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INTRODUCTION

Recently public concern over juvenile crime has escalated.[1] Some studies show juvenile crime has increased[2] while others suggest the opposite.[3] Either way, more and more communities in the U.S. are enacting juvenile curfew ordinances to alleviate this concern.[4] Communities and legislatures have used justifications such as drug problems and violent behavior,[5] gang activity,[6] juvenile crime,[7] and parental responsibility[8] to enact juvenile curfew ordinances.

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[1] *See generally* Jeremy Toth, *Juvenile Curfew: Legal Perspectives and Beyond*, 14 IN PUB. INTEREST 39 (1995).

[2] *See, e.g., Serious Juvenile Crime Cases Skyrocket*, NEW HAVEN REG., July 25, 1995, at A8 (reporting that "the number of juvenile court cases involving serious offenses such as murders and aggravated assaults grew 68% between 1988 and 1992"); Walter Updegrave, *You're Safer Than You Think*, MONEY, June 1, 1994, at 114 (saying FBI statistics demonstrate that in 1992, out of the 641,250 arrests for violent crimes, teenagers age 15-19 accounted for 22%); John Larrabee, *t 21, R.I. Serial Killer Soon Will Go Free-'There's No Doubt' He'll Strike Again*, USA TODAY, June 6, 1994, at 8A (saying the juvenile homicide rate increased 130% since 1987).

[3] *See, e.g.,* Howard N. Snyder, *Juvenile Arrests 1995*, JUV. JUST. BULL., Feb. 1997, at 1 (stating the juvenile arrests for murder, forcible rape, robbery, and aggravated assault have declined 3%); Kevin Johnson & Gary Fields, *'Young and the Ruthless' Never Materialized*, USA TODAY, Oct. 3, 1997, at A1 (reporting juvenile arrests for violent crime decreased 9% in 1996).

[4] *See* Arnold Binder, *Restrictions on Youth Strain Families, Burden Government*, L.A. TIMES, Sept. 18, 1994, at B1 (stating juvenile curfew laws are on the increase).

[5] *See* Waters v. Barry, 711 F. Supp. 1125, 1139 (D.C. Cir. 1989).

[6] *See* Note, *Juvenile Curfew Ordinances and the Constitution*, 76 MICH. L. REV. 109, 111 (1977).

[7] *See* Gary Peter Klahr, *The Legal War on the Young Continues*, 30 ARIZ. ATT'Y. 15 (July 1994).

[8] *See* DeNeen L. Brown & Stephen Buckley, *Teens Set to Fight for Right to Party: Students Say Social Disaster Lurks in Plan to Curb Drunken Driving*, WASH. POST, Mar. 4, 1993, at B1 (quoting a parental support group coordinator saying a "curfew, while it seems to be pretty radical, could be a real tool to help parents who are having trouble with their children").

A typical juvenile curfew applies to persons under the age of 17[9] or 18.[10] The duration of a curfew may be lenient, such as from 11:00p.m. until 6:00a.m., Sunday–Thursday, and 12:00a.m. until 6:00a.m., Friday–Saturday.[11] Or, duration may be strict, such as 10:00p.m. through daylight for the entire week.[12] A juvenile curfew ordinance usually offers exceptions when the curfew does not apply,[13] such as when juveniles are exercising their First Amendment rights, running an errand for a parent, or engaging in employment.[14] Juveniles who violate a curfew are usually charged with a misdemeanor[15] and may typically be fined up to $500.00.[16] Also, parents who knowingly allow their children to violate the curfew can be subject to criminal liability.[17]

The City of Charlottesville, Virginia, like many other cities, is not immune from nationwide increases in juvenile crime.[18] On December 16, 1996, in response to a variety of evidence,[19] Charlottesville amended its City Code to include a juvenile nocturnal curfew ordinance.[20] The City identified three purposes for the curfew: (1) reduction of juvenile crime and violence; (2) protection of juveniles from the dangers of drugs and crime victimization; and (3) enhancement of parental responsibility.[21] The Charlottesville curfew provides eight exceptions that restrict the curfew.[22] Violators of the

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9 *See* Qutb v. Strauss, 11 F. 3d 488, 497 (5th Cir. 1993) (citing DALLAS, TEX., CODE ch. 31, § 31-33 (1992)).

10 Nunez v. San Diego, 114 F. 3d 935, 938 (9th Cir. 1997) (citing SAN DIEGO, CAL., MUNICIPAL CODE art. 8, § 58.01 (1947)).

11 *Id.*

12 *Id.*

13 *See* Craig Hemmens & Katherine Bennett, *Out in the Street: Juvenile Crime, Juvenile Curfews, and the Constitution*, 34 GONZ. L. REV. 267, 274 (1988–9).

14 *See Strauss*, 11 F. 3d at 497 (citing DALLAS, TEX., CODE, ch. 31, § 31-33 (c) (B), (D), (H)).

15 *See Nunez*, 114 F. 3d at 938 (citing SAN DIEGO, CAL., MUNICIPAL CODE art. 8, § 58.01.2).

16 *See Strauss*, 11 F. 3d at 497 (citing DALLAS, TEX., CODE, ch. 31, § 31-33 (e) (1)).

17 *See Nunez*, 114 F. 3d at 938 (citing SAN DIEGO, CAL., MUNICIPAL CODE art. 8, § 58.01.1).

18 *See* Schleifer v. Charlottesville, 159 F. 3d 843, 848 (4th Cir. 1998).

19 *Id.* at 849.

20 *Id.* at 846.

21 *Id.* at 847 (quoting CHARLOTTESVILLE, VA., CODE § 17-7, Intro.).

22 *See* CHARLOTTESVILLE, VA., CODE § 17-7 (b) (1-8). Exceptions include being accompanied by a parent; involved in an emergency; engaged in employment, or to and from it; being on the sidewalk abutting their home; engaged in

curfew are first given a verbal warning;[23] however, if the person has already received a warning, he or she is charged with a violation of the curfew,[24] which constitutes a misdemeanor.[25]

This Comment discusses the 4th Circuit's decision of *Schleifer v. City of Charlottesville* to uphold Charlottesville's juvenile curfew ordinance as constitutional. Part I considers the fundamental rights distinction between minors and adults. Part II discusses how courts treat specific fundamental rights. Part III examines the differing standards of judicial review. Part IV analyzes the *Schleifer* court's decision. Part V explains what I believe the *Schleifer* court should have done. This Comment concludes that the Charlottesville juvenile curfew ordinance is clearly unconstitutional. Because fundamental rights of children are at stake, the *Schleifer* court should have applied strict scrutiny rather than intermediate scrutiny. Despite the *Schleifer* court's holding otherwise,[26] a strict scrutiny analysis should have rendered the ordinance unconstitutional for equal protection and vagueness violations. Instead, as a result of the decision, the Fourth Circuit "[r]elegates kids to second-class citizenship by upholding Charlottesville's nighttime curfew for minors."[27]

I. THE FUNDAMENTAL RIGHTS DISTINCTION BETWEEN MINORS AND ADULTS

A. *Minor's and Adult's Rights Are not Coextensive*

Juveniles, like adults, have constitutionally protected fundamental rights.[28] The constitution does not decline to extend rights to children purely because they are children.[29] Veritably, the United States Supreme Court has enunciated that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[30] Past Supreme Court decisions provide further proof that children have constitutionally

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certain religious, civic, or school activities; being on an errand for a parent; interstate travel beginning or terminating in the city; First Amendment activities. *Id.*

23 *Id.* at § 17-7 (g) (1).

24 *Id.* at § 17-7 (g) (2).

25 *Id.* at § 17-7 (h).

26 *See Schleifer*, 159 F. 3d at 847.

27 *Id.* at 858 (Michael, J., dissenting).

28 *See* Wisconsin v. Yoder, 406 U.S. 205, 243 (1972).

29 *See* Bellotti v. Baird, 443 U.S. 622, 633 (1979) [Hereinafter *Bellotti*].

30 Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976) [Hereinafter Planned Parenthood].

protected rights; specifically, minors have significant First Amendment protections[31] and 14th Amendment and certain Bill of Rights protections.[32]

Despite pronouncements that minors possess constitutional rights, their rights are not coextensive with adult's constitutional rights.[33] The Supreme Court has declared that states have the power to restrict minor's rights with greater force than it could with adult's rights.[34] Nonetheless, the Supreme Court has not provided a uniform framework to decide when those restrictions may apply.[35]

B. The Use of Bellotti v. Baird to Restrict Minor's Rights

The United States Supreme Court has never chosen to review the issue of the constitutionality of juvenile curfew ordinances.[36] In fact, the Court has actively refused to grant certiorari on the issue.[37] Despite this, many lower courts have turned to the Supreme Court case of *Bellotti v. Baird* for assistance.[38] The issue in *Bellotti* concerned a statute that required minors under the age of 18 to receive

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31 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512–4 (1969) (holding minor's possess free expression right); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding minor's possess freedom of religion and expression rights).

