Five is a Crowd: A Constitutional Analysis of the Boston Zoning Amendment Prohibiting More Than Four College Students From Living Together

"It's 11:30 at night and you want to go to bed, but there's a party going on next door. You tell them that; they don't care. It's having your wife go out to get the paper and cutting her feet on a bottle some undergrad smashed on your doorstep the night before. It's begging [Boston College] to assign its security people to Mary Ann's . . . at closing time, so that you're not awakened at 2 a.m. by 300 kids, all plastered, screaming and shouting at each other as they parade back to campus . . . . It's having some idiot race across the tops of six cars on your street . . . . This is what it's all about. These streets look like Times Square when the parties break up."[1]

I. INTRODUCTION

Boston, Massachusetts is home to thirty-six institutions of higher education that enroll close to 140,000 students, including graduate and part-time students.[2] These institutions provide many different benefits to Boston.[3] For example, colleges and universities spur the local economy by funneling educated young people into the local workforce and by creating a large number of jobs.[4] Despite these benefits, the presence of so many higher-education

1. *See* Joe Fitzgerald, *BC Foes Savor Revenge*, BOSTON HERALD, Aug. 26, 1993, at 98 (quoting angry resident regarding problems with college students).

2. *See* BOSTON REDEVELOPMENT AUTH., MAYOR MENINO'S REPORT ON BOSTON—AMERICA'S COLLEGE TOWN 1-3 (2006) [hereinafter MENINO'S REPORT] (presenting spring 2006 data on Boston's student population). *See generally* THOMAS H. O'CONNOR, THE HUB: BOSTON PAST AND PRESENT (2001) (outlining Boston's history). The latest Boston Redevelopment Authority (BRA) statistics place enrollment at 117,974 students. MENINO'S REPORT, *supra*, at 2-3. This number does not include the 21,683 students enrolled at three state institutions—Bunker Hill Community College, Roxbury Community College, and the University of Massachusetts at Boston. *Id.* at 2. Including the state students, enrollment in Boston totals 139,657 students. *Id.* at 2-3.

3. *See* BOSTON REDEVELOPMENT AUTH., BOSTON STILL #1 COLLEGE CITY IN U.S. 3 (2002) (detailing how colleges and universities positively impact economy and quality of life); Boston College: Community Benefits, http://www.bc.edu/offices/comaf/communitybenefits.html (last visited Sept. 14, 2009) (listing community benefits Boston College provides); Boston University: Making a Difference in the Community, http://www.bu.edu/community/index.html (last visited Sept. 14, 2009) (describing how Boston University improves local economy, education, and health).

4. *See* ASS'N OF INDEP. COLLS. & UNIVS. IN MASS., ENGINES OF ECONOMIC GROWTH: THE ECONOMIC IMPACT OF BOSTON'S EIGHT RESEARCH UNIVERSITIES ON THE METROPOLITAN BOSTON AREA 3-9 (2003) (summarizing economic impact of Boston's research universities); MENINO'S REPORT, *supra* note 2, at 1 (highlighting how colleges and universities benefit Boston's economy); HARVARD UNIV., INVESTING IN INNOVATION: HARVARD UNIVERSITY'S IMPACT ON THE ECONOMY OF THE BOSTON AREA 4 (2009) (noting

institutions also leads to problems.[5]

One such problem is the friction between Boston's permanent residents and undergraduate students who live off-campus.[6] Although almost half of Boston's undergraduate students live in campus dormitories, many colleges do not own enough dormitories to house all their enrolled students and require some students to live off-campus.[7] According to Boston Redevelopment Authority statistics, almost 13,000 undergraduate students live off-campus.[8] Conflicts between permanent residents and college students generally arise out of rowdy student behavior, as older residents decry disruptively loud parties that feature binge drinking.[9] Permanent residents also complain of student residents neglecting basic property maintenance and allowing their households to become neighborhood eyesores.[10] After years of attempting to control

private colleges and universities employ six percent of private employees in Boston metropolitan area); *see also* CAROLINE M. SALLEE & PATRICK L. ANDERSON, MICHIGAN'S UNIVERSITY RESEARCH CORRIDOR: SECOND ANNUAL ECONOMIC IMPACT REPORT, at ii (2008) (concluding Michigan residents over $13.3 billion richer in 2007 due to three universities' economic impact); Rich Karlgaard, *Live Rich in College Towns*, FORBES, Nov. 28, 2005, at 39 (describing economic advantages of college towns).

5. *See infra* notes 6-10 and accompanying text (detailing problems). In general, college towns suffer from problems associated with student behavior. *See* Thomas D. Russell, *Between Town and Gown: The Rise and Fall of Restorative Justice on Boulder's University Hill*, 2003 UTAH L. REV. 91, 94-99 (2003) (highlighting how University of Colorado students' behavior negatively impacts residential neighborhood); Henry Wechsler et al., *Secondhand Effects of Student Alcohol Use Reported by Neighbors of Colleges: The Role of Alcohol Outlets*, 55 SOC. SCI. & MED. 425, 429 (2002) (correlating close proximity to colleges with higher community disturbance rate); *see also* Daniel E. Wenner, Note, *Renting in Collegetown*, 84 CORNELL L. REV. 543, 557-60 (1999) (explaining unique characteristics of student renters and how they result in higher rents).

6. *See* MENINO'S REPORT, *supra* note 2, at 1 (noting issues associated with college students living in residential neighborhoods). Friction between college students and permanent residents, otherwise known as "town-gown" conflict, is a common problem in college towns. *See* BLAKE GUMPRECHT, THE AMERICAN COLLEGE TOWN 297-322 (2008) (providing in-depth analysis of town-gown conflict); *see also* GOOD WILL HUNTING (Miramax Films 1997), *available at* http://www.youtube.com/watch?v=ymsHLkB8u3s (portraying fictional verbal fisticuffs between local "townies" and Harvard student).

7. *See* MENINO'S REPORT, *supra* note 2, at 3 (providing residency statistics of Boston's undergraduate students). BRA statistics estimate Boston's undergraduate enrollment at 69,199 students. *Id.* Of the 69,199 undergraduates, 33,278 students live on campus, 23,037 students live outside of Boston, and 12,884 students live off-campus in Boston. *Id.* In order to house more students on campus, a number of colleges and universities are building or attempting to build more dorms. *See* Editorial, *Building Confidence Near BC*, BOSTON GLOBE, June 20, 2008, at A13 (detailing Boston College's plan to house all undergraduates on campus); Thomas C. Palmer, Jr., *Condo Residents Won't Oppose Suffolk Dorm, School Agrees to Limit its Future Expansion of Housing in the Area*, BOSTON GLOBE, July 3, 2007, at C1 (examining Suffolk University's construction of additional student housing); Scott Van Voorhis, *NU Sleeps on New Dorm Sites*, BOSTON HERALD, Jan. 19, 2006, at 36 (describing Northeastern University's dorm construction efforts).

8. *See* MENINO'S REPORT, *supra* note 2, at 3 (noting 12,884 of Boston's 69,199 undergraduate students live off-campus); *see also supra* note 7 and accompanying text (providing statistics for undergraduate housing in Boston).

9. *See* Andreae Downs, *Police Get Tough on Off-Campus Partying*, BOSTON GLOBE, Mar. 15, 1998, at B1 (quoting permanent residents calling themselves 'witnesses to hell' because of student rowdiness); Ralph Ranalli & Jack Encarnacao, *Allston Partyers Come Up Empty as Police Turn Up Heat*, BOSTON GLOBE, Dec. 13, 2004, at B1 (quoting older resident stating neighborhood turned into 'nightmare' because of intoxicated students); Adrian Walker, *Unneighborly Behavior*, BOSTON GLOBE, Sept. 4, 2007, at B1 (highlighting conflict between long-time Boston resident and student neighbors).

10. *See* Andreae Downs, *Area Students Cram for More than Finals; Brighton Homeowners Fight*

student behavior through increased policing, the city of Boston recently implemented a direct limitation on off-campus student housing.[11]

On March 12, 2008, the Boston Zoning Commission amended the Boston Zoning Code to restrict more than four undergraduate students from living together in a leased dwelling.[12] The amendment redefined the term "family" in the zoning code by explicitly stating that five or more full-time undergraduate students do not constitute a family.[13] This redefinition made it illegal for five or more undergraduate students to live together, as the City of Boston zones residential districts strictly for "family" habitation.[14] Proponents support the new definition because it strikes directly at the overcrowded, student-occupied dwellings that proponents believe are the main cause of neighborhood disruption.[15] Opponents believe the amendment arbitrarily targets undergraduate students and will result in higher rents.[16] In addition to public policy concerns, critics have raised serious issues regarding the amendment's legality.[17]

Overcrowding, Absentee Landlords, BOSTON GLOBE, Mar. 22, 1998, at B1 (illustrating how student neglect creates neighborhood eyesores and lowers property values); Editorial, *Cleaning Up Off-campus*, BOSTON GLOBE, Sept. 12, 2002, at A10 (describing decrepit condition of some student-occupied houses); Brighton Centered, http://brighton-community.blogspot.com/ (June 9, 2008, 00:06 EST) (highlighting student residents who left furniture strewn across front lawn upon moving out).

11. *See* Downs, *supra* note 9 (noting increased policing of neighborhoods with heavy student populations); Peter Schworm, *Students Face Caps in City Housing, Occupancy Limits Target Off-Campus Crowding, Rowdiness*, BOSTON GLOBE, Mar. 13, 2008, at A1 (describing Boston's recently passed restriction on student housing); *infra* notes 12-14 and accompanying text (describing new legislation prohibiting more than four college students from living together). Outside of additional policing, Boston has implemented other policies aimed at the problems associated with student residents. *See* Heather Allen, *Keg Alert Urged to Curtail Bingeing*, BOSTON GLOBE, Nov. 23, 2004, at B2 (describing city ordinance requiring liquor stores to register all beer keg sales); Lisa Wangsness, *As Students Arrive, City Agency Confronts Scofflaw Landlords*, BOSTON GLOBE, Sept. 2, 2005, at B2 (highlighting stricter enforcement of housing standards).

12. *See* Schworm, *supra* note 11 (explaining zoning amendment's approval). *See generally* CYNTHIA M. BARR, BOSTON ZONING: A LAWYER'S HANDBOOK (2007) (explaining Boston's zoning laws).

13. *See* BOSTON, MASS., ZONING CODE art. 2, § 2-1(19) (2008) (defining family for zoning purposes).

14. *See* BOSTON, MASS., ZONING CODE art. 8, § 8-7 (restricting residential districts to family occupants).

15. *See* BOSTON CITY COUNCIL, ORDER REGARDING A TEXT AMENDMENT FOR BOSTON ZONING CODE ARTICLE 2 AND ARTICLE 2A REGARDING THE DEFINITION OF "FAMILY" (filed Dec. 5, 2007) (offering initial reasons for proposed amendment); Brighton Centered, http://brighton-community.blogspot.com/ (Mar. 12, 2008, 23:05 EST) (outlining politicians' and residents' arguments supporting zoning amendment).

