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Juvenile Curfews: Political Pandering at the Expense of a Fundamental Right

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JUVENILE CURFEWS: POLITICAL PANDERING AT THE EXPENSE OF A FUNDAMENTAL RIGHT

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I. INTRODUCTION

Juvenile curfew laws enjoy overwhelming political popularity.¹ Laws requiring adolescents to be indoors during certain hours of the night have been around for decades, but there has been a resurgence of both enactment and enforcement in recent years. Beginning in the early 1990's, a flood of over a thousand new curfew laws were adopted nationwide, and many pre-existing curfew laws, long unenforced, were revived.² A 2000 study of the cities in the United States with a population of 15,000 or more found that an estimated two-thirds have enacted juvenile curfew laws.³ Although many of these curfew laws are decades old, enforcement has been relatively dormant until recently.⁴ This widespread revival can be attributed to the common use of child curfew laws as a quick fix by many local government officials in response to citizens' concerns over rising crime rates.⁵

Some West Virginia cities have also decided that juvenile curfews are the answer. One recent example is an ordinance passed in Huntington, West Virginia in September 2005⁶ which was modeled after the Charleston curfew approved by the West Virginia Supreme Court of Appeals in 2000.⁷ Support for the curfew emerged after a prom night shooting earlier in the year that left four young persons dead.⁸ The shooting occurred during the early hours of the morning in a part of town that was well known as a high crime area.⁹ Similar to this response in Huntington, other West Virginia cities may decide to follow the national trend, and many more child curfew laws could be enacted in the coming years.

¹ Note, *Juvenile Curfews and the Major Confusion over Minor Rights*, 118 HARV. L. REV. 2400, 2400 (2005) [hereinafter *Juvenile Curfews*]. A CBS News and New York Times poll revealed "87% support for an 11 p.m. weekday juvenile curfew." *Id.* at n.10.

² Deirdre E. Norton, *Why Criminalize Children? Looking Beyond the Express Policies Driving Juvenile Curfew Legislation*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 175, 175 (2001).

³ Andra J. Bannister et al., *Policies and Practices Related to Juvenile Curfews* 7 (2000), available at http://www.wsurpci.org/papers/policy_papers/CurfewResearch.pdf (last visited Mar. 2, 2006).

⁴ Angie Schwartz & Lucy Wang, *Proliferating Curfew Laws Keeps Kids at Home, but Fail to Curb Juvenile Crime*, YOUTH LAW NEWS, 1 (2005).

⁵ *Id.*

⁶ HUNTINGTON, W. VA., ORDINANCES, art. 525 (2005), available at <http://www.huntingtonnews.net/local/files/curfew.pdf>.

⁷ CHARLESTON, W. VA., CODE § 18-17 (2000).

⁸ Bryan Chambers, *Council Beefs up Minors Curfew*, HERALD-DISPATCH, Sept. 27, 2005, at 1C.

⁹ Bryan Chambers & Scott Wartman, *Four Shot to Death: Fairfield West Residents Struggle with Killings of Young People*, HERALD-DISPATCH, May 23, 2005, available at <http://www.herald-dispatch.com/2005/May/23/LNspot.htm>.

Although the constitutional legitimacy of child curfew laws has been validated by both the United States Court of Appeals for the Fourth Circuit¹⁰ and the West Virginia Supreme Court of Appeals,¹¹ there is division among the United States Courts of Appeals regarding the constitutionality of juvenile curfews.¹² The circuits are divided as to whether a minor possesses the fundamental right of freedom of movement, and if so, whether the right should be reduced due to their age.¹³ There is also division regarding the appropriate degree of scrutiny that should be applied.¹⁴ Even among the circuits that have applied the same level of scrutiny, the outcomes of those cases have been divergent.¹⁵ The United States Supreme Court has denied certiorari every time the issue has come before it, and as a result, the states have been left to sort out the issues for themselves with increasingly mixed outcomes.

This Article will examine the constitutionality of juvenile curfews. Part II of this Article will provide a background of juvenile curfews including a history of curfew laws, a discussion of common constitutional challenges, and a review of the current split among the United States Courts of Appeals. Part III will analyze the validity of juvenile curfews, the approach that should be taken by the United States Supreme Court, and the impact of juvenile curfew laws in West Virginia. Finally, this Article will conclude that broad juvenile curfew laws should be found unconstitutional under both strict and intermediate scrutiny analysis because they restrict the fundamental right of freedom of movement.

¹⁰ *Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998) (upholding a juvenile curfew as constitutional).

¹¹ *Sale ex rel. Sale v. Goldman*, 539 S.E.2d 446 (W. Va. 2000) (upholding a juvenile curfew as constitutional).

¹² *Compare Hodgkins v. Peterson*, 355 F.3d 1048 (7th Cir. 2004) (holding juvenile curfew ordinance to be unconstitutional), *Ramos v. Town of Vernon*, 353 F.3d 171, 184-85 (2d Cir. 2003) (same), *and Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997) (same), *with Hutchins v. District of Columbia*, 188 F.3d 531 (D.C. Cir. 1999) (en banc) (upholding juvenile curfew ordinance as constitutional), *Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998) (same), *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993) (same), *and Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir. 1976) (same).

¹³ *Compare Hutchins*, 188 F.3d 531 (holding that a minor does not possess the fundamental right of free movement), *and Qutb*, 11 F.3d 488 (same), *with Ramos*, 353 F.3d 171 (holding that a minor does possess the fundamental right of free movement), *Schleifer*, 159 F.3d 843 (same), *Nunez*, 114 F.3d 935 (same), *and Bykofsky*, 401 F. Supp. 1242 (same).

¹⁴ *Bykofsky*, 401 F. Supp. 1242 (applying rational basis); *Ramos*, 353 F.3d 171 (applying intermediate scrutiny), *Hutchins*, 188 F.3d 531 (same), *and Schleifer*, 159 F.3d 843 (same); *Nunez*, 114 F.3d 935 (applying strict scrutiny), *and Qutb*, 11 F.3d 488 (same).

¹⁵ The Second and Fourth Circuit Courts of Appeals applied intermediate scrutiny with different outcomes. The Fifth and Ninth Circuit Courts of Appeals applied strict scrutiny with different outcomes. *See cases cited supra* note 14.

II. BACKGROUND

A. *History of Curfew Laws*

A curfew is an order by the government which requires certain people to be off the streets during specified hours.¹⁶ For hundreds of years, curfews have been used to maintain public order and to suppress targeted or politically unpopular groups. Throughout history, curfews have commonly been based on youth, gender, ethnicity, or race.¹⁷ In addition, curfews have been used in times of emergency to protect citizens from riots and public unrest.¹⁸ Before the Civil War, the Confederate states utilized curfews to ensure that slaves returned home by a certain hour of the day.¹⁹ One of the best-known United States curfew laws, enacted during World War II, imposed a curfew on Japanese-Americans based on the purported necessity of national defense.²⁰

Juvenile curfews gained significant political support for the first time in the late nineteenth century.²¹ President Benjamin Harrison claimed that these laws were “the most important municipal regulation for the protection of the children of American homes, from the vices of the street”²² By the turn of the century, approximately 3,000 towns and cities in the United States had enacted some form of curfew law.²³ This first juvenile curfew movement was short-lived, and the curfews quickly disappeared or fell into disuse.²⁴ The brief duration of this movement was likely due to the fact that the nation’s priorities changed when its attention was shifted to World War I, prohibition, and the depression.²⁵ However, during World War II, public interest in teen curfews was once again renewed when many parents left to go to war.²⁶ The wartime curfews attempted to prevent adolescents from roaming the streets or loitering in public places while their parents were either overseas, or working nightshifts in war industries, and were not available to carefully watch their children as a result.²⁷ Since World War II, juvenile curfews have remained in existence and

¹⁶ BLACK’S LAW DICTIONARY 410 (8th ed. 2004).

¹⁷ See Norton, *supra* note 2, at 185-91.

¹⁸ *Id.* at 185.

¹⁹ Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 U. PA. L. REV. 66, 66 n.5 (1958). [hereinafter *Curfew Ordinances*] (citing 8 ENCYC. AMERICANA 306 (1957 ed.)). Curfews were enforced against black slaves prior to the civil war in the 1860’s. *Id.*

²⁰ See *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

²¹ *Curfew Ordinances*, *supra* note 19, at 66 n.5.

²² *Id.* (citing 8 ENCYC. AMERICANA 306 (3d ed. 1925)). Benjamin Harrison was president from 1889 to 1893.

²³ See Bannister, *supra* note 3, at 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *Curfew Ordinances*, *supra* note 19, at 66 n.5.

²⁷ *Id.*

have received continuing public support; however, most have not been enforced by local governments until recently.²⁸

Beginning in the early 1990's there was an explosion in the number of new juvenile curfews enacted and renewed enforcement of those already in existence.²⁹ President Bill Clinton, as part of his family values advocacy, promoted juvenile curfews, touting them as a tool to combat juvenile delinquency.³⁰ Many politicians began to promote curfew laws because they believed it would demonstrate to their constituents that they are tough on law and order issues.³¹ As juvenile crime and victimization rates increased throughout the early 1990's, the overwhelming response by communities across the board was to enact teen curfew laws.³²

It is possible that public anxiety resulting from fear of gang violence, or isolated incidents, such as the Columbine High School shooting in Littleton, Colorado is the real driver behind such laws.³³ Although the motivation behind these laws relates to a genuine issue, it is not clear that the laws are effective at achieving the desired result. A national study documenting the increase in number of new curfew laws conducted in the year 2000 indicated that this increase was in response to the public's frustration and fear related to the violent crimes involving children that are heard about on the news.³⁴ However, there is no evidence to suggest that nocturnal juvenile curfews would necessarily prevent violent juvenile crime or the sort of mass school violence that occurred in Littleton because most juvenile crime does not occur at night.³⁵ These restrictive laws are simply an ineffective, knee-jerk, political response to satiate citizens' fears.

B. Constitutional Challenges

As juvenile curfew laws continue to gain popularity, constitutional rights advocates rally in opposition.³⁶ With the support of these groups, the constitutionality of juvenile curfews has been challenged on several different grounds including violations of youths' rights to free expression, religion, and assembly, parents' rights to raise their children as they see fit, and youths' rights

²⁸ See Bannister, *supra* note 3, at 9.

