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## Scrutinizing Juvenile Curfews: Constitutional Standards & the Fundamental Rights of Juveniles & Parents

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# NOTES

## Scrutinizing Juvenile Curfews: Constitutional Standards & the Fundamental Rights of Juveniles & Parents

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### I. INTRODUCTION

“I think I should be the one setting the curfew, not the town.”<sup>1</sup>

Not surprisingly, juvenile curfew laws can elicit two opposing viewpoints. The first viewpoint, exemplified by the quote above, is that juvenile curfew laws, in any form, infringe on individual rights and are rarely, if ever, constitutional. The imposition is borne not only by

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1. Lisa Goldberg, *Teens Want Sun to Set on Curfew in Vernon: National Debate Pits Youth-Crime Rates Against Legal Rights*, THE HARTFORD COURANT, Oct. 27, 1998, at A1 (quoting Marcia Pahis, parent of sixteen-year-old juvenile).

the juveniles subject to the curfew, but also by their parents.<sup>2</sup> The second viewpoint is that juvenile curfews serve at least two very important state purposes: they deter juveniles from committing crimes and protect them from being the victims of crimes perpetrated at night.<sup>3</sup> This conflict of viewpoints illustrates the battle between the individual rights of juveniles and their parents and the interests of the state in deterring crime and protecting its citizens.

Courts have differing views on how to approach and analyze the validity and constitutionality of juvenile curfews.<sup>4</sup> At the crux of this division among courts are the different standards of scrutiny applied by the courts when dealing with curfews. The Equal Protection Clause provides three possible standards for courts to use when deciding on the constitutionality of juvenile curfews: strict scrutiny, intermediate scrutiny, and rational basis review.<sup>5</sup> As courts arrive at different conclusions as to which standard is appropriate in juvenile curfew cases, they likewise arrive at different, and often conflicting, holdings.<sup>6</sup>

This Note seeks to take a step back from the scholarship concerning juvenile curfews and analyze the possible standards of scrutiny under the Equal Protection Clause that are available to courts within the context of juvenile curfew laws and juvenile rights protected by the Equal Protection Clause. Instead of merely summarizing

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2. See Gregory Z. Chen, Note, *Youth Curfews and the Trilogy of Parent, Child, and State Relations*, 72 N.Y.U. L. REV. 131, 132 (1997) (arguing that one of the problems with the prior judicial analysis of juvenile curfew laws is the lack of emphasis on the role of parents); see also discussion *infra* Part V.

3. See *infra* notes 27-28 and accompanying text.

4. See *infra* note 6 and accompanying text.

5. Of course, the three levels of scrutiny are not limited to decisions concerning juvenile curfews, but can be applied to any constitutional decision where the Equal Protection Clause is at issue. See generally RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.3 (3d ed. 1999) (providing an overview of the equal protection standards of review).

While curfews have been attacked on many constitutional fronts such as the Fourth Amendment, the First Amendment, and the Due Process Clause, this Note will focus on the Equal Protection Clause because it is always implicated in curfew analysis. Many of the fundamental rights concerns raised in an equal protection challenge are also present in a due process claim. See *Hutchins v. District of Columbia*, 188 F.3d 531, 536 n.1 (D.C. Cir. 1999) (en banc) ("Appellees have couched this claim in terms of the threshold question that must be addressed in both the substantive due process and equal protection inquiries—is there a fundamental right at issue?").

6. Compare *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (using strict scrutiny and holding the curfew constitutional), with *Hutchins ex rel. Owens v. District of Columbia*, 144 F.3d 798, 809-10 (D.C. Cir. 1998), *rev'd*, 188 F.3d 531 (D.C. Cir. 1999) (en banc) (using intermediate scrutiny and holding the curfew unconstitutional), and *Nunez ex rel. Nunez v. City of San Diego*, 114 F.3d 935, 946-49 (9th Cir. 1997) (using strict scrutiny and finding the curfew unconstitutional).

the decisions reached by courts on the issue<sup>7</sup> or attempting to find a "perfect" and foolproof way to draft a curfew law or ordinance,<sup>8</sup> this Note starts from the premise that the standard of analysis a court chooses to employ is more important than the exact wording of the curfew in question. The conflicting results reached by courts are in large part due to the different standards utilized by the courts and the lack of a unified approach in dealing with juvenile curfews.

Lack of consistency in the selection of an appropriate judicial standard of analysis was demonstrated quite clearly in the opinions written by the judges in *Hutchins ex rel. Owens v. District of Columbia*.<sup>9</sup> A three-judge panel reviewed the constitutionality of Washington, D.C.'s juvenile curfew, and all three judges wrote a separate opinion, each judge using a different standard of scrutiny.<sup>10</sup>

This Note concludes that the appropriate standard of analysis for juvenile curfews is an intermediate standard of scrutiny. This standard takes into account the fact that the rights at issue when dealing with juvenile curfews should not trigger the highest level of scrutiny available. The intermediate level of analysis, requiring a "significant [state] interest" and a "substantial fit," provides the most appropriate standard for courts to use when deciding the constitutionality of juvenile curfews because it strikes the appropriate balance between protection of the rights at issue and the interests the state has in protecting its citizens.<sup>11</sup>

In Part II, this Note provides a brief introduction to juvenile curfew ordinances, examining their common characteristics and the

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7. See Jill A. Lichtenbaum, Note, *Juvenile Curfews: Protection or Regulation?*, 14 N.Y.L. SCH. J. HUM. RTS. 677, 686-708 (1998) (discussing the differing court opinions and claims made in juvenile curfew cases).

8. See Kevin C. Siebert, Note, *Nocturnal Juvenile Curfew Ordinances: The Fifth Circuit "Narrowly Tailors" a Dallas Ordinance, But Will Similar Ordinances Encounter the Same Interpretation?*, 73 WASH. U. L.Q. 1711, 1735-41 (1995) (outlining proposals that the author thinks drafters should take into account when drafting a curfew statute or ordinance).

9. *Hutchins*, 144 F.3d 798 (D.C. Cir. 1998). Although the judgment was reversed due to the court's decision en banc, the analysis used in the opinions is still instructive and is representative of the arguments on each side of the issue regarding which standard of analysis is appropriate.

10. See *id.* (Rogers, J.) (using an intermediate standard of scrutiny); *id.* at 825 (Tatel, J., concurring in judgment) (using a strict scrutiny standard); *id.* at 828 (Silberman, J., dissenting) (using a rational basis test and finding the curfew constitutional). For a full discussion on each judge's opinion, see Charles W. Gerdes, Notes & Comments, *Juvenile Curfew Challenges in the Federal Courts: A Constitutional Conundrum Over the (Less Than) Fundamental Rights of Minors*, 11 ST. THOMAS L. REV. 395, 425-36 (1999).

11. See, e.g., *Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3585 (U.S. Mar. 22, 1999) (No. 98-1146) (holding that the intermediate standard of scrutiny is appropriate when dealing with juvenile curfews); *Ramos v. Town of Vernon*, 48 F. Supp. 2d 176, 184 (D. Conn. 1999) (same).

states' reasons for their implementation. Part III then describes the three levels of scrutiny available to courts when deciding a curfew's constitutionality under the Equal Protection Clause. It begins with rational basis review, the most deferential standard available. Following the discussion of rational basis review, Part III then addresses both strict and, finally, intermediate scrutiny. After a discussion of each standard, Part III examines the specific application of each to juvenile curfew ordinances.

Part IV explores the rights implicated by juvenile curfew ordinances and focuses on the rights of the children and young adults subject to the restriction. This Part also examines the claims of juveniles to fundamental rights, such as the right to freedom of movement, often claimed to be infringed upon by curfew ordinances. Part V then examines the right of parents to raise their children as they see appropriate without undue state interference—a factor of analysis that becomes important when dealing with the restrictions imposed by juvenile curfews.

Part VI combines the discussion of scrutiny and individual rights and argues that the appropriate standard of analysis for courts to use when determining the constitutionality of juvenile curfews is intermediate scrutiny. Intermediate scrutiny is the only standard that strikes the appropriate balance between the rights at stake and the interests of the state in protecting juveniles and preventing crime.

## II. JUVENILE CURFEWS: AN OVERVIEW OF THE ORDINANCES

In an effort to battle the rampant crime and drug use that has become an increasing problem in many cities across the country, many city governments are enacting nocturnal juvenile curfew ordinances.<sup>12</sup> These ordinances are far from uniform in their wording and specific goals, but virtually all share four common features: a blanket rule,

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12. See Lichtenbaum, *supra* note 7, at 679; see also *Any Real Impact from Curfews for Teens?*, THE TENNESSEAN, Sept. 19, 1999, at 22A ("Some 300 towns and cities now have some sort of curfew for minors, and the Justice Department has expressed its approval."). Some state legislatures are also supportive of the rationale behind curfews. For example, Tennessee enacted a state "model" curfew for cities to adopt if they so choose. See TENN. CODE ANN. §§ 39-17-1702 to 1703 (1997) (establishing a model juvenile curfew that may be enacted by a two-thirds vote of any county having a population of more than seven hundred thousand). See generally Brian Privor, *Dusk 'Til Dawn: Children's Rights and the Effectiveness of Juvenile Curfew Ordinances*, 79 B.U. L. REV. 415, 422-24 (1999) (discussing local concerns and state enabling legislation).

exceptions to the rule, punishment for violation of the rule,<sup>13</sup> and a list of purposes for promulgating the rule.

The blanket rule set forth by most legislatures enacting juvenile curfews is fairly simple. It consists of a restriction on juveniles, defined within the ordinance, forbidding them from being out during certain hours of the night and early morning.<sup>14</sup> The following language is representative: "It shall be unlawful for a minor, during curfew hours, to remain in or upon any Public Place within the City, to remain in any motor vehicle operating or parked therein or thereon, or to remain in or upon the premises of any Establishment within the City."<sup>15</sup> Most ordinances set forth specific hour provisions, and when an ordinance is not specific in its hour requirement, courts have held the ordinance to be unconstitutionally vague.<sup>16</sup> As well as the time prohibition, the ordinances define the age group to which the curfew applies.<sup>17</sup> This feature varies widely, but courts give legislatures lee-

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13. The punishments generally include fines or jail time for not only the juvenile charged with violating the curfew, but also the parents of the child. *See infra* notes 24-26 and accompanying text.