32 *See In re* Gault, 387 U.S. 1, 30–1 (1967) (holding minor's possess due process rights in juvenile delinquency proceedings); *Planned Parenthood*, 428 U.S. at 74–5 (holding minor's possess privacy right); Breed v. Jones, 421 U.S. 519, 527–9 (1975) (holding minor's possess double jeopardy protection); *In re* Winship, 397 U.S. 358, 368 (1970) (requiring burden of proof of beyond a reasonable doubt in juvenile delinquency proceedings).

33 *See* Ginsberg v. New York, 390 U.S. 629, 638 (1968); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995).

34 *See, e.g.*, *Ginsberg*, 390 U.S. at 631–3 (1968) (upholding a state regulation of the sale of pornographic materials to children); Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (recognizing that the state has more power to regulate activities of minors than it does with adults).

35 *See infra* Part I.B.

36 *See* Frank DeLucia, *Connecticut's Juvenile Curfew Ordinances: An Effective Means for Curbing Juvenile Crime, or an Unconstitutional Deprivation of Minors' Fundamental Rights?*, 15 Q.L.R. 357, 365 (1995).

37 *See, e.g.*, Qutb v. Bartlett, 511 U.S. 1127 (1994) (denying petition for writ of certiorari); Schleifer v. Charlottesville, 143 L.Ed. 2d 349 (1999) (denying petition for writ of certiorari); Bykofsky v. Middletown, 429 U.S. 964 (1976) (denying petition for writ of certiorari).

38 *See* Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L. Q. 1315, 1337–8 (1995) (saying that *Bellotti* is the foundation of most juvenile curfew analyses).

parental consent before receiving an abortion.[39] The *Bellotti* court, in a four Justice plurality opinion, announced three justifications for treating minor's constitutional rights differently than adults rights: (1) the peculiar vulnerability of children; (2) children's inability to make critical decision in an informed mature manner; and (3) the importance of the parental role in child rearing.[40] However, because the Supreme Court has not endorsed using the *Bellotti* test in juvenile curfew cases,[41] its application has been incongruous.[42]

When used correctly, the *Bellotti* test could actually become the second prong of a two-part test to determine when a state has the necessary interests to justify restricting minor's rights.[43] The first prong of the test determines the nature of the right at risk.[44] For example, the right at risk can be a fundamental right, such as the right to vote,[45] or it can be a non-fundamental right, such as education.[46] The nature of the right decides the level of scrutiny that is incorporated in the second step; namely, measuring and evaluating the state's interests.[47] The *Bellotti* test is not used to determine the nature of the rights at risk, but to provide a backdrop upon which to measure the state interest in regulating those rights.[48] However, the *Bellotti* factors only become relevant under strict scrutiny; this is because it is the only standard of review, where absent certain factors, the law requires equal treatment of minors and adults.[49] Thus, in the case of fundamental rights, (which requires strict scrutiny), the state needs to provide sufficient interests (consistent with the *Bellotti* factors) in order to justify regulat-

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39 *See Bellotti*, 443 U.S. at 625.

40 *Id.* at 634.

41 *See id.* at 642; *Cf.* Deerfield v. Greenberg, 550 N.E. 2d 12, 16 (Ill. App. Ct. 1990) (stating that the use of the *Bellotti* factors outside the abortion rights situation is "troublesome.").

42 *Cf. Strauss*, 11 F. 3d at 492, n.6 (finding a juvenile curfew ordinance constitutional without using the *Bellotti* factors because all parties agreed that the state have sufficient interests to regulate minors); McCollester v. Keene, 586 F. Supp. 1381, 1385–6 (D.N.H. 1984) (striking down a juvenile curfew ordinance because it did not withstand *Bellotti* analysis); *see also*, Tona Trollinger, *The Juvenile Curfew: Unconstitutional Imprisonment*, 4 WM. & MARY BILL RTS. J. 949, 990 (1996).

43 *See* Brian Privor, *Dusk 'Til Dawn: Children's Rights and the Effectiveness of Juvenile Curfew Ordinances*, 79 B.U. L. REV. 415, 433 (1999).

44 *Id.*

45 *See* Reynolds v. Sims, 377 U. S. 533 (1964).

46 See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

47 *See* Privor, *supra* note 43.

48 *See* Trollinger, *supra* note 42.

49 *See Schleifer*, 159 F. 3d at 863 (Michael, J., dissenting).

ing the minor's rights more stringently than adults, when otherwise, the state would have to treat them equally.[50]

C. *Incorrect Use of the Bellotti Factors*

Some courts incorrectly use the *Bellotti* test to reason that because a state has sufficient interests consistent with the *Bellotti* factors, the minor's right at risk is less than fundamental.[51] If this were the correct reasoning, as soon as the sufficient state interests were demonstrated, the conclusion of "less than fundamental rights" would almost necessarily follow.[52] As one commentator notes, "it is a case of putting the cart before the horse by inquiring from the outset about government's justifications for abridging a liberty would leave us without guidance in deciding how strong a justification to demand."[53] Thus, to ensure a proper analysis, the nature of the right at risk should be determined separately and before the decision of whether a state has the sufficient interests (consistent with the *Bellotti* factors) to justify restricting minor's rights more than adult's.[54]

D. *The Use of Bellotti to Restrict Minor's Rights in Juvenile Curfew Cases*

Some courts analyze a municipality's ordinance using the *Bellotti* factors, decide upon their evaluation that the state has sufficient interests to regulate minors conduct greater than it would

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[50] *See, e.g.*, Panora v. Simmons, 445 N.W. 2d 363, 371–2 (Iowa 1989) (Lavorato, J., dissenting) (saying that minors' rights are not less fundamental than adults' and that special governmental interests are needed to treat them differently); *Schleifer*, 159 F. 3d at 864 (Michael, J., dissenting) (criticizing majority's holding that a minor's rights can be regulated more stringently than adults without sufficient reasons).

[51] *See, e.g.*, *Simmons*, 445 N.W. 2d at 368–9 (using *Bellotti* factors to decided minor's right to move freely is not fundamental and therefore, only applying rational basis review); Bykofsky v. Middletown, 401 F. Supp. 1242, 1253–8 (M.D. Pa. 1975) (case prior to *Bellotti*, deciding that governmental interests in regulating minor's behavior indicates minor's right to move freely is not fundamental, even though it is fundamental with respect to adults).

[52] *See* Federle, *supra* note 38, at 1350 (discussing how the a court's analysis would become a tautology: "Children's fundamental rights are not violated because the state may treat them differently, and the state has greater authority to regulate their activities because children's rights are not as extensive as those held by adults").

[53] LAWRENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 96 (1992).

[54] *See* Privor, *supra* note 43, at 434–5.

adults, and thus uphold the curfew ordinance.[55] One such case is *Village of Deerfield v. Greenberg*.[56] In *Greenberg*, the Village of Deerfield enacted a juvenile curfew ordinance that made it unlawful for persons under age 18 to be in public during curfew hours.[57] Greenberg, age 17, was charged with a violation of the ordinance after being found in public during curfew hours, and proceeded to challenge the ordinance on the ground that it unconstitutionally restricted his right to move freely.[58] The court first determined that the ordinance would be unconstitutional if applied to adults, thereby determining the right at risk to be fundamental (thereby fulfilling the first prong of a correct *Bellotti* analysis).[59] Greenberg cited the *Bellotti* factors in his defense, but the court stated that it was bound by precedent to apply *People v. Chambers*.[60] *Chambers* was a pre-*Bellotti* decision where the Illinois Supreme Court validated a juvenile curfew ordinance.[61] However, the *Greenberg* court engaged in a *Bellotti* factor analysis anyway (thereby fulfilling the second prong of a correct *Bellotti* analysis).[62] The court found that the 1st and 3rd *Bellotti* factors were present, and that the Illinois Supreme Court in *Chambers* considered these factors in reaching its decision.[63] Thus, the court concluded that since its decision (after a *Bellotti* analysis) and *Chambers* were consistent, precedent required the determination that the state had authority to regulate minor's conduct more so than adult's, and thus validated the juvenile curfew ordinance.[64]

E. Rejecting the Use of Bellotti to Restrict Minor's rights in Juvenile Curfew Cases

Some courts have used the B*ellotti* factors to determine that juvenile curfew ordinances are unconstitutional.[65] Indeed, several courts did not find that the mere presence of the *Bellotti* factors compelled a conclusion that a minor's behavior may be regulated

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55 *See, e.g.*, People *ex rel.* J.M., 768 P. 2d 219, 223 (Colo. 1989).
56 *See Deerfield*, 550 N.E. 2d at 16.
57 *Id.* at 13–4.
58 *Id.* at 12–3.
59 *Id.* at 15.
60 *Id.* at 15–6.
61 *See* People v. Chambers, 360 N.E. 2d 55, 59 (Ill. 1976).
62 *See Deerfield*, 550 N.E. 2d at 16.
63 *Id.*
64 *Id.* at 16–7.
65 *See* DeLucia, *supra* note 36, at 369–70.

