



2001

## A Tale of Two Curfews (And One City): What Do Two Washington, D.C. Juvenile Curfews Say about the Constitutional Interpretations of District of Columbia Courts and the Confusion over Juvenile Curfews Everywhere

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### Recommended Citation

Adam W. Poff, *A Tale of Two Curfews (And One City): What Do Two Washington, D.C. Juvenile Curfews Say about the Constitutional Interpretations of District of Columbia Courts and the Confusion over Juvenile Curfews Everywhere*, 46 Vill. L. Rev. 277 (2001).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol46/iss1/8>

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A TALE OF TWO CURFEWS (AND ONE CITY):  
WHAT DO TWO WASHINGTON, D.C. JUVENILE CURFEWS SAY  
ABOUT THE CONSTITUTIONAL INTERPRETATIONS OF DISTRICT  
OF COLUMBIA COURTS AND THE CONFUSION OVER  
JUVENILE CURFEWS EVERYWHERE?

I. INTRODUCTION

In light of this nation's long relationship with juvenile curfews, one would think that the related constitutional issues before so many American courts would have been resolved long ago.<sup>1</sup> After all, United States cities began implementing juvenile curfews over a century ago.<sup>2</sup> In fact,

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1. See Brian Privor, *Dusk Til' Dawn: Children's Rights and the Effectiveness of Juvenile Curfew Ordinances*, 79 B.U. L. REV. 415, 418 (1999) (noting that many state and federal courts have reviewed curfews over past fifty years); see also Craig Hemmens & Katherine Bennett, *Out in the Street: Juvenile Crime, Juvenile Curfews, and the Constitution*, 34 GONZ. L. REV. 267, 279 (1998-99) ("The most common curfew target in this country has been juveniles."); Brian J. Lester, *Is It Too Late for Juvenile Curfews? Qutb Logic and the Constitution*, 25 HOFSTRA L. REV. 665, 668 (1996) (noting that during late 1800s, urban crime was thought to stem from lack of parental responsibility exhibited by large numbers of immigrant families entering United States).

Throughout this Comment, "curfew," "juvenile curfew" and "ordinance" refer to "[a] law (commonly an ordinance) which imposes on people (particularly children) the obligation to remove themselves from the streets on or before a certain time of night." BLACK'S LAW DICTIONARY 381 (6th ed. 1990). Further, the terms "juvenile" and "minor" are used interchangeably to refer to persons affected by nocturnal juvenile curfews.

2. See *Ex parte McCarver*, 46 S.W. 936, 937 (Tex. Crim. 1898) (invalidating curfew). In fact, juvenile curfews really gained popularity around the year 1900, when about 3000 municipalities had adopted such restrictions. See Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1164 n.9 (1984) (noting growth trend in curfews around turn of century); see also 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, 121 (1998) (describing great proliferation of nocturnal juvenile curfews); Sue Anne Pressley, *Nightly Youth Curfews: Clamping Down Across America*, WASH. POST, July 13, 1994, at A1 (noting more current growth in finding that "over less than five years, officials in nearly 1000 jurisdictions across America . . . have chosen the controversial method [of juvenile curfews] as a way of fighting fear with formal action, of trying to regain some measure of control over a society where family values seem to be slipping").

One commentator describes the ebb and flow of curfew legislation as follows: Public demand for curfews has surged and subsided in waves, coinciding with the country's most dramatic periods of crime and social transformation. During the late nineteenth century, racism and fear drove the public to adopt curfews on incoming immigrants and their children. In the 1940s, the number of curfews in U.S. cities rose significantly in response to the wartime period's increasing problems of juvenile delinquency. Another surge of interest in curfews came during the 1970s in the face of sharp increases in violent urban crime. Until recently, such laws were so rarely enforced that they appeared to be forgotten sections of many local

President Benjamin Harrison once characterized juvenile curfews as “the most important municipal regulation for the protection of the children of American homes.”<sup>3</sup> Nevertheless, the constitutional issues surrounding juvenile curfews are anything but well settled.<sup>4</sup>

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criminal laws. During the past decade, however, local concerns about juvenile violence and gang-related activity have rekindled interest in curfews directed primarily at youth activity.

Gregory Z. Chen, Note, *Youth Curfews and the Trilogy of Parent, Child, and State Relations*, 72 N.Y.U. L. REV. 131, 134 (1997) (citations omitted).

3. Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 U. PA. L. REV. 66, 66 n.5 (1958) (citing 8 ENCYCLOPEDIA AMERICANA 306 (3d ed. 1957)). Further, a 1957 study revealed that more than fifty percent of all cities with populations exceeding 100,000 had juvenile curfews on their books. *See id.* at 68-69 (describing study).

4. The following courts found juvenile curfew ordinances unconstitutional: *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. Unit A Oct. 1981); *Naprstek v. City of Norwich*, 545 F.2d 815 (2d Cir. 1976); *McCollester v. City of Keene*, 586 F. Supp. 1381 (D.N.H. 1984); *McCollester v. City of Keene*, 514 F. Supp. 1046 (D.N.H. 1981), *rev'd on other grounds*, 668 F.2d 617 (1st Cir. 1982); *In re Frank O.*, 247 Cal. Rptr. 655 (Cal. Ct. App. 1988); *Alves v. Justice Ct.*, 306 P.2d 601 (Cal. Ct. App. 1957); *K.L.J. v. State*, 581 So. 2d 920 (Fla. Dist. Ct. App. 1991); *S.W. v. State*, 431 So. 2d 339 (Fla. Dist. Ct. App. 1983); *W.J.W. v. State*, 356 So. 2d 48 (Fla. Dist. Ct. App. 1978); *In re John Doe*, 513 P.2d 1385 (Haw. 1973); *City of Maquoketa v. Russell*, 484 N.W.2d 179 (Iowa 1992); *Brown v. Asheton*, 611 A.2d 599 (Md. Ct. Spec. App. 1992), *cert. granted*, 615 A.2d 262 (1992), *and vacated*, 660 A.2d 447 (1992); *City of Wadsworth v. Owens*, 536 N.E.2d 67 (Ohio Mun. Ct. 1987); *In re Mosier*, 394 N.E.2d 368 (Ohio Ct. C. P. 1978); *Hayes v. Mun. Court of Okla. City*, 487 P.2d 974 (Okla. Crim. App. 1971); *Ex parte McCarver*, 46 S.W. 936 (Tex. Crim. App. 1898); *City of Seattle v. Pullman*, 514 P.2d 1059 (Wash. 1973); *Waters v. Barry*, 711 F. Supp. 1125 (D.D.C. 1989); *Allen v. City of Bordentown*, 524 A.2d 478 (N.J. Super. 1987).

The following courts found their respective juvenile curfews constitutional: *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993); *Bykovsky v. Borough of Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975); *aff'd mem.*, 535 F.2d 1245 (3d Cir. 1976); *In re Nancy C.*, 105 Cal. Rptr. 113 (Cal. Ct. App. 1972); *People v. Walton*, 161 P.2d 498 (Cal. Ct. App. 1945); *In re J.M.*, 768 P.2d 219 (Colo. 1989) (en banc); *People v. Chambers*, 360 N.E.2d 55 (Ill. 1976); *Vill. of Deerfield v. Greenberg*, 550 N.E.2d 12 (Ill. App. Ct. 1990); *City of Panora v. Simmons*, 445 N.W.2d 363 (Iowa 1989); *Thistlewood v. Trial Magistrate, Worcester County*, 204 A.2d 688 (Md. Ct. Spec. App. 1964); *In re Carpenter*, 287 N.E.2d 399 (Ohio Ct. App. 1972); *City of Eastlake v. Ruggiero*, 220 N.E.2d 126 (Ohio Ct. App. 1966); *Baker v. Steelton Borough*, 17 Dauphin County Rep. 17 (Pa. C. 1912); *City of Milwaukee v. K.F.*, 426 N.W.2d 329 (Wis. 1988).

Juvenile curfews are actually distant relatives of the general emergency curfews that have been enacted in the past. *See* *Privor*, *supra* note 1, at 426 (noting relationship of curfews). Absent an emergency such as a war, natural disaster or period of civil uprising, these curfews have generally been struck down. *See id.* (noting lack of success of non-juvenile curfews); *see also* *United States v. Chalk*, 441 F.2d 1277, 1283 (4th Cir. 1971) (upholding curfew imposed after riot between police and African-American high school students); *People v. McKelvy*, 100 Cal. Rptr. 661, 665 (Ct. App. 1972) (finding that “clear showing of emergent necessity” engendered by race riots justified curfew); *Davis v. Justice Court*, 89 Cal. Rptr. 409, 414 (Ct. App. 1970) (upholding curfew enacted in response to riots at housing project); *State v. Boles*, 240 A.2d 920, 925 (Conn. Cir. Ct. 1967) (upholding curfew when city threatened by riotous behavior); *Glover v. D.C.*, 250 A.2d 556, 559-60 (D.C. 1969) (upholding curfew that excluded all persons except police, firefight-

The United States Supreme Court has never established specific constitutional standards for assessing the validity of juvenile curfews.<sup>5</sup> As a result, lower courts have been left with no central guidance in evaluating the constitutionality of these restrictive ordinances.<sup>6</sup> In turn, it is hardly surprising that the decisions of individual courts are significantly inconsistent regarding many constitutional issues.<sup>7</sup>

For example, courts have disagreed on whether the Fifth and Fourteenth Amendments protect a fundamental right of juveniles to move freely on the streets at night absent adult supervision, as well as whether parents have a fundamental right to allow their children to be on the streets without their supervision.<sup>8</sup> Moreover, even those courts that have

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ers, medical personnel and sanitation workers from streets as reasonable and usual police regulation in response to riotous conditions throughout city); *Municipal Court v. Patrick*, 254 So. 2d 193, 194-95 (Fla. 1971) (invalidating curfew enacted by mayor because only city commission had power to issue curfew during emergencies); *Walsh v. City of River Rouge*, 189 N.W.2d 318, 326 (Mich. 1971) (finding that during periods of civil unrest, city may not issue curfew absent action by governor because state action preempts city action under such circumstances); *State v. Dobbins*, 178 S.E.2d 449, 456-59 (N.C. 1971) (determining that emergency curfew was valid use of police power when city faced riotous conditions); *Ervin v. State*, 163 N.W.2d 207, 210-11 (Wis. 1978) (upholding curfew imposed to restore order after riots). For a general discussion of juvenile curfews, see Danny R. Veilleux, J.D., Annotation, *Validity, Construction, and Effect of Juvenile Curfew Regulations*, 83 A.L.R. 4th FED. 1056 (1991).

5. See *Bykovsky*, 429 U.S. at 965 (Marshall, J., dissenting) (“[t]he prior decisions of the Court provide no clear answer” for lower courts); see also Chen, *supra* note 2, at 139-49 (discussing past seventy years of United States Supreme Court case law on minors’ rights with respect to relations between minors, parents and states).

6. See *Privor*, *supra* note 1, at 418 (“[T]he Supreme Court has denied review in this area, depriving the lower courts of much needed guidance.”).

7. Compare *Nunez v. City of San Diego*, 114 F.3d 935, 951 (9th Cir. 1997) (holding juvenile curfew unconstitutional), with *Schleifer v. City of Charlottesville*, 159 F.3d 843, 855 (4th Cir. 1998) (holding juvenile curfew constitutional).

8. Compare *Hutchins v. D.C.*, 188 F.3d 531, 538 (D.C. Cir. 1999) (en banc) (finding that juveniles do not have fundamental right to be on streets late at night without adult supervision), with *Gaffney v. Allentown*, No. CIV. A. 97-4455, 1997 WL 597989, at \*4-5 (E.D. Pa. Sept. 17, 1997) (finding that juveniles have full fundamental right to move freely on par with rights of adults).

To determine whether a right is fundamental and deserving of strict scrutiny under the Equal Protection Clause, courts look to whether the right in question has its source, either explicitly or implicitly, within the Constitution. See *Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982) (determining whether class-based denial of particular right is deserving of strict scrutiny); see also *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (finding that right is fundamental when it is “deeply rooted in the Nation’s history and tradition”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (holding that right is fundamental when explicitly or implicitly protected by Constitution); *Palko v. Conn.*, 302 U.S. 319, 325 (1937) (finding that rights “implicit in the concept of ordered liberty” are fundamental), *overruled by Benton v. Md.*, 395 U.S. 784 (1969).

Among those freedoms determined to be fundamental under the Fifth and Fourteenth Amendments are the rights to marry, make personal family choices, have an abortion, make procreation decisions, travel from one state to another and vote. See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (protecting right to

found at least one fundamental right under equal protection or substantive due process analysis have utilized the applicable constitutional standards with differing results.<sup>9</sup> Furthermore, differences between the courts have not been limited to the Fifth and Fourteenth Amendments.<sup>10</sup>

There are other issues that have suffered from inconsistent treatment.<sup>11</sup> One such issue concerns whether juvenile curfews infringe upon juveniles' First Amendment freedoms.<sup>12</sup> In dealing with the First Amendment, some courts have found that juvenile curfews do not infringe upon First Amendment rights, while other courts have determined that juvenile curfews unconstitutionally encumber First Amendment freedoms.<sup>13</sup> Even among those courts that have found an impermissible infringement of the First Amendment, there are inconsistencies in the courts' determinations of how the curfews infringed on the juveniles' freedoms.<sup>14</sup>

In response to these shifting approaches, this Comment removes a significant variable from the constitutional analysis of juvenile curfews. That variable is location. By removing the issue of location, it becomes easier to compare and contrast the courts' analysis of the curfews because the factual background underlying each curfew is the same.<sup>15</sup> Therefore,

marry); *Moore*, 431 U.S. at 499 (protecting personal choice in family matter); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (preserving right to abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (protecting right relating to procreation); *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (protecting right to interstate travel), *overruled in part by Edelman v. Jordan*, 415 U.S. 657 (1974); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) (protecting right to vote).