16. *See* Richard L. Cravatts, *Property Rights Compromised; No Way to Stop Student Rowdiness*, BOSTON HERALD, Apr. 23, 2008, at 23 (arguing amendment unreasonable); Boston Students in Protest of No More than 4 Law, http://www.facebook.com (last visited Sept. 14, 2009) (presenting viewpoint of students opposed to zoning amendment); Small Property Owners of America, Boston City Council's Student Occupancy Limit is Rent Control, http://www.spoa.com/ (last visited Sept. 25, 2009) (presenting viewpoint of landlords opposed to zoning amendment); *see also* Editorial, *Hub Can't Afford to be Lease Police*, BOSTON HERALD, Jan. 4, 2008, at 14 (doubting amendment's potential to curb student rowdiness).

17. *See* Richard L. Cravatts, *Boston Threatens Property Rights*, AMERICAN THINKER, Apr. 6, 2008, http://www.americanthinker.com/2008/04/boston_threatens_property_righ.html (noting zoning amendment's potential legal complications). Other college towns have also attempted to control student populations by implementing policies of questionable legality. *See generally* Laura Marini Davis, *Has Big Brother Moved Off-campus?: An Examination of College Communities' Responses to Unruly Student Behavior*, 35 J.L. & EDUC. 153 (2006) (analyzing legality of regulations aimed at controlling student behavior).

An important legal question is whether the amendment violates either the Federal Constitution or the Massachusetts Constitution.[18] The amendment may unconstitutionally discriminate against college students by singling them out for regulation.[19] The new definition of "family" might also unconstitutionally infringe on college students' right to choose their roommates.[20] Furthermore, the amendment may be so arbitrary and irrational that it fails even the most deferential test of constitutional analysis.[21]

This Note explores the amendment through analysis of the aforementioned constitutional issues.[22] Part II.A summarizes the legal challenge that prompted Boston to amend its zoning code.[23] Part II.B examines case law relating to potential constitutional challenges to the amendment involving heightened scrutiny.[24] Part II.C presents case law relevant to the amendment's likelihood of passing the lowest level of judicial scrutiny.[25] With the important case law as a foundation, Part III analyzes the amendment's potential to receive heightened scrutiny and likelihood of passing the lowest level of constitutional review.[26]

18. *See infra* parts II-III (analyzing constitutionality of amendment). Some critics of the amendment claim it violates the "Takings Clause" of the Fifth Amendment of the U.S. Constitution; however, this Note does not discuss this constitutional issue. *See* Cravatts, *supra* note 17 (stating amendment violates Fifth Amendment); *see also* U.S. CONST. amend. V (preventing government from taking private property for public use without just compensation). Additional legal concerns, not based on constitutional law, exist regarding whether the amendment can be enforced without violating individual privacy rights. *See* Peter Schworm, *Students and Realtors Slam Limits; Fear Occupancy Restrictions are Discriminatory, Invasive*, BOSTON GLOBE, Mar. 14, 2008, at B1 (noting potential infringement of privacy rights).

19. *See* Schworm, *supra* note 18 (raising issue of whether zoning amendment unconstitutionally discriminates against students); Schworm, *supra* note 11 (quoting student comparing amendment's student-specific language to racial discrimination); *see also* U.S. CONST. amend. XIV, § 1 (granting all citizens equal protection under law); MASS. CONST. pt. 1, art. I, *amended by* MASS. CONST. amend. CVI (establishing equal protection in Massachusetts).

20. *See* U.S. CONST. amend. XIV, § 1 (guaranteeing individuals due process of law when deprived of life, liberty, or property by state); MASS. CONST. pt. 1, art. X (establishing due process protection under state constitution). *Compare* Village of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1974) (holding municipality may limit number of unrelated persons cohabitating in one dwelling), *with* City of Santa Barbara v. Adamson, 610 P.2d 436, 439-40 (Cal. 1980) (holding municipality may not limit number of unrelated persons cohabitating in one dwelling).

21. *Compare* Lantos v. Zoning Hearing Bd., 621 A.2d 1208, 1212 (Pa. Commw. Ct. 1993) (upholding student-specific zoning ordinance under most deferential constitutional test), *with* Kirsch v. Prince George's County, 626 A.2d 372, 381 (Md. 1993) (striking down student-specific zoning ordinance under most deferential constitutional test).

22. *See infra* Parts II-III.

23. *See infra* Part II.A.

24. *See infra* Part II.B.

25. *See infra* Part II.C.

26. *See infra* Part III.

II. HISTORY

A. Brief History of Boston Zoning

Prior to 2003, Boston's Inspectional Services Department (ISD) relied on the state lodging-house statute when pursuing legal action against proprietors of overcrowded buildings.[27] The lodging-house statute defines a lodging house as "a house where lodgings are let to four or more persons not within the second degree of kinship to the person conducting it."[28] When a house falls within this definition, the statute requires the owner to obtain a lodging-house license from the local municipality.[29]

In 2003, plaintiffs from three Vietnamese families challenged ISD's enforcement of the lodging-house statute in federal court.[30] The plaintiffs and their families faced eviction because ISD determined that each family lived in an unlicensed lodging-house.[31] The plaintiffs claimed ISD incorrectly interpreted the lodging-house statute by enforcing it against unrelated persons who shared living arrangements.[32] The parties settled before the case went to trial and the court issued a consent decree.[33] As part of the consent decree, ISD agreed not to apply the lodging-house statute to unrelated roommates who shared living arrangements.[34] With the statute no longer applicable, ISD had little power to stop large numbers of unrelated people from sharing households.[35]

In December 2007, City Councilor Michael Ross proposed the student-specific amendment in order to re-establish a limitation on large, shared living arrangements and to protect residential quality of life.[36] The Boston City

27. *See* MASS. GEN. LAWS ch. 140, §§ 22-32 (2008) (defining lodging house and proscribing requirements for lodging house operation).

28. *Id.* § 22.

29. *Id.* §§ 23-24. The operator of an unlicensed lodging house is subject to a maximum fine of five hundred dollars and a maximum of three months imprisonment. *Id.* § 24.

30. *See* Sang Vo v. City of Boston, No. 01-11338-RWZ, 2003 U.S. Dist. LEXIS 16519, at *11-12 (D. Mass. Sept. 22, 2003) (outlining plaintiff's claims at summary judgment stage of litigation).

31. *Id.* at *6-11. Each family lived in an apartment that they shared with another unrelated Vietnamese family. *Id.* at *3. Such shared living arrangements are common in Vietnam and amongst local Vietnamese immigrants. *Id.* at *3 n.2.

32. *Id.* at *18-19. The plaintiffs also claimed violations of their rights to equal protection, privacy, and procedural due process. *Id.* at *11-12.

33. *See* Sang Vo v. City of Boston, No. 00-11733-RWZ, 2005 U.S. Dist. LEXIS 3942, at *5-18 (D. Mass. Jan. 24, 2005) (containing settlement agreement).

34. *See id.* at *6 (distinguishing lodging from shared living situations).

35. *See* BOSTON CITY COUNCIL, ORDER REGARDING A TEXT AMENDMENT FOR BOSTON ZONING CODE ARTICLE 2 AND ARTICLE 2A REGARDING THE DEFINITION OF "FAMILY" (filed Dec. 5, 2007) (noting *Sang Vo* consent decree limited ISD's enforcement power).

36. *See id.* (asserting amendment necessary to re-establish Boston's enforcement power and protect neighborhoods). Councilor Ross has also trumpeted the amendment as a means of reducing property tax rates and rental values, even though he did not list these intentions when he initially filed the petition to amend. *Compare id.* (focusing on preserving quality of life), *with* Michael P. Ross, Zoning Amendment: Preserving Neighborhoods, http://www.cityofboston.gov/citycouncil/councillorscorner/CC_Ross_4-7-08.asp (last visited

Council unanimously approved Councilor Ross's petition to amend the zoning code, and the Boston Zoning Commission considered the amendment for final approval in March 2008.[37] At the Boston Zoning Commission's public hearing, proponents and opponents gathered in droves to voice their opinions on the amendment.[38] Despite the objections of property owners and students, the Boston Zoning Commission unanimously approved the amendment and Boston Mayor Thomas Menino signed the amendment into law on March 13, 2008.[39]

B. Heightened Scrutiny under Federal and State Constitutions

When a party challenges the constitutionality of legislation, a court generally reviews the legislation under one of three levels of scrutiny: strict, intermediate, or rational basis.[40] If the legislation discriminates against a suspect class or infringes on a fundamental right, the reviewing court applies either strict or intermediate scrutiny.[41] Strict scrutiny requires that the legislation be necessary to achieve a compelling governmental interest.[42] Intermediate scrutiny requires

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Sept. 14, 2009) (highlighting amendment's potential to keep property taxes low), *and* Michael Ross, Preventing Neighborhoods from Becoming "Shadow Campuses" (Jan. 2008), http://www.towngownworld.com/communityplanning/licencinghmos.html (claiming amendment will reduce rental values). Ross was also the main proponent of an ordinance passed in 2004 that requires colleges and universities to list where all their off-campus students live. *See* Adrienne P. Samuels, *Tensions Grow as Students Fan Out*, BOSTON GLOBE, Dec. 10, 2006, at B8 (noting Ross's leadership in passing ordinance).

37. *See* Richard Thompson, *Can Occupancy Rule Stop Students From Doubling Up?*, BOSTON GLOBE, Apr. 27, 2008, at B1 (explaining process of approval). To initiate the process of amending the Boston Zoning Code, a party must first file a petition to amend. *See* BARR, *supra* note 12, at 182 (describing petition process). The BRA then votes on whether to recommend the amendment. *See id.* at 182-83 (explaining BRA's involvement). If the BRA recommends the amendment, then the Zoning Commission has a public hearing and votes on whether to approve the amendment. *See id.* at 183-86. If the Zoning Commission approves the amendment, the mayor may sign the amendment into law or veto it. *See id.* at 186-87.

38. *See* Schworm, *supra* note 11 (describing Boston Zoning Commission hearing); Brighton Centered, http://brighton-community.blogspot.com/2008/03/boston-zoning-commission-passes-rule.html (March 12, 2008, 23:05 EST) (relating personal accounts from hearing attendees). Proponents of the amendment included community groups, college officials, and city politicians, while landlords and students opposed the amendment. *See* Schworm, *supra*.

39. *See* Thompson, *supra* note 37 (noting Zoning Commission unanimously approved amendment). Mayor Menino had previously encouraged the Zoning Commission to pass the amendment. *See* Scott Van Voorhis, *Fed Up With 'Dorms'; Hub May Limit Students in Rentals*, BOSTON HERALD, Mar. 11, 2008, at 24 (describing Menino's support for amendment).

40. *See* CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 47-49 (2d ed. 2005) (outlining three tiers of review).

41. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (noting heightened scrutiny under Federal Constitution triggered by protected class discrimination and fundamental right infringement); Barlow v. Wareham, 517 N.E.2d 146, 151 (Mass. 1988) (stating Massachusetts Constitution requires heightened scrutiny when suspect class or fundamental right involved); JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW 12 (2008) (stating Supreme Court applies strict scrutiny if legislation infringes on suspect class or fundamental right). Most state courts also raise the level of scrutiny based on involvement of suspect classes or fundamental rights. SHAMAN, *supra*, at 15.

42. *See* Johnson v. California, 543 U.S. 499, 505 (2005) (noting strict scrutiny requirements under U.S. Constitution); Lee v. Comm'r of Revenue, 481 N.E.2d 183, 185 (Mass. 1985) (setting forth strict scrutiny

that the legislation substantially relate to an important government purpose.[43] Courts are far more likely to overturn legislation when applying these heightened levels of scrutiny, so the success of a constitutional challenge often depends on whether the court applies heightened scrutiny instead of rational basis scrutiny.[44]

1. Protected Classes

a. What is a Protected Class?