²⁹ Robert E. Shepherd, Jr., *The Proliferation of Juvenile Curfews*, ABA JUV. JUST. vol. 12, no. 1 (Spring 1997), available at <http://www.abanet.org/crimjust/juvjus/cjcurfew.html>.

³⁰ *Id.*

³¹ See Schwartz, *supra* note 4, at 1.

³² See *Juvenile Curfews*, *supra* note 1, at 2403.

³³ See Schwartz, *supra* note 4, at 1.

³⁴ *Id.*

³⁵ *Id.* at 2.

³⁶ See, e.g., Rich Jahn, *Analysis of U.S. Curfew Laws*, <http://www.youthrights.org/curfewana.shtml> (last visited Mar. 2, 2006); Schwartz, *supra* note 4, at 1.

to freedom of movement.³⁷ Most juvenile curfew cases include challenges on all of these grounds. The First Amendment claims have been successful on occasion, but for the most part, the courts have rejected this claim.³⁸ Likewise, the claims involving a parent's right to raise their children as they see fit have been largely unsuccessful.³⁹ The most promising challenge is the claim that the curfew laws unconstitutionally restrict the minor's fundamental right of freedom of movement.⁴⁰

Many constitutional challenges of juvenile curfews include a claim of infringement of the First Amendment right to freedom of expression, religion, and assembly, stating that curfews squelch free exercise of these rights.⁴¹ By requiring youth to be at home or otherwise indoors during the night, they may be prevented from engaging in protected activities such as political and religious gatherings. These challenges typically fail because most juvenile curfew ordinances contain exceptions for First Amendment activities.⁴² These exceptions provide an affirmative defense for violating the juvenile curfew. However, it must be noted that the inclusion of this affirmative defense for First Amendment activities will only survive constitutional analysis if the restriction is sufficiently narrowly tailored to serve a significant government purpose.⁴³ In other words, it would not matter that an affirmative defense is included if young persons are still dissuaded from participating in protected activities because they want to avoid the hassle and embarrassment of being arrested by the police. The United States Court of Appeals for the Seventh Circuit found a juvenile curfew to be unconstitutionally restrictive under the First Amendment because the threat of arrest would "unduly chill[] the exercise of a minor's First Amendment rights."⁴⁴ To avoid this problem, some municipalities now include language in the curfew ordinance that requires police officers to conduct a reasonable inquiry before making a citation or arrest.

³⁷ See cases cited *supra* note 12.

³⁸ See *infra* notes 41-48 and accompanying text.

³⁹ See *infra* notes 49-53 and accompanying text.

⁴⁰ *Ramos v. Town of Vernon*, 353 F.3d 171, 184-85 (2d Cir. 2003) (holding that a minor possesses the fundamental right of free movement); *Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998) (same); *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997) (same); *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975) *aff'd*, 535 F.2d 1245 (3d Cir. 1976) (same).

⁴¹ *Hodgkins ex. rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1064 (7th Cir. 2004); *Hutchins v. District of Columbia*, 188 F.3d 531, 546-48 (D.C. Cir. 1999) (en banc); *Schleifer*, 159 F.3d at 853-54; *Nunez*, 114 F.3d at 949-51; *Qutb v. Strauss*, 11 F.3d 488, 494 (5th Cir. 1993); and *Bykofsky*, 401 F. Supp. 1242.

⁴² The Seventh Circuit struck down a juvenile curfew on first amendment grounds. See *Hodgkins*, 355 F.3d at 1064. Most of the circuits have rejected first amendment claims brought against juvenile curfews. See *Hutchins*, 188 F.3d at 546-48; *Schleifer*, 159 F.3d at 853-54; *Nunez*, 114 F.3d at 949-51; *Qutb*, 11 F.3d at 494; *Bykofsky*, 401 F. Supp. 1242.

⁴³ *Hodgkins*, 355 F.3d at 1064.

⁴⁴ *Id.*

To combat this view, it has been argued that the affirmative First Amendment defense for violation of the curfew law is inadequate because it is vague and overbroad.⁴⁵ The vagueness argument is that law enforcement officials are not given adequate standards to follow, and that ordinary citizens do not understand the complexities of constitutional law and do not always know what makes up a First Amendment right.⁴⁶ However, the courts have generally rejected this contention stating that a general First Amendment defense is not unconstitutionally vague because the rights that fall under the First Amendment are well known to the public.⁴⁷ The United States Court of Appeals for the Fourth Circuit remarked that it should be perfectly clear to everyone that political protests and religious worship are examples of activities that would be included under this defense.⁴⁸

Another common constitutional challenge to juvenile curfews is that the laws infringe on the fundamental rights of parents to rear their children as they see fit.⁴⁹ There is an undisputed fundamental right of parents to raise their children,⁵⁰ but most United States Appeals Courts have held that juvenile curfew laws do not unduly burden parents.⁵¹ Curfew laws containing exceptions for when the parent accompanies the child at night, has authorized another adult to do so, or has signed a written, dated permission slip for the child to be on a specific errand have generally been upheld.⁵² On the other hand, the United States Court of Appeals for the Ninth Circuit struck down one teen curfew on the ground that it impermissibly infringed on the parent's rights where the only exception to the curfew was if the parent personally accompanied the child during

⁴⁵ See, e.g., *Schleifer*, 159 F.3d 843.

⁴⁶ *Id.* at 853. The *Schleifer* court explained:

The Charlottesville ordinance provides an exception for those minors who are "exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech and the right of assembly." CHARLOTTESVILLE, VA., CODE § 17-7(b)(8). Plaintiffs insist that this exception accords standardless discretion to law enforcement officers to decide whether or not the exception applies. According to plaintiffs, it also forces citizens to learn a complex body of constitutional law in order to comprehend its scope.

Id.

⁴⁷ *Id.* at 854. See also *Hutchins*, 188 F.3d at 546.

⁴⁸ *Schleifer*, 159 F.3d at 854.

⁴⁹ *Hutchins*, 188 F.3d at 540-41; *Schleifer*, 159 F.3d at 852; *Qutb v. Strauss*, 11 F.3d 488, 496 (5th Cir. 1993); *Ramos v. Town of Vernon*, 48 F. Supp. 2d 176, 188 (D. Conn. 1999).

⁵⁰ *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

⁵¹ See *Hutchins*, 188 F.3d at 540-41 (holding that the parent's fundamental right to guide the upbringing of their children was not implicated by the curfew); *Schleifer*, 159 F.3d at 852 (recognizing that parents do not possess an unqualified right to raise their children); *Qutb*, 11 F.3d at 496 (holding the statute did not impermissibly infringe on parental rights); *Ramos*, 48 F. Supp. 2d at 188 (holding that there was no violation of any fundamental rights).

⁵² See *supra* note 51.

curfew hours.⁵³ However, very few curfew laws use this specific language, and typically survive constitutional challenges brought under this claim.

The most successful constitutional challenges to juvenile curfews, which will be the focus of this Note, have been that the laws infringe upon the minor's fundamental right to free movement. Since the beginning of the Twentieth Century, it has been clear that individuals have a fundamental right to *interstate* travel,⁵⁴ but the United States Supreme Court has declined to resolve the question of whether or not there is a fundamental right to *intrastate* travel.⁵⁵ The Court has however implied many times in dictum that there is a right to intrastate travel.⁵⁶ As a result, the United States Appeals Courts are split regarding whether this right also encompasses a right to intrastate travel or a right to free movement and whether that right should extend to minors. Additionally, there is no definitive ruling on what standard of review should be applied. Here, the circuits are also split, covering the full spectrum of review standards including rational basis, intermediate scrutiny, and strict scrutiny.⁵⁷ Even among the United States Courts of Appeals that have applied the same level of scrutiny, the courts have reached varying outcomes.⁵⁸

C. *Circuit Split Summary Regarding the Fundamental Right to Free Movement*

1. Strict Scrutiny Circuits

Strict scrutiny, which requires that the law achieve a compelling governmental interest and be narrowly tailored to meet that purpose, is applied to

⁵³ *Nunez v. City of San Diego*, 114 F.3d 935, 952 (9th Cir. 1997) (“The ordinance does not allow an adult to pre-approve even a specific activity after curfew hours unless a custodial adult actually accompanies the minor. Thus, parents cannot allow their children to function independently at night, which some parents may believe is part of the process of growing up.”).

⁵⁴ *United States v. Guest*, 383 U.S. 745, 759 (1966) (“[T]he constitutional right of interstate travel . . . exists. Its explicit recognition . . . goes back at least as far as 1904.”) (citing *United States v. Moore*, 129 F. 630, 633 (1904)).

⁵⁵ The United States Supreme Court has explicitly declined to even address whether a right to intrastate travel existed. *Mem’l Hosp. v. Maricopa County*, 415 U.S. 250, 255-56 (1974).

⁵⁶ *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (“[W]andering or strolling” from place to place was historically part of the “amenities of life.”); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972); *United States v. Guest*, 383 U.S. 745, 745 (1966) (stating that citizens of the United States “must have the right to pass and repass through every part of [the country] without interruption, as freely as in [their] own states”) (quoting *Crandall v. Nevada*, 73 U.S. 35, 49 (1867)); *Aptheker v. Secretary of State*, 378 U.S. 500, 520 (1964) (Douglas, J., concurring) (“[F]reedom of movement is the very essence of our free society Once the right to travel is curtailed, all other rights suffer”); *Kent v. Dulles*, 357 U.S. 116, 126 (1958) (“Freedom of Movement is basic in our scheme of values.”).

⁵⁷ See *supra* note 14.

