

# JUVENILE CURFEWS AND THE BREAKDOWN OF THE TIERED APPROACH TO EQUAL PROTECTION

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*In constitutional challenges to juvenile curfews, the “tiers of scrutiny” framework usually relied upon to resolve Equal Protection cases has failed to constrain courts’ analyses. Courts have applied all three tiers of scrutiny, have reached opposite results under each tier, and have explicitly modified various tiers. This result arises from a discord between the problem presented by juvenile curfew laws and the tiers of scrutiny framework itself: Curfew laws impact neither a fully fundamental right nor a fully suspect classification, but nevertheless affect a substantial liberty interest and a vulnerable class of people. This Note argues that courts should bypass the abstract discussion of “tiers” and “fundamental rights” and focus directly on what role courts should play, if any, in shielding juveniles from a democratically enacted curfew. The Note proposes an aggressive form of intermediate balancing similar to the Second Circuit’s approach in Ramos v. Town of Vernon.*

## INTRODUCTION

Among the provisions of the Fourteenth Amendment of the United States Constitution is the guarantee that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>1</sup> Since the 1940s, courts attempting to apply this broadly worded assurance have developed an analytical framework known as the “tiers of scrutiny,” within which claims brought under the Equal Protection Clause may be resolved. This framework has allowed courts to decide matters ranging from affirmative action to voting rights.<sup>2</sup> In equal protection cases involving asserted fundamental rights of juveniles,

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<sup>1</sup> U.S. CONST. amend. XIV, § 1.

<sup>2</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (affirmative action); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (voting rights).

however, the tiers of scrutiny framework has failed to provide a consistent approach for courts to follow. This failure has manifested itself through conflicting state and federal court opinions on the constitutionality of juvenile curfew laws.

The tiered approach to the Equal Protection Clause arose through the Warren Court at a time when the major constitutional issues of the day were about race.<sup>3</sup> This cultural backdrop lent itself to a binary approach. On the one hand, basic economic legislation was considered the proper business of legislatures, not courts.<sup>4</sup> With the specter of *Lochner v. New York*<sup>5</sup> hovering in the background,<sup>6</sup> courts developed the “rational basis” test, under which economic legislation would survive constitutional challenge unless it was wholly irrational. On the other hand, the Civil Rights Era was characterized by rampant de jure discrimination against African Americans. Such discriminatory legislation required aggressive judicial review to enforce the mandates of the Reconstruction Amendments against reluctant state governments. As a judicial mechanism to serve this purpose, “strict scrutiny”—which requires that a law be narrowly tailored to achieve a compelling government interest—was born.<sup>7</sup>

This basic divide no longer dominates our legal system.<sup>8</sup> Today, many constitutional issues involve challenges to laws that are neither basic economic legislation nor explicit de jure discrimination against a historically disfavored group.<sup>9</sup> This development raises a difficult

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<sup>3</sup> See generally William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2251–57 (2002) (describing emergence of two-tier system out of World War II and Civil Rights Era litigation concerning race discrimination).

<sup>4</sup> Paradigmatically, courts addressed economic legislation governing the practice of optometry and ophthalmology. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (discussing reluctance to strike down state law regarding regulation of opticians because legislature was proper party to decide such issues).

<sup>5</sup> 198 U.S. 45 (1905) (overruling state labor law as unreasonable and arbitrary interference with personal liberty).

<sup>6</sup> See Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293 (1992) (“*Lochner* hovers like a spectre to be continually banished.”).

<sup>7</sup> See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [C]ourts must subject them to the most rigid scrutiny.”).

<sup>8</sup> Cf. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 968 (1987) (“The two-tiered approach that arose from the ashes of *Lochner*—economic legislation subjected to ‘rationality review’; statutes impinging on fundamental interests or relying on ‘suspect classifications’ subjected to ‘strict scrutiny’—is cracking . . .”).

<sup>9</sup> See Eskridge, *supra* note 3, at 2257–69 (describing Supreme Court’s attempts to accommodate new kinds of classification-based claims into classic two-tier equal protection

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question: How does a court decide challenges to statutes that do not fit neatly into either side of the binary framework?

Some of today's hardest constitutional cases involve challenges to laws that share two common characteristics. First, the laws burden a class of citizens that is not quite "suspect" (e.g., defined by race), but still possesses some attributes of a suspect class (e.g., defined by inherent characteristics, poorly represented in the political process, or historically disfavored by legislation).<sup>10</sup> Second, the laws affect freedoms that, although not categorical (i.e., enumerated constitutional rights), are still very important. These "hybrid" cases integrate issues from both the suspect classification<sup>11</sup> and fundamental interest<sup>12</sup> strands of equal protection jurisprudence. They involve legislation that may not violate substantive constitutional provisions, but nevertheless imposes a substantial burden on a particularly vulnerable group.<sup>13</sup> What does the "equal protection of the laws" require in this context?

Juvenile curfew litigation is an area in which this problem has come to the forefront. Litigants challenging juvenile curfew laws generally have not argued that youth is a "suspect classification" like race

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framework, including attacks on classifications based upon sex, illegitimacy, wealth, age, disability, and sexual orientation).

<sup>10</sup> See *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (describing as aspects of suspect classification that targeted group possesses "an 'immutable characteristic determined solely by the accident of birth' [or is] . . . 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process'" (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion))); William D. Araza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 *UCLA L. REV.* 385, 415-16 (1997) (describing "various indicia of suspect class status," including "a history of purposeful unequal treatment or subjection to disabilities based on inaccurate stereotyping; social stigmatization; and possession of an immutable defining characteristic that bears no rational relation to a legitimate state purpose" (footnotes omitted)).

<sup>11</sup> See generally Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 *TEMP. L. REV.* 937, 938-41 (1991) (describing basic law of suspect classifications).

<sup>12</sup> See generally Rebecca L. Brown, *Liberty, the New Equality*, 77 *N.Y.U. L. REV.* 1491 (2002) (discussing judicial review of liberty claims under Equal Protection Clause); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 *MCGEORGE L. REV.* 473 (2002) (examining relationship between equality and liberty as embodied in Equal Protection and Due Process Clauses).

<sup>13</sup> See Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 *U. ILL. L. REV.* 1209, 1211 ("This emerging third strand of equal protection analysis imposes heightened scrutiny not only for fundamental rights or for suspect classes but also for situations where the rights and classes interact in such a way as to raise the Court's suspicions.").

or gender.<sup>14</sup> Instead, the typical claim is that curfew laws single out juveniles from the rest of the population in a way that infringes upon their fundamental right of “free movement.”<sup>15</sup> In response, state governments have argued that no such right exists and that curfews are, in any event, justified by the compelling interests of preventing juvenile crime and protecting juveniles from becoming victims of crime.

Courts have struggled to respond to these claims. Curfew laws impose a significant burden on the liberty of a particularly vulnerable group of people, children.<sup>16</sup> On the other hand, age classifications are not quite race classifications;<sup>17</sup> and the right to move around one’s town freely is not an enumerated right like the freedom of speech. The problem therefore does not fit neatly into the formal “tiers of

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<sup>14</sup> While the Supreme Court has never explicitly rejected youth as a suspect classification, it is usually assumed that youth is not suspect. *See, e.g.*, Craig Hemmens & Katherine Bennett, *Out in the Street: Juvenile Crime, Juvenile Curfews, and the Constitution*, 34 GONZ. L. REV. 267, 286 & n.181 (1998/99) (“Age is not a suspect classification.”); Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1078–82 (2003) (noting that state courts generally adhere to proposition that age classifications are not suspect). *But see* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §16-31, at 1588–93 (2d ed. 1988) (arguing that youth is “semi-suspect” classification). Age has been held not to be a suspect classification for elderly citizens. *See* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313–14 (1976) (holding that old-age classification is not suspect and is not subject to strict judicial scrutiny); *see also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) (“Old age . . . does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it.”); Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (“This Court has said repeatedly that age is not a suspect classification under the Equal Protection Clause.”).

<sup>15</sup> Juvenile curfews have been challenged under a variety of theories other than equal protection. *See, e.g.*, Hodgkins v. Peterson, 355 F.3d 1048, 1064 (7th Cir. 2004) (striking down curfew on First Amendment grounds); City of Maquoketa v. Russell, 484 N.W.2d 179, 185–86 (Iowa 1992) (holding curfew overbroad in violation of minors’ freedoms of religion, speech, assembly, and association); City of Sumner v. Walsh, 61 P.3d 1111, 1115–17 (Wash. 2003) (invalidating curfew for vagueness on due process theory). The equal protection challenge addressed in this Note, however, is both the most prevalent and the most controversial legal theory invoked in challenges to juvenile curfews. *See* Note, *Juvenile Curfews and the Major Confusion Over Minor Rights*, 118 HARV. L. REV. 2400, 2407 (2005) [hereinafter *Minor Rights*] (observing that “[t]he confusion in the circuits stems from their different approaches to minors’ rights” in equal protection context); Patryk J. Chudy, Note, *Doctrinal Reconstruction: Reconciling Conflicting Standards in Adjudicating Juvenile Curfew Challenges*, 85 CORNELL L. REV. 518, 571–73 (2000) (arguing that “equal protection is the [most] appropriate doctrinal mechanism to adjudicate [juvenile curfew] claims” because juvenile curfews burden freedom of only one class of persons, not all citizens equally).

<sup>16</sup> *See* Waters v. Barry, 711 F. Supp. 1125, 1136 (D.D.C. 1989) (“The restriction . . . would be massive. Every juvenile in the District of Columbia would be arrested if he or she sought to wander the monuments at night, or if he or she sought to gaze at the stars from a public park.”).

<sup>17</sup> *Cf.* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 160 (1980) (suggesting that age-based classifications may not be suspect because, while “most legislators have never been alien, poor, or female[,] [t]hey all were young, . . . a fact that may enhance their objectivity”).

scrutiny” framework: There is no suspect classification, but there remains a significant “class issue.” There is no well-defined fundamental right at stake, but there remains a substantial liberty issue.

Courts have tried to fit the problem of juvenile curfews into the existing formal framework, with inconsistent results. They have employed all three tiers of scrutiny: not only rational<sup>18</sup> and strict,<sup>19</sup> but also intermediate scrutiny,<sup>20</sup> which is not typically used to address asserted infringements on fundamental rights. Intermediate scrutiny, which evolved to deal with the problem of gender discrimination, permits a more fact-specific approach than strict and rational review and enables a court to uphold or strike down legislation depending on how the court weighs the various interests involved. Traditionally, the standard requires that a law be substantially related to furthering an important government interest.

Even with the introduction of a third tier into the typically binary fundamental interest analysis, courts have reached inconsistent outcomes. Courts have obtained opposite results under each tier of scrutiny: Curfew laws have been upheld under strict scrutiny and struck down under rational basis scrutiny.<sup>21</sup> As some scholars have pointed out, the courts’ actual analyses in juvenile curfew cases often bears little resemblance to the traditional application of the announced standards of review.<sup>22</sup> Finally, courts have explicitly—but inconsistently—modified various tiers to account for particular fact situations.<sup>23</sup>

The courts’ struggles have played out visibly in recent years. Among the six federal appeals courts to rule on curfew challenges

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<sup>18</sup> See *In re Spagnoletti*, 702 N.E.2d 917, 920 (Ohio Ct. App. 1997); *Sale ex rel. Sale v. Goldman*, 539 S.E.2d 446, 456 (W. Va. 2000); cf. *Metro. Dade County v. Pred*, 665 So.2d 252, 254 (Fla. Dist. Ct. App. 1995) (deferring to “legislative will” after “having determined that the [curfew] Ordinance does not violate any . . . rights under either the Florida or United States Constitutions”).

<sup>19</sup> See, e.g., *Nunez v. City of San Diego*, 114 F.3d 935, 946 (9th Cir. 1997); *Qutb v. Strauss*, 11 F.3d 488, 496 (5th Cir. 1993); *Gaffney v. City of Allentown*, No. CIV.A.97-455, 1997 WL 597989, at \*5–8 (E.D. Pa. Sept. 17, 1997).

<sup>20</sup> See, e.g., *Ramos v. Town of Vernon*, 353 F.3d 171, 187 (2d Cir. 2003); *Hutchins v. District of Columbia*, 188 F.3d 531, 541 (D.C. Cir. 1999) (en banc) (plurality opinion); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 855 (4th Cir. 1998).

<sup>21</sup> Compare *Qutb*, 11 F.3d at 496 (upholding curfew under strict scrutiny), with *Spagnoletti*, 702 N.E.2d at 920 (holding curfew unconstitutional under rational basis test).