9. *Compare Waters*, 711 F. Supp. at 1140 (finding curfew unconstitutional under strict scrutiny standard), *with Qutb*, 11 F.3d at 496 (finding curfew constitutional despite application of strict scrutiny standard).

10. *See Ramos v. Town of Vernon*, 48 F. Supp. 2d 176, 180-81 (D. Conn. 1999) (identifying challenges based on First Amendment, Fourth Amendment and vagueness grounds in addition to equal protection argument); *Nunez v. City of San Diego*, 963 F. Supp. 912, 916 (S.D. Cal. 1995) (noting challenges based on First and Fourth Amendments), *rev'd*, 114 F.3d 935 (9th Cir. 1997).

11. *Compare Schleifer*, 159 F.3d at 852-53 (finding that curfew complies with requirements of First Amendment), *and Hutchins*, 188 F.3d at 541-44 (same), *with Nunez*, 114 F.3d at 951 (finding that curfew violates First Amendment), *and Waters*, 711 F. Supp. at 1134 (same).

12. *Compare Schleifer*, 59 F.3d at 852-53 (finding that curfew complies with requirements of First Amendment), *with Nunez*, 114 F.3d at 951 (finding that curfew violates First Amendment).

13. *Compare Bykovsky v. Borough of Middletown*, 401 F. Supp. 1242, 1260 (M.D. Pa. 1975) (stating that "it is apparent that the curfew ordinance . . . does not unconstitutionally infringe on the First Amendment right of minors to gather on public streets for political, religious, or expressive purposes"), *with Johnson v. Opelousas*, 658 F.2d 1065, 1072-73 (5th Cir. Unit A Oct. 1981) (determining that juvenile curfew violated minors' First Amendment rights).

14. *Compare Nunez*, 114 F.3d at 950-51 (finding that limitations on freedom of movement infringe upon established First Amendment freedoms), *with Waters*, 711 F. Supp. at 1134 (determining that freedom of movement, in itself, is First Amendment right).

15. *Compare Waters*, 711 F. Supp. at 1127 (explaining that Emergency Act restricted juveniles under eighteen years of age and that curfew was aimed at unprec-

the only differences that remain lie in the curfews themselves, and the courts' reactions to those differences.<sup>16</sup> In pursuit of a comparison void of environmental inconsistencies, this Comment examines two opposing United States District Court for the District of Columbia juvenile curfew decisions, *Waters v. Barry*<sup>17</sup> and *Hutchins v. District of Columbia*.<sup>18</sup> This Comment then concludes by choosing, from a constitutional standpoint, the superior of the two decisions.

## II. BACKGROUND

The foundations of juvenile curfew challenges across the nation are remarkably consistent on a basic level in that almost all curfew ordinances face challenges under the First, Fourth and Fifth or Fourteenth Amendments.<sup>19</sup> Nevertheless, these initial similarities lessen when the cases are examined beyond the basic nature of their constitutional challenges.<sup>20</sup>

### A. Two Similar Curfews

In order to fully explain the succeeding constitutional comparisons, it is essential to establish the facts and backgrounds of the two principal cases, *Waters* and *Hutchins*. The *Waters* case was decided in 1989, approximately ten years before *Hutchins*.<sup>21</sup> In *Waters*, the plaintiffs consisted of minor and near-minor residents of Washington D.C., a few of the minors'

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edented explosion of violence in Washington, D.C. resulting from drug trade and problems of social inequity), with *Hutchins*, 188 F.3d at 534 (explaining that Curfew Act restricted juveniles under sixteen years of age and that curfew was aimed at increasing violence associated with juveniles in Washington D.C.).

16. See, e.g., *Waters*, 711 F. Supp. at 1125 (focusing on curfew in Washington D.C.); *Hutchins*, 1999 WL 397429 at \*1 (same).

17. 711 F. Supp. 1125 (D.D.C. 1989).

18. 188 F.3d 531 (D.C. Cir. 1999) (en banc).

19. See *Hutchins*, 188 F.3d at 535 (same); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 846 (4th Cir. 1998) (dealing with First and Fourteenth Amendment challenges); *Waters*, 711 F. Supp. at 1128 (including challenges based on First, Fourth and Fifth Amendments); *Bykovsky v. Borough of Middletown*, 401 F. Supp. 1242, 1248 (M.D. Pa. 1975) (same); see also *Beaumont*, *supra* note 2, at 93 ("[O]pponents often challenge the constitutionality of juvenile curfews on several grounds, including violations of the First, Fourth, Fifth, and Fourteenth Amendments.").

20. Compare *Nunez v. City of San Diego*, 114 F.3d 935, 950-51 (9th Cir. 1997) (finding that limitations on freedom of movement infringe upon established First Amendment freedoms), with *Waters*, 711 F. Supp. at 1134 (determining that freedom of movement, in itself, is First Amendment right). Compare *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (finding that juveniles do have fundamental right to free movement), with *Schleifer*, 159 F.3d at 847 (determining that juveniles do not have fundamental right to free movement on par with adults).

21. See *Hutchins*, 188 F.3d at 531 (stating date of decision as June 18, 1999); *Waters*, 711 F. Supp. at 1125 (stating date of decision as May 24, 1989). The Council of the District of Columbia approved the Act on April 4, 1989, and Mayor Marion Barry signed the Act into law on April 14, 1989. See *Waters*, 711 F. Supp. at 1127 n.1 (noting approval dates).

parents and citizens affiliated with religious organizations.<sup>22</sup> These groups collectively challenged the District's Temporary Curfew Emergency Act of 1989, No. 8-325 ("Emergency Act").<sup>23</sup>

The Emergency Act made it illegal for minors below the age of eighteen to be on the streets between the hours of 11:00 p.m. and 6:00 a.m.<sup>24</sup> In the event of a violation of the ordinance, the Emergency Act imposed sanctions on the juveniles and fines for their parents.<sup>25</sup> To justify enforcement of these restrictions, the Emergency Act included stated objectives that were to "reduce the incidence of juvenile violence, both against and by juveniles, to reduce juveniles' exposure to drug trafficking and other criminal activity, and to aid parents and others responsible for juveniles in carrying out their supervisory obligations."<sup>26</sup> In addition, the Emergency Act also contained a number of limited exceptions, one of which lifted the effect of the restriction when the juvenile was returning on a direct route from a pre-registered religious or other non-profit activity.<sup>27</sup>

Another exception exempted minors engaged in legitimate employment activity as long as the minor carried proof of identification.<sup>28</sup> Despite the express objectives and limited exceptions, the plaintiffs argued that if the Emergency Act were enforced, the regulation would infringe upon their First, Fourth and Fifth Amendment rights.<sup>29</sup> The district court

22. See *Waters*, 711 F. Supp. at 1127-28 (establishing identity of plaintiffs).

23. See *id.* (explaining actions taken by plaintiffs).

24. See *id.* at 1127 (describing scope of curfew). Commentators have described juvenile curfews as resulting from a dual focus. See *Privor*, *supra* note 1, at 423 (noting two-pronged concern). One commentator explains the dual focus in stating as follows: "First, policymakers take action in response to a public outcry regarding a perceived increase in juvenile crime . . . . Second, community wide concern for juvenile victims exists . . . . As a result, curfew legislation focuses on both prevention of youth-perpetrated crimes and avoidance of youth victimization." *Id.*

25. See *Waters*, 711 F. Supp. at 1141-42 (describing enforcement provisions). Such provisions that allow for the levying of fines against the parents of juveniles that violate a curfew are not unusual. See Peter Applebome, *Parents Face Consequences as Children's Misdeeds Rise*, N.Y. TIMES, Apr. 10, 1996, at A1 ("In 1995 alone, at least 10 states from New Hampshire to Louisiana to Oregon passed so-called parental responsibility laws calling for fines or sometimes imprisonment.").

26. *Waters*, 711 F. Supp. at 1127.

27. See *id.* at 1141 (noting registration exception).

28. See *id.* (describing employment exception). The Emergency Act also included exceptions for minors traveling in a motor vehicle, minors accompanied by a parent, and minors moved by reasonable necessity to carry out emergency errands. See *id.* at 1141-42 (expanding on available exceptions).

29. See *id.* at 1128 (noting constitutional challenges). Prior to the district court's decision, the plaintiffs first challenged the Short Term Curfew Emergency Act of 1989, a predecessor to the Act that the city council had approved on February 28, 1989. See *id.* at 1128 n.4 (noting initial challenge). The district court then enjoined enforcement of the Emergency Act on March 20, 1989. See *id.* (establishing date that Emergency Act was enjoined). Following the court's action, the Council produced the Act, which repealed the Emergency Act; whereupon, the plaintiffs amended their complaint to include a challenge to the newly formed Act. See *id.* (explaining inception of Act). As a result, the plaintiffs had secured a tem-

agreed with regard to the First and Fifth Amendment challenges and, as a result, the Emergency Act was struck down.<sup>30</sup>

Six years later, the District of Columbia City Council decided to impose another juvenile curfew.<sup>31</sup> In an attempt to stem the tide of both juvenile crime and victimization, the D.C. City Council unanimously adopted the Juvenile Curfew Act of 1995<sup>32</sup> ("Curfew Act").<sup>33</sup> The Curfew Act barred juveniles under the age of seventeen from being in a public place without parental or equivalent adult supervision from 11:00 p.m. until 6:00 a.m. on Sunday through Thursday and from 12:00 p.m. until 6:00 a.m. on Friday and Saturday.<sup>34</sup>

Like its predecessor, the Emergency Act, the Curfew Act placed some responsibility in the hands of parents or guardians.<sup>35</sup> Under the Curfew Act, a parent or guardian commits an offense "by knowingly permitting, or through insufficient control allowing, the minor to violate the curfew."<sup>36</sup> Unlike the Emergency Act, however, the Curfew Act establishes that owners, operators or employees can be found in violation if they knowingly allow a minor to remain at their place of business during the curfew hours, unless the minor refuses to leave the premises and the owner notifies the proper authorities.<sup>37</sup>

Another interesting facet of the Curfew Act is the scope of its exceptions, which are more detailed, numerous and expansive than those found in the Emergency Act.<sup>38</sup> The Curfew Act will not be violated if a minor is: (1) running an errand without detour on behalf of the minor's parent, guardian or caretaker; (2) accompanied by the minor's parent, guardian or caretaker more than twenty years old, as authorized by the minor's parent; (3) commuting to or from a place of employment without any detour or engaging in certain employment activities; (4) in a vehicle involved in interstate travel; (5) on the sidewalk bordering the minor's or the next-door neighbor's residence, provided that the neighbor has not previously complained to authorities; (6) involved in an emergency; (7) attending an

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porary restraining order on April 20, 1989. *See id.* at 1128 (noting temporary restraining order).

30. *See id.* at 1140 (establishing court's holding)

31. *See Hutchins v. D.C.*, 188 F.3d 531, 534 (D.C. Cir. 1999) (en banc) (stating Curfew Act was enacted in 1995).

32. D.C. CODE ANN. § 6-2182(5).

33. *See Hutchins*, 188 F.3d at 534 (noting adoption of ordinance).

34. *See id.* at 534-35 (explaining requirements of Curfew Act). A minor found in violation of the Curfew Act can receive up to twenty-five hours of mandatory community service. *See id.* The Curfew Act does not include judicially emancipated minors or married minors. *See id.* In order to have a violation, a police officer must reasonably believe that the juvenile has committed an offense and that there is no applicable defense. *See id.* The juvenile will then be released by the police to a parent, guardian or person standing in loco parentis. *See id.*

35. *See id.* (noting parental liability).

36. *Id.*

37. *See id.* (establishing additional responsibility for violations).

38. *See id.* (noting exceptions).



official school, religious or other recreational activity sponsored by the District of Columbia, a civic organization, or another similar entity that takes responsibility for the minor, or going to or from, without any detour or stop, such an activity sponsored by adults; or (8) exercising First Amendment rights, including free exercise of religion, freedom of speech and the right to assembly.<sup>39</sup>

Notwithstanding these exceptions, District of Columbia citizens challenged the Curfew Act on First Amendment, Fourth Amendment, Fifth Amendment and vagueness grounds, and, as with the Emergency Act, the district court agreed with the plaintiffs.<sup>40</sup> Unlike the treatment of the Emergency Act, however, the circuit court reversed the district court, determining that the Curfew Act was constitutional.<sup>41</sup> A closer look at the successful challenge of the Emergency Act and the unsuccessful challenge of the Curfew Act reveals a tremendous degree of inconsistency between the two decisions.<sup>42</sup>

### B. *Two Opposing Outcomes*

One need not look far to find differences between the two opinions, as the courts arrive at opposing conclusions on both the First and Fifth Amendment issues.<sup>43</sup> With regard to the First Amendment, the district court in *Waters* recognized that the First Amendment rights of District of Columbia juveniles were infringed when they were denied the opportunity to “[play] a late night game of basketball, to sit in the open air on a muggy summer night, or to walk home . . . from a party at a friend’s home . . . .”<sup>44</sup> Furthermore, the district court made clear that when “a juvenile on a solitary, totally innocent excursion with parental permission, such as stargazing, [or] sitting on the sidewalk near his house” has violated an ordinance, that ordinance is unconstitutional.<sup>45</sup>

Conversely, the United States Court of Appeals for the District of Columbia Circuit in *Hutchins* took a very different approach, stating that

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39. *See id.* (documenting exceptions).