14. *See infra* notes 15-17 and accompanying text.

15. *Schleifer*, 159 F.3d at 856-57. Most of the terms appearing in the rule are not self-defining, so the ordinance also contains a definition section spelling out specifics. For example, in this particular ordinance, the curfew hours are defined as "the hours of 12:01 a.m. through 5:00 a.m. on Monday through Friday, and 1:00 a.m. through 5:00 a.m. on Saturday and Sunday." *Id.* at 856; *see also* *Qutb v. Strauss*, 11 F.3d 488, 497 (5th Cir. 1993) (making it an offense to "remain[] in any public place or on the premises of any establishment within the city" from "11:00 p.m. on any Sunday, Monday, Tuesday, Wednesday, or Thursday until 6:00 a.m. of the following day; and 12:01 a.m. until 6:00 a.m. on any Saturday or Sunday"); *Naprstek v. City of Norwich*, 545 F.2d 815, 816 n.1 (2d Cir. 1976) ("All children under the age of seventeen (17) years are hereby forbidden to be upon the streets or in any public places or buildings of the City of Norwich, after 11:00 in the evening Sunday, Monday, Tuesday, Wednesday and Thursday, and 12:00 midnight on Friday and Saturday . . .").

16. *See Naprstek*, 545 F.2d at 818 ("This holding is expressly limited to the constitutional infirmity presented by the lack of a termination time for the curfew."). For the exact language of the ordinance, *see supra* note 15.

17. For examples of curfews applicable to juveniles under eighteen, *see Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1269 (M.D. Pa. 1975) (applying to all minors under eighteen, but instituting different hours of applicability depending on the minor's age); *In re J.M.*, 768 P.2d 219, 220-21 (Colo. 1989) (curfew applying to minors under eighteen) (quoting Pueblo Colo. Municipal Code § 11-1-703); *Allen v. City of Bordentown*, 524 A.2d 478, 480 (N.J. Super. Ct. Law Div. 1987) ("The city of Bordentown . . . prohibits minors under 18 years-of-age, with certain exceptions, from being in public places [during curfew hours]."). Many curfews, however, apply only to children under seventeen. *See, e.g., Schleifer*, 159 F.3d at 856 (defining "minor" to be any person under seventeen) (quoting § 17-7 of the Code of the City of Charlottesville); *Qutb*, 11 F.3d at 497 (same) (quoting § 31-33 of the Dallas City Code); *Johnson v. City of Opelousas*, 658 F.2d 1065, 1067 n.1 (Former 5th Cir. Oct. 1981) (same) (quoting Opelousas Code § 18-8.1). Some curfews draw the line at sixteen. *See, e.g., McCollester v. City of Keene*, 586 F. Supp. 1381, 1388 (D.N.H. 1984) ("the curfew shall apply to the persons under the age of 16 years") (quoting resolution of the City of Keene).

way in making a determination of the age at which to cap the restriction.<sup>18</sup>

The second element most curfews have in common is a list of exceptions to the general prohibition. No curfew adopts a blanket rule never allowing minors out during the hours the curfew is in effect. Common exceptions include emergencies,<sup>19</sup> running errands for parents,<sup>20</sup> being accompanied by a parent or guardian,<sup>21</sup> being on the sidewalk outside the juvenile's home or a neighbor's home,<sup>22</sup> and, perhaps most importantly, exercising First Amendment rights.<sup>23</sup>

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18. See *Bykofsky*, 401 F. Supp. at 1266 ("The state can draw lines in a rational manner, and it is not unreasonable for a legislative body to conclude that those eighteen years of age or older as a class have achieved a sufficient degree of maturity so that there is no need to restrict their freedom of movement . . .").

19. See, e.g., *Schleifer*, 159 F.3d at 857 (including "the minor is involved in an emergency" as an exception) (quoting § 17-7(b)(2) of the Code of the City of Charlottesville); *Qutb*, 11 F.3d at 498 (same) (quoting § 31-33(c)(1)(E) of the Dallas City Code); *State v. J.D.*, 937 P.2d 630, 636 (Wash. Ct. App. 1997) (listing "[w]hen the minor is on an emergency errand" as an exception) (quoting Bellingham Curfew, BMC 10.62.030(C)(2)).

20. See, e.g., *Qutb*, 11 F.3d at 498 ("It is a defense . . . that the minor was . . . on an errand at the direction of the minor's parent or guardian, without any detour or stop.") (quoting § 31-33(c)(1)(B) of the Dallas city code); *J.D.*, 937 P.2d at 636 (stating the curfew does not apply "[w]hen the minor is on an emergency errand or specific business or activity directed or permitted by his parent, guardian, or other adult person having the care and custody of the minor") (quoting Bellingham Curfew, BMC 10.62.030(C)(2)).

21. See, e.g., *Schleifer*, 159 F.3d at 857 (including "the minor is accompanied by a parent" as an exception to the curfew) (quoting § 17-7(b)(1) of the Code of the City of Charlottesville); *Qutb*, 11 F.3d at 498 (including a minor accompanied by a parent or guardian as a defense) (quoting § 31-33(c)(1)(A) of the Dallas City Code); *Bykofsky*, 401 F. Supp. at 1269 (including accompaniment by a parent as the first exception to the curfew) (quoting § 5(a) of Ordinance No. 662 for the year 1975 of the Borough of Middletown).

22. See, e.g., *Schleifer*, 159 F.3d at 857 (allowing the minor to be "on the sidewalk directly abutting a place where he or she resides with a parent") (quoting § 17-7(b)(4) of the Code of the City of Charlottesville); *Qutb*, 11 F.3d at 498 (including as a defense a minor "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") (quoting § 31-33(c)(1)(F) of the Dallas City Code); *Bykofsky*, 401 F. Supp. at 1269 (including as an exception "[w]hen the minor is on the sidewalk of the place where such minor resides, or on the sidewalk of either next-door neighbor not communicating an objection to the police officer") (quoting § 5(e) of Ordinance No. 662 of the year 1975 of the Borough of Middletown).

23. See, e.g., *Schleifer*, 159 F.3d at 857 (establishing "the minor is exercising First Amendment rights protected by the United States Constitution" as an exception) (quoting § 17-7(b)(8) of the Code of the City of Charlottesville); *Bykofsky*, 401 F. Supp. at 1269 (including "[w]hen exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech and the right of assembly" as an exception) (quoting § 5(c) of Ordinance No. 662 of the year 1975 of the Borough of Middletown). The Fifth Circuit, in upholding the constitutionality of the juvenile curfew enacted in Dallas, remarked that the exception carved out for the exercise of First Amendment rights was the most notable of the exceptions contained in the curfew ordinance. See *Qutb*, 11 F.3d at 494. The Court of Appeals of Washington, Division One, in holding that the curfew at issue was unconstitutional, noted that the ordinance did not contain an exception for the exercise of First Amendment rights comparable to the one in *Qutb*. See *J.D.*, 937 P.2d 630, 635 (Wash. Ct. App. 1997).

The third element juvenile curfew ordinances share is a clause providing for punishment in the event the restriction is violated. Virtually every curfew ordinance contains a provision not only punishing the child who violates the hour restriction without falling into one of the permissible exceptions,<sup>24</sup> but also punishing parents who knowingly allow the minor to break curfew.<sup>25</sup> Many ordinances allow for a warning the first time the curfew restriction is violated and establish fines for subsequent violations.<sup>26</sup>

The fourth and final element shared by curfew ordinances is the inclusion of the city's purposes for enacting the curfew. The most common reasons put forth for enacting a nocturnal juvenile curfew are to protect juveniles from being the victims of crimes,<sup>27</sup> to prevent juveniles from committing crimes at night,<sup>28</sup> and to strengthen parental

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In *Schleifer*, the dissenting judge contended that the "First Amendment 'exception' is impermissibly vague." *Schleifer*, 159 F.3d at 868 (Michael, J., dissenting). Judge Michael argued that "First Amendment jurisprudence is a vast and complicated body of law that grows with each passing day," and, therefore, "criminal conduct cannot be defined by simply referring to the title (First Amendment) or subtitle (speech or assembly) of a particular right." *Id.* at 871 (Michael, J., dissenting). The majority opinion condemned the dissent's "stringent application" of the standards imposed by strict scrutiny and determined that under the dissent's mode of analysis "no curfew would ever pass constitutional muster." *Id.* at 855.

24. See, e.g., *Qutb*, 11 F.3d at 498 (providing that each offense, upon conviction, "is punishable by a fine not to exceed \$500") (quoting § 31-33(e)(1) of the Dallas City Code); *City of Milwaukee v. K.F.*, 426 N.W.2d 329, 332-33 n.3 (Wis. 1988) (penalizing "[a]ny person . . . violating [the curfew] shall be fined not less than ten dollars (\$10) nor more than two hundred dollars (\$200)") (quoting § 106-23(5) of the Milwaukee Code of Ordinances).

25. See, e.g., *Schleifer*, 159 F.3d at 857 ("It shall be unlawful for a minor's parent to knowingly permit, allow or encourage such minor to violate" the curfew) (quoting § 17-7(c) of the Code of the City of Charlottesville); *Naprstek*, 545 F.2d at 817 n.1 ("Any parents . . . violating the provisions of this section will be punished by a fine") (quoting § 26-3 of City Ordinance VI of the City of Norwich); *Bykofsky*, 401 F. Supp. at 1271-72 (imposing a fine on parents after the first violation by their child) (citing § 8(a) of Ordinance No. 662 for the year 1975 of the Borough of Middletown).

26. See, e.g., *Schleifer*, 159 F.3d at 857 ("if the minor has not previously been issued a warning for any such violation, then the officer shall issue a verbal warning to the minor which shall be followed by a written warning mailed by the police department to the minor and his or her parents") (quoting § 17-7(g)(1) of the Code of the City of Charlottesville); *Bykofsky*, 401 F. Supp. at 1271 ("In the case of a first violation by a minor the Chief of Police shall . . . send to a parent written notice of said violation with a warning . . .") (quoting § 7(d) of Ordinance No. 662 for the year 1975 of the Borough of Middletown).

27. See, e.g., *Schleifer*, 159 F.3d at 856 (including "promote the safety and well-being of the City's youngest citizens" among the list of purposes) (quoting § 17-7 of the Code of the City of Charlottesville); *Qutb*, 11 F.3d at 496-97 ("the City of Dallas has an obligation to provide for the protection of minors from each other and from other persons") (quoting § 31-33 of the Dallas City Code).