<sup>22</sup> See Chudy, *supra* note 15, at 554–64 (arguing that courts purporting to apply strict scrutiny to juvenile curfew laws have in fact applied intermediate standard); 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, 1734–35 (1995) (arguing that “strict scrutiny” applied in *Qutb v. Strauss* lacked its usual rigor).

<sup>23</sup> See, e.g., *Nunez*, 114 F.3d at 946 (“[S]trict scrutiny in the context of minors may allow greater burdens on minors than would be permissible on adults as a result of the unique interests implicated in regulating minors.”).

since 1993, two courts—the Fifth and Ninth Circuits—applied strict scrutiny but reached opposite results.<sup>24</sup> Four courts applied intermediate scrutiny with equally inconsistent results: The Second and Seventh Circuits struck down the curfews before them,<sup>25</sup> while the Fourth and D.C. Circuits upheld curfew laws.<sup>26</sup> The two most recent state supreme courts to address juvenile curfew laws both applied strict scrutiny but also reached opposite results.<sup>27</sup> One commentator went so far as to observe that, in juvenile curfew cases, “the level of scrutiny applied has proven largely irrelevant.”<sup>28</sup>

Due to the nature of the classification and liberty interests at stake, courts have been unwilling to apply mere rational basis review in juvenile curfew cases.<sup>29</sup> However, they also have been unwilling to apply traditional strict scrutiny because they do not feel that the government necessarily should lose.<sup>30</sup> As some courts and commentators have pointed out, those courts purporting to apply “strict scrutiny”

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<sup>24</sup> Compare *Qutb*, 11 F.3d at 496 (curfew upheld), with *Nunez*, 114 F.3d at 952 (curfew struck down).

<sup>25</sup> The Seventh Circuit’s juvenile curfew decision in *Hodgkins v. Peterson*, 355 F.3d 1048 (7th Cir. 2004), was decided on First Amendment grounds, not on equal protection grounds. Because I intend to focus on the equal protection strand of curfew cases, I will not engage in a detailed examination of *Hodgkins*. For a thoughtful First Amendment analysis of juvenile curfews, see Todd Kaminsky, Note, *Rethinking Judicial Attitudes Toward Freedom of Association Challenges to Teen Curfews: The First Amendment Exception Explored*, 78 N.Y.U. L. REV. 2278 (2003).

<sup>26</sup> Compare *Hodgkins*, 355 F.3d at 1064–65 (curfew struck down), and *Ramos v. Town of Vernon*, 353 F.3d 171, 187 (2d Cir. 2003) (same), with *Hutchins v. District of Columbia*, 188 F.3d 531, 548 (D.C. Cir. 1999) (en banc) (plurality opinion) (curfew upheld), and *Schleifer v. City of Charlottesville*, 159 F.3d 843, 855 (4th Cir. 1998) (same).

<sup>27</sup> Compare *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 269 (Alaska 2004) (upholding curfew law under strict scrutiny), with *State v. J.P.*, 907 So.2d 1101, 1119 (Fla. 2004) (striking down curfew law under strict scrutiny).

<sup>28</sup> *Minor Rights*, *supra* note 15, at 2413.

<sup>29</sup> See, e.g., *Ramos*, 353 F.3d at 178 (“Simply denying the existence of a constitutional right is too blunt an instrument to resolve the question of juvenile rights to freedom of movement.”); *Schleifer*, 159 F.3d at 847 (recognizing that “children do possess at least qualified rights, so an ordinance which restricts their liberty to the extent that this one does should be subject to more than rational basis review”); *Nunez v. City of San Diego*, 114 F.3d 935, 944–45 (9th Cir. 1997) (rejecting rational basis test upon finding that curfew impaired juveniles’ fundamental rights).

<sup>30</sup> See, e.g., *Ramos*, 353 F.3d at 180 (“Youth-blindness is not a constitutional goal because, even with regard to fundamental rights, failing to take children’s particular attributes into account . . . would be irresponsible. Hence, strict scrutiny would appear to be too restrictive a test to address government actions that implicate children’s constitutional rights.” (citation omitted)); *Schleifer*, 159 F.3d at 847 (rejecting strict scrutiny on ground that “[t]he state’s authority over children’s activities is broader than over like actions of adults” (quoting *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944))); *Nunez*, 114 F.3d at 946 (“[W]e are mindful that strict scrutiny in the context of minors may allow greater burdens on minors than would be permissible on adults as a result of the unique interests implicated in regulating minors.”).

have been, in practical terms, applying a standard that is strict in theory but intermediate in fact.<sup>31</sup> Although they are unified in practice around an intermediate approach, however, the courts continue to reach inconsistent outcomes. Instead of helping to constrain the courts' analyses, the tiers of scrutiny framework has, in practice, muddled the inquiry into whether juvenile curfews are consistent with the equal protection of the laws. A more constructive question than "which tier should apply," therefore, may be "what should the intermediate standard look like?"

This Note provides a starting point for an analysis of juvenile curfews stemming from principles of equal protection law. Instead of focusing on the unsolvable question of whether minors enjoy an abstract right to "free movement" to the extent that adults do, I propose that courts should evaluate what role, if any, the judiciary should take in shielding juveniles from a democratically enacted curfew. I conclude that courts should apply an intermediate standard with enough "bite" to strike down curfews that are either pretextual or insufficiently directed at reducing juvenile crime and victimization, while allowing curfews to stand if they are truly necessary to confront a significant problem.

Part I sets forth a theoretical framework for understanding the tiers of scrutiny model and demonstrates that the model has broken down in juvenile curfew litigation. Part II describes how courts have attempted to integrate generalized juvenile rights jurisprudence into the tiers of scrutiny framework in an effort to resolve juvenile curfew litigation. In particular, I argue that courts have misinterpreted the Supreme Court's plurality opinion in *Bellotti v. Baird*<sup>32</sup> and that attempts to derive a "*Bellotti* test" from that decision should be abandoned. Finally, in Part III, I attempt to reframe the inquiry in juvenile curfew cases from one of juvenile rights to one of the proper role of the judiciary. I propose that courts should adopt an aggressive form of intermediate balancing similar to the Second Circuit's approach in *Ramos v. Town of Vernon*.<sup>33</sup>

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<sup>31</sup> See, e.g., Chudy, *supra* note 15, at 584 ("The cases that have articulated strict scrutiny have exhibited textual departures from the normally rigorous standards involved in a strict-scrutiny analysis. Furthermore, analysis of the applied strict scrutiny standards reveals that juvenile curfews are subject to judicial inquiry more consistent with the precepts of intermediate scrutiny."); cf. Sullivan, *supra* note 6, at 304 n.51 (describing Justice O'Connor's "undue burden" test in abortion context as "strict in name but intermediate in fact").

<sup>32</sup> 443 U.S. 622 (1979) (plurality opinion).

<sup>33</sup> 353 F.3d 171 (2d Cir. 2003).

## I

## WHY CURFEWS ARE SO DIFFICULT

A. *Theoretical Background: What Is Going On?*

Although framed in the language of balancing, the two extremes of the tiers of scrutiny model are really categorical approaches.<sup>34</sup> If a court applies strict scrutiny, the government will virtually always lose:<sup>35</sup> While it is usually easy for the government to articulate a “compelling interest,” the court will typically find a way in which the legislation is not “narrowly tailored.” If the court applies rational basis review, on the other hand, the government will almost always win:<sup>36</sup> A law can survive this standard even if it is justified only by “hypothesized or ad hoc state interests.”<sup>37</sup>

Unlike these categorical approaches, intermediate scrutiny, which requires a law to be “substantially related” to “important governmental objectives,”<sup>38</sup> is “an overtly balancing mode.”<sup>39</sup> Sometimes the government wins, and sometimes it loses, depending on how the court weighs the interests involved.<sup>40</sup> It is tempting to think of intermediate scrutiny as an objective test with rigid bars set at the levels of “important” interests and “substantial” relationships. It is more useful and accurate, however, to think of intermediate scrutiny as the range of standards encompassing the “zone of twilight”<sup>41</sup> between

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<sup>34</sup> See Sullivan, *supra* note 6, at 296 (“True, the standard formulations of these tests require a court to go through the motions of balancing a right against a legitimate or compelling interest. But this is not real balancing.”).

<sup>35</sup> See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as “‘strict’ in theory and fatal in fact”).

<sup>36</sup> See Browne C. Lewis, *Changing the Bathwater and Keeping the Baby: Exploring New Ways of Evaluating Intent in Environmental Discrimination Cases*, 50 ST. LOUIS U. L.J. 469, 478 (2006) (“The rational basis test is the lowest level of review. Thus, governmental decisions analyzed under the rational basis test are almost always upheld.”); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 35 (2003) (“When rational basis review is applied, statutes are almost always upheld under the Equal Protection Clause.”).

<sup>37</sup> Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 300 (1998).

<sup>38</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (defining intermediate scrutiny standard in gender context).

<sup>39</sup> Sullivan, *supra* note 6, at 297.

<sup>40</sup> Compare *Califano v. Webster*, 430 U.S. 313 (1977) (upholding preferential social security benefit formulas for female wage-earners as rational means to redress disparate economic status of women), with *Califano v. Goldfarb*, 430 U.S. 199 (1977) (striking down social security benefit system privileging widows over widowers as based on archaic notions of gender roles). See also Wexler, *supra* note 37, at 318 (noting unpredictable nature of intermediate scrutiny).

<sup>41</sup> Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (describing “zone of twilight” in which “President acts in the absence of either

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strict and rational review, in which the court engages in a flexible balancing of the State's interests against the individual's.<sup>42</sup>

Kathleen Sullivan has observed that courts abandon the categorical approaches of strict and rational review in favor of a balancing approach when they face "a crisis in analogical reasoning. A set of cases comes along that just can't be steered readily onto the strict scrutiny or the rationality track."<sup>43</sup> The intermediate standard for gender classifications evolved in this very way: After briefly flirting with both the rational basis test<sup>44</sup> and strict scrutiny,<sup>45</sup> the Supreme Court finally adopted the intermediate approach.<sup>46</sup>

In the face of this seemingly rigid system of strict, intermediate, and rational review, courts today find themselves confronting new constitutional issues that threaten to break down the tiered approach. In cases involving disability<sup>47</sup> and homosexuality,<sup>48</sup> for example, the Supreme Court has explicitly applied a heightened form of rationality review "with teeth" to strike down laws without invoking heightened

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a congressional grant or denial of authority," leaving lawfulness of President's authority uncertain).

<sup>42</sup> See Sullivan, *supra* note 6, at 297 (describing intermediate scrutiny as "overtly balancing mode"); Wexler, *supra* note 37, at 315 (defining intermediate scrutiny as "a level of review somewhere between strict scrutiny and rationality review that the Court uses in an area of law where it consistently employs such tier-based terminology").

<sup>43</sup> Sullivan, *supra* note 6, at 297; see also Wexler, *supra* note 37, at 319–21 (describing emergence of intermediate scrutiny out of such analogical crises in equal protection and First Amendment contexts).

<sup>44</sup> See *Reed v. Reed*, 404 U.S. 71, 75–76 (1971) (requiring gender classification to "bear[] a rational relationship to a state objective that is sought to be advanced" by statute employing classification). As Gerald Gunther famously pointed out, however, this rationality review had significantly more "bite" than the standard traditionally applied to economic legislation. See Gunther, *supra* note 35, at 12 (describing emergence of "equal protection bite without 'strict scrutiny'").

<sup>45</sup> See *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) (concluding that gender classifications are "inherently suspect" and should be subject to strict scrutiny).

<sup>46</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (declaring that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

<sup>47</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–48, 450 (1985) (striking down zoning restriction under rational basis test on suspicion that regulation was based on distaste for developmentally disabled people); *id.* at 456–58 (Marshall, J., concurring in judgment in part and dissenting in part) (observing that majority applied more skeptical form of rational basis test).

<sup>48</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in judgment) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."); *Romer v. Evans*, 517 U.S. 620, 631–33 (1996) (applying skeptical rational basis test to state constitutional amendment forbidding special protection for homosexuals on suspicion that amendment was passed for illegitimate purposes).

scrutiny.<sup>49</sup> At the other extreme, in areas such as campaign finance reform<sup>50</sup> and affirmative action,<sup>51</sup> the Court has applied a more deferential form of strict scrutiny.<sup>52</sup> Finally, scholars and judges have argued that, in gender discrimination jurisprudence, the Court has been moving toward a standard “falling somewhere between intermediate and strict scrutiny.”<sup>53</sup> Some scholars have gone so far as to announce the replacement of the tiered approach with a “sliding scale” of scrutiny under the Equal Protection Clause.<sup>54</sup> The next section describes the breakdown of the tiered approach that has taken place in juvenile curfew jurisprudence.

