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Curtis v. Kline: The Pennsylvania Supreme Court Declares Act 62 Unconstitutional—A Triumph for Equal Protection Law

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INTRODUCTION

In response to the Pennsylvania Supreme Court's decision in *Blue v. Blue*,[1] Pennsylvania's General Assembly enacted a college support law, "Act 62."[2] Launching much debate, Act 62

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1. 616 A.2d 628 (Pa. 1992). The Supreme Court of Pennsylvania deferred to the General Assembly on the issue of whether to impose a legal duty of postsecondary educational support: "Since our legislature has taken an active role in domestic matters through amendments and reenactment of the Divorce Code and the Domestic Relations Act, we feel the more prudent course is to await guidance from that body rather than creating duties and obligations by judicial pronouncement." *Blue*, 616 A.2d at 632.

2. 23 PA. CONS. STAT. § 4327 (1990 & Supp. 1995).

The text of the statute is as follows:

> § 4327. Postsecondary educational costs
>
> (a) General rule.—Where applicable under this section, a court may order either or both parents who are separated, divorced, unmarried or otherwise subject to an existing support obligation to provide equitably for educational costs of their child whether an application for this support is made before or after the child has reached 18 years of age. The responsibility to provide for postsecondary educational expenses is a shared responsibility between both parents. The duty of a parent to provide a postsecondary education for a child is not as exacting a requirement as the duty to provide food, clothing and shelter for a child of tender years unable to support himself. This authority shall extend to postsecondary education, including periods of under-

graduate or vocational education after the child graduates from high school. An award for postsecondary educational costs may be entered only after the child or student has made reasonable efforts to apply for scholarships, grants and work-study assistance.

(b) Action to recover educational expenses.—An action to recover educational costs may be commenced:

(1) by the student if over 18 years of age; or

(2) by either parent on behalf of a child under 18 years of age, but, if the student is over 18 years of age, the student's written consent to the action must be secured.

(c) Calculation of educational costs.—In making an award under this section, the court shall calculate educational costs as defined in this section.

(d) Grants and scholarships.—The court shall deduct from the educational costs all grants and scholarships awarded to the student.

(e) Other relevant factors.—After calculating educational costs and deducting grants and scholarships, the court may order either parent or both parents to pay all or part of the remaining educational costs of their child. The court shall consider all relevant factors which appear reasonable, equitable and necessary, including the following:

(1) The financial resources of both parents.

(2) The financial resources of the student.

(3) The receipt of educational loans and other financial assistance by the student.

(4) The ability, willingness and desire of the student to pursue and complete the course of study.

(5) Any willful estrangement between parent and student caused by the student after attaining majority.

(6) The ability of the student to contribute to the student's expenses through gainful employment. The student's history of employment is material under this paragraph.

(7) Any other relevant factors.

(f) When liability may not be found.—A court shall not order support for educational costs if any of the following circumstances exist:

(1) Undue financial hardship would result to the parent.

(2) The educational costs would be a contribution for postcollege graduate educational costs.

(3) The order would extend support for the student beyond the student's twenty-third birthday. If exceptional circumstances exist, the court may order educational support for the student beyond the student's twenty-third birthday.

(g) Parent's obligation.—A parent's obligation to contribute toward the educational costs of a student shall not include payments to the other parent for the student's living expenses at home unless the student resides at home with the other parent and commutes to school.

(h) Termination or modification of orders.—Any party may request modification or termination of an order entered under this section upon proof of change in educational status of the student, a material change in the financial status of any party or other relevant factors.

(i) Applicability.—

(1) This act shall apply to all divorce decrees, support agreements, support orders, agreed or stipulated court orders, property settlement agreements, equitable distribution agreements, custody agreements and/or court orders and agreed to or stipulated court orders in effect on, executed or entered since, November 12, 1992.

(2) In addition, this act shall apply to all pending actions for support. This section shall not supersede or modify the express terms of a voluntary written marital settlement agreement or any court order entered pursuant thereto.

purported to place the adult children of divorced parents on equal footing with those of married parents. Proponents of Act 62 espoused the argument that children of divorced parents are often left in a disadvantaged state. Opponents, on the other hand, focused on the disparity in treatment of the obligors/parents, the parents who, despite their wishes, are forced to support adult children in college. Opponents of Act 62 also focused on the disparity in treatment of the adult children of intact families; children who, unlike their counterparts, lack a forum in which to fulfill their educational dreams.

In *Curtis v. Kline*,[3] the Pennsylvania Supreme Court was called on to review the legislation that it had ostensibly solicited in *Blue*.[4] Commanding a sudden halt to the escalating dispute, the court declared Act 62 unconstitutional on equal protection grounds.[5]

This article on the Pennsylvania Supreme Court's decision in *Curtis* begins with an account of the unfolding college support law in the Commonwealth and the foreshadowing of Act 62. The article reviews the supreme court's decision and offers alternative views on the constitutionality of Act 62. The article concludes that, despite the court's restrained analysis, *Curtis* represents a victory for equal protection law.

I. The Evolution of Pennsylvania's College Support Law

At common law, the duty to support children and provide them with the necessities of life was commensurate with the parents' right to their children's services.[6] Today, however, the duty of support to a minor child is absolute and does not depend on the access of the parent to the child.[7]

(j) Definitions.—As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Educational costs." Tuition, fees, books, room, board and other educational materials.

"Postsecondary education." An educational or vocational program provided at a college, university or other postsecondary vocational, secretarial, business or technical school.

Id.

3. 666 A.2d 265 (Pa. 1995).

4. *See supra* note 1.

5. *Curtis*, 666 A.2d at 270.

6. Maureen Kelley O'Connor, Note, *Support Obligations of the Non-Custodial Parent for Private Secondary and College Education: Toward a Uniform and Equitable Resolution*, 16 SUFFOLK U. L. REV. 755, 756 n.5 (1982); *see also* Robert M. Washburn, *Post Majority Support: Oh, Dad, Poor Dad*, 44 TEMPLE L.Q. 319, 325 (1971).

7. *See, e.g.*, Melzer v. Witsberger, 480 A.2d 991, 996 (Pa. 1984).

Generally, courts award support and maintenance only to minor children[8] because a parent's legal obligation to support a child usually terminates upon the child's reaching the statutory age of majority.[9] Prior to 1971, the statutory age of majority in most states was twenty-one.[10] Because most children complete college prior to or shortly after reaching the age of twenty-one, there was little cause for debate.

The adoption of the Twenty-sixth Amendment to the United States Constitution in 1971 reduced the voting age from twenty-one to eighteen.[11] Shortly thereafter, many states staged efforts to terminate child support at age eighteen.[12] Out of this battle emerged the current controversy over postsecondary educational support. The lowering of the age of majority to eighteen intensified the college support debate because, as noted above, while a twenty-one year old is ordinarily nearing graduation from college, an eighteen year old is usually just beginning postsecondary education.[13]

States reacted to the college support controversy in various ways. Some states created or continued a right to college support through judicial decree, some passed statutes providing for college support, some passed statutes requiring support until a child completes high school, and still others enacted statutes terminating support at age eighteen, nineteen, or twenty, regardless of educational status.[14]

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8. 67A C.J.S. *Parent & Child* § 49 (1978). *See infra* note 14 for a survey of state law treatment of parental support.

9. 67A C.J.S. *Parent & Child* § 62a (1978).

10. Kathleen Conrey Horan, *Postminority Support for College Education—A Legally Enforceable Obligation in Divorce Proceedings?*, 20 FAM. L.Q. 589, 590 (1987).

11. U.S. CONST. amend. XXVI, § 1. "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." *Id.*

12. Horan, *supra* note 10, at 590-91.

13. *Id.* at 591.

14. As of August of 1995, seventeen states and the District of Columbia provide for college support in some manner and form. The states are: Alabama, Colorado, Hawaii, Illinois, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Utah, and Washington. *See* Stanford v. Stanford, 628 So. 2d 701, 703 (Ala. Civ. App. 1993); COLO. REV. STAT. ANN. §§ 14-10-115(1.5)(a)(III), 14-10-115(1.5)(b)(I) (West Supp. 1994); D.C. CODE ANN. § 30-401 (1981); Butler v. Butler, 496 A.2d 621, 622 (D.C. 1985); HAW. REV. STAT. § 580-47 (West Supp. 1992); ILL. REV. STAT. ch. 750, para. 5/513 (West Supp. 1995); IND. CODE ANN. § 31-1-11.5-12 (West Supp. 1994); IOWA CODE ANN. § 598.1(6) (West Supp. 1994); MD. CODE ANN., FAM. LAW § 12-202(a)(2)(iii)(1) (Michie 1991); MASS. GEN. L. ch. 208, § 28 (Supp. 1994); MISS. CODE ANN. §§ 93-5-23, 93-11-65 (Supp. 1994); MO. REV. STAT. § 452.340(5) (West Supp. 1995); N.J. STAT. ANN. § 2A:34-23 (West Supp. 1994); N.Y. DOM. REL. § 240(1-b)(c)(7) (West Supp. 1995); OR. REV. STAT. § 107.108 (1990); 23 PA. CONS. STAT.

Pennsylvania's General Assembly countered the Twenty-sixth Amendment by reducing the maximum age at which a criminal penalty could be imposed for non-support of a disabled child from twenty-one to eighteen, but the penalty for non-support of an able child still could be imposed only until the child reached the age of sixteen.[15] In many substantive areas, the General Assembly reduced the age of majority from twenty-one to eighteen,[16] excepting support of indigent and handicapped chil-

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§ 4327; S.C. CODE ANN. §§ 20-3-160, 20-7-40 (1989); Bull v. Smith, 382 S.E.2d 905 (S.C. 1989); UTAH CODE ANN. § 15-2-1 (1994); WASH. REV. CODE ANN. § 26.19.090 (West Supp. 1995).

