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Sturrup v. Mahan and its Progeny: Is There a Constitutional Right to Play High School Basketball in Indiana?

I. INTRODUCTION

If asked to identify individual rights and freedoms protected under the United States Constitution or the constitution of a particular state, most Americans could name freedom of religion, freedom of expression, the right to vote, and the prohibition of unreasonable searches and seizures. Likewise, most educators are familiar with the major cases in which the United States Supreme Court has measured the policies, rules and procedures of the public schools against the basic guarantees found in the Bill of Rights. For example, in *Brown v. Board of Education*, the Supreme Court established that the Fourteenth Amendment's guarantee of equal protection under the law forbids racial segregation in public schools.[1] In *Goss v. Lopez*, the Court found that the Fourteenth Amendment requires certain procedural safeguards within public school discipline actions.[2] In these cases, the Court employed a high level of scrutiny to determine the constitutionality of state action.

Surprisingly, some case law suggests that participation in high school athletics deserves a special level of constitutional protection similar to that of the *Brown* and *Goss* cases. In 1974, the Indiana Supreme Court decided *Sturrup v. Mahan*,[3] and announced that the Indiana High School Athletic Association (IHSAA) bylaws affecting student eligibility may be subjected to mid-tier judicial scrutiny under equal protection analysis. This decision set a far-reaching precedent by which many other high school students have challenged IHSAA eligibility rulings.[4] Although it is laudable that the Indiana courts have set aside seemingly unfair applications of IHSAA eligibility rules,

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1. Brown v. Board of Educ., 347 U.S. 483 (1954).
2. Goss v. Lopez, 419 U.S. 565 (1975).
3. Sturrup v. Mahan, 305 N.E.2d 877 (Ind. 1974).
4. *See* Jordan v. Indiana High Sch. Athletic Ass'n, 813 F. Supp. 1372 (S.D. Ind. 1993); Thomas v. Greencastle Community Sch. Corp., 603 N.E.2d 190 (Ind. Ct. App. 1992); Indiana High Sch. Athletic Ass'n v. Schafer, 598 N.E.2d 540 (Ind. Ct. App. 1992); Indiana High Sch. Athletic Ass'n v. Raike, 329 N.E.2d 66 (Ind. Ct. App. 1975).

their decisions have created more confusion than clarity. The cause of this confusion may be traced back to the *Sturrup* decision itself. Recently *Sturrup*'s shortcomings have again been highlighted as Indiana courts have been called upon to apply this precedent to different permutations of eligibility cases.

Part II of this casenote examines the *Sturrup* decision. Part III addresses the threshold question of whether the IHSAA engages in state action and is governed by the Equal Protection Clause. Part IV criticizes the court's analysis in *Sturrup* for not explaining the constitutional basis for its special treatment of IHSAA rules, failing to define the actual level of scrutiny it was applying, and incorrectly invoking federal constitutional authority. Part V illustrates the problems associated with using *Sturrup* as legal precedent by examining two recent Indiana Appellate Court cases. Finally, Part VI concludes that *Sturrup* is too enigmatic to be of value as legal precedent, and that the Indiana Supreme Court should either satisfactorily explain its decision, or overturn it.

II. *Sturrup v. Mahan*

A. *Facts of the Case*

In the summer of 1971, Warren Sturrup moved from the home of his mother in Miami, Florida, to live with his older brother in Bloomington, Indiana.[5] His change of residence was prompted by the "demoralizing and detrimental conditions" that existed in his home and school environments.[6] At trial it was established that there was widespread use of narcotics among Sturrup's peers at Miami Palmetto High School, and specifically among his friends on the basketball team.[7] Furthermore, Sturrup lived in a two-bedroom home with his parents and ten sisters; consequently he could not study at home.[8] Finally, Sturrup's mother had a heart condition which prevented her from giving him the discipline or the attention he needed.[9]

After Sturrup's change of residence, his brother, Lamount, was appointed legal guardian by the Monroe Circuit Court.[10]

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5. *Sturrup*, 305 N.E.2d at 878.
6. *Id.*
7. *Id.* at 878, n.1.
8. *Id.*
9. *Id.*
10. *Id.* at 881.

