
William L. Foreman

Follow this and additional works at: https://digitalcommons.law.ou.edu/olr

Part of the Constitutional Law Commons

**Recommended Citation**


This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.
NOTE

Constitutional Law: *Hutchins v. District of Columbia:*
The Constitutional Dilemma over Juvenile Curfews

I. Introduction

When judges are required, in interpreting and applying legislation, to balance the interests of a political community with the constitutional rights of individuals, they find themselves in a precarious situation. On the one hand, they risk trespassing on the domain of the policy makers and overturning the legitimate will of the duly elected democratic majority. On the other hand, courts risk trespassing on the rights of the individual person. Although an unenviable task, judges usually succeed at balancing the competing interests when they uphold a guiding principle to be impartial; regard only the law inasmuch as it is divorced from outside concerns; and seek as much ideal justice as is possible in a pragmatic world.

The existence of unenumerated rights forms a proverbial "no man's land" between political will and civil liberties. Yet, constitutional jurisprudence insists that fundamental rights are present in the very spirit of the U.S. Constitution — unwritten, but every bit as vital as those expressly set forth in the Bill of Rights.1 These include rights that perhaps the founders saw no need to list, believing them too evident to require formal protection. Or, perhaps the founders left these rights unwritten intentionally out of a belief that the matters of which they were part belonged more properly in the realm of politics. The necessity of recognizing these rights creates a dilemma that courts frequently face.

Among these unenumerated rights is a "right to movement." Although many courts have recognized the right to movement as fundamental, the U.S. Supreme Court has addressed the issue in only limited contexts.2 The term "movement" means a multitude of things, including international, interstate, and intrastate travel; movement in the sense of mere locomotion; and freedom from state-created hindrances such as residency requirements, vagrancy ordinances, and police interrogation.3 The few contexts in which the Court has addressed this right have never included municipal curfew ordinances,4 and only rarely has any law restricted an otherwise law-abiding citizen's movement outright.5 The Court has ruled in other

1. See infra text accompanying notes 115-22.
2. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (declaring the right to interstate travel to be fundamental); Kent v. Dulles, 357 U.S. 116 (1958) (holding that the right to travel is a part of the constitutional liberty interest).
3. See infra text accompanying notes 132-57.
5. See, e.g., Gomez v. Turner, 672 F.2d 134, 143 n.18 (D.C. Cir. 1982) ("That citizens can walk the
contexts that children are citizens enjoying the same fundamental rights as adults and that a broad right to movement indeed exists. While it may seem counterintuitive to suggest that minors have a fundamental right to be on the streets at night, there are legitimate circumstances implicated by juvenile curfews, not all of which are practical, and not all of which can be anticipated by statutory defenses. And, while a juvenile curfew ordinance may be valid on its face, the enforcement and application of the ordinance may extend beyond that which is permitted by constitutional standards.

This note analyzes the recent decision by the U.S. Court of Appeals for the D.C. Circuit in *Hutchins v. District of Columbia,* which overturned the district court's injunction against the enforcement of Washington D.C.'s juvenile curfew law. This note compares the circuit court's reasoning with other court decisions regarding similar issues. Although *Hutchins* raised many constitutional issues, this note focuses on the freedom of movement issue and addresses the appropriate constitutional test for dealing with the rights of minors. Part II of this note briefly traces the history of curfews in America, and describes recent circuit court decisions regarding juvenile curfews. Part III examines the plurality and dissenting opinions of *Hutchins.* Part IV analyzes the *Hutchins* plurality opinion regarding a minor's right to movement in light of the reasoning of other federal appellate and district court opinions, arguing that the plurality erred in implying that a broader right to movement does not exist. Part IV also analyzes federal case law with regard to constitutional tests and the rights of minors. It argues that the *Hutchins* plurality correctly chose the "intermediate scrutiny" test but that the curfew ordinance was not substantially tailored to the District of Columbia's objective.

**II. Juvenile Curfews v. Fundamental Rights in America**

The word "curfew" comes to the English language from the Norman French *couvre feu,* or "cover the lamp," which is a phrase meaning colloquially "lights out." Within the United States, curfews have met legal challenges almost since

---

6. See Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").


8. 188 F.3d 531 (D.C. Cir. 1999).

9. See Thistlewood v. Trial Magistrate for Ocean City, 204 A.2d 688, 690 (Md. 1964) (colloquial translation by the author). The first curfews in England may have been enacted under William the Conqueror in the eleventh century, although there may have been a curfew in Oxford as early as the reign of Alfred the Great in the ninth century. See id.
their inception. In *Ex parte McCarver*, the Texas Court of Criminal Appeals overturned a curfew ordinance that prohibited anyone under the age of twenty-one from being on the streets after the bell at the town's Baptist Church had rung. The court ruled that the ordinance was an unreasonable invasion of the rights of citizens to come and go as they please. Thus began a century-long relationship between juvenile curfew ordinances and the American courts. Despite the longevity of this relationship, only in the last forty years have curfews enjoyed widespread popularity. And, only the 1990s have witnessed a veritable "boom" in juvenile curfew enactments. The reasons for this boom are obvious to most Americans. Juvenile crime rates from the end of the 1980s into the beginning of the 1990s soared. The belief that removing juveniles from the streets at night would reverse this alarming trend motivated many large cities to enact juvenile curfew ordinances. Smaller cities, even those without serious crime problems, saw merit in this movement and quickly followed suit. The result today — most U.S. municipalities with substantial populations have some form of curfew ordinance. Local governments in Oklahoma, not immune to such concerns, have enacted their own juvenile curfews in the state's largest municipalities.