Nine states terminate child support at age eighteen or nineteen, or after graduation from high school or its equivalent, whichever occurs later. The nine states are: Alaska, Arizona, Arkansas, Idaho, Kansas, New Hampshire, Ohio, Texas, and Vermont. *See* ALASKA STAT. §§ 25.24.160, 25.27.061 (1991); ARIZ. REV. STAT. ANN. §§ 12-2451(A), 25-320(C) (West Supp. 1994); ARK. CODE ANN. § 9-12-312(a)(5)(A) (Michie 1993); IDAHO CODE § 32-706(B) (Supp. 1994); KAN. STAT. ANN. § 60-1610(a) (Supp. 1994); N.H. REV. STAT. ANN. § 458:35-C (Supp. 1994); OHIO REV. CODE ANN. § 3103.031 (Supp. 1994); TEX. FAM. CODE ANN. § 4.02 (1993); VT. STAT. ANN. tit. 15, § 658(c) (1989).

Twenty-four states terminate all child support once the child graduates from high school or its equivalent, or when the child reaches age eighteen, nineteen or twenty, whichever occurs first. The states are: California, Connecticut, Delaware, Florida, Georgia, Kentucky, Louisiana, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming. *See* CAL. FAM. CODE § 3901(a) (1994); CONN. GEN. STAT. ANN. § 46b-84(b) (West Supp. 1995); DEL. CODE ANN. tit. 13, § 501(d) (1994); FLA. STAT. ANN. § 743.07(2) (West Supp. 1995); GA. CODE ANN. § 19-6-15(e) (Michie Supp. 1994); KY. REV. STAT. ANN. § 403.213(3) (1994); LA. REV. STAT. ANN. § 9:315.22(c) (West Supp. 1995); ME. REV. STAT. ANN. tit. 19, § 303(2)(A) (West Supp. 1994); MICH. COMP. LAWS ANN. §§ 552.16a, 552.451c (West Supp. 1995); MINN. STAT. ANN. § 518.54(2) (West 1990); MONT. CODE ANN. § 40-4-208(5) (Supp. 1993); NEB. REV. STAT. §§ 42-364, 43-504 (1993); NEV. REV. STAT. ANN. § 425.300(a) (1993); N.M. STAT. ANN. §§ 28-6-1, 40-4-7(a) (Michie 1994); N.C. GEN. STAT. § 50-13.4 (1987); N.D. CENT. CODE § 14-09-08.2(1) (Michie 1993); OKLA. STAT. ANN. tit. 43, § 112(D) (West. Supp. 1995); R.I. GEN. LAWS § 15-5-16.2(b) (Michie 1988); S.D. CODIFIED LAWS ANN. §§ 25-5-18.1, 25-7-6.1 (1992); TENN. CODE ANN. § 34-11-102(a), (b) (Supp. 1995); VA. CODE ANN. § 20-107.2 (Michie 1994); W. VA. CODE ANN. § 48-2-15b(2) (1995); WIS. STAT. ANN. § 767.25(4) (West Supp. 1994); WYO. STAT. § 14-1-101 (1993).

15. *See* 23 PA. CONS. STAT. §§ 4321-4366 (1990 & Supp. 1995).

16. *See generally* 11 PA. CONS. STAT. § 1901 (1972), *repealed and replaced by* 23 PA. CONS. STAT. § 5101(b) (1990 & Supp. 1995) (recognizing individuals eighteen years old and older as adults who may sue and be sued); 16 PA. CONS. STAT. § 2175(4), (6) (Supp. 1992) (providing for emancipation of minors and the ability to establish settlement in counties); 25 PA. CONS. STAT. § 2811 (Supp. 1992) (reducing the voting age from twenty-one to eighteen); 42 PA. CONS. STAT. § 6302 (1990) (defining a "child" as a person under the age of eighteen for purposes of juvenile adjudicatory proceedings); 50 PA. CONS. STAT. § 4502 (Supp. 1995) (relieving parents of incompetent children in state institutions of a legal duty of support when the child reaches the age of eighteen); 73 PA. CONS. STAT. § 2021 (1972), *repealed and replaced by* 23 PA. CONS. STAT. § 5101(a) (1990) (giving to persons eighteen years of age and older the right to contract).

dren[17] and the consumption of alcohol.[18]

In 1972, the legislature amended the Pennsylvania Rules of Civil Procedure to change the age of "majority" from twenty-one to eighteen.[19] At approximately the same time, however, the legislature amended the rules of statutory construction to define "majority" as twenty-one years or older.[20] This definition of majority applies to all statutes enacted on or after September 1, 1937, unless the applicable statute provides otherwise.[21] Conversely, the Statutory Construction Act does not define a "child" or "children" in terms of age.[22] This ambiguity was compounded by the then-existing civil support statute which contained no reference to age and did not include the term majority.[23]

The civil support statute was amended and now reads in part: "Parents may be liable for the support of their children who are 18 years of age or older."[24] While this statutory provision seemingly furnished the grounds upon which to base a parental obligation of postsecondary educational support, Pennsylvania courts, prior to the enactment of Act 62, avoided reference to it when considering support petitions for postsecondary educational costs.[25] Instead, *Commonwealth ex rel. Ulmer v. Sommerville*[26] controlled the issue of college support in Pennsylvania for close to thirty years, from 1963 until 1992.

In *Sommerville*, a father petitioned the court to vacate the support order as to his eighteen-year-old daughter who was attending college.[27] The father contended that he was under no

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17. *See* PA. STAT. ANN. tit. 62, § 1973 (1968 & Supp. 1995) (providing that financially able parents shall assist indigent children as the court shall determine); PA. STAT. ANN. tit. 62, § 432.6 (Supp. 1995) (authorizing the Department of Public Welfare to initiate support actions against relatives for indigent children under the age of twenty-one receiving public assistance).

18. *See* 18 PA. CONS. STAT. §§ 6307-6310.7 (1990 & Supp. 1995).

19. *See* PA. R. CIV. P. 76.

20. *See* Statutory Construction Act of 1972 § 1991, 1972 Pa. Laws 1339, 1357 (codified at 1 PA. CONS. STAT. § 1991 (1975 & Supp. 1992)).

21. *Id.*

22. *Id.*

23. The repealed civil support statute provided:

> [I]f any man shall separate himself from his wife or children without reasonable cause, and, . . . shall neglect or refuse to provide suitable maintenance for his said wife or children, action may be brought, at law or in equity, against such husband for maintenance of said wife or children . . . .

1955-1956 Pa. Laws 878, *repealed and replaced by* 23 PA. CONS. STAT. §§ 4301-4366 (1990 & Supp. 1995).

24. 23 PA. CONS. STAT. § 4321(3).

25. *Id.*

26. 190 A.2d 182 (Pa. Super. Ct. 1963).

27. *Sommerville*, 190 A.2d at 182-83.

duty to continue support for his college-age daughter because the existing support agreement did not address the postsecondary education of either of his two daughters.[28] The trial court rejected this argument and denied the father's petition to vacate.[29]

The Superior Court of Pennsylvania reversed the trial court's ruling and vacated the support order as to the college-age daughter.[30] In so doing, the court initially remarked that a court may vacate a support order hen there is no agreement to support a child during his or her college years.[31] In the same judicial breath, however, the court opined that a parent may be required to pay college support absent an agreement to pay such support if the particular circumstances of the case so dictate.[32] The court relied on *Commonwealth v. Gilmore*,[33] a 1929 Pennsylvania Superior Court case in which a father was ordered to support his sixteen-year-old son who wanted to complete his high school education.[34] Acknowledging the great importance and necessity of education, the court in *Gilmore* noted that:

> The law, apart from statute has come to recognize that paternal duty involves, in addition to provision for mere physical needs, such instruction and education as may be necessary to fit the child reasonably to support itself and to be an element of strength, rather than one of weakness, in the social fabric of the state.[35]

The court in *Sommerville* articulated a two-pronged test to determine the propriety of ordering or enforcing support for postsecondary education.[36] Under the first prong of the *Sommerville* test, courts were required to ascertain whether the child was able or willing to successfully pursue a chosen course of study.[37] The second prong called for courts to evaluate the financial impact of such an order upon the obligor—that is,

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28. *Id.* at 183.
29. *Id.* at 182.
30. *Id.* at 185.
31. *Id.* at 183. For cases involving an agreement to provide support for college education, see Commonwealth *ex rel.* Howell v. Howell, 181 A.2d 903 (Pa. Super. Ct. 1962); Commonwealth *ex rel.* Grossman v. Grossman, 146 A.2d 315 (Pa. Super. Ct. 1958); Commonwealth *ex rel.* Stomel v. Stomel, 119 A.2d 597 (Pa. Super. Ct. 1956).
32. *Sommerville*, 190 A.2d at 183.
33. 97 Pa. Super. 303 (1929).
34. *Gilmore*, 97 Pa. Super at 312-13.
35. *Id.* at 308.
36. *Sommerville*, 190 A.2d at 184.
37. *Id.* (citing Commonwealth *ex rel.* Grossman v. Grossman, 146 A.2d 315 (Pa. Super. Ct. 1958)).

whether the parent had sufficient assets, earning capacity or income to pay college support without suffering undue hardship.[38]

The *Sommerville* test stood for approximately twenty-five years.[39] In 1989, however, this writer authored the opinion in *Milne v. Milne*,[40] in which the superior court added a third tier of analysis. Writing for the court en banc, this author held that a son's willful estrangement from his mother relieved the mother of a duty to contribute to her son's college expenses.[41] This writer noted the shortcomings of the rigid two-pronged *Sommerville* test:

