

Juvenile Curfews and Fundamental Rights Methodology

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In the 1990's, juvenile curfews became popular with municipal legislators. However, they were not greeted enthusiastically by all juveniles, and as a result, the constitutional legitimacy of these ordinances has been litigated in four federal courts of appeals, producing decisions that display an unusually diverse split of opinion. Three different standards of review—from strict to minimum scrutiny—have been applied to the equal protection claims raised in the cases. Only two circuits agree on the standard of review to apply to the equal protection claims, and those two disagree on the result. Two circuits concluded that the fundamental parental right to rear children protected by substantive due process was not implicated; the other two seemed to think it was implicated but not infringed. Woven throughout the cases are the problems of vagueness and, depending on the sweep of the ordinance involved, free speech. The result is a dissonant body of law that, were it music, would make even the devoted fans of Arnold Schonberg cringe.

The first part of this essay is descriptive; it compares the approaches taken by the four federal courts of appeals—the Fourth, Fifth, Ninth, and D.C. Circuits—that have spoken to this issue. The second part of this essay evaluates these various approaches and offers some thoughts not only on the specific issue of juvenile curfews but also on the larger issue of judicial enforcement of constitutionally unenumerated rights.

I. A Tale of Four Circuits

A. The Fifth Circuit

In order to protect children from nocturnal dangers, reduce

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juvenile crime, and foster parental involvement in their children's lives, the Dallas City Council in 1991 enacted a curfew ordinance that made it a misdemeanor for persons under age seventeen "to use the city streets or to be present at other public places within the city . . . from 11 p.m. until 6 a.m. on week nights and from 12 midnight until 6 a.m. on weekends."¹ The ordinance did not apply to married or emancipated persons, and excepted from its coverage persons under age seventeen accompanied by a parent or guardian, on an errand for a parent or guardian, in a motor vehicle traveling interstate or to or from a place of employment, when present on the sidewalk in front of their own or a neighbor's home, during an emergency, or when involved in "employment related activities" or exercising their "First Amendment speech and associational rights."² Parents of affected teenagers filed suit in federal district court, challenging the constitutional validity of the ordinance and seeking to enjoin its enforcement.³ After trial, the district court ruled that the ordinance violated the Constitution's guarantees of equal protection and free association, and permanently enjoined its enforcement.⁴ On appeal, in *Qutb v. Strauss*,⁵ the Fifth Circuit reversed.

The Fifth Circuit assumed, but was careful not to hold, that the right to move about freely is a fundamental right for purposes of the equal protection clause.⁶ Accordingly, the Court of Appeals applied strict scrutiny.⁷ The court thought it almost self-evident that the state had a "compelling interest in increasing juvenile safety and decreasing juvenile crime."⁸ The question then became whether the ordinance was "narrowly tailored" to fit those compelling objectives. "To be narrowly tailored, there must be a nexus between the stated government interest and the classification created by the ordinance, [such] 'that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate.'"⁹ Statistical evidence produced by the state to the effect that most crime occurs during the nocturnal hours of the curfew was

1. *Qutb v. Strauss*, 11 F.3d 488, 490 (5th Cir. 1993).

2. *Id.*

3. *See id.* at 491.

4. *See id.*

5. *Id.* at 496.

6. *See Qutb*, 11 F.3d at 492.

7. *See id.*

8. *Id.* at 493.

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

sufficient to establish the close fit required by strict scrutiny; the court saw no need for the city to show that juvenile crime or juvenile victimhood was closely associated with the curfew hours.¹⁰ The court also thought that the exceptions in the ordinance narrowed its scope sufficiently that it was “the least restrictive means of accomplishing its goals.”¹¹

The parent-plaintiffs in *Qutb* claimed that the ordinance violated “their fundamental right of privacy because it dictates the manner in which their children must be raised.”¹² The court thought this claim was overstated: “[T]his ordinance presents only a minimal intrusion into the parents’ rights [because] the only aspect of parenting that this ordinance bears upon is the parents’ right to allow the minor to remain in public places, unaccompanied by a parent or guardian or other authorized person, during the [curfew] hours.”¹³ Parental testimony that the ordinance interfered with the parental desire to permit her college-bound daughter “the opportunity to learn to manage her time and make decisions before going away to college [was] insufficient to support the district court’s finding that the ordinance unconstitutionally infringed the liberty and privacy interests of parents.”¹⁴ The court did not discuss the city’s justifications for its “minimal intrusion” upon the parental liberty interest, presumably because the court thought that the claimed parental liberty interest was simply not implicated because the ordinance interfered so insubstantially with the parental interest.¹⁵

B. The Ninth Circuit

In 1947, San Diego enacted a juvenile curfew that made it unlawful for anyone under age eighteen:

to loiter, idle, wander, stroll or play in or upon the public streets, highways, roads, alleys, parks, playgrounds, wharves, docks, or other public grounds, public places and public buildings, places of amusement and entertainment, vacant lots or other unsupervised places, between the hours of ten o’clock P.M. and daylight immediately following.¹⁶

The ordinance contained four exceptions: accompaniment by a

10. *See id.* at 493.

11. *Id.*

12. *Qutb*, 11 F.3d at 495.

13. *Id.*

14. *Id.* at 496.

15. *Id.* at 495-96.

16. *Nunez v. City of San Diego*, 114 F.3d 935, 938 (9th Cir. 1997).

parent, guardian, or authorized adult, performance of an emergency errand dictated by a parent or other custodial adult, returning directly home from a school-sponsored event, or activity connected with and required by some legitimate business in which the minor is engaged.¹⁷ In 1994, the San Diego City Council resolved “to enforce the curfew aggressively.”¹⁸ A facial challenge to the constitutional validity of the ordinance was brought in federal court by minors and their parents.¹⁹ The district court granted summary judgment for the city of San Diego.²⁰ On appeal, in *Nunez v. City of San Diego*,²¹ the Ninth Circuit reversed.