Not all juvenile curfew ordinances are created equal. Depending upon the level of restriction and the statutory defenses available, a court will be more or less inclined to find a constitutional violation. An important U.S. Supreme Court

---

11. See id. at 937.
12. The court declared in its ruling that the law is paternalistic and is an invasion of the personal liberty of the citizen. No power exists at common law for the enactment of such an ordinance by a city government. It is arbitrary and does not apply to all persons alike. It makes criminal acts which in themselves are not criminal.

*Id.* at 937.


14. See id. at 419 n.19 (stating that "the 1990's will be remembered as a decade in which a 'curfew movement' swept across America") (quoting William J. Ruefle & Kenneth M. Reynolds, *Keep Them at Home: Juvenile Curfew Ordinances in 200 American Cities*, 15 AM. J. OF POLICE 63, 75-77 & tbls.1-2 (1996)).

15. See id. at 421 n.25 (stating that "the rate at which juveniles committed violent crimes increased nearly 43% from 1989 to 1993") (quoting from OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 16 (1997)).


18. See id.

19. See, e.g., *OKLAHOMA CITY, OKLA., CODE art. XV, § 30-423; TULSA, OKLA., CODE tit. 27, § 2800-06*. These Oklahoma curfew laws are substantially identical to the Dallas, Charlottesville, and District of Columbia ordinances, which are discussed herein. See *infra* text accompanying notes 29-33, 41-45.

decision outlining a methodology for determining the constitutional validity of a law restricting the rights of juveniles generally is Bellotti v. Baird. In Bellotti, the Court struck down a law restricting a minor's right to an abortion, stating, "a child, merely on account of his minority, is not beyond the protection of the Constitution." Quoting from the 1967 decision, In re Gault, the Court continued, "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." These statements solidified the Court's previous pronouncements in the cases of Tinker v. Des Moines Independent School District and Planned Parenthood v. Danforth. The Bellotti Court, meanwhile, went on to declare three general factors differentiating the rights of minors from those of adults, including "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." The resulting policy resembled a balancing test with constitutional parity between adults and juveniles except in narrowly justified circumstances.

The Supreme Court has never ruled directly on the constitutionality of juvenile curfew laws. However, in the past decade, four U.S. Circuit Courts of Appeals have issued important and far-reaching opinions on the matter. In 1993, the U.S. Court of Appeals for the Fifth Circuit overturned a district court ruling that held the curfew ordinance of Dallas, Texas, unconstitutional in Qub v. Strauss. The district court had ruled that the ordinance violated a minor's First Amendment right to associate by creating unconstitutional classifications in violation of the Equal Protection Clause of the Fourteenth Amendment. The Fifth Circuit, noting the rule in Bellotti, agreed that the Dallas curfew implicated the fundamental rights of minors and thus was subject to strict scrutiny review. However, in a rare event in constitutional jurisprudence, the court held that the curfew satisfied both the compelling interest and narrow tailoring requirements of strict scrutiny analysis.

22. Id. at 633.
23. Id. (quoting In re Gault, 387 U.S. 1, 13 (1967)).
27. See Susan M. Horowitz, A Search for Constitutional Standards: The Judicial Review of Juvenile Curfew Ordinances, 24 COLUM. J.L. & SOC. PROBS. 381, 409 (1991) (arguing that the Bellotti standard should operate as a balancing tool to permit the review of juvenile laws as impinging on fundamental rights without discounting the right altogether).
28. See, e.g., Bykofsky v. Middletown, 429 U.S. 964 (1976) (denying a writ of certiorari in an appeal of a decision upholding a juvenile curfew law); see also Kizer, supra note 4, at 753.
29. 11 F.3d 488 (5th Cir. 1993).
30. See id. at 491.
31. See id. at 492 n.6. The court here suggests that the Bellotti rule does not affect the determination of whether juveniles possess fundamental rights or whether the constitutional test is different for juveniles. See id. Rather, the court indicates that, under Bellotti, laws affecting the fundamental rights of juveniles satisfy more easily the means/ends analysis, no matter the particular test. See id.
32. See id. at 492.
In 1997, the U.S. Court of Appeals for the Ninth Circuit struck down a curfew ordinance in *Nunez v. City of San Diego*. In this case, a federal district court upheld San Diego's curfew ordinance, claiming that the burden imposed on the rights of minors was minimal and that the law was narrowly tailored to address a compelling interest. The Ninth Circuit overturned the district court, ruling on the grounds that the curfew law was void for vagueness, that it was not narrowly tailored to meet the City's objective, that it was not a reasonable restriction on time, place, or manner of speech, and that it violated the fundamental rights of parents to raise their children.

In 1998, the U.S. Court of Appeals for the Fourth Circuit applied intermediate scrutiny to the curfew law of Charlottesville, Virginia, and upheld it as constitutional in *Schliefer v. City of Charlottesville*. The curfew law of Charlottesville closely resembled the curfew law of Dallas. The reasoning of the *Schliefer* court was much the same as the *Qutb* court, with the exception of the constitutional test employed.

Finally, in 1999, the U.S. Court of Appeals for the D.C. Circuit, sitting *en banc*, reversed a divided panel of its own court, as well as the district court, and upheld the constitutionality of the District of Columbia's juvenile curfew law in *Hutchins*, the case that is the subject of this note.

