2d at 209.

117. 293 N.W.2d 198 (Iowa 1980).
Supreme Court of Iowa determined that the Iowa statute defining support obligations to include a parental obligation to provide post-secondary education did not violate the equal protection clause. In both cases the courts used a rational relationship standard.

1. The Standard of Review

a. U.S. Constitution

The expression “equal protection of the laws” is not susceptible to precise definition. As a result, divergent standards of review have emerged under the equal protection clause. The traditional standard of review was extremely deferential, requiring only that questioned legislation have a reasonable basis. Eventually, a two-tiered equal protection approach became prevalent. Although the courts continued to apply the deferential standard to statutes regulating economic or social interests, a stricter standard was applied in exceptional cases. The “strict scrutiny” standard required that states show a compelling interest in the subject of the challenged statute. Strict scrutiny was applied to cases in which legislation implicated a suspect classification or impacted upon a fundamental interest.

118. Vrban, 293 N.W.2d at 202.
119. Childers, 89 Wash. 2d at 605, 575 P.2d at 209; Vrban, 293 N.W.2d at 202. The rational relationship standard measures the relationship of a legislative scheme against a state interest, culminating in a finding of constitutionality if the legislative scheme is rationally related to a legitimate state interest. Id.
120. The expression “equal protection of the laws” comes from the fourteenth amendment, which provides in pertinent part as follows: “No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.
124. See, e.g., Korematsu v. United States, 323 U.S. 214, 216 (1944) (pressing public necessity may sometimes justify the use of suspect classifications).
125. Veron, supra note 123, at 671.
Today, this two-tiered approach to equal protection analysis obtains, although some jurists have propounded an intermediate level of scrutiny in cases concerning quasi-suspect classes or quasi-fundamental interests. For consideration of the constitutional validity of postsecondary support obligations, however, this distinction is insignificant because the lowest level of scrutiny, bare rational relationship, applies to statutes affecting the financial interests of parents. A statute is presumed to be constitutionally valid when no fundamental interest or suspect classification is involved. The individual challenging the statute has the burden of demonstrating that the statute bears no rational relationship to a legitimate legislative purpose. A state legislature, therefore, need not establish the constitutionality of a proposed statute.

b. California Constitution

The California State Constitution includes an equal protection provision similar to that of the United States Constitution. The standards of review are substantially the same under both provisions. The tests used to interpret the California provision are the same as the tests used to define equal protection under the United States Constitution. Consequently, legislation imposing an obligation on parents to provide postsecondary education to their adult children, to the extent that the legislation classifies on the basis of

---


130. United States v. Carolene Products Co., 304 U.S. 144, 152-54 (1938); Lindsley, 220 U.S. at 78-79.

131. Carolene Products Co., 304 U.S. at 152-54; Lindsley, 220 U.S. at 78-79.

132. Cal. Const. art. I, § 7. Section 7(a) provides the following: "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . ." Id. Cf. U.S. Const. amend. XIV, § 1 (forbidding states to deny to persons due process or equal protection of the laws).


134. Id.
the parents' marital status or affluence, or the child's intellect, would be subject to a rational relationship test under either United States or California constitutional standards.

The California Supreme Court, in Ganschow v. Ganschow, applied a rational relationship test in assessing the constitutional validity of statutory classifications affecting postmajority support. Pursuant to a divorce decree entered prior to the reduction in the statutory age of majority, the trial court in Ganschow ordered a father to continue paying child support for his daughter while she remained in college. At issue was the constitutionality of the distinction in California Civil Code section 25.1 between different classes of parents concerning the support obligations owed to children. Section 25.1 effectively creates two classifications of child support obligations: one based on orders entered prior to March 4, 1972, which may continue in effect until the child reaches twenty-one years of age, and another based on orders entered after March 4, 1972, which terminate when the child attains age eighteen.