Once enrolled at University Junior-Senior High School, however, Sturrup was declared ineligible to play basketball by his principal, Robert Mahan. After consultation with Commissioner Eskew of the Indiana High School Athletic Association, Mahan interpreted IHSAA Rule 12, Section 1 as disqualifying Sturrup from any inter-school sports for the entire school year.[11] The rule reads:

> No student, who has been enrolled as a high school student in any member school, shall be permitted to participate in any inter-school contest as a member of another member school until he has been enrolled in such school for one calendar year, unless the parents of such student actually change their residence to the second school district. In the latter case, the student will be as eligible as he was in the school from which he withdrew.[12]

Although out-of-state transferees are not specifically addressed by Rule 12, it has been interpreted broadly and applied to them as well.[13]

B. Procedural History and Lower Court Decisions

At the trial court level, Sturrup attempted to enjoin Mahan and the IHSAA from declaring him ineligible for participation in varsity sports.[14] However, this preliminary injunction was denied.[15] Sturrup then appealed, winning a reversal of the trial court's decision.[16] The court of appeals held that the "IHSAA bylaws unconstitutionally burdened Warren Sturrup's fundamental right to travel among the states."[17] Therefore, the court of appeals found that Sturrup was denied equal protection of the laws guaranteed under the 14th Amendment to the United States Constitution.[18]

In arriving at this conclusion, the court of appeals reasoned that the IHSAA constituted a state actor within the meaning of the 14th Amendment.[19] After finding state action,

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11. *Id.*
12. *Id.* at 878-79.
13. *Id.* at 878, n.2.
14. *Id.* at 879.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*; U.S. CONST. amend. XIV, § 1.
19. *Sturrup*, 305 N.E.2d at 879. *See also* Haas v. South Bend Community

the court had to determine whether the rule in question was consistent with the Equal Protection Clause of the 14th Amendment. Generally, when making this determination, a court will subject legislative classifications to rational basis scrutiny. Under this analysis, if a law bears a rational relation to the stated legislative goal, a court must uphold it—despite its under or over-inclusive effect.[20]

Under strict scrutiny analysis, when a law involves suspect classifications or infringes on a fundamental right, the courts will hold it unconstitutional unless the law is necessary and narrowly tailored to promote a compelling state interest.[21] The court of appeals held that Rule 12 impeded Sturrup's fundamental right to travel among the states.[22] Since Mahan and the IHSAA failed to establish that Rule 12 was necessary to the furtherance of a compelling state interest, the court of appeals reasoned that the bylaws denied Sturrup equal protection of the laws in violation of the 14th Amendment to the United States Constitution.[23]

C. Indiana Supreme Court Decision

When Mahan and the IHSAA appealed, the Indiana Supreme Court granted transfer of the case in order to "correct a fundamental error in the Court of Appeals' opinion."[24] Justice Hunter, writing for the court, noted that while the Indiana Supreme Court reached the same practical outcome as the court of appeals, it did not agree with the lower court's application of equal protection analysis.[25] The court of appeals had based its ruling on the United States Supreme Court's holdings

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School Corp., 289 N.E.2d 495 (Ind. 1972); Indiana High School Athletic Ass'n v. Schafer, 598 N.E.2d 540 (Ind. Ct. App. 1992); Kriss v. Brown, 390 N.E.2d 193 (Ind. Ct. App. 1979); Indiana High School Athletic Ass'n v. Raike, 329 N.E.2d 66 (Ind. Ct. App. 1975).

20. Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488-89 (1955).

21. Palmore v. Sidoti, 466 U.S. 429 (1984) (race is a factor in allocating public benefits and burdens the law is suspect and subject to the most exacting scrutiny); Zablocki v. Redhail, 434 U.S. 374 (1978) (interference with the fundamental right to marry cannot be upheld unless closely tailored to effectuate a sufficiently important state interest).

22. *Sturrup*, 305 N.E.2d at 879.

23. *Id.*

24. *Id.*

25. *Id.*

in *Shapiro v. Thompson*[26] and *Dunn v. Blumstein*.[27] These cases involved statutes which imposed durational residency requirements for receiving welfare assistance and voting rights. The Court struck down both statutes on the grounds that they interfered with the fundamental right of interstate travel.

Justice Hunter, however, distinguished *Shapiro* and *Dunn* from the present case since, in those decisions, the statutes in question applied only to individuals who moved from out of state.[28] Thus, people moving from out of state and those changing residence within the state, although similarly situated, were treated differently under the law. In *Sturrup*, however, Rule 12 treated similarly situated people equally, regardless of whether they move from within or without the state, and therefore, the rule does not infringe upon the right of interstate travel.[29] For this reason, the Indiana Supreme Court rejected the reasoning of the appellate court.

