

Child Support for Post-secondary Education: Empirical and Historical Perspectives

by

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In 2014, only 46% of children younger than eighteen lived in a home with their married, legal parents, compared to 61% in 1980 and 73% in 1960.² Most of the remaining children lived with their mothers,³ and, regardless of whom they lived with, were eligible for child support from their absent parent(s). However, if child support ends at age eighteen, the usual age of majority, many of these children may be unable to attend post-secondary school because they cannot afford it or, if they get loans to pay for school, will leave school with very large debts. In about a third of all jurisdictions – sixteen states and the District of Columbia – the law allows courts to award post-majority child support for education to address this problem.⁴ This paper addresses

¹ Dorothy Kliks Fones Professor, University of Oregon School of Law. Stephanie Bullard, UO Law class of 2017, and my husband, Dr. Charles Patton, provided great help with the statistical analysis in this paper. Many thanks!

² Gretchen Livingston, *Fewer Than Half of U.S Kids Today Live in a "Traditional" Family*, PEW RES. (Dec. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/>. These figures include only opposite-sex couples. Much of the increase is attributable to the number of children born to unmarried parents, who were about 40% of all births in 2014, compared to 10% in 1970. Brady E. Hamilton et al., *Births: Final Data for 2014*, 64 NAT'L VITAL STAT. REP. 2 (Dec. 23, 2014); Stephanie J. Ventura et al., *Nonmarital Childbearing in the United States, 1940-99*, 48 NAT'L VITAL STAT. REP. tbl. 4 (Oct. 18, 2000), http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvsr48_16.pdf. Nonmarital unions are more likely to break up than marriages; by five years after a child's birth, 60% of the couples have broken up. Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, 20 FUTURE OF CHILD. 17, 21 (Fall 2010).

³ U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS OLD: 1960 TO PRESENT (Nov. 2015), <http://www.census.gov/hhes/families/files/ch1.xls>.

⁴ National Conference of State Legislatures, *Termination of Support – College Support Beyond the Age of Majority* <http://www.ncsl.org/research/>

whether there is evidence that such laws have had a measurable effect on children attending post-secondary schools, why more states do not have the laws, and whether current circumstances support a recommendation that other states enact such laws.

While one might assume that post-secondary education child support laws make it more likely that children will get advanced education, to my knowledge the effect of the laws has not been evaluated before. Therefore, I undertook an empirical analysis of their effect and found that, indeed, enabling courts to order post-majority support is significantly correlated with a higher proportion of the young people in the state obtaining education beyond high school and graduating from college. In other words, such laws appear to address one of the great disadvantages to children of not growing up in home with both their legal parents, that they generally have lower levels of academic achievement and are much less likely to go to college than their counterparts living with both legal parents.⁵ The first part of this paper discusses this study.

However, since it has probably been assumed all along that post-secondary educational support laws help increase the educational achievements of young people, other concerns must convince legislatures that they should not enact such laws. The most

human-services/termination-of-support-college-support.aspx (last visited Oct. 7, 2016). This list does not include the District of Columbia, but it should because a statute authorizes child support orders through age 21 there. D.C. CODE § 46-101 (2016).

In contrast, Canadian federal law governing divorce gives courts authority to order post-majority support for children who are in school or otherwise dependent, and laws in most of the provinces grant the same authority for children whose parents are not married. Most of the Canadian orders end when the children are in their twenties, although there is a trend to extend the support obligation to cover graduate school. Nicholas Bala & Sarah Spitz, *Support for Adult Children in Canada: When Does Childhood End?* (2016), <https://ssrn.com/abstract=2799767>.

⁵ Wendy Sigle-Rushton & Sara McLanahan, *Father Absence and Child Well-Being: A Critical Review*, in *THE FUTURE OF THE FAMILY* 116, 120–21 (Daniel P. Moynihan et al. eds. 2004), http://www.ibrarian.net/navon/paper/Father_Absence_and_Child_Well_being__A_Critical_R.pdf?paperid=337801. This article reported that 71% of children living with both biological parents went to college, but only half of children living with their mothers did. More children in stepfamilies go to college than children in single parent families, but still fewer than those who live with both legal parents.

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obvious objection is that laws that authorize post-secondary child support apply only to divorced or never-married and separated parents; parents whose marriages are intact are exempt. Divorcing parents through the years have consistently objected to this differential treatment.⁶ A less obvious but ultimately more important objection is that requiring parents to provide financial help to their “adult” children unduly interferes with the parents’ judgments about when childhood should end and how to help their children become independent adults.

The legal history of child support enforcement since the nineteenth century reveals that whether and when courts should be able to order parents to provide for their children, including educating them, are not new questions. Since the time of the earliest legal steps to make parents’ duties to support and educate legally enforceable, opponents have objected and asserted that such matters should be within parental discretion. Over the last two centuries, child support law has evolved with changes in society, first to allow courts to order parents to support their children at all, and later to require parents to allow children to attend school rather than going to work. The second part of this paper traces this history and shows that as society has become more complex, the social understanding of teenagers’ place in society and how much education they require to be effective citizens has evolved. This change, combined with increases in family dissolution, has produced laws that dictate how much schooling children should have and, when necessary, when parents must pay for it.

The third section of the paper examines current conditions, including the increasingly common expectation that young people will seek advanced education and the increasingly high costs of that education. Based on these changes and the efficacy of post-secondary child support laws, the conclusion argues that today courts should routinely have the authority to order parents who are not living with their children to continue providing financial assistance to the children for education beyond high school.

⁶ For a discussion of equal protection challenges to laws allowing courts to order only divorced parents to help pay for their children’s post-secondary education, see *infra* note 106 and accompanying text.

I. The Relationship Between Secondary Education Support Laws and Children's Educational Achievements

The percentage of young people aged 18 to 24 who are enrolled in or have graduated from college (the college participation rate) varies dramatically among the states. In 2014, at the low end of the scale, the college participation rate in Alaska was only 30%, and in Nevada the rate was 35%. At the high end of the scale, 68% of people 18 to 24 in the District of Columbia and 63% in Massachusetts were in or had completed college.⁷ While neither Alaska nor Nevada allows courts to order support for children older than eighteen, and both Massachusetts and the District of Columbia do,⁸ many variables besides the presence or absence of laws allowing for post-secondary educational support affect the college participation rate of young people. It certainly cannot be said that the laws determine the differences among the states.

The question I asked, though, is whether the presence or absence of a law is significantly correlated with differences in the rates of college participation. The results of a statistical analysis suggest that the statutes play a significant role in the variation in college participation rates among the states. This analysis was done twice, first for 2014, and then for 2010. The data on the percentage of people aged 18 to 24 who were attending or who had graduated from college in each year comes from the Kids Count Databook,⁹ and the information on state law comes from the National Conference of State Legislatures.¹⁰

For each year, a point-biserial correlation was run between the presence or absence of a law allowing post-secondary support and the percentage of residents age 18 to 24 who were college

⁷ Annie E. Casey Kids Count Data Center, *YOUNG ADULTS AGES 18 TO 24 WHO ARE ENROLLED IN OR HAVE COMPLETED COLLEGE*, <http://datacenter.kidscount.org/data/tables/77-young-adults-ages-18-to-24-who-are-enrolled-in-or-have-completed-college> (last visited Nov. 4, 2016).

⁸ National Conference of State Legislatures, *supra* note 4. R

⁹ See Annie E. Casey Kids Count Data Center, *supra* note 7.