The California Supreme Court determined that the classifications created by Civil Code section 25.1 neither infringed fundamental rights nor affected a suspect class. Rather, the court characterized the parental interest affected as a purely monetary interest. The court, therefore, required only that "[the] statute bear some rational relationship to a conceivable legitimate state purpose." Although the provisions of Civil Code section 25.1 differ from the provisions contained in the recently proposed legislation, California courts would likely characterize the parental interests affected by the proposed legislation as predominantly monetary, based on the rationale of the court in Ganschow. Consequently, a Ganschow analysis would require that a rational relationship test be applied to determine the constitutionality of the proposed changes pursuant to the equal

---

136. Ganschow, 14 Cal. 3d at 158, 534 P.2d at 709, 120 Cal. Rptr. at 869.
137. Id. at 154, 534 P.2d at 706, 120 Cal. Rptr. at 866.
139. Ganschow, 14 Cal. 3d at 158, 534 P.2d at 709, 120 Cal. Rptr. at 869.
140. Id.
141. Id.
142. Id.
143. Id.
144. Civil Code § 25.1 merely establishes the new age of majority. CAL. CIV. CODE § 25.1 (West 1982). The proposed legislation would, in a sense, create an exception to the age of majority. See S.B. 1129, supra note 7; S.B. 2065, supra note 7.
protection guarantees of both the United States and California constitutions.

2. California Legislation

Two senate bills introduced during the 1985-86 regular legislative sessions reflect the concern of California legislators over the disparity in parental assistance given to postsecondary students who are children of dissolved marriages as compared with that given students from intact families. Both bills purport to address this disparity by empowering California courts to order continuation of child support beyond the age of majority for children pursuing postsecondary education. To the extent that the provisions of the bills create classifications based on marital status, affluence, and intellect, the bills are subject to equal protection challenges. Moreover, the statutory changes contemplated under the bills contain ambiguities and would result in judicial speculation.

a. Senate Bill 1129

Senate Bill 1129 (S.B. 1129), in its various permutations, would alter certain provisions of, and add a section to, the California Civil Code. The new section would authorize a court to order payment of support for the costs of maintenance and education of children after the age of majority. The court, however, would have to find that but for the parents' separation or the dissolution of their marriage the parents would have assisted their adult child with support during postsecondary education. S.B. 1129 also suggests criteria that may be considered by the court in making this determination. These criteria include the following:

1. the pattern of parental support for education and training and the pattern of educational attainment of other family members, including the child's grandparents, parents, aunts, uncles, siblings, step-siblings and half-siblings;

145. S.B. 1129, supra note 7; S.B. 2065, supra note 7.
146. S.B. 1129, supra note 7; S.B. 2065, supra note 7.
147. See infra text accompanying notes 154-66.
148. See infra text accompanying notes 168-99.
149. S.B. 1129, supra note 7, secs. 2-5. S.B. 1129 would amend §§ 4351, 4700 and 7010 of the Civil Code and add § 4700.8 to the Civil Code. Id.
150. S.B. 1129, supra note 7, sec. 4.
151. Id.
152. Id.
(2) relevant statements or plans made or acquiesced in by the parent prior to the parents' legal separation or the dissolution of their marriage;
(3) the professional standing of the parent;
(4) the standard of living of the parent;
(5) the child's commitment to and aptitude for education and training;
(6) the child's past behavior in pursuing his or her goals for education or training.

These factors suggest class distinctions warranting an equal protection analysis apart from the challenge invited by the patent discrimination based on marital status.

Because this new provision would be used to impose postmajority educational support obligations only on parties to separation or dissolution actions, the provision discriminates based on marital status. Furthermore, some of the factors proposed by the legislature favor children with high intellect and affluent parents by giving them support, simultaneously disadvantaging the affluent parents by forcing them to provide their children with postsecondary education. Since neither marital status, intellect, nor affluence are regarded as suspect classifications for equal protection purposes, the proposed statute need only bear a rational relationship to a legitimate legislative purpose to be found constitutional.\textsuperscript{153}

The California Legislature has asserted that the state and citizens have a substantial interest in the education of the inhabitants of California.\textsuperscript{154} Indeed, higher education has been at the forefront of economic growth in California.\textsuperscript{155} To the extent that the legislation proposed by S.B. 1129 would apply only in cases of marital dissolution,\textsuperscript{156} however, S.B. 1129 is not entirely consistent with the purpose of promoting education. The proposed legislation nevertheless may serve a legitimate purpose. Generally, courts and legislators alike accept the premise that parents whose marriages have been dissolved are less likely to assist their children with educational expenses past the age of majority than are parents of intact families.\textsuperscript{158}