After finding the appellate court's reasoning was flawed, the majority of the Indiana Supreme Court went on to affirm the judgment on different Equal Protection grounds. Writing for the majority, Justice Hunter began by discussing Rule 12's "constitutional infirmity."[30] On their face, IHSAA bylaws appear to be well tailored to achieving desirable ends. The objective of IHSAA bylaws, and Rule 12 in particular, is to prevent the "despicable and odious" practices of "recruitment, proselyting, and school 'jumping' for athletic reasons."[31] Justice Hunter wrote: "Said bylaws are *unreasonable* in that they sweep too broadly in their proscription and, hence, violate the Equal Protection Clause of the 14th Amendment."[32]

Justice Hunter criticized Rule 12 for creating an over-inclusive class with its irrebuttable conclusion that all transfer students that do not fall within one of two narrow exceptions are participating in unfair recruiting practices.[33] For example, a student transferring from a public school to a parochial school for purely religious reasons would be barred from varsity sports even though this outcome would in no way further IHSAA

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26. Shapiro v. Thompson, 394 U.S. 618 (1969).
27. Dunn v. Blumstein, 405 U.S. 330 (1972).
28. *Sturrup*, 305 N.E.2d at 880.
29. *Id.*
30. *Id.* at 881.
31. *Id.*
32. *Id.* (emphasis added).
33. *Id.*

objectives. Looking at the ultimate purpose of IHSAA bylaws, the court determined that there was no basis for declaring Sturrup ineligible.[34]

III. DOES THE IHSAA ENGAGE IN STATE ACTION?

After reading *Sturrup*, one might wonder why the Indiana Supreme Court did not pose the threshold question of whether IHSAA eligibility rulings can be considered state action for purposes of Equal Protection analysis. This question is significant because if the IHSAA is found to engage in state action, its bylaws and enforcement mechanisms are subject to plenary judicial review.[35] If it is not considered a state actor, then the IHSAA is largely insulated from review under the principle of judicial deference to the policies of voluntary associations.[36]

The state action question seems especially important given the United States Supreme Court's ruling in *NCAA v. Tarkanian*[37] and the central role that issue played in determining the standard of judicial review and, ultimately, the judgment. Although *Sturrup* was decided nearly two decades before *Tarkanian*, it seems strange that the Indiana Court entirely failed to address this issue, because the Indiana Supreme Court resolved the issue just two years prior to *Sturrup*, in *Haas v. South Bend Community School Corp.*[38], and *Haas* is perfectly reconcilable with *Tarkanian*.

In *Haas* a female high school student challenged an IHSAA rule that kept her from competing on her school's only golf team, a men's varsity sport.[39] The court reviewed IHSAA Rule 9, section 7 that prohibited males and females from competing either on the same team or against teams composed of members of the opposite sex.[40] In striking down the rule on Equal Protection grounds, the court first concluded that the IHSAA engaged in state action.[41]

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34. *Id.*

35. Indiana High Sch. Athletic Ass'n v. Schafer, 598 N.E.2d 540, 547 (Ind. App. Ct. 1992).

36. State *ex rel.* Givens v. Superior Court, 117 N.E.2d 553 (Ind. 1954); United States Auto Club v. Woodward, 460 N.E.2d 1255 (Ind. Ct. App. 1984).

37. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).

38. Haas v. South Bend Community Sch. Corp., 289 N.E.2d 495 (Ind. 1972).

39. *Id.* at 496.

40. *Id.*

41. *Id.* at 497.

> Regardless of how the IHSAA denominates itself as an organization, or how it characterizes its relationship with its member schools, it is abundantly clear that the association's very existence is entirely dependent upon the absolute cooperation and support of the public school systems of the State of Indiana. The enforcement of the rules promulgated by the IHSAA and adopted by the member schools may have a substantial impact upon the rights of students enrolled in these tax supported institutions, and we conclude, therefore, that the administration of interscholastic athletics by the IHSAA should be considered to be "state action" within the meaning of the Fourteenth Amendment.[42]

Although the *Haas* decision was a departure from previous decisions which held that the IHSAA could not be considered a state actor,[43] it has been upheld in all subsequent Indiana cases in which IHSAA rules were challenged as violative of the Equal Protection Clause.[44]

In *Tarkanian* the United States Supreme Court found that the NCAA had not engaged in state action when compelling the University of Nevada, Las Vegas to enforce NCAA prescribed sanctions against Coach Tarkanian.[45] Since *Haas*, one federal district court in Indiana has drawn an analogy from the NCAA to the IHSAA to find that the IHSAA does not engage in state action.[46] Although the decision of a federal district court sitting in Indiana is not binding precedent for the Indiana Supreme Court,[47] it may be indicative of another shift in state actor analysis.