### III. Hutchins v. District of Columbia

#### A. Facts and Procedural History

In September 1995, the District of Columbia formally adopted a juvenile curfew ordinance that prohibited minors from remaining "in any public place or on the premises of any establishment within the District of Columbia during curfew hours." The law defined a minor as "any person under the age of 17 years," with the exception of a married or emancipated minor, and it set forth curfew hours as running from 11:00 p.m. to 6:00 a.m. beginning on any Sunday through Thursday until the next day and from midnight to 6:00 a.m. beginning on any Saturday or...
Sunday. 45 Although the District's evidentiary support was sketchy, the "findings and purpose" of the law claimed that the District's Council had noticed an increase in juvenile violence and gang activity and that minors under the age of seventeen were "particularly susceptible" to the lure of crime and to being the victims of crime. 46 The law further stated that the Council was seeking to reduce the victimization of juveniles, reduce juvenile crime, and aid parents in carrying out their parental responsibilities. 47 The law, besides setting forth a broad restriction on minors' movement, created a number of defenses and exemptions designed to protect innocent or justified activities. 48 Some of these defenses included accompaniment by a parent, interstate travel, errand running at the behest of a parent, involvement in an emergency, and the exercise of "First Amendment rights . . . including free exercise of religion, freedom of speech, and the right of assembly." 49

The law punished parents and employers for knowingly permitting or negligently allowing a minor to violate the curfew. 50 The penalties included police detainment of the minor, a $500 fine, community service, and parenting classes for the minor's parents and guardians. 51

Tiana Hutchins, her parents, a private business, and others sued the District of Columbia seeking to challenge the constitutionality of the curfew law and to enjoin the law's enforcement. 52 These plaintiffs charged that the law violated four constitutional principles, including equal protection of the law and the fundamental due process right to free movement, 53 the fundamental right of parents to raise their children free from state interference, unconstitutional vagueness, and the minors' rights to be free from unreasonable searches and seizures. 54 In October 1996, Judge Sullivan of the U.S. District Court for the District of Columbia ruled for the plaintiffs, granting summary judgment on the basis of the equal protection and due process claims, as well as the unconstitutional vagueness claim. 55 The district court held that the law violated the fundamental rights of movement and parental freedom and that the law was not narrowly tailored to a compelling interest under the correlative strict scrutiny analysis. 56 The District of Columbia appealed. A divided panel of the D.C. Circuit Court of Appeals affirmed the ruling in May 1998. 57 The circuit court,

45. Id. § 6-2182(1), (5).
46. Id. § 6-2181(a), (b).
47. See id. § 6-2181(e).
48. See id. § 6-2183(b).
49. Id. § 6-2183(b)(1)(H). But cf. City of Chicago v. Morales, 119 S. Ct. 1849 (1999) (holding that an anti-groting ordinance designed to deter gangs was unconstitutionally vague and violated due process by deterring innocent and constitutionally protected behavior).
51. See id. § 6-2183(c)(3), (d)(1), (2).
53. Although not a state, the District of Columbia is subject to the Fourteenth Amendment through the doctrine of "reverse" incorporation. See generally Bolling v. Sharps, 347 U.S. 497 (1954).
55. See id. at 680.
56. See id.
57. See Hutchins v. District of Columbia, 144 F.3d 798 (D.C. Cir. 1998), vacated rev'd en banc,
vacating the panel's ruling, agreed to rehear arguments en banc.\textsuperscript{58}

B. Issues and Holding of the Hutchins Plurality

The U.S. Court of Appeals for the District of Columbia Circuit, sitting en banc, reheard the arguments originally made by the plaintiff-appellees in the district court and subsequently found, in a plurality opinion, for the defendant-appellants on each issue. First, on the issue of the fundamental right to movement, the plurality ruled that such a substantive right does not exist beyond the narrow right to interstate travel. The U.S. Supreme Court had suggested a more general right only in dicta.\textsuperscript{59} And, even if the right to movement did indeed exist, juveniles did not possess it.\textsuperscript{60}

Second, on the issue of the fundamental right of a parent to raise a child, the plurality held that the curfew did not implicate such a right because whether a child is allowed outside the home at night is not an "intimate family decision[]."\textsuperscript{61} The court then entertained the hypothesis that if the fundamental rights of children and parents were implicated, where children's issues are concerned, intermediate scrutiny would apply.\textsuperscript{62} Consequently, according to the plurality the curfew could withstand such heightened scrutiny because it is substantially related to an important government interest.\textsuperscript{63} As to whether the curfew law was unconstitutionally vague, the plurality found that the District could legitimately enforce and expect broad understanding of the language set forth in the curfew.\textsuperscript{64} Finally, the plurality dispatched the claims that the curfew violated First and Fourth Amendment rights. Regarding the First Amendment, the plurality held that a challenge must first prove a facial violation of the First Amendment and that the statutory language at issue only implicated a potential violation.\textsuperscript{65} Regarding the Fourth Amendment, the plurality held that giving a police officer discretion to make an arrest based on reasonableness does not violate due process because probable cause is the very definition of Fourth Amendment due process.\textsuperscript{66}

C. Reasoning of the Hutchins Plurality

In addressing the fundamental right to movement and parental freedom claims, the Hutchins plurality began by distinguishing between procedural and substantive due process.\textsuperscript{67} In describing the substantive right to movement, the plurality cited the U.S. Supreme Court decisions creating the fundamental right to interstate travel

