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Alan M. Fenning

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CONCLUSION

As this Note has suggested throughout, perhaps the most important aspect of *Hurtado* is the flexibility of method evidenced by the opinion. It is apparent that the supreme court has no intention of binding itself inextricably to any single choice of law approach.\(^1\) Such flexibility is indeed wise, since the court's general method for identifying governmental policies, and its silence as to what nexus is sufficient to legitimate a governmental interest, may expand the field of possible true conflicts. If the California Supreme Court is to remain in the forefront in choice of law it will need an approach to resolving these true conflicts that is workable and flexible, yet just. *Hurtado* contains the germ of just such an approach.

Bruce Maximov

IV

CONSTITUTIONAL LAW

*Responsible Relative Laws and Equal Protection*

*Swoap v. Superior Court.*\(^1\) The California Supreme Court upheld against plaintiffs' equal protection attack a California statute requiring adult children of old age security (OAS) recipients to reimburse the state for the aid extended to their respective parents. The court rejected a number of arguments that the statute involved a "suspect" classification or a "fundamental interest" calling for the "strict scrutiny" equal protection test. Instead, the court applied a rational basis test and held that the reimbursement requirement is rationally related to the state's purpose of protecting the public treasury either on the ground that children have a statutory duty to support indigent parents or on the basis of the special benefits received by children during their minority from their parents.

Plaintiffs were two OAS recipients and their adult children. Former California Welfare and Institutions Code section 12101 (now section 12351) provided that the adult children of an OAS recipient must

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\(^1\) 10 Cal. 3d 490, 516 P.2d 840, 111 Cal. Rptr. 136 (1973) (Sullivan, J.) (4-2 decision). The case below was entitled *Carleson v. Superior Court*.
contribute to the recipient's support amounts determined by a fixed schedule according to the child's income, and former section 12100 (now section 12350) provides that the county welfare department may bring suit against the recipient's adult children to collect these contributions. Plaintiffs brought a class action seeking to enjoin state officials

2. The statute provided in pertinent part:
The director may establish a relatives' contribution scale setting forth the amount an adult child shall be required to contribute toward the support of a parent in receipt of aid under this chapter provided that the schedule established shall not exceed the amounts in the schedule specified in this section. Regulations of the department shall prescribe the criteria, methods of investigation and test check procedures relating to the determination of the maximum amount any adult child may be held liable to contribute toward the support of a parent to the end that the required contribution does not impose an undue hardship upon the adult child and administrative time and effort are not expended on nonproductive investigative activities.

3. The statute provided in pertinent part:
If an adult child living within this state fails to contribute to the support of his parent as required by Section 12101, then the county granting aid under this chapter may proceed against such child. Upon request to do so, the district attorney or other legal officer of the county may maintain an action in the superior court of the county granting such aid, to recover that portion of the aid granted as it is determined that the child is liable to pay, and to secure an order requiring payment of any sums which may become due in the future.
from enforcing these reimbursement provisions. After the trial court granted a temporary restraining order, the defendants sought a writ of prohibition in the supreme court, arguing that since the challenged statutes are valid the trial court had no jurisdiction to issue the injunction. Holding that the statute did not deny plaintiffs equal protection, the supreme court issued the writ.

This Note focuses on the court's equal protection analysis in Swoap. Courts have developed a bifurcated approach in reviewing equal protection challenges. In most cases, courts apply a rational basis test, under which a statutory classification is upheld if it is rationally related to a conceivable legitimate state purpose. But if the challenged statute involves a suspect classification or a fundamental right the strict scrutiny test is invoked. A statute is upheld under this test only if the government proves both that the statute promotes a compelling state interest and that the statute is necessary to further the interest.

The application of this two-tier formulation is result-determinative, with the strict scrutiny test consistently yielding a finding of unconstitutionality. This fact has resulted in judicial dissatisfaction with the two-tier formulation. Recent cases suggest that the United States Supreme Court is moving away from the two-tier approach and toward a more flexible analysis. Thus, where dubious statutory classifications or significant but not fundamental rights have been involved, the Court has applied a stricter rational basis test which requires that the challenged statute bear a substantial relationship to

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4. 10 Cal. 3d at 493-95, 516 P.2d at 842-43, 111 Cal. Rptr. at 138-39.
5. Id. at 508, 516 P.2d at 852, 111 Cal. Rptr. at 148.
9. Id. at 17-18,
This Note first analyzes the court's refusal to apply the strict scrutiny test in *Swoap*. Next, the critique of the court's rational basis analysis begins with a review of the "responsible relative" cases decided in California prior to *Swoap*. These cases demonstrate that an intermediate equal protection standard had been developed in this area. Since the court applied a pure rational basis test in *Swoap*, it is argued that the decision effectively overruled these cases. This result is criticized because it affords little protection against legislative abuse of the power to impose support obligations and accompanying responsible relative provisions.