40. *See id.* at 535 (establishing challenges to Curfew Act).

41. *See id.* at 534 (“[T]he curfew implicates no fundamental rights of minors or their parents. Even assuming the curfew does implicate such rights, we hold that it survives strict scrutiny. And, it does not violate the First or Fourth Amendment rights of minors.”).

42. *Compare id.* (finding that Curfew Act implicates no fundamental rights and does not infringe upon juvenile First Amendment freedoms), *with Waters v. Barry*, 711 F. Supp. 1121, 1140 (D.D.C. 1989) (determining that Emergency Act violated juveniles’ First and Fifth Amendment rights).

43. *Compare Waters*, 711 F. Supp. at 1134 (“[I]t is apparent that the [Emergency] Act involves such a wide and indiscriminate denial of the First and Fifth Amendment rights of juveniles that it cannot be constitutionally applied.”), *with Hutchins*, 188 F.3d at 534 (finding no violation of Fifth Amendment or First Amendment).

44. *Waters*, 711 F. Supp. at 1135.

45. *Id.* (citing *McColleston v. City of Keene*, 586 F. Supp. 1381, 1385 (D.N.H. 1984)).

“[t]he curfew regulates the activities of juveniles during nighttime hours; it does not, by its terms, regulate expressive conduct.”<sup>46</sup> More specifically, the court defined “expressive conduct” as those actions that intend to convey a particular message.<sup>47</sup> Further, the message must be likely to be understood by others.<sup>48</sup> Therefore, even though this was a limited narrowing of the exception, it seems apparent that the Curfew Act’s First Amendment exceptions do not include such activities as sitting outside on a muggy summer night or stargazing.<sup>49</sup> Thus, the *Waters* court and the *Hutchins* court adopted different interpretations of the rights available to juveniles under the First Amendment. The inconsistencies, however, do not stop there.<sup>50</sup>

The respective court decisions are also at odds over how to apply the Fifth Amendment substantive due process and equal protection requirements to juvenile curfews.<sup>51</sup> Under both standards, the real controversy between the two decisions revolves around whether a fundamental right exists for juveniles to move freely at all times.<sup>52</sup> This controversy is para-

46. *Hutchins*, 188 F.3d at 548.

47. *See id.* (citing *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

48. *See id.*

49. *See id.* at 546 (“[I]t is perfectly clear that some activities, such as religious worship and political protests, would be protected under the [First Amendment] defense, and that other activities, such as rollerblading would not.”).

50. *Compare Waters*, 711 F. Supp. at 1134 (establishing that Emergency Act violated First Amendment), *with Hutchins*, 188 F.3d at 548 (finding no violation of First Amendment).

51. *Compare Waters*, 711 F. Supp. at 1134-40 (determining that Emergency Act infringed on fundamental right and violated Fifth Amendment substantive due process and equal protection rights), *with Hutchins*, 188 F.3d at 541-47 (finding no infringement of fundamental right and no violation of Fifth Amendment substantive due process and equal protection rights).

Note that while the Fifth Amendment does not include an express equal protection clause, the Fifth Amendment due process guarantee includes an equal protection component. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (“Equal Protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”).

Also, it is important to recognize that within each opinion, the *Waters* and *Hutchins* courts base their substantive due process and equal protection determinations on the same analysis of fundamental rights. *See Hutchins*, 188 F.3d at 536-41 (recognizing both substantive due process and equal protection challenges, but performing only one juvenile fundamental rights analysis); *Waters*, 711 F. Supp. at 1132-40 (same). In turn, this Comment explains and compares the substantive due process and equal protection challenges simultaneously and notes differences when necessary.

52. *Compare Waters*, 711 F. Supp. at 1134 (recognizing fundamental right to free movement for juveniles), *with Hutchins*, 188 F.3d at 536-39 (recognizing no fundamental right to free movement for juveniles). The *Hutchins* court also discussed and dismissed an argument based on the substantive due process rights of the juveniles’ parents. *See Hutchins*, 188 F.3d at 540 (discussing possibility of parental fundamental rights). There is no corresponding discussion in the *Waters* opinion. *See, e.g., Waters*, 711 F. Supp. at 1132 (declining to address possible implication of fundamental rights for parents). Thus, this Comment focuses on the fundamental rights of juveniles, not their parents.

mount to an application of the Fifth Amendment because if the rights of juveniles are deemed to be fundamental, then a juvenile curfew that limits these rights must survive the highest level of constitutional scrutiny under both substantive due process and equal protection applications.<sup>53</sup> Conversely, if the rights are not considered fundamental, a lesser level of constitutional scrutiny is applied.<sup>54</sup>

Along these lines, the *Waters* court found that the curfew improperly infringed upon the equal protection and substantive due process rights of the juveniles.<sup>55</sup> The court specifically found that the juveniles did have a fundamental right to move freely.<sup>56</sup> As a result, the curfew was subject to, and failed under, an application of the strict scrutiny standard.<sup>57</sup> In light of the results of this test, the court concluded that the curfew drew an unconstitutional distinction between juveniles and non-juveniles.<sup>58</sup>

Conversely, the *Hutchins* court was unsympathetic to the possibility of a fundamental right for juveniles to move freely during the curfew hours.<sup>59</sup> The court determined that there was no fundamental right for juveniles to be in public places during curfew hours without parental supervision.<sup>60</sup> As a basis for its conclusion, the court cited the absence of precedent or historical support for such a fundamental right.<sup>61</sup> This resulted in an application of intermediate scrutiny rather than strict scrutiny, which, in part, allowed the curfew to be upheld under the Fifth Amendment.<sup>62</sup> Interestingly, in an attempt to cover all its bases, the *Hutchins* court noted that even if the Curfew Act did implicate a fundamental right of juveniles, the curfew would have survived the strict scrutiny standard.<sup>63</sup> As with the First Amendment issue, the *Hutchins* court's con-

53. See *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (recognizing that violation of fundamental right implicates strict scrutiny); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (noting that strict scrutiny is required when challenged statute infringes on fundamental right).

54. See *Cleburne Living Cent.*, 473 U.S. at 440 (finding that violation of right that is not fundamental results in application of lesser standard than strict scrutiny).

55. See *Waters*, 711 F. Supp. at 1138 (finding violation of equal protection clause).

56. See *id.* at 1139 (noting fundamental right of juveniles).

57. See *id.* (concluding that Emergency Act was not narrowly tailored and that it fails to satisfy strict scrutiny standard).

58. See *id.* at 1138-39 (finding violation of Equal Protection Clause).

59. See *Hutchins v. D.C.*, 188 F.3d 531, 538 (D.C. Cir. 1999) (en banc) ("We think that juveniles do not have a fundamental right to be on the streets at night without adult supervision.").

60. See *id.* (noting that juveniles do not have right to come and go as they wish).

61. See *id.* at 539 (noting lack of historical and precedential support).

62. See *id.* at 541-48 (determining that intermediate scrutiny is appropriate constitutional standard, and upholding Curfew Act despite Fifth Amendment).

63. See *id.* at 541 (positing that curfew would survive heightened scrutiny).

clusion on the Fifth Amendment issue stands in contrast to the stance adopted by the *Waters* court.<sup>64</sup>

In sum, *Hutchins* and *Waters* deal with two curfews enacted to resolve similar problems in the same city.<sup>65</sup> Yet, the respective courts treated these curfews very differently, to the point of disagreeing on the very nature of the First and Fifth Amendments.<sup>66</sup> It seems only logical then that one of the two decisions is more constitutionally sound than the other on each of the two issues. Unfortunately, it is not quite that simple. As the following analysis will make clear, both courts came to reasonable conclusions in determining whether there was an infringement of the juveniles' First Amendment freedoms.<sup>67</sup> Both approaches, however, contain substantial drawbacks.<sup>68</sup> With respect to the Fifth Amendment challenges, the decisions are in complete opposition, and therefore, one of the opinions is superior.<sup>69</sup> This Comment demonstrates that the *Waters* decision takes the more constitutionally consistent Fifth Amendment approach.<sup>70</sup>

### III. ANALYSIS: THE FIRST AMENDMENT

Juvenile rights under the Constitution are not always coextensive with adult rights.<sup>71</sup> It is apparent, however, that juvenile curfews may infringe on juveniles' First Amendment rights.<sup>72</sup> Less clear is exactly how curfews

64. Compare *Waters v. Barry*, 711 F. Supp. 1125, 1134-37 (D.D.C. 1989) (holding that juveniles have same fundamental right to free movement as adults, and applying strict scrutiny), with *Hutchins*, 188 F.3d at 539-45 (recognizing that juveniles do not have same fundamental right to free movement as adults, and applying intermediate scrutiny).

65. See *Hutchins*, 188 F.3d at 534 (noting that District of Columbia Council enacted Curfew Act after determining that crime and victimization in District was becoming more common); *Waters*, 711 F. Supp. at 1127 (making clear that District of Columbia Council adopted Emergency Act in response to violence and drug trafficking).

66. For a discussion of differing approaches of *Waters* and *Hutchins* see *supra* notes 43-65 and accompanying text and *infra* notes 67-70 and accompanying text.

67. For a discussion of First Amendment positions of *Waters* and *Hutchins*, see *supra* notes 41-47 and accompanying text.

68. For a discussion of drawbacks of First Amendment positions, see *infra* notes 87-135 and accompanying text.

69. For a discussion and comparison of Fifth Amendment positions, see *infra* notes 160-84 and accompanying text.

70. For a discussion of the superior fundamental rights analysis in *Waters*, see *infra* notes 170-84 and accompanying text.

71. See generally *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (distinguishing between constitutional rights of minors and adults); *Bellotti v. Baird*, 443 U.S. 622 (1979) (same); *Ginsberg v. N.Y.*, 390 U.S. 629 (1968) (*Stewart, J.*, concurring) (same); *Prince v. Mass.*, 321 U.S. 158 (1944) (same).

72. See *Roberts v. United States Jaycees*, 468 U.S. 609, 616-19 (1984) (determining that freedom of association is incidental to First Amendment freedoms). Logically, a restriction that limits the ability to associate with others has the potential to infringe upon First Amendment rights. See *id.*; see also *W.J.W. v. State*, 356 So. 2d 48, 50 (Fla. Dist. Ct. App. 1978) (determining that juvenile curfew that "[r]estrain[ed] children . . . from freely walking upon the streets or other public

may infringe upon these rights.<sup>73</sup> While there have consistently been constitutional challenges to juvenile curfews under the First Amendment, these challenges have not been uniform in nature.<sup>74</sup> In fact, there are two different forms of First Amendment challenges to juvenile curfews.<sup>75</sup> A number of courts have determined that juvenile curfews restrain express First Amendment freedoms such as the rights of assembly and religion.<sup>76</sup> Other courts, including the *Waters* court, have concluded that the right to free movement is, in itself, a First Amendment freedom.<sup>77</sup>

The stronger approach is to argue that curfews restrain First Amendment freedoms.<sup>78</sup> Courts applying this view focus on how curfews infringe upon juveniles' freedoms of speech, expression, association and religion.<sup>79</sup> An excellent example of this approach can be found in *Nunez v. City of San Diego*.<sup>80</sup> In *Nunez*, the plaintiffs argued that the curfew was overly broad on its face in that it unreasonably restricted minors' legitimate exercise of their First Amendment rights.<sup>81</sup> The Ninth Circuit agreed, stating that the juvenile curfew at issue "had an integral effect on

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places when no emergency exist[ed] . . . [was] incompatible with the freedoms of speech, association, peaceful assembly and religion" and was therefore deemed unconstitutional).

73. For a discussion of the effects of differing First Amendment approaches, see *infra* notes 74-135 and accompanying text.

74. Compare *Johnson v. City of Opelousas*, 658 F.2d 1065, 1072 (5th Cir. Unit A Oct. 1981) (inquiring whether curfew affects long-established First Amendment rights), with *Waters v. Barry*, 711 F. Supp. 1125, 1134 (D.D.C. 1989) (inquiring whether freedom of movement is rooted in expression of association rights).

75. Compare *Opelousas*, 658 F.2d at 1072 (finding that curfews directly affect First Amendment rights), with *Waters*, 711 F. Supp. at 1134 (noting that freedom is rooted in expression of association rights). See Martin E. Mooney, Note, *Assessing the Constitutional Validity of Juvenile Curfew Statutes*, 52 NOTRE DAME L. REV. 858, 861 (1977) (identifying two approaches to judging constitutionality of juvenile curfews under First Amendment).

76. See *Opelousas*, 658 F.2d at 1072 (finding indirect right due to infringement on express rights).

77. See *Waters*, 711 F. Supp. at 1134 (finding direct right to movement).

78. For a discussion explaining why the former approach is stronger, see *infra* notes 91-103 and accompanying text.

79. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513-14 (1969) (noting minors' right to free expression); *Aptheker v. Sec'y of State*, 378 U.S. 500, 520 (1964) (describing freedom of movement as "kin to the right of assembly and to the right of association"); *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (finding minors have freedom of religion and expression).