¹⁰ See National Conference of State Legislatures, *supra* note 4. This source shows state laws as of 2016, and the author then checked to determine whether any state's law had changed between 2014 and 2016. None had. R

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attendees or graduates.¹¹ In 2014, there was a statistically significant correlation between the presence of a law allowing courts to make post-secondary support orders and college participation at the 95% confidence level; having such a law accounted for 7.6% of the variability in college participation.¹² For 2010 the correlation was not as strong. There was no statistically significant correlation between the existence of a law and college participation rate at the 95% confidence level, but the results were significant at the 90% confidence level. Having a law allowing for a post-secondary support order accounted for 5.5% of the variability in college participation.¹³

These results are shown in these two charts:

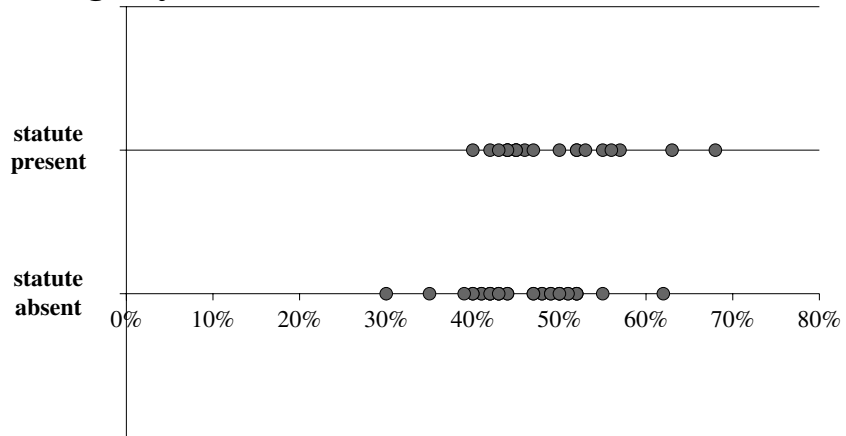
¹¹ Here, the point-biserial correlation coefficient, r_{pb} , is the best fit. Point-biserial correlation is used to determine the strength of a linear relationship between one continuous variable and one nominal variable with two categories (i.e., a dichotomous variable). In addition, the coefficient of determination, r_{pb}^2 , can be calculated and used to determine the proportion of variance in one variable that can be “explained” by the other variable. Here, the existence of support duty is dichotomous (either absent or present) is tested for correlation individually against the continuous variables above.

Data are mean \pm standard deviation, unless otherwise stated. Preliminary analyses showed there were (a) no outliers, as assessed by boxplot; (b) engagement score was normally distributed, as assessed by Shapiro-Wilk’s test ($p > .05$); and (c) there was homogeneity of variances, as assessed by Levene’s test for equality of variances.

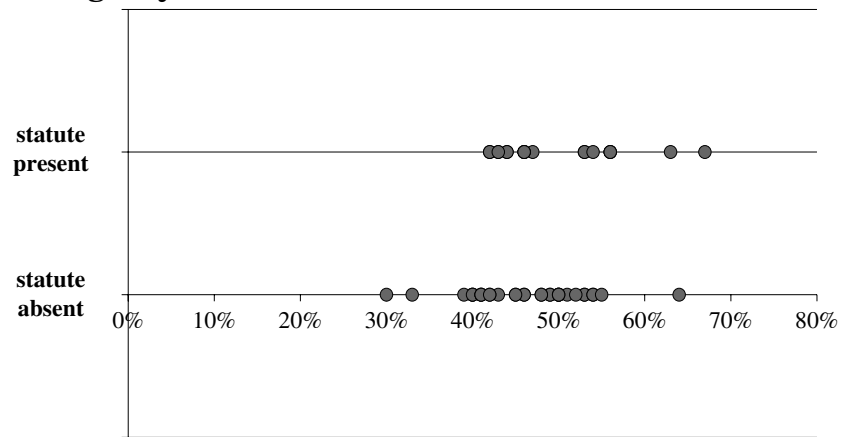
¹² The correlation between the existence of the law and college participation was statistically significant, $r_{pb}(38) = .277$, $p = .025$.

¹³ Here, $r_{pb}(38) = .235$, $p = .097$.

Percentages of people 18–24 participating in college by state in 2014



Percentages of people 18–24 participating in college by state in 2010



While this data analysis suggests that having a law allowing post-secondary support orders is positively correlated with higher proportions of college participation, it is very likely not enough by itself to convince a skeptic that such laws should exist. This analysis does not address the claim that parents should be allowed to express their own values by deciding whether to help their children with college. Therefore, the next section examines this claim through the lens of legal changes over the last two cen-

turies in parents' duties to support and provide for their children's education.

II. A Brief History of Parents' Legal Obligations to Support and Educate Children

Although William Blackstone, writing at the time of the American Revolution, said that parents have the duty to support and educate their children, it was understood that for most people this obligation was moral only.¹⁴ Except for the Poor Laws, which enforced support obligations when children would otherwise become a financial burden on the parish,¹⁵ the law did not require parents to support their children. During the nineteenth century courts began to develop tools to enforce the child support obligation, at least indirectly. During roughly the same period, states also began to supervise how parents executed their duty to educate children, culminating in compulsory education laws. At first the education laws were symbolic and not widely enforced, but by the end of the century states were beginning to enforce the laws and to increase the minimum amount of education that must be provided to children. During the twentieth century courts increasingly often extended divorced parents' child support duties to include paying for college when the facts warranted it. Throughout these two centuries the legal disputes over support and education placed parents' claims to primary authority over how to raise their children in conflict with societal claims to protect children and to insure that they were prepared to be effective participants in adult society.

¹⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 446-54 (Christian ed. 1807).

¹⁵ Jacobus TenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status (Part I)*, 16 STAN. L. REV. 257, 279-87 (1964). Legal authority to intervene in families who were too poor to support their children dates at least to the Poor Laws of the early seventeenth century. Under the Poor Laws local authorities could remove children from parents unable to support them and apprentice them to more financially capable members of the community. A master was obliged to support and teach an apprentice the master's craft. In return, the master received the benefit of the apprentice's labor. In addition, relatives of poor people unable to work to support themselves, including parents, grandparents and children, were obligated to contribute to the support of the poor person. *Id.*

A. *Child Support Becomes Enforceable and Education Becomes Compulsory*

The first cases raising the possibility that middle class parents' child support duty might be legally enforceable were brought by third parties who had supplied goods or services to the parents' children even though the parents had not asked them to do so. At first, courts held that the third parties had no claim in the absence of the parents undertaking a contractual obligation to pay the debts, even if the debts were for goods or service necessary for the children's wellbeing.¹⁶ Similarly, while parents were said to have a moral duty to educate their children, the specifics of that duty were left solely in the parents' hands well into the nineteenth century.

Courts were reluctant to require parents to support their children and pay for necessary goods or services provided to them because they wanted to protect parental authority. Courts feared that if parents could be legally required to pay for necessary items supplied to their children without their express consent, the parents would lose control over their children to third parties or to the children themselves. Joel Prentiss Bishop, author of a leading nineteenth century family law treatise, wrote that this concern supported the prevailing rule: "Yet in reason, though the father might in law be compelled to support his children, by a process instituted for that purpose, still, to allow the child to pledge the father's credit against the father's consent, would be to encourage disobedience in one not arrived to years of discretion."¹⁷

Nevertheless, in the early nineteenth century American courts began to contemplate requiring parents to pay such debts. In 1816, a clothing store in New York sued a father for the cost of

¹⁶ See, e.g., *Shelton v. Springett*, 138 Eng. Rep. 549 (1851) (father not obligated to pay for room and board provided to 20-year-old son absent contract); *Mortimore v. Wright*, 151 Eng. Rep. 502 (1840) (same).

¹⁷ 2 JOEL PRENTISS BISHOP, *MARRIAGE AND DIVORCE*, § 528, at 425 (4th ed. 1864). As late as 1931 the author of a leading family law treatise wrote, "It must be recognized however, that a rule which may remove from a father the discretion of determining what is sufficient and proper, that is, necessary, food, clothing, medical attention and education, and allow that discretion to be exercised by a third person, and confirmed by a jury in a suit by the third person against the father, has dangerous possibilities." JOSEPH W. MADDEN, *THE LAW OF PERSONS AND DOMESTIC RELATIONS* §§ 110-11, at 386 (1931).

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a coat that it supplied to his son. The court rejected the claim because the father had provided adequate clothing for the son but said in dicta that if he had not, his “natural obligation to furnish necessities” for his minor children would have supported the claim.¹⁸ However, it was only in 1863 that New York’s courts clearly held that the parental support duty was legally enforceable outside the Poor Laws.¹⁹ Before then, courts in Connecticut in 1808,²⁰ Massachusetts in 1819,²¹ and Vermont in 1845²² rejected the dicta in the 1816 case and refused to require parents to pay for necessities. While over the century, the trend was in favor of enforcement of parents’ support duty,²³ when courts did

¹⁸ Van Valkinburgh v. Watson, 13 Johns. 480 (N.Y. Sup. Ct. 1816).