I. STRICT SCRUTINY

The court in *Swoap* rejected a number of arguments advanced by plaintiffs that the statute involved a suspect classification or fundamental right calling for the application of the strict scrutiny test.

a. Wealth classification

Although no case has yet applied the strict scrutiny test to a wealth classification in the absence of an adversely affected fundamental right, both opinions in *Swoap* apparently agreed that wealth classifications are suspect and require the application of the strict scrutiny test. The majority and dissenting opinions split sharply, however, on the question whether the reimbursement requirement imposed upon the class of adult children of OAS recipients created a wealth classification.

Distinguishing between the class of OAS recipients and the class of adult children of OAS recipients, the court concluded that no wealth classification was involved in *Swoap*, but considered it "indisputable that "careful examination on our part is especially warranted where lines are drawn on the basis of wealth . . . .""
classification was made by the statute. The court recognized that the class of OAS recipients is based on wealth, but it viewed this classification as the logical result of the state's purpose of benefiting people in need.\textsuperscript{13} In contrast the court noted that the statutes imposing liability upon the class of adult children apply to all adult children of OAS recipients regardless of the children's wealth.\textsuperscript{14} The court concluded that the classification drawn by the statute is parentage\textsuperscript{15} and not wealth.

It might be argued that a wealth classification was involved in \textit{Swoap} in two ways. First, it might be contended that, instead of distinguishing between the class of OAS recipients and the class of recipients' children, the whole family must be viewed as a unit. Since certain members of the unit, the adult children, are singled out for liability because of the poverty of other members, their parents, the whole unit is disadvantaged by the contribution statute because of the unit's lack of wealth. Indeed, one scholar has argued that the responsible relative statute at issue in \textit{Swoap} is part of a discriminatory body of family law of the poor distinct from the family law of the rest of the community.\textsuperscript{16} Plaintiffs analogized the statute to the school finance system held to involve a wealth classification in \textit{Serrano v. Priest}:

\begin{quote}
\textit{Just as school children cannot be discriminated against because of the poverty of the unit—the school district—to which they belong, so adult children cannot be penalized for the poverty of the unit—the family—to which they belong.}\textsuperscript{17}
\end{quote}

The court conceded that this argument has a "surface plausibility" but dismissed it on closer examination as "pure sophistry," holding that

\begin{flushleft}
\textsuperscript{13} 10 Cal. 3d at 505, 516 P.2d at 850, 111 Cal. Rptr. at 146. It is constitutionally permissible to make wealth classifications for the purpose of delineating the class eligible to receive public assistance. \textit{In re Yturburru's Estate}, 134 Cal. 567, 66 P. 729 (1901). \textit{Cf.} 10 Cal. 3d at 522, 516 P.2d at 563, 111 Cal. Rptr. at 159 (Tobriner, J., dissenting).

\textsuperscript{14} 10 Cal. 3d at 505, 516 P.2d at 850, 111 Cal. Rptr. at 146.

\textsuperscript{15} The court had previously rejected plaintiffs' contention that ancestry is a suspect classification. Plaintiffs' only authority for this contention was a statement in \textit{Hirabayashi v. United States}, 320 U.S. 81 (1943), where the Court characterized distinctions based on "ancestry" as "odious," but it is clear from the context that the Court was referring to racial discrimination. \textit{See} 10 Cal. 3d at 505-06, 516 P.2d at 850-51, 111 Cal. Rptr. at 146-47.


\begin{quote}
It is this basic fact, the poverty of the class of persons entitled to assistance under the state's welfare laws, which underlies the further and altogether dependent classification of certain relatives of such persons as responsible. One classification based on poverty is thus built upon another, and the whole system is accordingly doubly indivisive.
\end{quote}

\textit{Id.} at 644.

\textsuperscript{17} Petition for Hearing at 27. \textit{Cf.} Brief for California Senior Citizens, \textit{et al.} as Amicus Curiae at 50-51 [hereinafter cited as Senior Citizens Brief].
\end{flushleft}
the class of aid recipients, based on wealth, and the class of their children, based on parentage, must be distinguished.\textsuperscript{18} The court's reasoning, however, does not clearly show why the two classes must be distinguished or why the analogy to \textit{Serrano} was improperly drawn.