⁵⁸ *Id.*

laws that impinge upon fundamental rights.⁵⁹ The United States Court of Appeals for the Fifth Circuit in the 1993 case, *Qutb v. Strauss*,⁶⁰ and the United States Court of Appeals for the Ninth Circuit in the 1997 case, *Nunez v. City of San Diego*,⁶¹ both recognized that minors have a fundamental right to free movement and used strict scrutiny in reviewing the claims.⁶²

a. *Qutb v. Strauss*

In *Qutb*, the United States Court of Appeals for the Fifth Circuit applied strict scrutiny, and upheld the juvenile curfew as constitutional. The city council of Dallas, Texas enacted an ordinance in 1991 which made it a misdemeanor for persons less than seventeen years of age to be present on city streets or in public places between the hours of 11:00 p.m. and 6:00 a.m. on week nights and between 12:00 a.m. and 6:00 a.m. on weekends.⁶³ The ordinance provided for many exceptional circumstances such as exceptions for married or emancipated persons, persons accompanied by a guardian or on an errand approved by a guardian, travel to or from work, exercise of First Amendment rights, and emergency situations.⁶⁴

The court did not rule on whether the right to move about freely is a fundamental right, but rather assumed that it was for the purposes of their analysis.⁶⁵ Applying strict scrutiny, the court indicated that the stated governmental purpose of “increasing juvenile safety and decreasing juvenile crime” was clearly a compelling governmental interest, but the court questioned whether the curfew law was narrowly tailored to meet that purpose.⁶⁶ “To be narrowly tailored, there must be a nexus between the stated government interest and the classification created by the ordinance, [such] ‘that the means chosen “fit” this compelling goal’”⁶⁷ Although the statistical evidence of nocturnal crime rates presented at trial did not provide any specific information about juvenile crime rates,⁶⁸ the court felt that the data was sufficient to establish the close fit required by strict scrutiny and held the law to be constitutional.⁶⁹ The court also noted that the exceptions included in the curfew law were evidence that the gov-

⁵⁹ *Nunez v. City of San Diego*, 114 F.3d 935, 946 (9th Cir. 1997); *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993).

⁶⁰ 11 F.3d 488.

⁶¹ 114 F.3d 935.

⁶² *Qutb*, 11 F.3d at 492; *Nunez*, 114 F.3d at 946-47.

⁶³ *Qutb*, 11 F.3d at 490.

⁶⁴ *Id.*

⁶⁵ *Id.* at 492.

⁶⁶ *Id.* at 493.

⁶⁷ *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

⁶⁸ *Id.*

⁶⁹ *Id.*

ernment was attempting to find the least restrictive means of accomplishing their goal.⁷⁰

b. Nunez v. City of San Diego

In *Nunez*, the United States Court of Appeals for the Ninth Circuit applied strict scrutiny, and struck down the juvenile curfew at issue as unconstitutional.⁷¹ In 1994, The City Council of San Diego, California resolved to enforce an ordinance that was enacted in 1947 which made it unlawful for persons less than eighteen years of age to “loiter, idle, wander, stroll, or play” in a long list of public places during the hours between 10:00 p.m. and daylight of the next day.⁷² The ordinance provided four exceptions including accompaniment by an authorized adult, running an errand approved by an authorized adult, returning home from a school-sponsored event, or activity required by some legitimate business.⁷³

The Ninth Circuit Court of Appeals noted that although age is not a suspect classification, citizens should have a fundamental right to free movement generally.⁷⁴ The court indicated that minors, like all other citizens, are entitled to that right.⁷⁵ However, because the government has “somewhat broad[] authority to regulate the activities of children,” the court looked to *Belotti v. Baird*⁷⁶ to determine whether the government had a heightened interest in restricting the freedom of minors more than adults.⁷⁷ In *Belotti*, the United States Supreme Court identified three reasons why the state might have a heightened interest in restricting minors: “(1) the peculiar vulnerability of children; (2) their inability to make critical decisions in an informed, mature manner; and (3) the importance of the parental role in child rearing.”⁷⁸

Applying strict scrutiny, the Ninth Circuit Court of Appeals agreed that San Diego had a compelling interest in protecting the community from crime and reducing juvenile crime and juvenile victimization.⁷⁹ However, the court indicated that the law was not narrowly tailored to meet that purpose.⁸⁰ Unlike the court in *Quib*, the *Nunez* court felt that statistical data regarding general nocturnal crime rates were insufficient proof to demonstrate the link between juve-

⁷⁰ *Id.*

⁷¹ *Nunez v. City of San Diego*, 114 F.3d 935, 949 (9th Cir. 1997).

⁷² *Id.* at 938, 939.

⁷³ *Id.* at 938.

⁷⁴ *Id.* at 944.

⁷⁵ *Id.* at 945.

⁷⁶ 443 U.S. 622 (1979).

⁷⁷ *Nunez*, 114 F.3d at 945.

⁷⁸ *Id.* (citing *Bellotti*, 443 U.S. at 634).

⁷⁹ *Id.* at 946-47.

⁸⁰ *Id.* at 949.

nile crime and victimization and the hours mandated by the curfew, and held the law to be unconstitutional.⁸¹

2. Intermediate Scrutiny Circuits

Intermediate scrutiny is a lower standard than strict scrutiny, which requires that the law serve an important governmental purpose and that the means employed are substantially related to meeting those objectives.⁸² Although recognizing that minors may have a fundamental right to movement, three United States Courts of Appeals have chosen to apply intermediate scrutiny to curfew laws.⁸³ The United States Court of Appeals for the D.C. Circuit in the 1999 case, *Hutchins v. District of Columbia*,⁸⁴ the United States Court of Appeals for the Second Circuit in the 2003 case, *Ramos v. Town of Vernon*,⁸⁵ and the United States Court of Appeals for the Fourth Circuit in the 1998 case, *Schleifer v. City of Charlottesville*,⁸⁶ have all reasoned that a lesser degree of review is required because minors have different vulnerabilities and characteristics than adults.⁸⁷

a. *Hutchins v. District of Columbia*

In *Hutchins*, the United States Court of Appeals for the D.C. Circuit upheld the juvenile curfew in question as constitutional under intermediate scrutiny review.⁸⁸ In 1995, the District of Columbia Council adopted a curfew that barred unemancipated minors ages sixteen and under from being in a public place unaccompanied by a responsible adult from 11:00 p.m. on Sunday through Thursday and midnight on Friday and Saturday until 5:00 a.m. of the next day.⁸⁹ The ordinance listed numerous specific exceptions including running errands, interstate travel in a vehicle, employment, emergencies, attending school, religious, or civic functions, and exercising First Amendment rights.⁹⁰

A plurality of judges held that the juvenile curfew in question did not involve a fundamental right.⁹¹ The plurality stated that minors do not possess a

⁸¹ *Id.* at 948-49.

⁸² *Ramos v. Town of Vernon*, 353 F.3d 171, 180 (2d Cir. 2003); *Hutchins v. District of Columbia*, 188 F.3d 531, 541 (D.C. Cir. 1999) (en banc); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998).

⁸³ The Second Circuit, the Fourth Circuit, and the D.C. Circuit.

⁸⁴ 188 F.3d 531.

⁸⁵ 353 F.3d 171.

⁸⁶ 159 F.3d 843.

⁸⁷ *See, e.g., Ramos*, 353 F.3d at 180; *Hutchins*, 188 F.3d at 541; *Schleifer*, 159 F.3d at 847.

⁸⁸ *Hutchins*, 188 F.3d 531.

⁸⁹ *Id.* at 534.

⁹⁰ *Id.* at 534-35.

⁹¹ *Id.* at 539.

fundamental right to freedom of movement because: (1) the United States Supreme Court has not specifically held that freedom of movement is a fundamental right; (2) children are always under some form of custody; and (3) the government has broad authority over children's activities.⁹² However, the court held that even if a fundamental right was implicated, the ordinance would withstand intermediate scrutiny and analyzed it as such.⁹³

First, the court interpreted *Bellotti* to mean that a lesser degree than strict scrutiny is necessary when the fundamental rights of minors are concerned.⁹⁴ Applying intermediate scrutiny, the court used three factors to determine whether a substantial relationship existed between the important governmental interest and the curfew: "(1) the factual premises upon which the legislature based its decision, (2) the logical connection the remedy has to the premises, and (3) the scope of the remedy employed."⁹⁵ The appellees pointed out that the statistical evidence and other proof offered in support of the curfew were over-inclusive and lacked specific data related to times and places of juvenile crime and victimization,⁹⁶ but the court noted that the legislature does not need to "prove a precise fit between the nature of the problem and the legislative remedy – just a substantial relation."⁹⁷ Additionally, the court felt that the enumerated exceptions sufficiently narrowed the scope of the curfew.⁹⁸ The D.C. Circuit held the juvenile curfew to be constitutional.⁹⁹

b. Ramos v. Town of Vernon

In *Ramos*, the Second Circuit applied intermediate scrutiny, and struck down the juvenile curfew at issue as unconstitutional deciding that it violated the juveniles' Fourteenth Amendment right to Equal Protection by burdening their fundamental right to freedom of movement.¹⁰⁰ In 1994, the town council of Vernon, Connecticut enacted a curfew ordinance that made it illegal for persons younger than 18 years of age to "remain, idle, wander, stroll, or play in any public place or establishment in the [t]own during curfew hours."¹⁰¹ The curfew hours began at 11:00 p.m. on Sunday through Thursday and 12:01 a.m. on Friday and Saturday and ended at 5:00 a.m. of the next day.¹⁰² The council incor-

⁹² *Id.* at 536-39.

⁹³ *Id.* at 541.

⁹⁴ *Id.* (citing *Belotti v. Baird*, 443 U.S. 622 (1979)).

⁹⁵ *Id.* at 542.

⁹⁶ *Id.*

⁹⁷ *Id.* at 543.

⁹⁸ *Id.* at 545.

⁹⁹ *Id.* at 548.

¹⁰⁰ *Ramos v. Town of Vernon*, 353 F.3d 171, 187 (2d Cir. 2003).

¹⁰¹ *Id.* at 172.

¹⁰² *Id.*

porated into the ordinance several exceptional circumstances, such as the minor being accompanied by an adult guardian, running an emergency or guardian approved errand, and traveling to or from work, school, religious, or organization activity with parental permission.¹⁰³

The Second Circuit has formally recognized that the freedom of movement is a fundamental right, and as such, a restriction of that right would typically receive strict scrutiny analysis.¹⁰⁴ However, the Second Circuit chose not to apply strict scrutiny because “youth blindness is not a goal in the allocation of constitutional rights”¹⁰⁵ By this the court meant that the minor’s immaturity needed to be accounted for when analyzing a minor’s constitutional rights. The court indicated that responsible analysis of minors’ constitutional rights must take into consideration the particular attributes of children.¹⁰⁶ As a result, the Second Circuit chose to apply intermediate scrutiny.¹⁰⁷

The Second Circuit took a unique approach by stating that the juveniles must be the direct and primary beneficiaries of an ordinance in order for the law to be found constitutional.¹⁰⁸ The court stated that if the law restricted the youths’ freedom for the benefit of others in the community, the law must be considered more suspect.¹⁰⁹ Following the approach outlined in the D.C. Circuit in *Hutchins*,¹¹⁰ the Second Circuit Court of Appeals determined that the means chosen did not have a close relationship to the state’s interest in the youths’ welfare.¹¹¹ The proof offered in support of the curfew was insufficient because it did not pertain to crimes committed during night-time hours, and as a result, the United States Court of Appeals for the Second Circuit held that the curfew was unconstitutional.¹¹²

c. Schleifer v. City of Charlottesville

In *Schleifer*, the Fourth Circuit upheld a juvenile curfew as constitutional based on intermediate scrutiny review.¹¹³ In 1997, the city of Charlottes-

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 176.