¹⁹ See, e.g., Edwards v. Davis, 16 Johns. 281 (N.Y. Sup. Ct. 1819); *In re Ryder*, 11 Paige Ch. 185 (N.Y. Ch. 1844). In 1863, a New York appellate court clearly held that parents have a legally enforceable child support duty. *Cromwell v. Benjamin*, 41 Barb. 558 (N.Y. App. Div. 1863).

²⁰ *Stanton v. Willson*, 3 Day 37, 57 (Conn. 1808) (“The danger of encouraging children in idleness and disobedience, and of their being inveigled into expense by the artful and designing, furnishes sufficient reason for the rule.”).

²¹ *Angel v. McLellan*, 16 Mass. 27, 31 (1819) (“One of the greatest restraints upon the bad passions and vicious propensities would be removed, if young persons should feel that they could flee their parents’ presence, without suffering in any of the essentials of life.”).

²² *Gordon v. Potter*, 17 Vt. 348, 353 (1845) (“if [the duty can be enforced] in extreme cases, it can in every case, where the necessity exists; and the right of a parent to control his own child will depend altogether upon his furnishing necessities, suitable to the varying tastes of the times. There is no stopping-place short of this, if any interference whatever is allowed.”).

²³ Drew D. Hansen, Note, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 *YALE L.J.* 1123, 1135-49 (1999); Donna Schuele, *Origins and Development of the Law of Parental Child Support*, 27 *J. FAM. L.* 807, 811-16 (1988-1989). As late as the mid-nineteenth century, a leading treatise writer said that a father’s support duty was only a moral one. JOEL PRENTISS BISHOP, *COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE* § 632 (2d ed. 1852). State legislatures also began to enact statutes providing that parents had a legally enforceable duty to support their children. The final draft of the New York Field Draft Civil Code declared the existence of such a duty. N.Y. CODE COMM’RS, *DRAFT OF A CIVIL CODE FOR THE STATE OF NEW YORK* § 97 (Final Draft 1865). Though this code was never adopted by the New York legislature, it was very influential in other states. For example, in 1872 the California legislature enacted a similar statute. CAL. CIV. CODE § 206 (West 1872). In 1936, Vernier wrote that all states except Kansas had civil statutes imposing this obligation. 4 CHESTER G. VERNIER, *AMERICAN FAMILY LAWS* § 234, at 57 (1936).

impose the duty, they protected parental control by legal rules that limited the scope of the duty and made legal enforcement difficult and cumbersome.²⁴

Courts in this era explicitly tied parents' duty to support their children to the children's economic and personal dependence on the parents. In the nineteenth century, children, especially boys, often attained functional adulthood in late adolescence, even though they were still legally minors. A parent was not required to support a minor child who struck out on his own, since the child was considered emancipated, and authorities were even divided about whether parents had a duty to support a child who was able to earn money even if the child remained under the parent's roof.²⁵ An exception to the support duty/dependency connection arose as divorce became more common and legislatures granted courts authority to order divorced fathers to pay support for their children, even though they no longer had control over them because the children were usually placed in their mothers' custody.²⁶

The theme of parental control also ran through the law about educating children. The expectation that young children would receive a basic education was not developed through disputes over payment for school, but rather over whether attending school was compulsory. As early as 1642, the Massachusetts Bay Colony had laws requiring parents to teach their children relig-

²⁴ Leslie J. Harris et al., *Making and Breaking Connections Between Parents' Duty to Support and Right to Control Their Children*, 69 OR. L. REV. 689, 704-05 (1990).

²⁵ See MADDEN, *supra* note 17, §§ 110-11, at 386-87 ("Some cases, however, . . . impose upon the parent of an unemancipated minor the duty to pay for his necessities in spite of the fact that he is perfectly able to make his own living and is allowed by the parent to do so if he will. The error in such a decision would seem to be in finding that there was any necessity for the furnishing of such supplies upon the credit of the parent." (footnotes omitted)); *Angel v. McLellan*, 16 Mass. 27 (1819); *Raymond v. Loyl*, 10 Barb. 483 (N.Y. App. Div. 1851); *State v. Langford*, 176 P. 197, 200 (Or. 1918) ("If the child is able to earn its own support, in whole or in part, the father is not obliged to support his offspring in idleness; but he is bound to furnish such portion as the child cannot, all things being considered, earn by reasonable effort.").

²⁶ Schuele, *supra* note 23, at 811-14, 824. For a more detailed discussion of the rise of divorce, see Hansen, *supra* note 23, at 1127-29. On the development of the nineteenth century legal preference for maternal custody, see MICHAEL GROSSBERG, *GOVERNING THE HEARTH* ch. 7 (1985).

ion, reading, and an “honest calling.”²⁷ This was a minimal requirement, though, since through the early nineteenth century children were mostly seen as small adults whose labor was economically valuable. As a more romantic view of children as innocents to be protected developed, middle and upper-class parents increasingly kept their children out of the work force and sent them to school, although working-class parents still needed their children’s labor to support the family.²⁸ Throughout the first half of the nineteenth century, the duty to educate a child remained firmly with the child’s parent or master, and much education occurred outside schools.²⁹ Public schools and compulsory attendance laws gained ground from 1820 into the 1860s as a response to the growth of cities and immigration, as a means to stamp out crime and socialize the new residents.³⁰ Massachusetts enacted the first compulsory attendance law in 1852, requiring parents to send children to public school for at least twelve weeks, but it was not enforced.³¹ By 1890 most states had compulsory attendance laws, but they were still not regularly enforced.³²

B. *The Invention of Adolescence – and High School*

Beginning in the late nineteenth century, with the rising complexity and urbanization of society, the social understanding of the line between childhood and adulthood changed. From the last decades of that century into the first twenty years of the twentieth century, new state laws and social practices expressed the understanding that teenagers are not the same as adults, but are not children either. In 1904, psychologist G. Stanley Hall wrote the first definitive statement of the idea that adolescence is

²⁷ MICHAEL S. KATZ, *A HISTORY OF COMPULSORY EDUCATION LAWS* 11-12 (1976). Massachusetts law later provided that communities of fifty households or more were to provide a teacher to instruct children in reading and writing, and communities of one hundred households or more were to establish a grammar school. However, these laws were not effectively enforced. *Id.*

²⁸ Hansen, *supra* note 23, at 1129.

²⁹ KATZ, *supra* note 27, at 13.

³⁰ *Id.* at 14-15.

³¹ *Id.* at 17.

³² *Id.* at 18-19.

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a distinct life stage between childhood and adulthood.³³ Schools began to be segregated by grade, juvenile courts for minors accused of violating the criminal law were established, and the minimum age for marriage and for consenting to sex were raised.³⁴ All these changes tended to extend the amount of time young people were regarded as properly dependent on and obedient to their parents.

Educational practices changed in ways consistent with this new understanding of adolescence. Over the first thirty years of the twentieth century, local school districts developed the administrative machinery to enforce school attendance laws, and child labor laws, which supported the school laws, were enacted and enforced.³⁵

Compulsory attendance laws were challenged as unconstitutionally infringing on parental authority in this era,³⁶ and in the 1920s conflicts between parents and schools over public education reached the Supreme Court in *Meyer v. Nebraska*³⁷ and *Pierce v. Society of Sisters*.³⁸ In these cases, the fundamental dispute was between those who believed that education is necessary

³³ G. STANLEY HALL, *ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATIONSHIP TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION, AND EDUCATION* (1904).

³⁴ Nicholas I. Syrett, *The Contested Meanings of Child Marriage in the Turn-of-the-Century United States*, in *CHILDREN AND YOUTH DURING THE GILDED AGE AND PROGRESSIVE ERA* 145 (James Marten ed. 2014).

³⁵ At first the child labor laws were not enforced much, but by the 1920s they were. Adriana Lleras-Muney, *Were Compulsory Attendance and Child Labor Laws Effective? An Analysis from 1915 to 1939*, 45 *J. L. & ECON.* 401, 403 (2002).