\textsuperscript{58} 188 F.3d 531 (D.C. Cir. 1999).
\textsuperscript{59} See Hutchins v. District of Columbia, 188 F.3d 531 (D.C. Cir. 1999).
\textsuperscript{60} See id. at 536-38 (referring to Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972); United States v. Guest, 333 U.S. 476, 758 (1966); Kent v. Dulles, 357 U.S. 116, 126 (1958); and Williams v. Fears, 179 U.S. 270, 273 (1900)).
\textsuperscript{61} See id. at 538-39.
\textsuperscript{62} See id. at 541.
\textsuperscript{63} See id.
\textsuperscript{64} See id. at 541-46.
\textsuperscript{65} See id. at 546.
\textsuperscript{66} See id. at 548.
\textsuperscript{67} See id. at 536.
and then denied that those decisions lend any support to a broader right to movement.68

The plurality next acknowledged a small number of cases supporting a broader right to movement, but held that since those cases assert the right only in dicta, they were not controlling.69 The plurality also suggested that because a broad right to movement must necessarily include international travel, and the regulation of international travel has been specifically declared constitutional, a fundamental right could not exist at all.70 The plurality declined to accept the right to movement essays found in the "vagrancy cases"71 as dispositive since the holdings of those cases went to different issues. The court conceded that there was substantial case law supporting a right to "intrastate" travel paralleling the right to travel interstate and that this might implicate a fundamental right in instances where a curfew is "draconian."72 Finally, the plurality relied on a distinction between the rights of juveniles and those of adults.73

In addressing the fundamental right of parents to raise their children without government interference, the court was brief in its reasoning. The plurality outlined the cases establishing the right and then discussed a distinction between a "private realm of family life" and laws regarding public places.74 The plurality also looked to the defenses to the curfew and found that parents still retain "almost total discretion" over their children's activities.75 The plurality concluded its reasoning on this issue by stating that curfews do not infringe any recognized "intimate family decisions."76

The remainder of the plurality opinion divided the other claims into two categories. First, denying that the curfew implicated any fundamental right, the plurality considered the problem of deciding which constitutional test to use, as a hypothetical question.77 Agreeing with case law on point, the plurality stated that juveniles do possess constitutional rights, but found that those rights are not coextensive with the rights of adults.78 The plurality resolved the dilemma of which constitutional analysis to use by compromising the usual strict scrutiny test

69. See id. at 537.
70. See id.
72. Id. at 538.
73. See id. at 539-41.
74. Id. at 540-41 (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923)).
75. Id. at 545.
76. Id. at 541.
77. See id.
and concluding that "something less than strict scrutiny — intermediate scrutiny — would be appropriate." Intermediate scrutiny requires that a law be substantially related to the achievement of an important government interest. The plurality reasoned that reducing juvenile crime and protecting minors from being victimized by crime were important objectives.

Next, admitting that determining whether the curfew is substantially related to these objectives "is the more difficult question here," the plurality set forth a three-part analysis for identifying a substantial relationship. The plurality looked to: (1) "the factual premises upon which the legislature based its decision," (2) "the logical connection the remedy has to those premises," and (3) "the scope of the remedy employed." Discussing the use of statistical and other sociological data by both the Council in enacting the law and the district court in striking it down, the plurality found that despite irregularities in the District's statistics, the government need only demonstrate a substantial relation between the law and the statistics. The plaintiff-appellees' argument that the curfew should be confined to the high-crime areas of the district in order to substantially tailor the law to its objective was discarded as potentially racist or politically unpopular. The plurality also noted that the defenses to the curfew helped narrow the scope of the law to more suspicious "nocturnal activities."

D. Judge Rogers' Dissent

Hutchins had two dissenting opinions that differed mainly in the determination of which constitutional test to apply when dealing with the fundamental rights of minors. The more cogent dissent by Circuit Judge Rogers had four parts. Parts I and II dealt with defining a fundamental right in general and defining the right to movement in particular. In addressing the plurality's methodology for defining fundamental rights, the dissent began by criticizing the narrow definition of the rights at issue. Instead of defining a right "as the mirror-image of a particular burden," Judge Rogers admonished the plurality for not defining rights in a more abstract context. Otherwise, according to Rogers' dissent, narrow definitions would result in stripping protection from constitutionally protected, disfavored conduct and tipping the scales against recognizing any right. Second, and conversely, Judge Rogers argued that a narrowly defined right denies the recognition

79. Id.
80. See id.; see also Craig v. Boren, 429 U.S. 190, 197 (1976).
81. See Hutchins, 188 F.3d at 542.
82. Id.
83. Id.
84. See id. at 543.
85. See id. at 544.
86. See id. at 545.
87. See id. at 552, 570.
88. See id. at 552-54.
89. Id. at 554-55.
90. See id. at 555.
of an individual's interest against the "conventional wisdom." Third, Judge Rogers asserted that although defining rights too broadly encourages improper subjectivity, defining rights too narrowly results in the same problem in reverse. That is to say, a court might be too subjective in its attempt to restrict a proposed right. Judge Rogers claimed that since the plurality failed to proffer a methodology for defining rights, it left open the door to apply whatever standard the court might subjectively desire in the future. Fourth, Judge Rogers criticized the application of an equal protection analysis to a fundamental rights issue. He asserted that the combining of the analyses resulted in a "blurring" of the tests so that it allowed the plurality to dispense with the equal protection claim, and, by extension, allowed the plurality to deny the recognition of the fundamental right. Finally, Judge Rogers attacked the plurality's application of Justice Scalia's reductionist method for characterizing a fundamental right, pointing out that the approach has never garnered a majority on the Supreme Court.