28. See, e.g., *Schleifer*, 159 F.3d at 856 (including "protect the general public through the reduction of juvenile violence and crime within the City" as a purpose of the curfew) (quoting § 17-7 of the Code of the City of Charlottesville); *Qutb*, 11 F.3d at 496 (finding the "increase in juvenile violence, juvenile gang activity, and crime by persons under the age of 17" as one of the needs for a curfew) (quoting § 31-33 of the Dallas City Code).



control over their children.<sup>29</sup> Virtually every court recognizes these reasons as compelling interests of the government;<sup>30</sup> however, some courts view the last rationale, that of strengthening parental control, as antithetical to the freedom of parents to raise their children without undue state interference.<sup>31</sup>

### III. SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause of the Fourteenth Amendment is the specific constitutional protection from unjust classification systems established by legislatures.<sup>32</sup> Courts did not always read the clause as broadly as they do today, but it currently encompasses more than the protection of the rights of racial minorities—the purpose for which Congress originally ratified the Equal Protection Clause.<sup>33</sup> As the use of equal protection claims has grown and its protection expanded, three standards have emerged for courts to use in determining the constitutionality of a statute under equal protection analysis: rational basis review, strict scrutiny, and intermediate scrutiny.<sup>34</sup> This section proceeds chronologically, rather than in order from the most deferential standard to the strictest, solely because the development of the two “newer” standards, strict scrutiny and intermediate scrutiny, arose as a result of discontent with the previous standard and its precedents.

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29. See, e.g., *Schleifer*, 159 F.3d at 856 (including “foster and strengthen parental responsibility for children” as a purpose of the curfew) (quoting § 17-7 of the Code of the City of Charlottesville); *Qutb*, 11 F.3d at 496-97 (“the city of Dallas has an obligation to provide . . . for the enforcement of parental control over and responsibility for children”) (quoting § 31-33 of the Dallas City Code); *Bykofsky*, 401 F. Supp. at 1267 (including “for the furtherance of family responsibility” as a purpose of the ordinance) (quoting § 2 of Ordinance No. 662 for the year 1975 of the Borough of Middletown).

30. See, e.g., *Hutchins v. District of Columbia*, 188 F.3d 531, 542 (D.C. Cir. 1999) (en banc); *Schleifer*, 159 F.3d at 847-49 (noting that the listed purposes were compelling interests).

31. See, e.g., *Nunez v. City of San Diego*, 114 F.3d 935, 951 (9th Cir. 1997) (“The right to rear children without undue governmental interference is a fundamental component of due process.”); see also *infra* Part V.

32. U.S. CONST. amend. XIV, § 1.

33. In 1927, for example, Justice Holmes wrote that a claim of equal protection was “the usual last resort of constitutional arguments.” *Buck v. Bell*, 274 U.S. 200, 208 (1927). Today, equal protection arguments are the source of many claims. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 628-35 (13th ed. 1997). Of course, an entire history of the Equal Protection Clause is well beyond the scope of this Note. This introductory material is meant only to inform the reader of the relevant background to the establishment of the levels of judicial scrutiny currently used by courts to resolve equal protection issues.

34. See *ROTUNDA & NOWAK*, *supra* note 5, § 18.3.

*A. Rational Basis Review*

The Equal Protection Clause has long been recognized to allow some threshold amount of judicial review when examining legislative classifications. For example, as early as 1919, the Supreme Court recognized that

the equal protection of the laws required by the Fourteenth Amendment does not prevent the States from resorting to classification to achieve the purposes of legislation. . . . But the classification must be reasonable, not arbitrary, and must rest upon some ground of deference having a fair and substantial relation to the subject of the legislation.<sup>35</sup>

Before the 1960s, the Court was highly deferential to the legislature in equal protection cases, and in most cases, the legislation at issue passed constitutional muster if the classification had any rational relationship to the purpose of the legislation.<sup>36</sup>

More recently, the Court has described the deferential standard of rational basis review as "not a toothless one,"<sup>37</sup> but the fact remains that rational basis review is the least strict standard a court can apply when reviewing an equal protection claim.<sup>38</sup> In *FCC v. Beach Communications*, Justice Thomas described rational basis review as "a paradigm of judicial restraint."<sup>39</sup> A statute being judged under the rationality standard "bear[s] a strong presumption of validity."<sup>40</sup> Thus,

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35. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

36. See GUNTHER & SULLIVAN, *supra* note 33, at 629 (noting that during the period before the Warren Court, "courts did not demand a tight fit between classification and purpose").

37. *Mathews v. Lucas*, 427 U.S. 495, 510 (1976).

38. See *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989) (describing rational basis review as the "most relaxed and tolerant" that the Court employs). While many speculated that the Court would become increasingly deferential after the Reagan and Bush appointees took the bench, the rationality standard does not appear to have moved back to the rubber stamp position it had before the 1960s. See GUNTHER & SULLIVAN, *supra* note 33, at 652 ("The widespread expectation that the Court of the 1980s would return to exercising lowest tier rationality review in a very deferential manner has not been wholly fulfilled."). The Court has struck down statutes using the rational basis standard of review since 1980. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 450 (1985) (using the rational basis standard to invalidate a zoning ordinance); *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981) ("[As] long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred."). Some of the justices appointed during the Reagan and Bush administrations have sounded more deferential, however. See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

39. *Beach Communications*, 508 U.S. at 314.

40. *Id.*

given the amount of deference a statute receives under this standard, rational basis review virtually assures the statute's constitutionality.

In a dissenting opinion, Justice Brennan laid out what he argues is the appropriate analysis under rational basis review, and this accurately describes the state of rational basis analysis today: "When faced with a challenge to a legislative classification under the rational-basis test, the court should ask, first, what the purposes of the statute are, and, second, whether the classification is rationally related to achievement of those purposes."<sup>41</sup>

Few courts have used the rational basis standard to review juvenile curfew ordinances. However, in the first federal case determining the constitutionality of a curfew, *Bykofsky v. Borough of Middletown*, the district court used the rational basis standard.<sup>42</sup> In determining which standard was appropriate, the court reasoned that because age is not a suspect classification and the curfew did not implicate a fundamental right, the proper standard was rational basis review.<sup>43</sup> The court alluded to the existence of an intermediate standard, but determined that the intermediate standard elucidated by the Supreme Court at that time was limited to statutes involving gender classifications.<sup>44</sup> Unsurprisingly, after the court determined the rational basis test was appropriate, the court went on to hold that the ordinance did not violate the Equal Protection Clause.<sup>45</sup>

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41. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 184 (1980) (Brennan, J., dissenting).

42. *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1265 (M.D. Pa. 1975) ("[T]he traditional rational basis test is the proper yardstick to utilize in determining the constitutionality of the ordinance.")

43. *See id.*; *see also Hutchins ex rel. Owens v. District of Columbia*, 144 F.3d 798, 828 (D.C. Cir. 1998), *rev'd*, 188 F.3d 531 (D.C. Cir. 1999) (en banc) (Silberman, J., dissenting) ("Because I do not read either Supreme Court precedent or the history and tradition of this country as giving minors a fundamental right to be unaccompanied on the streets at night, I would apply rational basis review and uphold the curfew."). After the D.C. Circuit heard the case again en banc, Judge Silberman changed his stance and analyzed the curfew under an intermediate standard. *See Hutchins*, 188 F.3d at 541-46.

44. *See Bykofsky*, 401 F. Supp. at 1265 (noting that the Supreme Court's "mode of analysis in sex classification cases suggests that it has adopted an intermediate equal protection test"). At the time of the *Bykofsky* decision, the Supreme Court's use of the intermediate standard was new and still fairly undeveloped.

45. *See id.* at 1266 (holding that "the legislative determination in the instant case that the age of eighteen provides the dividing line between minors and adults with respect to a nighttime curfew is not unreasonable, does not create an arbitrary classification, and hence is not violative of equal protection").

The Colorado Supreme Court also used the rational basis standard to uphold a juvenile curfew ordinance.<sup>46</sup> The Colorado court, like the court in *Bykofsky*, determined that the ordinance neither burdened a fundamental right nor created a suspect classification.<sup>47</sup> The court stated that while adults may enjoy a fundamental right to "freedom of movement and to use the public streets, a child's liberty interest in being on the streets after 10:00 o'clock at night" was not fundamental.<sup>48</sup> Because the court found no suspect classification and no fundamental right sufficiently impeded to trigger strict scrutiny, the court resorted to rational basis analysis.<sup>49</sup> As in *Bykofsky*, the Colorado Supreme Court upheld the ordinance.<sup>50</sup>

### B. Strict Scrutiny

The deferential propensities of the rational basis test fail to protect fundamental rights fully, including the right to vote, the right to interstate travel and the right of access to the judicial system.<sup>51</sup> The Supreme Court eventually recognized that a heightened level of scrutiny needed to be developed in order to protect certain fundamental rights that were previously protected only by a standard of rationality.<sup>52</sup>

The strict scrutiny now employed by courts requires that a classification be "precisely tailored to serve a compelling governmental interest."<sup>53</sup> This test rejects the argument "that a mere showing of a

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46. See *In re J.M.*, 768 P.2d 219, 223 (Colo. 1989) (en banc) ("An ordinance which does not infringe upon a fundamental right or create a suspect classification is generally measured by the rationality standard.").

47. See *id.*

48. *Id.* at 221, 223.

49. See *id.* at 221-24. The court never acknowledged the possibility of analyzing the ordinance under the intermediate standard of scrutiny. Discussions of strict scrutiny and intermediate scrutiny follow in Parts II.B and II.C.

50. See *id.* at 224 (holding that the ordinance did not unconstitutionally infringe upon J.M.'s "liberty interests").

51. See *infra* notes 62-64, and accompanying text.

52. For example, in *Skinner v. Oklahoma*, the Court declared unconstitutional an Oklahoma statute requiring sterilization of certain state prisoners. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). As Professor Gerald Gunther notes, the Court's decision rested more on due process arguments than equal protection, GUNTHER & SULLIVAN, *supra* note 33, at 517, but implicit in the Court's reasoning and language was a recognition of a heightened level of scrutiny necessary to protect the fundamental right of procreation from being infringed upon by the statute, see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 34 n.76 (1973).