A second argument is that the class of adult children of parents in need, while technically neutral with respect to wealth, is nevertheless discriminatory in practice because "by and large poor parents have less-than-wealthy adult children."\textsuperscript{19} The court did not consider this argument; its silence on the issue is probably explained by the lack of any substantial evidence to support the contention.\textsuperscript{20} The possibility remains, therefore, that the responsible relative provisions might be shown in a future case to involve a suspect wealth classification.

\textbf{b. Fundamental interests}

The court gave only the briefest consideration\textsuperscript{21} to plaintiffs' arguments that the responsible relative provisions adversely affect fundamental interests. Plaintiffs' first contention was that the provisions infringe the fundamental right of family privacy by requiring probing by the state into the children's financial affairs.\textsuperscript{22} The court dismissed this argument in a footnote as "[not] worthy of extended discussion."\textsuperscript{23}

Plaintiffs' second contention was that the responsible relative provisions affect the fundamental interest of OAS recipients in receiving public assistance.\textsuperscript{24} \textit{Goldberg v. Kelly}\textsuperscript{25} provides some authority for

\textsuperscript{18} 10 Cal. 3d at 505, 516 P.2d at 850, 111 Cal. Rptr. at 146.


\textsuperscript{20} No evidence was presented or referred to in the Petition for Hearing or in the Senior Citizens Brief, \textit{supra} note 17. \textit{Cf.} Rosenbaum, \textit{Are Family Responsibility Laws Constitutional?}, 1 FAM. L.Q. 55, 66 (1967); Tully, \textit{Family Responsibility Laws: An Unwise and Unconstitutional Imposition}, 5 FAM. L.Q. 32, 42 (1971).

\textsuperscript{21} At one point the court stated that plaintiffs recognized that no fundamental interests were affected. 10 Cal. 3d at 504, 516 P.2d at 850, 111 Cal. Rptr. at 146.

\textsuperscript{22} The probing includes, but is not limited to, "independent investigation[s]" such as "checks with a credit bureau [and] employers." Petition for Hearing at 34.

The extent of the probing, however, does not seem constitutionally objectionable. \textit{Cf.} Wyman v. James, 400 U.S. 309 (1971). Furthermore, plaintiffs' reliance on \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965), and \textit{Prince v. Commonwealth of Massachusetts}, 321 U.S. 158 (1944), to establish the alleged general right of family privacy is misplaced since \textit{Griswold} dealt with the special area of sexual relations and contraception and \textit{Prince} involved a conflict between the free exercise of religion and state laws designed to protect children. Neither case supports the existence of a general right of family privacy.

\textsuperscript{23} 10 Cal. 3d at 507 n.16, 516 P.2d at 852 n.16, 111 Cal. Rptr. at 148 n.16.

\textsuperscript{24} \textit{See} Petition for Hearing at 26, 34, 35.

\textsuperscript{25} 397 U.S. 254 (1970).
the argument that OAS recipients have a fundamental interest in the receipt of OAS benefits.\textsuperscript{26} It should be noted, however, that there is substantial authority to the contrary.\textsuperscript{27} Since some OAS recipients are deterred from continuing with the program because of the responsible relative provisions,\textsuperscript{28} there is merit in the claim that if public assistance is a fundamental right, it is adversely affected. The decision did not mention this argument; the contention remains unresolved and may provide the basis for a new challenge to responsible relative provisions.

II. THE RATIONAL BASIS TEST

Having rejected application of the strict scrutiny test, the court found that the responsible relative provisions of Welfare and Institutions Code sections 12100-01 do not deny equal protection under the rational basis test.\textsuperscript{29} The remainder of this Note will attempt to identify and evaluate the precise basis of this finding of rationality.

a. The prior responsible relative cases

\textit{Swoap} was not the first case in which the constitutionality of a responsible relative statute was challenged. In \textit{Department of Mental Hygiene v. Kirchner},\textsuperscript{30} the department sought reimbursement under former Welfare and Institutions Code section 6650\textsuperscript{21} for the costs of

\begin{itemize}
\item \textsuperscript{26} \textit{Id.} at 264. \textit{Goldberg} required a fair hearing prior to the termination of welfare benefits. The fundamental nature of welfare benefits was suggested by this statement:

\begin{quote}
\textit{[W]elfare provides the means to obtain essential food, clothing, housing, and medical care. . . . [T]ermination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.}
\end{quote}

\textit{Id.} The Court, however, refrained from declaring the right to receive welfare benefits fundamental. \textit{See also} Shapiro v. Thompson, 394 U.S. 618 (1969).