> By refusing to perfunctorily apply the two-pronged test in this case, we are announcing that we are not content to focus on the pragmatic aspects of the case—the wiseness of the investment (Caleb's aptitude to do college work) and the feasibility of making it (Karen Milne's[, the mother's,] ability to pay)—to the exclusion of familial aspects so undeniably central to the policy concerns giving rise to our intervention in this area. We refuse to champion the importance of postsecondary education over that of adult responsibility.[42]

Consistent with this rationale, *Milne* made it clear that estrangement must be considered as an additional prong of the test in deciding post-minority support cases.[43]

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38. *Id.*

39. *See, e.g.*, Emerick v. Emerick, 284 A.2d 682 (Pa. 1971); Leonard v. Leonard, 510 A.2d 827, 830 (Pa. Super. Ct. 1986) (holding that the proper determination in evaluating parents' ability to pay college expenses is the parents' earning capacity rather than actual income); Miller v. Miller, 509 A.2d 402, 404 (Pa. Super. Ct. 1986) (holding that the independent resources of a college-age child may be considered in determining the child's need for support); Lederer v. Lederer, 435 A.2d 199, 201 (Pa. Super. Ct. 1981) (holding that factors to be considered in awarding support for college education include whether the child is able and willing to successfully pursue a course of studies, the adequacy of the income of the child, and whether the parent has sufficient estate, earning capacity or income to provide for the education without undue hardship); Brake v. Brake, 413 A.2d 422, 423 (Pa. Super. Ct. 1979) (holding that a parent who never agreed to support a child past the age of eighteen may be ordered to pay support for the child's college education, as long as the support order would not impose undue hardship upon the parent).

40. 556 A.2d 854 (Pa. Super. Ct.) (Cirillo, P.J.), *appeal denied*, 568 A.2d 1248 (Pa. 1989).

41. *Milne*, 556 A.2d at 861. The facts of *Milne* are worthy of comment. Caleb Milne had lived with his mother following the separation of his parents in 1984. *Id.* at 853. Caleb was a senior in high school at the time of the separation. *Id.* By March of 1985, Caleb became estranged from his mother and moved into his father's residence. *Id.* Prior to moving out of his mother's home, however, Caleb struck his mother, spat in her face, and shoved her to the ground on a least two occasions. *Id.* at 855-56. In light of these facts, the superior court vacated the trial court's entry of an order of support against Caleb's mother. *Id.* at 866-67.

42. *Id.* at 859.

43. *Id.* at 865. The three-part test enunciated in *Milne* is hereinafter referred

For approximately three years, the trial courts and the superior court applied the *Sommerville-Milne* analysis to college support cases.[44] In 1992, the Pennsylvania Supreme Court, in *Blue v. Blue*,[45] expressly rejected the *Sommerville-Milne* test.[46] Writing for the majority, Justice Zappala opined that the underlying premise upon which Pennsylvania courts applied the test never existed in either statutory law or in common law.[47]

The Pennsylvania Supreme Court in *Blue* disapproved of *Sommerville*'s reliance on *Gilmore*.[48] The court in *Gilmore* had recognized the importance of education and held that support for education may be awarded when education is necessary for children to support themselves.[49] For approximately sixty years, however, the superior court applied the *Gilmore* analysis to college support cases.[50] The court in *Blue* stated that the term "education" as it was defined in 1929 did not contemplate collegiate or professional education, "but rather was confined to elementary and vocational education."[51] The *Blue* court, therefore, rejected *Gilmore*'s application to cases involving "enhanced" education.[52]

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to as the *Sommerville-Milne* test.

44. *See, e.g.*, Cook v. Covey, 609 A.2d 560 (Pa. Super. Ct. 1992); Marino by Marino v. Marino, 601 A.2d 1240 (Pa. Super. Ct. 1992); O'Connell v. O'Connell, 597 A.2d 643 (Pa. Super. Ct. 1991); Spitzer v. Tucker, 591 A.2d 723 (Pa. Super. Ct. 1991), *appeal denied*, 607 A.2d 255 (Pa. 1992); Fager v. Fatta, 576 A.2d 1089 (Pa. Super. Ct. 1990); Pharoah v. Lapes, 571 A.2d 1070 (Pa. Super. Ct. 1990); Powell v. Conway, 562 A.2d 324 (Pa. Super. Ct. 1989), *rev'd*, 625 A.2d 641 (Pa. 1993); Griffin v. Griffin, 558 A.2d 75 (Pa. Super. Ct.), *appeal denied*, 571 A.2d 383 (Pa. 1989).

45. 616 A.2d 628 (Pa. 1992).

46. *Blue*, 616 A.2d at 632.

47. *Id.* at 631. In *Blue*, Reginald Blue filed an action against his father for the payment of Reginald's college expenses. *Id.* The trial court ordered the father to pay $4,600.00 per year towards Reginald's college education, later to be reduced by any educational loans and/or grants that Reginald received. *Id.* at 630. On appeal, the superior court affirmed the $4,600.00 support amount, but reversed the trial court's order insofar as it made Reginald's receipt of the support contingent upon him making application for financial aid. *Id.*

The Supreme Court of Pennsylvania reversed the superior court's judgment, finding that "[n]either statute nor specific case law had enunciated the legal maxim relied upon by the lower courts." *Id.* at 631. The court acknowledged that it had previously ordered a parent to pay college support. *Id.* (citing Emerick v. Emerick, 284 A.2d 682 (Pa. 1971)). However, in *Blue*, the court limited the application of *Emerick* to situations where the parents had entered into an agreement to pay for postsecondary educational costs, and the agreement was subsequently incorporated into the divorce decree. *Id.* at 631.

48. *Id.* at 632.

49. Commonwealth v. Gilmore, 97 Pa. Super. 303, 311 (1929).

50. *Blue*, 616 A.2d at 632.

51. *Id.*

52. *Id. But see* Bolton v. Bolton, 657 A.2d 1270, 1272 (Pa. Super. Ct. 1995) (holding that Act 62 directs courts to order parents to contribute to their adult

The *Blue* court opined that a parent's common law duty to support a child terminates when the child reaches the age of eighteen.[53] The court refused to expand this common law duty of support by judicial pronouncement and, instead, declared that it would await legislative input on the matter.[54] The supreme court's wait was short-lived; seven and one-half months later, the Pennsylvania General Assembly enacted Act 62.[55]

II. *CURTIS V. KLINE*[56]

A. *The Facts*

Philip H. Kline, the appellee in *Curtis*, is the father of three children, Jason, Amber and Rebecca.[57] Kline was paying support for his three children pursuant to a court order dated July 12, 1991.[58] In March of 1993, Kline filed a petition to terminate his support obligation to Jason and Amber.[59] At that time, Amber was a student at Kutztown University and Jason was a student at West Chester University.[60]

On January 11, 1994, the trial court granted Kline's petition to terminate child support for Amber and Jason.[61] The trial court found that the order violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[62] Thereafter, the Pennsylvania Department of Public Wel-

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children's undergraduate educations).

53. *Blue*, 616 A.2d at 632.

54. *Id.* Recognizing that many persons reach their eighteenth birthday prior to graduation from high school, the court concluded that a parental duty of support is owed until a child reaches eighteen or graduates from high school, whichever occurs later. *Id.* at 632-33.

55. *See supra* note 2 for the text of Act 62.

56. 666 A.2d 265 (Pa. 1995).

57. *Curtis*, 666 A.2d at 267.

58. *Id.*

59. *Id.* Kline also asserted a constitutional challenge to Act 62, however, the Pennsylvania Attorney General declined to participate in the litigation. *Id. See* PA. R. CIV. P. 235 (granting the Pennsylvania Attorney General the discretionary right to intervene as a party or to be heard without intervention in a proceeding alleging the unconstitutionality of an Act of the Pennsylvania General Assembly).

60. *Curtis*, 666 A.2d at 267.

61. *Id.*

62. *Id.* The Fourteenth Amendment provides: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In *Curtis*, the court indicated that, had Kline raised his claim under the Pennsylvania Constitution, the court would have applied the same equal protection analysis and reached the same result. *Curtis*, 666 A.2d at 267 n.1. *See infra* note 66 for a discussion of equal protection analysis under the Pennsylvania Constitution.

fare ("DPW") was granted permission to intervene.[63] DPW then filed a direct appeal to the Supreme Court of Pennsylvania.[64]

B. The Issue

On direct appeal,[65] the Supreme Court of Pennsylvania was asked to determine whether Act 62 violates the Equal Protection Clause of the United States Constitution.[66] The court opined that equal protection of the law is a pledge, and its requirement is discharged if the laws operate on all alike.[67] The court further stated that the principle of equal protection requires that uniform treatment be given to similarly situated individuals.[68]

C. The Analytical Framework

In determining whether a particular piece of legislation passes inquiry with respect to equal protection, it is necessary to identify the group and the right or interest affected.[69] The conventions of equal protection do not absolutely proscribe states from classification and administering differing treatment.[70]

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63. *Curtis*, 666 A.2d at 267.

64. *Id.* While *Curtis* was pending before the Pennsylvania Supreme Court, the Pennsylvania Superior Court decided the case of Byrnes v. Caldwell, 654 A.2d 1125 (Pa. Super. Ct.) (en banc), *rev'd*, 665 A.2d 1160 (Pa. 1995). The Supreme Court of Pennsylvania granted allocatur. *See* Byrnes v. Caldwell, 658 A.2d 791 (Pa. 1995) (granting allocatur). As a result of the decision in *Curtis*, *Byrnes* was reversed. *See Byrnes*, 665 A.2d at 1161.