53. *Pylar v. Doe*, 457 U.S. 202, 217 (1982). The Court articulated this standard before 1982, however. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). As mentioned above, the Court recognized the need for a stricter standard in *Skinner v. Oklahoma*; however, the requirement of narrow tailoring in order to achieve compelling state interests came later. In *Shapiro*, 394 U.S. 618 (1969), Justice Harlan's dissenting opinion noted that in this case the compelling

rational relationship between the [legislation] and . . . permissible state objectives will suffice to justify the classification."<sup>54</sup> While recognizing that "[a] legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived,"<sup>55</sup> a statute can run afoul of the Equal Protection Clause and be deserving of strict scrutiny if it either disadvantages a suspect class or impinges upon a fundamental right.<sup>56</sup>

The notion of suspect classes is rooted in the Equal Protection Clause's original purpose of protecting blacks and was expanded during the Second World War to other groups.<sup>57</sup> Suspect classifications refer to a legal classification or restriction curtailing the rights of a specific group.<sup>58</sup> Given the Court's jurisprudence, race is clearly and unmistakably a suspect classification;<sup>59</sup> however, other classifications are less clear. The Court has said, however, that "legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."<sup>60</sup>

What qualifies as a fundamental right deserving of strict scrutiny analysis is likewise a subject of debate. On this issue, the Court has given some guidance and stated that "[i]n determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein."<sup>61</sup> The rights that the Court has held to be fundamental in this context, and thus deserving of strict scrutiny, include the right to vote,<sup>62</sup> the

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interest doctrine is "articulated more explicitly than ever before," *id.* at 658 (Harlan, J., dissenting).

54. *Shapiro*, 394 U.S. at 634.

55. *Pyle*, 457 U.S. at 216.

56. *See id.* at 216-17.

57. *See* GUNTHER & SULLIVAN, *supra* note 33, at 663-81 (discussing the evaluation and expansion of the Equal Protection Clause).

58. *See* *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (affirming conviction of remaining in a "Military Area" as applied to citizens of Japanese descent).

59. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

60. *Pyle*, 457 U.S. at 217 n.14. To illustrate this point, the Court refused to acknowledge illegal aliens as a suspect class since entry into the country was the "product of voluntary action." *Id.* at 219 n.19.

61. *Id.* at 217 n.15.

62. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (stating that the right to vote is fundamental to the preservation of all rights); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (same).

right to interstate travel,<sup>63</sup> and the right of access to the judicial system.<sup>64</sup>

Unlike rational basis review, once a court has determined that the appropriate standard is strict scrutiny, the likelihood that a statute will be found constitutional decreases considerably.<sup>65</sup> Courts throughout the country, both state and federal, have been willing to find fundamental rights implicated in curfew ordinances<sup>66</sup> and have employed strict scrutiny to strike them down as violative of the Equal Protection Clause.<sup>67</sup> But the use of strict scrutiny does not automatically trigger the death knell for a juvenile curfew; some courts have been willing to hold that curfews can pass the tough evidentiary burden of strict scrutiny analysis.<sup>68</sup>

In order for a court to determine that strict scrutiny is the appropriate standard of analysis for a juvenile curfew ordinance, the act must burden a fundamental right.<sup>69</sup> When courts have used strict scru-

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63. See GUNTHER & SULLIVAN, *supra* note 33, at 901-09 (examining the durational residency requirements that penalized the right of citizens to interstate migration—including *Griffin v. Illinois*, 351 U.S. 12 (1956) and *Douglas v. California*, 372 U.S. 353 (1963) in their analysis).

64. See GUNTHER & SULLIVAN, *supra* note 33, at 895-901 (including *Griffin v. Illinois*, 351 U.S. 12 (1956) and *Douglas v. California*, 372 U.S. 353 (1963) in their analysis).

65. See *Bush v. Vera*, 517 U.S. 952, 1010 (1996) (Stevens, J., dissenting) (“[W]e apply strict scrutiny more to describe the likelihood of success than the character of the text to be applied.”).

66. See *infra* note 70 and accompanying text.

67. See, e.g., *Nunez ex rel. Nunez v. City of San Diego*, 114 F.3d 935, 951 (9th Cir. 1997) (holding that the ordinance was not narrowly tailored, and thus violated the Equal Protection Clause under strict scrutiny review); *Waters v. Barry*, 711 F. Supp. 1125, 1139 (D.D.C. 1989) (holding that “the standard applicable to the [curfew] is whether the Act is narrowly tailored to serve a compelling governmental interest [and determining that] the Court is unable to conclude that the act [satisfies strict scrutiny]”); *State v. J.D.*, 937 P.2d 630, 635 (Wash. Ct. App. 1997) (“Because the law is not narrowly tailored to prevent juvenile crime or protect minors from becoming victims, we hold that it is an unconstitutional infringement on minors’ freedom of movement.”).

68. See, e.g., *Qutb v. Strauss*, 11 F.3d 488, 496 (5th Cir. 1993) (holding that “the state has demonstrated that the curfew ordinance furthers a compelling state interest, i.e., protecting juveniles from crime on the streets . . . [and] is narrowly tailored to achieve this compelling state interest”); *In re Maricopa County*, 887 P.2d 599, 612 (Ariz. Ct. App. 1994) (holding that the state law satisfied strict scrutiny); *City of Milwaukee v. K.F.*, 426 N.W.2d 329, 339 (Wis. 1988) (holding that “the interest of the municipality in the present case in protecting youths and curtailing juvenile crime is compelling . . . [and] the ordinance . . . is as narrowly drawn as practicable”).

The *Qutb* decision has been questioned, and it is unclear whether it is merely an anomaly among strict scrutiny decisions. See generally Brian J. Lester, Comment, *Is It Too Late for Juvenile Curfews? Qutb Logic and the Constitution*, 25 HOFSTRA L. REV. 665 (1996) (questioning the rationale of *Qutb*); Siebert, *supra* note 8, at 1734-35 (same). *Qutb*, however, is not the only decision upholding a curfew under strict scrutiny analysis. See *supra*.

69. This is the case because it is now clear that age is not a suspect classification. See *Qutb*, 11 F.3d at 492 (“age is not a suspect class”) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991)). If the statute does not discriminate against a suspect class, the only remaining way a curfew could be deemed to deserve strict scrutiny would be to find that it burdened a fundamental right. See *supra* note 56 and accompanying text.

tiny, they have found the curfew to burden the right to freedom of movement.<sup>70</sup> Once a court has determined that the rights implicated by the curfew are fundamental and worthy of analysis under the most severe standard, the state must meet the exceedingly difficult burden of demonstrating narrow tailoring<sup>71</sup> of the statute at issue.<sup>72</sup>

### C. Intermediate Scrutiny

Gender classifications began to pose a problem for equal protection analysis; specifically, whether gender is a suspect classification and, hence, deserving of strict scrutiny. In *Reed v. Reed*, the Supreme Court refused to acknowledge gender as a suspect classification and judged the statute under a standard of rationality.<sup>73</sup> Shortly after the *Reed* decision, the Court explicitly laid out the intermediate level of scrutiny appropriate for gender classifications: "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>74</sup> The Court has

70. See *Allen v. City of Bordentown*, 524 A.2d 478, 486 (N.J. Super. Ct. Law Div. 1987) (stating that "*Papachristou* appears to have made travel, including loitering, a fundamental right"); *J.D.*, 937 P.2d at 632 (concluding that the curfew "impinges on minors' fundamental freedom of movement"); see also *infra* Part IV.B.1.

71. The state has no problem demonstrating a compelling interest in any curfew case, so when strict scrutiny is used, the only issue is whether the ordinance in question is narrowly tailored. See *supra* notes 27-30 and accompanying text.

72. The test "ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for classification was illegitimate." *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493 (1989) (emphasis added). For an example of where a state provided statistics to argue the curfew was narrowly tailored, but the argument was rejected by the court, see *Waters*, 711 F. Supp. at 1139; cf. *Qutb*, 11 F.3d at 493 ("Although the city was unable to provide precise data concerning the number of juveniles who commit crimes during the curfew hours . . . [it] nonetheless provided sufficient data to demonstrate that the classification created by the ordinance 'fits' the state's compelling interest.").

73. *Reed v. Reed*, 404 U.S. 71, 76 (1971) (framing the issue as "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective").

74. *Craig v. Boren*, 429 U.S. 190, 197 (1976); see also *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("to withstand intermediate scrutiny, a statutory classification must be substantially related to an important government objective"); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) ("If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present.").

In addition, in a case involving gender classification, the Court stated that an "exceedingly persuasive" government purpose is needed in order to satisfy intermediate scrutiny. *United States v. Virginia*, 518 U.S. 515, 533 (1996). Justice Rehnquist condemned the Court's emphasis on this language, rather than the traditional "important governmental objective" language, as "unfortunate" because it "introduce[d] an element of uncertainty respecting the appropriate test." *Id.* at 559 (Rehnquist, C.J., concurring in judgment). How this language will play itself out, particularly in cases not involving gender discrimination, remains to be seen.

also noted that this standard may apply to classifications based on illegitimacy.<sup>75</sup>

Clearly, the intermediate level of scrutiny is more exacting than the rational basis test. Also, the intermediate standard requires only substantial relation to an important government objective while strict scrutiny requires narrow tailoring in order to further a compelling government interest.<sup>76</sup> While the distinction may be merely one of degree rather than three distinct standards,<sup>77</sup> the chosen standard is of extreme importance.<sup>78</sup> The distinction between the three standards, then, is one of language and likely outcome: while rational basis is, in practice, almost a standard of per se legality, strict scrutiny is difficult to overcome. In fact, the decision of the correct standard to employ can often be the deciding factor of a case. Chief Justice Rehnquist recognized this when he noted that the "key question" in *City of Dallas v. Stanglin* was "the level of judicial 'scrutiny' to be applied."<sup>79</sup>

If a court determines that a heightened level of scrutiny beyond mere rationality is needed, how should it determine between strict and intermediate? The determination could merely be one of default: if the court decides the classification is deserving of a heightened level of scrutiny, yet does not burden a fundamental right or classify individuals based on a suspect classification, intermediate scrutiny is appropriate. Currently, there are no exact tests developed by the Court to trigger the intermediate standard, so this approach may, in practice, be the correct one in deciding which standard is appropriate.