A thorough reading of *Tarkanian* reveals that organizations such as the IHSAA were not implicated by the U.S. Supreme Court's decision. The Court distinguished *Tarkanian* from high school cases by pointing out that the NCAA is com-

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42. *Id.* at 498. *See also* Louisiana High Sch. Athletic Ass'n v. Saint Augustine High Sch., 396 F.2d 22 (5th Cir. 1968).

43. State *ex rel.* IHSAA v. Lawrence Circuit Court, 162 N.E.2d 250 (1959).

44. Sturrup v. Mahan, 305 N.E.2d 877 (Ind. 1972); Thomas v. Greencastle Community Sch. Corp., 603 N.E.2d 190 (Ind. Ct. App. 1992); Indiana High Sch. Athletic Ass'n v. Schafer, 598 N.E.2d 540 (Ind. Ct. App. 1992); Kriss v. Brown, 390 N.E.2d 193 (Ind. Ct. App. 1979); Indiana High Sch. Athletic Ass'n v. Raike, 329 N.E.2d 66 (Ind. Ct. App. 1975).

45. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 199 (1988).

46. Anderson v. Indiana High Sch. Athletic Ass'n, 699 F. Supp. 719 (S.D. Ind. 1988).

47. Security Credit Acceptance Corp. v. State, 247 N.E.2d 825 (Ind. Ct. App. 1969).

posed of universities throughout the United States, the majority of which are not located in any one state.[48] It held that the source of the NCAA's legislation is not the law of any one state, but "the collective membership, speaking through an organization that is independent of any particular State."[49]

In a footnote to the above quoted passage, the Court stated: "The situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign.[50] In an Arizona case cited by the Supreme Court, the 9th Circuit court held that the Arizona Interscholastic Association was a state actor because "the activities of the [Arizona high school athletic association] are so intertwined with the state that the regulations of the [association] must be considered state action."[51] Therefore, given the distinguishing characteristics between the NCAA and the IHSAA and the Supreme Court's footnote 13 from *Tarkanian*, there is no reason to believe that *Haas* would be rejected by the Supreme Court. Likewise, there is no indication that the IHSAA should not be found a state actor.

IV. CRITIQUE OF THE COURT'S ANALYSIS

The *Sturrup* opinion may be criticized on several levels. First, the Indiana Supreme Court did not explain why it departed from traditional rational basis analysis. Second, and closely related to the first point, the court failed to define the level of review that it actually employed or the legal theory justifying the use of this undefined level of scrutiny. Third, the court based its opinion on the Equal Protection Clause of the 14th Amendment to the United States Constitution, rather than on similar guarantees within the Indiana State Constitution.[52] Fourth, the decision failed to create a coherent rule upon which later actions could be judged.

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48. *Tarkanian*, 488 U.S. at 193.

49. *Id.*

50. *Id.* at 193, n.13; *See* Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982).

51. *Clark*, 695 F.2d at 1128.

52. U.S. CONST. amend. XIV, § 1; IND. CONST., art. 1, § 23; *Sturrup*, 305 N.E.2d at 879.

A. Rational Basis Scrutiny

One of the most confusing aspects of *Sturrup* was the court's failure to utilize traditional rational basis scrutiny. In his decision, Justice Hunter described Rule 12 as intended to eliminate the "odious" practices of recruitment and school jumping for athletic purposes. He wrote: "These transferee eligibility bylaws are *reasonably* related to the above-stated objective. That is to say, they are designed to and do, in fact, contribute to the realization of that goal."[53] If the court were utilizing traditional rational basis review, such a finding would be sufficient to uphold the rule.[54] Since the Indiana Supreme Court reversed the lower courts' denial of eligibility, it is clear that Hunter did not apply the rational basis standard.