The Supreme Court has interpreted the Fourteenth Amendment to the United States Constitution to require elevated judicial scrutiny when a law discriminates against a protected class.[45] State courts generally apply equality provisions contained in state constitutions in similar fashion.[46] Despite this similarity in federal and state equal protection analyses, the Federal Constitution does not limit state constitutions, so state courts are free to conclude that their respective state constitutions provide more protection to a class than does the Federal Constitution.[47]

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requirements under Massachusetts Constitution); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 541 (3d ed. 2006) (defining strict scrutiny).

43. *See Clark*, 486 U.S. at 461 (explaining intermediate scrutiny requirements); Craig v. Boren, 429 U.S. 190, 197 (1976) (holding gender classifications subject to intermediate scrutiny); CHEMERINSKY, *supra* note 42, at 540 (defining intermediate scrutiny).

44. *Compare* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006) (reporting thirty percent strict scrutiny survival rate for legislation involving protected class or fundamental right), *with* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 370 (1999) (noting rational basis review satisfied in 100 out of 110 Supreme Court cases from 1971 to 1996). Under rational basis scrutiny, the challenged legislation must have a rational relationship to a legitimate governmental interest. *See infra* notes 90-93 (detailing rational basis test).

45. *See Clark*, 486 U.S. at 461 (stating classifications based on illegitimacy must pass intermediate scrutiny); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (applying strict scrutiny to racial classification); *Craig*, 429 U.S. at 197 (employing intermediate scrutiny to gender classification); Graham v. Richardson, 403 U.S. 365, 367 (1971) (reviewing classification of non-citizens under strict scrutiny); Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying strict scrutiny to classification based on nationality); *see also* CHEMERINSKY, *supra* note 42, at § 9 (outlining Supreme Court's equal protection jurisprudence).

46. *See* Am. Subcontractors Ass'n v. City of Atlanta, 376 S.E.2d 662, 663-64 (Ga. 1989) (applying strict scrutiny to racial classification under equal protection clause of Georgia Constitution); Attorney Gen. v. Waldron, 426 A.2d 929, 941 (Md. 1981) (noting equality protections of Maryland Constitution interpreted in same fashion as Federal Equal Protection Clause); Kinney v. Kaiser Aluminum & Chem. Corp., 322 N.E.2d 880, 882-83 (Ohio 1975) (stating federal and Ohio equal protection clauses operate identically). *But see* SHAMAN, *supra* note 41, at 18-20, 25-28 (highlighting different approaches to equal protection in Alaska, New Jersey, Oregon, and Vermont). The state supreme courts of Alaska, New Jersey, and Vermont utilize a sliding scale of scrutiny, rather than attaching rigid tiers of scrutiny to specific protected classes. *See* SHAMAN, *supra* note 41, at 18-20 (describing states' adoption of sliding scale system). The Oregon Supreme Court has developed a unique approach in which the level of scrutiny depends on whether the classification exists independent of the law or is solely a legal creation. *See id.* at 26-27 (detailing Oregon's approach to equal protection).

47. *See* Sw. Wash. Chapter Nat'l Elec. Contractors Ass'n v. Pierce County, 667 P.2d 1092, 1102 (Wash.

The Supreme Court has highlighted a number of factors to consider when determining if a particular classification warrants heightened scrutiny.[48] One factor to consider is the immutability of the classification.[49] Another factor is the ability of the group to protect itself through the political process.[50] Federal courts are also more likely to grant protected class status when the class has been the subject of discrimination throughout history.[51] State courts, including Massachusetts courts, consider the same or similar factors when making protected class determinations under state constitutional law.[52]

The Supreme Court has declined to apply protected class status to classifications based on age, wealth, sexual orientation, and mental retardation.[53] In addition, lower federal courts have rejected numerous other

1983) (holding Washington Constitution prohibits sexual classifications even if strict scrutiny is met); SHAMAN, *supra* note 41, at 76-77 (comparing federal and state constitutional protections of equality); Stanley H. Friedelbaum, *State Equal Protection: Its Diverse Guises and Effects*, 66 ALB. L. REV. 599, 604-29 (2003) (examining state equal protection clauses affording greater protection than Federal Constitution). *Compare* Hartzell v. Connell, *679 P.2d 35*, 54 (Cal. 1984) (Bird, C.J., concurring) (reasoning California Constitution requires elevated scrutiny for wealth classifications), *and* Breen v. Carlsbad Mun. Sch., *120 P.3d 413*, 422-23 (N.M. 2005) (applying intermediate scrutiny to disability classifications under New Mexico Constitution), *with* Heller v. Doe, 509 U.S. 312, 321 (1993) (noting rational basis review applied to disability classifications under U.S. Constitution), *and* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28-29 (1973) (holding wealth classification not suspect class under U.S. Constitution). As a local example, Massachusetts courts apply strict scrutiny to gender classifications, although federal courts apply only intermediate scrutiny. *Compare* Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to gender classification), *with* Commonwealth v. King, 372 N.E.2d 196, 206 (Mass. 1977) (holding Massachusetts Constitution mandates strict scrutiny of gender classifications).

48. *See Rodriguez*, 411 U.S. at 28 (listing factors); CHEMERINSKY, *supra* note 42, at 672-73 (discussing criteria considered); Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 16 (2000) (listing characteristics Supreme Court considers when analyzing classifications); *see also infra* notes 49-51 and accompanying text (highlighting factors considered).

49. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 496 (1980) (Powell, J., concurring) (using strict scrutiny because of race's immutability); Mathews v. Lucas, 427 U.S. 495, 505 (1976) (requiring heightened scrutiny for legitimacy-based classification because individual does not control legitimacy); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (reasoning immutability of gender dictates heightened scrutiny for gender classifications).

50. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985) (considering political efforts on behalf of disabled while determining if disabled constitute protected class); *Frontiero*, 411 U.S. at 686 (noting women underrepresented in political offices); Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (stating aliens constitute discrete and insular political minority deserving of heightened scrutiny).

51. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) (noting history of discrimination against women before applying heightened scrutiny to gender classification); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313-14 (1976) (reasoning age-based classifications not suspect as no widespread history of discrimination against elderly); *Mathews*, 427 U.S. at 505-06 (considering history of discrimination against illegitimate before deciding on required scrutiny).

52. *See In re* Herrick, 922 P.2d 942, 959 (Haw. 1996) (applying federal factors to determine court reporters not suspect class); Williams v. Sec'y of Executive Office of Human Serv., 609 N.E.2d 447, 456-57 (Mass. 1993) (considering state's historical treatment of disabled); *Breen*, 120 P.3d at 422-23 (considering same factors when deciding scrutiny for disability classifications under New Mexico Constitution); Hewitt v. State Accident Ins. Fund Corp., 653 P.2d 970, 977-78 (Or. 1982) (applying same factors when determining protection for gender under Oregon Constitution).

53. *See* Romer v. Evans, 517 U.S. 620, 631-32 (1996) (applying rational basis scrutiny to classification

arguments for protected class status.[54] Massachusetts courts have exhibited similar hesitancy towards extending protected class status under the Massachusetts Constitution.[55]

b. Students as a Protected Class

Federal and state courts have rejected arguments that college students warrant protected class status.[56] In *Smith v. Lower Merion Township*,[57] the United States District Court for the Eastern District of Pennsylvania considered whether an ordinance prohibiting property rental to three or more students violated the Equal Protection Clause.[58] Smith, a landowner who rented primarily to college students, argued that student classifications deserve a heightened standard of scrutiny.[59] The court rejected Smith's argument, noting that society has not been historically prejudiced against students.[60] The United States District Court for the Middle District of Pennsylvania, facing a slightly different type of ordinance, came to the same conclusion in *Bloomsburg Landlords Association v. Bloomsburg*.[61] The ordinance in question imposed additional legal duties on landowners who rented to three or more unrelated

based on sexual orientation); *Cleburne*, 473 U.S. at 442-47 (holding mentally disabled not protected class); *Murgia*, 427 U.S. at 313-14 (rejecting heightened scrutiny for age classifications); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28-29 (1973) (noting wealth discrimination does not invoke higher scrutiny).

54. *See, e.g.*, Calloway v. District of Columbia, 216 F.3d 1, 7 (D.C. Cir. 2000) (reasoning District of Columbia residents not protected class); Gazette v. City of Pontiac, 41 F.3d 1061, 1067 (6th Cir. 1994) (holding alcoholics not protected class); Cordero v. Coughlin, 607 F. Supp. 9, 10 (S.D.N.Y. 1984) (stating AIDS victims not protected class).

55. *See, e.g.*, Tobin's Case, 675 N.E.2d 781, 784 (Mass. 1997) (stating individuals over sixty-five years of age not protected class); *Williams*, *609 N.E.2d at 456-57* (declining to extend protected class status to disabled); LaCava v. Lucander, 791 N.E.2d 358, 363-64 (Mass. App. Ct. 2003) (reasoning inmates not protected class).

56. *See* Smith v. Lower Merion Twp., Civ. A. No. 90-7501, 1992 WL 112247, at *2 (E.D. Pa. May 11, 1992) (reasoning student classification does not require heightened scrutiny); Davis v. Churchill County Sch. Bd. of Trs., 616 F. Supp. 1310, 1313 (D. Nev. 1985) (concluding students not suspect classification); Lantos v. Zoning Hearing Bd., 621 A.2d 1208, 1212 (Pa. Commw. Ct. 1993) (holding students not protected class).

57. Civ. A. No. 90-7501, 1992 WL 112247 (E.D. Pa. May 11, 1992).

58. *Id.* at *1. Under the ordinance, a property owner could only rent to three or more college students if the zoning board granted a special exception. *Id.* The ordinance covered all unrelated students attending a college or university, as well as incoming students and students on semester or summer break. *Id.* at *1 n.1.

59. *Id.* at *2. The plaintiff relied on *City of Cleburne v. Cleburne Living Center* to support his claim that student classifications deserve heightened scrutiny. *Id. Cleburne* was a confusing decision that temporarily prompted some to believe the Supreme Court would be more amenable to protecting classes previously not considered suspect. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-450 (1985) (applying heightened standard even though no suspect class involved). *Cleburne* appears to be an anomaly, however, as federal courts have consistently declined to apply the heightened standard of scrutiny used in *Cleburne*. *See* Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591, 635-39 (2000) (arguing temporary application of *Cleburne*-style scrutiny replaced by return to highly deferential rationality test).

60. *Smith*, 1992 WL 112247, at *2. As mentioned above, courts consider the history of discrimination and prejudice against a class when deciding whether the class warrants heightened scrutiny. *Supra* note 51 and accompanying text.

61. 912 F. Supp. 790, 805 (M.D. Pa. 1995).

persons.[62] A landowner challenged the ordinance as disguised discrimination against college students and argued for a heightened standard of scrutiny.[63] The court declined to apply a heightened standard of scrutiny, noting the lack of societal prejudice towards college students and citing recent judicial decisions upholding municipal restrictions on young adults' behavior.[64]

2. Fundamental Rights

a. When Is a Right Fundamental?