\textsuperscript{153} Id.
\textsuperscript{154} Ganschow, 14 Cal. 3d at 158, 534 P.2d at 709, 120 Cal. Rptr. at 869.
\textsuperscript{155} Both S.B. 1129 and S.B. 2065 contain express findings to this effect made by the California Legislature. S.B. 1129, supra note 7, sec. 1; S.B. 2065, supra note 7, sec. 1.
\textsuperscript{156} T. Hayden, supra note 4, at 1.
\textsuperscript{157} S.B. 1129, supra note 7, sec. 1.
\textsuperscript{158} In re Marriage of Vrban, 293 N.W.2d 198, 202 (Iowa 1980); Esteb v. Esteb, 138 Wash. 174, 184, 244 P. 264, 267 (1926); S.B. 1129, supra note 7, sec. 1; S.B. 2065, supra note 7, sec. 1.
The logical extension of this premise is that to encourage education, some accommodation must be made for the disadvantaged children of dissolved marriages. The proposed statute, therefore, would seem to bear a rational relationship to the legislative purpose of fostering education, albeit an indirect relationship. Moreover, a legislative scheme can withstand equal protection scrutiny even if the scheme does not offer a solution to the entire problem at which the scheme is directed. The statute proposed by S.B. 1129 should survive an equal protection attack.

b. Senate Bill 2065

Senate Bill 2065 (S.B. 2065) would add a section to the California Civil Code. The proposed section would permit courts entering or amending child support awards to provide for continuation of support payments to any unmarried child who is a full-time student at an accredited institution of higher learning. Since the purpose of S.B. 2065 is to extend parental child support obligations arising from marital dissolutions, the proposed legislation will discriminate on the basis of marital status. Because S.B. 2065 does not prescribe discriminatory factors to guide judges in making the decision to order child support for postsecondary education, however, S.B. 2065 is less offensive to equal protection sensibilities than S.B. 1129. The legislation proposed under S.B. 2065, however, does contain one limit not found in the provisions of S.B. 1129. S.B. 2065 imposes an age ceiling of twenty-one years on recipients of postsecondary educational support awards made pursuant to the proposed provision. Because of this seemingly arbitrary designation of twenty-one

159. Railway Express v. New York, 336 U.S. 106, 110 (1949) (stating that equal protection does not require that all evils of the same genus be eradicated); Park & Shop Market, Inc. v. City of Berkeley, 116 Cal. App. 3d 78, 92, 172 Cal. Rptr. 515, 520 (1981) (equal protection does not require that all problems of the same type be solved in a single legislative scheme).

160. See S.B. 2065, supra note 7, sec. 2. S.B. 2065 would add § 4709 to the Civil Code. Id.

161. Id.


163. Since S.B. 2065 does not prescribe specific factors, the only patent discrimination contained in the provisions proposed by S.B. 2065 is on the basis of marital status. Discrimination on the basis of the parents' affluence or the child's intellect might occur, but will depend on choices made by individual jurists applying the provisions. The factors embodied in the S.B. 1129 proposal, however, virtually mandate discrimination on the bases of affluence and intellect. See supra text accompanying notes 152-53.

164. S.B. 2065, supra note 7, sec. 2. Cf. S.B. 1129, supra note 7. Although S.B. 1129 does not propose an age ceiling, it does provide that actions be brought before the child for whom support is sought reaches 23 years of age. Id. sec. 4.
years as the limit on postsecondary educational support, the rationality of the relationship between the proposed addition and the legislature’s avowed purpose of fostering higher education is rather dubious. Most children do not complete postsecondary education until after their twenty-second birthday, and graduate or professional training usually extends well beyond age twenty-one. Consequently, the age ceiling precludes meaningful awards by assuring support sufficient only for three years of postsecondary education. Furthermore, inclusion of the twenty-one year age ceiling strongly suggests that the true purpose of S.B. 2065 is to restore the circumstances that existed prior to reduction of the statutory age of majority, rather than to promote higher education.

When the rationality of legislation is challenged on equal protection grounds, the judiciary affords great deference to the legislative scheme, which need not be designed to work a total solution to the problem addressed. Regardless of the legislative purpose, inclusion of the twenty-one year age ceiling in the proposed section nevertheless would enable postsecondary students between eighteen and twenty-one years of age to secure support. Thus, a partial solution to the educational disadvantages suffered by children of dissolved marriages would result. A partial solution in turn would foster higher education indirectly. For this reason, the formulation suggested under S.B. 2065 probably would survive equal protection scrutiny. Despite this likelihood, the proposed statutes would also result in some very adverse practical effects.