One commentator has observed that intermediate scrutiny "is appropriate when a classification may be offensive if based on derogatory stereotypes (women are unfit to practice law), but which may be reasonable when designed for some benign, not derogatory purpose (women bear children and require a reasonable leave of absence from

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75. See *Clark*, 486 U.S. at 461 ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy."). The intermediate level of scrutiny is, as the quote recognizes, not limited to gender classifications. The intermediate level of scrutiny has also been used in cases involving illegitimacy. See *id.* at 463 (holding a statute unconstitutional under an intermediate scrutiny standard); *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (same). This Note, in setting forth the three standards of analysis under the Equal Protection Clause, ignores the "intermediate-intermediate" scrutiny Justice Scalia accused the Court of inventing in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 791 (1994) (Scalia, J., dissenting).

76. See *supra* note 53 and accompanying text.

77. See *Bush v. Vera*, 517 U.S. 952, 1010 (1996) (Stevens, J., dissenting) ("[A]ll equal protection jurisprudence might be described as a form of rational basis scrutiny.>").

78. See *id.* ("[W]e apply 'strict scrutiny' more to describe the likelihood of success than the character of the test to be applied.").

79. *City of Dallas v. Stanglin*, 490 U.S. 19, 23 (1989).



their jobs to do so).<sup>80</sup> This approach also seems to acknowledge that some lines drawn by a statute may be questionable, but not based on distinguishing a suspect class.

Recently, courts have demonstrated more willingness to extend the use of an intermediate level of scrutiny to cases involving juvenile curfew ordinances and thus beyond gender classifications.<sup>81</sup> In *Hutchins v. District of Columbia*, the D.C. Circuit upheld the constitutionality of Washington, D.C.'s juvenile curfew ordinance under intermediate scrutiny.<sup>82</sup> Although only a plurality of the court believed that the curfew implicated no fundamental rights of minors or parents, every judge except one held that intermediate scrutiny was the appropriate standard of analysis.<sup>83</sup> The court's opinion maintained that "neither history nor precedent supports the existence of a fundamental right for juveniles to be in a public place without adult supervision during curfew hours."<sup>84</sup> Furthermore, the court's opinion recognized that, while parents may enjoy a right to "control of the home," the court believed that such a right was not implicated by the curfew, and the right to "unilaterally determine when and if children will be on the streets . . . at night" was not among the "intimate family decisions" protected under the Supreme Court's family law precedent.<sup>85</sup> The court premised its decision to use intermediate scrutiny on the fact that children's rights are not coextensive with those of adults, and that a lesser degree of scrutiny than strict scrutiny was called for due to

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80. Lucy Katz, *Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of Theory After Richmond v. J.A. Croson, Co. and Metro Broadcasting, Inc. v. Federal Communications Commission*, 17 T. MARSHALL L. REV. 317, 328 (1992).

81. Two federal courts of appeals have recently used an intermediate standard of scrutiny. See *Hutchins v. District of Columbia*, 188 F.3d 531 (D.C. Cir. 1999); *Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998). Interestingly, only one judge in the D.C. Circuit claimed that intermediate scrutiny was not appropriate; however, the case generated five separate opinions. The most notable opinion was a dissent by Judge Rogers who argued that juveniles have a fundamental right to movement, but that the curfew should be subject to intermediate scrutiny despite "a formalistic allure to treating all fundamental rights alike." *Hutchins*, 188 F.3d at 563 (Rogers, J., dissenting in part). Both the *Hutchins* and the *Schleiffer* opinions were accompanied by a dissenting opinion advocating the use of strict scrutiny. See *Hutchins*, 188 F.3d at 571 (Tatel, J., dissenting); *Schleifer*, 159 F.3d at 860 (Michael, J., dissenting). A recent district court opinion in Connecticut also employed an intermediate standard of scrutiny to hold a juvenile curfew ordinance constitutional. See *Ramos v. City of Vernon*, 48 F. Supp. 2d 176, 185-86 (D. Conn. 1999).

82. *Hutchins*, 188 F.3d at 545.

83. See *id.* at 571 (Tatel, J., dissenting).

84. *Id.* at 539.

85. *Id.* at 540-41. The court here was referring specifically to the Supreme Court's decisions concerning the right of privacy with respect to family decisions in *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Prince v. Massachusetts*, 321 U.S. 158 (1944), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

children's "unique vulnerability, immaturity and need for parental guidance."<sup>86</sup>

Even those judges determining that fundamental rights were implicated by the curfew decided that, with one exception, intermediate scrutiny was the appropriate standard.<sup>87</sup> The reason for these judges was that even though fundamental rights are at stake, the fundamental rights of children, or parents' rights regarding their children, were entitled to less deference than strict scrutiny provides. This is borne out, the argument goes, by the Supreme Court's acknowledgement that constitutional "rights have less force when used by minors as shields against regulation."<sup>88</sup> Furthermore, Judge Rogers' partial dissent disagreed with Judge Silberman's characterization of the right at issue. While Judge Silberman defined the right narrowly as a child's right to be on the street unaccompanied at night,<sup>89</sup> Judge Rogers defined the right more broadly, encompassing a fundamental right to movement, regardless of whether it is exercised by adults or children.<sup>90</sup>

The Fourth Circuit Court of Appeals followed the lead of Judge Rogers' initial opinion for the D.C. Circuit in *Hutchins*, and determined that the appropriate balance between the fundamental rights of children and the heightened state interest in the protection of children was worthy of intermediate scrutiny in *Schleifer v. City of Charlottesville*.<sup>91</sup> The court reached this determination by making two observations: (1) children do possess "at least qualified rights," and thus, a curfew which restricts their rights should be subject to a stricter standard than mere rational basis review; and (2) since these rights are not the same as adults, the curfew should be subject to something less than strict scrutiny.<sup>92</sup> The Fourth Circuit, then, took the position that intermediate scrutiny was the default: rational basis failed to adequately protect the implicated rights, but strict scrutiny failed to give sufficient weight to the interest of the state. Applying intermediate scrutiny to Charlottesville's curfew, the court determined that the cur-

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86. *Hutchins*, 144 F.3d at 541.

87. See *id.* at 548-49 (Edwards, J., concurring); *id.* at 563-64 (Rogers, J., dissenting in part); *id.* at 570-71 (Tatel, J., dissenting).

88. *Id.* at 563 (Rogers, J., dissenting in part).

89. See *id.* at 539.

90. See *id.* at 554-60.

91. *Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843 847 (4th Cir. 1998) (stating that intermediate scrutiny was the "most appropriate level of review"). Although the court determined that intermediate scrutiny was appropriate, the court noted that "[t]he limited scope of the curfew and its numerous exceptions would satisfy even the strict scrutiny requirement of narrow tailoring." *Id.* at 851.

92. *Id.* at 847.

few did not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>93</sup>

In reaching its conclusion, the court stressed the special vulnerability of children, and noted that "[s]tates authority compliments parental supervision."<sup>94</sup> The court also noted that while it was "mindful" that the Supreme Court has suggested parents may have a fundamental right to raise their child without undue state interference, the court argued that the curfew at issue simply "did not implicate the kinds of intimate family decisions" the Court had addressed in its cases.<sup>95</sup>

#### IV. THE RIGHTS OF JUVENILES

As mentioned above, in order for a statute to warrant an analysis of strict scrutiny under the Equal Protection Clause, one of two things must be present: the classification must be of a suspect class, or the classification must burden a fundamental right or interest.<sup>96</sup> This section will focus on the latter category<sup>97</sup> and demonstrate that most curfew ordinances do not substantially burden a juvenile's fundamen-

93. *See id.* at 855 (holding the curfew did not violate the Equal Protection Clause of the Fourteenth Amendment).

94. *Id.* at 848.

95. *See id.* at 852-53. Like the D.C. Circuit in *Hutchins*, the Fourth Circuit was referring to such Court decisions as *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Meyer v. Nebraska*, 262 U.S. 390 (1923). *See Schleifer*, 159 F.3d at 852.

96. The term fundamental right can mean a right explicitly set forth in the Constitution, such as the right to freedom of speech guaranteed by the First Amendment, or a right inherent in the grant of equal protection and not explicitly laid out in the text of the Constitution. *See Pylar v. Doe*, 457 U.S. 202, 217 n.15 (1982). The Warren Court was the first to find constitutional rights implicit in the Equal Protection Clause. *See GUNTHER & SULLIVAN, supra* note 33, at 630. Successive Courts have been less willing to extend equal protection to encompass other rights. *See id.* at 631-33. Such fundamental rights and interests held to exist under the Equal Protection Clause include the right to vote, interstate travel, and the right of access to the court system. *See supra* notes 62-64 and accompanying text.

97. The first of these equal protection violations, the classification of a suspect class, does not become an issue when dealing with children's rights. Courts have acknowledged that age is not a suspect classification. *See Gregory v. Aslcroft*, 501 U.S. 452, 407 (1991) ("This Court has said repeatedly that age is not a suspect classification under the Equal Protection Clause."); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976) (arguing same).

Although the Court dealt with the issue of whether age is a suspect class only in the context of legislation establishing older persons as a class, *see Hutchins v. District of Columbia*, 188 F.3d 531, 556 n.4 (D.C. Cir. 1999) (Rogers, J., dissenting) (noting the lack of consideration to classifications based on youth, but leaving that question open), courts have uniformly assumed that legislative restrictions on younger people also do not create suspect classifications based on age. *See, e.g., Qutb v. Strauss* 11 F.2d 488, 492 (5th Cir. 1993). However, many of the reasons courts have accorded gender classifications more protection than rational basis even though they are not suspect are also implicated for juveniles. *See Part VI.*

tal rights. Furthermore, the fundamental rights of juveniles do not equal those of adults, and curfews, therefore, should not be examined under strict scrutiny.

#### A. *Juvenile Rights v. Adult Rights*

It should appear obvious that, at least to some degree, children have constitutional rights.<sup>98</sup> The Supreme Court has observed in an oft-quoted passage that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”<sup>99</sup> The issue, then, is not whether juveniles have rights to be protected, but how these rights compare to those of adults and how much power the state can wield over juveniles.