¹⁰⁵ *Id.* at 179 (citing *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

¹⁰⁶ *Id.* at 180.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (“Identifying the true beneficiaries of a restriction of this sort is particularly important in assessing both the legitimacy of the government’s objectives and the relationship of those objectives to the means employed to achieve them If the direct and primary beneficiaries are children, then the constraint on liberty is more likely to pass constitutional muster.”).

¹⁰⁹ *Id.* (“[W]hen evidence suggests that a curfew targeting juveniles was passed for the benefit of others in the community, that law’s constitutionality is more suspect.”).

¹¹⁰ *Hutchins v. District of Columbia*, 188 F.3d 531, 541-42 (D.C. Cir. 1999) (en banc).

¹¹¹ *Ramos*, 353 F.3d at 187.

¹¹² *Id.*

¹¹³ *Schleifer v. City of Charlottesville*, 159 F.3d 843, 855 (4th Cir. 1998).

ville, Virginia, enacted a juvenile curfew ordinance that prohibited minors under age seventeen from remaining in any public place, vehicle, or establishment during curfew hours.¹¹⁴ The curfew hours went into effect at 12:01 a.m. on Monday through Friday, at 1:00 a.m. on Saturday and Sunday, and lifted at 5:00 a.m. of the next morning.¹¹⁵ The ordinance listed numerous specific exceptions including running errands; interstate travel; employment; emergencies; attending school, religious, or civic functions; and exercising First Amendment rights.¹¹⁶

The court recognized that children possess at least qualified rights so the ordinance should be subject to more than rational basis review, but because those rights are not coextensive with those of adults, strict scrutiny would not be appropriate.¹¹⁷ Applying intermediate scrutiny, the court determined that the data used in support of the curfew was sufficient evidence to prove that the curfew was narrowly tailored to achieve those ends.¹¹⁸ The court stated that a juvenile curfew is a political issue that should be carefully considered and decided by a legislature and that courts should not second guess those lawmakers' decisions.¹¹⁹ The Fourth Circuit upheld the curfew as constitutional.¹²⁰

3. Rational Basis Circuit - *Bykofsky v. Borough of Middletown*

Rational basis, the lowest standard of constitutional review, requires only that the means chosen by the government to achieve its objective be rationally related to the ends sought.¹²¹ In other words, as long as the means chosen are not wholly irrational, the law will survive rational basis review. The only United States Court of Appeals to review juvenile curfews under the rational basis standard is the United States Court of Appeals for the Third Circuit in *Bykofsky v. Borough of Middletown*.¹²² In 1975, the Third Circuit affirmed a decision by the federal district court, which upheld a juvenile curfew based on rational basis review.¹²³ However, it is important to note that this case was de-

¹¹⁴ *Id.* at 846.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 847.

¹¹⁸ *Id.* at 849-52.

¹¹⁹ *Id.* at 850.

¹²⁰ *Id.* at 855.

¹²¹ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 728 n.21 (1997); *Reno v. Flores*, 507 U.S. 292, 303 (1993).

¹²² 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir. 1976) (unpublished table decision).

¹²³ *Id.* at 1273.

cided before the establishment of the intermediate level of scrutiny by the United States Supreme Court¹²⁴ as well as before *Bellotti*.¹²⁵

III. ANALYSIS

A. *Juvenile Curfews are Not the Answer*

1. The Data Supporting Their Effectiveness are Lacking

As the enforcement and enactment of juvenile curfews across the nation continues to grow, debates among concerned citizens regarding the efficacy of the laws will likely grow as well. Many people share the view that keeping kids home at night will reduce the amount of juvenile crime and victimization.¹²⁶ This idea is attractive because it is easy to understand, accept, and implement. However, the reality is more complex. It is not at all clear that juvenile curfews have any significant impact on juvenile crime and victimization rates.¹²⁷ There are few, if any, comprehensive national studies on the effectiveness of curfews.¹²⁸

There are, however, a few commonly cited local studies. A Detroit study conducted in 1975 determined that although the city's juvenile curfew suppressed some crime during curfew hours, there was also a corresponding displacement of crime.¹²⁹ The crimes still occurred, but they were shifted into the daytime non-curfew hours.¹³⁰ In 1998, another study examining California juvenile curfews concluded that enforcement of the curfews had no impact on youth crime and victimization rates.¹³¹ These reports in combination with a variety of other factors contribute to the arguments made by curfew opponents. Although the two reports indicate that juvenile curfews are ineffective, proponents of juvenile curfews can also cite instances where juvenile curfews have appeared to curb youth victimization and crime.¹³² A 1996 study conducted in the state of Washington examined the effectiveness of various juvenile curfews by surveying city officials of the towns that had enacted curfew ordinances.¹³³ The results indicated that most of the cities felt that the ordinances had been

¹²⁴ See *Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny for the first time).

¹²⁵ 443 U.S. 622 (1979).

¹²⁶ See Bannister, *supra* note 3, at 4.

¹²⁷ *Id.*

¹²⁸ See Norton, *supra* note 2, at 193.

¹²⁹ See Bannister, *supra* note 3, at 6.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See *Juvenile Curfews*, *supra* note 1, at 2405-06.

¹³³ Peggy Slavick & Steve Aos, *Juvenile Curfew and Parental Responsibility Ordinances*, Washington State Institute for Public Policy, 3 (1996), available at <http://www.wsipp.wa.gov/rptfiles/JuvCurfew.pdf> (last visited Mar. 2, 2006).

effective in reducing juvenile victimization and crime.¹³⁴ Although a standardized statistical comparison was not conducted, of the twenty-seven Washington cities surveyed, forty-eight percent stated that their curfews resulted in a reduction in juvenile crime, twenty-two percent stated that there was no impact, and thirty percent stated that they did not know whether there was an impact on juvenile crime.¹³⁵

It is important to recognize that it is very easy for parties on either side of the issue to manipulate and distort the implications of these types of studies or to discredit the outcomes. Statistical analysis of the need for and efficacy of juvenile curfews can be muddled by other factors and can be subjected to potential bias of the persons collecting or reporting the data. Numerous changes may occur in a community that could result in an increase or decrease in crime, skewing results. Researchers must consider factors such as changes in the overall crime rates, creation or breakdown of social programs directed at youth, existence of recreational centers, and changes in management or operation of the police force.¹³⁶ Furthermore, data regarding the ages of the juveniles committing the crimes and the times and locations of the occurrences must also be collected and reported in order to conduct a reasonably reliable analysis. Given the multitude of influential and distorting factors, it is easy to understand why so few studies are conducted and why it is so difficult to get a complete picture of the impact of juvenile curfews.

2. The Reality of Juvenile Curfews

Three explicit policy goals are commonly cited by the local government when enacting juvenile curfews: 1) reducing juvenile crime, 2) preventing harm to minors, and 3) increasing parental responsibility.¹³⁷ While these are unquestionably important goals, juvenile curfews are not necessarily the best approach to achieving them. The first goal, reducing juvenile crime, is not very well served because logically only a small percentage of juvenile crime would occur during the night-time hours when the overwhelming majority of minors are sleeping. Because some studies have shown that 3:00 p.m. to 8:00 p.m. is the time of day when most juvenile crime occurs, night-time curfews could only have a minor impact on the overall rates of juvenile crime.¹³⁸ Additionally, the sort of teens that would commit the types of violent nocturnal crimes that the curfews seek to prevent are not likely to be deterred by the relatively small fines

¹³⁴ *Id.*

¹³⁵ *Id.* at 3-4.

¹³⁶ See Norton, *supra* note 2, at 194.

¹³⁷ See, e.g., Ramos v. Town of Vernon, 353 F.3d 171, 181 (2d Cir. 2003); Nunez v. City of San Diego, 114 F.3d 935, 946 (9th Cir. 1997).

¹³⁸ See Norton, *supra* note 2, at 194.

and penalties of the curfew when they would have been willing to risk punishment for the more serious crime in the first place.¹³⁹

The second goal, preventing harm to minors, might actually be hindered if children who are victimized by family members are forced to stay in their house at night with an abusive or substance dependant parent.¹⁴⁰ Child victimization, such as sexual, physical, and emotional abuse, occurs most frequently at home.¹⁴¹ Finally, achievement of the third goal, increasing parental responsibility, is debatable at best. Some may presume that parental responsibility is increased by forcing parents restrict their children's boundaries. However, some parents may believe that a youth's maturity and responsible decision making skills are best developed by giving the child limited freedom and personal autonomy.¹⁴² It seems counterintuitive that removing a parent's authority would achieve the third goal of increasing parental responsibility.

Because the laws appear to be only loosely correlated to the three stated goals discussed above, a person may suspect that certain unstated goals for enacting juvenile curfews exist. In reality, curfews are likely a "knee-jerk reaction" by politicians in response to community fears.¹⁴³ Due to generation gaps, which have always been present throughout the ages in all societies, many adults are afraid of youths.¹⁴⁴ Today, in our society, "*to be young is to be suspect.*"¹⁴⁵ This perception is unfortunate because many young persons are law abiding citizens who want to make positive contributions to their communities and families.¹⁴⁶ However, isolated cases of youth violence frequently receive extensive coverage by the media because they are shocking and disturbing. When people hear about such senseless youth violence and incidents of young lives lost on the news, they demand action from their law makers.¹⁴⁷ Degenerate kids roaming the streets at night in search of trouble has become a common image in our collective fears.¹⁴⁸ Consequently, minors then become the target of ineffective laws that potentially violate their constitutional rights because of the

¹³⁹ Jordan C. Budd, *Juvenile Curfews: The Rights of Minors vs. the Rhetoric of Public Safety*, HUMAN RIGHTS, Fall 1999, available at www.abanet.org/irr/hr/fall1999humanrights/budd.html (last visited Mar. 2, 2006).