Judge Rogers' dissent continued by declaring that "there is no doubt that minors possess rights that are fundamental." He reasoned that the corpus of juvenile and fundamental rights cases read together results, not in an absolution of such rights when applied to minors, but only in a dilution. In defining the right to movement, his dissent distinguished the plurality's legitimate concern over extending a broad right to locomotion, which might serve to challenge even "trivial . . . impediments" such as traffic lights, from a vital liberty interest protecting a citizen from "police interference for mere [public] presence."

Parts III and IV of Judge Rogers' dissent dealt with the means/ends analysis appropriate for juvenile rights issues. He began by agreeing with the plurality's application of intermediate scrutiny in dealing with the fundamental rights of minors. While admitting that some juvenile curfews might survive intermediate scrutiny and stating without comment that the "curfew has legitimate ends," Judge Rogers claimed that the District's curfew was not substantially tailored to meet those ends. First, he criticized the District's evidence as being "too broad" in that it included crimes and victimization by and of those who were not affected by the curfew. Second, Judge Rogers found the evidence too narrow in that it failed to point out when juvenile crime and victimization occur. He next demonstrated that over "90% of all juveniles do not commit any crimes," thus burdening a far

91. Id.
92. See id.
93. See id. at 556.
94. Id.
95. See id. at 557.
96. Id. at 558.
97. See id. at 558-59
98. Id. at 562.
99. See id. at 563.
100. Id. at 564.
101. Id. at 565.
102. See id.
larger class than might be necessary. Judge Rogers distinguished the facts in the Schliefer case as having "sturdier evidence." Finally, Judge Rogers claimed that "efficacy can be no substitute for constitutional scrutiny." In other words, the curfew was not rendered constitutionally proper simply because the juvenile crime rate had declined; a curfew of adults or a juvenile curfew covering day and night would also reduce crime, yet they would both raise constitutional questions.

IV. An Analysis of Hutchins

A. The Freedom of Movement as a Liberty Interest

Liberty is an ancient word. Its most basic and common meaning is "freedom." It comes to the English language from the French liberté, and to the French from the Latin libertas. Although its denotation in all three languages is the same, in American jurisprudence it has connotations all its own. Liberty's mention in the Fourteenth Amendment is loaded with legalistic meaning; along with "life" and "property" it provides the foundation for the concept of substantive due process. Liberty's etymology has arguably given the Supreme Court the jurisprudential mandate to recognize the existence of broad, fundamental rights. These rights, in turn, have spawned the recognition of other rights within what has been termed the penumbra of the Bill of Rights. When one of these rights is fully recognized and its sanctity threatened, the menacing state action will be subjected to the strictest of constitutional tests and will almost certainly fail. The constitutional

103. Id. at 566.  
104. Id. at 568.  
105. Id. at 570.  
106. See id.  
107. See BLACK'S LAW DICTIONARY 664 (6th ed. 1990) (defining "freedom" as "[t]he state of being free; liberty; self-determination; absence of restraint; the opposite of slavery.").  
109. See, e.g., BLACK'S LAW DICTIONARY 918-19 (6th ed. 1990). There are no fewer than thirteen sub-definations for "liberty" listed, including "personal liberty," which states, "The right or power of locomotion; of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." Id.  
110. U.S. CONST. amend. XIV, § 1. The Amendment states: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Id.  
tests of strict scrutiny, intermediate scrutiny, and rational basis review collectively form the modern paradigm for constitutional review.  

And, as entrenched as these tests are in constitutional methodology, it seems impossible to imagine that anything will replace them in the foreseeable future.

One of the fundamental rights that courts often recognize as being under the rubric of substantive due process is the fundamental right to movement.  

This makes sense because a literal, layman's reading of the words, "deprive any person of . . . liberty" tends to indicate a person in a state of imprisonment, or in some other analogous state of confinement. What is meant by "liberty" in this context would at least mean the inverse of confinement, which "deprivation" of liberty denotes.  

Syllogistically, therefore, liberty means freedom from confinement, the synonym of free movement. On its face such a conclusion is clearer than this analysis would suggest. However, the clarity of this logical analysis becomes muddied when one confronts the problem of defining due process.

Before undertaking a critical analysis of Hutchins, it is important to have a basic framework for understanding the dual nature of the Due Process Clause of the Fourteenth Amendment. A denotation/connotation dichotomy proves useful in acquiring this cursory understanding because the courts have chosen to interpret due process along similar lines. A denotative reading of the Due Process Clause provides the basis for the concept of "procedural" due process. It means simply that a state actor must be fair and impartial in its application of the laws; it must follow established legal process owed to every person.  

In this way, the literal reading of the words "deprive any person of . . . liberty" does not create any unenumerated rights. However, the connotative reading of the word "liberty" in the Due Process Clause does lay a foundation for the recognition of many rights by way of the doctrines of incorporation and "substantive" due process.  

Substantive due process rights are based on the connotations (i.e., the implicit and traditional meanings) of the term "liberty." Inherent in the American cultural understanding of the word "liberty" is the "absence of confinement" connotation described above, or

---

114. The three most common tests include: the "rational basis test" (a law must be rationally related to a legitimate governmental interest), see, e.g., Williamson v. Lee Optical, 348 U.S. 483 (1955); the "intermediate scrutiny" test (a law must be substantially tailored to meet an important governmental interest), see, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); and the "strict scrutiny" test (a law must be narrowly tailored to a compelling governmental interest), see, e.g., Roe v. Wade, 410 U.S. 113 (1973).

115. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969) (finding the right to travel to be implicit in the concept of personal liberty); King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971) (stating that the right to interstate travel has a corollary in intrastate travel).


120. See, e.g., Palko v. Connecticut, 302 U.S. 319, 324-25 (1937) (establishing the doctrine of fundamental versus nonfundamental rights and the incorporation of fundamental rights in the Bill of Rights into the Due Process Clause of the Fourteenth Amendment).
its analog "free movement."\textsuperscript{121} This particular connotation coincides with liberty's denotation, resulting in the possibility of confusion. However, the word does not uniquely mean one or the other, but both. The American concept of unenumerated rights being founded on the connotations of liberty,\textsuperscript{122} this analysis suggests that foremost among any fundamental rights derived from the Fourteenth Amendment is a general right to movement.

\textbf{B. The Fundamental Right to Movement in the Courts}

The \textit{Hutchins} plurality erred when it implied that a fundamental right to movement does not exist.\textsuperscript{123} The Supreme Court has indeed found a fundamental right to movement implicit in the Fourteenth Amendment.\textsuperscript{124} The fact that the Court has not heard a case implicating this right with regard to juvenile curfews does not mean that the general right does not continue to hold an important position in everyday American life. On the contrary, were it not for the fundamental right of movement, states could restrict even the most innocent aspects of daily travel; police could question a citizen's mere presence in public. Yet, few would doubt that such restrictions would be constitutionally prohibited. The right to movement is perhaps such an obvious aspect of personal liberty that the right has not been specifically recognized as needing formal protection. What rational political entity would ever legislate such a right away? Absent a compelling justification, such as a civil emergency, it is unlikely a law would ever be enacted that would similarly restrict the movement of adults who could, and surely would, vote the legislators out of office. Thus, the judiciary is unlikely to deal with such an issue given the systemic prohibitions present in a representative democracy with universal suffrage. Suffrage, however, is not truly universal. Besides mental incapacity and conviction of a felony, there is yet another prohibition to voting — age.\textsuperscript{125} Minors, by definition, cannot vote. They are politically powerless in the truest sense of the phrase. Therefore, the judiciary must be extra sensitive to the fundamental rights of minors. In their capacity as the last defense of civil liberties, the courts should weigh carefully the public policy at stake and realize, from both an ethical and positivist standpoint,\textsuperscript{126} that a repudiation of a right so intrinsic to the concept of a free society could substantially harm that society as a whole. This is especially true when the particular court happens to bear the moniker of "the second highest

\begin{footnotesize}
\begin{enumerate}
\item[121. ] In saying "American cultural understanding," the author is intending a purely legalistic reference, insofar as our legal tradition comes from the common law of England. \textit{See} BLACK'S LAW DICTIONARY, supra note 109.
\item[122. ] U.S. CONST. amend. XIV, § 1.
\item[124. ] \textit{See}, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969).
\item[125. ] U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").
\item[126. ] From the standpoint of both Kantian and utilitarian ethics it is morally wrong to pursue a policy that needlessly sacrifices the rights of autonomous, morally significant agents. For a brief and accessible explanation of the ethical implications involved, see \textit{generally} JEFFRIE G. MURPHY & JULES L. COLEMAN, \textit{PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE} 67-106 (1990).
\end{enumerate}
\end{footnotesize}
court in the land."  

The foundation for a violation of the Equal Protection Clause is the prejudicial treatment by a state actor of a suspect class. Prejudicial treatment can come in the form of a facially prejudicial law or the prejudicial application of an otherwise neutral law. A suspect class is any group of persons sharing an immutable trait whose special protection has been recognized by law. While curfew laws are facially prejudicial to minors, age is not a legally recognized classification for equal protection purposes. However, based upon the analysis proffered by Judge Rogers, an equal protection analysis is unnecessary. Rather, substantive due process may stand on its own where a fundamental right is at stake. The issue first demands a definition of the fundamental right. The analysis of a fundamental rights' branch of equal protection and that of a substantive due process claim is essentially the same. Therefore, the underlying question remains, is movement a fundamental right?  

The Supreme Court has defined "interstate" movement as a fundamental right. In *Shapiro v. Thompson* the Court invalidated Connecticut, Pennsylvania, and District of Columbia laws that created a one-year residency requirement for recipients of welfare benefits. The Court held that such statutory provisions violate a fundamental "freedom of travel" by discouraging poorer families from moving wherever they so choose within the country. This seminal case engendered a series of subsequent federal court rulings that struck down temporal residency requirements for state benefits, all in the name of the fundamental freedom of interstate travel.  

Years earlier, in 1941, the Supreme Court addressed a similar issue in *Edwards v. California*. When California enacted the "anti-okie" law, prohibiting the transportation of indigents and migrant workers into California, the Court struck it down as "void on its face and operat[ing] to deprive the appellant of liberty without due process of law and to deny him the equal protection of the laws."  

131. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (utilizing the same strict scrutiny analysis triggered by the fundamental rights branch of equal protection as would be necessary under a substantive due process analysis).  
132. Id.  
133. See id. at 638-42.  
134. Id. at 638.  
137. Id. at 163.
More recently, in Memorial Hospital v. Maricopa, the Court again dealt with a residency requirement for state benefits in a slightly more subtle context. When Arizona refused to provide county-funded, non-emergency medical care to a person prior to that person's establishment of a one-year residency, the Court refined the Shapiro ruling to strike down the residency requirement. Because medical care was a necessity of life, the Court reasoned that to withhold it constituted an unconstitutional penalty on interstate travel. In each of these cases and their progeny, the Court interpreted the right to travel interstate as both a fundamental right, deserving of strict scrutiny analysis, and a liberty interest, thereby applicable to all "persons" under the Fourteenth Amendment.