80. 114 F.3d 935 (9th Cir. 1997).

81. See *Nunez*, 114 F.3d at 940 (noting challenge based on overly broad application and finding curfew unconstitutional). A statute is overly broad when it "make[s] unlawful a substantial amount of constitutionally protected conduct . . ." *City of Houston v. Hill*, 482 U.S. 451, 459 (1987); see also *Thornhill v. Ala.*, 310 U.S. 88, 97 (1940) (finding that law will be void when it "does not aim specifically at evils within the allowable area of [government] control but . . . sweeps within its ambit other activities" protected by the First Amendment).

the ability of minors to express themselves.”<sup>82</sup> Thus, the Ninth Circuit determined that the curfew was unconstitutional.<sup>83</sup>

The second type of challenge is different in that it attempts to establish that juvenile curfews directly trample on an actual freedom of movement found in the First Amendment.<sup>84</sup> The foremost opinion advocating this view comes from *Waters*, where the court found that the right to meet publicly for no particular purpose was rooted in the Constitution.<sup>85</sup> In part for this reason, the court found the Emergency Act to be overly broad and unconstitutional.<sup>86</sup> The *Waters* opinion is an excellent example of a court coming to the correct conclusion for the wrong reason. While the Emergency Act did infringe on the juveniles’ First Amendment freedoms, there is no freedom of movement inherent in the First Amendment.<sup>87</sup>

This limitation is apparent in the Supreme Court’s approach, which does not include free mobility in the First Amendment as a full-fledged First Amendment right.<sup>88</sup> In analyzing the scope of First Amendment rights, the Court has determined that the “Constitution [does not] recognize a generalized right of ‘social association’ that includes chance encounters in dance halls.”<sup>89</sup> Furthermore, the Court has found that freedom of association is limited, stating that “[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street, or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”<sup>90</sup>

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82. *Nunez*, 114 F.3d at 950-51. The Fifth Circuit also adopted the first view. See *Johnson v. City of Opelousas*, 658 F.2d 1065, 1072 (5th Cir. Unit A Oct. 1981) (finding that minors’ First Amendment rights were burdened by curfew). The *Opelousas* court found minors’ First Amendment rights burdened because the curfew prohibited minors from attending associational gatherings such as religious or school meetings, organized dances and theater and sporting events when reasonable and direct travel to or from such activities had to be made during the curfew period. See *id.* (determining how First Amendment freedoms were burdened). The curfew infringed on the freedoms of expression, association and religion and, as a result, it was deemed unconstitutional. See *id.*

83. See *Nunez*, 114 F.3d at 952 (reversing decision of lower court).

84. See *Waters v. Barry*, 711 F. Supp. 1125, 1134 (D.D.C. 1989) (noting constitutional right to meet publicly); see also *Bykovsky v. Borough of Middletown*, 401 F. Supp. 1242, 1254 (M.D. Pa. 1975), *aff’d mem.*, 535 F.2d 1245 (3d Cir. 1976) (stating that “[t]he rights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in way that does not interfere with the personal liberty of others are basic values ‘implicit in the concept of ordered liberty’ . . .”).

85. See *Waters*, 711 F. Supp. at 1134 (recognizing associational right).

86. See *id.* (stating that “the [Emergency] Act involves such a wide and indiscriminate denial of the First and Fifth Amendment rights of juveniles that it cannot be constitutionally applied”).

87. See *City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989) (declining to recognize specific First Amendment right to social association).

88. See *id.* (same).

89. *Id.* at 25.

90. *Id.* Lower courts have followed suit in refusing to extend First Amendment protection to all associational activities. See *Bush v. Dassel-Cokato Bd. of*

Given the Supreme Court's stance, it seems unlikely that the Court would extend First Amendment protection to activities such as sitting outside on a muggy summer night or stargazing.<sup>91</sup> Nevertheless, the *Waters* court was most likely correct in finding that the Emergency Act violated the First Amendment.<sup>92</sup> The basis for its decision, however, is flawed because there is no specific First Amendment right to free movement.<sup>93</sup> Interestingly, the conclusions about First Amendment freedoms reached by the *Hutchins* court are not constitutionally sound either, even though they stand in stark contrast to those made by the *Waters* court.<sup>94</sup>

The District of Columbia City Council attempted to reconcile the Curfew Act with the First Amendment by including specific exceptions, designed to exempt legitimately protected activities from the general restrictions of the Act.<sup>95</sup> Again, note that the Emergency Act had included a number of exceptions, but failed to provide the same exceptions as the Curfew Act, most notably a general First Amendment exception.<sup>96</sup> These rather limited exceptions did not save the Emergency Act from being deemed unconstitutional.<sup>97</sup> Learning from its mistake, the District of Columbia Council went further in carving out exceptions to the Curfew Act.<sup>98</sup> This, in turn, created an issue as to whether these new, more specific exceptions succeeded in protecting juveniles' First Amendment free-

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Educ., 745 F. Supp. 562, 569 (D. Minn. 1990) (deciding that student's desire to associate socially with her friends at parties was not either form of intimate or expressive conduct entitled to protection under First Amendment).

91. See *Stanglin*, 490 U.S. at 24-25 (finding First Amendment protects right of association in only limited circumstances).

92. See Jill A. Lichtenbaum, *Juvenile Curfews: Protection or Regulation?*, 14 N.Y.L. SCH. J. HUM. RTS. 677, 691 (1998) (finding that if curfew ordinances fail to provide adequate exceptions for First Amendment, they should be deemed unconstitutional).

93. See *id.* at 684 (listing fundamental rights guaranteed by Constitution, not including general freedom of mobility).

94. Compare *Hutchins v. D.C.*, 188 F.3d 531, 548 (D.C. Cir. 1999) (stating that "the curfew regulates the activit[ies] of juveniles during nighttime hours; it does not, by its terms, regulate expressive conduct"), with *Waters v. Barry*, 711 F. Supp. 1125, 1134 (D.D.C. 1989) ("[I]t is apparent that the [Emergency] Act involves such a wide and indiscriminate denial of the First Amendment . . . rights of juveniles . . ."). For a discussion of the differences between "exceptions" and "defenses," see Tona Trollinger, *The Juvenile Curfew: Unconstitutional Imprisonment*, 4 WM. & MARY BILL RTS. J. 949, 967 n.102 (1996).

95. For a list of exceptions to the Curfew Act, see *supra* notes 38-39 and accompanying text.

96. See *Waters*, 711 F. Supp. at 1135-36 (explaining exceptions).

97. See *id.* at 1128 ("[T]he Court is constrained to conclude that the [Emergency] Act is constitutionally unacceptable.").

98. Compare *id.* at 1135 (listing five exceptions), with *Hutchins*, 188 F.3d at 535 (listing eight exceptions).

doms, where the Emergency Act exceptions had failed.<sup>99</sup> It seems clear that the exceptions sufficiently protect First Amendment freedoms.<sup>100</sup>

The District of Columbia Council is not the first municipal body to attempt this type of constitutional preservation through the use of specific exceptions.<sup>101</sup> Other municipalities have both succeeded and failed in using extensive exceptions to preserve the constitutionality of their curfews.<sup>102</sup> Many of the exceptions have been aimed at certain school, church, political or social activities.<sup>103</sup>

For example, one constitutional curfew contained exceptions based on both the reasonable necessity communicated to the police by the minor's parent and for minors returning directly home from either a school activity or activity of a religious or other voluntary association, when the police were provided with written notice of the travel.<sup>104</sup> The ordinance also contained a broad exception for the exercise of First Amendment rights, including the free exercise of religion, freedom of speech and the right of assembly.<sup>105</sup> Further exceptions excluded minors that were employed, accompanied by an adult, authorized by a parent, traveling interstate, or minors on the sidewalk of their residence or the residence of their next-door neighbors.<sup>106</sup> These exceptions went far enough in pro-

99. *Compare Waters*, 711 F. Supp. at 1135 (offering five exceptions without First Amendment exception), *with Hutchins*, 188 F.3d at 535 (establishing eight exceptions including one aimed specifically at First Amendment freedoms).

100. *See Hutchins*, 188 F.3d at 535 (specifically excepting First Amendment rights, including free exercise of religion, freedom of speech and right of assembly).

101. *See Bykovsky v. Borough of Middletown*, 401 F. Supp. 1242, 1246-47 (M.D. Pa. 1975), *aff'd mem.*, 535 F.2d 1245 (3d Cir. 1976) (excepting minors participating in "reasonably necessary" travel, minors returning directly home from school activities, minors returning from religious or voluntary association activities and minors exercising First Amendment rights); *McCollester v. City of Keene*, 514 F. Supp. 1046, 1048 (D.N.H. 1981) (excepting minors' travel to and from place of employment, from restaurant, library, movie theater, store, play, dance, sporting event, church, meeting hall, school, courthouse or other place of public assembly); *City of Panora v. Simmons*, 445 N.W.2d 363, 364 (Iowa 1989) (excepting minors' presence on streets after curfew hours if they are traveling between home and employment, church, municipal or school function or if they are accompanied by their parent).

102. *Compare Bykovsky*, 401 F. Supp. at 1266 (upholding curfew, in part, due to exceptions), *with McCollester*, 514 F. Supp. at 1053 (striking down curfew despite exceptions).

103. *See Schleifer v. City of Charlottesville*, 159 F.3d 843, 852 (4th Cir. 1998) (excepting attendance at supervised school and religiously sponsored events); *Nunez v. City of San Diego*, 114 F.3d 935, 938 (9th Cir. 1997) (excepting travel to and from school sponsored events); *McCollester*, 514 F. Supp. at 1048 (excepting travel to schools and churches); *Bykovsky*, 401 F. Supp. at 1246-47 (same).

104. *See Bykovsky*, 401 F. Supp. at 1266 (finding curfew constitutional based, in part, because of exceptions).

105. *See id.* at 1269-71 (noting exceptions based specifically on First Amendment freedoms).

106. *See id.* (listing other exceptions).



protecting juveniles' First Amendment freedoms, and, as a result, the curfew was upheld.<sup>107</sup>

One curfew that did not survive a constitutional challenge exempting juveniles when they were passengers in a moving vehicle or if they were traveling before midnight to or from a public assembly, "including participation in demonstrations, protests, gatherings, rallies, picketing, sit-ins, sleep-ins, or similar occupations by a group seeking to publicize its position," provided that the city had granted a permit for such activity.<sup>108</sup> This particular court determined that the curfew impermissibly prohibited many innocent behaviors despite the protection afforded by its exceptions.<sup>109</sup> Other curfews have used exceptions based on reasonable necessity or legitimate use.<sup>110</sup> One court determined that such a curfew, which provided an exception for juveniles "upon an emergency errand or upon legitimate business," was unconstitutional because it unnecessarily restricted juveniles' personal freedoms.<sup>111</sup>

In light of these decisions, it is apparent that the exceptions set out in the Curfew Act, and endorsed as constitutional in *Hutchins*, are similar to the exceptions in previous constitutional curfews.<sup>112</sup> In order to assure constitutionality, however, the Curfew Act, like some other constitutional curfews, adopted an exception that quite possibly sacrificed its own effectiveness.<sup>113</sup>

The first specific Curfew Act exception exempts a juvenile from restriction when the minor is running an errand, without detour, on behalf of the minor's parent, guardian or caretaker.<sup>114</sup> Similar provisions can be found in the curfews at issue in both *Qutb v. Strauss*<sup>115</sup> and *Bykovsky v. Middletown*<sup>116</sup>—two examples of courts upholding curfews under First Amendment attack.<sup>117</sup> Other Curfew Act exceptions exempt minors who are: accompanied by a parent; commuting to or from a place of employment; traveling in a vehicle involved in interstate travel; remaining on the

107. See *id.* at 1266 (upholding curfew despite First Amendment challenge).

108. See *McColleston*, 586 F. Supp. at 1053 (finding ordinance unconstitutional despite exceptions).

109. See *id.* at 1052 (discussing conduct of minors that is innocent in nature).

110. See *Bykovsky*, 401 F. Supp. at 1247 (excepting minors participating in "reasonably necessary" travel); see also *Allen v. City of Bordentown*, 524 A.2d 478, 482 (N.J. Super. Ct. Law Div. 1987) (excepting travel based on legitimate business).

111. *Allen*, 524 A.2d at 482.

112. See *Bykovsky*, 401 F. Supp. at 1266 (upholding curfew containing exceptions similar to those in Curfew Act); see also *Qutb v. Strauss*, 11 F.3d 488, 496 (5th Cir. 1993) (same).

113. See *Hutchins v. District of Columbia*, 188 F.3d. 531, 535 (D.C. Cir. 1999) (adding vague First Amendment exception).

114. See *id.* (noting errand exception).

115. 11 F.3d 488, 490 (5th Cir. 1993).

116. 401 F. Supp. 1242 (M.D. Pa. 1975).