### B. *Juvenile Curfews and the Breakdown of the Formal Approach*

The formal approach to equal protection doctrine has broken down in juvenile curfew cases in two ways. First, courts have struggled to accommodate juveniles’ asserted right to “free movement” within the established binary framework for fundamental interest claims, either explicitly or implicitly incorporating an intermediate standard of review within a typically two-pronged doctrinal structure. Second, even once the universe of available standards has been expanded to incorporate a third tier, courts have encountered difficulty applying the three-tier equal protection framework in a consis-

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<sup>49</sup> See generally Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357 (1999) (describing “successful rational basis claims” from 1971 through Court’s 1996 decision in *Romer v. Evans*).

<sup>50</sup> See *Buckley v. Valeo*, 424 U.S. 1, 28 (1976) (finding eradication of “corruption” or “appearance of corruption” to be compelling justification for First Amendment infringement in context of political contribution ceilings).

<sup>51</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (applying strict scrutiny to University of Michigan Law School’s affirmative action program but deferring to law school’s “educational judgment that [diversity] is essential to its educational mission” in keeping with Court’s “tradition of giving a degree of deference to a university’s academic decisions”).

<sup>52</sup> See *Sullivan*, *supra* note 6, at 300 (describing weakening of strict scrutiny standard in these areas).

<sup>53</sup> Wexler, *supra* note 37, at 301–02.

<sup>54</sup> See, e.g., Eskridge, *supra* note 3, at 2268–69 (announcing that “the usefulness of the tiers has eroded” and suggesting that “the Court has informally moved away from giving such critical importance to the level of scrutiny and has moved toward a sliding scale approach”); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 991 (2004) (“While it is premature to pronounce tiered scrutiny dead . . . it is not too early to speculate about the future of tiered scrutiny or its possible replacements. . . . The first, and more obvious, [possibility] . . . is a version of the flexible, or ‘sliding-scale’ scrutiny that Justice Thurgood Marshall long advocated.”); Lawrence Schlam, *Equality in Culture and Law: An Introduction to the Origins and Evolution of the Equal Protection Principle*, 24 N. ILL. U. L. REV. 425, 446–47 (2004) (describing efforts of some justices to adopt implicit “sliding scale” approach).

tent manner. As a result, the distinctions between the three tiers have become blurred. I discuss these two problems in turn.

### 1. *Curfews and Fundamental Interests*

Most challenges to juvenile curfew laws assert that curfews unconstitutionally infringe on juveniles' fundamental right to "free movement" or "intrastate travel." Although the Supreme Court has held that the Constitution protects an individual's right to *interstate* travel,<sup>55</sup> it has not decided whether individuals enjoy a right to *intrastate* travel.<sup>56</sup> In addition, it is debatable whether the "localized movement" implicated by juvenile curfew laws fits within a general right to intrastate travel or free movement. Another open question is whether minors enjoy such a right at all.<sup>57</sup>

A court's approach in a juvenile curfew case has often depended on how the court classified the right at issue. Most courts have adopted a general definition—the right of all citizens to "free movement"<sup>58</sup>—and have asked separately whether juveniles enjoy such a right to the same extent as adults. A plurality of the D.C. Circuit, however, criticized this broad formulation on the ground that newly recognized due process rights should be defined narrowly.<sup>59</sup> The plurality therefore defined the asserted right as a minor's right "to be on

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<sup>55</sup> *Shapiro v. Thompson*, 394 U.S. 618, 629–30 (1969) (recognizing "right to travel interstate" as fundamental).

<sup>56</sup> Some circuits have extended the Supreme Court's holding in *Shapiro* to include travel within a state, but others have declined to do so. The First, Second, and Third Circuits recognize a general right to intrastate travel or "free movement." See *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990) (upholding "right to move freely about one's neighborhood or town"); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648–49 (2d Cir. 1971) (asserting that right to travel would be "meaningless" if it did not apply to travel within state); *Cole v. Hous. Auth. of Newport*, 435 F.2d 807 (1st Cir. 1970) (overturning two-year residency requirement for access to public housing as violating constitutional right to travel). The Fifth, Sixth, and Seventh Circuits have declined to find such a right. See *Andre v. Bd. of Trs. of Maywood*, 561 F.2d 48, 53 (7th Cir. 1977) (distinguishing right to travel from requirement that village employees establish residency); *Wardwell v. Bd. of Educ.*, 529 F.2d 625, 627 (6th Cir. 1976) (finding no support for extending constitutional protection to intrastate travel); *Wright v. City of Jackson*, 506 F.2d 900, 902–03 (5th Cir. 1975) (arguing "right to travel" was not meant to apply to intrastate travel and municipal employment residency requirements).

<sup>57</sup> See *Hutchins v. District of Columbia*, 188 F.3d 531, 538 (D.C. Cir. 1999) (en banc) (plurality opinion) ("[W]e must ask not whether Americans enjoy a general right of free movement, but rather whatever are the scope and dimensions of such a right (if it exists), do minors have such a substantive right?").

<sup>58</sup> See, e.g., *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (framing right as "right to move about freely").

<sup>59</sup> *Hutchins*, 188 F.3d at 538 ("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, i.e., the free movement of people, the easier is the extension of substantive due process.").

the streets at night without adult supervision,”<sup>60</sup> or, “the right [of minors] to freely wander the streets—even at night.”<sup>61</sup> Having defined the right in such a limited way, the plurality unsurprisingly concluded that a rational basis test was appropriate.<sup>62</sup>

Of course, the *Hutchins* plurality’s formulation is not the only way in which a court might have construed the right narrowly. A minor’s “right to take a walk at night without being arrested” is just as narrow but frames the minor’s interest in a much more positive light. Indeed, one can imagine a spectrum of formulations ranging from “the right to be a hoodlum” to “the right to behave peacefully without being thrown in handcuffs,” all of which might accurately describe rights implicated by a juvenile curfew.

Whatever may be the precise contours of the applicable right, it is noteworthy that the majority of every federal circuit court to consider a curfew case has concluded—or at least assumed—that the juvenile curfew law before it implicated fundamental rights in some form.<sup>63</sup> Even the D.C. Circuit plurality—which authored the only lead circuit court opinion to advocate a rational basis test—acknowledged that “a hypothetical municipal restriction on the movement of its citizens, for example, a draconian curfew, might bring into play the concept of substantive due process.”<sup>64</sup> Thus, even some of the judges who are most hesitant to embrace a right of free movement recognize not only that the right has some content at a constitutional level, but that at least some curfews could pose constitutional problems.

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *See id.* at 539–41 (refusing to recognize fundamental right and claiming ordinance would survive even if heightened scrutiny were applicable). *But see id.* at 554–55 (Rogers, J., dissenting) (criticizing plurality’s narrow formulation).

<sup>63</sup> *See Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir. 2003) (recognizing that curfew impaired fundamental right of intrastate travel); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998) (“[A]n ordinance which restricts [minors’] liberty to the extent that this one does should be subject to more than rational basis review.”); *Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (finding that juvenile curfew impinged upon fundamental right); *Qutb*, 11 F.3d at 492 (assuming without deciding that juvenile curfew impacted fundamental right); *see also Hutchins*, 188 F.3d at 548–51 (Edwards, C.J., concurring) (arguing that juvenile curfew impairs parents’ fundamental right of child-rearing); *id.* at 552 (Wald, J., concurring) (concluding that juvenile curfew “implicates the constitutional rights of children and their parents”); *id.* at 562–63 (Rogers, J., concurring in part and dissenting in part) (concluding that curfew burdens children’s fundamental rights); *id.* at 570 (Tatel, J., dissenting) (concluding that curfew “implicates a fundamental right to free movement”).

<sup>64</sup> *Hutchins*, 188 F.3d at 538 (en banc) (plurality opinion). This statement is somewhat odd given that one could frame the entire exercise of considering a curfew’s constitutionality as seeking to determine whether the curfew is, in fact, “draconian.”

All of this wordplay may be beside the point. Courts are uncomfortable subjecting curfew laws to only a rational basis test because, whatever one might call it, curfews impose a restriction on minors' "liberty" that could become quite severe. Imagine, for example, a curfew providing that juveniles may not leave their homes except during school hours. Such a law would deprive juveniles of a wide range of activities that characterize "free" life, even if it would not run up against any explicit provision of the Constitution. The more expansive a curfew's scope, the more uncomfortable a court is likely to find itself in denying that the curfew impairs "liberty" in a manner that amounts to a constitutional violation.

Courts have been forced into abstract discussions of rights, however, because the equal protection doctrine passed down from the Warren Court imposes a rigid all-or-nothing formalism on fundamental interest claims. Under this framework, if a right is "fundamental," it is entitled to typically fatal "strict scrutiny"; if it is not "fundamental," it receives feeble rationality review. The binary framework thus front-loads the inquiry into a law's constitutionality, forcing courts to answer complex abstract questions that may intuitively have little to do with the "equal protection of the laws." In the end, it seems impossible to find a definitive answer to whether a fundamental right to free movement exists, let alone whether minors enjoy it to the extent that adults do, or whether juvenile curfew laws infringe upon such a right.

## 2. *Curfews and the Breakdown of the Tiers Approach*

The disintegration of the formal approach to equal protection is further revealed in the courts' attempts to squeeze the juvenile curfew problem into the three-level "tiers of scrutiny" model. The four juvenile curfew cases decided in the U.S. Court of Appeals between 1993 and 1999 are illustrative and can be divided into two categories: those that purported to apply strict scrutiny and those that purported to apply intermediate scrutiny. A close examination of the courts' reasoning reveals that, whether they called it "strict" or "intermediate," all four courts were applying an intermediate balancing approach.

### a. Strict Scrutiny "Without Bite": *Qutb v. Strauss* and *Nunez v. City of San Diego*

In *Qutb v. Strauss*,<sup>65</sup> the Fifth Circuit considered a Dallas, Texas curfew ordinance that prohibited persons under the age of seventeen from remaining in a public place from 11:00 p.m. until 6:00 a.m. on

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<sup>65</sup> 11 F.3d 488 (5th Cir. 1993).

weeknights and from midnight until 6:00 a.m. on Friday and Saturday nights. The curfew also contained a number of exceptions designed to address concerns from earlier curfew cases.<sup>66</sup>

The court began by invoking the formal tiers of scrutiny framework.<sup>67</sup> Perhaps to avoid the difficult question of how the framework might accommodate the peculiar “fundamental interest” in moving about freely, the court “assume[d] without deciding” that the curfew impinged upon a fundamental right and therefore subjected the ordinance to “strict scrutiny.”<sup>68</sup> As an early sign that the strict scrutiny standard might lack its traditional bite, however, the court noted that the “ordinance is directed solely at the activities of juveniles and, under certain circumstances, minors may be treated differently from adults.”<sup>69</sup>

The court had no trouble concluding that the city had a compelling interest in reducing juvenile crime and victimization.<sup>70</sup> Instead, the decision hinged on whether the curfew was narrowly tailored to further those interests.

In support of the curfew’s tailoring, the city presented statistical data to establish the following: (1) juvenile crime increases proportionally with age; (2) juveniles were arrested in Dallas for over five thousand crimes per year, including murders and sex offenses; (3) murders (including those committed by adults) were most likely to occur between 10:00 p.m. and 1:00 a.m.; (4) most aggravated assaults occurred between 1:00 a.m. and 3:00 a.m. and sixteen percent of rapes occur on public streets; and (5) thirty-one percent of robberies occur on streets and highways.<sup>71</sup>

The court concluded on the basis of these statistics that the city of Dallas had established a sufficient “fit” between the curfew ordinance

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<sup>66</sup> In *Johnson v. City of Opelousas*, 658 F.2d 1065, 1072 (5th Cir. 1981), the Fifth Circuit struck down a curfew because no exception was made for minors attending religious or school meetings, sitting on their own sidewalks, participating in legitimate employment, or engaging in interstate travel. Subsequent curfews fixed these constitutional defects by writing in exceptions for certain activities. See, e.g., *Ramos v. Town of Vernon*, 353 F.3d 171, 172 (2d Cir. 2003) (listing exceptions to Vernon, Connecticut curfew); *Qutb*, 11 F.3d at 490 (listing exceptions to Dallas curfew); see also *Minor Rights*, *supra* note 15, at 2413 (“[I]n *Qutb v. Strauss*, the Fifth Circuit upheld a Dallas curfew designed precisely to address the concerns raised in *Johnson* . . . . Because of *Qutb*’s strong holding, Dallas’s curfew became the model used by most cities and the paradigm against which alternative ordinances were judged.”).