In *Byrnes*, a majority of the superior court held that Act 62 passed the rational basis test of the equal protection analysis. *Byrnes*, 654 A.2d at 1132. This author dissented in *Byrnes*, and suggested that Act 62 does not meet the lowest level of scrutiny, reasoning that Act 62 unconstitutionally burdens divorced parents, imposing upon that class of parents an obligation to provide financially for an adult child's college education. *Id.* at 1136 (Cirillo, J., dissenting).

65. *See* 42 PA. CONS. STAT. § 742 (1990) ("The Superior Court shall have exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas . . . .").

66. *Curtis*, 666 A.2d at 267. The courts of the Commonwealth of Pennsylvania, in interpreting the Pennsylvania Constitution, are guided by the standards and analysis employed by the United States Supreme Court. *See* Commonwealth v. Parker White Metal Co., 515 A.2d 1358, 1362 (Pa. 1986). The Pennsylvania Constitution does not contain an "equal protection" clause per se—rather, it contains several provisions within the Declaration of Rights and within the body of the document which have been utilized to employ state equal protection analysis. *See* PA. CONST. art. I, §§ 1, 26; PA. CONST. art. II, § 32.

67. *Curtis*, 666 A.2d at 268.

68. *Id.* at 267. *See* Commonwealth v. Bell, 516 A.2d 1172 (Pa. 1986). *See also* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949).

69. *Curtis*, 666 A.2d at 267-68.

70. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90

There remains a caveat, however, that:

> If classifications are drawn, then the challenged policy must be reasonably justified. What counts as justification will depend upon which of three types a classification belongs to, what governmental interest is in promulgating the classification, and the relationship between that interest and the classification itself.[71]

Equal protection examinations are guided by the following analysis:

> The types of classifications are: (1) classifications which implicate a "suspect" class or a fundamental right; (2) classifications implicating an "important" though not fundamental right or a "sensitive" classification; and (3) classifications which involve none of these. Should the statutory classification in question fall into the first category, the statute is strictly construed in light of a "compelling" governmental purpose; if the classification falls into the second category, a heightened standard of scrutiny is applied to an "important" governmental purpose; and if the statutory scheme falls into the third category, the statute is upheld if there is any rational basis for the classification.[72]

D. The Pennsylvania Supreme Court's Decision

The *Curtis* court declared Act 62 unconstitutional on equal protection grounds.[73] Utilizing the rational basis test, the lowest level of scrutiny, the court reasoned that the members of the legislative designation, similarly situated young adults desiring a college education and in need of financial assistance, were, as a result of Act 62, treated unequally.[74] The court reasoned that

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MICH. L. REV. 213, 228 (1991) (reiterating the oft-cited principle that the Equal Protection Clause does not require universal equal treatment, and suggesting that no practical theory of equal protection could do so).

71. Smith v. City of Philadelphia, 516 A.2d 306, 310-11 (Pa. 1986) (citations omitted), *appeal dismissed*, 479 U.S. 1074 (1987).

72. *Smith*, 516 A.2d at 311 (citations omitted).

73. *Curtis*, 666 A.2d at 270. Justice Zappala authored the majority opinion, and was joined by Chief Justice Nix and Justices Flaherty and Castille. *Id.* at 267. Justice Montemuro, sitting by designation, authored the dissenting opinion, in which Justice Cappy joined. *Id.* at 270 (Montemuro, J., dissenting).

74. *Id.* The superior court in Byrnes v. Caldwell, 654 A.2d 1125 (Pa. Super. Ct.) (en banc), *rev'd*, 665 A.2d 1160 (Pa. 1995), utilized the rational basis test and concluded that "Act 62 'bears some rational relationship with a legitimate state end,' and therefore does not violate the state and federal guarantees of equal protection." *Byrnes*, 654 A.2d at 1132 (quoting Martin v. Unemployment Compensation Bd., 466 A.2d 107, 111 (Pa. 1983), *cert. denied*, 466 U.S. 952 (1984)). Other jurisdictions have utilized this level of scrutiny when presented with this issue. Generally, the equal protection argument fails when the lowest level of scrutiny is used. *See, e.g.*, Kujawinski v. Kujawinski, 376 N.E.2d 1382, 1391 (Ill. 1978) (upholding, against an equal protection challenge, the constitutionality of the Illinois

there was no rational basis for the legislatively created classification, stating that it could "conceive of no rational reason" why the members of the class should be treated differently.[75]

The court dismissed the higher levels of scrutiny, stating that Act 62 "neither implicates a suspect class nor infringes upon a fundamental right."[76] The court also concluded that the classification did not implicate an important right.[77] To support this conclusion, the court indicated that the classification does not create a "suspect class," and that in the Commonwealth of Pennsylvania there exists no entitlement to postsecondary education.[78]

In applying the rational basis test, the court set forth its inquiry as follows: first, to determine whether Act 62 sought to promote any legitimate state interest or public value, and, second, if that question is answered in the affirmative, to determine whether "the classification adopted in the legislation is reasonably related to accomplishing that articulated state interest or interests."[79]

The court identified the "legitimate governmental purpose" as "obviating difficulties encountered by those in non-intact families who want parental financial assistance for postsecondary education."[80] The court, however, "perceive[d] no rational basis for the state government to provide only certain adult citizens with legal means to overcome the difficulties they encounter in pursuing that end."[81] The court recognized potential anomalous circumstances demonstrating the arbitrariness of the statute's classification.[82] Of note is the example of a parent of two children, one from a first marriage, and one from a second intact marriage.[83] The first child would have a legal forum in which to compel college support; the second child, by virtue of an intact marriage, would have no such forum.[84]

Marriage and Dissolution of Marriage Act, which requires divorced parents to pay for a child's post-majority education while not imposing this burden on non-divorced parents). *Accord Ex parte* Bayliss, 550 So. 2d 986, 995 (Ala. 1989); Neudecker v. Neudecker, 566 N.E.2d 557, 563-64 (Ind. Ct. App.), *aff'd*, 577 N.E.2d 960 (Ind. 1991); Childers v. Childers, 575 P.2d 201, 209 (Wash. 1978). *See also* Horan, *supra* note 10, at 8.

75. *Curtis*, 666 A.2d at 270.
76. *Id.* at 268.
77. *Id.*
78. *Id.*
79. *Id.* at 269.
80. *Curtis*, 666 A.2d at 269.
81. *Id.* at 269-70.
82. *Id.* at 270.
83. *Id.*
84. *Id.*

The court then examined the analysis of the New Hampshire Supreme Court in *LeClair v. LeClair*.[85] In *LeClair*, the court identified the classification in terms of parents—married parents and divorced parents.[86] Rejecting the constitutional challenge to the postsecondary educational support statute, the New Hampshire court determined that the statutory scheme ensured that children of divorced families would not be deprived of educational opportunities solely because their families were no longer intact, and the New Hampshire legislature could rationally conclude that absent judicial involvement, children of divorced parents may be less likely to receive postsecondary educational support.[87]

The Pennsylvania Supreme Court rejected this analysis.[88] The court emphasized that in enacting Act 62, the legislature focused on children, not parents.[89] The legislative classification, therefore, was the adult children desiring a postsecondary education and requiring financial assistance.[90] Confining its view to this classification, the court concluded that it could conceive of "no rational reason why those similarly situated with respect to needing funds for college education[] should be treated unequally."[91]

E. The Dissenting Opinion

The dissent emphasized that the majority had ignored the "distinction between the children of broken families and those of intact families."[92] The dissent also reviewed *LeClair*, and noted that the intent of the Pennsylvania legislature in enacting Act 62 was precisely the same as that of the New Hampshire state legislature—an attempt to ameliorate the "disadvantage wrought on children by divorce of their parents, and the necessity of court intervention to protect them from the consequences of this disadvantage."[93] Rejecting the majority's argument that the legislature, in enacting Act 62, had focused on the children and not the parents, the dissent observed that "any child support legislation necessarily involves the marital status of the par-

85. 624 A.2d 1350 (N.H. 1993).
86. *Curtis*, 666 A.2d at 270 (citing *LeClair*, 624 A.2d at 1352).
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Curtis*, 666 A.2d at 270.
92. *Id.* at 271 (Montemuro, J., dissenting).
93. *Id.* at 272 n.3 (citing *LeClair*, 624 A.2d at 1355).

ents."[94]

Riveted to the "consequences of divorce" and the "emotional ill which trails" in its wake, the dissent opined that "to deprive children of broken marriages of the economic support which they would normally receive from nuclear families is to deny them equal protection."[95] The dissent concluded that the majority had overlooked protection of these children as the General Assembly's "rational basis" for enacting Act 62,[96] and cautioned that, "[i]f the Majority's view prevails, there is no recourse for these children, who will be victimized twice, first by the disruption, both financial and psychological, of their parents' divorce, and again by the system which is theoretically designed to protect them."[97]

F. Analysis

In its decision holding Act 62 unconstitutional on equal protection grounds, the Pennsylvania Supreme Court discounted the discriminatory classification of parents implicated by Act 62. It is suggested that Act 62 creates a classification of parents—divorced parents of adult children who desire a postsecondary education, and non-divorced parents of adult children who desire a postsecondary education. The statutory classification has a differential impact on divorced parents as compared to married parents. Furthermore, as explained in Part III, infringement upon divorced parents' right to make decisions concerning their children's postsecondary education implicates the fundamental right of privacy.[98]

The *Curtis* court summarily concluded that the legislature's focus in enacting Act 62 was on children.[99] Maintaining this focus, the court stated that neither the state constitution nor the Federal Constitution "provides an individual right of postsecondary education."[100] The court, therefore, neglected both the discriminatory classification of parents affected and the fundamental privacy rights implicated by Act 62.

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94. *Id.*

95. *Id.*

96. *Curtis*, 666 A.2d at 273.

97. *Id.* at 274.