more stringently than an adult's behavior.[66] The court in *Waters v. Barry*[67] took this exact approach. In *Waters*, the D.C. legislature adopted a curfew that made it unlawful for persons under age 18 to be in public during curfew hours (11:00p.m.–6:00a.m. Sunday to Thursday; 12:00a.m.–6:00a.m. Friday to Saturday).[68] The court held that the ordinance was unconstitutional because of both 1st and 5th Amendment violations.[69] The Waters court considered the District's argument[70] that minor's constitutional rights are unequal with an adult's rights, and thus may be regulated in a way that adults right's cannot.[71] However, the court disagreed with the District's contention. The court decided that in the area of fundamental rights, minor's rights and adult's rights are equal, and thus strict scrutiny applies (correctly using the first prong of the test in determining the nature of the right at risk).[72] Then, the court proceeded to the second prong; namely, the *Bellotti* factor analysis.[73] With respect to the 1st *Bellotti* factor, the court called violence "ubiquitous," and that its danger posed no more a peculiar threat to minors as it does to adults.[74] For the 2nd factor, the court stated that the decision to go out at night will rarely have "serious consequences" and "does not ineluctably lead to nighttime violence."[75] Finally, with regard to the 3rd factor, the court said that by vesting parental responsibility in the state and the police, the ordinance frustrates rather than fosters parental responsibility.[76] Thus, the court con-

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66 *See, e.g.*, Maquoketa v. Russell, 484 N.W.2d 179, 185–6 (Iowa 1992) (holding the juvenile curfew ordinance was overbroad, and thus application of the *Bellotti* factors was unnecessary); Johnson v. Opelousas, 658 F. 2d 1065, 1073 (5th Cir. Unit A Oct. 1981) (holding the curfew ordinance was overbroad and denying the presence of the 2nd *Bellotti* factor in situations covered by the ordinance); Allen v. Bordentown, 524 A. 2d 478, 486 (N.J. Super. Ct. Law Div. 1987) (following *Johnson* analysis and holding the curfew violated the Equal protection Clause); *Keene*, 586 F. Supp. at 1385–6 (holding the curfew overbroad and that *Bellotti* factors "do not come into play where the innocent behavior of the juvenile creates no risk of delinquent activity.").

67 *See Waters*, 711 F. Supp. at 1125.

68 *Id.* at 1127.

69 *Id.* at 1139.

70 *Id.* (district's argument is largely based upon the one used in *Bykofsky*, 401 F. Supp. at 1256).

71 *See Waters*, 711 F. Supp. at 1135.

72 *Id.* at 1138–9.

73 *Id.* at 1136–7.

74 *Id.*

75 *Id.*

76 *Id.*

cluded that after a *Bellotti* analysis, "there is no basis for treating juveniles differently than adults."[77]

II. Courts Recognition of Fundamental Rights

A. *Freedom of Movement*

The most consequential fundamental right infringed by juvenile curfew ordinances is a minor's freedom of movement.[78] Over the years, freedom of movement, although not enumerated in the Constitution, has been guarded by the U.S. Supreme Court.[79] The Court has even gone as far as saying freedom of movement is "[b]asic in our scheme of values."[80] Moreover, several lower courts have decided that freedom of movement is a fundamental right.[81] Thus, because a juvenile curfew ordinance impinges on a minor's right to move freely during curfew hours, a fundamental right is unduly compromised.[82]

B. *Freedom of Association and other First Amendment Rights*

The other constitutional dispute juvenile curfew ordinances usually raise is the restriction on freedom of association.[83] Freedom of association is well grounded in Supreme Court precedent.[84] The

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77 *See Waters*, 711 F. Supp. at 1136.

78 *See* Jeff A. Beaumont, *Nunez and Beyond: An Examination of Nunez v. City of San Diego and the Future of Nocturnal Juvenile Curfew Ordinances*, 19 J. Juv. L. 84, 111 (1998).

79 *See, e.g.*, Papachristou v. Jacksonville, 405 U.S. 156, 164 (1972) (saying freedom of movement has historically been "[p]art of the amenities of life as we have known them."); United States v. Wheeler, 254 U.S. 281, 293 (1920) (saying that even from the time of the Articles of Confederation, citizens have had the fundamental right to move freely within their states, and to have free access thereto and therefrom).

80 *See* Kent v. Dulles, 357 U.S. 116, 126 (1958).

81 *See, e.g.*, *Waters*, 711 F. Supp. at 1134 (holding freedom of movement is a fundamental right under the 1st & 5th Amendments); *Russell*, 484 N.W. 2d at 183 (saying when 1st Amendment rights involvement, such movement must be protected by the 1st Amendment).

82 *See Bykofsky*, 401 F. Supp. at 1254.

83 *See* Trollinger, *supra* note 42, at 978.

84 *See, e.g.*, Apthekar v. Secretary of State, 378 U.S. 500, 517 (1964) (holding that freedom of travel is closely related to freedom of speech and association, and thus Congress cannot draft a statute constitutionally prohibiting travel); Roberts v. United States Jaycees, 468 U.S. 609, 617 (1984) (saying freedom of association flows from the 1st Amendment, is incidental to the exercise of the 1st Amendment, and may itself be inherent in the 1st Amendment).

Supreme Court acknowledges two situations where freedom of association applies: intimate relationships[85] and 1st Amendment affairs.[86] With respect to intimate relationships, freedom of association is deemed an integral part of personal liberty.[87] As for 1st Amendment association, the Supreme Court has considered it essential for exercising 1st Amendment freedoms.[88] Moreover, the Supreme Court has extended the association right to include social purposes.[89] Thus, when a curfew restricts a minor from being in public during curfew hours, it also divests that minor of the ability to make intimate relationships[90] and exercise 1st Amendment freedoms.[91]

III. JUDICIAL STANDARDS OF REVIEW

The standard of review, rather than the facts of the case, is usually outcome determinative in a case based on constitutional law.[92] Individual rights do not receive equal protection under the law; rather, a hierarchy exists.[93] Strict scrutiny, the most rigorous standard of review, is used in cases involving either a fundamental right or a suspect classification.[94] The U.S. Supreme Court has referred to fundamental rights (such as those in the Bill of Rights) as those that have been "[f]ound to be implicit in the concept of ordered liberty . . ."[95] According to the Court, race[96] and religion[97] are the only suspect classes in all situations; age is not a suspect classification.[98] Intermediate scrutiny, a less stringent standard of

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85 *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

86 *See Roberts*, 468 U.S. at 617–619.

87 *See* Trollinger, *supra* note 42, at 979.

88 *See Roberts*, 468 U.S. at 622.

89 *See, e.g.*, Coates v. Cincinnati, 402 U.S. 611, 615 (1971) (acknowledging 1st and 14th Amendment rights to congregate in public for social or political reasons); NAACP v. Button, 371 U.S. 415, 430–1 (1963) (saying free association includes social aspects).

90 *See* Trollinger, *supra* note 42, at 980.

91 *Id.* at 981.

92 *See* Hemmens & Bennett, *supra* note 13, at 286; *see generally,* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1022–39 (2d. ed. 1988).

93 *Id.*

94 *See Rodriguez*, 411 U.S. at 17.

95 Palko v. Connecticut, 302 U.S. 319, 324–5 (1937).

96 *See* Brown v. Bd of Educ., 349 U.S. 294, 298 (1955).

97 *See Bykofsky*, 401 F.Supp. at 1256; *see also*, TRIBE, *supra* note 92, at 1179.

98 *See Nunez*, 114 F.3d at 944.

review, is used in certain classifications.[99] Rational basis review is used when the case involves neither a fundamental right nor a suspect classification, and when intermediate scrutiny is inappropriate.[100]

A. Rational Basis Review

Rational basis review, also known as the "roll-over-and-play-dead" test, is the least stringent standard of review.[101] This is because as long as the disputed statute/law "[b]ears some rational relationship to legitimate state purposes," courts will uphold the disputed legislation.[102] Under this test, state actions are given a presumption of validity.[103] Moreover, reviewing courts do not closely examine the effects of the legislation.[104] Generally, the court will uphold any state statute that "[r]easonably can be conceived to constitute a distinction or difference in state policy . . ."[105]; it need not be the best possible way.[106]

B. Intermediate Scrutiny

Disapproval of the rational basis test in gender-based classifications gave rise to intermediate scrutiny.[107] While not quite as rigorous as strict scrutiny review, intermediate scrutiny review requires "sharper focus" than the "relatively deferential 'rational basis' test."[108] Intermediate scrutiny necessitates that the disputed statute/law serve "important governmental objectives" and that the means used be "substantially related to the achievement of those objectives."[109] Reviewing courts must find the justification "genuine, not hypothetical or invented post hoc in response to litigation."[110]

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99 *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464, 468 (1981) (saying intermediate scrutiny is used for gender-based classifications).

100 *See* Hemmens & Bennett, *supra* note 13, at 287.