<sup>67</sup> *Qutb*, 11 F.3d at 492.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See *id.* (finding compelling interest in increasing juvenile safety and decreasing juvenile crime).

<sup>71</sup> *Id.* at 493.

and the city's compelling interests.<sup>72</sup> The court also concluded that, because the curfew contained numerous exceptions, the ordinance "employ[ed] the least restrictive means of accomplishing its goals."<sup>73</sup>

In reaching these conclusions, the court either ignored or expressly dismissed significant defects in the curfew law's tailoring.<sup>74</sup> First, the city failed to present any evidence that nocturnal *juvenile* crime or victimization was a particular problem. Indeed, national statistics historically indicate that, in contrast to adult crime and victimization, juvenile crime and victimization both peak in the hours immediately following the end of the school day, between 3:00 p.m. and 6:00 p.m., and decline to their lowest levels at night.<sup>75</sup> The government did nothing to show that Dallas deviated from this national trend.<sup>76</sup> Second, in reaching its conclusion that the curfew was the least restrictive means, the court focused solely on the ordinance's exceptions without discussing, or requiring the city to have considered, *any* means of addressing juvenile crime other than a general curfew law.<sup>77</sup> In short, as one supporter of the *Qutb* decision felt com-

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* The Court contrasted the Dallas ordinance with the broader curfew it struck down in *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. 1981). *Qutb*, 11 F.3d at 494; see also *supra* note 66 (discussing *Johnson* and subsequent cases).

<sup>74</sup> See Chudy, *supra* note 15, at 558–60 (describing defects in *Qutb* court's tailoring analysis).

<sup>75</sup> See, e.g., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK: COMPARING ADULT & JUVENILE OFFENDERS (2006), <http://ojjdp.ncjrs.org/ojstatbb/offenders/qa03401.asp> (showing that juvenile violent crime peaks at 3:00 p.m. and decreases to lowest level at night, whereas adult crime peaks at night); OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK: VIOLENT CRIME VICTIMIZATION (2006), <http://ojjdp.ncjrs.org/ojstatbb/victims/qa02602.asp> (showing that juvenile violent crime victimization peaks between 3:00 p.m. and 4:00 p.m. and decreases to its lowest levels at night, whereas adult violent crime victimization reaches its highest levels at night). Based on these statistics, the Federal Office of Juvenile Justice and Delinquency Prevention has concluded that "efforts to reduce juvenile crime after school would appear to have greater potential to decrease a community's violent crime rate than do juvenile curfews." OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK: TIME OF DAY (2006), <http://ojjdp.ncjrs.org/ojstatbb/offenders/qa03301.asp>.

<sup>76</sup> As the *Qutb* court stated:

Although the city was unable to provide precise data concerning the number of juveniles who commit crimes during the curfew hours, or the number of juvenile victims of crimes committed during the curfew, the city nonetheless provided sufficient data to demonstrate that the classification created by the ordinance 'fits' the state's compelling interest.

*Qutb*, 11 F.3d at 493.

<sup>77</sup> See Chudy, *supra* note 15, at 535 ("Instead of focusing on the efficacy of the juvenile curfew laws, the court focused on the breadth of exceptions afforded by the Dallas ordinance.").

pelled to admit, the Fifth Circuit's version of strict scrutiny was "charitable . . . and cursory."<sup>78</sup>

In *Nunez v. City of San Diego*,<sup>79</sup> the Ninth Circuit considered a challenge to a substantially more burdensome curfew than that upheld by the *Qutb* court. No hours extension was provided for weekend nights, and the curfew lacked many of the exceptions that had characterized the Dallas curfew.<sup>80</sup>

Unlike the Fifth Circuit in *Qutb*, the *Nunez* court expressly recognized the "right to free movement" as a fundamental right.<sup>81</sup> Following the formal binary approach for fundamental interests, the court therefore applied "strict scrutiny."<sup>82</sup> Nevertheless, the court determined that in applying strict scrutiny it would recognize that "minors' rights are not coextensive with the rights of adults," not because minors lack such rights or because their rights are not as "fundamental," but because "the state has a greater range of interests that justify the infringement of minors' rights."<sup>83</sup> In applying its chosen standard of review, the court announced that it would be "mindful that strict scrutiny in the context of minors may allow greater burdens on minors than would be permissible on adults as a result of the unique interests implicated in regulating minors."<sup>84</sup>

Finding that reducing juvenile crime and victimization is a compelling interest, the *Nunez* court turned to means testing. The city presented national data showing, at best, lukewarm support for the curfew's efficacy. The data revealed that (1) the juvenile crime rate was rising nationally, and that (2) juvenile crime nationally peaks at 3:00 p.m. and again at 6:00 p.m.<sup>85</sup> Localized statistics also provided mixed support: A 1995 report showed that only fifteen percent of juvenile arrests took place during curfew hours, and that juvenile vic-

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<sup>78</sup> Siebert, *supra* note 22, at 1734–35; *see also* Chudy, *supra* note 15, at 560 ("Although the *Qutb* court clearly exhibited a preference for heightened review, the court's willingness to overlook the state's inability to substantiate the efficacy of the curfew undermines the usual rigor of strict scrutiny.").

<sup>79</sup> 114 F.3d 935 (9th Cir. 1997).

<sup>80</sup> The San Diego ordinance contained only four exceptions: (1) accompaniment by a parent or guardian; (2) emergency errands at the direction of a parent or guardian; (3) returning directly home from a school-sponsored activity; and (4) required presence by legitimate business activity. *Id.* at 938–39.

<sup>81</sup> *Id.* at 944.

<sup>82</sup> *Id.* at 946.

<sup>83</sup> *Id.* at 945.

<sup>84</sup> *Id.* at 946 (observing further that "the government may have a compelling interest in protecting minors from certain things that it does not for adults").

<sup>85</sup> *Id.* at 947 (summarizing statistical evidence).

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timization actually *increased* during curfew hours in the year after enforcement began.<sup>86</sup>

The court determined that while “the statistical evidence provides some, but not overwhelming, support for the proposition that a curfew will help reduce crime,” the city had made “little showing . . . that the nocturnal, juvenile curfew is a particularly effective means of achieving that reduction.”<sup>87</sup> The court also “reject[ed] the City’s further justification that the ordinance ha[d] the additional beneficial deterrent effect of permitting police officers to get juveniles off the streets before crimes are committed.”<sup>88</sup>

The court’s response to the evidence, however, was striking. In spite of its apparent rejection of the city’s justification for the curfew ordinance, the court ruled that in the face of such “concerns” the ordinance might nevertheless survive strict scrutiny.<sup>89</sup> After concluding that minors are especially vulnerable at night—a position unsupported by the city’s own statistics—the court opined that San Diego had established “some nexus” between the curfew and its compelling interests.<sup>90</sup> This language hardly reflects the more rigorous “narrow tailoring” standard characteristic of strict scrutiny review. The court struck down the curfew only because it lacked the exceptions from the Dallas curfew upheld in *Qutb*.<sup>91</sup>

b. Intermediate Scrutiny: *Schleifer v. City of Charlottesville* and *Hutchins v. District of Columbia*

In contrast to the *Qutb* and *Nunez* decisions, which tried to follow the formal binary framework for fundamental interest claims, the Fourth Circuit in *Schleifer v. City of Charlottesville*<sup>92</sup> and the D.C. Circuit in *Hutchins v. District of Columbia*<sup>93</sup> explicitly abandoned the

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 948.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (“Notwithstanding our expressed concerns, we reject a challenge to the ordinance that is based on the argument that a curfew is not particularly effective at meeting the City’s interest. The City has established some nexus between the curfew and its compelling interest of reducing juvenile crime and victimization.”).

<sup>90</sup> *Id.*

<sup>91</sup> As the court explained:

[T]he curfew’s blanket coverage restricts participation in . . . many legitimate recreational activities[,] even those that may not expose [minors’] special vulnerability. In this regard, it is significant that San Diego rejected a proposal to tailor the ordinance more narrowly by adopting the broader exceptions used in the ordinance upheld in *Qutb*.

*Id.* at 948–49 (citation omitted).

<sup>92</sup> 159 F.3d 843 (4th Cir. 1998).

<sup>93</sup> 188 F.3d 531 (D.C. Cir. 1999) (en banc) (plurality opinion).

two-tier framework. These courts instead applied “intermediate scrutiny.”

*Schleifer* involved a curfew similar to the Dallas curfew from *Qutb*.<sup>94</sup> In an unusual step, the court began by considering what level of scrutiny should apply to children’s rights without ever mentioning which rights were implicated.<sup>95</sup> While acknowledging that laws that impinge on a group’s fundamental rights are subject to strict scrutiny, the court nevertheless reasoned, based on some of the Supreme Court’s juvenile rights decisions, that minors’ rights are not coextensive with those of adults.<sup>96</sup> The court therefore concluded that intermediate scrutiny, not strict scrutiny, was appropriate.<sup>97</sup>

The *Hutchins* opinion followed a similar pattern. Addressing another Dallas-model curfew, the D.C. Circuit, sitting en banc, splintered, revealing the tenuousness of the tiers of scrutiny framework as applied to juvenile curfew laws.<sup>98</sup> A plurality of four judges reasoned that minors do not enjoy a fundamental right “to be on the streets at night without adult supervision,” and therefore would have applied a rational basis test.<sup>99</sup> Three judges concluded for reasons substantially expressed in *Schleifer* that intermediate scrutiny was appropriate, and that the curfew should be upheld.<sup>100</sup> Judge Rogers agreed on interme-

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<sup>94</sup> See *Schleifer*, 159 F.3d at 846 (describing Charlottesville curfew ordinance).

<sup>95</sup> See *id.* at 846–47 (“Initially we must consider the level of scrutiny appropriate to this case.”). Indeed, the majority opinion in *Schleifer* does not once mention the words “free movement” or “intrastate travel,” nor does it ever explain what “constitutional liberties” the curfew law impinges, let alone whether such liberties are “fundamental.” Nevertheless, the *Schleifer* court applied heightened scrutiny. See *id.* at 847 (“[A]n ordinance which restricts [minors’] liberty to the extent that this one does should be subject to more than rational basis review.”). In taking this unusual step, the court may unwittingly have revealed how irrelevant the abstract rights discussion is to resolving juvenile curfew cases, where a substantial but poorly defined liberty interest is at stake.

<sup>96</sup> See *id.* (“[T]he Supreme Court has made it abundantly clear that children’s rights are not coextensive with those of adults.” (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (plurality opinion); *Ginsberg v. New York*, 390 U.S. 629, 638 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944))).

<sup>97</sup> See *Schleifer*, 159 F.3d at 847 (“[B]ecause children do not possess the same rights as adults, the ordinance should be subject to less than the strictest level of scrutiny. We thus believe intermediate scrutiny to be the most appropriate level of review . . . .” (citation omitted)).

<sup>98</sup> For a more in-depth summary of the assorted opinions in *Hutchins*, see Chudy, *supra* note 15, at 541–48.

<sup>99</sup> *Hutchins v. District of Columbia*, 188 F.3d 531, 538 (D.C. Cir. 1999) (en banc) (plurality opinion). The plurality went on to apply intermediate scrutiny only because it was unable to achieve a majority for the conclusion that no fundamental rights were implicated. See *id.* at 541 (“Even if the curfew implicated rights of children or their parents, it would survive heightened scrutiny.”).