98. *See* Barbara L. Shapiro, *"Non-Traditional" Families in the Courts: The New Extended Family*, 11 J. AM. ACAD. MATRIM. L. 117, 129 (1993) (citing Stantosky v. Kramer, 455 U.S. 745, 766 (1982) (holding that the state cannot constitutionally interfere with a family merely because it thinks it can do a better job of parenting)).

99. *Curtis*, 666 A.2d at 270.

100. *Id.* at 268.

Act 62 imposes upon divorced parents an obligation to pay for their adult child's college education, where no corresponding obligation exists for married parents. The effect, therefore, is to strip divorced or separated parents of their choices when the question of college financing arises.[101] Act 62's classification implicates the fundamental right of privacy in the family domain, and operates to restrict personal choice in matters of family life.[102] As such, a searching judicial analysis, strict scrutiny, and the least deferential level of review, is applicable to this inquiry.

Application of the strict scrutiny test is fatal to Act 62. The state possesses no compelling interest, absent a minor child's interests, which justifies a classification having a differential impact and intrusion into the private family domain.[103] The courts of Pennsylvania have held that when a fundamental right of privacy exists, the federal and state constitutions preclude governmental limitation of this right unless justified by a compelling state interest.[104] What counts as justification depends on the classification, what the governmental interest is in promulgating the classification, and the relationship of that interest to the classification itself.[105]

To clarify, the essential questions are: what legitimate state interest does the classification promote, and what fundamental personal rights might the classification endanger?[106] Achievement of an "enhanced" education in today's society should not be

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101. *See* Jeff Atkinson, *Support For a Child's Post-Majority Education*, 22 LOY. U. CHI. L. J. 695, 711 (1991) (presenting the argument that a parent's right to raise a child and direct a child's affairs is the right to exert influence over the child's educational choices, including a determination of the level of financial support to be provided by the parent for a child's education).

102. *See also* Jackson v. Garland, 622 A.2d 969, 971 (Pa. Super. Ct. 1993) (citing Santosky v. Kramer, 455 U.S. 745 (1982)); Weber v. Weber, 524 A.2d 498, 498-99 (Pa. Super. Ct. 1987), *appeal dismissed*, 538 A.2d 494 (Pa. 1988)). *See generally* Susan J. Germanio, Note, *When College Begins and Child Support Ends: An Analysis of the Pennsylvania Legislature's Response to* Blue v. Blue, 3 WIDENER J. PUB. L. 1109 (1994); Atkinson, *supra* note 101, at 711 (citing Gerald Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

103. *See* Roe v. Wade, 410 U.S. 113, 152 (1973); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

104. *See* McCusker v. Workmen's Compensation Appeal Bd., 639 A.2d 776 (Pa. Super. Ct. 1994). *See also* Fabio v. Civil Serv. Comm'n, 373 A.2d 751 (Pa. Commw. Ct. 1977), *aff'd*, 414 A.2d 82 (Pa. 1980). *See generally* C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933 (1983).

105. James v. SEPTA, 477 A.2d 1302, 1306 (Pa. 1984).

106. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 173 (1972).

minimized; without a doubt, the state possesses a legitimate interest in preparing the young adults of this Commonwealth to brave the challenges of an advanced society. That interest, however, cannot be characterized as "compelling" so as to justify legislative classifications and governmental intrusion into private parental decisions.[107] Though appropriately reluctant to do so, the state interferes to protect the interests of minor children; equity demands legislative or judicial interference. State interference is not appropriate, however, with respect to the relationships between parents and adult children.[108]

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107. Constitutional concerns aside, it is this author's contention that Act 62 offends the natural law from which the duty to support offspring is derived. *See generally* Horan, *supra* note 10, at 602 (indicating that the underlying sentiment in decisions refusing to impose a duty of postminority support is that a system of voluntary support to adult children is more likely to foster a close relationship between parents and children); Donna Schuele, *Origins and Development of the Law of Parental Child Support*, 27 J. FAM. L. 807, 808-26 (1988-1989) (tracing the development of American law on the subject); 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, 692-96 (1990) (summarizing the development of child support law and analyzing how the law of child support is shaped by the reciprocity between support duties, control rights, and the principle of parental autonomy); Dana F. Castle, *Early Emancipation Statutes: Should They Protect Parents As Well As Children?*, 20 FAM. L. Q. 343, 347 (1986) (defining family relationship in terms of rights and obligations). *Cf.* Milne v. Milne, 556 A.2d 854 (Pa. Super. Ct.) (Cirillo, P.J.), *appeal denied*, 568 A.2d 1248 (Pa. 1989).

As this writer expressed in the majority en banc opinion in *Milne*:

> By college age, children of divorced parents must be expected to begin to come to terms with the reality of their family's situation. They must begin to realize that their attitudes and actions are their individual responsibilities. Whatever their biases and resentments, while one can understand how they got that way, when they become adults it is no longer appropriate to allow them to stay that way without consequence. One of a parent's main duties in raising a child is to teach him that he must take responsibility for his actions. The time-honored way in which this is accomplished is to make certain that the child deals with the natural consequences that follow from whatever course of action was chosen. Consider the lesson we are teaching if we allow adult children to use the powers of the state to force a parent whom they have abused and rejected to contribute to their college education. This kind of message can hardly be considered one which is beneficial for the welfare of those children.

Milne, 556 A.2d at 861.

Taking this view one step further, this author raises the question of whether the courts or the legislature should delve at all into the financing and decision-making regarding postsecondary education for adult children. Regulating filial relationships between adults when it comes to matters such as custody or support of minor children can be rationalized purely on the basis of the child's minority and the doctrine of *parens patriae*. This is not applicable, however, in matters between parents and adult children.

108. Various authorities, including the eminent Justice Blackstone, have opined that the duty to support a child is a moral one. *See* WILLIAM BLACKSTONE, I COMMENTARIES ON THE LAW OF ENGLAND 441-42 (1765). *See also* Blue v. Blue, 616 A.2d 628, 633 (Pa. 1992) (determining that the duty of support extends to a basic

As the dissent in *Curtis* astutely observed, Act 62 "necessarily involves" the parents.[109] The dissent acknowledged that a statute "requiring parents of an intact marriage to finance their children's college education would indeed infringe upon the constitutional/privacy right of the parties[,]" but stopped short of delving into the privacy issue with respect to divorced or separated parents.[110] The dissent justified state interference on two findings: "the widespread need for enforcement of court ordered support" and the need for "educational achievements of the next generations" as "critical to the success of this country in an increasingly competitive world."[111]

III. ALTERNATIVE AVENUES FOR REACHING THE SUPREME COURT'S HOLDING

In deeming Act 62 unconstitutional, the Pennsylvania Supreme Court predicated its holding on equal protection grounds, concluding that similarly positioned young adults, those in need of financial assistance for postsecondary education, should not be treated unequally.[112] While *Curtis* exemplifies a triumph in the realm of equal protection, the decision, in this author's opinion, potentially could have rested upon other constitutional bases, namely, the right to privacy and separation of powers.

A. The Right to Privacy

Closely related to the equal protection concerns brought about by Act 62 is the troublesome notion that had the Act been permitted to stand, it undoubtedly would have served to infringe upon the privacy rights of the divorced family, specifically, the freedom of the family to make important decisions. The Pennsylvania Supreme Court has recognized the existence of a constitutionally guaranteed right of privacy based on article 1, section 1 of the Pennsylvania Constitution, which provides: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."[113]

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education, defined as a high school education, or until a minor reaches the age of eighteen, whichever occurs later).

109. *Curtis*, 666 A.2d at 272 (Montemuro, J., dissenting).

110. *Id.* at 273.

111. *Id.* at 274.

112. *Id.* at 270.

113. PA. CONST. art. I, § 1. *See* Denoncourt v. Commonwealth, State Ethics

At the suggestion of the United States Supreme Court in *Whalen v. Roe*,[114] the Pennsylvania Supreme Court adopted a two-pronged analysis of privacy encompassing: (1) a freedom from disclosure of personal matters and, more relevant for purposes of this article, (2) the freedom to make certain important decisions.[115] In *Denoncourt v. Commonwealth, State Ethics Commission*,[116] Justice Flaherty synopsized Justice Brandeis' description of our constitutional right to privacy and its correlation to our individual freedom:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. *They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.*[117]

The United States Supreme Court's acknowledgment of the right to privacy comes not from the United States Constitution, in which there exists no specific right to privacy guarantee, but, rather, has grown out of the Court's recognition of zones of privacy created by the more specific constitutional guarantees; the sources of this right may be found in the penumbra of various specific constitutional provisions.[118] The landmark case of

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Comm'n, 470 A.2d 945, 948 (Pa. 1983) (plurality opinion) (recognizing article I, section 1 as the basis for the guaranteed right to privacy); *In Re* June 1979 Allegheny County Investigating Grand Jury, 415 A.2d 73, 77 (Pa. 1980) (stating that privacy interest finds explicit protection in article I, section 1). *See also* Stenger v. Lehigh Valley Hosp., 609 A.2d 796 (Pa. 1992); Fabio v. Civil Service Comm'n, 414 A.2d 82 (Pa. 1980); *In Re* "B", 394 A.2d 419 (Pa. 1978).

114. 429 U.S. 589 (1977).

115. *See Denoncourt*, 470 A.2d at 948; *In Re June 1979 Allegheny County Investigating Grand Jury*, 415 A.2d at 77; *see also* McCusker v. Workmen's Compensation Appeal Bd., 639 A.2d 776, 778 (Pa. 1994); *Stenger*, 609 A.2d at 800; Commonwealth v. Schaeffer, 536 A.2d 354, 361 (Pa. Super. Ct. 1987), *aff'd*, 652 A.2d 294 (Pa. 1994); Fischer v. Commonwealth, Dep't of Public Welfare, 482 A.2d 1148, 1159 (Pa. Commw. Ct. 1984), *aff'd*, 502 A.2d 114 (Pa. 1985).