B. Practical Effects of California’s Proposed Resolutions

The recent proposals by the California legislature suffer from inherent defects unrelated to the equal protection challenges they invite. One defect stems from a latent ambiguity contained in each of the bills which might be interpreted to create a cause of action for educational support for adult children from intact families. The other defects are manifested by the speculative and disparate results that are likely to occur under the proposed legislation.

165. See supra note 9.
166. Railway Express, 336 U.S. at 110 (stating that equal protection does not require that all evils of the same genus be eradicated); Park & Shop, 116 Cal. App. 3d at 92, 172 Cal. Rptr. at 520 (equal protection does not dictate that a single legislative scheme be designed to solve all problems of the same type).
167. S.B. 1129, supra note 7; S.B. 2066, supra note 7.
168. See infra text accompanying notes 170-80.
169. See infra text accompanying notes 181-99.
1. Legislative Ambiguities

The provisions proposed by both S.B. 1129 and S.B. 2065 purport to limit recovery of postmajority educational support to actions brought pursuant to the California Family Law Act. California Civil Code section 4700, the section of the Family Law Act dealing with orders for support, makes specific reference to California Civil Code section 206, which establishes a reciprocal duty of support between parents and children based on need. To be eligible for support under section 206, persons seeking support must be unable to maintain themselves by work. Inability to maintain oneself by work may be due to a lack of education, or due to the time constraints posed by the pursuit of education.

In Rebensdorf v. Rebensdorf, the California Court of Appeal determined that questioning whether the status of an individual as a student creates an inability to be self-sustaining by work presents a triable issue of fact. The indirect reference to actions under Civil Code section 206 in the two senate bills consequently leaves open a tiny avenue by which a postsecondary student might assert a right to educational support from the student's parents by alleging an inability to be self-sustaining prior to completion of the postsecondary education. In Rebensdorf, however, the adult child who sought support was still in high school because he had repeated the first grade. The fact that society perceives high school education as essential and postsecondary education as useful though not vital undermines the applicability of the Rebensdorf reasoning to issues concerning postsecondary support obligations. Moreover, one of the

171. Cal. Civ. Code § 206 (West 1982). The reference to § 206 in the proposed statutes concerns the authorization of courts to render support orders for children for whom support is authorized under § 206. Id.
173. See Rebensdorf v. Rebensdorf, 169 Cal. App. 3d 138, 143-44, 215 Cal. Rptr. 76, 79 (1985) (implying that inability to be self-sustaining may result from temporary condition such as enrollment in educational program).
175. Rebensdorf, 169 Cal. App. 3d at 143, 215 Cal. Rptr. at 79.
176. Id. at 143, 215 Cal. Rptr. at 78-79.
purposes of continuing support of a needy child past majority is to avoid burdening society with the child’s support.\textsuperscript{179} An individual without postsecondary education is not necessarily a burden on society since many jobs require no postsecondary education.

Admittedly, interpreting the provisions of the bills as providing children from intact families with a cause of action for postsecondary support against their parents would preclude constitutional challenges asserting discrimination against parents based on their marital status because all parents would have the same duty.\textsuperscript{180} This dubious interpretation, however, would not reduce the likelihood of equal protection challenges on other bases.\textsuperscript{181} Furthermore, courts are generally reluctant to permit intervention into the affairs of intact families.\textsuperscript{182} Thus, any attempt to assert a cause of action for support during postsecondary education, solely on the strength of the ambiguities found in S.B. 1129 and S.B. 2065, should meet with little success.

2. The Judiciary: Omniscient or Omnipotent?

More dangerous than the legislative ambiguities contained in S.B. 1129 and S.B. 2065 is the threat of speculative and disparate results should either bill or a similar formulation pass. The statutory changes proposed by both S.B. 1129 and S.B. 2065 would give the judiciary discretionary authority to order child support payments for adult children who pursue postsecondary education.\textsuperscript{183} Since discretion traditionally has played a major part in child support decisions,\textsuperscript{184} the


\textsuperscript{180} See supra text accompanying notes 151-59 (discussing discrimination based on marital status under S.B. 1129); supra text accompanying notes 162-63 (discussing discrimination based on marital status under S.B. 2065).

\textsuperscript{181} See supra text accompanying notes 154-59 (discussing discrimination based on intellect and affluence).