First, the court concluded that the nocturnal conduct prohibited to minors by the ordinance—to “loiter, wander, idle, stroll, or play”—was unconstitutionally vague and thus violated the due process guarantee.²² The California courts had interpreted this phrase to mean something narrower than mere presence but had failed to explain adequately the difference.²³ The district court had treated the phrase to refer to “hanging out,” an activity that, according to the district court, “requires a degree of aimlessness.”²⁴ Perhaps only in California would the term “hanging out” be used as a legal term of art; but it failed to impress the Ninth Circuit panel, which thought that “‘hanging out’ and ‘aimless conduct’ . . . are as inherently vague as the phrase ‘loiter, wander, idle, stroll or play’ itself.”²⁵ The Ninth Circuit thought that the ordinance would not be unconstitutionally vague if it prohibited “all juvenile nocturnal presence,” but warned that such a broad reading might “unconstitutionally burden the [substantive] rights of minors and their parents.”²⁶ Such a broad reading of the San Diego ordinance was implausible, not only because of the narrower construction provided by the California courts but also because it would render at least three of the statutory exceptions wholly superfluous, a fact that suggested that San Diego intended to

17. *See id.* at 938-39.

18. *Id.* at 939.

19. *See id.*

20. *See id.*

21. *Id.* at 938.

22. *Id.* at 940-44.

23. *See id.* at 942.

24. *Nunez*, 114 F.3d at 941.

25. *Id.* at 941.

26. *Id.* at 943.

make criminal something less than mere presence.²⁷

Second, the court applied strict scrutiny to the plaintiffs' equal protection claim.²⁸ Age, of course, is not a suspect classification, but the court of appeals concluded that "[c]itizens have a fundamental right of free movement,"²⁹ and that minors are as entitled to that right as any other citizen. The fact that minors are constantly subject "to the control of their parents or guardians"³⁰ was treated as irrelevant to the question of whether minors possessed such a fundamental right "vis-a-vis the state."³¹ But since "the State has somewhat broader authority to regulate the activities of children than of adults" the court found it necessary "to examine whether there is any significant state interest in [regulating the free movement of minors] that is not present in the case of an adult."³²

In *Bellotti v. Baird*,³³ the Supreme Court identified three reasons why the state might have a heightened interest in restricting the freedom of minors more than adults: "(1) the peculiar vulnerability of children, (2) their inability to make critical decisions in an informed, mature manner; and (3) the importance of the parental role in child rearing."³⁴ Those factors, said the Ninth Circuit, are relevant to determining whether the state has a sufficiently compelling interest to infringe the constitutionally fundamental liberty of minors in free movement.³⁵ San Diego had a compelling interest in "protecting the entire community from crime"³⁶ and had a particularly "compelling interest in reducing juvenile crime and juvenile victimization."³⁷ But the ordinance was not sufficiently narrowly tailored to accomplish these interests. The Ninth Circuit required a stronger statistical demonstration of the link between juvenile crime and victimization and the curfew hours than the Fifth Circuit mandated in *Qutb v. Strauss*.³⁸ Moreover, the Ninth Circuit failed to provide enough

27. *See id.* at 941.

28. *See id.* at 944-48.

29. *Id.* at 944.

30. Nunez, 114 F.3d at 944, quoting *Vernonia School Dist. v. Acton*, 515 U.S. 646, 654 (1995).

31. *Id.* at 945.

32. *Id.*

33. 443 U.S. 622 (1979).

34. Nunez, 114 F.3d at 945.

35. *See id.* at 945.

36. *Id.* at 946.

37. *Id.* at 947.

38. *See* Nunez, 114 F.3d at 948-49.

exceptions for legitimate activities, with or without parental permission.³⁹

Furthermore, the ordinance's failure to provide any exception for fundamental First Amendment rights rendered the ordinance unconstitutionally overbroad.⁴⁰ The ordinance was subject to overbreadth analysis because it "restricts access to any and all public forums."⁴¹ Although the ordinance was content-neutral in its impact on free expression, it was not "narrowly tailored to a significant government interest."⁴² While the "physical and psychological well-being of minors is a compelling government interest,"⁴³ the near-total and complete denial of minors' nocturnal access to public fora was proof of its shabby tailoring to that objective. "[T]he ordinance is not narrowly tailored because it does not sufficiently exempt legitimate First Amendment activities from the curfew."⁴⁴

Finally, the Ninth Circuit concluded that the ordinance also "violates the plaintiff parents' substantive due process rights . . . to rear children without undue governmental interference. . . . The curfew is, quite simply, an exercise in sweeping state control irrespective of parents' wishes."⁴⁵ Unlike valid laws that require a minor to consult with a parent or obtain judicial approval prior to terminating pregnancy short of term,⁴⁶ the San Diego curfew in no way supported parental authority to rear children. Under the ordinance, "parents cannot allow their children to function independently at night, which some parents may believe is part of the process of growing up."⁴⁷

C. The Fourth Circuit

In December, 1996, Charlottesville, Virginia adopted a juvenile curfew ordinance that was virtually identical to the Dallas ordinance

39. *See id.*

40. *See id.*

41. *Id.* at 950.

42. *Id.* at 951, citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

43. *Id.*, citing *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989).

44. *Id.*

45. *Nunez*, 114 F.3d at 951-952. The court also quoted *Hodgson v. Minnesota*, 497 U.S. 417, 446-47 (1990): "The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to the American tradition."

46. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 638-39 (1979).