³⁶ See, e.g., *State v. Bailey*, 61 N.E. 730 (Ind. 1901) (upholding compulsory attendance law over state constitutional challenge). At least some poorer parents may not have valued more education because they did not see the advantages for their children, and they may have needed their children's economic contributions to the family; industries that relied on child labor also opposed the legislation. Lleras-Muney, *supra* note 35, at 417-18.

³⁷ 262 U.S. 390 (1923). *Meyer* is a prosecution of a teacher for violating a state law against teaching German to children younger than eighth grade, but the opinion focuses on the rights of parents to control their children's education much more than the rights of the teacher.

³⁸ 268 U.S. 510 (1925). *Pierce* is a challenge by private schools to a state law abolishing private schools. As in *Meyer*, the opinion is focused more on parental rights than the schools' rights. The issue returned to the Supreme Court almost fifty years later in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a case

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to promote democracy, national unity, and economic productivity, on the one hand, and parents' rights advocates on the other. The Supreme Court's opinions in *Meyer* and *Pierce* recognized that this conflict was at the heart of the case and threaded between the perspectives. In *Pierce* the Court wrote:

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare. . . .

Under the doctrine of *Meyer v. Nebraska*, 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.³⁹

involving application of compulsory education laws to Amish teenagers over their parents' objections.

³⁹ 268 U.S. at 534-35. Both *Meyer* and *Pierce* were authored by Justice McReynolds, the "most reactionary (not to mention bigoted and mean-spirited) curmudgeon ever to serve on the Supreme Court," who "loathed" immigrants and was so anti-Semitic that he would leave the Supreme Court conference room when Justice Brandeis spoke. Louise Weinberg, *The McReynolds Mystery Solved*, 89 DENVER L. REV. 133, 140-41 (2011). Seeking to understand how such a man could have written *Meyer* and *Pierce*, the wellsprings of constitutional protection for parental rights, Professor Weinberg concluded:

McReynolds, that most reactionary of judges, might well have thought that immigrant parents *ought* to have the "liberty" of diminishing their children's opportunity to obtain a secular public education in the English language. Those children, at once or later, could furnish a cheap, submissive, and trapped pool of workers. *Meyer* identified and advanced the parental authority, as against the state, that in *Pierce* empowered the parent to pull a child out of public school. . . . while forcing the child into work. McReynolds might well have thought that parents *ought* to have the "liberty" of pulling their children out of school and putting them out to work. . . .

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While most children still did not attend school beyond the eighth grade at this time, the next battleground over children's education had already begun to emerge in the 1890s as high schools were developed to bridge between grammar school and the university.⁴⁰ At first high schools were only for the elite. In 1922, sociologist and educator George Counts wrote that while public high schools existed, only the children of the professional and merchant classes were likely to attend and graduate, while other children were expected to go to work. He said,

While the establishment of the free public high school marked an extraordinary educational advance, it did not by any means equalize educational opportunity, for the cost of tuition is not the entire cost of education, or even the larger part of it. Education means leisure, and leisure is an expensive luxury. In most cases today, this leisure must be guaranteed the individual by the family. Thus, secondary education remains largely a matter for family initiative and concern, and reflects the inequalities of family means and ambition.⁴¹

Similarly, at the time, in divorce cases, child support for children older than sixteen was rarely ordered, since teens were typically expected to start becoming self-supporting by that age. A Pennsylvania court in 1929 broke with this practice in *Commonwealth v. Gilmore*.⁴² In that case, a divorced father sought to terminate child support for his son, who had turned sixteen, the age at which schooling was no longer compulsory. Even though the court found that the boy had employment opportunities in the community, it ruled that a court could order continued support past that age for a child who wanted to continue in school if the facts warranted it. The court's opinion again recognized the ten-

From McReynolds' point of view, I suppose, the urchin offspring of loathed immigrants had no place in mainstream American life. They belonged in the factories, contributing to their parents' support, and saving entrepreneurs the expense of employing their fathers.

Id. at 158.

⁴⁰ KATZ, *supra* note 27, at 23. Public universities were established at or near the same time as public common schools. For a brief survey of the history of high schools in Michigan, see *Stuart v. School Dist. No. 1*, 30 Mich. 69 (1874) (interpreting legislation as authorizing establishment of public high schools).

⁴¹ GEORGE S. COUNTS, *THE SELECTIVE CHARACTER OF AMERICAN SECONDARY EDUCATION* 141-48 (Chicago 1922), reprinted in 2 (Pts. 7 & 8) ROBERT H. BREMNER, *CHILDREN AND YOUTH IN AMERICA* 1392-95 (1971).

⁴² 97 Pa. Super. 303 (1929).

sion between parental authority and the broader community interest in adequate education for young people:

It must thus appear that in this city and generation the law does recognize a legal duty upon the part of every father to give to his minor children an education, beyond the minimum required by law, in the public schools provided by the Commonwealth which reasonably accords to the father's financial ability and position in life and the child's ability, progress and prospects. In the ordinary case, especially where the child is living with the father, the actual extent of that education must be left to the control and determination of the father, whose honest judgment in the matter should never be lightly disregarded and overruled. . . .

In a republic where every adult citizen has a share in public affairs, it becomes essential for the preservation of the State and the happiness of the people, that the citizens be acquainted with public affairs and be intelligent and to that end be educated to the highest extent possible. This being so, it is highly proper that the law should, in the matter of the support of minors, adopt such rule as will work to the benefit of the State and the public rather than the convenience of a particular individual. The general benefit to be obtained by continuing an order for the support of a minor child to the end that such child may receive a common school education greatly outweighs that derived from the relief of the father, when able, from the payment of the order.⁴³

The number of young people with high school degrees grew fivefold between 1910 and 1940, partly because of increasing demand for educated workers and lower demand for agricultural labor, and partly because of changes in educational and child labor laws.⁴⁴ However, as late as 1976 one state, Mississippi, still did not have a compulsory education law, and only five states required compulsory school through age eighteen, although the general social expectation by then was that teens would complete high school.⁴⁵

⁴³ *Id.* at 308, 310, 312-13.

⁴⁴ Lleras-Muney, *supra* note 35, at 401-02.

⁴⁵ KATZ, *supra* note 27, at 8. However, in 1974 only about 75% of all young people graduated from high school in the United States. *Id.* at 27.

C. *Ordering Parents to Pay for College in the Twentieth Century*

While colleges have existed in the United States since colonial times,⁴⁶ at least through the early twentieth century few people went to college. Therefore, courts usually refused to order parents to pay for their minor children's college education under the necessities doctrine, since something so rare could hardly be considered "necessary."⁴⁷ The first reported case requiring a divorced father to pay tuition for a child in college was decided in 1920.⁴⁸ Over the decades, courts entered orders for postsecondary educational support increasingly often; a researcher who analyzed 90 cases decided between 1920 and 1971 found that courts entered orders in 60% of the cases, and of the cases denying support, more than half were based on the parent's poverty, the child's lack of aptitude, or the child's age, rather than general lack of authority.⁴⁹

In the early part of the twentieth century, judges exercised discretion about ordering college support, based on the family's social class and the child's aptitude, ambition, and gender. In the middle to later years of the twentieth century, courts focused less on these factors that suggested college was appropriate only for an elite and more on the importance of education to social mobility and the conditions of modern society.⁵⁰ The Washington Supreme Court adopted the latter approach very early in the 1926 case of *Esteb v. Esteb*.⁵¹ Ruling that a divorced railroad conductor could be ordered to provide support to a minor child in college, the court said:

⁴⁶ Harvard is the oldest college in the United States, established in 1636 by the Massachusetts Bay Colony. *About Harvard, Harvard at a Glance, History*, <http://www.harvard.edu/about-harvard/harvard-glance/history> (last visited Nov. 4, 2016).

⁴⁷ See, e.g., *In re Ryder*, 11 Paige Ch. 185, 188 (N.Y. Ch. 1844). As late as 1899 a court relied on this view in refusing to order a father to help pay for his son's professional training. *Streitwolf v. Streitwolf*, 58 N.J. Eq. 570 (1899).