<sup>100</sup> See *id.* at 548–49 (Edwards, C.J., concurring) (arguing that curfew implicated rights of children and parents); *id.* at 552 (Wald, J., concurring) (citing *Schleifer* and asserting curfew implicated rights of children and their parents).

diate scrutiny, but would have struck down the curfew because the legislature ignored evidence that most juvenile crime occurs outside curfew hours, and that almost half of juvenile crime is committed by individuals not subject to the curfew.<sup>101</sup> Judge Tatel agreed with Judge Rogers's conclusion but would have applied strict scrutiny.<sup>102</sup>

### 3. *What Does This All Mean?*

An odd formalism characterizes these cases. In each case, the court began by attempting to fit the curfew problem within the formal tiers of scrutiny framework. Just as quickly, however, the court proceeded to reject that framework, either explicitly or implicitly, by modifying or abandoning the usual standard. Each court then attempted to apply the standard to the facts of the case, but by that time the tiers of scrutiny had lost their formal character. As commentators have pointed out, the courts' strict scrutiny analysis in these cases bears little resemblance to the traditional application of strict review.<sup>103</sup> In the words of Dean Sullivan, it is "strict in name but intermediate in fact."<sup>104</sup> Reading through all four cases one gets the sense, as Judge Michael did in his *Schleifer* dissent, that despite claiming to apply heightened scrutiny, the courts were prepared to uphold *any* juvenile curfew that contained the Dallas exceptions, no matter how weak the evidentiary support in its favor.<sup>105</sup>

There is also a disturbing circularity to these opinions. To determine whether a curfew may be applied to minors, courts adjust the level of scrutiny downward. Whether juveniles may be treated differently from adults—and therefore validly subjected to a nocturnal curfew—depends on the extent of that adjustment, but the extent of the adjustment itself turns on whether it is permissible to treat juveniles differently. In the end, as Katherine Federle has pointed out, the courts' analysis "collapses into a tautology: Children's fundamental rights are not violated because the state may treat them differently, and the state has greater authority to regulate their activities

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<sup>101</sup> See *id.* at 552–70 (Rogers, J., dissenting).

<sup>102</sup> See *id.* at 570–75 (Tatel, J., dissenting) (arguing that curfew "so plainly lacks an evidentiary link to the stated goal that it fails the tailoring prong of both strict and intermediate scrutiny").

<sup>103</sup> See *supra* Part I.B.2.a.

<sup>104</sup> Sullivan, *supra* note 6, at 304 n.51.

<sup>105</sup> See *Schleifer v. City of Charlottesville*, 159 F.3d 843, 858 (4th Cir. 1998) (Michael, J., dissenting) ("The majority attempts to brush this dissent aside by claiming that under my approach 'no curfew ever would pass constitutional muster.' I can as easily say that under the majority's approach no curfew would ever *fail* constitutional muster. I'm afraid that my claim will be proven true." (citation omitted)).

because children's rights are not as extensive as those held by adults."<sup>106</sup>

The problem is that juvenile curfew cases simply do not fit into the formal tiers of scrutiny framework. The "right to free movement" is so difficult a concept, and the status of juveniles as rights-holders so vexing a complication, that trying to funnel the claim into a binary "fundamental right" or "no fundamental right" system is an impossible task that courts have rightly rejected. The categorical tiers approach thus describes neither the problem that the courts are trying to solve nor the approach that the courts are taking. The emptiness of the strict scrutiny, intermediate scrutiny, and rational basis labels in the curfew context helps to explain the futility of the approach courts have taken to resolve this problem, which involves attempting to incorporate generalized juvenile rights jurisprudence into the tiers framework. I now turn to a discussion of those efforts.

## II

### THE JUVENILE RIGHTS APPROACH

Having to apply a binary all-or-nothing framework for fundamental rights to juvenile curfew cases creates the following problem. Courts assume that a nonemergency curfew applying to adults would receive strict scrutiny and be declared invalid.<sup>107</sup> Juvenile curfews, by contrast, do not seem to invite automatically fatal review. Courts therefore have sought ways to distinguish the juvenile context from the adult context, either by articulating reasons why juveniles have "lesser" rights than adults, or by suggesting reasons why the state has a greater interest in regulating children.<sup>108</sup>

Like the tiers of scrutiny framework, however, generalized juvenile rights jurisprudence is a poor fit for the problem presented by juvenile curfew laws, and its application has failed to generate a principled and unified approach. This Part first discusses the applicability of juvenile rights jurisprudence generally, and then examines courts'

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<sup>106</sup> Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1350 (1995).

<sup>107</sup> Most nonemergency adult curfews have been declared unconstitutional. See Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1164 (1984).

<sup>108</sup> See, e.g., *Minor Rights*, *supra* note 15, at 2407 ("The confusion in the circuits stems from their different approaches to minors' rights."); Chudy, *supra* note 15, at 536 ("The constitutionality of juvenile curfews is predicated on the threshold question of whether the rights of minors are coextensive with those of adults."); see also *Bykofsky v. Borough of Middletown*, 429 U.S. 964, 965 (1976) (Marshall, J., dissenting) ("The question squarely presented by this case, then, is whether the due process rights of juveniles are entitled to lesser protection than those of adults.").

efforts to craft a “test” out of language from the Supreme Court’s plurality opinion in *Bellotti v. Baird*.<sup>109</sup>

### A. *Curfews and Juvenile Rights Jurisprudence*

Constitutional cases concerning children may be classified into three categories: parent-state conflicts, parent-child conflicts, and child-state conflicts.<sup>110</sup> Parent-state conflicts ask who—the parents or the state—may make decisions for the child, who is assumed not competent to make decisions for herself.<sup>111</sup> In most such cases, the Supreme Court has determined that parents—not the state—have the ultimate authority in child rearing, and even have a constitutional right to raise their children without undue state interference.<sup>112</sup> Challenges to curfew laws have often been framed as parent-state conflicts, but the argument that curfews unlawfully infringe on parents’ fundamental right to direct their children’s upbringing by letting them out during curfew hours has gained little traction in the courts.<sup>113</sup>

Juvenile curfew cases also are not properly conceptualized as clashes between parent and child. It is taken for granted that a parent may set a curfew for his or her child. In many curfew cases both parents and children want the children to be outside at night, but the state forbids this activity.

Accordingly, juvenile curfew cases are best classified as conflicts between the child and the state. The question is: May the *state* prohibit the *child* from going outside during curfew hours, regardless of the parents’ wishes? Most cases involving child-state conflicts fall into

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<sup>109</sup> 443 U.S. 622 (1979).

<sup>110</sup> See Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 592–600 (2002) (summarizing three categories of constitutional cases involving children).

<sup>111</sup> See Barbara Bennett Woodhouse, “Who Owns the Child?”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1068–1100 (1992) (describing theories of parent-state conflict articulated in *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

<sup>112</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972) (holding compulsory education law unconstitutional as applied to Amish parent who preferred to keep his daughter home to work); *Meyer*, 262 U.S. at 399 (invalidating law prohibiting children from learning foreign language, holding that “liberty” protected by due process clause of Fifth and Fourteenth Amendments includes right of parents to determine how to raise children).

<sup>113</sup> Courts have mostly concluded that curfew laws decrease parents’ authority to direct their children’s upbringing, but that this infringement on parental authority does not rise to the level of a constitutional violation. See *Hutchins v. District of Columbia*, 188 F.3d 531, 540–41 (D.C. Cir. 1999) (en banc) (plurality opinion) (construing parents’ due process right to direct children’s upbringing to extend only to parents’ “control of the home” and of “the formal education of children”); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 852–53 (4th Cir. 1998) (construing parents’ fundamental right to raise children to extend only to “intimate family decisions”). But see *Hutchins*, 188 F.3d at 548–49 (Edwards, C.J., concurring) (finding that curfew infringes on rights of parents but survives heightened scrutiny).

two categories: those involving juvenile delinquency proceedings and those involving children's rights in public schools. Neither set of cases provides much guidance on how to resolve juvenile curfew challenges.

Minors are entitled to basic procedural rights in the juvenile justice system, including the right to counsel, the right to know the charges against them, the right to cross-examination, and the right to remain silent.<sup>114</sup> The Supreme Court recognized in *In re Gault* that children are "persons" under the Constitution and possess constitutional rights, stating famously that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."<sup>115</sup> In *Gault* and in subsequent cases the Court has extended to minors most of the basic procedural rights that adults enjoy in criminal trials.<sup>116</sup>

In the school context, the state exercises quasi-parental authority; consequently, the government is afforded much greater power over children than it normally enjoys. In two recent cases the Supreme Court upheld suspicionless, warrantless drug-testing programs for students engaged in extracurricular activities in public schools.<sup>117</sup> The Court reasoned that when parents bring their children to school, they delegate some of their custodial and tutelary responsibilities to the school.<sup>118</sup> The special custodial relationship between the state-as-school and the child-as-student allows the state to deprive students of some liberty that could not permissibly be stripped of an individual in society at large.<sup>119</sup> The Court also reasoned that children have a

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<sup>114</sup> *In re Gault*, 387 U.S. 1, 31–57 (1967) (establishing robust set of procedural rights for juveniles in delinquency proceedings).

<sup>115</sup> *Id.* at 13.

<sup>116</sup> *See id.* at 10 (noting minors' procedural due process rights); *Breed v. Jones*, 421 U.S. 519 (1975) (holding that juveniles are entitled to double jeopardy protection); *Goss v. Lopez*, 419 U.S. 565 (1975) (holding that juveniles are entitled to due process prior to certain property deprivations). The notable exception is the right to trial by jury. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 545–50 (1971) (concluding that Constitution does not require trial by jury in juvenile justice system because, among other reasons, requirement would "remake the juvenile proceeding into a fully adversarial process and . . . put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding" and because "a jury is not a necessary part even of every criminal process that is fair and equitable").

<sup>117</sup> *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

<sup>118</sup> *See Vernonia*, 515 U.S. at 655 ("[T]he nature of [a public school's] power [over schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. . . . [W]e have acknowledged that for many purposes 'school authorities ac[t] *in loco parentis*.'" (citation omitted)).

<sup>119</sup> That power is not unlimited, however. The state may not, for example, prohibit public school students from exercising their First Amendment rights when such exercise would not materially and substantially interfere with the operation of discipline in a public school. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). The Court's recent decision in *Morse v. Frederick*, which involved a student who unfurled a

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diminished expectation of privacy in school that justifies heightened state intrusion.<sup>120</sup> Neither rationale applies in the curfew context where juveniles are on the public street, not in the classroom, and where the state stands in relation to them not as quasi-parent but as sovereign.<sup>121</sup>

Outside of the schools and juvenile delinquency context, the Supreme Court has analyzed child-state conflicts without reference to any constitutional differences between children and adults. In *McConnell v. Federal Election Commission*,<sup>122</sup> for example, the Supreme Court struck down a law prohibiting minors from making contributions to candidates or political parties. Stating simply that “[m]inors enjoy the protection of the First Amendment,” the Court applied “heightened scrutiny” and summarily invalidated the contested provision without any analysis of how minors’ First Amendment rights might differ from adults’.<sup>123</sup>

None of these cases is much help in deciding whether a juvenile curfew is constitutional. What does it mean that juveniles have the same procedural due process rights as adults except for the right to a jury trial? That children have a diminished expectation of privacy while in the state’s custody in school? That parents ordinarily have more authority to direct children’s upbringing than does the state? These principles provide no guidance in the case where the child is on a public street and the parent and teacher are out of the picture, nor

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large banner bearing the phrase “BONG HITS 4 JESUS” at a school activity, revolved around the special custodial relationship between the State and the child at school. 127 S.Ct. 2618 (2007). In *Morse*, the Court held that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.” *Id.* at 2622. That holding flowed from the Court’s recognition that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

<sup>120</sup> See *Earls*, 536 U.S. at 830–32 (“A student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.”); *Vernonia*, 515 U.S. at 657 (“Somewhat like adults who choose to participate in a closely regulated industry, students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.” (internal quotation marks omitted)).

<sup>121</sup> See *Ramos v. Town of Vernon*, 353 F.3d 171, 183 n.5 (2d Cir. 2003) (observing that rule of *Vernonia* “aris[es] in special circumstances, [namely] that of children in a public school, where we accept that the state necessarily has a greater degree of control over children in its role *in loco parentis*” and declining to extend *Vernonia* to curfew context); *Nunez v. City of San Diego*, 114 F.3d 935, 944–45 (9th Cir. 1997) (declining to extend *Vernonia* beyond school context).

<sup>122</sup> 540 U.S. 93, 231–32 (2003).

<sup>123</sup> *Id.* at 231 (“When the Government burdens the right to contribute, we apply heightened scrutiny.”).

do they offer any guidance as to how juveniles' fundamental rights figure into the "tiers of scrutiny" framework.