117. See *Bykovsky*, 401 F. Supp. at 1247 (exempting reasonably necessary travel); see also *Qutb*, 11 F.3d at 496 ("The parent may still allow the child to . . . perform an errand for the parent . . .").

sidewalk bordering the minor's or the next-door neighbor's residence; participating in an emergency; or attending an official school, religious or other recreational activity sponsored by the District of Columbia, a civic organization or another similar entity.<sup>118</sup> These exceptions alone bring the Curfew Act close in nature to other curfews held constitutional, but it is the Curfew Act's eighth and final exception that brings the curfew fully within the scope of other curfews deemed constitutional under the First Amendment.<sup>119</sup> Pointed directly at First Amendment freedoms, the exception assures constitutionality, but it may also hinder any substantial practical effect of the curfew.<sup>120</sup>

The First Amendment exception exempts juveniles from the restrictions of the Curfew Act when they are "exercising First Amendment rights, including free exercise of religion, freedom of speech, and the right to assembly."<sup>121</sup> The *Hutchins* court dismissed the juveniles' challenge to the Curfew Act based on the vagueness of this exception.<sup>122</sup> In fact, the court relied on the vagueness of the exception, stating that the lack of specificity

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118. See *McColester v. City of Keene*, 514 F. Supp. 1046, 1048 (D.N.H. 1981) (excepting minors' travel to and from place of employment, restaurant, library, movie theater, store, play, dance, sporting event, church, meeting hall, school, courthouse or other place of public accommodation, entertainment or assembly); *Bykovsky*, 401 F. Supp. at 1247-48 (excepting minors returning directly home from school activities, minors returning from religious or voluntary association activities and minors exercising First Amendment rights); *City of Panora v. Simmons*, 445 N.W.2d 363, 364 (Iowa 1989) (excepting minors' presence on streets after curfew hours if they are traveling between home and employment, church, municipal or school function or if they are accompanied by their parents).

119. See *Qutb*, 11 F.3d at 490 (upholding curfew based on specific exceptions including First Amendment exception); see also *Bykovsky*, 401 F. Supp. at 1266 (same).

The curfew in *Qutb* excepted juveniles: (1) accompanied by a parent or guardian; (2) running an errand without detour for a parent or guardian; (3) riding in a motor vehicle involved in interstate travel; (4) engaging in an employment activity, or going to or returning home from an employment activity, without any detour or stop; (5) involved in an emergency situation; (6) staying on the sidewalk abutting the minor's residence or abutting the residence of a next-door neighbor if the neighbor did not complain to the police department about the minor's presence; (7) attending an official school, religious or other recreational activity supervised by adults and sponsored by the City of Dallas, a civic organization, or another similar entity that takes responsibility for the minor, or going to or returning home from, without any detour or stop, an official school, religious or other recreational activity supervised by adults and sponsored by the City of Dallas, a civic organization, or another similar entity that takes responsibility for the minor; (8) exercising First Amendment rights protected by the U.S. Constitution, such as the free exercise of religion, freedom of speech and the right of assembly; or (9) married or formerly married. See *Qutb*, 11 F.3d at 498.

120. See *Hutchins v. D.C.*, 188 F.3d 531, 535 (D.C. Cir. 1999) (approving broad exception that allows minors to exercise First Amendment rights without violating Curfew Act).

121. *Id.*

122. See *id.* at 546-48 (finding statutory provision sufficiently definite).

allowed the Curfew Act to avoid undercutting parental control.<sup>123</sup> With this finding, the court placed itself in a precarious position. By embracing the vagueness and potentially broad scope of the First Amendment exception, the court was able to reconcile the Curfew Act with the First Amendment. It seems, however, that there was a price to pay for this reconciliation.<sup>124</sup>

This vague exception of the Curfew Act serves to delay litigation, because it is not clear what specific juvenile actions are included within the Curfew Act's "First Amendment rights."<sup>125</sup> The *Hutchins* court provided minimal guidance by limiting "expressive conduct" to those actions intended to convey a particular message.<sup>126</sup> This slight narrowing of the exception, however, provides only a modicum of guidance because there are many actions that could reasonably fall within or outside this exception.<sup>127</sup> The *Hutchins* court itself admitted that there are actions that must be dealt with on a case-by-case basis because they are not clearly within the scope of the curfew.<sup>128</sup> There is simply no way to tell, and the resulting ambiguity and lack of notice only succeeds in creating future litigation.<sup>129</sup>

Furthermore, if too many actions fall within the scope of the exception, then the exception may have the effect of swallowing the rule. In light of the probable effects of this exception, the District of Columbia Council assured constitutionality under the First Amendment in exchange for future confusion over the scope of the curfew.<sup>130</sup> Such future confu-

123. *See id.* at 546 (stating that "the very flexibility that the administration of the curfew contemplates enhances parental control").

124. *See id.* (holding that exception ensures that curfew will not infringe upon First Amendment rights).

125. *See id.* (failing to set out specific juvenile actions that constitute "First Amendment rights").

126. *See id.* ("[T]he defense simply assures that the curfew will not be applied to protected expression . . .").

127. *See id.* (noting that some situations will require case-by-case treatment).

128. *See id.* (stating that "there may be marginal cases [in] between . . . [that] can be addressed as they arise . . .").

129. *See id.* (implying that those actions, not clearly within exceptions, will probably be addressed in future case-by-case litigation).

130. *See id.* (upholding broad exception protecting indeterminate pool of activities). Despite the problems inherent with broad exceptions, a curfew not containing such protection may be less likely to survive. *See Johnson v. City of Opelousas*, 658 F.2d 1065, 1073-74 (5th Cir. Unit A Oct. 1981) (determining that curfew was unconstitutional because it restricted innocent First Amendment activities); *City of Maquoketa v. Russell*, 484 N.W.2d 179, 182-86 (Iowa 1992) (same); *Allen v. City of Bordentown*, 524 A.2d 478, 483 (N.J. Super Ct. Law Div. 1987) (same); *see also* Craig M. Johnson, *It's Ten O'Clock: Do You Know Where Your Children Are?* *Quib v. Strauss and the Constitutionality of Juvenile Curfews*, 69 ST. JOHN'S L. REV. 327, 363 n.62 (1994) ("The failure to draft the curfew with an exception for First Amendment activities should result in an unconstitutional curfew."); Lichtenbaum, *supra* note 92, at 691 ("When curfew ordinances fail to provide adequate exceptions, they infringe upon the First Amendment rights that minors possess."); Jeremy Toth, Note, *Juvenile Curfew: Legal Perspectives and Beyond*, 14 IN PUB. INTEREST 39, 62 (1994-95) ("A properly constructed curfew contains exceptions for registered First

sion could have signaled the *Hutchins* court to strike down the Curfew Act based on the unconstitutional vagueness of the First Amendment exception.<sup>131</sup>

In sum, both the *Waters* and *Hutchins* courts arrived at arguably correct, but flawed conclusions in deciding whether their respective curfews infringed on the First Amendment rights of juveniles.<sup>132</sup> The *Waters* court reasonably found the Emergency Act unconstitutional under the First Amendment, however, it based its analysis on a direct First Amendment right to free movement, a freedom that never existed and a concept which has since been expressly dismissed.<sup>133</sup> The *Hutchins* court, on the other hand, reasonably found the Curfew Act constitutional, but relied in large part on the strength of a vague First Amendment exception. At best, this exception hinders enforcement, and at worst, proves unconstitutional.<sup>134</sup> Thus, neither court came to a completely sound constitutional conclusion, and, as a result, neither opinion exhibits a superior First Amendment analysis.<sup>135</sup>

#### IV. ANALYSIS: THE FIFTH AMENDMENT

Freedom of expression issues are not the sole sources of inconsistency between the *Waters* and *Hutchins* decisions.<sup>136</sup> Far more contradictory are the respective courts' positions concerning the constitutionality of juvenile curfews under substantive due process and the Equal Protection Clause.<sup>137</sup>

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Amendment activities as well as instances where the adolescent is accompanied by an adult." *But see*, *City of Milwaukee v. K.F.*, 426 N.W.2d 329, 339 (Wis. 1988) (determining that curfew lacking First Amendment exception was not overly broad).

131. *See Allen*, 524 A.2d at 478 (holding that express exception was unconstitutionally vague); *see also* *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."); *S.W. v. State*, 431 So. 2d 339, 341 (Fla. Dist. Ct. App. 1983) (finding that curfew ordinance was unconstitutionally vague because it lacked sufficient guidelines and provided potential for selective enforcement).

132. For a discussion of the unsound conclusions, *see supra* notes 79-131 and accompanying text.

133. *See Waters v. Barry*, 711 F. Supp. 1125, 1134 (D.D.C. 1989) (stating that right to free movement is "rooted in the First Amendment's protection of expression and association").

134. *See Allen*, 524 A.2d at 480-82 (finding broad express exception was unconstitutionally vague).

135. *See Hutchins*, 188 F.3d at 547-48 (failing to recognize vagueness of First Amendment exception); *Waters*, 711 F. Supp. at 1134 (advocating nonexistent First Amendment right to freedom of movement).

136. *Compare Waters*, 711 F. Supp. at 1134-37 (finding that Emergency Act violates Fifth Amendment), *with Hutchins*, 188 F.3d at 540-44 (determining that Curfew Act does not violate Fifth Amendment).

137. *Compare Waters*, 711 F. Supp. at 1134-37 (holding that juveniles have same fundamental right to free movement as adults, applying strict scrutiny and striking down curfew), *with Hutchins*, 188 F.3d at 540-44 (recognizing that juveniles do not

The Equal Protection Clause requires that all persons similarly situated be treated alike.<sup>138</sup> In order for a curfew or any other law to survive an equal protection or substantive due process challenge, it must be either rationally related to a legitimate state purpose or substantially related to an important governmental interest.<sup>139</sup> A law that infringes upon a fundamental right or burdens a suspect class obviously will fail under rational basis scrutiny.<sup>140</sup> If a law is based on a suspect classification, such as race, alienage, illegitimacy or gender, or if the law infringes upon a fundamental right under either substantive due process or equal protection analysis, the higher constitutional standard of strict scrutiny will apply.<sup>141</sup> When strict scrutiny is applied, a law will be deemed constitutional only if it is narrowly tailored to serve a compelling state interest.<sup>142</sup> Thus, the determination of whether a law, such as a juvenile curfew, burdens a suspect class or restricts a fundamental right is paramount to its survival under an equal protection or substantive due process challenge.<sup>143</sup>

In deciding which standard to apply to juvenile curfews, it is important to note that age does not create a suspect classification.<sup>144</sup> Therefore, the central issue in juvenile curfew cases revolves around the possible exis-

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have same fundamental right to free movement as adults, applying intermediate scrutiny and upholding curfew).

138. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (noting basic goal of Equal Protection Clause).

139. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) (finding that in order to uphold state curfew ordinance, state must show curfew is rationally related to legitimate state interest).

140. See *id.* (pointing out exceptions to usual rational basis standard).

141. See *id.* (noting that there is higher standard when ordinance affects suspect class or potentially infringes upon fundamental right); see also *Hill v. Stone*, 421 U.S. 289, 295 (1975) (affecting right to vote); *Dunn v. Blumstein*, 405 U.S. 330, 355-56 (1972) (same); *Graham v. Richardson*, 403 U.S. 365, 382-83 (1971) (affecting suspect class); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (affecting right to vote); *Shapiro v. Thompson*, 394 U.S. 618, 675-78 (1969) (affecting suspect class); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (same).

142. See *Gaffney v. City of Allentown*, 1997 U.S. Dist. LEXIS 14565, at \*18 (E.D. Pa. 1997) ("For the curfew to survive strict scrutiny, the City must show a compelling state interest and the curfew must be narrowly tailored to achieve that interest.").

143. Compare *id.* at \*18-30 (applying strict scrutiny and striking down curfew), with *Schleifer v. City of Charlottesville*, 159 F.3d 843, 855 (4th Cir. 1998) (upholding curfew after applying intermediate scrutiny), and *Bykovsky v. Borough of Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd mem.*, 535 F.2d 1245 (3d Cir. 1976) (upholding curfew under rational basis standard).

144. See *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (finding that age does not constitute suspect class); see also *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14 (1976) (noting that age does not constitute suspect class); *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28 (finding that "suspect class" is class of persons "saddled with such disabilities, or subjected to such history of purposeful unequal treatment, or regulated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"); *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (stating that age does not constitute suspect class).

tence of a juvenile fundamental right to free movement and whether juvenile curfews infringe upon that right.<sup>145</sup> Both the *Waters* and *Hutchins* courts dealt with this issue differently. The *Waters* court acknowledged a fundamental right for juveniles, while the *Hutchins* court declined to recognize any such right.<sup>146</sup>

Adults generally have a fundamental right to move freely and travel at all times.<sup>147</sup> This, however, does not necessarily mean that juveniles have the same right.<sup>148</sup> The question of whether adults and juveniles have the

145. See Johnson, *supra* note 130, at 345-46 ("The issue is significant because a conclusion that a minor does not have a fundamental right to movement results in an Equal Protection analysis using the less stringent rational basis test.").

146. Compare *Waters v. Barry*, 711 F. Supp. 1125, 1134 (D.D.C. 1989) (finding that right to walk streets "is rooted in the First Amendment's protection of expression and association, as well as . . . the Fifth Amendment's protection of fundamental liberty interests under the doctrine of substantive due process"), with *Hutchins v. D.C.*, 188 F.3d 531, 538 (D.C. Cir. 1999) ("We think that juveniles do not have a fundamental right to be on the streets at night without adult supervision.").

147. See *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) ("Freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." (quoting *United States v. Guest*, 383 U.S. 745, 758 (1966))); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (determining that Constitution protects right to wander, stroll or loaf because "[t]hese unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity"); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (upholding fundamental right to interstate travel because "the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel . . ."); *Aptheker v. Sec'y of State*, 378 U.S. 500, 508 (1964) (finding law that restricted passport application unconstitutional because it restricted Fifth Amendment right to travel); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment . . . . Freedom of movement is basic in our scheme of values.").