101 Schleifer v. Charlottesville, 963 F.Supp. 534, 539 (W.D. Va. 1997).

102 *Id.*

103 *See* TRIBE, *supra* note 92, at 1444.

104 *Id.*

105 Allied Stores v. Bowers, 358 U.S. 522, 530 (1959).

106 *See* Hemmens & Bennett, *supra* note 13, at 289.

107 *See* TRIBE, *supra* note 92, at 1601–10.

108 Craig v. Boren, 429 U.S. 190, 210–1 (1976).

109 United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

110 *Id.* at 532.

C. *Strict Scrutiny*

In order to withstand strict scrutiny (the most rigorous standard of review), the disputed statute/law needs to "achieve a compelling governmental interest," and it must be "narrowly tailored to achieve this result."[111] 'Narrowly tailored' means there must be a "sufficient nexus between the stated governmental interest and the class created by the ordinance,"[112] and that the legislation uses the least restrictive means to achieve its goal.[113] A reviewing court will closely examine the purpose and effect of the statute/law rather than defer to the legislature; no presumption of validity is given to the state.[114]

IV. THE 4TH CIRCUIT'S DECISION IN SCHLEIFER V. CITY OF CHARLOTTESVILLE

A. *Determination of the Appropriate Judicial Standard of Review*

The *Schleifer* court first determined the correct level of scrutiny applicable in the case.[115] The court considered plaintiff's argument that minors deserve protection under the Constitution,[116] and admitted that minors deserve some constitutional rights before becoming adults.[117] However, the court cited several U.S. Supreme Court decisions that minor's rights are not coextensive with adults.[118] Citing *Prince v. Massachusetts*, the Court stated that because of this precedent, "[t]he state's authority over children's activities is broader than over like actions of adults."[119]

In examining the case law, the court based its decision on two determinations:

> First, children do possess at least qualified rights, so an ordinance which restricts their liberty to the extent that this one does should be subject to more than rational basis review. Second, because children do not possess

111 Plyler v. Doe, 457 U.S. 202, 216–7 (1982).
112 *See Nunez*, 114 F. 3d at 946.
113 *See Strauss*, 11 F. 3d at 492.
114 *See* TRIBE, *supra* note 92, at 1022–3 & 1058–9.
115 *See Schleifer*, 159 F. 3d at 846.
116 *Id.* at 847.
117 *Id.*
118 *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682; *Bellotti*, 443 U.S. at 634; *Ginsberg*, 390 U.S. at 638; *Prince*, 321 U.S. at 168; *Vernonia Sch. Dist.*, 515 U.S. at 654.
119 *See Prince*, 321 U.S. at 168.

> the same rights as adults, the ordinance should be subject to less than the strictest level of scrutiny.[120]

Therefore, the court determined that the best judicial standard of review to apply is intermediate scrutiny.[121] As a result, the court needed to determine whether the ordinance is "substantially related" to "important" governmental interests.[122] However, despite this conclusion, the court stated that the ordinance would also survive strict scrutiny.[123]

B. The Effect of Intermediate Scrutiny: No Bellotti Analysis

When minors and adults have the same rights, certain considerations specific to the former come into play, and when present, justify the state's authority to regulate minor's rights more stringently than adult's.[124] These considerations are the *Bellotti* factors: "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."[125] Therefore, only the presence of these factors entitles the government to restrict minor's rights with greater force than it can adult's rights.[126] However, the *Schleifer* court found that minors do not possess the same fundamental rights as adults, and thus applied intermediate scrutiny.[127] Thus, the court did not engage in a *Bellotti* analysis (since it is relevant only when minors and adults have equal rights) and proceeded to evaluate the city's interests under the "substantially related" to "important" government interest test of intermediate scrutiny.[128]

C. Evaluation of the State's Purposes

The Charlottesville legislature posited three purposes for the juvenile curfew ordinance.[129] The first purpose was the reduction of juvenile violence and crime in the city.[130] The second purpose was for protection of minors from unlawful drug activity and from

120 *See Schleifer*, 159 F.3d at 847.
121 *Id.* at 847.
122 *Id.* (quoting *Hogan*, 456 U.S. at 724).
123 *Id.*
124 *Id.* at 863 (Michael, J., dissenting).
125 *See Bellotti*, 443 U.S. at 634.
126 *Id.* at 633–639.
127 *See Schleifer*, 159 F. 3d at 847.
128 *See Virginia*, 518 U.S. at 533 (quoting *Hogan*, 458 U.S. at 724).
129 *See Schleifer*, 159 F. 3d at 847.
130 *Id.*

the possibility of becoming the victims of older perpetrators of crime.[131] The third and final purpose was to foster parental responsibility.[132]

The court evaluated the first purpose through two different avenues.[133] First, the court looked to past Supreme Court decisions.[134] In *Schall v. Martin*, the Court acknowledged that "[t]he 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted."[135] Further, in *Brown v. Texas*, the Court called protecting the community from crime "a weighty social objective."[136] The *Schleifer* court called this the most fundamental interest in government, and that "this interest persists undiluted in the juvenile context. . . ."[137]

Second, the court looked to the national and local increases in juvenile crime.[138] The court considered testimony by a criminology expert saying juvenile crime, like the national trend, was also increasing in Charlottesville.[139] Next, the court contemplated the city's report, from its Juvenile & Domestic Relations Court, that its caseload increased 25% from 1991-1996.[140] Finally, the court weighed the city's evidence of a high rate of juvenile recidivism and an increase in violence in juvenile crime.[141] With all this information, the court concluded that the city's first purpose was "undeniably compelling."[142]

The court also evaluated the city's second purpose, protecting juveniles from harm and crime, with prior Supreme Court decisions.[143] The Supreme Court has always recognized the "streets" as threatening to children[144], and according to the *Schleifer* court, today the threat has materialized in the form of violent crime and

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131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.*
135 Schall v. Martin, 467 U.S. 253, 264 (1984) (quoting De Veau v. Braisted, 363 U.S. 144, 155 (1960)).
136 Brown v. Texas, 443 U.S. 47, 52 (1979).
137 *See Schleifer*, 159 F. 3d at 847 (quoting *Schall*, 467 U.S. at 264–5).
138 *Id.*
139 *Id.* at 848.
140 *Id.*
141 *Id.*
142 *Id.* at 847.
143 *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 766 (1982); *Ginsberg*, 390 U.S at 640; *Prince*, 321 U.S. at 166–67.
144 *See Prince*, 321 U.S. at 169.

drugs.[145] Moreover, various lower courts have acknowledged the impact of dangerous urban life on vulnerable children.[146] Each child, the court says, "[r]isks becoming another victim of the assaults, violent crimes, and drug wars that plague America's cities."[147] Further, two Charlottesville police officers provided evidence that children on the city's streets during curfew hours are at a marked risk.[148] Thus, the court found that the city's second purpose was "well-established."[149]

The court labels the city's third purpose, supporting parental responsibility, as "significant."[150] Once more, the court looks to Supreme Court cases for direction.[151] The Supreme Court describes parental responsibility as something that should be shared between parents and the state.[152] Further, the Court says parental responsibility should be complemented and guided by the state.[153] Lastly, the Court said "[t]he state is appropriately concerned with the integrity of the family unit."[154] Therefore, the *Schleifer* court determined that the city's third purpose constituted "an important governmental purpose."[155]

D. Evaluation of the Means by which the Ordinance Seeks to Achieve its Goals

The plaintiffs, in addition to attacking the city's purposes behind the ordinance, also attacked the means by which the ordinance purported to achieve its goals.[156] The court agreed with the plaintiff's argument that the curfew "must be shown to be a meaningful step toward solving a real, not fanciful problem."[157] However, the court did not accept plaintiffs' challenge and noted that this burden

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145 *See Schleifer*, 159 F. 3d at 848.

146 *See, e.g., Nunez*, 114 F. 3d at 947; *In re* Appeal in Maricopa County, Juvenile Action No. JT9065297, 887 P. 2d 599, 606 (Ariz. Ct. App. 1994); *J.M.*, 768 P. 2d at 223; *Bykofsky*, 401 F. Supp. at 1257.

147 *See Schleifer*, 159 F. 3d at 848.

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *See, e.g., Prince*, 321 U.S. at 165–66; Pierce v. Society of the Sisters of the Holy Names of the Jesus and Mary, 268 U.S. 510, 535 (1925).

153 *See Bellotti*, 443 U.S.at 637.

154 Trimble v. Gordon, 430 U.S. 762, 769 (1977).

155 *See Schleifer*, 159 F. 3d at 849.