\item \textsuperscript{27} \textit{See}, \textit{e.g.}, Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

\item \textsuperscript{28} \textit{See} Petition for Hearing at Exhibits G, K & L.

\item The adverse effect of responsible relative statutes on the OAS program has been noted:

\begin{quote}
It is generally thought that the major effect of relative responsibility requirements has been to discourage applications because of the reluctance of the parents to subject their children to a financial investigation or to enforce support that is not voluntarily given.
\end{quote}

\textit{ST\textsuperscript{U}DIES IN PUBLIC WELFARE PAPER NO. 10, SUBCOMMITTEE ON FISCAL POLICY OF THE JOINT ECONOMIC COMMITTEE, 93d Cong., 1st Sess. 47 (1973)}.

\item \textsuperscript{29} 10 Cal. 3d at 507, 516 P.2d at 852, 111 Cal. Rptr. at 148.


\item \textsuperscript{31} At the time of the cause of action in \textit{Kirchner}, the statute provided: \textit{"The husband, wife, father, mother, or children of a mentally ill person . . . shall be liable}
maintaining the defendant’s mother in a state mental institution. The defendant challenged the statute on equal protection grounds, and the California Supreme Court sustained the attack. Noting that institutional care of mentally ill persons is a proper state function, the purpose of which is to protect society at large as well as the individual treated, the court said that the cost could not be “arbitrarily charged to one class in the society” as contemplated by the statute in question.\textsuperscript{32}

Arguably, the court’s analysis is not consistent with the traditional rational basis test. The court asserted the arbitrariness of the statutory classification and summarily rejected the argument that the family relationship provides a rational basis for the reimbursement statute,\textsuperscript{33} but the opinion did not even mention a number of other “conceivable” rational bases suggested by the commentators: (1) the “special benefits” received by the daughter as a result of the state’s care of her mother; (2) the legislature’s desire to preserve traditional values of family responsibility; (3) the historical origins of family support obligations; (4) the special relationship existing among family members; and (5) the moral obligation of supporting family members.\textsuperscript{34} This suggests that a stricter variant of the traditional rational basis test was really being applied by the court in \textit{Kirchner}.

Appellate court cases after \textit{Kirchner} have upheld statutes shifting the costs of public benefit programs to responsible relatives where the relatives have been “otherwise obligated” to support the aid recipi-
The rationale of this rule is that where a public benefit program has the effect of discharging a pre-existing obligation of a third person, the public program provides a private benefit for which the state deserves compensation. Such an obligation provides a rational basis for the responsible relative statute. The dissenting opinion in Swoap indicates that the purpose of the rule is to prevent abuse of majoritarian power by precluding a majority from arbitrarily shifting onto a powerless minority part of the costs of a state program that is otherwise funded through general taxation.

The scope of this rule was at issue in Swoap. Clearly, a common law duty of support is a “pre-existing duty” sufficient to rationalize a responsible relative statute. But such a common law duty argument was not available to the state in Swoap because there was no obligation at common law upon adult children to support their parents. The state, however, relied on Civil Code section 206, which requires adult children to support their parents if “in need,” as supplying the required pre-existing duty. Prior to the court’s decision in Swoap, the question whether a statutory as opposed to a common law duty of support should be a sufficient rational basis for a responsible relative statute had not been resolved.
The issue arose, but was not decided, in County of San Mateo v. Boss,42 where the facts were essentially the same as in Swoap. At the time the cause of action arose, Civil Code section 206 required adult children to support parents who were “poor.”43 Noting that defendant’s mother had assets worth over $31,000 the court held that she was not “poor” within the meaning of section 206, even though she was “in need” so as to qualify for OAS assistance.44 Thus, the court avoided the issue of the sufficiency of a statutory as opposed to a common law duty of support as a rational basis for the statute by holding that no statutory duty existed on the special facts of the case. Since the defendant was not “otherwise obligated” to support his mother, the responsible relative statute as applied to him was a denial of equal protection. Subsequent to the court’s decision in Boss, the legislature amended Civil Code section 206 to make children liable to support their parents who are “in need.”45 This amendment forced the court in Swoap to confront squarely the issue of the sufficiency of a statutory duty of support as a rational basis for a responsible relative provision.

the care, support, and maintenance of her mentally deficient adult daughter in a state institution. Despite the absence of a pre-existing common law duty of support, the court found the mother to be “otherwise obligated” under Civil Code § 206 to support her daughter. The court reasoned that the applicable reimbursement statute (former Welfare & Institutions Code § 5260) was rational and not violative of equal protection of the law since the defendant would have been personally obligated to support her daughter in the absence of any state program. Id. at 410-11, 48 Cal. Rptr. at 796.