¹⁴⁰ *Id.*

¹⁴¹ See Norton, *supra* note 2, at 194.

¹⁴² See, e.g., Qutb v. Strauss, 11 F.3d 488, 496 (5th Cir. 1993) (One parent felt the juvenile curfew in question "would . . . deprive her daughter of the opportunity to learn to manage her time and make decisions before going away to college.").

¹⁴³ Ramos v. Town of Vernon, 353 F.3d 171, 187 (2d Cir. 2003).

¹⁴⁴ Annette Fuentes, *The Crackdown on Kids: The New Mood of Meanness Toward Children – To be Young is to be Suspect*, THE NATION, June 15, 1998, at 20-23.

¹⁴⁵ *Id.*

¹⁴⁶ See Budd, *supra* note 139.

¹⁴⁷ See Schwartz, *supra* note 4, at 1.

¹⁴⁸ *Id.*

actions of a few bad actors. Juvenile curfew laws are “ineffectual posturing and pandering—at the expense of the civil rights of young people”¹⁴⁹

Minority and poor children suffer the most from juvenile curfews. Minority youths are disproportionately affected because the police most frequently stop black and Hispanic youths assuming that they are likely gang members.¹⁵⁰ Poor children are also disproportionately affected because they have evening jobs more often than wealthier children and have to risk being stopped more often.¹⁵¹ Also, many poor families in urban areas do not have basements, yards, or porches where children typically play.¹⁵² Additionally, some disadvantaged kids may simply want to get away from a bad home life.

3. A Less Restrictive Approach to Reducing Juvenile Crime Should be Adopted

If the proponents of curfews truly want to achieve the express policy goals of reducing juvenile crime and victimization, programs should be implemented that are actually likely to achieve those goals. Rather than passing ordinances that could potentially violate youths’ rights, it makes more sense to generate proactive solutions. There are many options that are likely to be at least as effective at reducing juvenile crime and victimization such as school based programs, supervised recreation, employment opportunities, anti-gang programs, youth gun violence reduction programs, and other intervention programs. In order to be successful, the design of social programming needs to target the age groups and neighborhoods that are the source of the community’s problems and encourage involvement of families, schools, and communities. The costs of these options can be high and the impact may be questionable and difficult to assess, but the same problems exist regarding the cost and impact of juvenile curfews.¹⁵³ Although the cost and effectiveness of all the available options are problematic, only one option appears to restrict the rights of the persons it purports to help.

B. *The Constitutional Analysis of Juvenile Curfews That Should be Adopted*

Because the United States Supreme Court has not ruled on the issue, the approach taken to analyze the constitutionality of juvenile curfews is currently divided across the circuits.¹⁵⁴ The circuits are split over not only the definition

¹⁴⁹ Sale *ex rel.* Sale v. Goldman, 539 S.E.2d 446, 460 (W. Va. 2000) (Starcher, J., dissenting).

¹⁵⁰ See Norton, *supra* note 2, at 193; *Juvenile Curfews*, *supra* note 1, at 2404.

¹⁵¹ See Norton, *supra* note 2, at 195; *Juvenile Curfews*, *supra* note 1, at 2404.

¹⁵² See Norton, *supra* note 2, at 195.

¹⁵³ See *supra* Part III.A.1.

¹⁵⁴ See *supra* Part II.C.

of the right to freedom of movement, the fundamentality of the right, and the extension of the right to minors, but also what the appropriate standard of review should be, what impact *Bellotti* should have on the analysis, and how closely related the means must be to the ends under each standard of review. The Supreme Court has not given clear guidance on many of these questions embedded in the analysis, leaving the circuits broad leeway for divergent interpretations.

1. Defining and Classifying the Right at Issue

a. *Freedom of Movement is a Fundamental Right*

It is well established that people have the fundamental right to interstate travel.¹⁵⁵ Although not expressly defined in the text of the Constitution, the United States Supreme Court has stated that the right to travel is a “privilege and immunity of national citizenship under the Constitution,”¹⁵⁶ as well as a “part of the ‘liberty’ of which the citizen cannot be deprived without the due process of law”¹⁵⁷ Unfortunately, the existence of a fundamental right to intrastate travel, or freedom of movement generally, is less certain. The Supreme Court has not expressly stated whether the right of freedom of movement is a fundamental right, but it has implied many times in dictum that it is.¹⁵⁸ It seems intuitive that if people have the fundamental right to movement between states, then they should also possess the right to move freely within their own state. After all, what is “liberty” if not the freedom to move from place to place? In *United States v. Wheeler*,¹⁵⁹ the Court stated, “In all the states . . . the

¹⁵⁵ See, e.g., *Saenz v. Roe*, 526 U.S. 489, 510 (1999) (invalidating a statute limiting the maximum welfare benefits available to newly arrived residents because it burdened the fundamental right to interstate travel); *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 269 (1974) (invalidating a one-year residency requirement in a county as a condition of receiving free non-emergency hospitalization or medical care because it burdened the fundamental right to interstate travel); *Dunn v. Blumstein*, 405 U.S. 330, 359 (1972) (invalidating a one-year in state residency requirement for voting because it burdened the fundamental right to interstate travel); *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (invalidating a law denying welfare benefits to new state residents until they had resided in the state for at least a year because it burdened the fundamental right to interstate travel); *United States v. Guest*, 383 U.S. 745, 759 (1966).

¹⁵⁶ *Guest*, 383 U.S. at 764 (Harlan, J., concurring) (citing *Corfield v. Coryell*, 4 Wash. C.C. 371 (1825)). See also U.S. CONST. art. IV, § 2, cl. 1; U.S. CONST. amend. XIV, § 1.

¹⁵⁷ *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

¹⁵⁸ See *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (“[W]andering or strolling” from place to place was historically part of the “amenities of life.”); *Guest*, 383 U.S. at 758 (1966) (stating that citizens of the United States “must have the right to pass and repass through every part of [the country] without interruption, as freely as in [their] own states” (quoting *Crandall v. Nevada*, 73 U.S. 35, 49 (1867))); *Aptheker v. Sec’y of State*, 378 U.S. 500, 520 (1964) (Douglas, J., concurring) (“[F]reedom of movement is the very essence of our free society Once the right to travel is curtailed, all other rights suffer”); *Kent*, 357 U.S. at 126 (“Freedom of Movement is basic in our scheme of values.”).

¹⁵⁹ 254 U.S. 281 (1920).

citizens thereof possess[] the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, *to move at will from place to place therein*, and to have free ingress thereto and egress therefrom”¹⁶⁰ When the Supreme Court denied certiorari in the appeal of the *Bykofsky* case, the Third Circuit case that upheld a lower court’s decision to preserve a juvenile curfew under rational basis scrutiny, Justice Thurgood Marshall wrote a strong dissent stating that freedom of movement is a fundamental right and that the Supreme Court should review the case under strict scrutiny to determine whether juvenile curfews curtail that right.¹⁶¹ Although it is not absolutely certain, most circuits have concluded that a fundamental right to freedom of movement exists.¹⁶²

The first step in analyzing juvenile curfews is defining the specific right at issue. Because the freedom of movement is an unenumerated right, there is disagreement over the definition of the right and the degree of generality or specificity with which the right should be stated. For example, in *Hutchins*, the D.C. Circuit defined the right at issue narrowly as a minor’s right to be on the streets at night without adult supervision.¹⁶³ As another example, in *Nunez*, the Ninth Circuit defined the right at issue broadly as every citizen’s fundamental right to the freedom of movement.¹⁶⁴ In *Washington v. Glucksburg*,¹⁶⁵ the United States Supreme Court stated that a “careful description” of the asserted fundamental right is required.¹⁶⁶ This implies some undetermined degree of specificity, but courts must be careful not to “defin[e] the right as the mirror image of the particular burden”¹⁶⁷ Because the degree of specificity with which the right in question must be defined is entirely within the discretion of the court, it is possible that the court’s choice of definition will be influenced by its own personal views of the underlying conduct.¹⁶⁸ With respect to a minor’s right to freedom of movement, a court must be careful not to define the right too

¹⁶⁰ *Id.* at 293 (emphasis added).

¹⁶¹ *Bykofsky v. Borough of Middletown*, 429 U.S. 964, 964-65 (1976) (Marshall, J., dissenting).

¹⁶² *See, e.g., Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir. 2003) (stating the right to freedom of movement has been recognized in this circuit); *Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (stating that citizens have a fundamental right to free movement); and *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1254 (M.D. Pa. 1975), *aff’d*, 535 F.2d 1245 (3d Cir. 1976) (unpublished table decision) (stating that the right of freedom of movement is protected by the due process clause of the Fourteenth Amendment). *But see Hutchins v. District of Columbia*, 188 F.3d 531, 537 (D.C. Cir. 1999) (en banc) (stating that the Supreme Court has only indicated in dicta that a freedom of movement might exist while they were examining other issues).

¹⁶³ 188 F.3d at 538.

¹⁶⁴ 114 F.3d at 944.

¹⁶⁵ 521 U.S. 702 (1997).

¹⁶⁶ *Id.* at 703 (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

¹⁶⁷ *Hutchins*, 188 F.3d at 554 (Rogers, J., dissenting).

¹⁶⁸ *Id.* at 556.

narrowly by reading their individual beliefs into the Constitution instead of interpreting it. The right at issue in juvenile curfew cases should be simply the right of freedom of movement.

b. *The Fundamental Right of Freedom of Movement
Should be Extended to Minors*

Once a court has determined that the freedom of movement is a fundamental right, it must then determine whether that right extends to minors. Many of the circuits have decided that children do possess a fundamental right to freedom of movement, but some circuits have stated that they do not possess the right to the same extent as adults.¹⁶⁹ The circuits that have held that children possess only a reduced right to freedom of movement, or deny that children possess this right at all, frequently rely on the Supreme Court's statement in *Prince v. Massachusetts*¹⁷⁰ that "the state's authority over children's activities is broader than over like actions of adults."¹⁷¹ In *Prince*, the United States Supreme Court sustained the conviction of a woman who took her nine-year-old niece with her to help sell religious material in the evening.¹⁷² The Court determined that the state had a strong interest in protecting the child from psychological and physical harm.¹⁷³ Reliance on this precedent is misplaced because the Court was careful to state that its decision should not be extended beyond the facts of that particular case.¹⁷⁴ Additionally, since *Prince*, the Supreme Court has limited the application of that case to situations where a "substantial threat" of harm exists to the "physical or mental health of the child or to the public safety, peace, order, or welfare."¹⁷⁵

Cases denying a minor's unqualified right to freedom of movement also frequently cite *Vernonia School District 47J v. Acton*.¹⁷⁶ In *Vernonia*, the United States Supreme Court held that "[t]raditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination – including even the right of liberty in its narrow sense, [for ex-

¹⁶⁹ See *Ramos v. Town of Vernon*, 353 F.3d 171, 177-78 (2d Cir. 2003) (stating that the existence of rights is not based on age); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998) (stating that children do possess at least a qualified right to freedom of movement); *Nunez*, 114 F.3d at 945 (declining to hold that the Constitution does not secure minors' fundamental rights). But see *Hutchins*, 188 F.3d at 539 (stating that although adults may possess freedom of movement, children do not).