156 *Id.*

157 *Id.*

does "not demand of legislatures 'scientifically certain criteria of legislation.'"[158] Moreover, the court observed that it should not substitute its judgment for the legislatures, despite the unknown effects the curfew may have.[159]

The court defended the means of the ordinance via its first purpose largely by deferring to legislative judgment.[160] First, the court said that the city, upon hearing a variety of evidence, from a variety of sources (police reports, public opinion, news reports, information from the U.S. Dept. of Justice, national crime reports, etc.), was justified in believing that "keeping unsupervised juveniles off the streets late at night will make for a safer community."[161] Second, after attack on the city's exclusion of 17 year old persons from the ordinance, the court said it was "loath to second-guess" the legislature's decision.[162] Third, the court said that, based upon the aforementioned variety of evidence, the city was permitted to believe juvenile crime was a problem in Charlottesville.[163] Finally, and logically next in sequence, the court said the city was entitled to enact a juvenile curfew ordinance in hopes of reducing juvenile crime, and should not have their choice aborted before having a chance to work.[164]

In defending the city's second purpose, protecting juveniles from crime, the court also deferred to legislative judgment.[165] The plaintiffs argued that the streets are not a distinctly dangerous place for minors.[166] Rather, plaintiff's contended that most violence against minors occurs by family members and friends.[167] However, the court stated that just because the curfew does not completely solve the juvenile crime problem, does not mean the city cannot attempt to solve the juvenile crime problem on the streets.[168] Further, the city relied on local and national crime reports that documented the juvenile crime problem on the streets.[169] Thus, the

158 *See Ginsberg*, 390 U.S. at 642–3 (quoting Noble State Bank v. Hasker, 219 U.S. 575 (1911)).
159 *See Schleifer*, 159 F. 3d at 849.
160 *Id.* at 849–51.
161 *Id.*
162 *Id.* at 850.
163 *Id.*
164 *Id.*
165 *See Schleifer*, 159 F. 3d at 850–51.
166 *Id.* at 850.
167 *Id.*
168 *See id.*
169 *Id.*

court reasoned, "the Constitution certainly does not put legislatures to the choice of solving the entirety of a social problem or no part of it at all."[170]

Lastly, the plaintiffs attacked the city's third purpose: providing support to the parental role of child rearing.[171] Plaintiffs characterize the ordinance, based upon parental testimony, as unwanted and unnecessary.[172] The court responded to this argument in three ways. First, the curfew helps parents keep children off the streets when their own efforts to do so have failed.[173] Second, the curfew pushes parents to take a more meaningful role in their children's lives.[174] Third, the curfew helps parents who want their children to use their time more productively, as opposed to spending it on the streets.[175] Furthering the court's view, the court noted that the city acted on substantial public endorsement for the curfew.[176]

E. The Schleifer Courts' Response to the Unconstitutionally Vague Challenge

The plaintiffs also argued that several of the ordinance's exceptions were unconstitutionally vague.[177] A law will not be deemed void for vagueness as long as it "(1) establishes 'minimal guidelines to govern law enforcement,' and (2) gives reasonable notice of the proscribed conduct."[178] Further, when criminal penalties are imposed, "the standard of certainty is higher."[179] Despite these pronouncements, the court is quick to note that clarity in a criminal statute is never perfect, so that it may be "[b]oth general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."[180]

The court also noted at the outset its antipathy at striking down ordinances as void for vagueness.[181] The court said it would much

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170 *Id.* at 851.
171 *Id.*
172 *Id.*
173 *Id.*
174 *Id.*
175 *See Schleifer*, 159 F. 3d at 851 (4th Cir. 1998).
176 *Id.*
177 *Id.* at 853.
178 *See Schleifer*, 159 F. 3d at 853 (quoting Elliot v. Administrator, Animal & Plant Health Inspection Serv., 990 F. 2d 140, 145 (4th Cir. 1993).
179 *Id.* (quoting Kolender v. Lawson, 461 U.S. 352, 359 n. 8 (1983).
180 *Id.* (quoting Colten v. Kentucky, 407 U.S. 104, 110 (1972).
181 *See Schleifer*, 159 F. 3d at 853.

rather strike down a specific application of a law, than invalidate the law as a whole.[182] Thus, the court would rather use judicial restraint to avoid invalidating laws and then deal with challenges on a case-by-case basis.[183]

The first provisional attack by plaintiffs is on the First Amendment exception.[184] Under the exception, behavior is exempt from the curfew when a minor is "exercising First Amendment rights protected by the U.S. Constitution, such as free exercise of religion, freedom of speech, and the right of assembly."[185] Plaintiffs assert that the ordinance (1) accords law enforcement officers complete discretion in its enforcement, and (2) forces children to learn constitutional law in order to understand it.[186]

However, the court refused to "punish the city for its laudable effort to respect the First Amendment."[187] The court felt the exception fosters First Amendment values, rather than weakens them.[188] Thus, the court decided it would not belittle the city's attempt to protect expressive activity.[189]

Moreover, the court did not feel unrestrained discretion is given to law enforcement officials enforcing the ordinance.[190] Every criminal law, the court states, grants discretion to those enforcing it.[191] However, the chance of abuse of that discretion does not force a court to invalidate that law.[192] Plaintiffs rely on testimony of the city's police chief, whose answer to a hypothetical question about the First Amendment exception seemed to reaffirm the proposition that abuse of discretion is likely.[193] The court responded that "such hedged deposition testimony about a speculative hypothetical does not demonstrate that police will enforce the curfew arbitrarily."[194]

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182 *Id.*
183 *Id.*
184 *Id.*
185 CHARLOTTESVILLE, VA., CODE § 17-7 (b) (8).
186 *See Schleifer*, 159 F. 3d at 853.
187 *Id.*
188 *Id.*
189 *Id.*
190 *See Schleifer*, 159 F. 3d at 854.
191 *Id.*
192 *Id.*
193 *Id.*
194 *See Schleifer*, 159 F. 3d at 854; *See also* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 503 (1982).

Plaintiff's second vagueness challenge is in the term "civic" as used in the ordinance's exception for activities sponsored by civic organizations.[195] Plaintiffs rely on the Supreme Court, who invalidated a door-to-door solicitation ordinance exception that included the phrase, "borough civic groups and organizations."[196] However, the court did not read *Hynes v. Mayor of Oradell* as standing for per se vagueness of any statutory use of the word "civic."[197] Rather, the *Hynes* court found "civic" was just one of a number of unclear terms in the statute.[198] On the contrary, the city of Charlottesville, the court urged, intended "civic" to be understood as its ordinary, everyday dictionary definition.[199] Thus, the court refused to find such "[u]se of the term civic to suffer an ambiguity of constitutional magnitude."[200]

Finally, the plaintiff's challenged the exception in the ordinance where a child is involved in an emergency.[201] Plaintiffs contended there are many possible situations when it is impossible to tell if the curfew will apply.[202] However, the court responded that mere possibilities will not render the exception void for vagueness.[203]

F. The Schleifer Courts' Conclusion

The *Schleifer* court concluded that the city's interests were within the intermediate scrutiny standards,[204] and that the ordinance was not void for vagueness.[205] In sum, the court said the ordinance "[c]omfortably satisfies constitutional standards."[206] The court based the totality of its opinion on the "[b]elief that communities possess constitutional latitude in devising solutions to the persistent problem of juvenile crime."[207]

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195 *See Schleifer*, 159 F. 3d at 854.
196 *See* Hynes v. Mayor of Oradell, 425 U.S. 610, 621 (1976).
197 *See Schleifer*, 159 F. 3d at 854.
198 *See Hynes*, 425 U.S. at 621.
199 *See Schleifer*, 159 F. 3d at 854.
200 *See Schleifer*, 159 F. 3d at 854; *See also* Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).
201 *See Schleifer*, 159 F. 3d at 854.
202 *Id.*
203 *See Schleifer*, 159 F. 3d at 854; *See also* American Comm. Ass'n. v. Douds, 339 U.S. 382, 412 (1950).
204 *See Schleifer*, 159 F. 3d at 849.
205 *Id.* at 854.
206 *Id.* at 855.
207 *Id.*

V. WHAT THE *SCHLIEFER* COURT SHOULD HAVE DONE

A. Choosing the Appropriate Judicial Standard of Review

The Charlottesville ordinance, by prohibiting children under 17 from being in public during curfew hours, operates through an aged-based classification, and thus is bound by the Equal Protection Clause of the 14th Amendment.[208] Usually, aged-based classification laws are subject to rational basis review.[209] Thus, the ordinance is validated as long as there is a rational basis underlying the classification's use to achieve a legitimate governmental purpose.[210] But, when an aged-based classification infringes upon fundamental rights, strict scrutiny is required.[211]

1. Fundamental Rights Are Infringed Upon by the Ordinance

The Charlottesville ordinance does infringe upon fundamental rights (e.g., First Amendment rights and freedom of movement).[212] However, the *Schleifer* court found that because only minors are affected by the ordinance, the Equal Protection Clause requires only intermediate scrutiny.[213] The court should have followed the lead of the 5th and 9th circuits, in deciding whenever fundamental rights are impinged, strict scrutiny must be applied.[214]

2. Why Strict Scrutiny Should Apply

Minors' rights under the constitution are basically equal to those of adults'.[215] However, there may be, in some situations, "sig-

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208 *See Schleifer*, 159 F. 3d at 859 (Michael, J. dissenting).