⁴⁸ Scott Gelbert, *Child Support Litigation and the "Necessity" of American Higher Education, 1920-70*, 54 AM. J. LEGAL HIST. 39, 40 (2014).

⁴⁹ *Id.* at 49-53 (2014).

⁵⁰ *Id.* at 53-58.

⁵¹ 244 P. 264 (Wash. 1926). For the factual background of *Esteb*, see Gelbert, *supra* note 48, at 45-48.

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Nor should the court be restricted to the station of the minor in society, but should, in determining this fact, take into consideration the progress of society, and the attendant requirements upon the citizens of today. . . . An opportunity (in the 1800's) for a common school education was small, for a high school education less, and for a college education was almost impossible to the average family, and was generally considered as being only within the reach of the most affluent citizens. . . . But conditions have changed greatly in almost a century that has elapsed since that time. Where the college graduate of that day was the exception, today such a person may almost be said to be the rule. . . . It cannot be doubted that the minor who is unable to secure a college education is generally handicapped in pursuing most of the trades or professions of life, for most of those with whom he is required to compete will be possessed of that greater skill and ability which comes from such an education.⁵²

Courts also justified college support orders as improving the capacity of young people to be good citizens. For example, the Oregon Supreme Court in 1941 wrote:

One of the principal purposes of an education is still to train the young for the discharge of their duties to society and to afford them such knowledge of our government and American institutions that upon reaching majority they will intelligently perform their part in the great social order. The capacity to discharge those duties is especially demanded in a country such as ours. . . . When the duties of citizenship are to be discharged nothing less will be expected of the children of divorced parents than of those who come from homes where the marital ties remained intact.⁵³

Through the 1960s, when the age of majority in most states was twenty-one, appellate courts held with increasing frequency that divorce courts could order parents to continue supporting their children attending post-secondary school.⁵⁴ The enactment of the Twenty-Sixth Amendment in 1971, which lowered the minimum voting age to eighteen and which prompted many states to lower the age of majority to eighteen, curtailed this development.⁵⁵ While some states accompanied the legislation lowering

⁵² *Esteb*, 244 P. at 267.

⁵³ *Jackman v. Short*, 109 P.2d 860, 865-66 (Or. 1941).

⁵⁴ *Gelbert*, *supra* note 48, at 68. *See, e.g.*, *Dorman v. Dorman*, 241 N.E.2d 50 (Ind. 1968); *Pass v. Pass*, 118 So.2d 769 (Miss. 1960).

⁵⁵ *Gelbert*, *supra* note 47, at 68. As soon as the age of majority began to be lowered, commentators began to argue that state law should be interpreted (where possible) and amended where necessary to allow courts to order post-secondary school support. *See, e.g.*, Robert M. Washburn, *Post-Majority Sup-*

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the age of majority with provisions allowing child support to continue to age twenty-one,⁵⁶ many other states did not. In some of these states, divorce legislation was written broadly enough to allow courts to continue ordering support for children after the age of majority, as when it allowed support for “dependent children”⁵⁷ or “children of the marriage.”⁵⁸ However, other courts refused to order post-secondary support, either because statutory language only allowed them to order support for minors or because they believed parents should be allowed to make the decision for themselves.⁵⁹

Despite this variation, through the 1990s the number of states toward allowing such orders grew slightly. In addition to favorable court orders during this period, at least one state legislature enacted a statute authorizing post-secondary education support.⁶⁰ However, the number of states allowing the orders de-

port: *Oh Dad, Poor Dad*, 44 TEMPLE L.Q. 319 (1971). A rare article arguing against such authority is Judith G. McMullen, *Father (or Mother) Knows Best: An Argument Against Including Post-Majority Educational Expenses in Court-Ordered Child Support*, 34 IND. L. REV. 343 (2001).

⁵⁶ See, e.g., D.C. STAT. § 46-101 (1976); N.Y. FAM. CT. ACT § 413 (McKinney 1962); OR. REV. STAT. § 107.108 (1973). New York never lowered the age of majority for purposes of parents’ child support obligations from age 21, unlike most other states.

⁵⁷ See, e.g., *Childers v. Childers*, 575 P.2d 201 (Wash. 1978).

⁵⁸ *Ex parte Bayliss*, 550 So.2d 986 (Ala. 1989), *overruled by Ex parte Christopher*, 145 So.3d 80 (Ala. 2013).

⁵⁹ See, e.g., *In re Marriage of Plummer*, 735 P.2d 165 (Colo. 1987) (divorce statute which authorizes support award for dependent children does not apply to healthy adult child in college); *Dubroc v. Dubroc*, 284 So. 2d 869 (La. Ct. App. 1973) (eighteen-year-old child still in high school capable of self-support and thus not entitled to support under support-for-adult-children statute).

⁶⁰ *Blue v. Blue*, 616 A.2d 628 (Pa. 1992), overruled a thirty-year-old decision allowing post-secondary education support, holding that the earlier decision misinterpreted the divorce statute. In response to *Blue*, the legislature enacted a law allowing such support, which the Pennsylvania Supreme Court held unconstitutional in *Curtis v. Kline*, 666 A.2d 265 (Pa. 1995). The early Pennsylvania law is discussed in Paul R. Beckert, *The Duty of a Father Under Pennsylvania Law to Support His Child in College*, 18 VILL. L. REV. 243 (1972). Between 1984 and 2004, three other states’ laws were changed by legislation or judicial decision to eliminate court authority to order post-eighteen educational child support. *Dowling v. Dowling*, 679 P.2d 480 (Alaska 1984), *overruling Hinchey v. Hinchey*, 625 P.2d 297 (Alaska 1981) (legislature did not intend to allow educational support); *In re Marriage of Chalat*, 112 P.3d 47, 51 (Colo. 2005) (between 1987 and 1997 legislation authorized postsecondary support or-

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clined to eighteen in 2007.⁶¹ The two states that most recently eliminated the authority to order post-secondary support are Alabama and Indiana. In 2013, the Alabama Supreme Court overruled a 1989 decision that had held courts could order post-majority support for education under a statute allowing support for “children of the marriage.”⁶² In 2012, the Indiana legislature amended its educational child support statute to provide that a parent could be ordered to pay only until the child turned 19.⁶³

The changes have not all been in one direction, however; in 2012 in *McLeod v Starnes* the Supreme Court of South Carolina reversed a two-year-old decision that had eliminated the post-secondary support authority originally established by a 1979 case.⁶⁴ Echoing language from earlier cases, the *Starnes* court wrote, “This State has a strong interest in the outcome of disputes where the welfare of our young citizens is at stake. As can hardly be contested, the State also has a strong interest in ensuring that our youth are educated such that they can become more productive members of our society.”⁶⁵

When authority to order post-secondary education is questioned, as *McLeod* shows, the underlying contest is between parental authority to decide how to raise children and the state’s interest in limiting that authority for the sake of the children themselves and of society. The same issue has arisen at every step the law has taken toward making child support duties and obliga-

ders, repealed in 1997); N.H. REV. STAT. § 461-A:21 (2004) (superseding *Gnirk v. Gnirk*, 589 A.2d 1008 (N.H. 1991), which allowed postsecondary support orders).

⁶¹ Jason D. Hans, *Should Child Support Obligations Continue for Children Attending College?* 48 J. DIVORCE & REMARRIAGE 109, 110 (2008) (citing information from the National Conference of State Legislatures).

⁶² *Ex parte Christopher*, 145 So.3d 80 (Ala. 2013), *overruling Ex parte Bayliss*, 550 So.2d 986 (Ala. 1989).

⁶³ Ind. Pub. L. 207-2013 § 45, amending IND. CODE § 31-16-6-6(c). The change was part of a package of legislation intended to reconcile the support duties of divorced and never-married parents, but there is no explanation for this specific change.

⁶⁴ *McLeod v. Starnes*, 723 S.E.2d 198 (S.C. 2012), *overruled Webb v. Sowell*, 692 S.E.2d 543 (S.C. 2010), which had abrogated *Risinger v. Risinger*, 253 S.E.2d 652 (S.C. 1979). *Webb* held that allowing orders to divorced but not married parents violated equal protection, and *McLeod* overruled that holding. For more on the equal protection issue, see *infra* note 106 and accompanying text.