B. What Level of Review was Applied?

The facts of the case indicate that Rule 12 should not have been subjected to strict scrutiny. Strict scrutiny is invoked only when a law restricts a fundamental right, or burdens a suspect classification.[55] Justice Hunter did not contend that eligibility for high school athletics was a fundamental right, nor did he suggest that transfer students comprised a suspect class. Furthermore, the court did not announce that the standard it employed was the same as that applicable to strict scrutiny analysis.

Under strict scrutiny, a state action will be held invalid unless the state can prove that it is necessary and narrowly tailored to further a compelling state interest.[56] Justice Hunter did not discuss whether discouraging school jumping and recruiting for athletic purposes is necessary to further a compelling state interest. Nor did he consider whether Rule 12 is the least discriminatory means by which to achieve this objective. Absent all of these considerations, it is difficult to imagine that the court intended to apply strict scrutiny to the IHSAA bylaw, or that if it did, it was justified in doing so.

Also markedly absent is any discussion of elements which would justify an intermediate level of scrutiny. A limited number of equal protection issues have been afforded mid-tier scru-

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53. *Sturrup*, 305 N.E.2d at 881.
54. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).
55. Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
56. Korematsu v. U.S., 323 U.S. 214 (1944).

tiny. These include discrimination on the basis of quasi-suspect classification, such as gender, illegitimacy and alien status.[57] A law will fail intermediate scrutiny unless it is substantially related to an important governmental interest.[58] Nevertheless, *Sturrup* involved none of the issues traditionally associated with mid-tier review.

In several recent cases, however, the Supreme Court has applied a modified intermediate scrutiny to cases that involve different, arguably suspect classes, such as age classifications, mental illness and mental retardation.[59] Although transferee student athletes have not been recognized by the Supreme Court as deserving special protection in earlier cases, they conceivably could be afforded mid-tier review as a newly recognized suspect class. This idea is problematic in that the class implicated in *Sturrup* differs significantly from those recognized by the U.S. Supreme Court because transfer student status is not an immutable characteristic and has rarely, if ever, been the basis of discrimination. Furthermore, Justice Hunter did not use any of the language which suggests the use of modified intermediate level scrutiny. He made no finding of whether Rule 12 was "substantially related to an important governmental interest." Additionally, he did not clearly identify an intention to recognize a new suspect classification. Therefore, one is led to believe that a modified intermediate standard was not invoked either.

C. Overbreadth

The decision in *Sturrup* was based on an "overbreadth" analysis of Rule 12. The critical portion of the decision was extremely brief, consisting of only one paragraph, but directed exclusively at the issue of overbreadth. Justice Hunter stated that IHSAA transferee eligibility rules were designed to further a valid objective: "to preserve the integrity of interscholastic athletics by minimizing recruitment, proselyting, and school 'jumping,' for athletic reasons."[60] Justice Hunter wrote:

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57. Craig v. Boren, 429 U.S. 190 (1976).

58. *Id.*

59. Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); Williams v. Vermont, 472 U.S. 14 (1985), Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985).

60. *Id.* at 881.

> These transferee eligibility bylaws are *reasonably* related to the above-stated objective. That is to say, they are designed to and do, in fact, contribute to the realization of that goal. However, said bylaws are *unreasonable* in that they sweep too broadly in their proscription and, hence, violate the Equal Protection Clause of the 14th Amendment. . . . This is precisely where the rules sweep too broadly, they create an over-inclusive class—those who move from one school to another for reasons wholly unrelated to athletics are grouped together with those who have been recruited or who have "jumped" for athletic reasons.[61]

Thus, after originally holding that the IHSAA bylaws were "reasonably related" to a valid state objective, Justice Hunter concluded that "denying eligibility to such transferees in no way furthers IHSAA objectives."[62]

The decision is the first impression that the rules satisfy the rational basis test. This is because they contribute to the realization of a valid state objective: minimizing unfair recruitment practices. Nonetheless, Justice Hunter holds that the rule is so broad that it does not further its objective because it unfairly discriminates against innocent students; students who may transfer between schools for "academic or religious reasons or for any number of other legitimate reasons."[63] Justice Hunter applied a standard similar to strict scrutiny analysis and found that IHSAA bylaws were not narrowly tailored to accomplish their objective.