The Supreme Court has also interpreted the Fourteenth Amendment to require heightened scrutiny when state action deprives an individual of a fundamental right.[65] Equal protection and due process guarantees in state constitutions generally apply in the same manner, subjecting state action to strict scrutiny when the action infringes upon a fundamental right.[66] The Federal Constitution does not limit state constitutional protections; courts may afford a right more protection under a state constitution than the United States Constitution requires.[67]

When determining if a right is fundamental or not, federal and state courts consider whether the applicable constitution explicitly or implicitly protects the

62. *Id.* at 799. The ordinance required property owners to obtain a license from the town in order to rent units to three or more unrelated people and made licensed property owners responsible for regulating their tenants' conduct. *Id.* Property owners who failed to curtail their tenants' disruptive behavior faced license revocation, monetary fines, and possible jail time. *Id.*

63. *Id.* at 804-05. Bloomsburg is the home of Bloomsburg University; the town passed the ordinance to control student behavior. *Id.* at 798-99.

64. *Id.* at 805. The court cited a decision that upheld an "anti-cruising" ordinance as constitutional. *Id.*; *see* Lutz v. City of York, 692 F. Supp. 457, 461 (M.D. Pa. 1988). The *Lutz* case involved an ordinance that prohibited repeatedly driving down certain streets, an activity that teenagers and young adults commonly practice. *Lutz*, 692 F. Supp. at 457-58. The *Lutz* court declined to apply a heightened standard of scrutiny and upheld the ordinance under the rational basis test. *Id.* at 459-61.

65. *See* Zablocki v. Redhail, 434 U.S. 374, 384-88 (1978) (applying strict scrutiny to infringement of fundamental right to marry); Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 262-63 (1974) (holding strict scrutiny applies when right to travel infringed); Roe v. Wade, 410 U.S. 113, 155 (1972) (holding right to abortion fundamental and applying strict scrutiny); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (deeming right to procreate fundamental and applying strict scrutiny); *see also* CHEMERINSKY, *supra* note 42, at § 10 (outlining Supreme Court's protection of fundamental rights under due process and equal protection).

66. *See* Hunter Contracting Co. v. Superior Court, *947 P.2d 892*, 894 (Ariz. Ct. App. 1997) (stating fundamental right infringement subject to strict scrutiny under Arizona Constitution); Jegley v. Picado, *80 S.W.3d 332, 350 (Ark.* 2002) (holding anti-sodomy law violates fundamental right to privacy Arkansas Constitution protects); Stephenson v. Bartlett, *562 S.E.2d 377*, 393-94 (N.C. 2002) (applying strict scrutiny to law infringing on fundamental right to vote on equal terms); SHAMAN, *supra* note 41, at 15 (noting most state courts have adopted federal concept of fundamental right protection).

67. *See* SHAMAN, *supra* note 41, at 79-241 (comparing rights protection under federal and state constitutions). *Compare* N. Fla. Women's Health & Counseling Servs. v. State, 866 So.2d 612, 620-22 (Fla. 2003) (holding Florida Constitution requires strict scrutiny of any law infringing on abortion rights), *and* Bd. of Educ. v. W. Va. Bd. of Educ., *639 S.E.2d 893,* 899 (W. Va. 2006) (recognizing fundamental right to education under West Virginia Constitution), *with* Stenberg v. Carhart, 530 U.S. 914, 921 (2000) (noting undue-burden test applied when abortion rights infringed), *and* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (holding no fundamental right to education under U.S. Constitution).

right.[68] Even if no textual basis for protection exists, courts have based fundamental rights on history and tradition.[69] Additionally, courts protect rights encompassed within the fundamental right to privacy.[70] Applying the aforementioned factors, the Massachusetts Supreme Judicial Court (SJC) has rejected most fundamental right arguments and has rarely expanded fundamental right protection under the Massachusetts Constitution beyond that of the Federal Constitution.[71]

b. Do Students Have a Fundamental Right to Live Together?

The Supreme Court has held that zoning ordinances limiting the number of unrelated people who can live together in one household do not infringe upon a fundamental right.[72] In *Village of Belle Terre v. Boraas*,[73] the Court considered

68. *See, e.g.*, *Rodriguez*, 411 U.S. at 35 (1973) (holding right to education not fundamental because U.S. Constitution does not guarantee right); Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963) (incorporating fundamental right to counsel under Fourteenth Amendment based on language of Sixth Amendment); Mills v. Reynolds, 837 P.2d 48, 55 (Wyo. 1992) (holding court access fundamental right based on explicit language in Wyoming Constitution); *see also* CHEMERINSKY, *supra* note 42, at 795 (noting some scholars believe rights only fundamental if stated in text of constitution).

69. *See* Michael H. v. Gerald D., 491 U.S. 110, 122-24 (1989) (looking to tradition when considering whether father's visitation rights fundamental); Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (reasoning family sanctity fundamental based on national history and tradition); CHEMERINSKY, *supra* note 42, at 795 (stating Supreme Court considers history and tradition).

70. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) (holding women's right to choose encompassed within fundamental right to privacy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding fundamental right to privacy includes right to choose to use contraceptives); Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965) (reasoning right to privacy implicitly guaranteed in Bill of Rights); Commonwealth v. Wasson, 842 S.W.2d 487, 491-92 (Ky. 1992) (holding right to consensual homosexual sex within fundamental right to privacy Kentucky Constitution protects); *see also* SHAMAN, *supra* note 41, at 121-62 (describing and comparing federal and state protection of right to privacy); Nancy C. Marcus, *Beyond* Romer *and* Lawrence*: The Supreme Court Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 370-78 (2006) (discussing Supreme Court's expansion of the fundamental right to privacy). The SJC has also recognized that the Massachusetts Constitution protects the fundamental right to privacy. *See* Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 398-99 (Mass. 1981) (holding abortion rights inherently included in fundamental right to privacy Massachusetts Constitution protects); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 424 (Mass. 1977) (reasoning fundamental right to privacy includes right to freedom from unwanted medical treatments).

71. *See, e.g.*, Tobin's Case, 675 N.E.2d 781, 784 (Mass. 1997) (holding no fundamental right to workers' compensation); Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1095 (Mass. 1995) (recognizing no fundamental right to education); Williams v. Sec'y of Executive Office of Human Servs., 609 N.E.2d 447, 457 (Mass. 1993) (reasoning no fundamental right to receive mental health services). *But see Moe*, 417 N.E.2d at 402-03 (holding Massachusetts Constitution affords greater protection to abortion rights than does U.S. Constitution). Outside the context of fundamental rights, the SJC has not hesitated to expand state constitutional protections beyond federal constitutional protections. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 959 n.18 (Mass. 2003) (noting Massachusetts Constitution offers more protection than Federal Constitution in several contexts); Alexander Wohl, *New Life for Old Liberties—The Massachusetts Declaration of Rights: A State Constitutional Law Case Study*, 25 NEW ENG. L. REV. 177 (1990) (describing extended constitutional protections under Massachusetts Constitution).

72. *See* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1974) (reasoning unrelated people have no fundamental right to live together). In comparison, the Court has held that extended family members have a fundamental right to live with one another. *Moore*, 431 U.S. at 503-05. In *Moore*, the Court considered the constitutionality of a zoning ordinance that prevented a grandmother from living with her two young

the constitutionality of a zoning ordinance that prevented more than two unrelated persons from living together in the same household.[74] Belle Terre charged Boraas with violating the ordinance after he rented a house to six unrelated students from a local university.[75] The landowner and the students challenged the ordinance, claiming that it violated numerous constitutional provisions.[76] The Court upheld the ordinance as constitutional, specifically stating that it did not intrude on the fundamental rights of association or privacy.[77] Therefore, the Court applied rational basis review.[78]

Most state courts have either explicitly or implicitly followed the Court's reasoning in *Belle Terre* regarding unrelated groups of people and their rights to live together.[79] A number of state courts explicitly adopted the *Belle Terre* reasoning.[80] Other courts implicitly rejected the notion that unrelated people

grandchildren. *Id.* at 495-98. *See generally* Pala Hersey, Comment, Moore v. City of East Cleveland*: The Supreme Court's Fractured Paean to the Extended Family*, 14 J. CONTEMP. LEGAL ISSUES 57 (2004) (discussing *Moore* decision). The *Moore* Court distinguished *Belle Terre* by noting that the Belle Terre ordinance applied only to unrelated individuals, whereas the East Cleveland ordinance affected family members. *Moore*, 431 U.S. at 498-99. To explain the importance of this distinction, the Court reasoned family members have a fundamental right to live together that unrelated individuals do not possess. *Id.* at 499.

73. 416 U.S. 1 (1974).

74. *Id.* at 2; *see* Rebecca M. Ginzburg, Note, *Altering "Family": Another Look at the Supreme Court's Narrow Protection of Families in* Belle Terre, 83 B.U. L. REV. 875, 887-96 (2003) (describing facts and procedural history); Alyson Taub, Comment, Village of Belle Terre v. Boraas *and the Meaning of "Family"*, 14 J. CONTEMP. LEGAL ISSUES 51, 51 (2004) (elaborating facts).

75. *Belle Terre*, 416 U.S. at 2-3. The students were all enrolled at the State University of New York at Stony Brook and decided to live together as an alternative to traditional dormitory living, as they believed communal living would be "pleasant, convenient, promotive of scholarly exchange, and within their pocketbooks." Boraas v. Vill. of Belle Terre, 476 F.2d 806, 808-09 (2d Cir. 1973). As part of their living arrangement, the six students dined together, shared chores, and maintained a communal checking account to pay for necessary household upkeep. *Id.* at 809. None of the students had behaved irresponsibly as tenants. *Id.*

76. *Belle Terre*, 416 U.S. at 7. The plaintiffs claimed the ordinance violated a person's right to travel and to migrate and settle within a state. *Id.* They additionally claimed the ordinance was motivated by a desire for social homogeneity, an illegitimate governmental interest. *Id.* Lastly, they claimed the ordinance violated their right to privacy because Belle Terre had no valid concern as to residents' marital status. *Id.*

77. *Id.* at 7-8. In dissent, Justice Marshall reasoned that the zoning ordinance unconstitutionally infringed on the fundamental rights to privacy and freedom of association. *Id.* at 13 (Marshall, J., dissenting). Marshall believed an individual's decision as to who to live with was within the fundamental right to privacy because of the deeply personal considerations involved. *Id.* at 16. Applying strict scrutiny, Marshall reasoned that the ordinance was unconstitutional because the preservation of family neighborhoods could be achieved by less restrictive means. *Id.* at 18-19.

78. *Id.* at 8-9 (majority opinion). This Note discusses the Court's application of the rational basis test in a subsequent section. *Infra* Part II.B.3.a.

79. *See* Katia Brener, Note, Belle Terre *and Single-Family Home Ordinances: Judicial Perceptions of Local Government and the Presumption of Validity*, 74 N.Y.U. L. REV. 447, 454-57 (1999) (noting most state courts follow *Belle Terre*). At the time of the Brener note's publication, twenty-eight state courts had not considered the constitutionality of these ordinances. *See id.* at 454, n.39 (listing state courts). In 2007, the Iowa Supreme Court also considered the issue. Ames Rental Prop. Ass'n. v. City of Ames, 736 N.W.2d 255, 258-63 (Iowa 2007).