⁶⁵ 723 S.E. 2d at 204-05.

tions to provide education legally enforceable since the early nineteenth century. As the world has become more complex, people have come to need more education to achieve their goals and to fill their roles in society. As the amount of time young people spend in school has grown, the period during which they remain dependent on others, particularly their parents, rather than earning their own livings has increased too. The law regarding child support to cover post-secondary education over the last forty years has not developed evenly to respond to these changes, however. As the next section shows, the need for such laws is greater than it has ever been.

III. Changing Norms and Behaviors About Education and the End of Childhood

Because of structural and cultural social changes, today's young people take longer to establish careers and independent households and spend more years in school than they did forty-five years ago, when most states lowered the age of majority. Some social scientists believe that in Western culture a new life stage between adolescence and adulthood is emerging, a stage that generally lasts from age eighteen through the mid- to late-twenties or the early thirties when young people are developing their identities and transitioning to adulthood.⁶⁶ Even those who would not define what is happening as the development of a new life stage agree that the transition from adolescence to adulthood is taking longer for young people than in past generations.⁶⁷ Along with these behavioral changes, normative expectations about when young people should become independent of parents and how much education they should receive are also changing.⁶⁸

⁶⁶ The first articulation of the claim is Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development From the Late Teens Through the Twenties*, 55 *AM. PSYCHOLOGIST* 469 (2000).

⁶⁷ See, e.g., Teresa Toguchi Swartz et al. *Safety Nets and Scaffolds: Parental Support in the Transition to Adulthood*, 73 *J. MARRIAGE & FAM.* 414 (2011).

⁶⁸ *Id.* at 415 (discussing literature). For an argument that because of these trends, the law should change to allow courts to order child support for post-majority young adults who are not financially independent, regardless of whether they are still in school, see Sally F. Goldfarb, *Who Pays for the "Boomerang Generation"?: A Legal Perspective on Financial Support for Young Adults*, 37 *HARV. J. L. & GENDER* 45, *passim* (2014).

These expectations are changing at the same time that college costs, and students' need for parents' helping in paying those costs, are also increasing.

A. *Longer Periods of Dependence on Parents*

For the first time in more than one hundred and thirty years, adults aged eighteen to thirty-four are more likely to be living in their parents' homes than alone or with a spouse.⁶⁹ While the Great Recession exacerbated the trend for young adults to live with their parents, it started before the onset of the recession;⁷⁰ between 1970 and 1990 the proportion of people in their twenties who lived with their parents increased by 50%.⁷¹

Financial dependence on parents is also very common. In 2007, 73% of young people between the ages of eighteen and twenty-five who participated in a national survey reported that they had received financial help from their parents in the last twelve months.⁷² Surveys conducted in 2010-2011 found that a third to a half regularly received financial help from their families or lived with their families at least part time.⁷³ Parents across income groups were equally likely to provide some support, although the amount increased with parents' education. Close relationships with mothers made both kinds of support more

⁶⁹ Richard Fry, *For First Time in Modern Era, Living With Parents Edges Out Other Living Arrangements for 18- to 34-Year Olds*, PEW RES. CTR. 4 (2016), <http://www.pewsocialtrends.org/2016/05/24/for-first-time-in-modern-era-living-with-parents-edges-out-other-living-arrangements-for-18-to-34-year-olds/>. In the 1940s a larger proportion of young adults lived with their parents (35% in 1940 compared to 32% in 2014), but in 1940 even more were married and living with their spouses. *Id.* at 5. Young men are more likely to live with their parents than young women (35% compared to 29%). *Id.* at 6.

⁷⁰ *Id.* at 8.

⁷¹ Goldfarb, *supra* note 68, at 53 (citing sources).

⁷² Pew Research Center, *A Portrait of "Generation Next"* 19 (2007), <http://www.people-press.org/2007/01/09/a-portrait-of-generation-next/>.

⁷³ Kim Parker, *The Boomerang Generation*, PEW RES. CTR. (2012), <http://www.pewsocialtrends.org/2012/03/15/the-boomerang-generation/>. (2011 survey of young adults between eighteen and twenty-four years old, 34% said they regularly received financial assistance from their families); Swartz et al., *supra* note 67, at 425 (longitudinal study of 712 randomly selected young people found that almost half received financial support or lived at least part of time with parents during their early twenties, declining to 10-15% during their early thirties).

common, but relationship quality had no effect on economic support from fathers, and better relationship quality with fathers decreased the likelihood that the child would live with the parents.⁷⁴

B. *Longer Periods of Schooling Are Expected and Valuable*

Most parents today expect their children to continue in school after twelfth grade. Consistent with this expectation, Millennials are the most highly-educated generation in American history, and the economic value of their educations is greater than for prior generations.

A 2012 survey found about two-thirds (64%) of parents with children in sixth through twelfth grade expected their children would attain a bachelor's degree, and another 26% expected that their children would have some postsecondary education; only 10% expected that their children would complete only high school or less.⁷⁵ About a decade earlier, in 2003, a national survey of parents of children in grades six through twelve also found that about 90% of the children had parents who expected them to continue going to school beyond high school.⁷⁶

Young people increasingly are obtaining the education that their parents want for them. Today a third (34%) of young people between twenty-five and thirty-two years old have at least a bachelor's degree, compared to 24% of the Baby Boomers who were twenty-five to thirty-two in the late 1970s and 1980s, and to 13% of the generation that matured around 1965. The proportion of twenty-five- to thirty-two-year-olds with only a high school education has declined from 43% in 1965 to only 26% today.⁷⁷

The economic value of more education is also clear, and its value is greater for Millennials than for Baby Boomers. A typical Baby Boomer who had only completed high school earned 77%

⁷⁴ Swartz et al., *supra* note 67, at 425.

⁷⁵ Child Trends, *Parental Expectation for Their Children's Academic Attainment* 3 (Oct. 2015), http://www.childtrends.org/wp-content/uploads/2012/07/115_Parental_Expectations.pdf.

⁷⁶ Laura Lippman et al., *Parent Expectations and Planning for College* 7, 17-18, NAT'L CTR. EDUC. STATISTICS, U.S. DEP'T EDUC. (2008), nces.ed.gov/pubs2008/2008079.pdf.

⁷⁷ Pew Research Center, *The Rising Cost of Not Going to College* (Feb. 11, 2014), <http://www.pewsocialtrends.org/2014/02/11/the-rising-cost-of-not-going-to-college/>.

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of what a college graduate made when the two were twenty-five to thirty-two years old. In comparison, today a Millennial aged twenty-five to thirty-two who has only completed high school earns 62% of what a college graduate the same age makes.⁷⁸ Put another way, Millennial college graduates who are employed fulltime earn an average of \$17,500 per year more than their high school graduate counterparts.⁷⁹ The college premium is higher than it has been at any time since 1915, when the first representative data on U.S. earnings by education group were collected.⁸⁰

Besides earning more, four-year college graduates also experience less unemployment than those who have only graduated from high school. In 2014 unemployment for young high school graduates was estimated at 12.2% to 14.7%, while the unemployment rate for college graduates was estimated to be 3.8% to 7.2%.⁸¹

C. Rising Costs of Post-Secondary Education

At the same time that higher education has become more valuable and more common, it has also become more expensive. Over the last forty years state financial support for higher education has declined, resulting in students bearing a much higher share of the costs of education.

Between 1977 and 2012, the share of higher education revenues contributed by state governments declined by 18%, from 57% in 1977 to 39% in 2012.⁸² The trend has been especially

⁷⁸ *Id.*

⁷⁹ *Id.* The difference is particularly great for young men and has been increasing since the 1970s.

⁸⁰ DAVID AUTOR & MELANIE WASSERMAN, *WAYWARD SONS: THE EMERGING GENDER GAP IN LABOR MARKETS AND EDUCATION* 24-25 (Third Way Mar. 2013), <http://economics.mit.edu/files/8754>. The value of a college education has been noted for decades. In 1938, a survey of 13,000 people found that 17% of college graduates said they had “dead-end” jobs, compared to 44% of high school graduates, and the college graduates’ median wage was 45% higher. Gelbert, *supra* note 48, at 50.