209 *See* Gregory v. Ashcroft, 501 U.S. 452, 470 (1991); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313–14 (1976).

210 *See* Heller v. Doe, 509 U.S. 321, 319–21 (1997).

211 *See* Clark v. Jeter, 486 U.S. 456, 461 (1988); Austin v. Michigan Chambers of Commerce, 494 U.S. 652, 666 (1990).

212 *Cf. Nunez*, 114 F. 3d at 944–45 (9th Cir. 1997) (holding that San Diego's juvenile curfew ordinance does impinge upon minor's fundamental rights); *Qutb*, 11 F.3d at 492 (5th Cir. 1993) (assuming the Dallas' juvenile curfew ordinance at issue implicates minor's fundamental rights); Kolender v. Lawson, 461 U.S. 352, 358 91983) (finding a loitering statute affects First Amendment liberties and freedom of movement right); *Waters*, 711 F. Supp. at 1139 (D.D.C. 1989) (concluding the D.C. juvenile curfew ordinance "directly burdens First Amendment and fifth Amendment liberty interests" of minors affected by the ordinance).

213 *See Schleifer*, 159 F. 3d at 847.

214 *Id.* at 865-66 (Michael, J., dissenting); *Nunez*, 114 F. 3d at 945–46; *Qutb*, 11 F. 3d at 492.

215 *See Schleifer*, 159 F. 3d at 862 (Michael, J., dissenting).

nificant state interest[s] . . . that [are] not present in the case of an adult" that will justify the state's greater authority to regulate children.[216] Therefore, when the appropriate interests are present, greater regulation can be exercised over minors — not because minors are unequal to adults, but because certain state interests pass strict scrutiny review.[217]

Justice Marshall, in *H.L. v. Materson*,[218] echoed this logic. In *Matherson*, the Supreme Court upheld a statute requiring parental notification before a minor has an abortion.[219] The majority's decision was based upon the grounds that the statute furthered "important state interests" and was "narrowly drawn to protect only those interests."[220] Justice Marshall, dissenting in the judgment, expressed support for the majority's test, and observed that under such a test, minors' rights are not inferior to adults', but that appropriate state interests justified greater regulation of those rights.[221] Thus, fundamental rights of minors should be equal with those of adults, and should likewise be protected under strict scrutiny analysis.[222]

Moreover, the Supreme Court's analysis of minors' rights supports this conclusion.[223] The Supreme Court has said that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights."[224] Furthermore, minors cannot be denied constitutional protection solely because of their age.[225] The Court has also said that "[c]onstitutional rights do not mature and

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216 *Id.* (quoting *Danforth*, 428 U.S. at 75).

217 *Id.* at 862–63.

218 H.L. v. Matherson, 450 U.S. 398 (1981).

219 *Id.* at 413.

220 *Id.*

221 *Id* at 441–42, n. 32 (Marshall, J., dissenting).

222 *See Schleifer*, 159 F. 3d at 863 (Michael, J., dissenting); *Nunez*, 114 F. 3d at 945; *See also* Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution* , 97 HARV. L. REV. 1163, 1171 (1984) (saying minor's rights "should be presumptively equal to those of adults, and violations of such rights should merit strict scrutiny).

223 *See Schleifer*, 159 F. 3d at 863 (Michael, J., dissenting).

224 *See Danforth*, 428 U.S. at 74; *See also Tinker*, 393 U.S. at 511 (stating "[s]tudents . . . 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) (saying "whatever may be their precise impact, neither the 14th Amendment nor the bill of Rights is for adults alone").

225 *See Bellotti*, 443 U.S. at 633 (saying "A child, merely on account of his minority, is not beyond the protection of the Constitution").

come into being magically when one attains the state defined age of majority."[226]

Thus, generally speaking, minors "[a]re protected by the same constitutional guarantees against governmental deprivations as adults."[227] However, there are cases that, when *Bellotti* factors are present, justify the state's having enhanced authority to regulate minors' rights.[228] This compels the conclusion that in order for the state to possess this enhanced authority to regulate minors, the *Bellotti* factors must support it.[229] "'It is only upon such a premise that a state may deprive children of . . . rights [when a similar deprivation] would be constitutionally intolerable for adults.'"[230]

The *Schleifer* court would use a "categorical approach" and apply intermediate scrutiny in all cases involving minors, even in the cases where the state does not possess interests particular to minors to justify its greater regulation.[231] However, in those cases, there is no justification for regulating minors' rights more stringently than adults'.[232] The Supreme Court put forth the required justification when the Court announced the *Bellotti* factors.[233] Under the *Schleifer* courts' categorical approach, a reviewing court could "[a]utomatically . . . afford less protection to those rights even in cases in which there was no justification for doing so."[234] This result would have "far ranging implications," for legislatures "can pass many laws regulating conduct that would pass intermediate scrutiny, but fail strict scrutiny."[235] The *Schleifer* court's categorical approach would create "a second-class citizenship for all persons under the age of majority."[236]

Thus, the application of strict scrutiny in all Equal Protection Clause challenges concerning fundamental rights, whether in relation to minors or adults, would bypass these constitutional dilem-

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226 *See Danforth*, 428 U.S. at 74.

227 *See Bellotti,* 443 U.S. at 635.

228 *Id.* at 634.

229 *See Schleifer*, 159 F. 3d at 863 (Michael, J., dissenting).

230 *Id.; Bellotti*, 443 U.S. at 635, n.13 (quoting *Ginsberg*, 390 U.S. at 650) (Stevens, J., concurring)).

231 *See Schleifer*, 159 F. 3d at 864 (Michael, J., dissenting).

232 *See* Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1170 (1984).

233 *See Bellotti*, 443 U.S. at 634. *See also supra* note 231.

234 *See* Note, *supra* note 232, at 1170–71.

235 *See Schleifer*, 159 F. 3d at 864 (Michael, J., dissenting).

236 *Id.* at 865.

mas.[237] Under this approach, a state could regulate minors' rights with greater authority than it could adults only when the appropriate interests are present.[238] Thus, after the application of the *Bellotti* factors, if the appropriate interests are present, and the state's legislation passes strict scrutiny review, minors' rights may be regulated more stringently than adults'.[239]

B. Evaluation of the City's Stated Purposes for the Curfew Ordinance

Upon examining the Charlottesville curfew ordinance, it becomes evident that it cannot withstand strict scrutiny.[240] Despite the majority's labeling of the city councils' objectives underlying the ordinance as "laudable,"[241] the ordinance should have been struck down for violating the Equal Protection Clause of the 14th Amendment.[242]

1. The City's First Purpose: Protecting Juveniles from Crime

The City's first interest of protecting juveniles from crime may well be a compelling interest; however, this is only part of what is required under strict scrutiny analysis.[243] In addition to advancing a compelling state interests, strict scrutiny requires that:

> statutes affecting constitutional rights must be drawn with 'precision,' and must be 'tailored' to serve their legitimate objectives . . . [I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, [the government] may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'[244]

The first problem with the Charlottesville ordinance is that it is not narrowly drawn to achieve its goal.[245] This is because it lumps

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237 *Id.*

238 *Id.*; *Cf. Bellotti,* 443 U.S. at 635 n.13; *Danforth*, 428 U.S. at 74–75.

239 *See Schleifer*, 159 F. 3d at 865 (Michael, J., dissenting); *See also Nunez*, 114 F. 3d at 135.

240 *See Schleifer*, 159 F. 3d at 866 (Michael, J., dissenting).

241 *See Schleifer*, 159 F. 3d at 853.

242 *See Schleifer*, 159 F. 3d at 866 (Michael, J., dissenting).

243 *Id.*

244 Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (quoting Shelton v. Tucker, 364 U.S. 479 (1960).