80. *See* Behavioral Health Agency v. Casa Grande, 708 P.2d 1317, 1322 (Ariz. Ct. App. 1985) (explicitly adopting *Belle Terre* reasoning); State v. Champoux, 566 N.W.2d 763, 767-68 (Neb. 1997) (agreeing with *Belle Terre* decision); *In re* Appeal of McGinnis, 448 A.2d 108, 112 (Pa. Commw. Ct. 1982) (following *Belle Terre*).

have a fundamental right to live together by avoiding the issue without discussion and applying the rational basis test.[81] The SJC has not conclusively determined whether unrelated people have a fundamental right to live together under the Massachusetts Constitution.[82]

California is the only state that has held that unrelated persons have a fundamental right to live together.[83] In *City of Santa Barbara v. Adamson*,[84] the California Supreme Court considered whether a zoning ordinance that restricted more than five unrelated people from living together violated the California Constitution.[85] Three members of a group of twelve adults living together challenged the ordinance.[86] The court held that an individual's right to choose living partners fell within the fundamental right to privacy protected by the California Constitution.[87] Consequently, the court applied strict scrutiny to the zoning ordinance.[88]

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81. *See* Hayward v. Gaston, 542 A.2d 760, 768-69 (Del. 1988) (citing *Belle Terre* and applying rational basis); Ladue v. Horn, 720 S.W.2d 745, 750 (Mo. Ct. App. 1986) (dismissing involvement of fundamental right); Town of Durham v. White Enters., 348 A.2d 706, 708-09 (N.H. 1975) (implicitly adopting *Belle Terre* reasoning).

82. *See* Brener, *supra* note 79, at 454 n.39 (noting Massachusetts has not determined whether unrelated persons have fundamental right to live together). In *Commonwealth v. Jaffe*, the defendants, landlords in the City of Newton, argued that a municipal ordinance violated their tenants' due process rights because it restricted single family zoning districts to persons related by blood, marriage, or adoption. 494 N.E.2d 1342, 1346 (1986). The SJC avoided deciding the issue, noting that the defendants' tenants could not qualify as a single family, even if the ordinance had no restrictions on unrelated persons, because the tenants' living arrangements "did not achieve the permanency and cohesiveness inherent in the notion of a single housekeeping unit." *Id.*

83. *See* City of Santa Barbara v. Adamson, 610 P.2d 436, 439-40 (Cal. 1980) (reasoning right to choose cohabitants within fundamental right to privacy protected by the California Constitution); *see also* Sara Dunski, Note, *Make Way for the New Kid on the Block: The Possible Zoning Implications of* Lawrence v. Texas, 2005 U. ILL. L. REV. 847, 867-68 (2005) (contending restrictive ordinances infringe on right to privacy as expanded by *Lawrence v. Texas*); Ginzburg, *supra* note 74, at 897 (arguing Court should overturn *Belle Terre* and adopt broader constitutional protection of non-traditional families). A Rhode Island trial court has reasoned that a fundamental right to choose cohabitants exists under the state constitution, but the Rhode Island Supreme Court has not considered the issue. DiStefano v. Haxton, C.A. No. WC 92-0589, 1994 R.I. Super. LEXIS 98, at *21 (R.I. Super. Ct. Dec. 12, 1994).

84. 610 P.2d 436 (Cal. 1980).

85. *Id.* at 438-39.

86. *Id.* at 438. The twelve occupants lived together in a large mansion with twenty-four rooms, including ten bedrooms, and six bathrooms. *Id.* The occupants were all young professionals, including a lawyer, a real estate agent, a tractor-business operator, and a graduate biochemistry student, amongst others. *Id.* The group shared expenses, chores, and nightly dinners together. *Id.*

87. *Id.* at 439-40; *see also* CAL. CONST. art. I, § 1 (protecting individual right to privacy). The court was influenced by a 1972 ballot amendment that added protection for the right to privacy to the California Constitution. *Adamson*, 610 P.2d at 439. Noting this amendment, the court reasoned protection of the right to privacy is narrower under the Federal Constitution than under the California Constitution. *Id.* at 440. The dissent criticized the majority for interpreting the privacy provision too broadly, reasoning that voters approved the provision to limit government surveillance, not to protect unrelated persons' rights to live together. *Id.* at 448 (Manuel, J., dissenting).

88. *Id.* at 440-44 (majority opinion). The court held that the ordinance did not pass strict scrutiny because the restriction on unrelated people living together did not substantially relate to the stated goals of the ordinance and the ordinance was not the least restrictive means for achieving those goals. *Id.* at 440-42.

C. The Rational Basis Test

1. Application of Rational Basis Review

When legislation does not affect a protected class or infringe on a fundamental right, courts generally review constitutional challenges to that legislation using rational basis scrutiny.[89] The rational basis test is highly deferential under the Federal Constitution; federal courts uphold legislation as long as there is a rational relationship to a legitimate governmental interest.[90] Applying this standard, valid legislation can be significantly overinclusive or underinclusive; it can include people undeserving of regulation and exempt people who presumably should be subject to regulation.[91] Additionally, factual evidence does not need to support legislative rationale.[92] Though most state courts apply an identical rational basis test, some state courts apply stricter versions of the test by explicitly noting the added stringency or subtly using less deference while purporting to apply an identical test.[93]

89. *See, e.g.*, Vacco v. Quill, 521 U.S. 793, 799 (1997) (noting rational basis test applied when no suspect class or fundamental right involved); Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 462-63 (1988) (applying rational basis test); Exxon Corp. v. Eagerton, 462 U.S. 176, 195-96 (1983) (applying rational basis test to economic legislation). Many scholars assert that the Supreme Court subtly applies a more demanding version of the rational basis test when considering classifications based on sexual orientation. *See* Jerald W. Rogers, Note, Romer v. Evans*: Heightened Scrutiny Has Found a Rational Basis—Is the Court Tacitly Recognizing Quasi-Suspect Status for Gays, Lesbians, and Bisexuals?*, 45 KAN. L. REV. 953, 969 (1997) (arguing Court applies heightened rational basis test to classifications based on sexual orientation); Jeremy B. Smith, Note, *The Flaws of Rational Basis With Bite: Why the Supreme Court Should Acknowledge its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2770 (2005) (suggesting *Romer* and *Lawrence* imply Court applies stricter rational basis test to sexual orientation classifications).

90. *See, e.g.*, Heller v. Doe, 509 U.S. 312, 320 (1993) (seeking rational relationship to state purpose); Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) (stating test); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (noting economic legislation must rationally relate to legitimate state purpose); CHEMERINSKY, *supra* note 42, at § 9.2 (describing rational basis test).

91. *See* Vance v. Bradley, 440 U.S. 93, 111-12 (1979) (upholding underinclusive and overinclusive law); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) (reasoning legislators may address problems with underinclusive legislation); Ry. Express Agency v. New York, 336 U.S. 106, 110 (1949) (noting elimination of "all evils of the same genus" not required); CHEMERINSKY, *supra* note 42, at 686-87 (describing rational basis test's tolerance for overinclusive and underinclusive legislation). Underinclusive classifications are those in which "[a]ll who are included in the class are tainted with the mischief, but there are others also tainted whom the classification does not include." Joseph Tussman & Jacobus TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949). In contrast, overinclusive classifications "impose a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims." *Id.* at 351.

92. *See Heller*, 509 U.S. at 320 (1993) (holding state has no evidentiary obligation to prove rationality); FCC v. Beach Commc'ns, 508 U.S. 307, 315 (1993) (stating rationality not subject to courtroom fact-finding); *see also* Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 897, 904-06 (2005) (criticizing rational basis test's lack of evidentiary requirement).

93. *See* Gluba v. Bitzan & Ohren Masonry, 735 N.W.2d 713, 720 (Minn. 2007) (stating Minnesota rational basis test more stringent than federal); Taylor v. Town of Plaistow, 872 A.2d 769, 772-73 (N.H. 2005) (requiring substantial relationship when reviewing classifications in zoning ordinances under New Hampshire Constitution); Ferdon v. Wis. Patients Comp. Fund, 701 N.W.2d 440, 461 (Wis. 2005) (acknowledging stricter rational basis test under Wisconsin Constitution); SHAMAN, *supra* note 41, at 17-18 (noting some states apply enhanced rational basis test).

The Massachusetts SJC appears to apply an enhanced version of the rational basis test when state action infringes on an important, yet not fundamental, right.[94] *Goodridge v. Department of Public Health*[95] suggests that an individual's right to free association is sufficiently important, so legislation that infringes on this right triggers enhanced rational basis scrutiny.[96] In *Goodridge*, the court considered whether denial of marriage licenses to same-sex couples violated the state constitution.[97] Even though the court claimed to apply the normal rational basis test, judicial review was more exacting.[98] The court acknowledged the legitimacy of the Commonwealth's goals, but held that the denial of marriage licenses to same-sex couples did not rationally relate to achieving these goals.[99] As a basis for this conclusion, the court considered the overinclusive and underinclusive nature of the ban, even though such considerations are normally irrelevant under the rational basis test.[100] The court

94. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 960-68 (Mass. 2003) (applying more exacting rational basis test); Murphy v. Comm'r of Dep't of Indus. Accidents, 612 N.E.2d 1149, 1156-57 (Mass. 1993) (requiring Commonwealth to provide evidence and not solely assumptions to pass rationality review); Lawrence Friedman, *Ordinary and Enhanced Rational Basis Review in the Massachusetts Supreme Judicial Court: A Preliminary Investigation*, 69 ALB. L. REV. 415, 418 (2006) (noting SJC employs enhanced rational basis test when legislation infringes important right); Macavan Baird, Recent Case, *Individual Autonomy Rights and Equality under the Massachusetts Constitution Prohibit Exclusion of Same-Sex Couples from Civil Marriage*, 36 RUTGERS L.J. 1381, 1399-403 (2004) (recognizing Massachusetts employs slightly stricter rational basis test).

95. 798 N.E.2d 941 (Mass. 2003).

96. *See* Friedman, *supra* note 93, at 440 (noting *Goodridge* indicates freedom of association infringement triggers enhanced rational basis test). In a broad sense, enhanced rational basis scrutiny is apparently triggered when legislation infringes on rights "that are important to individuals as autonomous beings and political actors." *Id.* at 443.

97. 798 N.E.2d at 948-49; *see also* SUSAN GLUCK MEZEY, QUEERS IN COURT: GAY RIGHTS LAW AND PUBLIC POLICY 104-09 (2007) (providing detailed description of *Goodridge* decision and subsequent political response). The plaintiffs, fourteen individuals from seven same-sex relationships, wished to marry, but municipal clerks denied their applications for marriage licenses. *Goodridge*, 798 N.E.2d at 949-50.

98. *Goodridge*, 798 N.E.2d at 960-68. There is considerable debate regarding the *Goodridge* court's application of the rational basis test. *Compare* Sigrid Ulve, Note, Hernandez v. Robles *and* Goodridge v. Department of Public Health*: The Irrationality of the Rational Basis Test*, 11 J. GENDER RACE & JUST. 149, 176-79 (2007) (praising application of rational basis test in *Goodridge*), *with* James Hart, Comment, *In Search of Tradition:* Goodridge v. Department of Public Health, 82 DENV. U.L. REV. 79, 89-91 (2004) (arguing rational basis test applied incorrectly).

99. *Goodridge*, 798 N.E.2d at 960-65. The Commonwealth's stated rationales were to provide favorable settings for procreation, to ensure optimal settings for child-rearing, and to preserve financial resources. *Id.* at 961.