### B. *The "Bellotti Test"*

To make up for this lack of guidance, courts addressing juvenile curfew laws have attempted to fashion a "test" out of language in the Supreme Court's plurality opinion in *Bellotti v. Baird*.<sup>124</sup> In *Bellotti*, the Court approved parental-notification provisions in abortion statutes as long as the statutes contained judicial bypass procedures.<sup>125</sup> In its opinion, the plurality "recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."<sup>126</sup>

Courts that invoke *Bellotti* in the juvenile curfew context often have read this language to establish a test under which children enjoy lesser rights if at least one of the three prongs—vulnerability, inability to make mature decisions, and the importance of the parental role—are implicated by the circumstances in question.<sup>127</sup> Courts have, however, disagreed on the ramifications of this test. In *Nunez*, for example, the Ninth Circuit concluded that "[t]he *Bellotti* test does not establish a lower level of scrutiny for the constitutional rights of minors in the context of a juvenile curfew. Rather, the *Bellotti* framework enables courts to determine whether the state has a compelling interest justifying greater restrictions on minors than on adults."<sup>128</sup> In contrast, the D.C. Circuit concluded in *Hutchins* that *Bellotti* "necessarily" means that intermediate scrutiny is the proper test.<sup>129</sup> In the following paragraphs, I outline the reasons why courts should discard this so-called "*Bellotti* test."

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<sup>124</sup> 443 U.S. 622 (1979) (plurality opinion).

<sup>125</sup> *Id.* at 651.

<sup>126</sup> *Id.* at 634.

<sup>127</sup> See, e.g., *Schleifer v. City of Charlottesville*, 159 F.3d 843, 848–49 (4th Cir. 1998) (supporting government's interests with reference to "the peculiar vulnerability of children," "the guiding role of parents in the upbringing of their children," and "minors' [lack of] experience, perspective, and judgment [necessary] to recognize and avoid choices that could be detrimental to them" (internal quotation marks omitted)); *Nunez v. City of San Diego*, 114 F.3d 935, 945 (9th Cir. 1997) (discussing and applying "*Bellotti* test"); see also *Minor Rights*, *supra* note 15, at 2409–13 (systematically analyzing three "*Bellotti* factors"); Chudy, *supra* note 15, at 538 (discussing courts' various approaches to "the *Bellotti* criteria").

<sup>128</sup> *Nunez*, 114 F.3d at 945.

<sup>129</sup> *Hutchins v. District of Columbia*, 188 F.3d 531, 541 (D.C. Cir. 1999) (en banc) (plurality opinion).

First, *Bellotti* itself did not seek to establish a “test” whereby children enjoy lesser rights any time one or more factors is present. The plurality recognized that in many cases children *did* have the same rights as adults even though children were vulnerable (e.g., delinquency cases).<sup>130</sup> Surely children are more vulnerable than adults in situations where they might incriminate themselves or where they must consider the advice of counsel, but the Court has rejected the idea that such vulnerability implies that children lack the privilege against self-incrimination or the right to counsel.<sup>131</sup> It would be quite strange if basic constitutional rights could be withheld from those who are most in need of protection on account of their very vulnerability. Indeed, our system generally does the opposite, extending extra entitlements to individuals most in need of protection.<sup>132</sup>

Instead, the *Bellotti* plurality merely sought to point out that courts should not make the “uncritical assumption” that children’s constitutional rights are *always* the same as those of adults.<sup>133</sup> This does not mean that *every time* children are vulnerable, faced with important decisions, or involved in a decision in which parenting might be helpful, the law must be different. It is not surprising, therefore, that the Supreme Court has never applied the so-called “*Bellotti* test,” despite nearly thirty years’ worth of opportunities to do so.<sup>134</sup> Nor has any court ever applied the test outside the curfew context.

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<sup>130</sup> *Bellotti*, 443 U.S. at 634 (“With respect to many of these claims, we have concluded that the child’s right is virtually coextensive with that of an adult.”).

<sup>131</sup> See *In re Gault*, 387 U.S. 1, 34–36, 55 (1967) (making clear that minors have right to counsel and right against self-incrimination). There is, admittedly, a mismatch between the reasoning of the *Gault* line of cases and courts’ analyses of juvenile curfew laws. *Gault* and its progeny were discussing extensions of procedural rights to juveniles for their own protection, whereas juvenile curfew cases raise the question of whether the State may deprive minors of substantive rights in order to protect them. Nevertheless, when *Bellotti* explained its “vulnerability” analysis, it was referring to the *Gault* line of cases. See *Bellotti*, 443 U.S. at 634 (plurality opinion) (discussing vulnerability of children in reference to *Gault*). This disconnect between *Bellotti*’s “vulnerability” analysis and the problem presented by juvenile curfew laws is further evidence that *Bellotti* cannot be construed to create a mechanical “test” applicable to juvenile curfew cases without engaging in more nuanced analysis.

<sup>132</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (suggesting that more searching judicial scrutiny may be appropriate when assessing whether prejudice against minorities may tend to curtail operation of political processes that would otherwise protect them).

<sup>133</sup> See *Bellotti*, 443 U.S. at 635 (stating that past rulings have not been made on basis of such assumptions).

<sup>134</sup> For example, when the Court addressed restrictions on juveniles’ political campaign contributions in *McConnell v. Federal Election Commission*, 540 U.S. 93, 231–32 (2003), it did not pause to consider whether making such a contribution constitutes a “mature decision” that juveniles are not prepared to make, or what other effect *Bellotti* might have on juveniles’ First Amendment rights.

Second, applying the “*Bellotti* test” to juvenile curfews deprives each of the test’s “three prongs” of any meaning. According to the argument that appears in *Nunez* and elsewhere, for example, children are more vulnerable to danger at night than adults.<sup>135</sup> Therefore, the state may impose greater restrictions on children’s public nighttime activities. Under the logic of this argument, however, children are *always* more vulnerable than adults. They are more vulnerable than adults when they walk around during the daytime, when they ride the bus, and when they sit in the park. If children may be treated differently from adults any time they are more vulnerable, then they may always be treated differently from adults.

The same can be said for the “mature decisions” prong. The *Nunez* court, other courts, and commentators all have justified treating juveniles differently on the grounds that minors “are not equally able as adults to make mature decisions regarding the safety of themselves and others” on the street at night.<sup>136</sup> But minors are *always* less able to make mature choices: They are confronted with “potentially life-shaping decisions”<sup>137</sup> not only on the street at night, but also on the street during the day, in the school yard, and in their own homes. If the “*Bellotti* test” were so easily satisfied, it would just be a rule that minors may *always* be treated differently from adults. But that is not the law. Instead, *Bellotti*’s reference to “mature decisions” alludes not to abstract decisionmaking but to *specific profound decisions*, like obtaining an abortion or purchasing pornography.<sup>138</sup>

Finally, even assuming that the *Bellotti* plurality established a “test” of general applicability, and that the “*Bellotti* factors” extend to the juvenile curfew context, courts still would lack any guidance as to which tier of scrutiny to apply, or what that tier would mean. Courts have confidently declared, usually with no particular support or analysis, that “[t]he *Bellotti* test does not establish a lower level of scrutiny

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<sup>135</sup> See *Nunez v. City of San Diego*, 114 F.3d 935, 947 (9th Cir. 1997) (“[W]e find it unexceptional for the City to conclude that minors are more susceptible to the dangers of the night and are generally less equipped to deal with danger that does arise.”); *Hutchins v. District of Columbia*, 188 F.3d 531, 541 (D.C. Cir. 1999) (en banc) (plurality opinion) (advancing similar argument).

<sup>136</sup> *Nunez*, 114 F.3d at 947; see also *Minor Rights*, *supra* note 15, at 2418 (suggesting that children may be treated differently from adults as constitutional matter based on “judicial notice . . . that children are more vulnerable, more likely to make bad decisions, and more likely to fall prey to the nighttime dangers”).

<sup>137</sup> *Schleifer v. City of Charlottesville*, 159 F.3d 843, 849 (4th Cir. 1998) (“Alone on the streets at night children face a series of dangerous and potentially life-shaping decisions. Drug dealers may lure them to use narcotics or aid in their sale. Gangs may pressure them into membership or participation in violence.”).

<sup>138</sup> See *Bellotti*, 443 U.S. at 635–37 (referring to making of important, affirmative choices such as those at issue in *Ginsberg v. New York*, 390 U.S. 629 (1968)).

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for the constitutional rights of minors in the context of a juvenile curfew.”<sup>139</sup> However, courts just as confidently have stated that “[t]he reasoning of *Bellotti*, *Prince*, and *Carey* necessarily suggests that something less than strict scrutiny—intermediate scrutiny—would be appropriate here.”<sup>140</sup> There seems to be no satisfactory way to resolve this dispute. After all this “*Bellotti* analysis,” the courts are back to square one.

### III

#### RAMOS V. TOWN OF VERNON AND THE SKEPTICAL INTERMEDIATE APPROACH

As the preceding Parts have demonstrated, the formal method of resolving juvenile curfew litigation has failed to produce a coherent approach. Faced with Dean Sullivan’s “analogical crisis,” courts have attempted to funnel curfew challenges into the binary framework for fundamental interest claims, but the framework has always broken down. Unable to settle upon strict or rational review, courts have applied some kind of intermediate balancing standard.<sup>141</sup> Announcing “intermediate scrutiny” as the proper standard, however, will not resolve the conflict between the courts. There is a lot of space between strict and rational review, and “intermediate scrutiny” does not mean the same thing in all contexts. For example, if the courts applied the kind of intermediate scrutiny used for gender classifications, it is hard to imagine that any curfews challenged to date could survive.<sup>142</sup> On the other hand, the “intermediate scrutiny” standard applied to regulations of expressive conduct under *United States v. O’Brien*<sup>143</sup> has allowed laws to survive even when supported by relatively weak government interests.<sup>144</sup> Recent curfew cases, too, show that the intermediate approach can carry varying degrees of “bite.”<sup>145</sup>

What kind of intermediate review should apply in juvenile curfew challenges? This question is difficult to answer for at least two rea-

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<sup>139</sup> *Nunez*, 114 F.3d at 945.

<sup>140</sup> *Hutchins*, 188 F.3d at 541.

<sup>141</sup> See *supra* Part I.B.2.b.

<sup>142</sup> See *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”).

<sup>143</sup> 391 U.S. 367 (1968).

<sup>144</sup> See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (upholding public indecency statute based upon “government interest in protecting order and morality”).

<sup>145</sup> Compare *Ramos v. Town of Vernon*, 353 F.3d 171, 181–87 (2d Cir. 2003) (engaging in aggressive intermediate review to strike down curfew ordinance), with *Hutchins*, 188 F.3d at 541–45 (en banc) (plurality opinion) (upholding curfew under intermediate scrutiny).

sons. First, the formal framework makes no distinction between “aggressive” intermediate scrutiny and “weak” intermediate scrutiny. Instead, the framework requires that all cases get discretely slotted into one of the three “tiers.” Second, the tiers labels have been virtually meaningless in curfew cases, such that encouraging a court to apply a particular standard of review to juvenile curfew cases may end up providing little guidance.<sup>146</sup>

For these reasons, courts and scholars should move away from the formalism of tiers and instead revisit the rationales underpinning equal protection jurisprudence. When functioning properly, the tiers of scrutiny framework operates as a prism to channel the abstract mandate of “equal protection of the laws” into judicially manageable standards. In juvenile curfew cases, however, instead of streamlining the analysis, application of the framework has only confused the analysis, blurred the lines between the three tiers themselves, and hindered more in-depth discussion of whether juvenile curfew laws comport with equality. This Part attempts to shift the debate to a potentially more constructive focus on the role courts should take in reviewing a democratically enacted curfew law that constrains juveniles’ freedom.

I will first attempt to elaborate a justification for more skeptical judicial review, discussing what role juvenile status should play in that analysis. Second, I will describe the Second Circuit’s opinion in *Ramos v. Town of Vernon*, which engaged—for the first time—in constructive analysis of the courts’ proper role in reviewing juvenile curfews. Finally, I will analyze the benefits of the *Ramos* approach and attempt to provide some direction for future analysis.

### A. Reframing the Question

#### 1. A Focus on the Court’s Role

The dominant approach to juvenile curfew cases contains two defects. First, it starts with a question that is unanswerable: whether a fundamental right to free movement “exists” for juveniles.<sup>147</sup> Second, the courts have reacted to the breakdown of the formal approach with yet more formalism—unable to answer “yes” or “no” to whether the right at stake is fundamental, they generally recognize “free movement” as a right, but mechanically use juveniles’ status either to

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<sup>146</sup> See *supra* Part I.B.2.

<sup>147</sup> The continuing debate over whether juveniles have a right to free movement that is coextensive with adults’ rights illustrates John Hart Ely’s conclusion that it is impossible for courts to identify “fundamental values,” at least without making political judgments. See generally ELY, *supra* note 17.

change the appropriate “tier” or to modify traditional strict review.<sup>148</sup> Regardless of what form this modification takes, however, it is still not clear whether judicial review should be deferential or aggressive. In the end, courts are still struggling to determine what the Constitution requires. Still, neither the Constitution’s broad guarantee of “equal protection of the laws”<sup>149</sup> nor the Supreme Court’s juvenile rights jurisprudence<sup>150</sup> provides significant guidance.