245 *See Schleifer*, 159 F. 3d at 866 (Michael, J., dissenting).

together all minors under 17 and labels them as dangers to society.[246] As a result, while only a minute percentage of the group may actually commit crimes and thus be a danger to society, all minors (including those who are law-abiding) are treated in the same fashion by the ordinance.[247] Moreover, the ordinance's exceptions and limited curfew hours do not decrease this deficiency.[248] The city's proclamation of crime prevention does not warrant the drastic measures of the ordinance; strict scrutiny requires more than this.[249]

2. The City's Second Purpose: Promoting the Safety and Well Being of Children

The city's second purpose of promoting the safety and well being of children also fails strict scrutiny analysis.[250] This is because the interest "[I]s not compelling . . . because the curfew was not designed to be supportive of the parental role."[251] The Supreme Court has recognized that a "[c]hild is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[252] Further, this duty lies "first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[253] Thus, parents, in their primary role, "[a]re entitled to the support of laws designed to aid discharge of that responsibility."[254]

Simultaneously, as the Court notes, legal restrictions that support the parental role may enhance a child's chance to have a complete and meaningful impact on society.[255] Therefore, legal restrictions that support the parental role justify the enhanced authority of a state in regulating minors' conduct.[256] Thus, when parental authority is united with, and not displaced by, a governmental interest to restrict minors, the justification for in-

246 *Id.*
247 *Id.*
248 *Id.*
249 *Id.* at 866–67.
250 *Id.* at 867.
251 *See Schleifer*, 159 F. 3d at 867 (Michael, J., dissenting).
252 Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).
253 *See Prince*, 321 U.S. 158, 166 (1944).
254 *See Ginsberg*, 390 U.S. 629, 639 (1968).
255 *See Bellotti,* 443 U.S. at 638–39.
256 *See Schleifer*, 159 F. 3d at 867 (Michael, J., dissenting).

creased authority is strengthened.[257] The *Ginsberg* court provided a good example of this principle when it prohibited direct sales of pornography to minors.[258] The approach taken by the Court was "[c]areful to note, however, that the government did not displace parental authority: 'the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.'"[259] The *Ginsberg* law was justified because it deferred to parental authority, rather than usurped it.[260]

However, the Charlottesville ordinance makes it illegal for parents to permit their children to go out at night, thereby usurping parental discretion.[261] Only parents, and not the city, know their children well enough to decide if letting them go out at night is a good idea.[262] Moreover, parents cannot let their children roam independently at night even if they believe it is best for the maturation process.[263] As a result, this type of "[p]arental discretion is impossible under the ordinance."[264]

Further, there is some evidence that the city council intended to displace parental discretion via the ordinance.[265] The city council's agenda about the curfew purpose said: (1) parental responsibility should be legally enforced where it is below the norm; and (2) when parents refuse to exercise parental responsibility, a curfew ordinance will impose a community-wide standard of such responsibility.[266] Thus, it is clear the curfew usurps, rather than supports the parental role.[267] Moreover, "the statist notion that governmental power should supersede parental authority in all cases because some parents abuse or neglect children is repugnant to the American tradition."[268] As a result, by attempting to promote the safety and well-being of minors by usurping parental authority, "[t]he curfew does not serve a compelling governmental interest."[269]

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257 *Id.*
258 *See Ginsberg*, 390 U.S. at 631.
259 *See Schleifer*, 159 F. 3d at 867 (Michael, J., dissenting) (quoting *Ginsberg*, 390 U.S. at 639); *See also* Reno v. ACLU, 521 U.S. 844, 874–878 (1997).
260 *See Schleifer*, 159 F.3 d at 867 (Michael, J., dissenting).
261 *Id.*
262 *Id.*
263 *See Nunez*, 114 F. 3d at 952.
264 *See Schleifer*, 159 F. 3d at 867 (Michael, J., dissenting).
265 *Id.*
266 *Id.*
267 *Id.*
268 Hodgson v. Minnesota, 497 U.S. 417, 446–47. (1990).
269 *See Schleifer,* 159 F.3d at 868 (Michael, J., dissenting).

3. The City's Third Purpose: Fostering Parental Responsibility

Likewise, the city's third purpose of aiding parental responsibility does not satisfy strict scrutiny analysis for much of the same reasons the second purpose failed.[270] As the Supreme Court recognizes in *Ginsberg* and *Bellotti*, laws that regulate minors with enhanced authority can be justified if they support the parental role of child rearing.[271] But parental child rearing cannot be supported when an ordinance mandates community-wide standards of child rearing.[272] Thus, "[t]he curfew's attempt to foster and strengthen parental responsibility by displacing parental authority does not support a compelling state interest."[273]

C. *The Bellotti Factors*

Because the *Schleifer* court concluded that intermediate scrutiny was the correct judicial standard of review,[274] the court never engaged in a *Bellotti* factor analysis. However, if strict scrutiny was applied, as it should have been, the *Bellotti* factors should become relevant to decide if the state has the necessary interests that justify regulating a minor's behavior more stringently than an adults'.[275] Once the *Bellotti* factors are analyzed, it is clear that Charlottesville "has no '[s]ignificant interest . . . that is not present in the case of an adult,' which would justify the prohibition its curfew ordinance places on the specific activities of minors. . . ."[276]

1. Analysis of the First *Bellotti* Factor

The first *Bellotti* factor that determines whether or not the state has increased authority to regulate minors' conduct is "the peculiar vulnerability of children."[277] First, minors mere physical presence in public during curfew hours does not make them particularly vulnerable to crime more so than adults.[278] If this logic were correct, "similar concerns could easily support barring the elderly

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270 *Id.*
271 *See Ginsberg*, 390 U.S. at 639; *Bellotti*, 443 U.S. at 638–39.
272 *See Schleifer*, 159 F. 3d at 868 (Michael, J., dissenting).
273 *Id.*
274 *See Schleifer*, 159 F. 3d at 847.
275 *See Bellotti*, 443 U.S. at 633–39.
276 *See Johnson*, 658 F.2d at 1074 (quoting Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1981)).
277 *See Bellotti*, 443 U.S. at 634.
278 *See* Note *supra* note 232, at 1175.

or handicapped from the streets or even excluding women or particular racial groups from certain areas of some cities."[279] Second, violence is "ubiquitous" and affects minors as well as adults.[280] Third, minors engaged in legitimate nighttime activities are not specifically vulnerable to crime.[281] Further, these legitimate activities "[d]o not involve a minor's special vulnerability to the extent which justifies differing juvenile proceedings,[282] or special control of obscene materials."[283] Finally, as a result of the curfew prohibiting minors from engaging in legitimate activities, minors may be deprived of valuable experiences.[284] Thus, there is far from the proof that strict scrutiny requires that children are vulnerable to crime in a manner which justifies treating them differently from adults.

2. Analysis of the Second *Bellotti* Factor

The second *Bellotti* factor is children's "inability to make critical decisions in an informed, mature manner."[285] We must first examine *Bellotti's* decision, in order to fully understand the situations when the *Bellotti* court intended this factor to apply.[286] *Bellotti* concerned a statute requiring parental notification before a child had an abortion.[287] The Court said generally, minors and adults are equally protected against government deprivations.[288] Then the Court noted that "[t]he states validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences."[289] In deciding the case, the Court held that a state may, in some circumstances, require parental notification in order for a minor to have an abor-

279 *Id.*

280 *See Waters*, 711 F. Supp. at 1137.

281 *See Johnson*, 658 F. 2d at 1073.

282 *See, e.g., In re* Gault 387 U.S. 1 (1967); McKeiver v. Pennsylvania, 403 U.S. 528 (1978).

283 *See Johnson*, 658 F. 2d at 1073.

284 *See Waters,* 711 F. Supp. at 1137; *See also* Note, *supra* note 232 at 1175–76 (saying "Banning children from the streets . . . [I]s an attempt to shelter them from some unspecified future harm — an attempt that simultaneously forecloses many beneficial opportunities").

285 *See Bellotti,* 443 U.S. at 634.

286 *Id. at* 622 (1979).

287 *Id.*

288 *Id.* at 635.

289 *Id.*

tion because that decision "[r]aises profound moral and religious concerns" for some people.[290]

However, the activities confronting minors under a juvenile curfew ordinance, such as movements, associations, and other First Amendment rights, "[d]o not involve any 'critical decisions' on the part of minors."[291] One can see the possible long-term, life-altering, serious consequences surrounding an abortion;[292] however, it is virtually impossible to see these consequences in a decision, with parental guidance, to go to a late night movie.[293] On the same token, the decision to go out during curfew hours does not necessarily lead to violence (the curbing of which the ordinances sought to protect); in fact, most decisions by juveniles never have any serious consequences.[294] Again, it is hard to see how the activities prohibited by the ordinance will keep children from making critical decisions in a hasty, uninformed manner.

3. Analysis of the Third *Bellotti* Factor

The Third *Bellotti* factor is "[t]he importance of the parental role in child rearing."[295] As is evident in the Charlottesville city council's agenda concerning the purposes of the curfew,[296] the curfew "[r]ests upon the implicit assumption that the traditional family unit, in which parents exercise control over their children's activities, has dissolved in many areas of the city."[297] While this may be true in some instances, the ordinance "[g]racelessly arrogates unto itself and to the police the precious rights of parenthood" in countless other families where the parent-child relationship is flourishing.[298]

Further, as evidenced by the application of the second *Bellotti* factor, the activities prohibited under the curfew do not usually involve decisions with serious, long-term, life-shaping consequences.[299] "When such choices are not at stake, the principle of

290 *Id.* at 640.
291 *See Johnson*, 658 F. 2d at 1073.
292 *See, e.g., Bellotti*, 443 U.S. at 622.
293 *See Johnson*, 658 F. 2d at 1073.
294 *See Waters*, 711 F. Supp. at 1137.
295 *See Bellotti*, 443 U.S. at 634.
296 *See supra* Part V (B) (2) and accompanying text.
297 *See Waters*, 711 F. Supp. at 1137.
298 *Id.*
299 *See, e.g., Waters*, 711 F. Supp. at 1137; *Johnson*, 658 F. 2d at 1073; *see also Schleifer supra* note 229, at 1177–78.

protecting the parental role cuts against the exercise of state power and requires the government to defer to parents on issues that merely involve authority over children."[300] This flows from the principles announced by the Supreme Court that parents have the primary role in regulating the activities of their children.[301] Thus, this curfew ordinance hinders, rather than fosters, parental responsibility,[302] and like the other *Bellotti* factors in this case, does not justify treating children differently under thew law than adults.