General curfews have been upheld in emergency situations. See *Ervin v. State*, 163 N.W.2d 207, 210 (Wis. 1968) (finding curfew during riots restricted right to movement); *Glover v. D.C.*, 250 A.2d 556, 561 (D.C. App. Ct. 1969) (finding that right to travel was not protected during riots when streets neared state of anarchy).

148. See *Prince v. Massachusetts*, 321 U.S. 158, 169 (1944) (noting that in some instances state power to restrict children's activities is broader than power to restrict adult's activities); *Bykovsky v. Borough of Middletown*, 401 F. Supp. 1242, 1265 (M.D. Pa. 1975), *aff'd per curiam*, 535 F.2d 1245 (3d Cir. 1976) (finding that minors do not have same constitutional rights as adults); *People ex rel. J.M.*, 768 P.2d 219, 223 (Colo. 1989) (holding that minor's right to intra-city travel was not fundamental); *City of Panora v. Simmons*, 445 N.W.2d 363, 386 (Iowa 1989) (same); *Metro. Dade County v. Pred*, 665 So. 2d 252, 253 (Fla. Dist. Ct. App. 1995) (determining that juveniles do not always possess same level of rights under Constitution as adults); Katherine H. Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1332 (1995) ("[C]hildren stand in a different relation to the Constitution."); see also *Quib*, 11 F.3d at 492 (holding that right to movement extended to minors for purpose of overbreadth analysis); *Waters*, 711 F. Supp. at 1134 (holding that right to walk streets is protected under First and Fifth Amendments); *McCollester v. City of Keene*, 586 F. Supp. 1381, 1384-85 (D.N.H. 1984) (holding that curfew violated juvenile's freedom of movement); *McCollester v. City of Keene*, 514 F. Supp. 1046, 1050 (D.N.H. 1981) (determining that right to move-

same fundamental right to free movement has created much confusion, in large part, because, as Justice Marshall once stated, “[t]he prior decisions of this Court provide no clear answer” to the question.<sup>149</sup> Justice Marshall’s assessment is still true at the present time, as there remains no direct determination of the scope of juveniles’ free movement rights.<sup>150</sup> The Court, however, has created a framework that many courts and commentators believe judges should use to determine whether a right that is fundamental for adults should be fundamental for juveniles as well.<sup>151</sup>

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ment is invaluable to juveniles), *rev’d on other grounds*, 668 F.2d 617 (1st Cir. 1982); *City of Maquoketa v. Russell*, 484 N.W.2d 179, 183 (Iowa 1992) (“Whenever the First Amendment rights . . . require one to move about, such movement must necessarily be protected under the First Amendment.”); *Allen v. City of Bordentown*, 524 A.2d 478, 483 (N.J. Super. Ct. Law Div. 1987) (determining that curfew unconstitutionally restricted right to free movement); *City of Milwaukee v. K.F.*, 426 N.W.2d 329, 337 (Wis. 1988) (holding that juvenile curfew infringed upon minors’ right to free movement); *Brown v. Ashton*, 611 A.2d 599, 606 (Md. Ct. Spec. App. 1992) (holding that minors’ right to movement is widely recognized as fundamental); Paul M. Cahill, Note, *Nonemergency Municipal Curfew Ordinances and the Liberty Interests of Minors*, 12 FORDHAM URB. L.J. 513, 558-59 (1984) (positing that juvenile curfews are unconstitutional unless limited to loitering or prowling, except in case of emergency condition); Jonathan Hangartner, Comment, *The Constitutionality of Large Scale Police Tactics: Implications for the Right of Intrastate Travel*, 14 PACE L. REV. 203, 232 (1994) (finding that police sweeps are de facto curfews in violation of juveniles’ constitutional rights); Note, *Assessing the Scope of Minor’s Fundamental Rights: Juvenile Curfews and the Constitution*, *supra* note 2, at 1174-77 (arguing that juvenile curfews do not serve sufficient state purpose to justify limiting minors’ fundamental right to free movement).

149. *Bykovsky*, 429 U.S. at 965 (Marshall, J., dissenting):

150. *See Ramos v. Town of Vernon*, 48 F. Supp. 2d 176, 184 (D. Conn. 1999) (“The Supreme Court has never clearly indicated the appropriate level of scrutiny to apply to legislation that affects minors.”); *see also* Susan M. Horowitz, *A Search for Constitutional Standards: Judicial Review of Juvenile Curfew Ordinances*, 24 COLUM. J.L. & SOC. PROBS. 381, 383 (1991) (“Circumstances have not changed since Justice Marshall’s complaint that past Supreme Court cases do not provide a reliable guide for reviewing courts to appropriately weigh and evaluate minors’ rights as opposed to like rights of adults.”); Chen, *supra* note 2, at 132 (“The confusion in youth curfew jurisprudence arises from the absence of a unified legal framework that would enable courts to analyze the relevant relationships among state, parent, and child.”); Charles W. Gerdes, Note, *Juvenile Curfew Challenges in the Federal Courts: A Constitutional Conundrum Over the (Less Than) Fundamental Rights of Minors*, 11 ST. THOMAS L. REV. 395, 398 (1999) (recognizing that there is no bright line rule from Supreme Court defining analytical framework for determination of co-extensive fundamental rights for minors). The Supreme Court has denied certiorari to cases challenging the constitutionality of juvenile curfews on a number of occasions. *See, e.g., Qutb v. Bartlett*, 511 U.S. 1127 (1994) (denying petition for writ of certiorari).

151. *See Bellotti v. Baird*, 443 U.S. 622, 633-39 (1979) (establishing three-part test). *Bellotti* dealt with the constitutionality of a Massachusetts statute that required parental consent before a minor could have a lawful abortion. *See id.* at 625-26 (citing MASS. GEN. LAWS ANN. ch. 112, § 12S (West Supp. 1979)). The statute provided that in order for an unmarried woman less than eighteen years old to obtain an abortion, the women needed the consent of both parents. In the absence of such consent, a judge could issue an order permitting the abortion upon a showing of good cause. *See id.* The court determined that the statute was uncon-

In dealing with juvenile abortion, the United States Supreme Court, in *Bellotti v. Baird*,<sup>152</sup> established three factors to justify treating juveniles and adults differently.<sup>153</sup> The three factors the Court set out were: (1) a peculiar vulnerability of juveniles; (2) an inability for juveniles to make critical decisions in an informed and mature manner; and (3) the importance of the parental role in child rearing.<sup>154</sup> Following the *Bellotti* decision, many courts, including the *Waters* court, applied the *Bellotti* factors to define the scope of juvenile rights in other non-abortion contexts.<sup>155</sup>

Nevertheless, what at first glance appeared to be an applicable standard has become a hotly debated issue.<sup>156</sup> The crux of this debate centers over whether the *Bellotti* factors should apply outside the abortion context in which they were first created.<sup>157</sup> Those courts and commentators that would limit the factors to the facts of *Bellotti* point to the unusual issues that arise with juvenile abortions and parental consent.<sup>158</sup> Specifically, those that oppose the application in the realm of juvenile curfews point to the Court's own words: "The abortion decision differs in important ways from other decisions that may be made during minority . . . . [T]here are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible."<sup>159</sup> Finally, these courts and commentators stress that only four of the eight justices joined the opinion establishing the three factors.<sup>160</sup>

In contrast, other courts have applied the *Bellotti* factors to non-abortion contexts based upon the specific language of the *Bellotti* decision.<sup>161</sup>

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stitutional because it unduly infringed on the minor's right to seek the procedure. *See id.*

152. 443 U.S. 622 (1979).

153. *See Bellotti*, 443 U.S. at 633-39 (establishing three factors used to indicate whether adult and juvenile rights are coextensive).

154. *See id.* at 633 (listing three factors).

155. *See City of Panora v. Simmons*, 445 N.W.2d 363, 368-69 (Iowa 1989) (using *Bellotti* factors to determine scope of juveniles rights); *see also City of Milwaukee v. K.F.*, 426 N.W.2d 329, 339-40 (Wis. 1988) (applying *Bellotti* factors to determine whether minors' rights deserved less deference).

156. *See Beaumont*, *supra* note 2, at 103 ("[S]ubsequent courts have applied *Bellotti* inconsistently when assessing the constitutionality of facially similar juvenile curfews.").

157. *Compare id.* at 101-02 (recognizing that *Bellotti* factors may apply outside abortion context, but Supreme Court has never expressed willingness to extend factors), *with Vill. of Deerfield v. Greenberg*, 550 N.E.2d 12, 16 (Ill. App. Ct. 1990) (finding application of *Bellotti* factors was "troublesome outside of the particular setting of abortion rights"), *and Horowitz*, *supra* note 150, at 383-84 (rejecting application of *Bellotti* factors in juvenile curfew context).

158. *See Beaumont*, *supra* note 2, at 102 (acknowledging important differences involved in making abortion decision from other decisions faced by minors).

159. *Bellotti*, 443 U.S. at 642.

160. *See id.* at 622-23 (discussing endorsement of *Bellotti* factor approach by four justices).

161. *See Privor*, *supra* note 1, at 429 (noting that courts have most often applied *Bellotti* factors when dealing with rights of minors).



Those courts supporting the application of the *Bellotti* factors in non-abortion contexts cite the *Bellotti* court's recognition of the special constitutional position of minors when it remarked that "the status of minors under the law is unique in many respects."<sup>162</sup> This statement by the *Bellotti* court recognizing a difference of rights seems to indicate that the Court intended a more general application of its approach.<sup>163</sup> Moreover, the decision takes into account the "many ways" in which juvenile rights may differ from the rights of adults.<sup>164</sup> Furthermore, the *Bellotti* court never expressly limited the factors to the abortion context.<sup>165</sup>

Besides the specific language of the decision, the Court, in forming the *Bellotti* factors, relied on prior decisions distinguishing between juvenile and adult rights outside the abortion context.<sup>166</sup> Surely, the factors still apply in the contexts from which they were derived; therefore, the logical extension of this reality is that the *Bellotti* factors already apply and should continue to apply in other areas beyond juvenile abortion rights.<sup>167</sup>

Nevertheless, because the Court has never established an applicable standard, one cannot be absolutely certain that the Court will apply the *Bellotti* factors to juvenile curfews.<sup>168</sup> Given the broad language and foundations of the *Bellotti* decision, coupled with the lack of any other discernable standard, it is likely that the Court will use the *Bellotti* factors if and

162. *Bellotti*, 443 U.S. at 633.

163. *See id.* at 634 (discussing need for flexible application of constitutional principles to situations involving minors and recognizing "that the constitutional rights of children cannot be equated with those of adults").

164. *See id.* at 633-34 (finding unique role of family requires constitutional principles be applied more flexibly).

165. *See id.* (lacking express limitation on applicability of *Bellotti* factors).

166. *See id.* at 634-39 (relying on previous caselaw in creating *Bellotti* factors). In forming the test, the *Bellotti* court relied on *Ginsberg v. N.Y.*, 390 U.S. 629 (1968), and *Prince v. Mass.*, 321 U.S. 158 (1944), which illustrate the difficulties juveniles have in making mature choices. *See Bellotti*, 443 U.S. at 636 (discussing Court's concern over inability of children to make mature decisions). Furthermore, the Court relied on *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Wis. v. Yoder*, 406 U.S. 205 (1972), which establish that the rights of parents should be weighed in determining whether juveniles deserve the same rights as adults. *See Bellotti*, 443 U.S. at 637-39 (justifying limitations on freedom of minors).

167. *See, e.g., Ginsberg*, 390 U.S. at 629 (forming basis for second *Bellotti* factor); *Prince*, 321 U.S. at 158 (same); *Yoder*, 406 U.S. at 205 (same); *Pierce*, 268 U.S. at 510 (forming basis for third *Bellotti* factor).

168. *See* Peter L. Scherr, Note, *The Juvenile Curfew Ordinance: In Search of a New Standard of Review*, 41 WASH. U. J. URB. & CONTEMP. L. 163, 192 (1992) (noting lack of Supreme Court-advocated standard regarding fundamental rights of minors); Hemmens & Bennett, *supra* note 1, at 290 ("The Supreme Court has refrained from setting out a precise framework for analyzing the rights of juveniles differently from the rights of adults."); *see also* Horowitz, *supra* note 150, at 383 ("The Supreme Court has never ruled on the constitutionality of juvenile curfew ordinances, and there is no definite indication that it would rely upon the *Bellotti* analysis if it were to consider the issue.").

when it examines a juvenile curfew statute.<sup>169</sup> As a result, the three factors constitute a “useful starting point for examining juvenile curfew laws.”<sup>170</sup>

The *Waters* court recognized this usefulness and applied the *Bellotti* factors to the juvenile curfew context, deciding that “[a]n application of these criteria . . . makes clear that there is no basis for treating juveniles differently than adults . . . .”<sup>171</sup> Likewise, the *Nunez* court adopted the *Bellotti* factors, finding that the “three specific [*Bellotti*] factors . . . warrant differential analysis of the constitutional rights of minors and adults,” in the context of juvenile curfews.<sup>172</sup>

Despite these decisions, the D.C. Circuit in *Hutchins* declined to apply the *Bellotti* factors in a juvenile curfew context.<sup>173</sup> Rather, the court simply concluded that “it would be inconsistent to find a fundamental right” when “the [Supreme] Court has concluded that the state may intrude upon the ‘freedom’ of juveniles in a variety of similar circumstances without implicating fundamental rights.”<sup>174</sup> As an explanation for its position, the court first pointed to the Supreme Court’s statements limiting juvenile free movement in *Schall v. Martin*<sup>175</sup> and *Vernonia School District 47J v. Acton*.<sup>176</sup> In alluding to these cases, however, the court confused parental

169. See *Qutb v. Strauss*, 11 F.3d 488, 492 n.6 (5th Cir. 1993) (“[The *Bellotti*] analysis affects the balancing . . . of the state’s interest against the interests of the minor when determining whether the state’s interest is compelling.”); see also *Gerdes*, *supra* note 150, at 402 (“This statement by the Court [setting out the three factors] explicitly directs the application of the three factors, and therefore the inquiry of the decision-maker, to the differentiation of the constitutional rights of minors from those of adults.”); *Hemmens & Bennett*, *supra* note 1, at 292 (“The Supreme Court most clearly illuminated its rationale for denying juveniles the protection of some fundamental rights while extending the protection of others as enjoyed by adults in *Bellotti* . . . .”). *But see* *Horowitz*, *supra* note 150, at 408 (“It is by no means clear that the Supreme Court will apply the *Bellotti* factors in all future cases involving children’s rights.”).