The supreme court cast doubt upon this decision, however, in County of San Mateo v. Boss, 3 Cal. 3d 962, 479 P.2d 654, 92 Cal. Rptr. 294 (1971), in which the facts were essentially the same as in Swoap. Although the supreme court avoided the issue by finding no support obligation under Civil Code § 206 on the facts of the case, the court indicated in a footnote that § 206, even when applicable, could not provide the requisite rational basis for a responsible relative provision. Id. at 971 n.8, 479 P.2d at 660 n.8, 92 Cal. Rptr. at 300 n.8. Dudley might be distinguished from Kirchner, Boss, and Swoap on the ground that the reimbursement provision challenged in that case, former Welfare and Institutions Code § 5260, merely provided a procedure for enforcing any support liability that might otherwise exist while the other cases all involved reimbursement provisions that purported to create and to impose responsible relative liability. The court in Dudley itself suggested this distinction. 239 Cal. App. 2d at 408, 48 Cal. Rptr. at 794-95.

42. 3 Cal. 3d 962, 479 P.2d 654, 92 Cal. Rptr. 294 (1971).
43. The statute read in pertinent part:
   It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability.
44. 3 Cal. 3d at 970-71, 479 P.2d at 659, 92 Cal. Rptr. at 299.
b. Rational relationship analysis

The court's opinion in *Swoap* focused on whether the responsible relative provisions of Welfare and Institutions Code sections 12100-01 are rationally related to a conceivable legitimate state purpose. The majority and the dissenting opinions both agreed that the actual purpose of the responsible relative provisions is to relieve the public treasury of part of the burden arising from the state's assumption of the responsibility of maintaining the destitute through its aid programs. Since this is a legitimate state purpose, the issue before the court was reduced to whether the selection of adult children of aid recipients to bear the burden was rational. The court resolved the issue by finding the classification rational on two distinct grounds: (1) the statutory duty of adult children to support their parents established by Civil Code section 206 is a pre-existing obligation within the rule of *Kirchner* and its progeny; and (2) the special benefits received by children during their minority from their parents constitute an independent rational basis for the statute.

1. The argument based on Civil Code section 206. The majority argued that the obligation imposed upon the adult children of poor parents or of parents in need by Civil Code section 206, as amended
in 1971,50 constituted a pre-existing duty which provided a rational basis for the OAS responsible relative provisions.61 The court thereby answered affirmatively the issue left unresolved in *Boss* and found, for the first time, that a statutorily imposed duty could support a responsible relative provision.62

This decision resulted, in large part, from the court's framing of the central issue as whether: "the class of adult children in general are [sic] otherwise under a duty to support needy or poor parents which duty provides a rational basis for upholding the relatives' responsibility created by sections 12100 and 12101 . . . ."56 This formulation overruled *Boss* to the extent that it required an analysis of the *individual* duty under section 206 of each adult child. *Swoap*'s general duty approach enabled the court to reject plaintiffs' argument that children of OAS recipients who are "in need" but not "poor" do not have a pre-existing duty of support since they had no obligation prior to the 1971 amendment of section 206. The approach, however, is not responsive to the danger of majoritarian abuse which underlies the *Kirchner* rule and the individual duty analysis of *Boss*.

In challenging the rationality of the responsible relative provisions, plaintiffs had argued that a proper application of the reasoning

50. See notes 40 and 43 supra for the text of Civil Code § 206 before and after its amendment in 1971.
51. 10 Cal. 3d at 500, 504, 507, 516 P.2d at 842, 844, 847, 111 Cal. Rptr. at 143, 145, 148.
52. Any statutory duty of support used to provide a rational basis for a responsible relative provision must itself be rational and not arbitrary. The court in *Swoap* implied that § 206 was rational since it "rest[ed] soundly on our Anglo-American legal tradition." *Id.* at 507, 516 P.2d at 852, 111 Cal. Rptr. at 148. Section 206 would also appear to be rational on the basis of one or more of the other grounds advanced in the text accompanying note 34 supra. The use of a traditional rational basis test is justified where the issue is the validity of the statutory obligation of adult children to support their needy parents and not their liability to reimburse the state for benefits provided under a public program since the danger of majoritarian abuse which calls for the stricter test is absent.
53. *Id.* at 502, 516, P.2d at 848, 111 Cal. Rptr. at 144 (emphasis in original).