\textsuperscript{182} See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (requiring Amish parents to send child to school beyond eighth grade held unconstitutional). Interestingly, in \textit{Yoder} the court did not address the situation in which the parents and child disagree on school attendance. See \textit{id}. Since this would be the situation in cases asserting a cause of action based on the ambiguities in the two bills, perhaps courts would abandon their reluctance to intervene in intact families. For if the parents and child are at odds over school attendance, family disharmony no doubt exists. See also Griswold v. Connecticut, 381 U.S. 479 (1965) (state forbidden to intervene in matters of family privacy concerning contraception). \textit{Cf.} Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (state statute preventing parents from electing to send their children to private rather than public school held unconstitutional).

\textsuperscript{183} S.B. 1129, \textit{supra} note 7, sec. 4 (“the court may order”); S.B. 2065, \textit{supra} note 7, sec. 2 (“an order for child support . . . may provide, or may be amended to provide”).

\textsuperscript{184} See \textit{In re} Marriage of Aylesworth, 106 Cal. App. 3d 869, 876, 165 Cal. Rptr. 389, 393 (1980) (holding it is well settled that the amount of child support rests in the sound discretion of the trial court).
grant of discretion proposed under either senate bill is not, of itself, an evil. Discretion exercised in conjunction with either the factors recommended by S.B. 1129 or factors conceived in the minds of judges, however, requires judicial omniscience, or establishes judicial omnipotence on the subject of educational opportunities.

S.B. 1129 would require that before ordering postmajority support for educational purposes, the court must find that but for the parents' separation or the dissolution of their marriage, the parents would have provided support for the education of the adult child. Requiring a finding of this type forces courts to speculate on how parents would have behaved had their marriages survived. S.B. 1129 recommends factors to be considered by the courts in making the required finding. Among these factors are the following: The pattern of parental support for education; relevant plans; the professional standing of the parent; the standard of living of the parent; the child's commitment to and aptitude for education. Since these factors favor persons from backgrounds suggesting advanced education and affluence, they tend to perpetuate the social stratification that exists as a result of disparate educational opportunities. In this regard, the recommended factors are undesirable, for they contravene the strong policy of promoting equal opportunity prevalent in this country.

The factors recommended in S.B. 1129 admittedly seem relevant in determining how parents would have conducted themselves if the family had remained intact. If the intent of the legislature is to return the family to the predissolution status quo, the provisions of S.B. 1129 are consistent with that intent. The California Legislature, however, cannot hope to relieve all of the hardships created by marital dissolution. Furthermore, the use of these factors does not

185. S.B. 1129, supra note 7, sec. 4.
186. Id.
187. Id.
render a determination under S.B. 1129 free from speculation. The judiciary still would be required to guess at a course of conduct that would have occurred in the future. Indeed, the bill demands judicial omniscience.

Unlike S.B. 1129, S.B. 2065 does not suggest guidelines under which the proposed legislation should be used. The only criteria included in S.B. 2065 are that the child in question be unmarried and a full-time student, in good standing, at an accredited institution of higher learning. Once these two criteria are met, application of the proposed legislation is left to judicial discretion. The language of S.B. 2065 provides no clear guidance regarding what factors ought to be considered. This deficiency could be corrected easily by incorporating guidelines into the provisions of S.B. 2065. The danger, of course, is in the choice of guidelines. If the legislature were to incorporate guidelines similar to the factors recommended in S.B. 1129, or the judiciary were to apply similar factors, the same adverse effects would result.

More importantly, S.B. 2065 would result in a kind of judicial omnipotence in matters of postsecondary educational support for students from dissolved families. Under the provisions of S.B. 2065, judges would be free to decide which children should receive support during postsecondary education using any method, as long as the decision stops short of an abuse of discretion. Deciding whether a child should receive postsecondary support requires a different sort of inquiry than deciding basic child support issues. In ordering basic child support, judges are not called upon to decide whether a child needs food, clothing, shelter, and education, but are only expected to decide which parents will contribute support and in what amounts.