170. *Privor*, *supra* note 1, at 432; see *Gerdes*, *supra* note 150, at 406 (stating usefulness of *Bellotti* decision in analyzing rights of juveniles). As one commentator stated:

The Supreme Court’s discourse . . . sheds a bright light on the constitutionally permissible ends that would justify state intrusion into the decision making process of minors but not of adults. It is in this light that the criticality of any given choice facing a minor should be assessed in determining whether broader state power is justified under *Bellotti*.

*Id.*

171. *Waters v. Barry*, 711 F. Supp. 1125, 1136-37 (D.D.C. 1989); see *Privor*, *supra* note 1, at 429 (noting that “[i]n reviewing the constitutionality of juvenile curfew ordinances, courts have most often turned to *Bellotti v. Baird* . . . .”).

172. *Nunez v. City of San Diego*, 114 F.3d 935, 945 (9th Cir. 1997).

173. See *Hutchins v. D.C.*, 188 F.3d 531, 538-40 (D.C. Cir. 1999) (declining to apply *Bellotti* factors).

174. *Id.* at 539.

175. 467 U.S. 253 (1984).

176. 515 U.S. 646 (1995). In *Vernonia*, a high school student and his parents challenged a regulation enacted by the school district requiring all participants in interscholastic athletic events to submit to random urinalysis testing for illegal drug use. See *id.* at 649-50 (noting facts). The Supreme Court determined that the

custody with governmental custody, as both cases define the rights of juveniles placed under government custody, not juveniles under parental custody.<sup>177</sup>

In support of the Curfew Act, the *Hutchins* court highlighted the treatment of deportable juveniles, juvenile delinquents, juveniles selling goods on public streets and juveniles buying nearly obscene material.<sup>178</sup> While these situations involve aspects of juvenile free movement, they all entail some condition making them different from a plain juvenile curfew.<sup>179</sup> Unlike the restrictions relied on by the *Hutchins* court, the Curfew Act reaches all juveniles.<sup>180</sup> It is not limited to delinquency, the sale of goods, deportation or obscenity.<sup>181</sup>

These limitations are significant. Because a minor does not have a fundamental right to preach on public streets, it does not necessarily follow that the minor lacks the fundamental right to free movement after a certain time of night.<sup>182</sup> Thus, the *Hutchins* court ignored the certain level of uncertainty associated with juvenile curfews.<sup>183</sup> As previously noted, the *Bellotti* factors provide a mechanism to deal with this type of uncertainty.<sup>184</sup> In turn, the *Hutchins* court should have applied the *Bellotti*

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searches, when conducted in schools, were reasonable rather than finding that the students were not protected by the Fourth Amendment. *See id.* at 664-65 (discussing constitutionality of Vernonia School District's policy).

177. *See generally*, *Schall*, 467 U.S. 253 (focusing on juveniles under governmental custody); *Vernonia Sch. Dist.*, 515 U.S. 646 (same); *see also, e.g., Nunez*, 114 F.3d at 945 (“[W]e reject the City’s argument that *Vernonia* changes or abandons the *Bellotti* framework.”). It is important to note that Justice Scalia emphasized the limited scope of *Vernonia* by stating that “[c]entral . . . to the present case is the fact that the subjects of the [drug testing] Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.” *Vernonia Sch. Dist.*, 515 U.S. at 654.

178. *See Hutchins*, 188 F.3d at 539 (setting out curfews aimed at specific actions).

179. *See Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (upholding regulation limiting movement of deportable juveniles); *Schall*, 467 U.S. at 263-64 (upholding pretrial detention of juvenile delinquents); *Ginsberg v. N.Y.*, 390 U.S. 629, 637-43 (1968) (banning sale of material to minors that would not be “obscene” to adults); *Prince v. Mass.*, 321 U.S. 158, 169 (1944) (upholding state’s ability to restrict juvenile street preaching).

180. *See Hutchins*, 188 F.3d at 534 (establishing that Curfew Act applies to all juveniles under age sixteen).

181. *See id.* at 534-35 (making clear that Curfew Act is not aimed at any particular juvenile activity).

182. *See Prince*, 321 U.S. at 169 (upholding state’s ability to restrict juveniles from preaching on streets, not from being on streets).

183. *See Hutchins*, 188 F.3d at 538-41 (relying on highly distinguishable caselaw rather than applying *Bellotti* factors).

184. *See Nunez v. City of San Diego*, 114 F.3d 935, 945 (9th Cir. 1997) (explaining that *Bellotti* factors provide guidance in determining whether juveniles have same rights as adults).

factors to the juveniles affected by the Curfew Act, rather than implying a standard derived from very different circumstances.<sup>185</sup>

Had the *Hutchins* court applied the *Bellotti* factors, it is likely that, as in the *Waters* decision, there would have been no justification for creating a different standard for juveniles.<sup>186</sup> The *Hutchins* court would have had to first determine whether a peculiar vulnerability existed for children.<sup>187</sup> In applying the first factor, it is apparent that the vulnerability is not limited to children.<sup>188</sup> As the court in *Waters* noted, "violence is ubiquitous" as all citizens are vulnerable to crime at night.<sup>189</sup>

Arguably, juveniles may be more vulnerable than adults to crime at night because they are easier to physically or mentally overwhelm and, in turn, are more likely targets of crime.<sup>190</sup> One obvious weakness of this approach, however, is that juveniles are just as physically or mentally inferior during the daytime—a no less threatening time of the day.<sup>191</sup> Also,

185. See Trollinger, *supra* note 94, at 990 (stating that courts should apply *Bellotti* factors to assess government interest in regulating liberties of juveniles).

186. See *Nunez*, 114 F.3d at 945 ("The *Bellotti* test does not establish a lower level of scrutiny for the constitutional rights of minors in the context of a juvenile curfew."); See *Waters v. Barry*, 711 F. Supp. 1125, 1136-37 (D.D.C. 1989) ("An application of these [*Bellotti*] criteria in this case makes clear that there is no basis for treating juveniles differently than adults . . .").

187. See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (noting that first indicator is peculiar vulnerability of juveniles).

188. See *Johnson v. City of Opelousas*, 658 F.2d 1065, 1073 (5th Cir. Unit A Oct. 1981) (discussing absence of particular vulnerability associated with minors engaging in nocturnal activities); see also *Beaumont*, *supra* note 2, at 102 ("[N]octurnal crime does pose a danger to minors who are, in general, more vulnerable than adults. However, this ignores the fact that not only is violence ubiquitous, victimizing all persons, but all persons—both minors and adults—are vulnerable to nocturnal crime.").

189. See *Waters*, 711 F. Supp. at 1137; see also *Privor*, *supra* note 1, at 446 ("The plague of violence does not uniquely affect juveniles . . ."); *Beaumont*, *supra* note 2, at 84-85 ("[A]dults account for a significant amount of all violent crime arrests, yet it is a small proportion of juvenile offenders that is driving rapid and sweeping legislation aimed at curbing violent juvenile crime and victimization."); *Horowitz*, *supra* note 150, at 410 ("[I]t is obvious that the plague afflicting the District [of Columbia] poses no peculiar danger to children.").

In 1995, the year the Curfew Act was enacted, juveniles accounted for only eighteen percent of all serious crime arrests, thus amounting to less than one-fifth of all persons entering the criminal justice system charged with committing a violent crime. See HOWARD N. SNYDER, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE ARRESTS 1995, 1-2 (1997) (summarizing statistics on arrests of juveniles). Furthermore, less than one-half of one percent of persons ages ten through seventeen were arrested for committing a violent crime. See *id.* (discussing findings of Uniform Crime Reporting Program).

190. See *City of Panora v. Simmons*, 445 N.W.2d 363, 372 (Iowa 1989) (Lavorato, J., dissenting) ("Physically, children are generally smaller, weaker, and less capable of taking care of themselves than adults."); see also *Toth*, *supra* note 130, at 56 ("The vulnerability of a child is not simply physical; there are emotional and mental vulnerabilities as well.").

191. See *Lester*, *supra* note 1, at 867 n.181 ("[M]ore kids are killed or injured by their parents, so if you really want to protect kids, you should pass a law, saying

such logic would justify restrictions on the elderly or physically impaired.<sup>192</sup> Thus, a juvenile curfew does not really protect minors from their own natural limitations.<sup>193</sup>

Moreover, even if minors are more vulnerable due to these limitations, one could argue that adults are more likely to be criminal targets than juveniles because they usually carry greater wealth, such as money and jewelry, when traveling. These theories are supported by statistical data showing that, although persons younger than twenty-five may be the most susceptible to crime, eighteen to twenty-one year olds are most likely to fall victim to violent crime.<sup>194</sup> Thus, juveniles that participate in legitimate late night activities are no more at risk than adults in the same circumstances, albeit for different reasons.<sup>195</sup> Therefore, like the Emergency Act, the Curfew Act would not have satisfied the first *Bellotti* factor.<sup>196</sup>

Similarly, the Curfew Act would not have satisfied the second *Bellotti* factor, which requires a weighing of the juveniles' ability to make informed decisions.<sup>197</sup> Here, the *Hutchins* court would have to decide which

kids can't be home between 7:00 and midnight . . .") (citing 20/20: *Time to Go Home*, at 12 (ABC television broadcast, Apr. 8, 1994)); Fox Butterfield, *Successes Reported for Curfews, but Doubts Persist*, N.Y. TIMES, June 3, 1996, at A1 (stating that "most juvenile crime occurs after school, from 3 to 6 P.M., not late at night when most curfews are in force"); see also James Gill, *ACLU's Drive to Scrap City's Curfew*, TIMES-PICAYUNE, Sept. 16, 1994, at B7 (positing that keeping juveniles off streets merely convinces public that fewer juveniles will become crime victims); Mark Sauer, *Effectiveness of Curfew Remains Questionable*, SAN DIEGO UNION-TRIB., June 8, 1996, at E1 (finding that most violent crimes and victimization occurs during daytime); Mark D. Shear, *Prince William Supervisors Vote to Impose Curfew on Youths*, WASH. POST, Jan. 22, 1997, at B3 (declaring that eighty percent of murders and eighty-two percent of robberies resulting in charges against minors occurred outside curfew hours); Jodi Wilgoren & Faye Fiore, *Curfews Cited for Drop in Juvenile Crime Rate*, L.A. TIMES, Dec. 2, 1997, at A1 (attributing failure of city's juvenile curfew to fact that crime occurs mainly during non-curfew hours).

192. See *Panora*, 445 N.W.2d at 372 (Lavorato, J., dissenting) ("[I]f the government could merely use such vulnerabilities to justify juvenile curfews, the government could easily cite similar concerns to justify barring the elderly or physically impaired from the streets. [It] could . . . extend such reasoning to exclude women or members of racial groups from certain areas of some cities . . .").

193. See *id.* ("Because physical vulnerability alone does not sufficiently distinguish children from adults, the government cannot use this as an excuse to justify otherwise impermissible curfews aimed solely at children.").

194. See CRAIG A. PERKINS, U.S. DEP'T OF JUSTICE, AGE PATTERNS OF VICTIMS OF SERIOUS VIOLENT CRIME 2 (1997) (establishing that persons age eighteen to twenty-one are more likely to be victims of violent crime than juveniles); see also Gerdes, *supra* note 150, at 441 (noting statistical data used by District of Columbia to justify curfew indicated that minors under age seventeen were not particularly attracted to criminal activity).

195. See Horowitz, *supra* note 150, at 410 (finding no particular threat of violence to juveniles); see also Privor, *supra* note 1, at 446 (same).

196. See Privor, *supra* note 1, at 446 ("The State's desire to protect children from crime and violence is not, in itself, a sufficient justification for restricting minors' fundamental rights more severely than the fundamental rights of adults.").