In formulating its general duty approach the majority argued that since the county's right to reimbursement under Welfare and Institutions Code §§ 12100-01 is not dependent upon its being subrogated to the aid recipient's right to recover against his or her adult children under Civil Code § 206, the rationality of the liability imposed by Welfare and Institutions Code §§ 12100-01 "should not depend upon the exact subrogation of an individual duty, factually established, under Civil Code section 206." *Id.*

But the dissent points out that County of San Bernardino v. Simmons, 46 Cal. 2d 394, 296 P.2d 329 (1956), upon which the majority relies, did not assert as a constitutional matter the claimed independence of the county's right to reimbursement. Furthermore, the dissent notes that in *In re Dudley*, 239 Cal. App. 2d 401, 48 Cal. Rptr. 790 (1st Dist. 1966), the court of appeal distinguished *Simmons* and examined the defendant's individual duty under Civil Code § 206 before determining whether the defendant was "otherwise obligated" to support her daughter. 10 Cal. 3d at 516-17 n.2, 516 P.2d at 858-59 n.2, 111 Cal. Rptr. at 154-55 n.2 (Tobriner, J., dissenting). See also *In re Dudley*, 239 Cal. App. 2d 401, 410, 48 Cal. Rptr. 790, 796 (1st Dist. 1966).
of *Kirchner* and its progeny meant that the pre-existing duty concept should be interpreted as requiring a duty of support existing prior to and independent of the statutory responsible relative contribution requirement. Plaintiffs argued further that the application of this "prior to and independent of" standard called for distinguishing between the obligations arising under Civil Code section 206 before and after its amendment in 1971.

From 1872 until 1971 section 206 imposed an obligation upon adult children of poor parents. As the court noted, this clearly antedated the obligation placed upon adult children of parents in need by the first OAS responsible relative provision.\(^{54}\) Thus, section 206 may be said to have created an obligation prior to that found in Welfare and Institutions Code Sections 12100-01 as to those adult children whose parents are poor. But as to the adult children of parents in need, section 206 cannot be said to have created a prior obligation since section 206 was not amended to cover the adult children of parents in need until 1971.

The court rejected this argument, noting that "[i]t is abundantly clear that children have generally been subject to a duty to support poor parents for a very long time, indeed."\(^{55}\) It looked to the history and origin of both Civil Code section 206 and the responsible relative provision to determine whether the statutory support obligation does, in fact, satisfy the pre-existing duty standard of *Kirchner* and its progeny. The court traced the section 206 duty to the Elizabethan Poor Law of 1601\(^ {56}\) and then noted that it was not until 1937 that a responsible relative provision was added to the OAS program.\(^ {57}\) After examining these two factors the opinion concluded:

> It is thus abundantly clear that a long tradition of law, not to mention a measureless history of social customs, has singled out adult children to bear the burden of supporting their poor parents. This duty existed prior to, and independent of, any duties arising out of the state assistance to the aged. Subsequent statutes imposing liability upon the adult children of persons receiving aid to the aged merely selected a class of relatives who were otherwise legally responsible for the support of their parents. The fact that the Legislature in 1971 changed the standard from "poor persons unable to

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\(^{54}\) 10 Cal. 3d at 503, 516 P.2d at 849, 111 Cal. Rptr. at 145.

\(^{55}\) Id. at 502, 516 P.2d at 852, 111 Cal. Rptr. at 144 (emphasis added).

\(^{56}\) 10 Cal. 3d at 502-03, 516 P.2d at 848-49, 111 Cal. Rptr. at 144-45. The origins of the Elizabethan Poor Law and the development of the statutory duty codified in § 206 in 1872 is detailed in tenBroek, pts. 1-2, *supra* note 2, and in tenBroek, pt. 3, *supra* note 16.

\(^{57}\) 10 Cal. 3d at 503, 516 P.2d at 849, 111 Cal. Rptr. at 145.
maintain themselves by work' in no way affects or changes this conclusion.68

The court's examination of the general duty of adult children enabled it to find that the duty of support existed "prior to and independent of' the imposition of responsible relative liability. However, the court's shift from the individual duty analysis to an analysis of the duty of the class of adult children in general is inconsistent with the reasoning underlying Kirchner and its progeny.