¹⁷⁰ 321 U.S. 158 (1944).

¹⁷¹ *Id.* at 168.

¹⁷² *Id.* at 161-62, 171.

¹⁷³ *Id.* at 169-70.

¹⁷⁴ *Id.* at 171; *Schleifer*, 159 F.3d at 862 (Michaels, J., dissenting).

¹⁷⁵ *Schleifer*, 159 F.3d at 862 (Michaels, J., dissenting) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972)).

¹⁷⁶ 515 U.S. 646 (1995).

ample], the right to come and go at will.”¹⁷⁷ Using this authority is misleading because the statement is taken out of context.¹⁷⁸ The *Vernonia* Court went on to explain in the next sentence that children “are subject, even as to their physical freedom, to the control of their parents or guardians.”¹⁷⁹ Courts should not extend this case to mean that minors are always automatically subject to broad authority of the state beyond the extent that the state has control over their parents.¹⁸⁰ The Supreme Court has held that the state may regulate children to a greater extent than adults, but this does not mean that the state can easily trump parental authority.¹⁸¹ “The state’s power to displace parental discretion is limited, however, and must be justified on a case-by-case basis [E]xcept in special circumstances, the state normally must defer to the exercise of a broad degree of parental discretion.”¹⁸² In order for the state to regulate children to a greater extent than adults, there must be a significant state interest that is present in the case of minors that is not present for adults.¹⁸³ In other words, if the streets are dangerous at night, it is so for both minors and adults, and the crimes committed at night may be perpetrated by both minors and adults.

When identifying fundamental rights, the Court “has neither rested on any single textual basis nor expressed a consistent theory.”¹⁸⁴ However, the Court has often relied on an examination of America’s history and tradition to find such rights. For example, in *Washington v. Glucksberg*,¹⁸⁵ when determining the fundamentality of a right, the United States Supreme Court held that “the

¹⁷⁷ *Id.* at 654.

¹⁷⁸ *Nunez v. City of San Diego*, 114 F.3d 935, 944 (1997).

¹⁷⁹ 515 U.S. at 654.

¹⁸⁰ *Nunez*, 114 F.3d at 944-45.

¹⁸¹ *See Schall v. Martin*, 467 U.S. 253, 265, (1984) (the state may trump parental discretion in delinquency proceedings because parental control has already faltered); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (the state may also trump parental control where a child’s “physical or mental health is jeopardized”).

¹⁸² *Schleifer v. City of Charlottesville*, 159 F.3d 843, 861 (4th Cir. 1998) (Michaels, J., dissenting).

¹⁸³ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74-75 (1976). The court stated:

Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than adults It remains, then, to examine whether there is any significant state interest in [the effect of the statute] that is not present in the case of an adult.

Id. *See also Ginsberg v. New York*, 390 U.S. 629, 636-37, 643 (1968) (upholding prohibition on pornography sales to minors and stating that the state may restrict minors’ rights more than adults’ rights).

¹⁸⁴ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

¹⁸⁵ 521 U.S. 702 (1997).

Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed . . .'"¹⁸⁶ Juvenile curfews have been used in the United States for over a century,¹⁸⁷ but this fact alone should be insufficient to deny the existence of a minor's right to freedom of movement. Liberty and justice are not served by imposing such restrictions on minors. Some children may not have sufficient maturity or knowledge to exercise their fundamental rights, but this is the reason why children are subject to the control of their parents.

Age should not be a factor used to define the right at issue.¹⁸⁸ Children may have less ability to assert or appreciate their constitutional liberties, but their rights are no less important. The United States Supreme Court has repeatedly held or implied that juveniles possess unqualified constitutional rights.¹⁸⁹ On many occasions, the Court has made it clear that youths are entitled to all of the rights and protections afforded by the Constitution and Bill of Rights.¹⁹⁰ It would be inconsistent to say that juveniles possess the fundamental rights of freedom of religion, freedom of speech, due process, and equal protection, but not freedom of movement. While the state may regulate children to a greater extent than adults,¹⁹¹ these considerations should come into play *only* when justifying the state's interest and *not* when determining the fundamentality of a right.

¹⁸⁶ *Id.* at 720-21 (quoting *Moore*, 431 U.S. at 503; *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

¹⁸⁷ See *Curfew Ordinances*, *supra* note 19, at 66 n.5.

¹⁸⁸ *Hutchins v. District of Columbia*, 188 F.3d 531, 555 (1999) (en banc) (Rodgers, dissenting and concurring).

¹⁸⁹ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982) (equal protection); *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975) (due process); *Stanton v. Stanton*, 421 U.S. 7, 17-18 (1975) (equal protection); *In re Winship*, 397 U.S. 358, 365-68 (1970) (due process); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969) (speech rights); *In re Gault*, 387 U.S. 1, 13, 28 (1967) (due process and other criminal procedural rights); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-94 (1954) (equal protection); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (speech and religion rights).

¹⁹⁰ *Bellotti v. Baird*, 443 U.S. 622, 633, (1979) (four-vote plurality opinion) ("A child, merely on account of his minority, is not beyond the protection of the Constitution."); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); *Tinker*, 393 U.S. at 511, (1969) ("Students . . . are 'persons' under our Constitution [who] are possessed of fundamental rights which the State must respect."); *In re Gault*, 387 U.S. 1, 13, (1967) ("whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"). See also *Breed v. Jones*, 421 U.S. 519 (1975); *Goss v. Lopez*, 419 U.S. 565 (1975).

¹⁹¹ See *supra* note 183.

2. Standard of Review

a. *Rational Basis is not the Appropriate Standard of Review*

The courts that have analyzed the constitutionality of juvenile curfews under rational basis review have premised the appropriateness of this standard on their opinions that the relevant interest in question is not a fundamental right.¹⁹² This view results when the court defines the right so narrowly that it can no longer be classified as fundamental.¹⁹³ If courts were allowed to define all rights based on the specific circumstances of every case, many of the rights that we possess as citizens under the Constitution could be restrained by the judiciary depending on the judges' own personal views.¹⁹⁴ This is not to say that every right should be defined in the broadest terms possible, but rather that the definition of the right must be broad enough that it does not obscure the fundamentality of the right at issue. The relevant interest in juvenile curfew cases should not be defined any more narrowly than a juvenile's right to the freedom of movement subject to their parent's control. It seems wrong to review infringement of the right to freedom of movement under the lowest degree of scrutiny when there is evidence to support the assertion that it is a fundamental right.¹⁹⁵ An ordinance that restricts liberty to such an extent should be subject to a heightened degree of scrutiny rather than rational basis review.¹⁹⁶

b. *Intermediate Scrutiny is not the Appropriate Standard of Review*

Although recognizing that minors may have a fundamental right to movement, the Second, Fourth, and D.C. Circuits have chosen to apply intermediate scrutiny.¹⁹⁷ Relying heavily on *Bellotti v. Baird*,¹⁹⁸ these circuits have all reasoned that a lesser degree of review is required because youths have different vulnerabilities and characteristics than adults.¹⁹⁹ In the 1979 plurality opinion of *Bellotti*, the United States Supreme Court established new guidelines for analyz-

¹⁹² *Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir. 2003). The opinion explains that the courts that have used rational basis review to analyze the Constitutionality of juvenile curfews have "defin[ed] the relevant interest so narrowly that it is not deemed a constitutional right and heightened scrutiny does not come into play." *Id.*

¹⁹³ *Hutchins*, 188 F.3d at 542 (defining the right at issue narrowly as juveniles' "right to be on the streets at night without adult supervision").

¹⁹⁴ See *supra* Part III.B.1.a.

¹⁹⁵ See *supra* notes 158-162 and accompanying text.

¹⁹⁶ *Schleifer v. City of Charlottesville*, 159 F.3d 843, 846-47 (4th Cir. 1998).

¹⁹⁷ *Ramos*, 353 F.3d 171; *Hutchins*, 188 F.3d 531; *Schleifer*, 159 F.3d 843.

¹⁹⁸ 443 U.S. 622 (1979).

¹⁹⁹ See, e.g., *Ramos*, 353 F.3d at 176-81; *Hutchins*, 188 F.3d 531; *Schleifer*, 159 F.3d at 847.

ing juveniles' rights when it reviewed a Massachusetts statute that required a minor to obtain parental consent in order to have an abortion.²⁰⁰ The Court set forth three specific factors that should be considered when analyzing the constitutional rights of minors to determine whether a different analysis should be applied for minors than would be for adults.²⁰¹ As stated in *Bellotti*:

The Court has long recognized that the status of minors under the law is unique in many respects We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.²⁰²

The three factor *Bellotti* Test should not be construed to provide reasons that always justify greater restrictions on minors than adults, and, more importantly, it should not be read to establish a lower level of scrutiny for the constitutional rights of minors.²⁰³ Instead, *Bellotti* provides courts with a framework that they can use to determine whether the state has a sufficiently important or compelling interest that would justify imposition of greater restrictions on minors than on adults with respect to the right at issue.²⁰⁴ The courts that have interpreted *Bellotti* to mean that a lesser degree than strict scrutiny is appropriate when these factors are applicable are using the factors improperly. Worse yet, these intermediate scrutiny cases are double counting the factors by using them once to lower the standard from strict to intermediate scrutiny, and then using them again in the argument justifying the state's important interest. The *Bellotti* factors should not be used for both determining the right at issue and justifying the states interests, but rather, they should only be used to analyze the state's interest.