---

190. See S.B. 2065, supra note 7.
191. Id. sec. 2.
192. Id. Under S.B. 2065, proposed Civil Code § 4709 provides:
   Notwithstanding any other provision of law, an order for child support issued pursuant to this part may provide, or may be amended to provide, that support shall continue to be paid as to any unmarried child who is a full-time student during the academic year, in good standing, in an accredited institution of higher learning . . . .
   Id. (emphasis added).
193. See supra text accompanying notes 185-89 (discussing speculation and social stratification resulting under the provisions of S.B. 1129).
195. See CAL. CIV. CODE § 196 (West 1982). Parents are required to provide their children with support and education in a manner suitable to the circumstances of the children, taking into account the respective earnings or earning capacities of the parents. Imposition of this duty is not within the discretion of courts. Id.
The provisions of S.B. 2065, however, do not purport to impose an absolute obligation upon parents to provide their children with post-secondary education. Instead, S.B. 2065 would place imposition of this obligation within the discretion of the judiciary. The allocation of this determination to the judiciary tacitly requires a preliminary inquiry by judges into whether the child ought to receive a post-secondary education before the judge could consider whether the parents should contribute and in what amounts. Herein lies the grant of judicial omnipotence in matters of educational opportunity. Conceivably, a child who otherwise qualifies for relief under the provisions of S.B. 2065 could be denied postsecondary support simply because a judge believes further education for the child would be a frivolous use of the parents' money.

Admittedly, a conscientious judiciary would probably refrain from imposing personal educational standards upon others, choosing instead to use the traditional child support standards of need and ability to pay. The California Legislature, however, need not rely on judicial equanimity. S.B. 2065 provides a foundation upon which the Legislature could build to establish a dependency standard for postsecondary educational support.

C. Dependency: A Superior Solution

The California Legislature cannot expect to relieve all of the educational hardships caused by marital dissolution any more than the legislature can expect to relieve the resultant emotional suffering. Just as the legislature could not require noncustodial parents to play ball with their children or spend holidays with them, it cannot mandate meaningful participation by parents in the postsecondary education of their children. The legislature, however, does have the

196. The bill does not require the judiciary to order postsecondary support. See S.B. 2065, supra note 7.
197. Id. See also supra note 181 (identifying language in S.B. 2065 making award discretionary).
198. Appellate courts cannot interfere with trial court child support orders unless, as a matter of law, an abuse of discretion is shown. Aylesworth, 106 Cal. App. 3d at 876, 165 Cal. Rptr. at 393. Review of decisions made on the basis of the personal views of judges, therefore, is unlikely since an abuse of discretion would not necessarily be apparent in the result reached by the judge.
power to impose an obligation upon parents to support their adult children who pursue postsecondary education.\textsuperscript{200}

The methods proposed by the legislature in S.B. 1129 and S.B. 2065 are needlessly deficient because they could be modified to incorporate a variation of the approach used by other states. Several states consider two simple factors: the child’s capacity for academic achievement and the parents’ financial ability to assist with postsecondary educational expenses.\textsuperscript{201} Indeed, one commentator has proposed a model provision embracing these two factors.\textsuperscript{202} The utility of these factors lies in their susceptibility to objective proof without resort to speculation. One need only produce adequate academic and financial records to satisfy the court that an educational support award is warranted.\textsuperscript{203} An academic capacity standard, however, is not particularly egalitarian in a society in which equal opportunity in education is fundamental.\textsuperscript{204}

Rather than emphasizing the child’s capacity along with the parents’ financial ability to provide postsecondary support, California might adopt a simple dependency standard, substituting a “need” requirement for the academic capacity element of the common approach. Washington applies a dependency standard to require divorced parents to provide postsecondary support when their adult children are dependent due to the demands of education.\textsuperscript{205} Similarly, the Florida Supreme Court has indicated that the pursuit of education may render a person dependent.\textsuperscript{206} The provisions of S.B. 2065

\textsuperscript{200} See supra text accompanying notes 120-66 (concluding that California’s postsecondary support schemes will withstand equal protection challenges).


\textsuperscript{202} Veron, supra note 123, at 684. The model provision was designed to be added to state statutory schemes governing marriage and divorce. The provision recommends that courts consider the following factors in making awards for postmajority educational support: (1) the financial resources of both parents; (2) the financial resources of the child; (3) the standard of living the child would have enjoyed had the marriage not been dissolved; (4) the child’s abilities and ambitions. Id.


\textsuperscript{204} See, e.g., Serrano v. Priest, 18 Cal. 3d 728, 766, 557 P.2d 929, 951, 135 Cal. Rptr. 345, 367 (1976), cert. denied, 432 U.S. 907 (1977) (endorsing assertion that education is a fundamental interest under the California Constitution).