47. *Nunez*, 114 F.3d at 952.

upheld in *Qutb v. Strauss*.⁴⁸ A group of plaintiffs consisting of five affected minors, a young adult who contended that the ordinance interfered with his ability to associate with minors, and two parents of affected minors challenged the constitutional validity of the ordinance in federal district court.⁴⁹ The district court sustained the validity of the ordinance and, in *Schliefer v. City of Charlottesville*,⁵⁰ the Fourth Circuit affirmed the district court.⁵¹

In considering the plaintiffs' equal protection claims, the court concluded that minors possess "qualified rights... [but] do not possess the same rights as adults."⁵² Accordingly, "the ordinance should be subject to less than the strictest level of scrutiny."⁵³ It should be no surprise that the court concluded that intermediate scrutiny was "the most appropriate level of review."⁵⁴

The interests that other circuits had found compelling—reduction of juvenile crime and protection of juveniles from crime—were equally compelling to the Fourth Circuit. In addition, the court concluded that Charlottesville's interest in "strengthen[ing] parental responsibility for children"⁵⁵ was also compelling. Of course, intermediate scrutiny requires only that the government prove that its objectives are "important;" the court's conclusion that these objectives were compelling amounted to a dictum declaration that strict scrutiny would also be satisfied as to the governmental interests in imposing a curfew.⁵⁶ For the curfew ordinance to be "substantially related" to the accomplishment of these important governmental objectives, the court required Charlottesville to prove that the curfew is "a meaningful step toward solving a real, not fanciful problem [by demonstrating] 'that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'"⁵⁷ The plaintiffs argued that the ordinance was defective in scope, in that the failure to include

48. Compare *Qutb v. Strauss*, 11 F.3d 488, 496-499 (5th Cir. 1993) with *Schliefer v. City of Charlottesville*, 159 F.3d 843, 852, 855-858 (4th Cir. 1998).

49. See *Schliefer*, 159 F.3d at 846.

50. See *id.* at 843.

51. See *id.* at 855.

52. *Id.* at 847.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 849, quoting *Turner Broadcasting System v. FCC*, 512 U.S. 622, 664 (1994).

seventeen-year-old minors left the law “impermissibly underinclusive.”⁵⁸ However, the court’s reaction was to conclude, as is commonly done under minimal scrutiny, that such judgments are effectively immune from judicial review.⁵⁹ The Schliefer Court stated:

[T]he City’s decision to exclude seventeen-year-olds from coverage under the curfew is a legislative judgment that we are loath to second-guess. . . [The] City was forced to balance the law enforcement benefit of subjecting seventeen-year-olds to the curfew against the greater law enforcement burden of doing so. Weighing benefits and burdens is what legislatures are about.⁶⁰

Plaintiffs’ arguments that the curfew was ineffective were equally unavailing. The presence of statistical and anecdotal evidence vouching for the utility of the ordinance, coupled with corroborating testimony of local law enforcement officers, was enough to satisfy the government’s burden of proving that the ordinance would, in fact, directly and materially contribute to the achievement of the government’s objectives.⁶¹

The claimed parental right “to direct their children’s upbringing without undue government interference”⁶² was treated by the court as too general to be useful. Perhaps heedful of the Supreme Court’s admonition that “we have required in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest,”⁶³ one that is rooted in our national “history, legal traditions, and practices [in order to] provide the crucial ‘guideposts for responsible decisionmaking’ that direct and restrain our exposition of the Due Process Clause,”⁶⁴ the Fourth Circuit concluded that a parental interest in permitting “young children from remaining unaccompanied on the streets late at night simply does not implicate the kinds of intimate family decisions.”⁶⁵ This proposition was recognized in such cases as *Wisconsin v. Yoder*,⁶⁶ *Stanley v. Illinois*,⁶⁷

58. *Id.*

59. *See id.* at 850

60. *Id.*

61. *See Schliefer*, 159 F.3d at 850-851.

62. *Id.* at 852.

63. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

64. *Id.*

65. *Schliefer*, 159 F.3d at 853.

66. *See* 406 U.S. 205 (1972) (recognizing interest of parents of Old Order Amish children to cease formal education for their children in violation of compulsory education law because the law interfered with “traditional concepts of parental control over the religious upbringing and education of their minor children”).

and *Meyer v. Nebraska*.⁶⁸

Finally, the court concluded that the exception contained in the ordinance for "First Amendment activities" was not unconstitutionally vague, at least in the context of the facial challenge presented.⁶⁹ "The First Amendment exception provides adequate notice to citizens. It is perfectly clear that core First Amendment activities such as political protest and religious worship after midnight would be protected. It is equally clear that rollerblading would not. Between these poles lie marginal cases, which can be taken as they come."⁷⁰ The exceptions provided for participation in activities sponsored by civic organizations and where a minor is involved in an emergency were also regarded as adequately specific. The term "civic organizations" was defined in the ordinance to include school and religious organizations; that definition was an everyday use of the term civic, sufficient to make the exception not an "ambiguity of constitutional magnitude."⁷¹ Similarly, "[w]hile 'there is little doubt that imagination can conjure up hypothetical cases' to test the meaning of emergency, these speculative musings do not render this term unconstitutionally vague."⁷²

D. The D.C. Circuit

In 1995, the District of Columbia Council adopted a juvenile curfew ordinance nearly identical to the Dallas and Charlottesville ordinances.⁷³ The ordinance was challenged by affected minors, parents, and a private business.⁷⁴ A federal district court granted summary judgment to the plaintiffs and enjoined enforcement of the ordinance, concluding that the ordinance infringed upon the minors' fundamental right to freedom of movement, the parents' fundamental right to raise their children free of undue state interference, and was

67. See 405 U.S. 645 (1972) (recognizing "the interest of a parent in the companionship, care, custody, and management" of his children as sufficient to defeat a state presumption that an unmarried single father was an unfit parent).

68. See 262 U.S. 390 (1923) (recognizing "the natural duty [and implicit right] of the parent to give his children education suitable to their station in life" as sufficient to void a state law against teaching of foreign languages).

69. Schliefer, 159 F.3d at 853-55.

70. *Id.* at 854.

71. *Id.*

72. *Id.*, quoting *American Communications Ass'n v. Douds*, 339 U.S. 382, 412 (1950).

73. Compare *Qutb*, 11 F.3d at 496-99 with *Schliefer*, 159 F.3d at 855-58 and with *Hutchins v. District of Columbia*, 942 F. Supp. 665, 681-84 (D.D.C. 1996).