In 2003, the United States Court of Appeals for the Second Circuit chose to analyze a constitutional challenge to a juvenile curfew under intermediate scrutiny stating that youth-blindness is not a constitutional goal.²⁰⁵ The Second Circuit stated that "strict scrutiny . . . embodies a constitutional preference for blindness . . . [and] reflects the notion that some rights are so important that they should be afforded to individuals in a manner blind to all group classifications, absent the most compelling reason to do otherwise."²⁰⁶ The

²⁰⁰ *Bellotti*, 443 U.S. at 624-26.

²⁰¹ *Id.* at 634.

²⁰² *Id.*

²⁰³ *Nunez v. City of San Diego*, 114 F.3d 935, 945-46 (1997).

²⁰⁴ *Id.*

²⁰⁵ *Ramos v. Town of Vernon*, 353 F.3d 171, 179 (2d Cir. 2003).

²⁰⁶ *Id.*

court implied that youth-blindness must be avoided because inherent mental and physical differences between adults and children raise concerns about minors' vulnerability and inexperience.²⁰⁷ Although the Second Circuit did not indicate that they were using the *Bellotti* factors to reduce the level of scrutiny, their reasons for reducing the level of scrutiny are embodied in the first two factors of the *Bellotti* test.²⁰⁸ However, by applying the *Bellotti* factors when analyzing the state's interest, these concerns would have been addressed, and the court's goal of avoiding youth-blindness would have been achieved.

c. *Strict Scrutiny is the Appropriate Standard of Review*

Freedom of movement is a fundamental right, and under traditional constitutional analysis, an ordinance restricting a fundamental right should be reviewed under strict scrutiny.²⁰⁹ Although there has a broad range of standards used among the circuits, the Fifth and Ninth Circuits have decided that strict scrutiny is the appropriate standard of review.²¹⁰ Minors must be treated the same as adults whenever the government lacks interests specific to minors to support more restrictive regulatory authority over them.²¹¹ It can be deducted from this that the standard of review for a law that intrudes upon a fundamental right is strict scrutiny regardless of whether the person whose rights have been violated is a minor or an adult.

All fundamental rights should begin with analysis under strict scrutiny,²¹² however, when interests specific to minors exist the government's claim for restrictions on minors is much stronger.²¹³ As the Court stated in *Planned Parenthood of Central Missouri v. Danforth*:

Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults. It remains, then, to examine whether there is any significant state interest in

²⁰⁷ *Id.* at 179-80.

²⁰⁸ *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (points used in *Bellotti* factors one and two).

²⁰⁹ *Att'y General of New York v. Sato-Lopez*, 476 U.S. 898, 906 (1986); *see also* *Shapiro v. Thompson*, 394 U.S. 618 (1969).

²¹⁰ *Nunez v. City of San Diego*, 114 F.3d 935, 945-47 (9th Cir. 1997); *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993).

²¹¹ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74-75 (1976).

²¹² *See* cases cited *supra* note 209.

²¹³ *Qutb*, 11 F.3d at 492 n.6; *Nunez*, 114 F.3d 945.

conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult.²¹⁴

If there are concerns specific to minors that indicate that the state must regulate minors in a more severe manner than would be permissible for adults, then the *Bellotti* factors should be used to determine the strength of the state's compelling interest under strict scrutiny analysis. This creates a more principled approach for deciding whether children can be treated differently than adults, rather than categorically applying intermediate scrutiny to all cases involving minors' rights.²¹⁵ It would be wrong to allow juveniles to be deprived of constitutional rights even when the government has no justification specific to minors and where similar deprivations would be intolerable for adults.²¹⁶

3. Analyzing Juvenile Curfews under Strict Scrutiny

Now that the right of freedom of movement has been defined and classified as fundamental,²¹⁷ and the standard of review has been determined,²¹⁸ the next step is to apply the standard to the right. Although strict scrutiny seems to be the most appropriate standard of review, it is largely irrelevant whether strict or intermediate scrutiny is applied because most juvenile curfews should not stand under either level of review. In order to withstand strict scrutiny analysis, the government must show that the statute achieves a *compelling* governmental interest and that it is *narrowly tailored* to meet that purpose.²¹⁹ To withstand intermediate scrutiny analysis, the government must show that the statute serves an *important* governmental purpose and that the means employed are *substantially related* to meeting those objectives.²²⁰ Although strict scrutiny should be used to analyze juvenile curfews, this Article will apply intermediate scrutiny to demonstrate that these ordinances should not stand even under the less stringent standard.

Three explicit policy interests commonly cited by local governments when enacting juvenile curfews include reducing juvenile crime, preventing harm to minors, and increasing parental responsibility.²²¹ The first step in applying the standard is determining whether these interests are sufficiently impor-

²¹⁴ *Planned Parenthood*, 428 U.S. at 74-75 (citations omitted).

²¹⁵ *Schleifer v. City of Charlottesville*, 159 F.3d 843, 865 (4th Cir. 1998) (Michael dissenting).

²¹⁶ *Id.* at 864.

²¹⁷ *See supra* Part III.B.1.

²¹⁸ *See supra* Part III.B.2.

²¹⁹ *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

²²⁰ *See, e.g.*, *Ramos v. Town of Vernon*, 353 F.3d 171, 176-81 (2d Cir. 2003); *Hutchins v. District of Columbia*, 188 F.3d 531, 541 (D.C. Cir. 1999) (en banc); *Schleifer*, 159 F.3d at 847.

²²¹ *See, e.g.*, *Ramos*, 353 F.3d at 181; *Nunez v. City of San Diego*, 114 F.3d 935, 946 (9th Cir. 1997).

tant. It is undisputable that the government's goals are important. The next step in applying the standard is determining whether juvenile curfews are substantially related to achieving those goals. The *Bellotti* factors should be used at this point to decide whether the government's interests justify a differential analysis for minors' rights. These factors are: (1) the peculiar vulnerability of children; (2) their inability to make critical decisions in an informed, mature manner; and (3) the importance of the parental role in child rearing.²²²

The first factor, the peculiar vulnerability of children, requires that there be a real danger to which children are particularly susceptible.²²³ Crime impacts all of society, but there should be some evidence that suggests minors are more likely to be affected by it than any other group. *Bellotti* requires a realistic appraisal on a case by case basis to determine whether minors are in fact disproportionately at risk to commit crimes or become the victims of crime.²²⁴ It has been argued by some that this standard is too high because the evidence needed to prove that a real danger is present is exceptionally difficult to obtain.²²⁵ While this may be true, the state should at least be required to try to make an objective inquiry as to whether a real danger exists for children before depriving them of a fundamental right. Although scientifically certain statistics are not required,²²⁶ courts should demand more than paternal assumptions, intuition, and stereotypes. Additionally, if a real provable danger to children during the nighttime hours did in fact exist, the vast majority of parents would not even consider allowing their children to be out alone on the streets at night, nor would children want to be there.

The second *Bellotti* factor, children's inability to make critical decisions in an informed, mature manner, requires that the state have an interest in limiting minors' right to make "important, affirmative choices with potentially serious consequences."²²⁷ The choices implicated by juvenile curfews are not serious, critical decisions.²²⁸ The decision to either stay inside or roam at night

²²² *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

²²³ See, e.g., *Ramos*, 353 F.3d at 186 ("Significantly, the survey results do *not* identify any hours as particularly dangerous, and they do *not* indicate that the schoolchildren themselves are the source of the problem or any more likely than adults to be victims. We see no direct connection therefore between the survey results and the curfew.") (emphasis in original); *Schleifer*, 159 F.3d at 849 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664, (1994)) ("[T]he government 'must do more than simply "posit the existence of the disease sought to be cured." It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'").

²²⁴ Susan M. Horowitz, *A Search for Constitutional Standards: Judicial Review of Juvenile Curfew Ordinances*, 24 COLUM. J.L. & SOC. PROBS. 381, 412 (1991).

²²⁵ See *Juvenile Curfews*, *supra* note 1, at 2419.

²²⁶ *Ginsberg v. New York*, 390 U.S. 629, 641 (1968) (citing *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911)).

²²⁷ *Bellotti*, 443 U.S. at 635.

²²⁸ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976) (examining a minor's right to have an abortion).

simply does not present the type of profound decision which *Bellotti* would leave to the state.²²⁹ The decision at issue is not whether to engage in crime, but whether to remain in public at night. This decision is much less serious than weighing the life-altering consequences surrounding the choice to abort a pregnancy, as was the case in *Bellotti*.²³⁰

The third factor, the importance of the parental role in child rearing, favors laws that foster the parent-child relationship.²³¹ The *Bellotti* Court stated that the intention of this third factor is to support, rather than supplant the choices parents make in raising their children.²³² The “importance of the parental role in child-rearing” may be promoted by legal restrictions “especially . . . supportive of the parental role” in preparing children for responsible adulthood.²³³ When the issue involves only a parent’s authority over their children’s general activities, the parental role is protected against the exercise of state power.²³⁴ On the contrary, juvenile curfews undermine parental control by interfering with the parent’s decisions about how to prepare their children for adulthood. Some parents may feel it is important to allow their children to go see a late movie and have a late dinner with friends on special occasions in order to reward them and to help the child develop mature decision making skills. Restricting the parental role in this manner actually has the opposite effect of the intent of the third *Bellotti* factor.

The stated policy reasons behind juvenile curfews are legitimate concerns; however, it is not clear that the means employed are likely to be substantially related to achieving the goals. Although every case must be reviewed on an individual basis, it is difficult to see how any child curfew law could pass constitutional muster unless the state could provide support for the contention that a real danger, specific to children, exists on the streets during curfew hours. Under this analysis, most juvenile curfew laws would be struck down as unconstitutional.

²²⁹ *Hutchins v. District of Columbia*, 942 F. Supp. 665, 673-74 (D.D.C. 1996); *Waters v. Barry*, 711 F. Supp. 1125, 1137 (D.D.C. 1989); *McColleston v. City of Keene*, 586 F. Supp. 1381, 1385-86 (D.C.N.H. 1984); *Johnson v. City of Opelousas*, 658 F.2d 1065, 1073 (5th Cir. 1981).

²³⁰ *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

²³¹ *See Bellotti*, 443 U.S. at 637-39.

²³² *Id.* at 638 (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“[I]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include *preparation for obligations the state can neither supply nor hinder.*”) (emphasis in original)).

²³³ *Id.* at 634, 638-39.