100. *Id.* at 960-65; *see* Lawrence Friedman, *The (Relative) Passivity of* Goodridge v. Department of Public Health, 14 B.U. PUB. INT. L.J. 1, 13 (2004) (noting *Goodridge* justices believed marriage exclusion irrationally broad); *supra* note 90 and accompanying text (highlighting rationality test's tolerance for overinclusiveness and underinclusiveness). *But see Goodridge*, 798 N.E.2d at 1003 n.35 (Cordy, J., dissenting) (arguing overinclusiveness does not render marriage statute unconstitutional). The court found no rational relationship to the goal of providing favorable settings for procreation because the Commonwealth did not deny marriage licenses to heterosexual couples lacking the ability to procreate. *Id.* at 961-62. The court held that optimization of child-rearing settings was not rationally related because some homosexual couples are excellent parents. *Id.* at 962-63. Lastly, the court held that the goal of preserving financial resources, on the basis that homosexual couples are less financially independent on one another, involved no rational relationship because many homosexual couples are financially interdependent. *Id.* at 964-65.

also criticized the Commonwealth for not providing evidence to prove the rational relationship, even though this is unnecessary under normal rationality review.[101]

2. Rationality of Zoning Ordinances Targeting Unrelated Groups of People

Courts have come to different conclusions as to whether zoning ordinances pass rational basis review when restricting students' or unrelated persons' freedom to cohabitate.[102] In *Belle Terre*, the Supreme Court held that a zoning ordinance limiting the number of unrelated people who could live together rationally related to a legitimate government interest.[103] The Court stated that the maintenance of family values and quiet neighborhoods were legitimate governmental interests.[104] The Court reasoned the zoning ordinance rationally related to these goals because the ordinance sought to preserve these residential qualities by limiting the threat of overpopulation and congestion.[105]

Most state courts have followed the Supreme Court's *Belle Terre* reasoning when applying rational basis review to restrictive zoning ordinances.[106] In a recent example, the Iowa Supreme Court considered whether a City of Ames zoning ordinance violated the state constitution.[107] Similar to the ordinance in *Belle Terre*, the ordinance in *Ames* prohibited more than three unrelated people from living together.[108] Applying the rational basis test to the ordinance, the court first reasoned the city had a legitimate interest in preserving family

101. *Id.* at 964-65; *see supra* note 91 and accompanying text (noting rationality requires no support from factual evidence). *But see Goodridge*, 798 N.E.2d at 998 n.21 (Cordy, J., dissenting) (criticizing majority for placing evidentiary burden on Commonwealth).

102. *See* Brener, *supra* note 79, at 450-63 (examining different constitutional rulings regarding restrictive zoning ordinances). *Compare* Dinan v. Bd. of Zoning Appeals, 595 A.2d 864, 870-71 (Conn. 1991) (discerning rational basis for ordinance), *with* McMinn v. Town of Oyster Bay, 488 N.E.2d 1240, 1244 (N.Y. 1985) (holding ordinance fails rational basis review).

103. Vill. of Belle Terre v. Boraas, 416 U.S. 1, 8-9 (1974); *see supra* notes 74-76 and accompanying text (highlighting *Belle Terre* facts).

104. *Belle Terre*, 416 U.S. at 9.

105. *Id.* at 9. *But see* Dunski, *supra* note 83, at 859-60 (arguing *Belle Terre* ordinance irrational and ineffective).

106. *See, e.g.*, Behavioral Health Agency v. City of Casa Grande, 708 P.2d 1317, 1322 (Ariz. Ct. App. 1985) (upholding ordinance and citing *Belle Terre*); Rademan v. Denver, 526 P.2d 1325, 1327-28 (Colo. 1974) (evaluating ordinance under rational basis test); Hayward v. Gaston, 542 A.2d 760, 768-69 (Del. 1988) (citing *Belle Terre* and upholding single family dwelling ordinance).

107. Ames Rental Prop. Ass'n. v. City of Ames, 736 N.W.2d 255, 258-63 (Iowa 2007). The plaintiff also challenged the ordinance under the Federal Constitution, claiming the Supreme Court would likely overturn *Belle Terre* if given the opportunity. *Id.* at 258. The court dismissed this argument, refusing to make an assumption about how the Supreme Court might rule. *Id.*

108. *Id.* at 258. Like other cities that have passed similar zoning ordinances, the City of Ames is a college town, home to Iowa State University, and the city enacted the ordinance to combat problems presumed to result from student-occupied households. *Id.* at 261; *see also, e.g.*, Belle Terre, 416 U.S. at 2-3 (involving students from nearby State University of New York at Stonybrook); State v. Champoux, 555 N.W.2d 69, 70 (Neb. Ct. App. 1996) (considering ordinance passed by City of Lincoln, home of University of Nebraska); Durham v. White Enters., 348 A.2d 706, 707 (N.H. 1975) (regarding ordinance passed by Town of Durham, home of University of New Hampshire).

neighborhoods.[109] Rounding out the analysis, the court concluded the ordinance rationally related to the preservation of family neighborhoods because unrelated groups of people tend not to contribute to community development due to their transient nature.[110] The court also reasoned unrelated people typically host friends more often, thus increasing neighborhood traffic and congestion.[111]

In contrast to *Belle Terre*, some state courts have struck down similar zoning ordinances as lacking a rational basis.[112] In a Michigan Supreme Court case, *Charter Township of Delta v. Dinolfo*,[113] members of two households challenged the constitutionality of a township's zoning ordinance that prohibited individuals and families from living with more than one unrelated person.[114] The township charged the plaintiffs with violating the ordinance because their households each included numerous unrelated adults.[115] Reviewing the ordinance for rationality, the court acknowledged the municipality's goals—preservation of family values, maintenance of property values, and population control—as legitimate governmental objectives.[116] Even though the goals were legitimate, the court determined no rational relationship existed between the ordinance and achieving the goals.[117] The court reasoned that the township passed the ordinance based on the mere assumption, unsupported by any evidence, that unrelated groups of people live

109. *Ames*, 736 N.W.2d at 260. The court quoted extensively from *Belle Terre* while discussing the legitimacy of Ames' goals. *Id.*

110. *Id.* at 261. *But see id.* at 265-66 (Wiggins, J., dissenting) (arguing families in college communities also frequently transient). The plaintiffs argued the ordinance did not have a rational relationship because it was both overinclusive and underinclusive and the stated goals could be achieved through more direct means. *Id.* at 260 (majority opinion). The court rejected this argument, noting the rational basis test did not require the ordinance to be narrowly tailored. *Id.*

111. *Id.* The dissent argued that families are just as likely to park numerous vehicles outside their residences and noted that college students are actually more likely to use public transportation, ride bicycles, or walk instead of owning a vehicle. *Id.* at 265 (Wiggins, J., dissenting).

112. *See* Charter Twp. of Delta v. Dinolfo, 351 N.W.2d 831, 841-43 (Mich. 1984) (criticizing *Belle Terre* and assumptions regarding households of unrelated persons); State v. Baker, 405 A.2d 368, 375 (N.J. 1979) (describing *Belle Terre* as unpersuasive); McMinn v. Town of Oyster Bay, 488 N.E.2d 1240, 1243-44 (N.Y. 1985) (characterizing ordinance as fatally overinclusive and underinclusive); Brener, *supra* note 79, at 458-61 (highlighting state courts striking down ordinances under rational basis review); Dunski, *supra* note 82, at 863-64 (discussing state courts' invalidation of restrictive ordinances).

113. 351 N.W.2d 831 (Mich. 1984).

114. *Id.* at 833. The ordinance defined "family" as "[a]n individual or a group of two or more persons related by blood, marriage, or adoption . . . together with not more than one additional person not related by blood, marriage, or adoption, living together as a single housekeeping unit in a dwelling unit." *Id.* at 834 n.1.

115. *Id.* at 834. The members of the two households all belonged to The Work of Christ Community, a nonprofit religious organization. *Id.* The members chose to live communally as a part of their religious commitment. *Id.*

116. *Id.* at 840. Even though the court held the preservation of family values was a legitimate governmental interest, the court indicated some skepticism by noting that the enabling legislation and statutory language of the zoning ordinance did not mention this goal. *Id.* at 840 n.6. The dissent did not share this skepticism and reasoned that *Belle Terre* clearly endorsed the legitimacy of preserving family values. *Id.* at 846 (Williams, C.J., dissenting).

117. *Dinolfo*, 351 N.W.2d at 840.

differently than traditional families.[118] The ordinance's extreme levels of overinclusiveness and underinclusiveness also contributed to the court's holding of irrationality.[119]

3. Rationality of Student-Specific Ordinances

Despite apparent similarities, ordinances that specifically target students may fail the rational basis test even though ordinances that target unrelated persons in general do not.[120] Because fewer restrictive zoning ordinances have focused explicitly on students, fewer cases have addressed the constitutionality of student-specific ordinances, leaving significant uncertainty as to whether student-specific ordinances pass the rational basis test.[121] In *Smith v. Lower Merion Township*,[122] the United States District Court for the Eastern District of Pennsylvania applied the rational basis test to a student-specific restrictive ordinance.[123] The specific targeting of students did not change the result as compared to *Belle Terre*; the court still found a rational relationship between the ordinance and Lower Merion's stated goals.[124] The court had little problem finding a rational relationship because Lower Merion had conducted an in-depth investigation revealing that college students negatively affected residential neighborhoods.[125]

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118. *Id.* at 840-41. The court's apparent requirement of factual evidence suggests a modified application of the rational basis test. *Id.* Under the normal rational basis test, a rational relationship does not require the support of factual evidence. *Compare id.* at 841 (requiring basis for assuming unrelated people behave differently), *with* Heller v. Doe, 509 U.S. 312, 320 (1993) (noting state not obliged to produce evidence to pass rational basis test). The dissent criticized the majority for placing the evidentiary burden on the township, instead of on the plaintiffs. *Dinolfo*, 351 N.W.2d at 846 (Williams, C.J., dissenting).

119. *Id.* at 841-42 (majority opinion). The court acknowledged the overinclusive and underinclusive nature of the ordinance, even though it claimed to be applying the same rational basis test as applied under the U.S. Constitution. *Id.* As noted above, the federal rational basis test is unfailingly tolerant of overinclusive and underinclusive legislation. *Supra* note 90 and accompanying text. The dissent criticized the majority for relying on cases that took overinclusiveness and underinclusiveness into account. *Dinolfo*, 351 N.W.2d at 847 (Williams, C.J., dissenting).

120. *See* Ames Rental Prop. Ass'n v. City of Ames, 736 N.W.2d 255, 262 (Iowa 2007) (hinting outcome under rational basis test possibly different if ordinance solely restricted college students).

121. *See* Smith v. Lower Merion Twp., Civ. A. No. 90-7501, 1992 WL 112247, at *3 (E.D. Pa. May 11, 1992) (applying rationality test to student-specific zoning ordinance); Lantos v. Zoning Hearing Bd., 621 A.2d 1208, 1211-12 (Pa. Commw. Ct. 1993) (employing rational basis review of student-specific zoning ordinance). Even though few college communities have legislated student-specific zoning ordinances, they have enacted numerous other policies aimed at curbing unruly student behavior. *See* Davis, *supra* note 17, at 157-86 (describing other community actions designed to control student behavior).