⁸¹ Debbie Cochrane & Matthew Reed, *Student Debt and the Class of 2014* 3, THE INSTITUTE FOR COLLEGE ACCESS & SUCCESS (Oct. 2015), ticas.org/sites/default/files/pub_files/classof2014.pdf; Pew Research Center, *supra* note 77.

⁸² Margaret Cahalan & Laura Perna, *Indicators of Higher Education Equity in the United States* 25, PELL INSTITUTE (2015), www.pellinstitute.org/downloads/publications-Indicators_of_Higher_Education_Equity_in_the_vUS_45_

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sharp in the last decade.⁸³ After adjusting for inflation, per-student state spending on public colleges decreased 12% between 2004 and 2014.⁸⁴ In the same time period, the inflation rate in the United States was about 25%.⁸⁵ The amount of the decline is significant in individual terms. State funding per full-time equivalent student in public institutions declined from a high of \$10,110 in 2014 dollars in 2000-01 to \$6,960 in 2012-13 and rose to \$7,540 in 2014-15. The amount per student in 2014-15 was 14% lower in constant dollars than in 2000-01. During the same time period, FTE enrollments in public institutions rose 30%.⁸⁶

Concomitantly with the decline in state funding for higher education, between 1977 and 2012, the share that students and parents contribute to the revenues of colleges rose from 33% to 49%.⁸⁷ More recently, between 2004 and 2014, colleges' revenue from tuition increased 43% per student.⁸⁸

To look at this phenomenon from another perspective, between 2005-06 and 2010-11 college tuition, fees, room, and board rose 14%, and they rose another 11% between 2010-11 and 2015-16.⁸⁹ In 2015-2016, the average cost of in-state tuition, fees, room,

Year_Trend_Report.pdf. Throughout the period the federal government has contributed about 12% of the total revenues of higher education institutions.

⁸³ In all but four states (Alaska, Illinois, North Dakota, and Wyoming), state government support for higher education declined between 2008 and 2014. Am. Acad. Arts & Sci., *Public Research Universities: Changes in State Funding 9* (2015), https://www.amacad.org/multimedia/pdfs/publications/researchpapers/monographs/PublicResearchUniv_ChangesInStateFunding.pdf.

⁸⁴ Cochrane & Reed, *supra* note 81.

⁸⁵ U. S. INFLATION CALCULATOR, <http://www.usinflationcalculator.com/> (using consumer price index data from the Department of Labor Bureau of Labor statistics).

⁸⁶ *Total and Per-Student State Funding and Public Enrollment Over Time*, COLLEGE BOARD, <https://trends.collegeboard.org/college-pricing/figures-tables/total-and-student-state-funding-and-public-enrollment-over-time> (last visited Nov. 4, 2016).

⁸⁷ Cahalan & Perna, *supra* note 82, at 25.

⁸⁸ Cochrane & Reed, *supra* note 81. Reliance on tuition peaked in 2013 at 47.8%; in 2015 tuition provided 46.5% of total educational revenue. STATE HIGHER EDUCATION EXECUTIVE OFFICERS ASSN., SHEF: FY 2015 STATE HIGHER EDUCATION FINANCE 9 (2016), http://sheeo.org/sites/default/files/project-files/SHEEO_FY15_Report_051816.pdf.

⁸⁹ *Tuition and Fees and Room and Board Over Time, 1975-76 to 2015-16, Selected Years*, COLLEGE BOARD, <https://trends.collegeboard.org/college-pric->

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and board at a public four-year college was \$19,548, and the cost at a private nonprofit four-year college was \$43,921.⁹⁰

During this time of rising tuition and fees, Pell grants, which are the principal federal support for post-secondary students in need, increased but at a lower pace. Between 2004 and 2012, the average costs to students receiving grants who attended public four-year colleges increased by \$7,400, but their grant aid only increased by an average of \$2,900.⁹¹

Most college students go into debt to pay for their educations. While the percentage of college graduates who owed student loans in 2014 was not much more than the percentage in 2004 (69% compared to 65%), the average amount of debt per person rose 56% from \$18,550 to \$28,950. The percentage of graduates indebted in 2014 and the amount of debt an average graduate owed varied significantly from state to state. The percentage of indebted graduates ranged from 46% to 76%, and the average amount of debt ranged from \$18,900 to \$33,800. In six states the average debt exceeded \$30,000.⁹²

D. Parental Assistance With College Expenses

Student debt would be even greater were it not for parents' financial assistance with the costs of college. A 2011 study of parental financial and housing assistance to adult children found that children who are attending school receive more parental assistance, both economic and housing, than young people who are not in school. This finding is independent of age, family resources, and parent-child relationship quality. Parents helped

ing/figures-tables/tuition-and-fees-and-room-and-board-over-time-1975-76-2015-16-selected-years (last visited Nov. 4, 2016).

⁹⁰ *Average Published Undergraduate Charges by Sector, 2015-16*, COLLEGE BOARD, <https://trends.collegeboard.org/college-pricing/figures-tables/average-published-undergraduate-charges-sector-2015-16> (last visited Nov. 4, 2016).

⁹¹ Cochrane & Reed, *supra* note 81. In 1994-96, the total amount of state grants to undergraduate students was \$4.9 million, and the amount of the grants rose to \$9.9 million in 2010-11. The amount has remained more or less level since then. College Board, *Total Undergraduate Student Aid by Source and Type Over Time*, COLLEGE BOARD, <https://trends.collegeboard.org/content/total-undergraduate-student-aid-source-and-type-over-time-0> (last visited Nov. 4, 2016).

⁹² Cochrane & Reed, *supra* note 81.

children take advantage of opportunities to build human capital and improve their chances for achievement (and independence!).⁹³ Most parents making contributions to their children's educations do not have enough income to pay the bills; instead, they draw from savings or take on debt.⁹⁴ As the legal historian and estate planning scholar John Langbein has written, among the middle class in America today, "intergenerational wealth transmission no longer occurs primarily upon the death of the parent, but rather, when the children are growing, hence, during the parent's lifetimes" through the parent's financial support for children's education.⁹⁵ However, the willingness of parents to help varies with their own incomes and marital status.

Several studies have found that when children live with both their parents who are married to each other, the parents are significantly more likely to help pay for education than if the family is divided. In a 2003 survey, 82% of the parents who expected their children to continue in school said the family planned to help pay. Students living in two-parent families were more likely

⁹³ Swartz et al., *supra* note 67, at 426.

⁹⁴ John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 734 (1988).

⁹⁵ *Id.* at 723 (1988). In recognition of this financial assistance in developing their human capital, children no longer expect to inherit much property on their parents' death, Langbein adds:

Whereas of old, children did expect the transfer of the farm or firm, today's children expect help with educational expenses, but they do not depend upon parental wealth transfer at death. Lengthened life expectancies mean that the life-spans of the parents overlap the life-spans of their adult children for much longer than used to be. Parents now live to see their children reaching peak earnings potential, and those earnings often exceed what the parents were able to earn. Today, children are typically middle-aged when the survivor of their two parents dies, and middle-aged children are far less likely to be financially needy. It is still the common practice within middle- and upper-middle-class families for parents to leave to their children (or grandchildren) most or all of any property that happens to remain when the parents die, but there is no longer a widespread sense of parental responsibility to abstain from consumption in order to transmit an inheritance.

Id. at 736.

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to have family members who expected to help finance higher education (86%) than students in single-parent families (76%).⁹⁶

A second survey, published in 2005, found that about 75% of parents of minor children said that parents should help pay for college expenses.⁹⁷ This survey found that single custodial parents were less likely than parents in intact marriages to feel an obligation to help pay for college, a difference that was not affected by income levels.⁹⁸ The author of the study hypothesized that single parents may feel less financially secure or that they may be relying more on the children's other parent to contribute. This study also found that parents in stepfamilies, both the legal parent and the stepparent, started out less supportive of paying for their children's college education than two married legal parents, and they became even less supportive as the children grew older.⁹⁹ The author speculated that this might be due to less positive relationships between children and stepparents or to the diffusion of responsibility to help a child when the child has a complex of adults with parental obligations (as when parents divorce and remarry), compared to the focused responsibility when parents are in an intact relationship.¹⁰⁰

A recent study of parents' actual contributions toward their children's college expenses confirms that they act consistently with their expectations. Results of a national survey published in

⁹⁶ Lippman et al., *supra* note 76, at 7, 17-18.