74. See *Hutchins v. Dist. of Columbia*, 942 F. Supp. 665 (D.D.C. 1996)

void for vagueness.⁷⁵ A divided panel of the D.C. Circuit affirmed, but on rehearing *en banc* the D.C. Circuit, in *Hutchins v. District of Columbia*,⁷⁶ reversed the district court and upheld the validity of the ordinance.⁷⁷ A plurality of the court, in an opinion by Judge Silberman, thought “that the curfew implicates no fundamental rights of minors or their parents,”⁷⁸ and a majority, also led by Judge Silberman, concluded that “[e]ven assuming the curfew does implicate such rights . . . it survives heightened scrutiny.”⁷⁹ The level of heightened scrutiny to which the majority subjected the ordinance was intermediate scrutiny.⁸⁰

The plurality thought that there was no such thing as a substantive fundamental right to free movement. That term is merely “a synonym for the right to liberty,” a right the invasion of which “is constitutionally permissible if the person whose liberty has been curtailed is afforded due process.”⁸¹ The plurality agreed that there is a well-established constitutional right to interstate travel,⁸² but noted that the right originated in “a concern over state discrimination against outsiders rather than concerns over the general ability to move about.”⁸³ The foreign travel cases do not support the claim because *Haig v. Agee*⁸⁴ characterized foreign travel as a liberty “subject to reasonable government regulation within the bounds of due process, whereas interstate travel is a fundamental right subject to a more exacting standard. . . . Since the right to free movement would cover both interstate and international travel, *Agee* at least implies that the right recognized by the Court is decidedly more narrow.”⁸⁵ The vagrancy cases—*Kolender v. Lawson*⁸⁶ and *Papachristou v. City of Jacksonville*⁸⁷—were no more help. The

75. *See id.* at 680.

76. 188 F.3d. 531, 534 (D.C. Cir. 1999).

77. *See id.* at 548.

78. *Id.* at 534.

79. *Id.*

80. *See id.* at 541.

81. *Id.* at 536.

82. *See, e.g., Saenz v. Roe*, 526 U.S. 489 (1999); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

83. *Hutchins*, 188 F. 3d at 536.

84. 453 U.S. 280 (1981) (upholding passport revocation where the holder’s foreign actions are causing or likely to cause serious injury to national security).

85. *Hutchins*, 188 F. 3d at 537.

86. 461 U.S. 352 (1983).

87. 405 U.S. 156 (1972).

vagrancy ordinances struck down in those cases were voided for vagueness. In the plurality's view, "[w]hile vagrancy statutes certainly prohibit individuals from moving about, the constitutional infirmity in these statutes is not that they infringe on a fundamental right of free movement, but that they fail to give fair notice of conduct that is forbidden and pose a danger of arbitrary enforcement [-] they do not afford *procedural* due process."⁸⁸ Finally, the Supreme Court has never held that there is a right of *intrastate* travel, and the federal circuits are split on the issue.⁸⁹

The plurality also noted that the Supreme Court "has warned us that our analysis must begin with a careful description of the asserted right for the more general is the right's description . . . the easier is the extension of substantive due process. . . . For that reason we must ask not whether Americans enjoy a general right of free movement, but . . . do minors . . . have the right to freely wander the streets—even at night? . . . We think that juveniles do not have a fundamental right to be on the streets at night without adult supervision."⁹⁰ This conclusion was bottomed not only on the "careful description" admonition, but also on an extrapolation from *Reno v. Flores*,⁹¹ to the effect that minors have no freestanding right to move about freely because "juveniles, unlike adults, are always in some form of custody."⁹² Moreover, the plurality thought it logically inconsistent to recognize the claimed right when it has already been established that governments may curb the freedom of movement of minors without impinging on any fundamental constitutional rights through such things as compulsory school attendance and child labor laws, and by means that are "far more intrusive" than the curfew.⁹³ Finally, the

88. Hutchins, 188 F. 3d at 537 (emphasis in original).

89. *Compare* King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646 (2d Cir. 1971) (concluding that a five year residency requirement for eligibility for municipal housing infringed a right to intrastate travel) *with* Wardwell v. Bd. of Ed. of Cincinnati, 529 F.2d 625 (6th Cir. 1976) *and* Wright v. City of Jackson, 506 F. 2d 900 (5th Cir. 1975) (both rejecting a claimed fundamental right of intrastate travel). *See also* Lutz v. City of York, 899 F.2d 255 (3d Cir. 1990), the most germane case to this question, in which the Third Circuit applied intermediate scrutiny to void a municipal ordinance prohibiting "cruising," the repeated driving around a circuit of the public thoroughfares. The Third Circuit believed that there was a right to move freely around one's place of residence.

90. Hutchins, 188 F.3d at 538.

91. 507 U.S. 292 (1993).

92. *Id.* at 302 (quoting Schall v. Martin, 467 U.S. 253 (1984)).

93. Hutchins, 188 F.3d at 539. The intrusive practices cited by the court that did not even implicate any constitutionally fundamental rights were detention of deportable alien minors (*Reno v. Flores*, 507 U.S. 292 (1993)), pretrial detention of juvenile delinquents

plurality contended that “juvenile curfews were not uncommon early in our history,”⁹⁴ thus blunting any argument that juvenile freedom of nocturnal movement is deeply rooted in our history and traditions.