197. See *Waters v. Barry*, 711 F. Supp. 1125, 1137 (D.D.C. 1989) ("[T]he decision to either stay inside or roam at night simply does not present the type of

decisions to weigh.<sup>198</sup> There are two decisions that lead to nighttime violence.<sup>199</sup> First, there is the decision to leave one's home.<sup>200</sup> Second, there is the decision by a few to commit crimes.<sup>201</sup> These choices are separate and distinct; the decision to leave one's home after a certain hour does not in itself lead to nighttime violence.<sup>202</sup> Thus, a constitutional analysis of the Curfew Act and other curfews should focus on the decision to leave the home, and not on the decision to engage in criminal activity.<sup>203</sup>

In *Bellotti*, the juvenile choice at issue was whether a minor could make an informed decision to have an abortion.<sup>204</sup> The Court determined that minors could not make such a life-changing decision in an informed manner.<sup>205</sup> Certainly, one could hardly argue that the maturity required in deciding whether to leave one's home late at night is comparable to the maturity required in deciding whether to have an abortion.<sup>206</sup> Clearly, such a decision does "not involve the kind of profound decisions of concern in *Bellotti*."<sup>207</sup> Thus, had the second *Bellotti* factor been ap-

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profound decision *Bellotti* would leave to the state."). *But see In re People ex rel. J.M.*, 768 P.2d 219, 223 (Colo. 1989) ("[A] child's immaturity may lead to a decision to commit delinquent acts . . . . Although adults may also make these decisions, they are more likely to do so in an informed and mature manner with full consideration of the consequences of their acts.").

198. *Compare Waters*, 711 F. Supp. at 1137 (focusing on decision of whether to stay inside or roam at night), *with People ex rel. J.M.*, 768 P.2d at 223 (concentrating on decision to commit delinquent acts).

199. *Compare Waters*, 711 F. Supp. at 1137 (stressing decision to leave home), *with People ex rel. J.M.*, 768 P.2d at 223 (stressing decision to commit criminal acts).

200. *See Waters*, 711 F. Supp. at 1137 (recognizing decision to leave home).

201. *See People ex rel. J.M.*, 768 P.2d at 223 (stressing decision to commit criminal acts).

202. *See Waters*, 711 F. Supp. at 1137 (finding that decision to engage in criminal activity is separate from decision to leave one's home after curfew).

203. *See* Beaumont, *supra* note 2, at 102 (noting issue is whether or not to remain outside at night).

204. *See Bellotti v. Baird*, 443 U.S. 622, 642 (1979) (dealing with juveniles' decision to have abortions).

205. *See id.* (assessing decision-making capacity of juveniles).

206. *See id.* (The pregnant minor's options are much different from those facing a minor in other situations . . . . In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible."); *see also* Horowitz, *supra* note 150, at 384 ("The interest at stake in *Bellotti*, the right of a female minor to decide to have an abortion, is vastly different from the decision of a minor to go out at night.").

207. *See Nunez v. City of San Diego*, 114 F.3d 935, 947 (9th Cir. 1997) (stating that decision to roam at night or stay indoors does not equate to abortion decision at issue in *Bellotti*); *see also* Horowitz, *supra* note 150, at 413 ("[The] presumption of future immature behavior on the part of juveniles is an unwarranted extension of the *Bellotti* rationale, because it implies that children are always too immature to make positive choices, no matter how minor the decision or how trivial the consequences.").

Alternatively, even if the second *Bellotti* factor were applied to the decision of whether to commit a violent crime, it does not appear that juveniles are particularly susceptible to making bad decisions because less than one-fifth of all persons

plied, as it was in *Waters*, the result would not have supported the difference in fundamental rights expressed by the *Hutchins* court.<sup>208</sup>

Finally, the Curfew Act would have fared no better with the third *Bellotti* factor, which assesses the importance of the parental role in the juvenile actions at issue.<sup>209</sup> The *Bellotti* court found that states should generally defer to parental control because children “are not . . . creature[s] of the State; those who nurture [them] and direct [their] destiny have the right, coupled with the high duty, to recognize and prepare [them] for additional obligations.”<sup>210</sup> In turn, the *Bellotti* court strengthened the position of parents by requiring their consent before a juvenile could have an abortion.<sup>211</sup>

Conversely, the Curfew Act has an opposite weakening effect because it actually frustrates the parental role in many families.<sup>212</sup> Rather than requiring consent, the Curfew Act takes the decision-making ability away from parents and it ignores the fact that, for thousands of families in the District of Columbia, parental control is still highly effective.<sup>213</sup> For these families, juvenile curfews result in a transfer of valuable parental rights to the police and the state.<sup>214</sup> Thus, because the Curfew Act detracts from

charged with committing violent crimes in 1995 were juveniles. See SNYDER, *supra* note 189, at 1-2 (1997) (summarizing statistics on juvenile arrest). Moreover, the fact that less than one-half of one percent of all persons ages ten through seventeen were arrested for committing a violent crime in the same year seems to indicate that most juveniles make informed decisions about whether or not to commit violent criminal acts. See *id.* (noting small percentage of juveniles involved in violent crime).

208. See *Waters*, 711 F. Supp. at 1137 (determining that same juvenile decision involved in *Hutchins* did not satisfy second *Bellotti* factor).

209. See *id.* at 1137 (finding that curfew actually takes control away from parents).

210. *Bellotti*, 443 U.S. at 637 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

211. See *id.* at 638 (requiring parental participation in decision-making process).

212. Compare *id.* (requiring parents to help make decisions for juveniles), with *Hutchins v. D.C.*, 188 F.3d 531, 534-35 (D.C. Cir. 1999) (allowing state, not parents, to decide whether juveniles leave their homes). See Toth, *supra* note 130, at 45 (positing that while curfews serve to assist parents in supervising their children, they infringe upon rights of parents).

213. See *Hutchins*, 188 F.3d at 534 (giving control to state by upholding curfew); see also *Waters*, 711 F. Supp. at 1137 (finding that juvenile curfew infringes upon parental control).

214. See *Waters*, 711 F. Supp. at 1137 (“As to these families [affected by the Emergency Act and] struggling against the pressures of modern life, the [Emergency] Act gracelessly arrogates unto itself and to the police the precious rights of parenthood.”); see also Gerdes, *supra* note 150, at 407-08 (“It 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.” (citing *Pierce*, 268 U.S. at 535)); Chen, *supra* note 2, at 139-40 (arguing generally that curfews do not encourage family harmony and parental authority, but instead interfere with relationships between parents and children).

parental power, it is contrary to the spirit of *Bellotti*.<sup>215</sup> As a result, the Curfew Act would have faltered under the third *Bellotti* factor.<sup>216</sup>

In sum, the *Bellotti* factors are paramount in determining the scope of juvenile fundamental rights.<sup>217</sup> When applied to juvenile curfews, they provide a uniform test for determining whether a juvenile right is fundamental and thus deserves the same amount of protection as the adult

215. Compare *Bellotti*, 443 U.S. at 638 (requiring parental consent), with *Hutchins* 188 F.3d at 534 (disregarding parental consent by upholding curfew). See *Meyer v. Neb.*, 262 U.S. 390 (1923) (recognizing rights of parents to provide their children state-mandated level of education); see also *Pierce*, 268 U.S. at 534-35 (reinforcing *Meyer* holding); *Privor*, *supra* note 1, at 437 (noting that *Bellotti* plurality found that promoting strong parental role is consistent with child's individual liberty).

The Court has generally protected the rights of parents in raising their children. See *Gerdes*, *supra* note 150, at 407-09 (stating "The state's interest in assuring that these choices are 'exercised as wisely as possible' is enhanced by requiring parental participation. The Court's deference to parental authority has been a consistent and central theme of minors' rights jurisprudence . . ." and positing that most important part of *Vernonia* decision came when Justice Scalia described minors' rights as "subject . . . to the control of their parents or guardians" (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 104 (1976) (Stevens, J., dissenting) and *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995))).

216. See *Waters*, 711 F. Supp. at 1137 (finding curfew frustrates parental role); see also *Bellotti*, 443 U.S. at 638-39 (upholding regulation diminishing juvenile right, but stressing that regulation was supportive of parental role); *Allen v. City of Bordentown*, 524 A.2d 478, 487 (N.J. Super. Ct. 1987) (holding that curfew interfered with parental duties); *Johnson v. City of Opelousas*, 658 F.2d 1065, 1073-74 (5th Cir. Unit A Oct. 1981) (finding ordinance inhibits parental role in child-rearing); *Ex parte McCarver*, 46 S.W. 936, 937 (Tex. Crim. App. 1898) (finding curfew infringes upon parental functions); *Lichtenbaum*, *supra* note 92, at 698 ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." (citing *Tona Trollinger, The Juvenile Curfew: Unconstitutional Imprisonment*, 4 WM. & MARY BILL RTS. J. 949, 997 (1996))); *Chen*, *supra* note 2, at 132 ("One problem with courts' past treatment of youth curfews is their lack of emphasis on the parent's role.").

One commentator who has examined the third *Bellotti* factor with regard to juvenile curfews has stated the following:

[T]he third *Bellotti* factor, the importance of a parental role in child rearing, is not furthered by the enactment of a juvenile curfew. A juvenile curfew does not promote the parental role, but rather inhibits it. The ordinance does not give parents the power to make decisions concerning the amount of freedom and responsibility they should give their children, but instead exchanges this parental judgment with the presumed superior judgment of the state.

*Lester*, *supra* note 1, at 684. Furthermore, the ACLU has determined that curfews interfere with the rights of parents. See *Lourdes Rosado & Howard Manly, Keeping Teens Off the Street: More Cities Try Curfews*, NEWSWEEK, July 15, 1991 at 21 (describing position of ACLU).

217. See *Lester*, *supra* note 1, at 683 ("The *Bellotti* analysis allows a court to determine if the particular characteristics of a child elevates this [state] interest to the point where the state can restrict a juvenile's activity, even though they cannot restrict adults in the same manner.").



equivalent.<sup>218</sup> When the *Bellotti* factors are not applied, courts run the risk of assessing rights without any semblance of central guidance.<sup>219</sup> This was the case in the *Waters* and *Hutchins* decisions.<sup>220</sup> By applying the *Bellotti* factors, the *Waters* court found that juveniles did have a fundamental right on par with adults, and as a result, the court applied the strict scrutiny standard to the Emergency Act.<sup>221</sup> Conversely, by refusing to apply the *Bellotti* factors, the *Hutchins* court operated without a central test and decided that juveniles, unlike adults, did not have a fundamental right to free movement.<sup>222</sup> In turn, it applied the intermediate scrutiny standard.<sup>223</sup> Predictably, the Emergency Act was struck down and the Curfew Act was upheld.<sup>224</sup>

Even if the *Hutchins* court had applied the *Bellotti* factors, the opposing outcomes may have still resulted. The *Hutchins* court made clear in dicta that the Curfew Act would have survived strict scrutiny had it been applied.<sup>225</sup> Nevertheless, if the *Hutchins* court had used the *Bellotti* factors, found a juvenile fundamental right, applied strict scrutiny and upheld the Curfew Act, then the only dispute would concern the weight of the government's interests and the methods of pursuing those interests.<sup>226</sup> Instead, by ignoring the *Bellotti* factors, the *Hutchins* court only contributed to the already overwhelming confusion over how to distinguish the fundamental rights of juveniles from those of adults.<sup>227</sup> As a result, the *Waters* decision exhibits the superior Fifth Amendment analysis.

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218. See *id.* (noting that *Bellotti* allows juveniles to be treated differently than adults when three factors are present).

219. See *Horowitz*, *supra* note 150, at 383 (recognizing that Supreme Court has never expressly set out reliable guide for courts to appropriately weigh and evaluate minors' rights with regard to juvenile curfews).

220. See *Hutchins*, 188 F.3d at 538 (basing conclusion on restrictive ordinances aimed at specific juvenile actions rather than analysis of general juvenile curfews).

221. See *Waters*, 711 F. Supp. at 1138-39 (applying strict scrutiny and finding that curfew is not narrowly tailored).

222. See *Hutchins*, 188 F.3d at 540-41 (finding juveniles do not have fundamental right of free movement).

223. See *id.* at 541-45 (applying intermediate scrutiny).

224. See *id.* at 548 (upholding Curfew Act); *Waters*, 711 F. Supp. at 1140 (finding Emergency Act unconstitutional). Like the *Hutchins* court, other courts have also upheld a juvenile curfew under the intermediate scrutiny standard. See *Schleifer v. City of Charlottesville*, 159 F.3d 843, 846-47 (4th Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999) (applying intermediate scrutiny and upholding curfew); *Ramos v. Town of Vernon*, 48 F. Supp. 2d 176, 184-85 (D. Conn. 1999), *appeal dismissed*, 208 F.3d 203 (2d Cir. 2000) (same).

225. See *Hutchins*, 188 F.3d at 541 ("Even if the curfew implicated fundamental rights of children . . . it would survive heightened scrutiny.").

226. See *id.* at 541-45 (weighing government interest after determining proper level of constitutional scrutiny); *Waters*, 711 F. Supp. at 1139 (same).

227. See *Hutchins*, 188 F.3d at 537-38 (determining that juveniles have no fundamental right based on caselaw not pertaining to juvenile curfews).

## V. CONCLUSION

A comparison of the *Hutchins* and *Waters* decisions is revealing on two levels. Initially, such an analysis shows that both the *Hutchins* and *Waters* opinions display flawed, but constitutionally defensible First Amendment conclusions. Moreover, it is clear that the *Waters* decision contains a superior Fifth Amendment application as a result of its application of the *Belotti* factors.

More importantly, the comparison exposes the extent to which juvenile curfews confuse courts. When two courts face similar curfew ordinances directed at the same problems in the very same city and arrive at opposing conclusions, the only reasonable explanation is a lack of guidance on the part of both courts. Until the Supreme Court provides lower courts with more direction, the confusion exhibited in *Waters* and *Hutchins* will continue to plague every municipality that seeks to invoke a juvenile curfew.

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