D. The Void for Vagueness Doctrine-Facial Challenges and the Charlottesville First Amendment Exception

Due process principles are contained within the void for vagueness doctrine.[303] Under this doctrine, an ordinance must (1) "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited;" and (2) do so "manner that does not encourage arbitrary and discriminatory enforcement."[304] Moreover, when criminal penalties are possible, the level of preciseness with which the ordinance must be drawn to operate is greater.[305] This is necessary so that enforcement of the curfew is not left to "purely subjective decisions of the police, prosecutor, and juries . . ."[306] The ordinance itself must be extremely clear in defining what is legal and illegal for police and citizens.[307] As a result of the Charlottesville ordinance imposing criminal sanctions,[308] this increased definiteness is necessary in this case.

Generally, when facial challenges are successful, all applications of the challenged ordinance are invalidated.[309] As a result, the *Schleifer* court says this should not be done frequently.[310] However, the *Schleifer* court mistakenly says that courts should use judicial restraint and avoid striking down a statute for facial

300 *See* Note, *supra* note 232, at 1178.
301 *See Ginsberg,* 390 U.S. at 639.
302 *See, e.g., Johnson*, 658 F. 2d at 1074; *Waters*, 711 F. Supp at 1137; *Schleifer*, 159 F. 3d at 868 (dissenting opinion).
303 *See* Finley v. National Endowment for the Arts, 100 F. 3d 671, 675 (9th Cir. 1996).
304 *See Kolender,* 461 U.S. at 357.
305 *See Village of Hoffman,* 455 U.S. at 498–99.
306 *See Kolender*, 461 U.S. at 358.
307 *See Schleifer,* 159 F.3d at 868 (Michael, J., dissenting).
308 *See* CHARLOTTESVILLE, VA., CODE § 17-7 (h).
309 *See* Steffel v. Thompson, 415 U.S. 452, 474 (1974).
310 *See Schleifer*, 159 F. 3d at 853 and 868.

vagueness.[311] Statutes are not frequently facially invalidated because of the principles of judicial restraint, but "because few facial challenges satisfy the high burden normally imposed."[312]

However, there is an exception to the general rule of facial vagueness challenges: "[an] ordinance need not be vague in all applications if it reaches a 'substantial amount of constitutionally protected conduct.'"[313] This exception is to avoid the chilling effect vague statutes have on the exercise of constitutionally protected rights.[314] As the Supreme Court said: "the danger of [a] chilling effect upon the exercise of vital first Amendment rights must be guarded against by sensitive tools which clearly inform [citizens] what is being proscribed."[315] Thus, in this case, because a "substantial amount"[316] of constitutional protected activities can be chilled, a facial challenge is permitted[317] and a case-by-case analysis of particular applications of the ordinance is not required.[318]

The *Schleifer* court says that because "core First Amendment activities" are adequately protected by the ordinances' exception, "marginal cases" can be decided through specific applications of the ordinance on a case-by-case basis.[319] However, core activities should not be the basis of analysis; the basis of analysis should be if the ordinance "reaches 'a substantial amount of constitutionally protected conduct.'"[320] The *Schleifer* court says "political protest and religious worship" will be protected by the ordinance.[321] However, the First Amendment extends its sphere of protection far beyond this.[322] As a result of the *Schleifer* court's deferring to case-by-case application challenges, there seems to be a sizeable threat of chilling constitutionally protected conduct.[323]

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311 *Id.* at 869 (Michael, J., dissenting).

312 *Id.*

313 *See Nunez*, 114 F. 3d at 940 (quoting *Village of Hoffman*, 455 U.S. at 494).

314 *See Schleifer,* 159 F. 3d at 869 (Michael, J., dissenting).

315 Keyishan v. Board of Regents, 385 U.S. 589, 604 (1967).

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317 *Cf. Kolender*, 461 U.S. at 358 (allowing a facial challenge because the "law reached a substantial amount of constitutionally protected conduct").

318 *See Schleifer*, 159 F. 3d at 869 (Michael, J., dissenting).

319 *Id.* at 854.

320 *See Kolender,* 461 U.S. at 358 n.8 (quoting *Village of Hoffman*, 455 U.S. at 494).

321 *See Schleifer*, 159 F. 3d at 854.

322 *Id.* at 870 (Michael, J., dissenting).

323 *Id.*; *Cf.* 11126 Baltimore Blvd., Inc. v. Prince George's County, 58 F. 3d 988, 993–94 (4th Cir. 1995) (en banc) (holding that "courts must permit" facial challenges when a substantial chance of chilling First Amendment rights is present

The Charlottesville First Amendment exception is impermissibly vague because it forces people "of common intelligence. . .[to] guess at its meaning and . . . to its application."[324] The exception specifically covers freedom of speech and assembly.[325] But what exactly is speech and assembly is not clear in the exception.[326] Moreover, other First Amendment rights are not even mentioned in the exception.[327] "The questions above are difficult enough for courts, Congress, and constitutional scholars, let alone for someone with no legal training."[328] And when these tough questions can be answered, the result is usually uncertain and requires a detailed analysis of the specific facts of the case.[329] Further, the field of constitutional law is in constant flux, often getting more complex, every day.[330] "As a result, criminal conduct cannot be defined by simply referring to the title (First Amendment) or subtitle (speech or assembly) of a particular statute."[331]

Further, the chief of police of Charlottesville, through his testimony, established the ordinance's ambiguity.[332] The chief was questioned as to whether two teens talking about politics in a coffee shop during curfew hours violated the ordinance.[333] The chief responded that technically it was a violation, but the officer has discretion to determine if there was a violation or not.[334] This is a perfect example how arbitrary discretion combined with imprecise drafting renders the ordinance void for vagueness.

The *Schleifer* court says that Charlottesville was placed "between a rock and a hard place" in drafting the ordinance.[335] If no First amendment exception was included, the ordinance would be unconstitutional for not protecting First Amendment rights, and if

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because it [the chilling effect] "can be effectively alleviated only through a facial challenge.") (quoting City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988))).

324 Connaly v. General Constr., 269 U.S. 385, 391 (1926).

325 *See* CHARLOTTESVILLE, VA., CODE § 17-7 (b) (8).

326 *See Schleifer*, 159 F. 3d at 871 (Michael, J., dissenting).

327 *Id.*

328 *Id.*

329 *Id.*

330 *Id.*

331 *See Schleifer,* 159 F. 3d at 871 (Michael, J., dissenting).

332 *Id.*

333 *Id.*

334 *Id.*

335 *Id.* at 853.

one is included, it is void for vagueness.[336] While this may be true, the Supreme Court said:

> Our constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substance authority and content as well as for definiteness or certainty of expression.[337]

Legislatures have difficulties drafting statutes that will pass constitutional muster and the judiciary has difficulties interpreting them.[338] However, both must be done so persons of common intelligence need not guess at the statute's meaning.[339] "Although we may 'appreciate the difficulties of drafting precise laws, we must require that all statutes meet constitutional standards for clarity.'"[340] Thus, notwithstanding the city council's problems with drafting a constitutional statute, "the danger of chilling the exercise of constitutionally protected activity arises because of the uncertainty associated with the First Amendment exception."[341] As a result, the ordinance is void for vagueness.

CONCLUSION

The 4th Circuit refused to acknowledge that minors and adults have fundamental equal rights under the constitution.[342] Further, the 4th circuit, by applying intermediate scrutiny, failed to follow the lead of the 5th and 9th circuits (who both applied strict scrutiny).[343] As a result, thousands of innocent, law-abiding minors are quarantined to their homes 33 hours during each week. Moreover, since the Supreme Court refuses to grant certiorari on the issue,[344] it is likely that more decisions like this will follow. The 4th circuit had a chance to push juvenile's rights in the direction it should be headed, namely, forward. Instead, by upholding Charlottesville's

336 *See Schleifer*, 114 F. 3d at 853.
337 *See Kolender*, 461 U.S. at 357.
338 *See* Winters v. New York, 333 U.S. 507, 518 (1948).
339 *See* Kingsley Int'l Pictures Corp v. Regents of the Univ., 360 U.S. 684, 694 (1969) (concurring opinion).
340 *See Schleifer*, 159 F. 3d at 874 (Michael, J., dissenting) (quoting City of Houston v. Hill, 482 U.S. 451, 465 (1987)).
341 *Id.* at 874.
342 *Id.* at 847.
343 *Id.*
344 *See supra* Part I (B).

juvenile curfew ordinance, the court delivered a devastating blow to juvenile rights.

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