\textsuperscript{205} See Childers v. Childers, 89 Wash. 2d 592, 575 P.2d 201 (1978) (en banc) (applying dependency standard to award support for college). See also supra notes 96-102 and accompanying text (describing Washington’s use of a dependency statute to make awards for postsecondary education).

contain criteria that are consistent with a dependency approach. The California Legislature should simply amend S.B. 2065 to mandate that courts order support to continue for an adult child if, in the judgment of the court, the child is in fact dependent upon the child's parents by virtue of enrollment in a course of postsecondary study.

The advantages of a dependency approach are manifold. First, dependency is a very simple question of fact. Dependency can be proven by objective evidence of the lack of resources and inability to amass them. In making a determination of dependency, courts could look to facts such as whether the child lives with a parent, whether the child works or has financial resources, and whether the child has marketable skills which could be turned to income without sacrificing the academic pursuits. Once the child is found to be dependent, the court could order the parent to contribute to the child's education, provided that the parent has the financial resources to contribute without imposing a substantial hardship upon the parent or other family members. The underlying duty to provide postsecondary support need not depend upon the affluence of the parent, but the extent of the duty could be limited by ability to pay.

Second, the characterization of the child as factually dependent bears little relationship to family history concerning educational attainment. A dependency approach, therefore, is far more egalitarian than approaches requiring speculation or permitting arbitrary application.

A dependency standard, of course, is subject to some of the same concerns as the approaches contained in S.B. 1129 and S.B. 2065. If the dependency standard were to be construed as permitting courts to order all parents regardless of marital status to support their dependent children who are postsecondary students, courts would be forced to intervene in intact families. But there is probably very little family harmony present in the family that includes a child who

---

207. The provisions of S.B. 2065 would allow orders of postsecondary support only for unmarried, full-time students. S.B. 2065, supra note 7, sec. 2. These two criteria suggest that children qualifying for support under the provisions of S.B. 2065 are more likely to be dependent on their parents than are unqualified married or part-time students.


210. See supra note 180 (demonstrating reluctance of courts to allow intrusion into affairs of intact families).
is willing to bring this kind of action and parents who are able but unwilling to assist the child despite genuine need. Furthermore, indicia of dependency probably would be absent in a family of this description. The parents likely would not provide the child with support of any kind once the child attains majority.

If the dependency standard were confined to child support orders entered pursuant to marital separation or dissolution, discrimination on the basis of marital status would result. Like the provisions of S.B. 1129 and S.B. 2065 which similarly discriminate, the dependency approach should withstand constitutional scrutiny.211

A dependency approach is superior to the approaches proposed in S.B. 1129 and S.B. 2065. The superiority of the dependency approach stems from the ease with which a dependency determination can be made on the basis of existing facts. Furthermore, the dependency approach requires no speculation and leaves little room for abuse of discretion.

CONCLUSION

The trend toward imposing a parental obligation to provide post-secondary education has evolved from early rejection to modern acceptance. With the widespread reduction in the age of majority that took place in the mid-1970s, states were forced to revise their statutory schemes so that postsecondary education could be assured to adult children from dissolved marriages. California most recently joined this movement by entertaining two senate bills, either of which would permit courts to order postsecondary support.

California undoubtedly has a legitimate interest in fostering higher education, as well as in mitigating the educational disadvantages caused by marital dissolutions. The statutory schemes recently proposed in the California Legislature, aimed at protecting these interests, probably would withstand equal protection challenges. The recent proposals, however, require a great deal of speculation by the judiciary and are thus susceptible to abuse and inconsistency. In contrast, a statutory scheme emphasizing a flexible dependency approach would comport with the objectives of fostering higher education and mitigating the educational disadvantages caused by marital dissolutions, without requiring speculation or permitting abuse. If

211. See supra text accompanying notes 151-66 (concluding provisions of bills discriminating on the basis of marital status will withstand an equal protection challenge).
the California Legislature must persist in the attempt to mandate that parents provide their adult children with postsecondary education, the legislature should consider the dependency approach. Failing legislative adoption of a dependency approach, the judiciary should use a dependency standard in conjunction with whatever legislative scheme is adopted in California to the extent possible under the inevitable grant of discretion.

Terry L. Thurbon