Few people would disagree that children have rights worthy of protection; however, few would argue that the rights of children should be equal to those of adults. Children do not, and should not, have the “right” to vote, drive, or engage in any number of activities unsuitable or dangerous for young people.<sup>100</sup> For example, in *Ginsberg v. New York*, the Court upheld a New York statute making it illegal to sell adult “girlie” magazines to children under eighteen.<sup>101</sup> In upholding this “infringement” on the rights of minors, the Court noted quite clearly that “the well-being of its children is of course a subject within the state’s constitutional power to regulate.”<sup>102</sup> Seemingly, it is this interest that provides the state with greater power over juveniles.

Given that the state has the power to regulate in order to protect its children, the issue becomes whether certain state regulation, allowed due to the interest the state has in protecting children, unduly impedes a child’s fundamental rights and should, therefore, be analyzed under strict scrutiny. Phrased differently, is the balance a court must weigh between state interest and individual rights the same as it is for adults when dealing with juveniles?<sup>103</sup> The answer is a resounding “no.”

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98. See *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (“A child, merely on account of his minority, is not beyond the protection of the Constitution.”). In fact, popular culture has also commented on the rights of juveniles. For example, in a recent episode of the popular cartoon series *The Simpsons*, one character exclaimed: “The cops can’t just throw a curfew on us. We have rights.” *The Simpsons* (Fox television broadcast, Jan. 17, 1999).

99. *In re Gault*, 387 U.S. 1, 13 (1967).

100. See *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1266 (M.D. Pa. 1975) (noting that “youths under the age of eighteen have traditionally been regulated and restricted by American law in many ways”).

101. *Ginsberg v. New York*, 390 U.S. 629, 629 (1968).

102. *Id.* at 639.

103. This presumes, of course, that the state also has an interest in protecting the well-being of its adult citizens.

In *Prince v. Massachusetts*, the Supreme Court addressed a statute that prohibited any boy under twelve or girl under eighteen from, among other things, selling magazines in any public place.<sup>104</sup> The appellant in the case was a Jehovah's Witness who took her nine-year-old niece, over whom she had custody, with her when she went out to sell copies of *Watchtower* and *Consolation*.<sup>105</sup> The court proceeded by weighing the rights impeded by the statute against the state's regulatory power to protect its citizens' well-being.<sup>106</sup> Pertinent to the Court's decision was its observation that even though a statute similar to the one passed by the Massachusetts legislature would be unconstitutional if it were applied to adults, it was constitutional since it affected only children.<sup>107</sup> Clearly, the Court acknowledged that when judging a statute, children's rights are not always equal to the rights afforded adults. The state's power over children exceeds its power over adults.<sup>108</sup>

In *Bellotti v. Baird*, the Court "recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults."<sup>109</sup> The first reason outlined by the Court was "the peculiar vulnerability of children"<sup>110</sup> based on a child's "needs for concern, . . . sympathy, and . . . paternal attention."<sup>111</sup>

104. *Prince v. Massachusetts*, 321 U.S. 158, 160-61 (1944). The statute at issue in the case was part of Massachusetts's child labor law. *See id.* at 160. The statute read, in whole: "No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place." *Id.* at 160-61. The issue of whether this classification suffers in that it exempts children of different ages depending on their gender was not discussed by the Court and is inapposite to the discussion here.

105. *See id.* at 159-61. *Watchtower* and *Consolation* are publications of the Jehovah's Witnesses and fall within the category of forbidden material subject to the Massachusetts statute quoted *supra* in footnote 104.

106. The Court correctly noted that there were "two claimed liberties are at stake" in this case. *Id.* at 164. "One is the parent's, to bring up the child in the way he should go, . . . [and] [t]he other freedom is the child's . . ." *Id.*

107. *See id.* at 167 ("Concededly a statute or ordinance identical in terms with § 69, except that it is applicable to adults or all persons generally, would be invalid.").

108. *See id.* at 168 ("[T]he mere fact a state could not wholly prohibit this form of adult activity, whether characterized locally as a sale or otherwise, does not mean it cannot do so for children.").

109. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979). For a discussion of *Bellotti* and its dubious adaptability and application to juvenile curfew cases, see Privor, *supra* note 12, at 429-39. *But see* Gerdes, *supra* note 10, at 437 ("[T]he consideration of custodial configuration and the three factors enumerated in *Bellotti* must form the core of the inquiry.").

110. *Bellotti*, 443 U.S. at 634.

111. *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (plurality opinion); *see also* *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways.") (citations omitted).

The second reason the Court offered in support of its statement that juvenile rights are not coextensive with those of adults is a child's "inability to make critical decisions in an informed, mature manner."<sup>112</sup> This reason establishes that the Court is cognizant of the fact that children often do not have the experience or judgment to make decisions that may result in harm to them.<sup>113</sup>

The third reason the Court set forth in determining that children's rights are not equal with those of adults acknowledged the important role that parents play in rearing and teaching their children.<sup>114</sup> The Court, however, made an interesting claim. Instead of reaching the conclusion that the state should lessen its regulation over children in order to avoid impinging on the rights of parents to raise their children without interference by the state, the Court stated that "the guiding role of parents in the upbringing of their children *justifies* the limitations on the freedoms of minors."<sup>115</sup> The Court noted further that "[l]egal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding."<sup>116</sup>

The Court's jurisprudence demonstrates quite clearly that although children are protected by the Constitution and its grant of certain rights, these are not to be equated with the rights of adults. For purposes of analyzing juvenile curfew ordinances, the next question is which rights, if any, qualify as fundamental *for children*, and whether it necessarily follows that the same standard should be applied in the case of children as is applied to adults. The answer to these questions provide the way out of the dilemma concerning which standard of scrutiny is appropriate for juvenile curfews.

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112. *Bellotti*, 443 U.S. at 634.

113. *See id.* at 635 (observing that "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them"). The Court also noted, however, that "[a]lthough the State has considerable latitude in enacting laws affecting minors on the basis of their lesser capacity for mature, affirmative choice, . . . [the State] may not arbitrarily deprive them of their freedom of action altogether." *Id.* at 637 n.15 (citing *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969)).

114. *See Id.* at 634 (recognizing as the third reason that the constitutional rights of children are not equated with those of adults is "the importance of the parental role in child rearing").

115. *Id.* at 637 (emphasis added).

116. *Id.* at 638-39. The Court observed in a footnote that there is a line of decisions suggesting that parents are free from "undue, adverse interference by the State." *Id.* at 639 n.18. The claim that juvenile curfews impinge on parental rights to raise their child without interference is one discussed more fully below. *See infra* Part V.

### B. *The Fundamental Rights of Children*

As mentioned above, strict scrutiny is the standard under which to analyze a statute that may violate the Equal Protection Clause of the Fourteenth Amendment if the statute in question burdens a fundamental right.<sup>117</sup> What makes a right fundamental?

Of course, the Constitution itself is where a court will look first to determine whether a right qualifies as fundamental and, consequently, whether to subject a statute to strict scrutiny. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court held that the right to public education was not fundamental and analyzed the ordinance under the rational basis test.<sup>118</sup> The Court acknowledged that "the answer [to determining whether a right is fundamental] lies in assessing whether [the particular right is] explicitly or implicitly guaranteed by the Constitution."<sup>119</sup> The dissenting opinion, although disagreeing with the majority's opinion that education was not a fundamental right, likewise acknowledged the Constitution's text as the appropriate source to consult to make the determination.<sup>120</sup>

The recognition of a fundamental right need not be explicitly granted by the text of the Constitution, however.<sup>121</sup> Thus, rights such as voting,<sup>122</sup> the right to unhampered interstate travel,<sup>123</sup> and the right to procreate<sup>124</sup> have been determined to be fundamental under equal protection analysis and thus subject to strict scrutiny, even though these rights are not explicitly guaranteed in the text of the Constitution. The remainder of this section discusses which rights and interests at issue in cases involving juvenile curfews could be considered fundamental and, therefore, deserving of strict scrutiny.

117. See *supra* notes 53-56 and accompanying text.

118. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35-39 (1973).

119. *Id.* at 33-34.

120. See *id.* at 102 (Marshall, J., dissenting) ("Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution.")

121. See *Pylar v. Doe*, 457 U.S. 202, 217 n.15 (1982) ("In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein.") (emphasis added).

122. See *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (holding that the right to vote is a "fundamental matter in a free and democratic society").

123. See *Shapiro v. Thompson*, 394 U.S. 618, 630 (1965) ("The constitutional right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union.") (quoting *United States v. Guest*, 383 U.S. 745, 757-58 (1966)).

124. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (noting that "procreation [is] fundamental to the very existence and survival of the race").

## 1. Freedom of Movement

Exactly what “freedom of movement” entails and how curfews circumscribe that right, if at all, is a subject of some debate. While some courts define the right narrowly as the freedom of juveniles to be on the street unaccompanied at night, others argue that this construction is flawed, and the right at issue in curfew cases should be the right to movement.<sup>125</sup> Because juvenile rights and adult rights are not coequal, it seems more appropriate to define a child’s right to freedom of movement narrowly, rather than needlessly hamper the analysis of impediment erected by the state in a curfew: a restriction only on children in some circumstances during some hours of the night. The court’s opinion in *Hutchins* noted that the “more general is the right’s description, i.e., the freedom of movement of people, the easier is the extension of substantive due process.”<sup>126</sup> Thus, defining the right broadly risks a creation of a new fundamental right for children, and given the Court’s statements concerning the greater ability of the state to regulate children, it is counter to that premise to create new rights for children when the Court has been unwilling to create the same rights for adults.

One charge commonly leveled against juvenile curfew ordinances by those challenging their constitutionality is that the curfew restricts a minor’s right to freedom of movement.<sup>127</sup> The Supreme Court has not ruled on whether there exists a fundamental right to intrastate travel,<sup>128</sup> but the Court has indicated that such a right may

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125. Compare *Hutchins v. District of Columbia*, 188 F.3d 531, 538 (D.C. Cir. 1999) (en banc) (defining the right at issue as a “fundamental right to be on the streets at night without adult supervision”), with *id.* at 557 (Rogers, J., dissenting in part) (describing the right more broadly and arguing that it “should be defined more abstractly in two ways: first without regard to age, and second without regard to the manner in which it is exercised”).

126. *Hutchins*, 188 F.3d at 538.