⁹⁷ William S. Aquilino, *Impact of Family Structure on Parental Attitudes Toward the Economic Support of Adult Children Over the Transition to Adulthood*, 26 J. FAM. ISSUES 143 (Mar. 2005).

⁹⁸ *Id.* at 155.

⁹⁹ *Id.* at 162.

¹⁰⁰ A survey conducted in the mid-2000s in an unnamed southern state without a post-secondary support law found that only half the adult respondents supported such a law, but that women, the more likely custodial parents, were 2.7 times as likely to express support as men. Jason D. Hans, *Should Child Support Obligations Continue for Children Attending College?* 48 J. DIVORCE & REMARRIAGE 109 (2008). An earlier study is consistent with this explanation. It found that among divorced parents, fathers with joint legal or shared physical custody are much more likely to contribute to college voluntarily than fathers whose children are in the sole legal or primary physical custody of their mothers. Mothers with sole legal custody or primary physical custody pay more than mothers with joint custody. William V. Fabricius et al., *Divorced Parents' Financial Support of Their Children's College Expenses*, 41 FAM. CT. REV. 224, 235-39 (2003).

2011 found that married parents contributed more than divorced or separated parents after income, education, and other important variables were held constant, but remarried parents contributed amounts similar to divorced parents even though their incomes were similar to married parents.¹⁰¹ Compared to married parents, divorced parents contributed about a third as many dollars toward college costs;¹⁰² the odds that a parent would be able to pay for a child's postsecondary education decreased an estimated 57% if the parent was single.¹⁰³ Part of the difference between married and divorced parents is that divorced parents have significantly lower incomes; the median income of married parents was twice as much as the median income of divorced/separated parents. However, income is not the whole story. As in the 2005 study, remarried parents had about the same income as married parents but their contributions were more like those of divorced parents. Married parents contributed 8% of their income, divorced parents contributed 6% of their income, and remarried parents contributed 5% of their income to college costs.¹⁰⁴ While the financial need (costs less financial aid, including loans) of children of divorced parents was lower than that of children of married or remarried parents, divorced parents still only covered 42% of their children's financial need, compared to the 77% that married parents covered. Remarried parents covered 53% of their children's financial need.¹⁰⁵

¹⁰¹ Ruth N. Lopez Turley & Matthew Desmond, *Contributions to College Costs by Married, Divorced, and Remarried Parents*, 32 J. FAM. ISSUES 767, 768-69 (2011), http://scholar.harvard.edu/files/mdesmond/files/pdf_1.pdf. The data are from a nationally representative sample of undergraduate students, except that they do not include students whose parents were never married or widowed.

¹⁰² *Id.* at 776.

¹⁰³ *Id.* at 768.

¹⁰⁴ *Id.* at 776.

¹⁰⁵ *Id.* at 777-78. Federal student financial aid rules recognize the different behavior of married and divorced or separated parents. Students whose parents are divorced or unmarried and not living together are not required to provide financial information about the parent with whom they did not live or with whom they lived less time, but they must provide financial information about stepparents married to the parent with whom they live. FEDERAL STUDENT AID, U.S. DEPT. OF EDUC., REPORTING PARENT INFORMATION, <https://studentaid.ed.gov/sa/fafsa/filling-out/parent-info#divorced-separated> (last visited Nov. 4, 2016).

By any measure, divorced parents provided less assistance for college expenses than married parents, and the same was true for remarried parents. For this reason, almost all state courts have rejected equal protection challenges to state laws that allow courts to order divorced and separated parents to contribute to their adult children's post-secondary education costs but do not provide this authority when parents are married. The courts have said that the parents are simply not similarly situated and that the state interest in protecting the children of divorce justifies the differential treatment.¹⁰⁶

IV. Conclusion: Ending Parental Discretion to Deny Help to Children in Post-Secondary School

Whether the law should allow courts to order divorced or separated parents to pay support to help their children attend post-secondary school depends on whether this kind of assistance is truly needed, whether it has a positive effect on children's educational opportunities, and whether post-secondary education has become accepted as something that most children should be able to access if they have the ability and inclination to continue in school. As the discussion in this paper has shown, the answers to all these questions today, in the early twenty-first century, support laws that give courts this power.

¹⁰⁶ Kujawinski v. Kujawinski, 376 N.E.2d 1382 (Ill. 1978); Neudecker v. Neudecker, 577 N.E. 960 (Ind. 1991); *In re Marriage of Vrbanc*, 293 N.W.2d 198 (Iowa 1980); *In re Marriage of Kohring*, 999 S.W.2d 228 (Mo. 1999); LeClair v. LeClair, 624 A.2d 1350 (N.H. 1993), superseded by statute in 2004; McGinley v. McGinley, 19 P.3d 954 (Or. Ct. App. 2001); McLeod v. Starnes, 723 S.E.2d 198 (S.C. 2012, overruling Webb v. Sowell, 692 S.E.2d 543 (2010)); *see also* Birchfield v. Birchfield, 417 N.W.2d 891 (S.D. 1988); Childers v. Childers, 575 P.2d 201 (Wash. 1978); *Contra*: Curtis v. Kline, 666 A.2d 265 (Pa. 1995).

Children rarely sue parents who are married and living together for college support, but in 2014 a young New Jersey woman who was estranged from both her parents sued them for current private school tuition and support and future college support. The case never went to trial because the daughter moved back in with her parents. Lawrence Chinsky, Student Article, "Opening the Flood-gates": *Adult Children Suing Their Parents for College Support: Has the Law in New Jersey Gone Too Far or Not Far Enough?*, 68 RUTGERS U. L. REV. 827, 828-29 (2016).

Requiring parents to support children in college presents problems that arise from the children's growing independence, but legal solutions short of denying the children support are possible. For example, if parents object to paying college support to children's former custodial parents, orders could provide for the payments to go to the children themselves or to the educational institutions directly. To insure that children are actually taking advantage of their educational opportunities instead of loafing, courts could also require evidence that the children are enrolled in school and making progress.¹⁰⁷ To address parents' grievances against children who do not have a good relationship with them, courts could condition support on children's treating their parents reasonably,¹⁰⁸ or the law could provide that parents are obligated to pay college support without attempting to control the children, as is true when courts order spousal support.¹⁰⁹

At any rate, these problems of implementation do not justify eliminating college support altogether. In today's complex world, it has become normal and expected that people in their early twenties will still rely on their parents for financial assistance as they continue in school and find their way to independent adulthood. The young people most likely to lose out if parental financial help is voluntary are children whose parents are separated, whether the parents have remarried or not. Allowing courts to order post-secondary schooling support will not solve the problem of access to school for children whose parents are poor, since orders should not issue to parents who cannot afford to pay. However, laws establishing this authority would likely help young people whose parents are not poor, as the empirical analysis at the beginning of the article explains.

Parents who claim that they should be able to decide as a matter of child rearing philosophy that a child would be better off paying for his or her own education are making the same kind

¹⁰⁷ For examples of statutory provisions that make children parties to suits to establish and enforce post-secondary education support and require the children to prove that they are actively engaged in school, see OR. REV. STAT. § 107.105 (2015). While the Oregon statute is overly long and detailed, it provides an example that could be adapted.

¹⁰⁸ See, e.g., *Newburgh v. Arrigo*, 443 A.2d 1031, 1038 (N.J. 1982) (listing twelve factors that should be evaluated by a court before awarding support for an adult child, including the child's relationship with the parents).

¹⁰⁹ See, e.g., *Smith & Smith*, 606 P.2d 694 (Or. Ct. App. 1980).

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of claim that parents have been making since the early nineteenth century to challenge laws requiring them to provide for their children. That argument was rejected when courts or legislatures recognized that changing social conditions made it necessary for children to obtain more education, first going to school at all, and then being able to attend high school. By the same token, legislatures should recognize that today post-secondary education and educational assistance should not be optional when children can benefit from it and parents can afford to pay.