122. Civ. A. No. 90-7501, 1992 WL 112247 (E.D. Pa. May 11, 1992).

123. *Id.* at *1; *see supra* note 58 and accompanying text (explaining ordinance). The court applied rational basis review after concluding college students were not a protected class. *Smith*, 1992 WL 112247, at *2; *see supra* notes 59-60 and accompanying text (discussing court's rejection of heightened scrutiny for college students).

124. *Smith*, 1992 WL 112247, at *3. *Cf.* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 8-9 (1974) (upholding ordinance directed at unrelated cohabitants under rational basis test).

125. *Smith*, 1992 WL 112247, at *3. Though both courts came to the same conclusion, the *Smith* court based its finding of rationality on the fact that Lower Merion had actually done an investigation showing

Facing a similar situation in *Kirsch v. Prince George's County*,[126] the Court of Appeals of Maryland came to the opposite conclusion, holding a student-specific zoning ordinance did not pass the rational basis test.[127] *Kirsch* involved federal and state constitutional challenges to a zoning ordinance that placed extra restrictions on households domiciling three or more college students.[128] The so-called "mini-dorm" ordinance established certain living space and parking requirements that did not apply to households with non-student occupants.[129] The court held the student-specific language of the ordinance bore no rational relationship to the stated goals of reducing noise, litter, and parking problems.[130] In coming to this conclusion, the court reasoned that the student-specific language of the "mini-dorm" ordinance distinguished it from the *Belle Terre* ordinance because the "mini-dorm" ordinance specifically discriminated against students based on their occupation.[131] Having distinguished *Belle Terre*, the court concluded student-specific discrimination did not have a rational relationship to reducing noise, litter, and parking problems because non-student occupants were equally likely to contribute to these problems.[132]

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students negatively affect residential neighborhoods, whereas the *Belle Terre* Court based its holding of rationality on an assumption about unrelated people and their effects on residential neighborhoods. *Compare Belle Terre*, 416 U.S. at 8-9 (assuming unrelated cohabitants lead to more traffic, congestion, and noise), *with Smith*, 1992 WL 112247, at *3 (noting municipal investigation revealed students' presence changed character of neighborhood). Other studies, similar to the study Lower Merion conducted, have reached the same conclusions regarding the negative effects college students have on residential neighborhoods. *See* Wechsler, *supra* note 5, at 429 (linking proximity to college students to higher rate of community disturbances).

126. 626 A.2d 372 (Md. 1993).

127. *Id.* at 379-81.

128. *Id.* at 373; *see* Meera Somasundaram, *P.G.'s Mini-Dorm Law is Rejected; Court Says Housing Restrictions Violated Rights of Student Renters*, WASH. POST, June 29, 1993, at B7 (describing reaction to court's decision). A trial court and an intermediate appellate court had previously upheld the student-specific zoning ordinance as constitutional prior to the Court of Appeals decision. *Kirsch*, 626 A.2d at 375. The Prince George's County Council initially passed the legislation in response to complaints about University of Maryland students. Somasundaram, *supra*.

129. *Kirsch*, 626 A.2d at 373-75. More specifically, the ordinance required rooms used for sleeping to contain no less than seventy squared feet per occupant and required an on-site parking spot for each occupant. *Id.* at 374. The ordinance covered all unrelated students enrolled at an "institution of higher learning." *Id.*

130. *Id.* at 381. The dissent accused the majority of "subtly altering the rational basis test, or paying lip service to that test but refusing to apply it in the instant case." *Id.* at 381 (Chasanow, J., dissenting). The dissent argued that it was reasonably conceivable that an influx of students would lead to parking problems and a decline in neighborhood aesthetics. *Id.* at 382-83. Therefore, the dissent concluded the ordinance was rational. *Id.* at 383.

131. *Kirsch*, 626 A.2d at 381 (majority opinion). *Compare id.* at 374 (considering ordinance applicable to unrelated college students), *with* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 2 (1974) (examining ordinance applicable to all unrelated people).

132. *Kirsch*, 626 A.2d at 381. Similar to the Michigan Supreme Court in *Dinolfo*, the Maryland Court of Appeals based its reasoning on the underinclusive nature of the ordinance, even though legislation should not fail rational basis review solely because of overinclusiveness or underinclusiveness. *See supra* note 90 and accompanying text (stating rational basis test tolerant of overinclusive and underinclusive legislation). The dissent criticized the majority for striking down the ordinance based on its underinclusiveness. *Kirsch*, 626 A.2d at 383 (Chasanow, J., dissenting).

III. ANALYSIS

A. Potential for Heightened Scrutiny

1. Discrimination Against a Protected Class

A reviewing court is highly unlikely to grant college students protected class status under either the Federal Constitution or the Massachusetts Constitution.[133] Applying the Federal Constitution, two federal courts have considered the issue and held that college students are not a protected class.[134] These courts were correct in their holdings, as college students do not have the necessary characteristics to warrant protected class status.[135] Classification as a college student is not an immutable characteristic; students choose to attend college and can drop out of school whenever they please.[136] Additionally, almost all college students are of legal voting age and most college students actively partake in the political process.[137] Lastly, there is no history of discrimination against college students in Boston or in the United States as a whole.[138]

In general, federal courts have been extremely hesitant to expand the scope of protected class status.[139] Massachusetts courts have been similarly hesitant;

133. *See supra* Part II.A.2 (discussing students as protected class).

134. *See* Bloomsburg Landlords Ass'n v. Bloomsburg, 912 F. Supp. 790, 805 (M.D. Pa. 1995) (holding college students not protected class); Smith v. Lower Merion Twp., Civ. A. No. 90-7501, 1992 WL 112247, at *2 (E.D. Pa. May 11, 1992) (reasoning student classification requires no heightened scrutiny).

135. *See Bloomsburg*, 912 F. Supp. at 805 (noting college students not victims of historical prejudice or discrimination); *Smith*, 1992 WL 112247, at *2 (recognizing lack of discrimination against college students). A class warrants heightened scrutiny if the class is based on an immutable characteristic, underrepresented in the political process, and a historical target of societal prejudice or discrimination. *See supra* notes 48-51 and accompanying text (highlighting factors giving rise to heightened scrutiny).

136. *See* AM. COLL. TESTING, NATIONAL COLLEGIATE RETENTION AND PERSISTENCE TO DEGREE RATES 3 (2008) (estimating 65.7 percent of first-year college students return for second year); Anya Sostek, *No Simple Explanation for College Dropout Rate*, PITTSBURGH POST-GAZETTE, Sept. 6, 2008, at A1 (documenting various reasons college students dropout).

137. *See* 2007 DOE DIG. EDUC. STAT. 303, *available at* http://nces.ed.gov/pubsearch/pubsinfo asp?pubid=2008022 (2008) (providing 2007 statistics on undergraduate students' ages). Ninety-seven percent of undergraduate students were above the legal voting age of eighteen in fall 2007. *See id.* (showing 566,823 of 14,487,475 total undergraduate college students under eighteen upon enrollment in fall 2007). College student turnout in the 2004 presidential elections was sixty percent, as compared to sixty-four percent for the national voting age population. *Compare* KARLO BARRIOS MARCELO & EMILY HOBAN KIRBY, QUICK FACTS ABOUT U.S. YOUNG VOTERS: THE PRESIDENTIAL ELECTION YEAR 2008 3 (2008) (stating sixty percent of college students voted in 2004), *with* U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF 2004 1 (2006) (estimating sixty-four percent turnout amongst national voting age population).

138. *See Bloomsburg*, 912 F. Supp. at 805 (highlighting lack of prejudice towards college students); *Smith*, 1992 WL 112247, at *2 (noting college students not historically discriminated against). *But see* GUMPRECHT, *supra* note 6, at 298-300 (chronicling history of Newark citizens abusing Delaware College students); J.M. Lawrence, *College Students—They're baaaaack!; Why We Hate'em*, BOSTON HERALD, Aug. 25, 1996, at 1 (describing local animosity towards college students).

139. *See supra* notes 53-54 and accompanying text (describing federal courts' reluctance to expand scope of protected class status).

they have not extended protected class status to any classifications beyond those the federal courts protect.[140] Both the United States Supreme Court and the SJC have declined to apply heightened scrutiny to classifications based on sexual orientation or mental disability.[141] If these classifications, both based on an immutable characteristic and historically subjected to discrimination, do not warrant heightened scrutiny, then college student classifications, lacking immutability and historical discrimination, do not either.[142]

2. Fundamental Right Infringement

As established in the *Belle Terre* decision, a person's right to live with other unrelated persons is not a fundamental right under the Federal Constitution.[143] In light of *Belle Terre*, the amendment does not trigger heightened scrutiny by prohibiting more than four unrelated college students from living together.[144] Even though the Boston zoning amendment deals specifically with students, the issue is essentially the same, as the rights of unrelated college students to live together cannot be distinguished from the rights of unrelated persons, in general, to live together.[145] Therefore, *Belle Terre* is controlling; the amendment does not infringe on a fundamental right by restricting unrelated college students' rights to live together.[146]

Massachusetts courts have not yet decided whether unrelated persons have a fundamental right to live together under the Massachusetts Constitution.[147] Of the state courts that have considered the issue, most courts have followed *Belle*

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140. *See supra* note 55 and accompanying text (noting Massachusetts courts hesitant to expand protected class status beyond federal scope).

141. *See* Romer v. Evans, 517 U.S. 620, 631-32 (1996) (declining to apply heightened scrutiny to legislation targeting homosexuals); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442-46 (1985) (denying mentally disabled protected class status); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) (avoiding consideration of heightened scrutiny for sexual orientation classifications); Williams v. Sec'y of Executive Office of Human Servs., 609 N.E.2d 447, 456-57 (Mass. 1993) (holding disabled do not warrant protected class status). *But see supra* note 88 (noting some scholars believe Supreme Court has adopted enhanced rational test for sexual orientation classifications).

142. *Compare Cleburne*, 473 U.S. at 446 (acknowledging past discrimination against mentally disabled), *and Romer*, 517 U.S. at 632 (reasoning legislation motivated by animus towards homosexuals), *with* Smith v. Lower Merion Twp., Civ. A. No. 90-7501, 1992 WL 112247, at *2 (E.D. Pa. May 11, 1992) (recognizing lack of historical discrimination towards college students).

143. Vill. of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1974); *see also supra* note 65 and accompanying text (noting fundamental right infringement triggers heightened scrutiny).

144. *See Belle Terre*, 416 U.S. 1, 7-8 (1974) (holding unrelated people have no fundamental right to live together).

145. *See* Bloomsburg Landlords Ass'n v. Town of Bloomsburg, 912 F. Supp. 790, 804 (M.D. Pa. 1995) (relying on *Belle Terre* to justify applying rational basis test to student-specific ordinance); Lantos v. Zoning Hearing Bd., 621 A.2d 1208, 1212 (Pa. Commw. Ct. 1993) (rejecting higher scrutiny for student-specific zoning ordinances).

146. *See Bloomsburg*, 912 F. Supp. at 805 (holding student-specific ordinance does not infringe on fundamental right); *Smith*, 1992 WL 112247, at *3 (reasoning student-specific ordinance does not burden constitutionally protected right).

147. *See supra* note 79 (noting Massachusetts courts have not considered constitutionality of restricting unrelated persons' cohabitation rights).