127. See, e.g., *Johnson v. City of Opelousas*, 658 F.2d 1065, 1068 (Former 5th Cir. Oct. 1981) (including a claim by the plaintiff that the curfew at issue “violates the minor’s substantive due process rights under the Fourteenth Amendment to move freely”); *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1248 (M.D. Pa. 1975), *aff’d mem.*, 535 F.2d 1245 (3d Cir. 1976) (including a claim that the curfew “violates the constitutional right of intrastate travel”); *In re J.M.*, 768 P.2d 219, 221 (Colo. 1989) (including a claim that “the right to stroll, loiter, loaf, and use the public streets . . . is a fundamental right”).

128. One district court correctly observed that “[w]hile the Supreme Court has addressed the right to travel between the states, . . . it has not determined whether there is a fundamental right to intrastate travel.” *Townes v. City of St. Louis*, 949 F. Supp. 731, 734 (E.D. Mo. 1996) (noting the split in appellate courts over whether a right to intrastate travel exists) (citations omitted).

At least one judge has questioned the limitation of curfews to intrastate travel and hinted that they may, in some cases, burden interstate travel. See *Hutchins*, 188 F.3d 561 n.21 (Rogers, J., dissenting in part).



at least exist for adults.<sup>129</sup> In *Papachristou v. City of Jacksonville*, the Court addressed the constitutionality of a city vagrancy ordinance that made actions such as "nightwalking" a crime.<sup>130</sup> The Court referred to wandering, walking and strolling as "amenities of life," continuing on to say that they "have been in part responsible for giving our people [a] feeling of independence and self-confidence."<sup>131</sup> The Court noted that these "amenities" are nowhere to be found in the Constitution's text or in the Bill of Rights.<sup>132</sup> In fact, many courts have tried to find some fundamental right to freedom of movement in virtually every possible place it could be located within the Constitution.<sup>133</sup>

What is notable in the *Papachristou* decision, however, is that the ordinance and the Court's ensuing discussion necessarily focused on the freedom of adults, not children. The decision also never identified walking and loitering as rights; the Court merely stressed their importance to a free society.<sup>134</sup> Furthermore, in striking the ordinance down, the Court noted that the law would require poor people, nonconformists and others to "comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts."<sup>135</sup> This, the Court stated, was unacceptable.<sup>136</sup> Given the Supreme Court's lack of a definite statement concerning the right to intrastate travel, it is not difficult to see why lower courts have had such a difficult time trying to find a right to freedom of movement in the Constitution.<sup>137</sup>

Because the Court has never explicitly stated that a right to freedom of movement exists for adults even when given the opportunity, it seems difficult to say with any degree of certainty that minors have that right, much less that it is a fundamental right. Many cur-

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129. See generally *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (holding that a Florida law criminalizing repeated strolling, walking, or loafing was unconstitutional).

130. See *id.* at 163 ("The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent. 'Nightwalking' is one.")

131. *Id.* at 164.

132. See *id.* (noting that walking, strolling, and wandering "are not mentioned in the Constitution or in the Bill of Rights").

133. In *Lutz v. City of York*, the Third Circuit Court of Appeals stated that "[v]arious Justices at various times have suggested no fewer than seven different sources" for the right to travel. *Lutz v. City of York*, 899 F.2d 255, 260 (3d Cir. 1990). The court ultimately concluded that "such a right exists, and grows out of substantive due process." *Id.* at 256. Interestingly, the court used an intermediate standard of scrutiny to uphold the ordinance that prohibited cruising. See *id.* at 269.

134. See *Papachristou*, 405 U.S. at 164 (referring to them only as "amenities of life").

135. *Id.* at 170 (noting that the vagrancy ordinance was more likely to affect dissenters and the poor).

136. See *id.*

137. See *supra* notes 125-26 and accompanying text (noting the difficulties in defining the right to movement arguably implicated in juvenile curfew ordinances).

few, as noted, contain numerous exceptions to the broad, sweeping notion that minors can never be on the street at night.<sup>138</sup> As the District Court for the Middle District of Pennsylvania succinctly stated: “[t]he interests of minors in being abroad during the nighttime hours included in the curfew is not nearly so important to the social, economic, and healthful well-being of the community as the free movement of adults.”<sup>139</sup> It must be remembered that the rights at issue should be seen within the context of a curfew ordinance: limiting only movement at certain hours and of a certain age group with, typically, numerous exceptions.<sup>140</sup>

## 2. First Amendment Rights

Another common claim in the plaintiffs’ laundry list of violated rights is that juvenile curfew ordinances impinge upon the rights guaranteed by the First Amendment, namely the rights to freedom of speech, assembly, and association.<sup>141</sup> In the case of First Amendment rights, courts do not run into the same problem as when the right to freedom of movement is asserted because one need not look far to find

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138. See *supra* notes 19-23 and accompanying text.

139. *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1256 (M.D. Pa. 1975), *aff’d mem.*, 535 F.2d 1245 (3d Cir. 1976).

140. See *Hutchins v. District of Columbia*, 188 F.3d 531, 538 (“[J]uveniles do not have a fundamental right to be on the streets at night without adult supervision.”); *supra* notes 19-23 and accompanying text.

141. See, e.g., *Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843, 846 (4th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3484 (U.S. Jan. 19, 1999) (No. 98-1146) (listing, among allegations brought by plaintiffs, violation of rights under the First Amendment); *Hutchins*, 144 F.3d at 799 (“Their principle allegations were that the Act . . . violates their First Amendment rights to free speech and association.”); *Qutb v. Strauss*, 11 F.3d 488, 491 n.4 (5th Cir. 1993) (noting that plaintiffs asserted, inter alia, that the ordinance “impermissibly restricts First Amendment rights of free speech and free association”); *City of Milwaukee v. K.F.*, 426 N.W.2d 329, 333 (Wis. 1988) (noting appellants challenge the ordinance on the ground that it’s contrary to the First Amendment).

Often, the claim that a curfew ordinance infringes on First Amendment rights is grounded in a claim of overbreadth or vagueness. These two doctrines often arise in the context of curfew litigation, but this Note is limited in scope to claims based on the Equal Protection Clause; however, because this claim is often levied against curfews, a brief discussion is included here. Furthermore, the First Amendment context provides another palpable example of the distinction between juvenile and adult rights. An inartfully drafted curfew should fail under close constitutional scrutiny for reasons very different than equal protection classifications. For an example of a case striking down a curfew due solely to its overbreadth, see *Johnson v. City of Opelousas*, 658 F.2d 1065, 1074 (Former 5th Cir. 1981) (noting that its holding of unconstitutionality was “expressly limited to the unconstitutional overbreadth of the ordinance”). For an example of a court striking down a juvenile curfew as a result of it being too vague, see *Naprstek v. City of Norwich*, 545 F.2d 815, 818 (2d Cir. 1976) (expressly limiting their holding of the ordinance as unconstitutional due to “the constitutional infirmity presented by the lack of a termination time for the curfew”); see also *State v. J.D.*, 937 P.2d 630, 635-36 (Wash. Ct. App. 1997) (holding the curfew invalid and unconstitutionally vague).

that First Amendment rights are explicitly guaranteed in the text of the Constitution. However, the rule that the rights of minors are not coextensive with those of adults holds true in this setting as well.

Simply because claims of a First Amendment violation are included in the charges against a juvenile curfew and First Amendment rights are explicitly guaranteed in the Constitution, does not automatically lead to the conclusion that these rights should be accorded equal weight in the case of children and adults. For example, in *Ginsberg v. New York*, the Supreme Court held that a statute prohibiting children from purchasing adult magazines was constitutional; although such a statute implicates the child's First Amendment rights.<sup>142</sup> Also, in *Prince v. Massachusetts*, the Court upheld a statute prohibiting children from selling religious literature on the street; although, this statute obviously burdened the child's right to freedom of religion and speech.<sup>143</sup> Even within the context of the First Amendment guarantees, a child's right is not coextensive with an adult's rights.

## V. THE RIGHTS OF PARENTS

As was the case in *Prince*, and is the situation in many instances where juveniles are involved, two sets of liberties are at stake in a case involving parents and children: the child's rights and the parents' right to bring up their child without undue interference from the state.<sup>144</sup> The Supreme Court has recognized that parents have a right to be free in their homes to raise their children as they deem appropriate;<sup>145</sup> however, like virtually every right, this is not without qualification.<sup>146</sup> In some situations, the Court has stated that it is appropriate for the state to step in and either fill in where the parent is

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142. *Ginsburg v. New York*, 390 U.S. 629, 637 (1968) (holding that the statute does not invade the freedom of expression constitutionally secured to minors).

143. *See Prince v. Massachusetts*, 321 U.S. 158, 170-71 (1944) (holding the statute constitutional).

144. *See Prince*, 321 U.S. at 164 (finding that two liberty interests were implicated by the ordinance prohibiting children from selling magazines on the street or in public).

145. *See, e.g., Ginsberg*, 390 U.S. at 639 ("[T]he parent's claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.").

146. *See Prince*, 321 U.S. at 167 ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."); *see also City of Milwaukee v. K.F.*, 426 N.W.2d 329, 339 (Wis. 1988) ("[W]hile parental interests in rearing children without state or municipal interference may be impinged upon by the ordinance, we concur with the Supreme Court that where '[a]cting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control.'") (quoting *Prince*).

deficient or aid the parent in raising a child.<sup>147</sup> For example, the state forces children to attend school<sup>148</sup> and prohibits juveniles under a certain age from driving.

When analyzing the rights of parents and how they are, or are not, violated by juvenile curfews, it once again becomes necessary to contextualize and note that any possible infringement is limited in time and to children falling below a certain age.<sup>149</sup> Furthermore, many curfews contain provisions allowing the child to break the ordinance if he or she is on an errand for a parent or with one of them.<sup>150</sup> The only right claimed in these situations is the ability to raise a child as a parent sees fit, but very few curfews tread on this ability to any great extent,<sup>151</sup> and this should be weighed against the likelihood that, in many instances, a curfew can actually aid parents in controlling and raising their child.<sup>152</sup>

Courts using intermediate scrutiny have recognized that a fundamental right to raise a child may exist for parents; however, curfews do not ipso facto infringe this right.<sup>153</sup> While the Supreme Court has recognized that parents' control of the home and the raising of their children are rights that involve "intimate family decisions" and should be left to the parents rather than the state,<sup>154</sup> curfews do not interfere with this right to any significant degree.<sup>155</sup> Moreover, it may be the case that those decisions which would be affected by the curfew, that amount practically to allowing a child to be on the streets for no reason, are not within the decisions encompassed by the Supreme Court's

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147. See *Prince*, 321 U.S. at 166 ("[T]he state as *parens patriae* may restrict the parent's control . . .").