The plurality rejected the claimed parental right to direct and control their children’s upbringing without undue state interference, but not by the avenue of denying its existence. Rather, the plurality thought that this constitutionally fundamental right was simply “not implicated by the curfew.”⁹⁵ Reasoning much like the Fourth Circuit in *Schliefer*,⁹⁶ the plurality divined from the leading parental rights cases—*Meyer v. Nebraska*,⁹⁷ *Pierce v. Society of Sisters*,⁹⁸ and *Wisconsin v. Yoder*⁹⁹—the principle that the scope of the constitutionally fundamental parental right is “focused on the parents’ control of the home and parents’ interest in controlling . . . the formal education of children.”¹⁰⁰ A parent’s desire to determine unilaterally “when and if children will be on the streets . . . at night . . . is not among the ‘intimate family decisions’ encompassed by such a right.”¹⁰¹

A majority of the D.C. Circuit (including the Silberman plurality) concluded, however, that “[e]ven if the curfew implicated fundamental rights of children or their parents, it would survive heightened scrutiny.”¹⁰² The majority ruled that intermediate scrutiny was the appropriate level of review because, while children possess constitutional rights, “children’s rights are not coextensive with those of adults.”¹⁰³ The Court relied on *Prince v. Massachusetts*,¹⁰⁴ *Bellotti v. Baird*,¹⁰⁵ and *Carey v. Population Services International*,¹⁰⁶ for this

where there was a serious risk of harm (*Schall v. Martin*, 467 U.S. 253 (1984)), prohibiting children from street vending even when accompanied by a parent (*Prince v. Massachusetts*, 321 U.S. 158 (1944)), and a ban on sale of material to minors that would not be obscene if sold to adults (*Ginsberg v. New York*, 390 U.S. 629 (1968)).

94. *Hutchins*, 188 F.3d at 539.

95. *Id.* at 540.

96. 159 F.3d 843 (4th Cir. 1998).

97. 262 U.S. 390 (1923).

98. 268 U.S. 510 (1925).

99. 406 U.S. 205 (1972).

100. *Hutchins*, 188 F.3d at 541.

101. *Id.* (quoting *Schliefer*, 159 F. 3d at 853).

102. *Id.*

103. *Id.*

104. 321 U.S. 158 (1944).

105. 443 U.S. at 635.

106. 431 U.S. 678 (1977).

proposition, cases upholding restrictions on child labor, abortion access without parental consultation, and contraceptive access. A plurality of the Supreme Court, in *Bellotti*, asserted that “the State is entitled to adjust its legal system to account for children’s vulnerability;”¹⁰⁷ the D.C. court seized on this to conclude that “[t]his means, at a minimum, that a lesser degree of scrutiny is appropriate when evaluating restrictions on minors’ activities where their unique vulnerability, immaturity, and need for parental guidance warrant increased state oversight.”¹⁰⁸ Intermediate scrutiny followed almost axiomatically, since “juveniles [can] be thought to be more vulnerable to harm during curfew hours than adults, . . . they are less able to make mature decisions in the face of peer pressure, and are more in need of parental supervision during curfew hours.”¹⁰⁹ The ultimate conclusion flowed inexorably, since the statistical evidence of juvenile criminality and victimization in the District of Columbia during curfew hours was significant. Most juvenile arrests occurred during curfew hours,¹¹⁰ about a third of violent juvenile victimizations occurred on the streets (presumably during curfew hours),¹¹¹ and juvenile arrests during curfew hours dropped by over one-third during the first three months the curfew was in effect.¹¹² Since the government was “not obliged to prove a precise fit between the nature of the problem and the legislative remedy—just a substantial relation,”¹¹³ the court had no difficulty concluding that the evidence “adequately supports the relationship between the government’s interest and the imposition of the curfew.”¹¹⁴

The majority also applied intermediate scrutiny to the parental rights claim,¹¹⁵ presumably on the unarticulated theory that the parental right to permit one’s children to roam unaccompanied at night is wholly derivative of the minor’s claim to freedom of movement. In the majority view, the D.C. “curfew passes intermediate scrutiny because it is carefully fashioned much more to

107. 443 U.S. 622, 635 (1979).

108. Hutchins, 188 F.3d at 541.

109. *Id.*

110. *See id.* at 543.

111. *See id.* at 544.

112. *See id.*

113. *Id.* at 543.

114. Hutchins, 188 F.3d at 544.

115. *See id.* at 545.

enhance parental authority than to challenge it.”¹¹⁶ The court acknowledged that “[i]f the parents’ interests were in conflict with the state’s interests, we would be faced with a more difficult balancing of sharply competing claims,”¹¹⁷ but was convinced that no such conflict was posed by the curfew. The exceptions to the curfew, almost all of which were designed to confer upon parents “*almost* total discretion over their children’s activities during curfew hours,”¹¹⁸ preserved “parental discretion to direct the upbringing of their children” sufficiently [so] that the curfew did “not unconstitutionally infringe on such rights.”¹¹⁹

Finally, the majority made short work of the vagueness contentions, concluding in much the same manner as the Fourth Circuit in *Schliefer* that the exceptions for First Amendment activities, for participation in activities sponsored by “a civic organization, or another similar entity that takes responsibility for the minor,” for presence on the sidewalk in front of one’s own home or that of a neighbor, and during an emergency, were all sufficiently precise to inform a person of ordinary intelligence what conduct is prohibited and what is permitted.¹²⁰ This conclusion was no doubt buttressed by the fact that the challenge to the curfew law was a facial one.

E. A Merry-go-Round the Circuits.

Four circuits have considered the question of whether minors possess a fundamental right of free movement. The Fifth Circuit and a plurality of the D.C. Circuit think that such a right does not exist; the Fourth, Ninth and D.C. Circuits think it does, but the circuits have split on the appropriate level of review. The Fifth and Ninth Circuits applied strict scrutiny,¹²¹ but they reached different conclusions concerning two very different curfew laws. The Fourth and D.C. Circuits applied intermediate scrutiny and both these courts of appeals ruled that the government had sustained its burden of justification of virtually identical curfew laws.

Two circuits – the Fifth and Fourth – and a plurality of the D.C.

116. *Id.*

117. *Id.*

118. *Id.* (emphasis in original).

119. *Id.* at 546.

120. *Hutchins*, 188 F.3d at 546-48.

121. The Fifth Circuit assumed the existence of the right, but studiously avoided holding that it did in fact exist. See text following note 3, *supra*.