Terre and held that unrelated persons have no fundamental right to live together under their respective state constitutions.[148] The California Supreme Court is the only outlier, as it held that restricting unrelated persons' rights to live together violated the fundamental right to privacy specifically protected by an amendment to the California Constitution.[149]

Massachusetts courts are unlikely to follow the reasoning the California Supreme Court employed because the Massachusetts Constitution does not explicitly protect the right to privacy.[150] Considering most state courts' adherence to *Belle Terre* and the SJC's reluctance to expand the scope of fundamental right protection, a Massachusetts court is unlikely to hold that unrelated persons have a fundamental right to live together under the Massachusetts Constitution.[151]

B. Application of the Rational Basis Test

The Boston zoning amendment would likely survive the federal rational basis test, as this test requires only a rational relationship to a legitimate governmental interest.[152] The City of Boston implemented the amendment primarily to preserve residential quality of life.[153] This concern is a legitimate governmental objective, as recognized in *Belle Terre* and numerous other cases.[154] It is rational to assume that reducing overcrowded student-occupied dwellings will help protect residential neighborhoods because people generally presume that student residents lack a commitment to and respect for their neighborhood.[155] The City of Boston does not need to present factual evidence

148. *See supra* notes 79-81 and accompanying text (highlighting state courts' reliance on *Belle Terre*).

149. *See supra* notes 82-87 and accompanying text (discussing California's *Adamson* decision).

150. *Compare* MASS. CONST. art. I-CXX (containing no provision explicitly protecting privacy), *with* CAL. CONST. art. I, § 1 (protecting privacy).

151. *See supra* notes 78-80 and accompanying text (noting most state courts follow *Belle Terre*); *supra* note 71 and accompanying text (describing SJC's rejection of most fundamental right arguments).

152. *See supra* note 89 and accompanying text (explaining application of federal rational basis test). Federal courts are unlikely to apply an enhanced rational basis test to the amendment, as this enhanced test appears to be reserved for classifications based on sexual orientation. *See supra* note 88 (noting Supreme Court's apparent endorsement of enhanced rational basis test for sexual orientation classifications).

153. *See* BOSTON CITY COUNCIL, ORDER REGARDING A TEXT AMENDMENT FOR BOSTON ZONING CODE ARTICLE 2 AND ARTICLE 2A REGARDING THE DEFINITION OF "FAMILY" (filed Dec. 5, 2007) (stating amendment "necessary to protect residential quality of life").

154. *See, e.g.*, Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (holding protection of community's residential nature constitutes legitimate goal); Ames Rental Prop. Ass'n v. City of Ames, 736 N.W.2d 255, 258-63 (Iowa 2007) (noting legitimate state interest in preserving family neighborhoods); Lantos v. Zoning Hearing Bd., 621 A.2d 1208, 1211 (Pa. Commw. Ct. 1993) (reasoning preservation of family neighborhoods legitimate municipal purpose).

155. *See* Smith v. Lower Merion Twp., Civ. A. No. 90-7501, 1992 WL 112247, at *3 (E.D. Pa. May 11, 1992) (noting municipal study indicates large concentrations of college students change neighborhood character); *Ames*, 736 N.W.2d at 261 (reasoning large groups of young adults living together detract from family-friendly neighborhood atmosphere); Kirsch v. Prince George's County, 626 A.2d 372, 382-83 (Md. 1993) (Chasanow, J., dissenting) (listing problems rationally attributed to student residents); *see also supra* notes 9-10 and accompanying text (highlighting poor student behavior and resulting neighborhood friction).

to support this presumption, nor can a challenging party disturb the amendment's rationality by noting potential overinclusiveness or underinclusiveness.[156]

Goodridge suggests that the SJC may apply an enhanced rational basis test to legislation that infringes on an individual's right to freedom of association.[157] The amendment directly restricts this right by limiting college students' freedom to live together, so the amendment may have to pass the enhanced test.[158] In comparison to the federal rational basis test, Massachusetts's enhanced rational basis test is not as deferential to legislative decisions.[159] The *Goodridge* decision indicates legislation can fail Massachusetts's enhanced rational basis test if it is irrationally overinclusive or underinclusive.[160] Critics can attack the amendment for being both overinclusive and underinclusive.[161] For example, the amendment is overinclusive because it prevents perfectly behaved college students from living together, even though these students do not host disruptive parties and are respectful of their older, non-student neighbors.[162] On the other hand, the amendment is underinclusive because it does not prevent five high school dropout drug dealers from living together, even though these individuals probably threaten family neighborhoods more than hard-partying college students do.[163]

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156. *See supra* notes 91-92 and accompanying text (explaining federal rational basis test requires no evidentiary support and disregards potential overinclusiveness and underinclusiveness).

157. *See supra* note 95 and accompanying text (highlighting triggers for application of enhanced rational basis test).

158. *See supra* note 14 and accompanying text (noting amendment restricts more than four college students from living together).

159. *See* Friedman, *supra* note 93, at 415 (arguing Massachusetts applies enhanced rational basis test in certain situations). *Compare* Murphy v. Comm'r of Dep't of Indus. Accidents, 612 N.E.2d 1149, 1156-57 (Mass. 1993) (applying enhanced rational basis test requiring evidentiary support), *with* FCC v. Beach Commc'ns, 508 U.S. 307, 315 (1993) (noting no evidence needed under federal rational basis test).

160. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 960-65 (Mass. 2003) (considering overinclusiveness and underinclusiveness while applying rational basis test); Friedman, *supra* note 99, at 13 (noting *Goodridge* holding based on broadness of marriage exclusion); Hart, *supra* note 97, at 91 (criticizing *Goodridge* court for rejecting purported rationale due to underinclusiveness).

161. *See* Kirsch v. Prince George's County, 626 A.2d 372, 381 (Md. 1993) (striking down student-specific ordinance because of underinclusiveness); MENINO'S REPORT, *supra* note 2, at 1 (reporting most residents acknowledge some students make good neighbors); Cravatts, *supra* note 17 (arguing amendment unfairly and irrationally underinclusive).

162. *See* Mike Berry, *Homeowners Near UCF Vow to Stop Apartments*, ORLANDO SENTINEL, Feb. 11, 2002, at B1 (interviewing college neighbor who states most student residents are responsible and conscientious); Chuck Green, *Students Graduate to Condos*, WASH. POST, Nov. 8, 2003, at F1 (describing college students who maintained friendly relationship with neighbors); Somasundaram, *supra* note 127 (quoting student complaining about overinclusiveness of student-specific regulation); *see also* Ames Rental Prop. Ass'n v. City of Ames, 736 N.W.2d 255, 260-61 (Iowa 2007) (considering similar argument concerning overinclusion).

163. *See* Green, *supra* note 161 (quoting parent claiming youths not attending college equally likely to create disturbances as college students); *see also* Charter Twp. of Delta v. Dinolfo, 351 N.W.2d 831, 842 (Mich. 1984) (using similar reasoning regarding under-inclusiveness). *But see* PATRICK SEFFRIN & STEPHEN CERNKOVICH, JUVENILE DELINQUENCY, COLLEGE ATTENDANCE, AND THE PARADOXICAL ROLE OF HIGHER EDUCATION IN CRIME AND SUBSTANCE USE 5 (2008) (finding college students more likely to commit property

The *Goodridge* decision also indicates that Massachusetts's enhanced rational basis test requires evidentiary support for any purported rational relationship.[164] In *Goodridge*, the SJC held that the denial of marriage licenses to homosexuals did not rationally relate to the Commonwealth's goal of providing optimal settings for childrearing.[165] The court reasoned that the Commonwealth presented no evidence demonstrating that homosexuals are any less capable of raising children than heterosexual couples and noted that the Commonwealth based its argument on unsubstantiated assumptions about homosexuals.[166] In contrast to the Commonwealth's position in *Goodridge*, Boston has plenty of evidence demonstrating that dwellings overcrowded with college students harm residential quality of life.[167] Numerous residents have complained about how these dwellings negatively impact their quality of life, and police officers have noted that these dwellings lead to an inordinate amount of trouble.[168] Thus, evidence, not just bare assumptions, supports Boston's argument that restricting college students' ability to live together rationally relates to preserving quality of life.[169]

IV. CONCLUSION

The amendment to the Boston Zoning Code indicates the City of Boston is serious about confronting issues associated with college students living off-campus. By prohibiting more than four college students from living together, the city hopes to prevent college students from packing into large apartments and single-family homes. Residents complain that these overcrowded domiciles significantly disrupt their neighborhoods. The City of Boston should be most concerned about whether the amendment will actually improve residential quality of life, as the amendment is most likely constitutional in the context of federal and state equal protection and due process.

A reviewing court is likely to scrutinize the amendment under the lowest level of constitutional review because the amendment neither infringes on a

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crimes than peers not attending college).

164. *See* Friedman, *supra* note 93, at 418 (stating enhanced rational basis test requires Commonwealth to make evidentiary showing). *Compare Goodridge*, 798 N.E.2d at 963 (requiring evidence of rational relationship), *with* Heller v. Doe, 509 U.S. 312, 320 (1993) (noting state has no evidentiary obligations under federal rational basis test).

165. *See supra* notes 96-98 and accompanying text (discussing *Goodridge* case).

166. *See Goodridge*, 798 N.E.2d at 963 (requiring Commonwealth provide evidence supporting its conclusions about homosexual families); *see also id.* at 998 n.21 (Cordy, J., dissenting) (criticizing majority for placing evidentiary burden on Commonwealth).

167. *See* Wechsler, *supra* note 5, at 429 (concluding college students lead to higher rate of community disturbances).

168. *See supra* note 9 (documenting Boston residents' complaints about student behavior).

169. *Compare Goodridge*, 798 N.E.2d at 968 (concluding denial of marriage licenses to homosexual couples based on prejudicial assumptions), *with* Smith v. Lower Merion Twp., Civ. A. No. 90-7501, 1992 WL 112247, at *3 (E.D. Pa. May 11, 1992) (discussing evidence of college students detracting from residential quality of life).

fundamental right nor discriminates against a protected class. The Supreme Court's decision in *Belle Terre* forecloses the argument that unrelated students have a fundamental right to live together under the Federal Constitution. Though Massachusetts courts have not decided this issue, they are likely to follow *Belle Terre* when interpreting the Massachusetts Constitution. Federal and state courts are likely to reject the argument that college students represent a protected class, as college students do not possess the characteristics that traditionally warrant heightened scrutiny.

The amendment is likely to survive the rational basis test under both federal and state constitutions. The federal rational basis test only requires a hypothetical rational relationship. To pass this test, the city of Boston needs only to state that it limited off-campus students from crowding together in order to improve residential quality of life. This reasoning should establish a rational relationship, and the amendment will therefore pass the federal rational basis test.

Massachusetts's enhanced rational basis test is stricter, but the amendment is likely to pass this test as well. The City of Boston has evidence to support the argument that college students degrade residential quality of life. Thus, the amendment should satisfy the additional evidentiary requirement of the Massachusetts rational basis test.

Though likely to pass constitutional muster, there are still many other questions regarding the amendment's legality and practicality. The most important question of all is whether the City of Boston can effectively enforce the amendment. If not, then questions regarding the amendment's legality will become moot issues. The best option for property owners and students may be to wait and see if the City of Boston attempts to enforce the amended definition of "family." By rushing to file a constitutional challenge to the amendment, property owners and students risk wasting time and effort fighting an uphill legal battle that may prove unnecessary in the end.

Edward D. Crane