116. 470 A.2d 945 (Pa. 1983).

117. *Denoncourt*, 470 A.2d at 948-49 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (emphasis added)); *accord* Commonwealth v. Murray, 223 A.2d 102, 109-10 (Pa. 1966) (plurality opinion) (Musmanno, J.); *Schaeffer*, 536 A.2d at 361-62.

118. Such specific constitutional provisions include the First Amendment's guarantee of freedom of speech, press and association. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152 (1973); Cohen v. California, 403 U.S. 15, 23-24, *reh'g denied*, 404 U.S. 876 (1971); Stanley v. Georgia, 394 U.S. 557, 564 (1969); NAACP v. Alabama, 357 U.S. 449, 462 (1958). Such provisions also include the Third Amendment's prohibition against the peacetime quartering of soldiers in any house without the consent

Griswold v. Connecticut[119] provided the first express constitutional recognition to the right to privacy. In striking down a Connecticut criminal statute that prohibited the use of contraceptives, the Court established constitutional protection for the privacy of the marital unit.[120] Although *Griswold* was the first case to expressly articulate the right of family privacy, at least one scholar has recognized[121] that the Supreme Court has since identified the inception of the family privacy doctrine in two earlier decisions, *Meyer v. Nebraska*[122] and *Pierce v. Society of Sisters*.[123] The Court first identified this heritage of family privacy in 1944 in *Prince v. Massachusetts*,[124] wherein the Court

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of the owner. *See, e.g.*, Katz v. United States, 389 U.S. 347, 350 (1967); Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Poe v. Ullman, 367 U.S. 497, 549 (Harlan, J., dissenting), *reh'g denied*, 368 U.S. 869 (1961). In addition, the Supreme Court has found zones of privacy in the Fourth Amendment's prohibition of unreasonable searches and seizures. *See, e.g.*, *Roe*, 410 U.S. at 152; *Griswold*, 381 U.S. at 484-85. The Court has also found zones of privacy in the Fifth Amendment's privilege against self-incrimination. *See, e.g.*, *Roe*, 410 U.S. at 152; Miranda v. Arizona, 384 U.S. 436, 440-43, *reh'g denied*, 385 U.S. 890 (1966); *Griswold*, 381 U.S. 479, 484-85 (1965); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). Finally, such provisions also include the Ninth Amendment's reservation to the people of rights not expressly enumerated in the Constitution. *See, e.g.*, *Griswold*, 381 U.S. at 484; Mapp v. Ohio, 367 U.S. 643, *reh'g denied*, 368 U.S. 871 (1961)). *See In Re* "B", 394 A.2d 419, 424 (Pa. 1979).

119. 381 U.S. 479 (1965).

120. *Griswold*, 381 U.S. at 486. Finding the right of privacy to be grounded firmly in the Bill of Rights, Justice Douglas stated:

> We deal with a right of privacy older than the bill of rights—older than our political parties, older than our school system. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id.

121. *See generally* Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 968-70 (1993) (suggesting, among other things, that constitutional protection for the family has continued to be a primary focus in privacy cases, developing along with the right of individual autonomy).

122. 262 U.S. 390 (1923). In *Meyer*, the Court struck down a state law prohibiting the teaching of subjects in any language other than English. *Meyer*, 262 U.S. at 403. In so doing, the Court relied on the appellant instructor's right "to teach and the right of the parents to engage him . . . to instruct their children." *Id.* at 400. In addition to finding that parents have a right to enter into this educational contract, the Court insinuated that this right to contract developed from "the power of parents to control the education of their own." *Id.* at 401.

123. 268 U.S. 510 (1925). The *Pierce* Court, citing *Meyer*, invalidated a state statute prohibiting parents from sending their children to private schools on the basis that the law "unreasonably interferes with the liberty of parents to direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534-35 (citing *Meyer*, 262 U.S. at 390).

124. 321 U.S. 158, *reh'g denied*, 321 U.S. 804 (1944)

described *Pierce* and *Meyer* as decisions that "have respected the private realm of family life which the state cannot enter."[125] The Court has continued its constitutional protection for "the sanctity of the family,"[126] emphasizing that the family unit provides much of the substance for the constitutional right to privacy.[127]

Against this backdrop of the constitutionally recognized right to privacy and, specifically, the privacy rights traditionally accorded to the family unit, "the freedom to make certain important decisions," free from state intrusion, must be analyzed within the context of a divorced family, with a focus on the intrusion into the parent/child relationship where such "child" has reached the age of majority.[128]

The significance given to privacy by some commentators is the familiar one of autonomy or freedom from governmental control. One statement of this affiliation is:

> In this country, intrafamily relations are a private rather than a governmental concern. The state does establish a legal basis for the family's existence, but this defining function is exercised principally when families are either being founded, as in marriage or adoption, or dissolved, as in divorce or death. Even then, the state's role is minimal unless property is involved. The government is only too happy to avoid having either to forbid or to require particular interpersonal behavior.[129]

Naturally, it must be recognized that, upon divorce, the veil of

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125. *Prince*, 321 U.S. at 166. *See also* Hodgson v. Minnesota, 497 U.S. 417 (1990); Bowers v. Hardwick, 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986).

126. *Prince*, 321 U.S. at 166. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) (invalidating a housing ordinance limiting the occupancy of a dwelling unit to members of a single "family," which encompassed only a few categories of related individuals).

127. *Prince*, 321 U.S. at 166. *See generally Bowers*; Zablocki v. Redhail, 434 U.S. 374 (1978); Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Poe v. Ullman, 367 U.S. 497 (1961) (Harlan, J., dissenting); Skinner v. Oklahoma, 316 U.S. 535 (1942); *Pierce*; *Meyer*.

It should be recognized that, in the majority of these cases, the Court noted that the right to privacy related to family matters emanates from the Due Process Clause of the Fourteenth Amendment. That Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

128. *Denoncourt*, 470 A.2d at 948. *See supra* notes 107-08 and accompanying text.

129. Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1144-45 (1985) (quoting JUDITH STIEHM, GOVERNMENT AND THE FAMILY: JUSTICE AND ACCEPTANCE, CHANGING IMAGES OF THE FAMILY 361-62 (1979)).

family privacy is lifted to some extent. "Some judicial involvement is necessary to supervise the dissolution of the legal relationship and to reallocate the couple's property rights. Legal oversight also serves to reinforce informal social norms, weakened in the context of divorce, by directing parents to fulfill their prescribed responsibilities despite the breakdown of the marriage."[130] State regulation of custody and support of minor children, therefore, can be predicated on the basis of the child's minority and the law of *parens patriae*. More difficult to justify, however, is a law allowing for judicial intervention into that sphere of family decisions unrelated to the basic needs of minor children. This author proposes that within this realm of family privacy lies the choice parents are qualified to make with regard to their children's education, specifically, to what extent, if any, a parent opts to financially contribute to their adult children's college education. Clearly, a parent is obligated to provide the basic essentials to a minor child such as food, shelter, and medical expenses. Inevitably the question arises as to whether a college education is deemed a "necessity" for purposes of legally enforcing parents to provide such an education.[131] According to one group of scholars:

> Most courts' reluctance to require parents to support their adult children probably does not stem from skepticism about the worth of higher education. Instead, it may stem from the concern about the effect on family dynamics if parents are compelled to support their college student children. . . . Support during college can be a powerful means to this end. *Requiring a parent to support an adult child in school may in effect result in imposing a duty of support on a parent who has no legal authority (because the child is over the age of majority) or practical ability to control the child.*[132]

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130. Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 669 (1992). *See* Jordan C. Paul, Comment, *"You get the House. I get the Car. You get the Kids. I Get their Souls." The Impact of Spiritual Custody Awards on the Free Exercise Rights of Custodial Parents*, 138 U. PA. L. REV. 583 (1989).

Paul states:

> Although constitutional protection extends to a "parent in . . . his or her relationship with and authority over the child," this protection breaks down when there is a divorce and a battle for the custody of children ensues. . . . The state thus utilizes its power under the theory of "parens patriae to intervene in family affairs where the physical or mental well-being of the child is imminently and substantially threatened."

Id. at 597 (footnotes omitted).

131. *See* Harris et al., *supra* note 107, at 809-10; Terrance A. Kline, Note, *Clifford Trusts and the Parental Duty to Provide a College Education:* Braun v. Commissioner, 46 U. PITT. L. REV. 537, 547 (1985).

132. Harris et al., *supra* note 107, at 722 (footnotes omitted) (emphasis added).

A divorced or separated parent who is respected and honored will usually volunteer to send an adult child through college; to impose upon parents anything beyond a purely voluntary decision would make tyrants out of adult children who have little or no regard for their mother or father. We, as a society, must foster the Judeo-Christian precept: "Honor thy father and thy mother."[133]

Because the decision to support adult children through postsecondary education falls outside the parameter of the state's undeniable duty to see to it that children of divorced parents are supported throughout the child's minority,[134] the protection afforded to family privacy rights (between the parent and adult child) is not weakened. In other words, in terms of the right to privacy analysis, there is no reason to distinguish between divorced parents and non-divorced parents when considering the question of college support. "The suggestion that parental authority is diminished vis a vis the government as the result of the dissolution of the parents' spousal relationship . . . would seem inconsistent with constitutional recognition of parental authority where a spousal relationship between the parents never existed."[135]

That having been said, it must be determined to what extent the constitutional protection affording a parent's right to raise a child and provide guidance for an adult child's postsecondary educational choices is recognized. "Pennsylvania has not adopted a flexible approach in its state constitutionality privacy analysis. Under the law of this Commonwealth only a compelling state interest will override one's privacy rights."[136] It is true that not

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133. *Exodus* 20:12.