Circuit believe that juvenile curfew laws that exempt parental controlled juvenile nocturnal presence do not even implicate a parental right to rear children without undue government interference. This is because those courts think that the specific manifestation of the right – parental acquiescence in the uncontrolled nocturnal public presence of their children – is outside the scope of the constitutionally recognized parental right to rear children without undue state interference. The Ninth and D.C. Circuits are of the opinion that such curfew laws do implicate such a parental right, but they differ as to the level of scrutiny to apply and as to the outcome of that scrutiny. The Ninth Circuit, applied strict scrutiny and struck down the San Diego curfew ordinance before it; the D.C. Circuit applied intermediate scrutiny and upheld the D.C. ordinance. In a striking difference of opinion produced partly by the differing laws, the Ninth Circuit regarded the San Diego curfew as a pure superceding of parental authority while the D.C. Circuit regarded the D.C. ordinance as supportive of that authority.

The circuits views on vagueness are more uniform. The Ninth Circuit found unconstitutionally vague a curfew law with few exceptions that sought to ban such imprecise activities as loitering, wandering, idleness, strolling, or playing. The remaining circuits were confronted with curfew laws that banned all nocturnal public presence of affected minors save that included within a host of specific exceptions. All of these circuits agreed that the exceptions, though perhaps not a model of clarity, were clear enough to let the ordinary person know what conduct was permitted and what was prohibited.

We are left with a jagged division over whether a right of free movement exists, for anyone and particularly for minors, another division concerning the generality with which such a right should be stated, and a final division over the level of review to bring to curfew laws that circumscribe the free movement of minors late at night. An equally rough division exists on the question of whether the constitutionally fundamental right of parents to control their children's upbringing is even implicated by curfew laws that contain exemptions for parentally controlled nocturnal activities of minors, and also with respect to the subsidiary question of what level of review to apply to curfew laws that curb unlimited parental discretion to let their children do what they please during the hours of darkness. The resolution of these issues says much about our discourse concerning fundamental rights. I offer some thoughts on that topic in the next section.

II. As Much Liberty as the Law Allows

The intractable problem of unenumerated rights is definitional. To be sure, there are those who deny the validity of any unenumerated rights, but that contention is really an argument about the scope of such rights, since unenumerated rights are always connected, however tenuously, to some sliver of constitutional text. The argument is mostly about the generality with which such rights are to be stated. One explicit pole in that debate was staked out by Justice Scalia and Chief Justice Rehnquist in a footnote to the majority opinion in *Michael H. v. Gerald D.*,¹²² in which they asserted that fundamental rights must be defined at “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”¹²³ No other justice joined this footnote, however, and it sparked an impassioned dissent from Justice Brennan, who characterized it as stemming from a conception of the Constitution as a “stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past.”¹²⁴ While this approach has never explicitly commanded a majority of the Court, there is reason to think a softer version has slipped into the pantheon of *stare decisis*. When the Court, in *Washington v. Glucksberg*,¹²⁵ declared that an asserted fundamental right must be “carefully described” it implicitly demanded that such rights be stated at some uncertain level of specificity. Of course, the phrase is so Delphic that almost any level of generality (or specificity) can be accommodated, so long as the description of the general right is a model of care, but that, I suspect, is not what the majority of the Court intended.¹²⁶

The spectrum of debate in the courts of appeals, and particularly within the D.C. Circuit, spans the gamut of whether a claimed right of

122. 491 U.S. 110 (1989).

123. *Id.* at 127 n.6.

124. *Id.* at 141-42 (Brennan, J., dissenting).

125. 521 U.S. 702 (1997).

126. It is sheer speculation to say that the phrase represents a practical compromise between the advocates of rigid specificity—Justice Scalia, Chief Justice Rehnquist and (probably) Justice Thomas—and the advocates of a more flexible and temperate approach to the definition of fundamental rights, but who are nevertheless sympathetic to the perceived need to cabin the growth of amorphous and potentially all-encompassing rights. In the latter category probably reside Justices O'Connor and Kennedy, and perhaps other members of the Court. Reading the tea leaves of the Court is fun but dangerous. The reader is advised to take this footnote subject to the doctrine, now outmoded virtually everywhere else in law, of *caveat emptor*.

free movement should be phrased (most specifically) as a right of juveniles to be at large in public late at night without legitimate purpose, as a right of juveniles to be at large in public late at night, as a right of free movement of juveniles, and (most generally) as a right of free movement. The most specific tradition argument of Justices Scalia and Rehnquist would ask whether there is a tradition of permitting minors freedom to roam at will at night or whether there is a clear tradition of denying minors that freedom. In the absence of any such tradition, in either direction, the relevant question would become whether there is a tradition of permitting (or denying) minors freedom of movement. This is, of course, an inquiry that is largely bounded by history, but history is supposed to be our lodestar for identification of fundamental unenumerated rights. History, however, does not necessarily rule the present, however important it is to converse regularly with the past.

While we are parsing our traditions to locate useful specific traditions, we ought to be mindful of why we are doing. It is both to determine whether there is any such right embedded in our legal and social culture and to define such rights as do exist so that we can assess the government's justifications for their abrogation. The rigidly specific approach to unenumerated rights focuses exclusively on the first objective; the overly general approach focuses entirely on the latter objective. There is no virtue in creating constitutionally fundamental rights in the absence of any cultural tradition recognizing them, past or present, because that simply substitutes judicial discretion for legislative choice. I do not propose to travel again the worn path of debate over the degree to which the judiciary is anti-democratic; I take it as more or less established that the judiciary has no business trumping the judgments of the democratically elected representatives of the people unless there is a sound constitutional basis for doing so. With respect to unenumerated rights, *some* cultural tradition ought to support their existence before judges use them to veto the presumptively valid work of the people's representatives. But surely that is not the end of the matter. If we frame the claimed right so specifically that it subsumes into the definition of the right the very factors that are critical to justification of government limitations upon the ostensible right, we have imploded analysis in a fashion that is not conducive to responsible constitutional development.