Furthermore, the Court has indicated a corollary between the fundamental right to interstate travel and the right to move about within a state. In Papachristou v. City of Jacksonville, the Court struck down a municipal vagrancy ordinance as unconstitutionally vague. Justice Douglas's reasoning clearly supported a general right to movement as implicit in the concept of personal liberty. However, the holding of the case did not recognize this right directly or as distinct from the vagueness theory. Instead, the holding struck down the vagrancy ordinance as "void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden . . .' and because it encourages arbitrary and erratic arrests . . . ." Without confronting curfews by name, Justice Douglas did condemn their purpose by stating:

Persons "wandering or strolling" from place to place have been extolled by Walt Whitman and Vachel Lindsay. The qualification "without any lawful purpose or object" may be a trap for innocent acts . . . . The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity . . . . They have encouraged lives of high spirits rather than hushed, suffocating silence.

Although the Court has struck down broad restrictions to movement among and within the states, the Court has not upheld such restrictions anywhere. The paucity of Supreme Court precedent dealing with overt restrictions to movement is rather likely due to the uncommon existence of such restrictions.

139. See id. at 269.
140. See id.
141. 405 U.S. 156 (1972).
142. See id. at 170-71.
143. See id. at 162.
144. Id.
145. Id. at 164.
Recent examples of U.S. Circuit Court rulings on the right to movement tend to blur the distinction between interstate and intrastate travel. In Lutz v. City of York, the Third Circuit concluded that an unenumerated right to intrastate travel exists under substantive due process, even while holding that the particular "anti-cruising" law at issue did not violate it. The Lutz court applied intermediate scrutiny to this right, drawing an analogy to the time, place, and manner doctrine of free speech jurisprudence. The reasoning of the Lutz court was admittedly "ad hoc" and encompassed numerous constitutional arguments. However, the court claimed that given the "rational continuum" of substantive due process and the precedent of Shapiro and its progeny, the court had no choice but to recognize the basic right to travel as "implicit in the concept of ordered liberty" and "deeply rooted in the Nation's history."

Recently, the Supreme Court addressed similar liberty issues in City of Chicago v. Morales. In Morales, the Court struck down an anti-loitering ordinance enacted to deter gang activity as unconstitutionally vague. Justice Stevens' opinion held that because the ordinance did not set forth a requirement that the prohibited conduct have a "harmful purpose," and because it prevented two or more persons from congregating where even one of them was a gang member (thus encompassing non-gang members) the ordinance was too broad. Although the Morales majority did not invoke the fundamental right to movement per se, the same elements of unconstitutionality present in Chicago's failed ordinance existed in the District of Columbia's curfew. That is to say, the District's curfew did not require a harmful purpose on the part of juveniles and the ordinance applied to innocent juveniles as well as criminals; juveniles reasonably safe from crime as well as likely victims. In finding such breadth unconstitutional, the Morales Court implicated the substantial tailoring requirement of the intermediate scrutiny analysis present in the Hutchins opinion and strongly suggested that the District's ordinance would not withstand this requirement.

146. 899 F.2d 255 (3d Cir. 1990).
147. Id. at 270.
148. See id. at 269.
149. See id. at 268.
150. Id.
151. Id.
153. See id. at 63-64.
154. Id. at 62-63.
155. See id.
156. Compare D.C. CODE ANN. § 6-2182 (5) (1996) with § 6-2183(b)(1) (stating that a minor is any unemancipated person under the age of 17 and that a minor commits an offense simply by remaining in a public place after curfew hours).
157. Based on the Morales reasoning, the District's curfew ordinance is too vague and unrelated to its purpose to pass constitutional muster in that it criminalizes the innocent. Taken another way, this means that the curfew ordinance is not substantially tailored to the District's objective.
C. Applying the Appropriate Constitutional Test

The *Hutchins* plurality was correct in applying the standard of "intermediate scrutiny" to the fundamental rights of minors. Minors have the same fundamental rights as adults. The difference is that minors do not have these rights to the same extent as adults. What this difference translates into when making a constitutional analysis determines the level of review. For example, the *Tinker* case held that minors have the same extent of protection under the First Amendment right to free speech as do adults, subject to time, place, and manner restrictions. Hence, minors, like adults, could expect a strict scrutiny analysis from a court hearing their claim of a free speech violation. However, the *Bellotti* case held that minors are subject to certain factors that serve to lessen the extent of constitutional protection for fundamental rights such as the right to have an abortion. The distinction seems to lie in whether the fundamental right is enumerated or not. Where the right is enumerated, as in the right to free speech, minors have full constitutional protection commensurate with adults. Where the right is unenumerated, as in the privacy right to an abortion, special considerations seem to limit the extent of the constitutional protection of juveniles.