148. Although the state can force educational requirements on parents and children, the Court has noted the rights of parents to make some educational decisions regarding their children on more than one occasion. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

149. See *Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843, 853 (4th Cir. 1998) ("The Charlottesville ordinance, prohibiting young children from remaining unaccompanied on the streets late at night, simply does not implicate the kinds of family decisions considered [important in several Supreme Court cases]."); *Qutb v. Strauss*, 11 F.3d 488, 495 (5th Cir. 1993) ("this ordinance presents only a minimal intrusion into the parents' rights").

150. See *supra* notes 20-21 and accompanying text.

151. See *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1264 (M.D. Pa. 1975) ("The ordinance does not dictate to the parent an over-all plan of discipline for the minor.").

152. Many legislatures, in enacting curfews, set forth the reasons for its adoption. Foremost among the purposes is to aid the parents in carrying out their supervisory duty. See *supra* note 29 and accompanying text.

153. See *Hutchins v. District of Columbia*, 188 F.3d 531, 540-41 (D.C. Cir. 1999) (en banc).

154. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

155. See *Hutchins*, 188 F.3d at 540-41. *But see id.* at 549 (Edwards, J., concurring in part) ("[I]t should be clear that parents' rights cannot be limited to only those activities that are within the home or involve the formal education of one's child—such a formulation is too narrow.").

caselaw on parental rights.<sup>156</sup> With most curfews allowing exceptions for juveniles who are out with their parents or running an errand for them, it becomes difficult to formulate true examples of state usurpation of parental rights.<sup>157</sup>

## VI. THE CASE FOR INTERMEDIATE SCRUTINY

The Supreme Court stated that "[t]he question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer."<sup>158</sup> Yet, this is precisely the issue before courts when they determine whether a juvenile curfew ordinance impinges upon the fundamental rights of minors and violates the Equal Protection Clause of the United States Constitution. As mentioned above, one of the primary reasons lower courts have reached such divergent conclusions on juvenile curfew ordinances is the lack of guidance by the Supreme Court concerning which standard of scrutiny to use when deciding whether the curfew passes constitutional muster. Courts have reached opposite conclusions on curfews when the language contained in each is virtually identical.<sup>159</sup> This makes it difficult not only for lower courts to determine which ordinances impinge upon the constitutional rights of juveniles, but also for cities wishing to enact a curfew law with proper language. The resulting decision may depend more on the circuit in which the city is located rather than the provisions of the curfew law itself.

For two reasons, the intermediate standard of scrutiny is the appropriate mode of analysis in juvenile curfew cases. First, many of the same reasons supporting the use of intermediate scrutiny in the case of gender classification are also true in the curfew context. Second, the intermediate standard is the only standard available that strikes the appropriate balance between the rights at issue and the interests of the state.

As already mentioned, the intermediate standard of scrutiny developed in order to create a standard with which to judge statutes with classifications based on gender. Why did the Court deem it nec-

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156. *See id.* at 541.

157. *See id.* at 545 ("The curfew's defenses allow the parents *almost* total discretion over their children's activities during curfew hours.").

158. *Carey v. Population Servs. Int'l.*, 431 U.S. 678, 692 (1977).

159. Compare *Qutb v. Strauss*, 11 F.3d at 496 (holding the curfew constitutional), with *Hutchins ex rel. Owens v. District of Columbia*, 144 F.3d 798, 817 (D.C. Cir. 1998) (holding the curfew unconstitutional).

essary to create a new, intermediate standard between rational basis and strict scrutiny? Several considerations are present in the Court's decisions regarding why an intermediate standard of scrutiny is appropriate for these cases. First, the Court has consistently pointed to the fact that the United States has had a "long and unfortunate history of sex discrimination"<sup>160</sup> that has resulted in women being vastly underrepresented in decision-making bodies.<sup>161</sup> This observation suggests that because women are politically underrepresented, they deserve a stricter and more rigorous standard of analysis than mere rational basis review if a statute unfairly targets them. If this is the case, then intermediate scrutiny should likewise be applicable to the powerless political class of juveniles who have little inroads into the political system in order to be heard.

A second reason the Court has argued that gender-based classifications are deserving of a stricter standard than rational basis is because sex, like race, "is an immutable characteristic determined solely by the accident of birth."<sup>162</sup> While age, in the case of juvenile curfews, is distinguishable from both sex and race, it too is an immutable characteristic determined by the accident of when a person was born. Also, the accident of age at any given time is not a characteristic that was voluntarily entered into, and, thus, the legal burden bears no relationship to individual responsibility, a "basic concept of our system" according to the Court.<sup>163</sup>

The answer to the question of which standard should be employed by courts in reaching a decision on the constitutionality of ju-

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160. *United States v. Virginia*, 518 U.S. 515, 531 (1996); see also *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) ("[O]ur Nation has had a long and unfortunate history of sex discrimination."). In *Frontiero*, this argument was used by four Justices to argue that gender should be recognized as a suspect class, like race. In *United States v. Virginia*, however, the Court applied the traditional intermediate level of analysis. The traditional intermediate scrutiny has asserted itself as the proper mode of analysis for gender-based classifications; although, after *Frontiero* there was some doubt. Justice Rehnquist noted in his dissent to *Craig v. Boren* that "[t]he only redeeming feature of the Court's opinion . . . is that it apparently signals a retreat by those who joined the plurality opinion in *Frontiero* . . . from their view that sex is a 'suspect' classification for purposes of equal protection analysis." *Craig v. Boren*, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting); see also *Virginia*, 518 U.S. at 558-59 (Scalia, J., dissenting) (noting that since the Court's decision in *Craig v. Boren*, the Court has used the intermediate standard of scrutiny in deciding gender-based classifications under the Equal Protection Clause and citing a host of case law in support of this proposition).

161. See *Frontiero*, 411 U.S. at 686 n.17 ("[W]omen do not constitute a small and powerless minority . . . [but] because of past discrimination, women are vastly under-represented in the Nation's decisionmaking councils.").

162. *Id.* at 686.

163. *Id.* (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)). The Court has also refused to grant illegal aliens suspect class status since their illegality is within their control and a "product of voluntary action." *Pyler v. Doe*, 457 U.S. 202, 219 n.19 (1982).

venile curfew ordinances under the Equal Protection Clause of the Fourteenth Amendment is an intermediate standard. Not only does the Court's analysis in gender-based cases bear this out, but the intermediate standard is the only one that adequately balances the juveniles' and parents' rights with the interests of the state. As demonstrated above, the rights of juveniles are not coequal with those of adults,<sup>164</sup> and while curfews could impinge on the rights of juveniles, the standard of scrutiny used to evaluate the ordinance should not be as grueling as the one used to determine a law applying to adults. Nor should the standard be so lax as to overlook juvenile rights. The Court has reiterated this position in the last decade noting that "the State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."<sup>165</sup>

The proper standard, then, should be one that recognizes both the strong interest the state has in regulating children's behavior and the fact that minors' rights do not equal the rights of adults. Strict scrutiny is used to protect fundamental rights in the case of adults, but the rights of minors and the power of the state to regulate those rights is not considered in that context. Rational basis, on the other hand, does not accord the rights at issue enough respect.<sup>166</sup> Freedom of movement, while not fundamental, is nonetheless an important right, and First Amendment rights are certainly worthy of protection.<sup>167</sup>

When the fundamental rights of an adult are infringed, strict scrutiny is in order.<sup>168</sup> This proposition seems beyond dispute. As already noted, however, the Court has given three reasons why the constitutional rights of children can *not* be equated with adults' rights.<sup>169</sup>

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164. See *supra* Part IV.A.

165. *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990). The Court has long held to this view. See *supra* notes 98-103 and accompanying text.

166. See *Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998) (stating that a curfew ordinance that restricts the liberty of children should be subject to something more demanding than rational basis review).

167. As noted, almost all curfews contain an explicit exception for juveniles who are exercising their First Amendment rights. A curfew without such an exception may unduly burden First Amendment rights and, therefore, violate the Constitution.

168. See *supra* notes 52-56 and accompanying text.

169. See *supra* notes 110-16 and accompanying text. The three reasons the Court articulated—the peculiar vulnerability of children, their inability to make critical decisions in an informed manner, and the importance of the parental role in child rearing—are all implicated in the case of a juvenile curfew ordinance. See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (stating the three reasons); *Hutchins ex rel. Owens v. District of Columbia*, 144 F.3d 798, 809 (D.C. Cir. 1998) ("[J]uvenile curfews arise in a context in which children are more vulnerable than adults and in which children's lesser ability to make important decisions wisely could cause them harm.") (citations omitted).

Several courts have used the intermediate standard of scrutiny recently, recognizing that strict scrutiny is too demanding a standard to employ when dealing with rights that the state has greater leeway in regulating.<sup>170</sup> In order to correctly balance the compelling state interests at issue in juvenile curfew cases—curbing crime committed by juveniles and protecting them from crime—with the rights which are no doubt present but which the state has greater power over, the appropriate standard to use is an intermediate one. It is the only standard available that recognizes the importance of the rights at issue while at the same time recognizing that those rights are not as absolute and immune from state regulation as the same rights of adults.

## VII. CONCLUSION

As legislatures attempt to deal with the problems of crime and drug use in cities, juvenile curfew ordinances are an option many may choose to pursue, if they have not already. Curfews do restrict juveniles from freely moving around whenever they may choose to do so; however, when the state's interest is so high in protecting its citizens, both young and old, from crime, a court should be aware of the interests at stake. Use of strict scrutiny would make it much more difficult for cities and towns to enact constitutional juvenile curfew ordinances. But the rights impeded by these ordinances are worthy of protection by the courts as well. Legislatures should not have a blank check allowing them to ignore juveniles' rights; however, the compelling interest the state has should, likewise, be a consideration in any court's analysis. When these factors are acknowledged and properly weighed against one another, the intermediate standard of scrutiny appears to balance the competing interests at issue in a way that both rational basis review and strict scrutiny do not. If the curfew is properly drafted, and the courts give the legislatures some leeway under intermediate scrutiny, a curfew both allows the state to regulate the movement of minors at night and allows the state to accomplish its goal of protection.

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170. See *Hutchins*, 188 F.3d at 541; *Schleifer*, 159 F.3d at 847.

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