To illustrate, consider the various forms of the movement right at issue in the juvenile curfew cases. If the putative right is couched as a right of juveniles to move about freely at night without adult

supervision, the reasons why the government might wish to limit this right – to reduce juvenile crime and juvenile victimization by criminals – become framed as reasons why juveniles do not possess such a right in the first instance. If the asserted right is reformulated as a right of juveniles to move about freely, the reasons why the government might wish to limit that right – to protect a vulnerable group not always possessed of sound judgment – become needlessly embroiled in argument over whether the right exists at all. As Judge Rogers stated, in a partial dissent and partial concurrence in *Hutchins*, “age should not be an element of the right at issue because the state interests that are relevant at the balancing stage of analysis do not aid... inquiry at the definitional stage.”¹²⁷ Moreover, bifurcation of whatever movement right that may exist into an adult right and a juvenile right implicitly assumes that the two rights are distinct, albeit related, as two different species of the same genus. *Homo sapiens* and *Homo habilis* may be related, but the two are distinctly different. Is there any relevant difference between a juvenile’s interest in free movement and an adult’s interest in free movement? In other words, is freedom of movement a genus of right, such that two different classes of people have different interests in its possession, and thus claim a different species of the right? One can imagine such rights. The right to terminate pregnancy prior to viability means considerably more to a pregnant woman than to her physician, or her male partner. But are there any such relevant differences between an adult’s interest in moving about in public unmolested by the police, and a teenager’s interest in the same thing? To ask the question is to answer it. The arguments supporting the conclusion that a teenager has a lesser interest in moving about freely are arguments, however sound, that focus upon the *state’s interests* in controlling that free movement. Such considerations are simply not relevant to the antecedent question of how to define a claimed right in order to determine whether it is constitutionally fundamental.

A characteristic of modern fundamental rights discourse is to treat the fundamental right as non-existent until the government has substantially infringed the right. The right to terminate an unwanted pregnancy prior to viability is fundamental, but not so fundamental that it cannot be duly burdened.¹²⁸ The right to marriage is fundamental, but not so fundamental that its exercise cannot be used

127. *Hutchins*, 188 F.3d at 555 (Rogers, J., dissenting and concurring).

128. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

as the basis for denial for welfare benefits.¹²⁹ The same holds true for the parental right to control the manner of the raising of one's children. It may be fundamental, but not so fundamental that a "minimal intrusion" upon that right will trigger any heightened scrutiny.¹³⁰ If fundamental rights are truly fundamental, they ought to retain that character consistently. A government may have adequate justification for infringing such rights, but the state ought to be required to prove that justification whenever a fundamental right is infringed. Instead, the state's interest in protecting potential human life, as manifested by a 24-hour waiting period before obtaining a pre-viability abortion or any other "duly burdensome" regulation, operates to depress the asserted right to some quasi-fundamental or non-fundamental status. This must be so, or the state would be required to prove that the infringement is necessary to achieve a compelling interest. Of course, the undue burden standard requires nothing of the sort.¹³¹

Much the same thing seems to be happening with the parental right to rear one's children free of undue state interference. Indeed, even the definition of the right leaves open considerable territory for state interference with the parental design for children. When the courts of appeals declare that the curfew laws are minimal intrusions upon the parental right and thus the government action need not be justified under any level of heightened scrutiny they are treating the parental right as non-existent. It may well be the case that juvenile curfew laws are justified, at least under intermediate scrutiny, because they are supportive of parental authority, but that argument must be made at the justification stage, not as part of a process of characterizing the injury as so minor as not to require justification.

The level of generality at which the scope of the parental right should be defined should be decided, not by reference to historical tradition alone, but also by reference to our cultural traditions. For example, it is a common cultural assumption that parents will

129. See, e.g., *Califano v. Jobst*, 434 U.S. 47 (1977).

130. *Qutb v. Strauss*, 11 F.3d 488, 495-96 (5th Cir. 1993).

131. It might be argued that "duly burdensome" abortion regulations are so minimal an impediment to abortion that they do not constitute an infringement at all. That gambit simply substitutes judicial evaluation of the magnitude of the harm to the right-holder for examination of the government's justification. Of course, some state-originated burdens on the exercise of fundamental rights are so trivial that government justification is virtually self-evident. Assuming the existence of a right of free movement, the familiar stop sign or traffic signal is surely an example of a trivial interference that is so obviously justified it hardly merits consideration.

command their children to go to bed at an hour dictated by the parent, but nobody would think that the state has any legitimate power to command adults to go to bed at an hour dictated by the state. Now suppose a government enacts legislation that requires all children under age ten to be in bed by 8 p.m. each weeknight. Does this law infringe upon a constitutionally fundamental parental right to rear one's children free from state interference? Of course it does, and part of the reason why is that the state could not dictate the same behavior to adults. Could a state require every child to be immunized against measles? It could, and part of the reason why is that it could also demand the same behavior from adults. In short, one way of focusing on the scope of the parental right is to ask whether the *juvenile* behavior the government regulates is equally susceptible to regulation when engaged in by adults. If it is not, it should be presumed that the behavior is for the parent's discretion, not the state's. That presumption can be overcome, but it should be overcome by adequate proof of the government's heightened interest in regulating the juvenile behavior in question, and the necessity of this particular regulation to achieving those goals. Thus, it should be a constitutionally fundamental liberty interest of parents to decide whether their minor children can be trusted to be on the streets late at night, but the government should have an opportunity to justify its invasion of that right. But it would not be a constitutionally fundamental liberty interest of parents to decide whether their children may smoke marijuana, or imbibe alcoholic beverages, because those activities are equally susceptible to government regulation when engaged in by adults.

This principle is consistent with the existing scope of the parental right. An adult's constitutional liberties would be infringed by a law prohibiting him from procuring private education¹³² or learning a foreign language,¹³³ or a law requiring him to attend school or work.¹³⁴ *Pierce*, *Meyer*, and *Yoder* mark out substantive rights, but also a domain of presumptive parental control.