As the dissenting opinion notes, the purpose of upholding a responsible relative statute only where there is a pre-existing and independent obligation of support is to prevent the abuse of majoritarian power which occurs when the legislature singles out a relatively powerless minority to bear the expense of a public program.69 Shifting the burden is justified only where the state provides a certain form of public assistance and seeks reimbursement from those relatives who were already individually obligated to provide similar assistance to the aid recipient before the public aid program was initiated.

An altogether different situation exists when the state creates a duty to provide support equivalent to that provided by an existing aid program. If the new duty is deemed a prior and independent support obligation so as to provide the rational basis for a responsible relative provision, then there is no check on majoritarian power to shift the costs of public programs arbitrarily. This essentially was the situation when the legislature amended Civil Code section 206 in 1971 by imposing an obligation upon adult children of parents in need. This amendment apparently was aimed at overruling Boss, which had held that Welfare and Institutions Code sections 12100-01 were unconstitutional when applied to an adult child of a parent who was in need but not so poor that the child had no duty of support under Civil Code section 206. The amendment may be viewed, therefore, as an effort to create a duty of support in the Civil Code that would provide the rational basis for the responsible relative provisions of the existing OAS program.

Thus, in order to give substance to the "prior to, and independent of" standard and in order to place a check on majoritarian power, the court should have held that the obligation imposed by Civil Code section 206 upon adult children of parents in need did not provide a constitutional basis for requiring these children to reimburse the state for OAS aid received by their respective parents.60

58. Id. at 503-04, 516 P.2d at 849, 111 Cal. Rptr. at 145 (emphasis added).
59. See note 37 supra and accompanying text.
60. Since only the adult children of poor parents would remain liable, one effect of this conclusion is to strengthen the argument that Welfare and Institutions Code §§
The dissenters in *Swoap* argued that the obligation imposed by Civil Code section 206 upon the adult children of *poor parents* also failed to meet the "prior to, and independent of" standard. Tracing the history of Civil Code section 206 to its origins in the Elizabethan Poor Law, the dissent noted that the purpose of the Poor Law's responsible relative provisions was to relieve the public of part of the burden of caring for the poor. The support obligation imposed by Civil Code section 206 is therefore distinguishable from common law support obligations on the grounds that the section 206 duty "serves no general public role" other than to reduce the costs to the state and that the adult children obligated under section 206 would not have been "legally obligated to support their needy parents absent the state's decision to provide such aid."*

The dissent's argument is not persuasive given the purposes underlying the "prior to, and independent of" standard. A poor law system, including responsible relative provisions, did not develop in California until 1901, and the OAS program was not started until 1930. Under these circumstances, the motives prompting passage of the Elizabethan Poor Law in 1601 should not be attributed to the California Legislature; the enactment of Civil Code section 206 in 1872 could not have been intended to shift the costs of a then-existing state public assistance program onto a powerless minority.

The effect, then, of a proper application of the "prior to, and independent of" standard would be to uphold Welfare and Institutions Code sections 12100-01 as to the adult children of poor parents and to declare the provisions unconstitutional as to the adult children of parents in need. By looking only at the circumstances of classes of persons in general rather than of the specific litigants, the court has replaced the stricter rational basis test applied in earlier decisions with a more traditional deferential test which is not well-suited to protecting against majoritarian abuse of the power to impose responsible relative provisions.

2. *The special benefits approach.* As a second, and apparently

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12100-01 create a wealth classification.

A second effect is that strict adherence to the "prior to, and independent of" standard would force the court to abandon its analysis of the obligation of the class of adult children in general and to return to the type of individual duty analysis made by the court in *Boss*.

61. 10 Cal. 3d at 521, 516 P.2d at 862, 111 Cal. Rptr. at 158 (Tobriner, J., dissenting). See also tenBroek, pts. 1-2, supra note 2, at 281-83.

62. 10 Cal. 3d at 521-22, 516 P.2d at 862, 111 Cal. Rptr. at 158 (Tobriner, J., dissenting).

63. See tenBroek, pts. 1-2, supra note 2, at 907.

64. 10 Cal. 3d at 503, 516 P.2d at 849, 111 Cal. Rptr. at 145.