²³⁴ *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (announcing that parents have the primary role in regulating the activities of their children).

IV. JUVENILE CURFEWS AND WEST VIRGINIA

A. Sale ex rel. Sale v. Goldman²³⁵

In 1997, the Charleston city council enacted a “Youth Protection Ordinance” with the purpose of preventing juvenile victimization and exposure to criminal activity.²³⁶ The ordinance imposed a curfew on persons under the age of eighteen beginning at 10:00 p.m. on Sunday through Thursday nights and 12:01 a.m. on Friday and Saturday nights until 6:00 a.m. of the next morning.²³⁷ The list of exceptions in the ordinance includes emergencies, employment, emancipated children, accompaniment by a parent, running errands, exercising First Amendment rights, attending school, religious, or civic functions, and permission from a parent for special circumstances.²³⁸ The Sales challenged the curfew on various grounds, and the West Virginia Supreme Court of Appeals upheld Charleston’s juvenile curfew as constitutional.²³⁹

The court recognized freedom of movement as a fundamental right, but declined to extend that right to minors.²⁴⁰ Agreeing with the *Hutchins*²⁴¹ court, the West Virginia Supreme Court of Appeals referenced the portion of the analysis from that decision which noted that children are always in some form of custody and that juvenile curfews are deeply rooted in our nation’s history and traditions.²⁴² Based on these principals, the court declined to evaluate the ordinance under strict scrutiny and decided instead to use rational basis review.²⁴³ Applying rational basis, the court felt that the data used by the city to support the curfew was sufficient to establish that the law was rationally related to the city’s legitimate interest in its children’s welfare.²⁴⁴

The first problem with the court’s analysis is its failure to recognize that minors possess the fundamental right to freedom of movement. As stated previously, the United States Supreme Court has repeatedly recognized that children are entitled to the same rights and protections that the Constitution affords adults,²⁴⁵ even if it must be limited based on the *Bellotti* factors.²⁴⁶ The second problem with the court’s analysis is its choice of standard of review. Referenc-

²³⁵ 539 S.E.2d 446 (W. Va. 2000).

²³⁶ CHARLESTON, W. VA., CODE, *supra* note 7.

²³⁷ *Sale*, 539 S.E.2d at 449.

²³⁸ *Id.* at 450.

²³⁹ *Id.* at 450, 460.

²⁴⁰ *Id.* at 455.

²⁴¹ *Hutchins v. District of Columbia*, 188 F.3d 531 (D.C. Cir. 1999) (en banc).

²⁴² *Sale*, 539 S.E.2d at 455.

²⁴³ *Id.* at 456.

²⁴⁴ *Id.* at 457.

²⁴⁵ *See supra* notes 189-190.

²⁴⁶ *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

ing the analysis of the United States Court of Appeals for the D.C. Circuit in *Hutchins*, the West Virginia Supreme Court of Appeals took its decision one step beyond the loose treatment by the D.C. Circuit and chose to apply the rational basis standard of review.²⁴⁷ This is even more unusual considering West Virginia lies within the fourth circuit, and chose not to apply the intermediate scrutiny review used by the United States Court of Appeals for the Fourth Circuit in *Schleifer*.²⁴⁸ It is disconcerting that so many circuits, including the fourth circuit, have used the *Bellotti* factors to reduce the degree of scrutiny from strict to intermediate, but it is even more concerning that the West Virginia Supreme Court of Appeals would simply declare that minors do not possess fundamental rights and review the ordinance under rational basis.²⁴⁹ Since the United States Supreme Court established the intermediate scrutiny standard of review in 1976,²⁵⁰ all of the Circuit Courts of Appeals that have reviewed juvenile curfew cases have analyzed the issue under at least intermediate scrutiny analysis.²⁵¹ In Justice Starcher's dissent, he comments that the court's abandonment of strict scrutiny analysis is an inexplicable and unnecessary derogation of the rights of West Virginia's youth.²⁵² He also expressed his distaste over the way the youth of West Virginia are being "scapegoat[ed] and stigmatize[d] . . . for the larger shortcomings of our society."²⁵³

B. *The Continuing Impact in West Virginia*

In light of the support provided by the West Virginia Supreme Court of Appeals, West Virginia cities have continued to enact and modify existing juvenile curfew laws that mirror the Charleston ordinance.²⁵⁴ One example is the juvenile curfew passed in Huntington, West Virginia in September of 2005.²⁵⁵ In May of that year, four people ages sixteen to nineteen were shot and killed in the early morning hours after a Huntington high school prom.²⁵⁶ The neighborhood where the shooting took place has a history of incidents of violent crime and illegal drug activity.²⁵⁷ In response, the residents of the neighborhood

²⁴⁷ *Sale*, 539 S.E.2d at 456.

²⁴⁸ *Schleifer v. City of Charlottesville*, 159 F.3d 843, 849-52 (4th Cir. 1998).

²⁴⁹ *Sale*, 539 S.E.2d at 455-56.

²⁵⁰ The United States Supreme Court created and applied the intermediate scrutiny standard for the first time in *Craig v. Boren*, 429 U.S. 190 (1976).

²⁵¹ *See supra* notes 59-120 and accompanying text.

²⁵² *Sale*, 539 S.E.2d at 460 (Starcher, J., dissenting).

²⁵³ *Id.*

²⁵⁴ Bryan Chambers, *Huntington Ordinance Mirrors Charleston*, HERALD-DISPATCH, Nov. 4, 2005, at 2A.

²⁵⁵ HUNTINGTON, W. VA., ORDINANCES, *supra* note 6.

²⁵⁶ *See Chambers*, *supra* note 9.

²⁵⁷ *Id.*

where the shooting occurred began lobbying for a strengthened juvenile curfew in an effort to curb violent crime in the area.²⁵⁸ Based on the Charleston curfew that was approved by the West Virginia Supreme Court of Appeals, the Huntington city council passed the ordinance by a vote of 6 to 5.²⁵⁹ Although the city council was aware that the Charleston curfew has been largely unenforced and ineffective, the members supported and passed the curfew.²⁶⁰ As is the case in most similar circumstances, the city felt that it had to do something to appease the public, and passing a law “doesn’t cost the city any money . . . and the community feels like something has been accomplished.”²⁶¹ Unfortunately, it is a solution that will likely be ineffective and impinge upon the rights of minors.

The new ordinance provides the typical exceptions listed in juvenile curfew laws and states that parents and guardians may be charged with a misdemeanor if they knowingly permit their child to violate the curfew.²⁶² The law also state that anyone who assists in the violation may be fined or placed in jail for two days.²⁶³ Parents, even single moms who must trust their children while working evening jobs, can face jail time for their child’s curfew violation.²⁶⁴ Also, business proprietors, who can only guess the ages of their patrons, face the same penalties for allowing minors to remain at their establishment beyond curfew hours.²⁶⁵ Although the new Huntington ordinance is not likely to be enforced over the long run, good kids who want to make sure they do not get into trouble may end up staying at home, missing cultural events and opportunities to socialize with their friends. Despite the long list of exceptions to the ordinance,²⁶⁶ many law-abiding minors will fear being stopped on the way home from permissible late night activities.²⁶⁷ Adult violent offenders and delinquent minors who would be willing to risk the larger penalties for the crimes they commit at night will continue about their business, unaffected by the curfew.²⁶⁸

²⁵⁸ See Chambers, *supra* note 8 at 1C.

²⁵⁹ *Id.*

²⁶⁰ Bryan Chambers, *Can Curfew for Juveniles Cut Crime?*, HERALD-DISPATCH, Nov. 4, 2005, at 1A.

²⁶¹ *Id.* (quoting Clifford Johnson, executive director of the Institute for Youth Education and Families at the National League of Cities).

²⁶² See Chambers, *supra* note 8 at 1C.

²⁶³ HUNTINGTON, W. VA., ORDINANCES, *supra* note 6.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Teens on Curfews*, HERALD-DISPATCH, Nov. 4, 2005, at 1A.

²⁶⁸ See *id.*

V. CONCLUSION

Although various constitutional challenges continue to be brought against juvenile curfews, the best argument for invalidation is that they violate minors' fundamental right to freedom of movement. On this specific challenge, each of the circuits that have addressed the issue have applied their own unique analysis, but the United States Court of Appeals for the Ninth Circuit has been the only United States Appeals Court to get it right thus far.²⁶⁹ Children, as citizens of the United States, should possess all of the rights and protections afforded by the constitution. One of the core values of this country is liberty, and freedom of movement is inherent to this ideal. Freedom of movement should be considered a fundamental right, and courts should not be permitted to define that right out of existence just to satisfy the public. The United States Supreme Court has held that the government may regulate children to a greater degree than adults,²⁷⁰ but in order to do so, the circumstances should be exceptional.²⁷¹ The *Bellotti* test should be used to determine whether the circumstances are sufficiently exceptional by examining the state's interest. Some courts have used *Bellotti* as a justification for reducing the degree of scrutiny applied,²⁷² but this is not a correct interpretation.

Juvenile curfews owe their recent resurgence and popularity to politicians who use them as a tool to win public affection, even though the efficacy of these ordinances in reducing juvenile crime and victimization is unproven.²⁷³ Although the stated policy reasons behind juvenile curfews are legitimate, it is not clear that the means employed will achieve those goals. However, even if curfews are effective, there are better and less intrusive ways to reduce juvenile crime, prevent harm to minors, and increase parental responsibility. Proactive solutions such as school based programs, supervised recreation, employment opportunities, anti-gang programs, youth gun violence reduction programs, and other intervention programs that are more likely to achieve those goals should be implemented, rather than violating the fundamental rights of minors. Like most states, West Virginia has fallen victim to political pandering as well.²⁷⁴ It is disheartening to think that the fundamental rights of the state's youth are being tossed aside in an ineffectual effort to satisfy public fears.

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²⁶⁹ See *supra* notes 71-81 and accompanying text.

²⁷⁰ *Prince v. Massachusetts*, 321 U.S. 158, 169 (1944).

²⁷¹ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74-75 (1976).

²⁷² See, e.g., *Hutchins v. District of Columbia*, 188 F.3d 531, 541 (D.C. Cir. 1999) (en banc).

²⁷³ See Schwartz, *supra* note 4, at 1.

²⁷⁴ See, e.g., HUNTINGTON, W. VA., ORDINANCES, *supra* note 6; CHARLESTON, W. VA., CODE, *supra* note 7.

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