You may ask why it is necessary to focus on the parental right at all, since the scope of the parental right is formed by the scope of fundamental rights generally. The answer is that the state may have different justifications for infringing the juvenile's substantive liberty interests and infringing the close kin of the parental right to rear

132. Cf. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

133. Cf. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

134. Cf. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

children. An example can be seen in the juvenile curfew cases. The government justifications for overriding the juvenile's rights to freedom of movement center on the importance of preventing juvenile crime and juvenile victimization, and the presumed vulnerability and less keen judgment possessed by juveniles. The state's justifications for infringing the parental right to make decisions about their children's welfare center on the importance of supporting parents in exercising responsible control over the nocturnal movements of children. Those are distinctly different, albeit related, interests, and it is conceivable that a court might conclude that the state is justified in infringing the minor's right of freedom of movement but lacks justification to invade the parental right. Perhaps this is a distinction without a difference, but analytic clarity seems to require the distinction. Moreover, the distinction might make a subtle difference. Suppose that a Dallas-type juvenile curfew, containing multiple exceptions for many (but not all) parentally authorized juvenile activities, was upheld against a minor's assertion that it violates his freedom of movement, but struck down because it impermissibly infringes the parents' right of child-rearing. The legislative reaction might well be a juvenile curfew with an omnibus exception that permits any juvenile nocturnal public presence so long as the juvenile is authorized by the parent to be out and about. Surely this would not infringe the parental right. The result would be to push governments to recognize that parents have the primary right to govern their children's otherwise lawful activities.

What level of scrutiny should apply to the juvenile's right to free movement and to the parental right to control a juvenile's free movement? The Fourth and D.C. Circuit's application of intermediate scrutiny is premised upon the idea that juveniles possess only fledgling constitutional rights. That conclusion is disturbing. It is not entirely consistent with precedent, and leads to the possibility that governments can control juveniles in an authoritarian fashion that would be impermissible with respect to adults.

While it is true that such cases as *Bellotti v. Baird* focus on the state interests in regulating juvenile behavior – “the peculiar vulnerability of children, their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing”¹³⁵ – it is important to remember that this is a recitation of state interests that might be sufficient to warrant an

135. *Baird*, 443 U.S. 622, 634 (1979).

infringement of constitutional liberties. It is not a statement of reasons why juveniles do not possess full constitutional rights. Indeed, a host of cases have held or implied that juveniles possess unqualified constitutional rights.¹³⁶ The fact that the Court has simultaneously stated that “the state’s authority over children’s activities is broader than over like actions of adults,”¹³⁷ and that the constitutional “rights of minors are not ‘co-extensive with those of adults,’¹³⁸ can suggest one of two things: minors enjoy qualified, diluted constitutional rights or the government’s case for justification of invasion of a minor’s constitutional rights will typically be stronger than with respect to an adult. The former conclusion is an implicit repudiation of the long line of cases that have recognized, explicitly or implicitly, the unqualified constitutional rights of minors. Moreover, that conclusion rests on the implausible fiction that minors have less interest in their constitutional liberties than do adults. They may have less ability to assert them or less ability to appreciate their existence, but they are no less precious. The sound conclusion is that the government has a host of reasons for invading minors’ constitutional rights that it does not possess with respect to adults. That is very likely the case, and there is no reason the government should not advance those interests. If the reasons are sound, and the means the government has chosen are well-calculated to achieve those interests, the government will have sustained its burden of justification. Let it do so, but let us not load the dice in favor of government regulation of juveniles by reducing the level of scrutiny because the government has good reasons for invading the constitutional rights of juveniles. “Your Honor, the government has good reasons for regulating the nocturnal behavior of juveniles, and because we have good reasons, you should relieve us from the burden of thoroughly proving them.” Would any law professor accept that logic from his or her students? Shouldn’t lawyers and judges be held to at least as high a standard as law students and professors?

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

137. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975).

138. *Id.* at 214 n.11 (quoting *Tinker*, 393 U.S. 503, 515 (Stewart, J., concurring)).

III. Conclusion

The juvenile curfew cases raise large questions about how we define fundamental liberty interests and what level of review courts bring to the problem of invasion of those interests. The curfew cases also raise serious and disturbing issues of the quantum of constitutional protection we will extend to our sons and daughters. The four circuit courts of appeals that have decided these issues display a remarkable fragmentation concerning the method of defining the existence and scope of the rights asserted and an equally large cleavage concerning the appropriate level of review to use in determining the constitutional validity of these curfew laws.

Fundamental rights ought to be phrased at the lowest level of generality consistent with both our historical and cultural traditions, to the extent that level is not so specific that it denies the equal interest in enjoyment of the right that may in fact exist by different classes of people. In the case of a claimed freedom of movement, there is no difference between the interest in enjoyment of that right by an adult and a juvenile. There may well be significant differences in the state's interest in infringing a juvenile's or an adult's exercise of that right, but those differences are relevant at the justification stage, not at the definitional stage.

The scope of the fundamental right of parents to control the upbringing of their children has much to do with the scope of the government's legitimate power to control all behavior, adult or juvenile. To the extent that a government could not constitutionally regulate any given adult behavior, a presumption should attach that governmental attempts to regulate that same behavior, when engaged in by juveniles, encroaches upon the constitutionally protected zone of parental discretion in raising children. Of course, governments may have excellent reasons for invading that zone, but those reasons should be advanced at the justification stage.

The application of intermediate scrutiny to these claimed rights represents an admission, contrary to precedent and logic, that juveniles simply do not possess unqualified constitutional rights. Intermediate scrutiny is a way of counting twice the government's reasons for infringing a juvenile's constitutional liberties. I think that governments are already powerful enough, and do not need any additional help to skew the system in their favor. I suspect that most juveniles feel the same way.