65. Two implications of this result are discussed in note 60 supra.
independent, ground for its decision that the responsible relative provisions in Welfare and Institutions Code sections 12100-01 do not violate equal protection, the court made an abrupt departure from the reasoning of all the previous cases. Noting that a legitimate purpose of the statute is to relieve the public treasury of part of the burden of the welfare system, the court framed the issue as whether selecting adult children to bear this burden is rationally related to this purpose. The court then held that the statute is rational given the special benefits received by children during their minority from their parents:

It seems eminently clear that the selection of the adult children is rational on the ground that the parents, who are now in need, supported and cared for their children during their minority and that such children should in return now support their parents to the extent to which they are capable. Since these children received special benefits from the class of "parents in need," it is entirely rational that the children bear a special burden with respect to that class.67

This holding does not even make a pretense of following the stricter rational basis test of the previous cases. Boss and Kirchner both rejected the argument that a responsible relative statute could be justified by the incidents of the family relationship upon which the special benefits approach adopted by the court in Swoap rests.68 The approach openly abandons the stricter scrutiny developed in the past for evaluating responsible relative statutes in favor of the highly deferential traditional rational basis test. Under this new approach announced by the court in Swoap, the court may uphold a responsible relative provision in a future case simply by conceiving of a rational basis for the provision without engaging in any analysis of possible rational bases arising from common law or statutory support obligations. This approach, carried to its extremes, could result in uphold-

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66. See note 49 supra.
67. 10 Cal. 3d at 506, 516 P.2d at 852, 111 Cal. Rptr. at 147.
68. See County of San Mateo v. Boss, 3 Cal. 3d 962 at 967, 479 P.2d 654 at 657, 92 Cal. Rptr. 294 at 297 (1971); Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716 at 721, 388 P.2d 720 at 723, 36 Cal. Rptr. 488 at 491 (1964).
69. The court's special benefits rationale differs from the type of special benefits argument that is typically advanced to support such responsible relative classifications. The traditional formulation views the adult children as receiving special benefits because their aged parents are receiving the special benefits of the aid program. See, e.g., Note, 77 Harv. L. Rev. 1523, 1524 (1964); Note, 12 U.C.L.A. L. Rev. 605, 612-13 (1964); cf. tenBroek, pt. 3, supra note 16, at 640-42. This position is untenable if the purpose of the OAS program is to benefit the general public. See text accompanying note 32 supra. See also tenBroek, pt. 3, supra note 16, at 641-42. The special benefits theory advanced by the Swoap majority looks to the special benefits received by children from their parents rather than those received by the children as a result of the state's extension of aid to their parents. Thus, the special benefits are those flowing from the family relationship alone.
ing a responsible relative provision even where there is no common law or statutory support obligation.

The implications of this new approach are severe. For example, an adult child's liability to reimburse the state would no longer be limited by his obligation under Civil Code section 206. Adult children of parents in need could rationally be required to reimburse the state to the extent of their ability for the costs of subsidized housing for the aged, medical care, or any similar existing or conceivable program. Furthermore, responsible relative provisions could be imposed upon siblings, aunts and uncles, and perhaps even grandparents and grandchildren. Finally, the special benefits theory could be used to expand the obligations imposed upon certain family members under the common law and upheld in their modern form.

CONCLUSION

Faced with a challenge to the responsible relative provisions of former Welfare and Institutions Code sections 12100-01, the court in Swoap first rejected arguments for the application of the strict scrutiny test. The strongest argument, that the reimbursement statute involved a wealth classification by analogy to Serrano v. Priest, was rejected without adequate explanation. Applying a rational basis test, the court in Swoap upheld the OAS responsible relative provisions on two grounds. First, by analyzing the duty of support in terms of the class of adult children in general rather than the individual duty of each adult child, the court found that the support obligation established by Civil Code section 206 constituted a "prior or independent" duty of support providing a rational basis for the responsible relative provision within the meaning of the Kirchner line of cases. The court's position emasculates and effectively abandons the more stringent standard of review that had been applied in those cases. Whereas the prior standard strikes an equitable balance between permitting the legislature to provide for reimbursement in a limited class of cases and ensuring that the legislature will not shift the burdens of public assistance programs arbitrarily, the court's approach does not place any significant constraint upon the legislature. Second, the court held that the special benefits received by the adult children of OAS recipients during their minority provides a rational basis for the responsible relative provisions. This approach, as an application of

70. Factors limiting the adult child's liability under Civil Code § 206 include the priority of caring for one's own children, the proportionate ability of all adult siblings of the poor parent to contribute, and whatever ill-treatment the adult child received during his or her minority. See 10 Cal. 3d at 517 n.3, 516 P.2d at 859 n.3, 111 Cal. Rptr. at 155 n.3 (Tobriner, J., dissenting); Gluckman v. Gaines, 266 Cal. App. 2d 52, 71 Cal. Rptr. 795 (3d Dist. 1968). See also Senior Citizens Brief, supra note 17, at 32-36.