The factors articulated by the Supreme Court in *Bellotti* do not provide any blueprints for defining the extent of juvenile rights; neither do they provide much in the way of determining what level of review is appropriate for juveniles. Instead, the *Bellotti* factors simply provide justifications for why some juvenile rights should not extend to the level enjoyed by adults. Taking this way, courts are left with two options. On the one hand, a court may follow the example of the *Qutb* court and lower the government's threshold requirement for proving the relation of the means to the end. In other words, a court may make it easier to prove "narrowly" or "compelling" under strict scrutiny analysis. Or, on the other hand, a court may follow the example found in *Schlieffer* and *Hutchins* and simply take the level of heightened scrutiny down a notch, from strict scrutiny to intermediate scrutiny, when dealing with the fundamental rights of minors. The latter surpasses the former in judicial efficacy for two reasons. First, it takes an entire step out of the analytical process. Instead of starting with strict scrutiny and then struggling with how to adapt the terms "compelling" and "narrowly tailored" to the *Bellotti* criteria, a court would simply apply intermediate scrutiny and keep the specifics of the *Bellotti* test out of the analysis completely. Second, a simpler analytical process leaves less room for subjectivity. The interpretations of the words "narrowly" and "compelling" are already sufficiently imprecise to allow for a high level of judicial

---

159. See *Tinker*, 393 U.S. at 505-06.
discretion. With the *Bellotti* factors available to modify these words, the potential for subjective interference from a judge's personal prejudices increases greatly.

The *Hutcheson* plurality erred when it ruled that the District of Columbia's curfew ordinance was substantially tailored to meet its important objective. It would be wholly fruitless to argue that the District's objective of reducing juvenile crime and the likelihood of juvenile victimization was not at least important. Certainly it was important, and probably compelling as well. Few statements of purpose would invoke a greater sense of urgency than one such as, "we must save our children from becoming criminals and the victims of crime." However, a constitutional rights analysis under intermediate scrutiny also requires that the State's means be substantially tailored to its important objective. 163 The meaning of the word "substantially" is somewhat subjective, although a court must be as objective as possible. Yet, the word "substantial" does indicate a high standard. In high-crime areas of certain cities, a curfew ordinance such as the District of Columbia's would indeed be substantially related to the goal of preventing crime by and against minors. On its face, therefore, the District's curfew ordinance is constitutional. However, such an ordinance is unconstitutional where a less than substantial relationship exists between the curfew's application and the goal of preventing juvenile crime. An unconstitutional application would be the enforcement of a juvenile curfew in a city or distinguishable area of a city that does not have a juvenile crime or victimization problem. In *Hutcheson*, the District failed to limit application of the curfew ordinance to the areas of the District with recognizable crime problems. 164 Therefore, the curfew ordinance in *Hutcheson* was not substantially tailored to meet its important objective and the District's curfew ordinance should have failed the constitutional test.

The District of Columbia's curfew ordinance falls short of a substantial relationship by way of its overbreadth. Because the District is large and contains whole, definable suburbs and neighborhoods in which criminal activity by and against juveniles is not a problem, the ordinance as applied to these areas is unconstitutional. Conversely, there are certain areas of the District in which the curfew ordinance would be constitutional, in that therein exists a crime problem or potential for juvenile victimization. The *Hutcheson* plurality countered this conclusion by claiming that to require limited application of the curfew ordinance to high juvenile crime areas of the District would be to invite accusations of judicial racism. 165 This claim, besides being presumptuous and dubious, is itself racist by implication. The *Hutcheson* plurality betrayed two stereotypical assumptions: (1) the District's high-crime areas are home to members of a particular "race"; and (2) members of this race compose the majority of the District's juvenile criminals. Even if these assumptions are verifiable, the *Hutcheson* plurality did not rely on any evidence. 166 In any case, no court may shirk its duty to uphold the law on the

---

163. *See, e.g., Hutcheson*, 188 F.3d at 541.
164. *See id.* at 543-44.
165. *See id.*
166. *See id.*
basis of some speculative fear of political unpopularity. To do so recalls the disastrous undertones of *Scott v. Sandford* and stands to lessen the public’s expectation of impartiality from the courts.

V. Conclusion

Even if constitutional on its face, a juvenile curfew ordinance may still violate substantive due process where its application and enforcement does not comport with the limits demanded by accepted constitutional methodology. In *Hutchins*, the Council of the District of Columbia extended enforcement of a curfew ordinance to include areas of the District where crime by and against juveniles was too minimal to justify so drastic a restriction of the liberty interests of minors. In upholding the constitutionality of the curfew, the U.S. Court of Appeals for the D.C. Circuit correctly applied the intermediate scrutiny test for dealing with the fundamental rights of minors. However, the court erred by stating that to require stricter tailoring of the law would invite accusations of racism against the court. Such reasoning is unsupportable given the judicial duty to interpret the law impartially and according to the objective criteria set forth in controlling case precedent and established constitutional doctrine. The *Hutchins* court also erred in implying that a fundamental right to movement does not exist. This implication directly contradicts holdings and dicta from U.S. Supreme Court cases in which a general right to movement finds broad support.

The courts must always be careful in balancing the legitimate powers of state and federal actors against the restrictions imposed on state action by the substantive rights of individuals. Fundamentally stated, constitutional rights establish procedural and substantive limits to the exercise of political authority. When a court expands substantive rights out of some personal sense of justice or any subjective notion of natural law, this can result in an abrogation of legislative and political privilege. This is judicial activism. However, a court’s restriction of rights for any of the same illegitimate reasons, through "reverse" judicial activism, is at least as egregious a violation of the judicial duty, but arguably more so given the essential nature of fundamental rights and their paramount importance in the American constitutional scheme.

*William L. Foreman*

167. 60 U.S. (19 How.) 393 (1856) ("The Dred Scott Case") (holding that persons of African descent could not sue in federal court because, at the time, they were not considered citizens of the United States).