134. *See supra* note 7 and accompanying text.

135. Zummo v. Zummo, 574 A.2d 1130, 1139 (Pa. Super. Ct. 1990) (citing Caban v. Mohammed, 441 U.S. 380 (1979)). The *Zummo* court ruled, among other things, that a parent may pursue whatever course of religious indoctrination which that parent sees fit during periods of lawful custody and/or visitation. *Zummo*, 574 A.2d at 1140. In making its determination, the court specifically stated: "[W]e cannot see how the marital status of the parents should affect the degree of harm to the child required to justify governmental intervention." *Id.*

136. Stenger v. Lehigh Valley Hosp., 609 A.2d 796, 800 (Pa. 1992) (citing Fabio v. Civil Serv. Comm'n, 414 A.2d 82 (Pa. 1980)). *See also* McCusker v. Workmen's Compensation Appeal Bd., 639 A.2d 776, 778 (Pa. 1994) (holding that where a fundamental right to privacy exists, governmental regulation limiting such a right may only be justified by a compelling state interest); Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that governmental regulation limiting the right to privacy may only be justified by a compelling state interest).

As discussed earlier in this article the right of privacy encompasses two distinct privacy interests. *See supra* notes 114-18 and accompanying text. One is the autonomy interest, i.e., that relating to personal decision-making in important

every governmental intrusion into family affairs is an infringement on the constitutional right to privacy requiring a court to invoke strict scrutiny; however, when parental decision-making/privacy matters are brought into question, these issues are best served by invoking a strict scrutiny analysis.

The Pennsylvania Supreme Court in *Curtis* could have legitimately applied this analysis to Act 62. In implementing a strict scrutiny analysis, a court must first determine whether the parent's privacy interest in determining whether to financially contribute to an adult child's education is a "fundamental right." The net of constitutional protection for fundamental rights has not yet been thrown so far as to encompass the parental decision to provide college support for a child. To include such a right as fundamental, however, would not constitute a great leap from those family/parental autonomy decisions that have been determined to include fundamental rights.[137] In *Roe v. Wade*,[138] the Court cited many cases demonstrating that personal rights can be deemed fundamental and included in the right to privacy.[139] Such cases "make it clear that the right [to privacy] has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education."[140] It is undisputed that a college education carries with it many benefits; this, however, does not necessarily warrant the state's infringement upon the fundamental right to privacy that a parent should enjoy if, for instance, "for moral reasons, he [or she] wishes his [or her] child to earn his [or her] way through school."[141] It can be persuasively argued that the right to instill values, such as a strong work ethic, in one's children should not be vanquished by enactments that serve to intervene in such personal decisions.[142] To reiterate, if an aspiring student possesses the drive and aptitude, he or she will find a way to ac-

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matters. This interest may be overridden only when there is a compelling state interest. *See Stenger*, 609, A.2d at 800; *Fabio*, 414 A.2d at 89; *Roe*, 410 U.S. at 134. The constitutionality of the second interest, confidentiality (or freedom from disclosure of personal matters), is determined by a flexible balancing approach. *See Stenger*, 609 A.2d at 801.

137. *See generally supra* note 127.

138. 410 U.S. 113 (1973).

139. *Roe*, 410 U.S. at 152-53.

140. *Id. See supra* note 127, with emphasis on Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating a law requiring formal education through age sixteen as applied to Amish children and emphasizing the values of parental direction of a child's religious upbringing and education).

141. Germanio, *supra* note 102, at 1131.

142. *See* Marvin M. Moore, *Parents' Support Obligations to Their Adult Children*, 19 AKRON L. REV. 183, 195-96 (1985); *see also* Germanio, *supra* note 102, at 1131.

quire a college education without requesting a pecuniary contribution from a financially-pressed parent, and will thereby gain an appreciation for self-discipline and assiduousness.[143]

As stated by the Pennsylvania Supreme Court, "[c]entral to this aspect of the privacy right is the intrusion of government into the sphere of marriage and family life by prohibiting or criminalizing certain kinds of decisions."[144] A law which may serve to prohibit a parent's private decision to have a child earn his or her way through school, to cite one example, forbids a decision properly generated within the sphere of the family, even a divorced family. Thus, while Act 62 violates equal protection as pronounced in *Curtis*, it also, generally speaking, prohibits parental determination of educational support.

As an alternative to the Pennsylvania Supreme Court's holding, the case having been made that Act 62 implicates a "fundamental right" (i.e., it is a law which imposes upon divorced parents' right to make decisions regarding the rearing and education of their children), it should therefore be subject to the strict scrutiny test—the least deferential level of review. As Professor Gerald Gunther has noted, such a level of scrutiny is frequently "strict" in theory and "fatal" in fact.[145] Only a compelling state interest will override one's privacy rights.[146] The state's interest in ensuring that adult children of divorced parents receive a college education, while important, cannot be deemed compelling. The legislature's imposition upon divorced parents' rights to make decisions regarding the education of their children greatly diminishes family privacy and the freedom of choice. If a college-educated society is eminently significant to the state, perhaps the state should be the primary contributor of funds for that purpose.[147] Thus, just as Act 62 does not pass constitutional muster under an equal protection analysis, neither may it be deemed constitutional when analyzed within the realm of the right to privacy.

B. Separation of Powers / Retroactivity of Laws

In addition to the *Curtis* court's conclusion that Act 62 violates the precepts of equal protection, it is this author's opinion

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143. Moore, *supra* note 142, at 195-96.

144. McCusker v. Workmen's Compensation Appeal Bd., 639 A.2d 776, 779 (Pa. 1994).

145. Gunther, *supra* note 102, at 8; Atkinson, *supra* note 101, at 699.

146. *See supra* note 136.

147. *See* Moore, *supra* note 142, at 188.

that the Act could not have withstood a constitutional challenge pursuant to the separation of powers doctrine. As previously discussed, the Pennsylvania Supreme Court in *Blue v. Blue*[148] held that parents owe no duty of support for an adult child's postsecondary educational expenses.[149] *Blue* was filed on November 13, 1992.[150] The legislature responded to the Supreme Court's pronouncement in *Blue* by signing Act 62 into law on July 2, 1993, and making it retroactive to November 12, 1992, the day before *Blue* was decided.[151] Act 62 took effect, therefore, one day prior to the filing of *Blue*. The effect of this retroactive application nullified the Pennsylvania Supreme Court's decision in *Blue*, and violates the constitutional doctrine of separation of powers.

Bias against retroactive laws dates back to ancient Greek and Roman times.[152] American law also adopted this principle, and it was believed that the purpose of a law was that it be a rule for the future.[153] American courts recognized this principle as a rule of construction which would be followed in the interpretation of statutes.[154] In fact, the United States Supreme Court has specifically decreed that retroactive legislation would not be favored, that such laws were contrary to American jurisprudence, and that in the absence of an express command to the contrary, laws will act prospectively.[155] Thus, it follows that a statute commences on the day of its enactment.[156]

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148. 616 A.2d 628 (Pa. 1992).

149. *Blue*, 616 A.2d at 633.

150. *Id.* at 628.

151. 23 PA. CONS. STAT. § 4327.

152. *See* Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 775-77 (1936) (discussing the early opposition to the retroactive application of laws). Roman Law followed the principle that laws and customs should be applied to future transactions and should not be applied to past events unless it was expressly stated that such laws were to be applied to past events or pending transactions. *Id.* at 776. This principle found its way into English common law and was adopted by the English courts and commentators. *Id.* at 777. Early English courts subscribed to "the rule of construction that no law should be given an operation from a time prior to its enactment unless Parliament had expressly provided that it should have such an effect or unless the words of the Act could have no meaning except by application to this past time." *Id.* at 778 (footnotes omitted).

153. Smead, *supra* note 152, at 780.

154. *Id.*

155. United States v. American Sugar Refining Co., 202 U.S. 563, 577 (1906). *See also* United States v. Klein, 80 U.S. (13 Wall.) 128, 148 (1872).

156. Smead, *supra* note 152, at 781. The rule was ultimately incorporated into the Constitution of the United States by the construction given to the Ex Post Facto, Contract, and Due Process Clauses. *Id.* at 797. "By the doctrines of judicial review and separation of powers American law provided the institutionalism necessary to transpose this principle . . . into an effective transcendental limitation on

This deeply rooted concern in American jurisprudence regarding retroactive legislation, and its application to the separation of powers doctrine, was recently explored in the United States Supreme Court's decision in *Plaut v. Spendthrift Farms.*[157] The issue before the Supreme Court in *Plaut* was whether Section 27A(b) of the Securities Exchange Act of 1934, to the extent that it requires federal courts to reopen final judgments in private civil actions under Section 10(b) of the Act, contravenes the constitutional principal of separation of powers.[158] The Court found Section 27A(b) unconstitutional to the extent that it requires federal courts to reopen final judgments entered before its enactment.[159] Writing for the Court, Justice Scalia traced the connection between the separation of powers doctrine and the principle of legislative retroactivity back to the Framers of the United States Constitution.[160] Justice Scalia wrote that Congress' enactment of section 27A(b) violates Article III of the United States Constitution because it commands federal courts to reopen final judgments.[161] Justice Scalia stated:

> Article III establishes a "judicial department" with the "province and duty . . . to say what the law is" in particular cases and controversies. [Marbury v. Madison, 5 U.S. (1 Cranch) 49, 70 (1803).] The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy-with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial power' is one to render dispositive judgments."[162]

At the Constitutional Convention, the Framers made the crucial decision to create a judicial branch that was separate and independent of the legislative branch by providing that "the judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may

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legislative power." *Id.* Utilization of the separation of powers doctrine to support the limit on legislative power was the next natural step in American courts. *Id.* at 789 n.42.