Instead of focusing on abstract questions of what right to free movement juveniles may “possess,” it may be more constructive to reverse the inquiry and ask what role the court should take in shielding juveniles from a democratically enacted curfew law. This approach would bypass the prism of the three tiers of scrutiny, which has proved unhelpful, and instead jump directly from the Constitution’s mandate of equality to the proper judicial standard of review. In constitutional law, when the question of what the Constitution requires becomes too difficult to answer in the abstract, a more effective approach can be to ask “*who* should decide” what is required.<sup>151</sup> Indeed, this is the approach of the tiers of scrutiny framework itself: For legislation that commands rational basis deference, the legislature is empowered to decide what laws are appropriate; for laws that are strictly scrutinized, the court decides.<sup>152</sup>

Understanding equal protection scrutiny in the context of the judiciary’s proper role helps to explain differences in courts’ approaches, which emerge even when courts are ostensibly employing the same tiered labels. Decisions like *Nunez* represent a preference for allowing the legislature to decide whether a juvenile curfew adequately balances the relevant interests; such decisions give great deference to legislative conclusions even when the evidentiary support for those conclusions is weak.<sup>153</sup> Other courts prefer to decide for themselves whether the interests at stake have been properly bal-

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<sup>148</sup> See *supra* Part I.B.2.

<sup>149</sup> See *supra* Part I.

<sup>150</sup> See *supra* Part II.

<sup>151</sup> See generally ELY, *supra* note 17 (arguing that search for “fundamental values” is in vain and that courts should engage instead in representation-reinforcing review when political process breaks down).

<sup>152</sup> The famous footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938), announced that the Court would engage in a presumption of constitutionality for most legislation, but not for legislation that infringed upon constitutional rights, impaired the political process, or burdened discrete and insular minorities. See also ELY, *supra* note 17, at 8 (arguing that courts are better-equipped than legislatures to decide questions of political participation).

<sup>153</sup> See *Nunez v. City of San Diego*, 114 F.3d 935, 948 (9th Cir. 1997) (“We will not dismiss the City’s legislative conclusion that the curfew will have a salutary effect on juvenile crime and victimization.”).

anced, with less deference to legislative findings.<sup>154</sup> In the next section, I argue that the rationales underlying equal protection jurisprudence support this latter, more skeptical judicial approach.

## 2. *The Case for Less Deference*

Juvenile curfew cases fall within what Julie Nice identifies as an “emerging third strand” of equal protection jurisprudence.<sup>155</sup> The first two strands, which have been firmly established in law, revolve around “suspect classifications” and “fundamental rights,” the existence of which immediately trigger heightened review. In juvenile curfew litigation, as in a series of other recent cases,<sup>156</sup> there is neither a suspect classification nor a right that the courts are willing to identify as wholly fundamental. Instead, a classification converges with a significant deprivation of liberty, which together justify heightened scrutiny.

Within this context, there are several reasons to apply a less deferential standard of review to legislation that constrains the liberty of juveniles. First, children have no direct representation in government and little ability to organize to protect their own interests.<sup>157</sup> According to the “representation-reinforcement” model of the Equal Protection Clause, courts should intervene in such situations to ensure that the unrepresented group’s interests are taken into account.<sup>158</sup>

Second, children cannot rely on the political processes “which can ordinarily be expected to bring about repeal of undesirable legisla-

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<sup>154</sup> See *Ramos v. Town of Vernon*, 353 F.3d 171, 180–81 (2d Cir. 2003) (applying more aggressive scrutiny to legislative findings).

<sup>155</sup> See Nice, *supra* note 13, at 1211 (“This emerging third strand of equal protection analysis imposes heightened scrutiny not only for fundamental rights or for suspect classes but also for situations where the rights and classes interact in such a way as to raise the Court’s suspicions.”); see also Leslie Friedman Goldstein, *Between the Tiers: The New[est] Equal Protection and Bush v. Gore*, 4 U. PA. J. CONST. L. 372, 372 (2002) (“[P]roper equal protection scrutiny demands differing levels of justification for state policies, depending on the nature of the group lines drawn by the state classification and the nature of the benefit that the classification has burdened.”).

<sup>156</sup> See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 115–17, 123–27 (1996) (invalidating state denial of civil appeal brought by poor woman who could not afford appellate fee); *Romer v. Evans*, 517 U.S. 620 (1996) (involving significant deprivation of homosexual persons’ liberty); *Plyler v. Doe*, 457 U.S. 202, 223–24 (1982) (involving denial of free public education to undocumented immigrant students).

<sup>157</sup> It may be argued that minors are “virtually represented” by their parents, but in reality parents probably represent their children’s interests on some issues but not on others. Curfew laws seem like one area in which parents likely do not represent children’s interests as vigorously as children would themselves, if they were able.

<sup>158</sup> Eskridge, *supra* note 3, at 2266–67; see ELY, *supra* note 17, at 73–104 (arguing that Court should view its primary function as “Referee,” policing the political process to ensure that disadvantaged groups’ interests are adequately represented).

tion.”<sup>159</sup> Even if it turns out that a curfew does nothing to prevent juvenile crime and victimization, children are unlikely to be able to bring about repeal of the ineffective ordinance. The law will remain in place, therefore, although it imposes great restrictions on children’s freedom with little appreciable benefit.

Third, juvenile curfew laws potentially present a specific kind of political “process failure”: A powerful group may be engaging in “private rent-seeking” at the expense of a politically powerless group.<sup>160</sup> Ostensibly, curfews are passed to protect children from victimization and from falling into patterns of criminal conduct; thus, while the burdens of curfews are born by children, children also reap the benefits. There is a danger, however, that the curfews are actually enacted to benefit adults’ interests in aesthetics, peace and quiet, or even their distaste for the lifestyles of certain young people.<sup>161</sup>

Understood another way, there is a danger that legislatures are acting out of hidden or improper motives. While reducing juvenile crime and victimization may be compelling interests, removing unpleasant-looking youths from the nighttime streets is not.<sup>162</sup> While courts generally refrain from inquiring directly into legislative motives, heightened scrutiny operates as a procedural mechanism to “smoke out” illegitimate purposes, which a court may suspect are present but cannot detect directly.<sup>163</sup> Here the disconnect in curfew laws’ tailoring comes into play: As discussed in Part I, statistics show year after year that juvenile crime and victimization both peak during the afternoon and reach their lowest levels at night.<sup>164</sup> While a legislature

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<sup>159</sup> United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).

<sup>160</sup> See Eskridge, *supra* note 3, at 2266–67 (describing “rationality principle, whereby laws are supposed to be public-regarding rather than private rent-seeking,” and observing that desire to prevent such rent-seeking “has been instinct in the Court’s equal protection jurisprudence since the beginning, through the *Plessy* and then *Brown* periods” (emphasis removed)).

<sup>161</sup> This is what the Second Circuit suspected was going on in *Ramos v. Town of Vernon* and appears to have been the reason why the court struck down the Vernon, Connecticut, curfew law. See *Ramos*, 353 F.3d 171, 184 (2d Cir. 2003) (discussing testimonial evidence that curfew was passed in response to increased number of unpleasant-looking youths sighted on public streets).

<sup>162</sup> *Id.* at 185–86.

<sup>163</sup> See Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2359–64 (2000) (describing dual functions of strict scrutiny as “cost-benefit balancing” and “‘smoking out’ of illegitimate purposes”); Sullivan, *supra* note 6, at 295 (describing use of “fit analysis” to “smoke out impermissible motives”); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (“[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.”).

<sup>164</sup> See *supra* note 75 and accompanying text.

is entitled to focus on only part of a larger problem, a court should be skeptical that lawmakers endeavoring to reduce juvenile crime and victimization would target the times when such problems are least severe.

These concerns do not mean that youth should be added to the list of suspect classifications, or that any law directed at young people should be met with heightened review. Instead, the justification for heightened review emerges from the convergence of the class distinction and a severe<sup>165</sup> deprivation of liberty.<sup>166</sup> Whether or not that deprivation affects liberty interests that may be deemed “fundamental” is impossible to answer. Nevertheless, the imposition of curfews on the youth—a vulnerable class—creates the danger that legislatures could sharply restrict this group’s liberty, with minimal, if any, chance that such restrictions could be repealed through the normal operation of the democratic process. Skeptical review is appropriate in this situation to ensure that the vulnerable group’s interests are adequately protected.<sup>167</sup> In its recent opinion in *Ramos v. Town of Vernon*,<sup>168</sup> the Second Circuit recognized these considerations and engaged in skeptical review.

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<sup>165</sup> Addressing a District of Columbia curfew, District Judge Charles R. Richey observed that

[t]he restriction, although perhaps by its nature silent, would be massive. Every juvenile in the District of Columbia would be arrested if he or she sought to wander the monuments at night, or if he or she sought to gaze at the stars from a public park. The Act’s exceptions are substantial and constitutionally significant; yet, in the final analysis, the Act cannot help but “broadly stifle” the fundamental liberty interests of thousands of perfectly innocent, law-abiding juveniles who live in or who may visit the District of Columbia.

*Waters v. Barry*, 711 F.Supp. 1125, 1136 (D.D.C. 1989).

In its opinion striking down Indiana’s nocturnal curfew law, the Seventh Circuit described the impact of a nocturnal curfew on one individual:

Shortly after 11:00 pm on August 26, 1999, Colin Hodgkins and his three friends left a Steak ‘n Shake restaurant in Marion County, Indiana where they had stopped to eat after attending a school soccer game. As they left the restaurant, police arrested and handcuffed them for violating Indiana’s curfew regulation. The police took Colin and his friends to a curfew sweep processing site where he was given a breathalyzer test and escorted to a bathroom where he was required to submit a urine sample to be tested for drugs. Later, both tests were determined to be negative . . . . Two and a half hours later, at 1:30 a.m., a member of the Marion County Sheriff’s Department went to the Hodgkins residence to inform Nancy Hodgkins that her son had been arrested and had to be picked up at the local high school.

*Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1051–52 (7th Cir. 2004).

<sup>166</sup> See *supra* note 147.

<sup>167</sup> See ELY, *supra* note 17, at 102–03, 135–79 (arguing that strong judicial review is most justified when it ensures that minority interests are represented in situations where those in power may vote to give themselves advantages).

<sup>168</sup> 353 F.3d 171 (2d Cir. 2003).

*B. The Second Circuit Approach: Ramos v. Town of Vernon*

In *Ramos*, the Second Circuit addressed the constitutionality of a Vernon, Connecticut curfew designed to mirror the Dallas curfew upheld in *Qutb v. Strauss*.<sup>169</sup> The decision included some elements of the formal approach: The court recognized a “fundamental right” in intrastate travel and assumed that the curfew “would be subject to strict scrutiny” if applied to adults.<sup>170</sup> The threshold issue in the case, therefore, would be how minors’ rights should be analyzed within the tiers of scrutiny framework.<sup>171</sup>

Instead of launching into a formalistic “*Bellotti* analysis,” however, the Second Circuit focused on the tiers of scrutiny framework itself to determine the proper role for the court in reviewing juvenile curfew laws. The court settled on an intermediate balancing approach not through formal modification but by reasoning that the categorical extremes of strict scrutiny and rationality review were inappropriate.

First, the court concluded that “denying the existence of a constitutional right” by applying rationality review is “too blunt an instrument” for resolving juvenile curfew cases.<sup>172</sup> The court noted that when greater infringements are permitted on minors’ freedom, it is not because a “minor has no interest worth protecting,” but rather because “the government’s interest and the special status of minors justify the incursion.”<sup>173</sup> Therefore, the court declined to exclude minors entirely from the “protected zone” of fundamental rights and instead focused on how the competing interests should be balanced.<sup>174</sup>

Strict scrutiny, on the other hand, struck the court as “too restrictive” because it reflected a threshold judgment that the classification in question was so suspect that it should almost never be allowed.<sup>175</sup> As with gender classifications, where physical differences between

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<sup>169</sup> Compare *id.* at 172–73 (describing Vernon curfew ordinance), with *Qutb v. Strauss*, 11 F.3d 488, 490–91 (5th Cir. 1993) (describing Dallas curfew ordinance).

<sup>170</sup> *Ramos*, 353 F.3d at 176.