157. 115 S. Ct. 1447 (1995). *See generally* J. Richard Doige, *Is Purely Retroactive Legislation Limited by the Separation of Powers? Rethinking* United States v. Klein, 79 CORNELL L. REV. 910 (1994).

158. *Plaut*, 115 S. Ct. at 1450.

159. *Id.*

160. *Id.* at 1453.

161. *Id.* at 1457.

162. *Id.* at 1453 (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)).

from time to time ordain and establish."[163] Several of the principal Framers, James Madison, Thomas Jefferson, and Alexander Hamilton, acknowledged the dangers posed by legislative attempts to usurp judicial prerogatives.[164] Ratification of the United States Constitution solidified these concerns, and the judicial decisions which immediately followed the ratification confirmed the understanding that interference with the final judgments of courts was not to be tolerated.[165] This was reflected on both the federal and state levels.[166]

It is clear, therefore, that the final judgments of the courts, both state and federal, are outside the reach of the legislative branch. This principle existed prior to the formation of the federal and state constitutions, but was purposefully and wisely incorporated into those constitutions and it continues to sustain the separation of governmental powers today, as evidenced by the Supreme Court's decision in *Plaut*. In delivering the opinion of the Court in *Plaut*, Justice Scalia applied the separation of powers doctrine to Section 27A(b) and found that Section 27A(b) "effects a clear violation of the separation-of-powers principle we have just discussed."[167] Justice Scalia wrote:

> When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than reverse a determination once made, in a particular case. [The Federalist No. 81, at 545 (Alexander Hamilton) (J. Cooke ed., 1961).] Our decisions stemming

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163. *Plaut*, 115 S. Ct. at 1453.

164. *Id.* Madison enunciated his concern regarding the necessity for the separation of powers as he wrote: "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). *See also* Doige, *supra* note 157, at 13. Alexander Hamilton similarly expressed his belief that the judicial branch of government should be separate and independent of legislative domination:

> It is not true . . . that the Parliament of Great Britain, or the legislatures of the particular states, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory neither of the British, nor the state constitutions, authorizes the revisal of a judicial sentence, by a legislative act. . . . A legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases.

THE FEDERALIST No. 81, at 484 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

165. *Plaut*, 115 S. Ct. at 1455.

166. *Id.* Justice Scalia focused upon one state court decision as representative of the states' understanding of the separation of powers. *See id.* (citing Bates v. Kimball, 2 D. Chip. 77 (Vt. 1824) (holding the power of the legislature to annul a final judgment is an assumption of judicial power and therefore forbidden)).

167. *Id.* at 1456.

> from *Hayburn's Case* . . . have uniformly provided fair warning that such an act exceeds the powers of Congress.[168]

Justice Scalia recognized, however, that Congress may nevertheless revise the judgments of Article III courts. "When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly."[169] Justice Scalia elaborated on the effect that retroactive legislation has upon the hierarchy of "inferior courts" and "one supreme court" by explaining that the decision of an inferior court is not the final judgment in the case, unless the time for appeal has expired.[170] Rather, "it is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress' latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must 'decide according to existing laws.'"[171] Justice Scalia emphatically pointed out, however, that, once a judgment is, in fact, final, then the legislative branch may not alter that particular adjudication.[172] "Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was."[173] With regard to Section 27A(b), Justice Scalia opined that this enactment violates the separation of powers doctrine because it deprives judicial judgments of the conclusive effect that the judgments had when they were announced.[174]

Thus, the Supreme Court's pronouncement in *Plaut* is clear. The separation of powers doctrine restricting the legislative branch's interference with final judgments is, as it always has been, a crucial element in this country's governmental structure

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168. *Id.* (citing Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948)).

169. *Id.* at 1457 (citing United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) and Landgraf v. USI Film Prods., 114 S. Ct. 1485, 1500-08 (1994)).

170. *Plaut*, 115 S. Ct. at 1457.

171. *Id.*

172. *Id.*

173. *Id.* at 1458.

174. *Id.* Justice Scalia also noted that whether an enactment reopens (or directs the reopening of) final judgments in one case or a whole class of cases is irrelevant. *Id.* at 1457. He wrote: "The [separation of powers] prohibition is violated when an individual final judgment is legislatively rescinded for even the very best of reasons, . . . and it is violated 40 times over when 40 final judgments are legislatively dissolved." *Id.*

utilizing checks and balances to avoid the tyranny which our Founding Fathers so feared.

Since the inception of its governmental bodies, the Commonwealth of Pennsylvania has adhered to this understanding set forth by Justice Scalia in *Plaut* and strongly follows the principle that the doctrine of separation of powers is fundamental to the prevention of concentrated authority and tyranny.[175] "This principle, that the executive, legislative and judicial offices are independent, co-equal branches of government, is inherent in the governmental structure of the Commonwealth."[176] That the Supreme Court's analysis in *Plaut* is applicable to the retroactive application of Act 62 is evidenced by the Supreme Court's language in that case, as well as exhibited by Pennsylvania law regarding the separation of powers doctrine.[177]

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175. *See* PA. CONST. art. V, § 1; DeChastellux v. Fairchild, 15 Pa. 18 (1850); Sweeney v. Tucker, 375 A.2d 698 (Pa. 1977).

176. Grant v. GAF Corp., 608 A.2d 1047, 1060 (Pa. Super. Ct. 1992), *aff'd*, 639 A.2d 1170 (Pa. 1994). *See generally* John M. Mulcahey, Comment, *Separation of Powers in Pennsylvania: The Judiciary's Prevention of Legislative Encroachment*, 32 DUQ. L. REV. 539, 540-44 (1994) (discussing the background of the separation of powers doctrine in Pennsylvania).

177. The separation of governmental powers into the executive, legislative, and judicial branches has been inherent in the structure of Pennsylvania's government since its very beginning. Mulcahey, *supra* note 176, at 540. The 1776 convention included this doctrine in the Plan or Form of Government and was continued in Pennsylvania's Constitutions of 1790, 1838, and 1873. *Id.* The judiciary's independence was protected by article V, section 1 of the constitution which provided: "[T]he judicial power of the Commonwealth [is] vested in a Supreme Court, in County Courts of Common Pleas, Oyer and Terminer, and Quarter Sessions, in a Register's Court, and an Orphans' Court: and in such other courts as the legislature may from time to time establish." *Id.* (quoting PA. CONST. art. V, § 1 (1873)).

The Supreme Court of Pennsylvania made it clear from an early point in its history that legislative encroachment into judicial affairs would not be tolerated. The court developed principles to facilitate interpretation of the separation of powers doctrine under article V of the Pennsylvania Constitution in Greenough v. Greenough, 11 Pa. 489 (1849). There, the Pennsylvania Supreme Court interpreted the separation of powers doctrine found in article V, section 1 of the Pennsylvania Constitution, and pointed out that, according to the doctrine, the legislature was created to enact laws, while the judiciary's function was to interpret them and, therefore, the legislature was proscribed from exercising judicial power. *Greenough*, 11 Pa. at 494. Since *Greenough*, several important decisions have reinforced the Pennsylvania Supreme Court's concern in preventing the legislative branch from encroaching upon the legislative powers of the judicial branch. *See* Commonwealth v. Sutley, 378 A.2d 780, 782 (Pa. 1977) (declaring unconstitutional an act which mandated the judicial branch to resentence criminals who had been convicted under the prior act); Leahey v. Farrell, 66 A.2d 577, 578 (Pa. 1949) (in determining whether the legislature's regulation of the compensation of court employees unconstitutionally interfered with the judicial branch, the court emphasized that the legislature could not overrule a judicial decision or change the effect of judgments or decrees previously rendered); Hoopes v. Bradshaw, 80 A. 1098, 1100 (Pa. 1911) (in addressing the constitutionality of a law which provided that an attorney's admission to practice in the state supreme court would operate to simultaneously

"Thus, the separation of powers doctrine has evolved into a powerful check on legislative action,"[178] and is used to prohibit the legislature from enacting laws that conflict with court orders or decrees or engage in an exclusive judicial function.[179] Inasmuch as Act 62 interferes with the Pennsylvania Supreme Court's final judgment in *Blue*, Act 62 violates the separation of powers doctrine and is, therefore, unconstitutional. In addition to Pennsylvania's long line of cases supporting such a conclusion, Justice Scalia's pronouncement in *Plaut* is directly applicable to Act 62.

CONCLUSION

To this author's gratification, the mounting controversy surrounding Pennsylvania college support law was halted by the Pennsylvania Supreme Court's decision in *Curtis*. As a matter of judicial insight, complemented by the wisdom of experience as a family law practitioner, as a family court judge, and as a parent, this author regarded Act 62 as intolerable; because not only did Act 62 trample on our citizens' equal protection rights, it unconstitutionally infringed upon the private domain of the family, and violated the doctrine of separation of powers. Equally perilous, the Act served to condone a lack of honor and respect in the parent/child relationship. This author is hopeful that, in the wake of *Curtis*, a system of voluntary post-minority educational support will cultivate closer family relationships, engender parental respect, and foster social and educational justice in today's complex society.

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admit an attorney to practice in every county in the state, the court, in upholding the constitutionality of the act, emphasized that the judicial branch had exclusive control over the admission to the practice of law, but that this legislation was not an attempt to usurp judicial power as it stated only what effect was to be given to a purely judicial act); Commonwealth *ex rel.* Johnson v. Halloway, 42 Pa. 446, 448 (1862) (in holding that a law which allowed the gradual reduction in an individual's prison term based on good behavior violated the separation of powers doctrine and, thus, was unconstitutional, the court emphasized that the decision interfered with was an inherent power of the judicial branch).

178. Mulcahey, *supra* note 176, at 549.

179. *Id.* at 552.