<sup>171</sup> *Id.* (“Analysis in this case is more complicated because Vernon’s ordinance targets juveniles and we have not yet determined whether children, like adults, possess the right to intrastate travel or, if they do, how such right is impacted by their age.”).

<sup>172</sup> *Id.* at 177–78.

<sup>173</sup> *Id.* at 178.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 180. The court reasoned that strict scrutiny “embodies a constitutional preference for ‘blindness’” in both the suspect class and fundamental interests strands of equal protection law. *Id.* at 179. In the realm of suspect classes, “strict scrutiny views some classifications, such as race, as so pernicious that society should be blind to them in all but rare situations.” *Id.* Similarly, in the fundamental interests context, strict scrutiny “reflects the notion that some rights are so important that they should be afforded to individuals in a manner blind to all group classifications, absent the most compelling reasons to do otherwise.” *Id.*

men and women remained relevant, the court reasoned that inherent differences between children and adults meant that sometimes legislatures should be permitted to make distinctions between them.<sup>176</sup> In addition, the court concluded that it would be “irresponsible” to ignore differences between adults and children even in the “allocation of constitutional rights.”<sup>177</sup>

Despite its rejection of strict review, the court recognized the need for heightened judicial skepticism toward legislation affecting children’s significant liberty interests. First, it acknowledged the possibility that a juvenile curfew might be passed for hidden or improper motives. The court warned:

[W]hen evidence suggests that a curfew targeting juveniles was passed for the benefit of others in the community, that law’s constitutionality is more suspect. For example, testimony indicating that the restrictions were passed because adult residents are uncomfortable with the lifestyles of some juveniles tends to undermine the legitimacy of the restrictions.<sup>178</sup>

Second, the court recognized that juveniles occupy an unfavorable position in the political process. Citing *United States v. Carolene Products Co.*,<sup>179</sup> the court observed that minors lack the “ability, as a class, to articulate or mount an effective defense against . . . a restriction” on their liberty.<sup>180</sup> Without the right to vote, young people “rely on others to ensure adequate protection of their rights,” and fall “outside ‘those political processes ordinarily . . . relied upon to protect minorities.’”<sup>181</sup> Despite basing its rejection of strict scrutiny on juveniles’ status, therefore, the Second Circuit recognized that the interplay between rights and classes called for heightened skepticism.

The town in *Ramos* presented three pieces of evidence in defense of the curfew. First, testimony established that prior to the curfew’s enactment, “groups of young people had been seen gathering on the streets.”<sup>182</sup> A member of the town council testified that “she had stopped taking walks on Sunday mornings because she ‘saw people who look[ed] like skinheads’” on the streets, although she admittedly “‘didn’t see them doing anything but . . . sort of being there.’”<sup>183</sup> The same town council member volunteered that her evening sightings of groups of young people took place between the hours of 6:00 p.m. and

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<sup>176</sup> *Id.* at 179.

<sup>177</sup> *Id.* at 180.

<sup>178</sup> *Id.* (citations omitted).

<sup>179</sup> 304 U.S. 144, 152–53 n.4 (1938).

<sup>180</sup> *Ramos*, 353 F.3d at 181.

<sup>181</sup> *Id.* (quoting *Carolene Prods.*, 304 U.S. at 152–53 n.4).

<sup>182</sup> *Id.* at 184.

<sup>183</sup> *Id.* It was also not clear whether these “skinheads” were under the age of eighteen.

9:00 p.m.<sup>184</sup> Second, the deputy mayor of Vernon testified that the curfew had been a response to the murder of a sixteen-year-old Vernon resident. That murder, however, had taken place in the victim's home during the afternoon hours, not on the streets at night.<sup>185</sup> Finally, both parties presented statistics on the curfew's effect on crime. Like the statistics before the court in *Nunez*, however, these numbers provided little support for the curfew: They showed that crime had been reduced in recent years, but that the most substantial reduction took place before the curfew had gone into effect. The figures also provided no information about *nocturnal* juvenile crime and victimization.<sup>186</sup>

In the face of this weak justification, the Second Circuit invalidated the Vernon curfew law, relying on two considerations. First, the town failed to produce "any persuasive reason" for its chosen curfew hours: While all of the evidence justifying a curfew involved daytime incidents, the enacted curfew was in place only at night. Second, the town produced no persuasive evidence showing that the population targeted by the ordinance—children under eighteen—was the same as the population that was committing crime or being victimized. In sum, there was "a conspicuous lack of relationship between the contours of the problem identified by the Vernon Town Council and the curfew ordinance enacted in response."<sup>187</sup>

### C. Analysis of the Ramos Approach

The *Ramos* approach has several advantages. First, it avoids the unsatisfying formalism of prior cases. Focusing directly on the proper role of courts, rather than on abstract questions of juvenile rights, allowed the Second Circuit to engage in a more principled discussion of what judicial review should involve, rather than a rote application of some "tier" that does little to structure the courts' analysis. The court's reasoning also avoids some of the circularity of prior cases, which determined that greater infringements on minors' liberty are allowed because the State is permitted to treat minors differently.<sup>188</sup>

Second, the *Ramos* approach reflects underlying principles of equal protection jurisprudence, not just the verbiage of the tiers

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<sup>184</sup> *Id.* at 186.

<sup>185</sup> *Id.* at 184–85.

<sup>186</sup> *Id.* at 185. The court recognized that the curfew did not address the concerns raised in a 1994 youth survey. *See id.* at 186 ("Significantly, the survey results do *not* identify any hours as particularly dangerous, and they do *not* indicate that the schoolchildren themselves are the source of the problem or any more likely than adults to be victims. We see no direct connection therefore between the survey results and the curfew.")

<sup>187</sup> *Id.* at 186–87.

<sup>188</sup> *See supra* note 106 and accompanying text.

framework. In particular, the court recognized that more aggressive judicial review is justified where severe deprivations of liberty are imposed on a group that is underrepresented in the political process<sup>189</sup> and when legislation may be passed for a hidden or improper motive.<sup>190</sup>

Finally, *Ramos* recognized that juveniles' class status affects the analysis on several levels. On the one hand, government may have a greater interest in regulating minors, which may justify loosening formal heightened scrutiny requirements. On the other hand, juveniles are unrepresented in the political process and cannot vote, which gives rise to a greater justification for strong judicial review in order to protect juveniles from political decisions that fail to consider their interests adequately. In prior cases relying upon fixed "tiers" of scrutiny that had to be applied as complete packages, courts were unable to engage in this nuanced analysis.

The *Ramos* approach does have some disadvantages, however. First, its conclusion that strict scrutiny is generally incompatible with children, even in the "allocation of constitutional rights,"<sup>191</sup> is unnecessarily broad. There is no need to develop a new standard every time the affected parties in a constitutional case are minors. Strict scrutiny is still appropriate in cases like *McConnell v. Federal Election Commission*, in which the Supreme Court struck down a statute that infringed on minors' First Amendment rights without discussing whether minors should be treated differently.<sup>192</sup> *Ramos* needed only to conclude that in this case, where there was a significant deprivation of liberty and a troublesome but not fully "suspect" classification, skeptical intermediate review was appropriate.

Second, *Ramos* retained some of the formalism of the tiered model. The exercise of recognizing a "fundamental right" but insisting that juveniles' rights do not command strict scrutiny is theoretically weak and risks devolving into Katherine Federle's tautology.<sup>193</sup> Instead, the Second Circuit should have recognized that it was dealing with a "third strand" of equal protection and let its analysis of the court's proper role stand on its own.

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<sup>189</sup> See Eskridge, *supra* note 3, at 2267 (describing "representation-reinforcement idea, whereby the Court makes a judgment as to whether the disadvantaged class can rely on the political process to correct irrational laws that hurt them" (emphasis removed)); Nice, *supra* note 13, at 1211 (noting emergence of heightened scrutiny "for situations where the rights and classes interact in such a way as to raise the Court's suspicions").

<sup>190</sup> See *supra* note 178 and accompanying text.

<sup>191</sup> *Ramos*, 353 F.3d at 197.

<sup>192</sup> 540 U.S. 93, 231-32 (2003).

<sup>193</sup> See *supra* note 106 and accompanying text.

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*Ramos* has been criticized for applying a standard “more akin to strict scrutiny” in the guise of intermediate scrutiny.<sup>194</sup> The court’s standard only appears “strict,” however, in contrast to the review applied in *Qutb*, *Schleifer*, *Nunez*, and *Hutchins*, which—despite being labeled “intermediate” or “strict”—was a standard of virtually no scrutiny at all.<sup>195</sup> Before *Ramos*, it seemed that courts were willing to uphold *any* juvenile curfew as long as it contained the Dallas exceptions.<sup>196</sup> By contrast, the Second Circuit appropriately struck down a poorly justified curfew while leaving open the possibility that a town could implement a juvenile curfew if properly drafted in response to a significant need.<sup>197</sup>

Recognizing that it had abandoned categorization in favor of balancing, the *Ramos* court did not announce a “test” for determining whether a curfew is valid. It did, however, announce some guiding principles for a court’s skeptical review: “[E]qual protection demands that the municipality ‘carefully stud[y] the contours of the problem it [is] seeking to address and legislate[ ] in accordance with its findings.’”<sup>198</sup> A disconnect between the problem that the municipality seeks to solve and the solution it has enacted, on the other hand, raises the court’s suspicions and may lead it to invalidate the legislative act.

On its facts, *Ramos* was an easy case: There was “a conspicuous lack of relationship between the contours of the problem identified by the Vernon Town Council and the curfew ordinance enacted in response.”<sup>199</sup> Indeed, testimony established that the curfew had more to do with adults’ distaste for certain young people’s lifestyles than concern for their safety.<sup>200</sup> Future cases are unlikely to present such powerful evidence. Even without such testimony, however, courts

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<sup>194</sup> See, e.g., Lindsay LaCava, Note, *Ramos v. Town of Vernon: Second Circuit Weighs in on Juvenile Curfew Debate*, 23 QUINNIPIAC L. REV. 1197, 1234 (2005); see also *Minor Rights*, *supra* note 15, at 2412–13 (criticizing *Ramos* court’s requirement that valid curfew be intended to benefit minors rather than society at large).

<sup>195</sup> See Siebert, *supra* note 22, at 1734–35 (describing judicial review in *Qutb v. Strauss* as “charitable . . . and cursory”); see also *supra* note 28 and accompanying text.

<sup>196</sup> See, e.g., *Schleifer v. City of Charlottesville*, 159 F.3d 843, 858 (4th Cir. 1998) (Michael, J., dissenting) (“[U]nder the majority’s approach no curfew would ever fail constitutional muster.” (emphasis removed)).

<sup>197</sup> See *Ramos v. Town of Vernon*, 353 F.3d 171, 172 (2d Cir. 2003) (“[W]e do not question the Town of Vernon’s authority to have [a curfew] ordinance under some circumstances. But . . . to be upheld as a valid exercise of state power, the curfew’s enactment must have been done right.”).

<sup>198</sup> *Id.* at 186 (all but first alteration in original) (quoting *Buzetti v. City of New York*, 140 F.3d 134, 142 (2d Cir. 1998)).

<sup>199</sup> *Id.* at 186–87.

<sup>200</sup> See *supra* notes 182–84 and accompanying text.

may use skeptical balancing to ensure that curfews are permitted only where there is a substantial need.

#### IV CONCLUSION

Most notes and articles on juvenile curfew laws end with a call for the Supreme Court to grant certiorari in a curfew case, ride in like a white knight, and announce a standard that will resolve the juvenile curfew problem once and for all.<sup>201</sup> With great respect to these scholars, I disagree, not because the issue is not of sufficient importance, but because equal protection doctrine has not developed to the point where Supreme Court intervention would be constructive. While intermediate balancing may be unsatisfying, some scholars have confidence that it is a transitional approach, and that with time the “analogical crisis” will be resolved and a categorical approach will emerge.<sup>202</sup> That time has not yet arrived. The time is right, however, for a new direction.

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<sup>201</sup> See, e.g., *Minor Rights*, *supra* note 15, at 2421 (“The Court should take up the challenge raised by Justice Marshall in response to *Bykofsky v. Borough of Middletown* and determine the answer to this ‘substantial constitutional question . . . of importance to thousands of towns.’” (omission in original) (quoting *Bykofsky v. Borough of Middletown*, 429 U.S. 964, 965 (1976) (Marshall, J., dissenting from denial of certiorari))).

<sup>202</sup> See generally Wexler, *supra* note 37 (arguing that intermediate scrutiny is tool of judicial minimalism that is “uniquely suited to resolving analogical crises over time”).