The decision did not identify or name the standard applied, nor did it cite authority to support his use of a quasi-strict scrutiny overbreadth standard. As explained earlier, strict scrutiny is invoked only when a law restricts a fundamental right or burdens a suspect classification.[64] There are two ways to explain Justice Hunter's use of a quasi-strict scrutiny analysis. Either he intended to recognize a constitutional right to play high school basketball in Indiana, or he intended to use a new standard, which has been called "rational basis with teeth."

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61. *Id.*
62. *Id.*
63. *Id.*
64. Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

D. Rational Basis with Teeth

Victor Rosenblum, a Northwestern University Law School professor, has labelled the brand of review similar to that found in *Sturrup* "rational basis with teeth."[65] He wrote: "We've gotten used to the idea that if the test is rational basis, the legislation gets an automatic pass. Now rational basis is beginning to mean something."[66] Another commentator has suggested that courts are beginning to use this type of analysis to "reach perceived injustices that otherwise lie beyond constitutional reach."[67]

Unfortunately, application of rational basis with teeth is neither consistent nor predictable. In fact, on the rare occasions in which the U.S. Supreme Court has used this mode of analysis, it has not labeled it as such or explained its reasoning.[68] Commentators have severely criticized this approach to constitutional law as creating too much leeway for courts to closely scrutinize legislation whenever it so desires. Courts are also criticized for creating confusion as to what standard of review is actually being used. As illustrated by the case at hand, the rational basis with teeth level of analysis is usually not identified within the text of the decision itself.Rational basis with teeth could also be labeled intermediate review in disguise. It is the functional equivalent of the "substantially related to an important state interest" test[69] without an accompanying explanation of what triggered it. Finally, given the absence of an identifiable triggering classification or interest, confusion will invariably arise over what version of the rational basis test to apply in any given case.[70] These criticisms are clearly illustrated by *Indiana High School Athletic Association v. Schafer*[71] and *Thomas v. Greencastle Community School Corp.*[72]

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65. *Quoted in* Stewart, *A Growing Equal Protection Clause?*, 71 A.B.A. J. 108, 112-114 (1985).

66. *Id.*

67. *Id.* at 112.

68. Gayle L. Pettinga, Note, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 801 (1987).

69. Korematsu v. U.S., 323 U.S. 214 (1944).

70. Pettinga, *supra* note 68, at 780.

71. Indiana High Sch. Athletic Ass'n v. Schafer, 598 N.E.2d 540 (Ind. Ct. App. 1992).

72. Thomas v. Greencastle Community Sch. Corp., 603 N.E.2d 190 (Ind. Ct. App. 1992).

E. Equal Protection Under Federal and State Constitutions

It is clear from reading *Sturrup* that Justice Hunter based his opinion on the Equal Protection Clause of the 14th Amendment to the United States Constitution. As stated earlier, such a basis for the decision was unprecedented. The U.S. Supreme Court cases in which rational basis with teeth has been applied involved legislation which burdened important rights of groups at least approaching quasi-suspect status.[73] For example, in *Cleburne v. Cleburne Living Center*, the Court struck down a statute requiring a special use permit for a proposed group home for the mentally retarded, finding that it was not rationally related to any permissible government purpose.[74] The Court did not, however, consider whether there was any conceivable government interest in requiring a permit. Clearly there were interests besides discrimination on the basis of mental retardation, such as zoning requirements, public safety or the safety of the center's residents themselves.

Apparently the Court found that the mentally retarded as a class approached quasi-suspect classification and therefore deserved extra protection. The group and the burdens involved in *Sturrup*, however, do not approach a level of significance equal to those in *Cleburne*. Accordingly, they do not deserve enhanced rational basis scrutiny under the United States Constitution. Under traditional Equal Protection Clause analysis, the *Sturrup* decision appears wrong.

The unavailability of greater than rational basis review under the Federal Equal Protection guarantee does not eliminate the possibility of relief. An understanding of Constitutional history indicates that federal law was never envisioned as the ultimate protector of civil liberties. In fact, for a century and a half after the adoption of the Bill of Rights, state constitutions remained the principal force in American civil liberties.[75] What Justice Hunter incorrectly attempted to justify under the Federal Constitution could legitimately have been accomplished through application of the Indiana State Constitution, Article I, Section 23, which states, "The General Assem-

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73. Pettinga, *supra* note 68, at 801; Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Williams v. Vermont, 472 U.S. 14 (1985); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985);

74. *Cleburne*, 473 U.S. 432.

75. Chief Justice Randall T. Shephard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 576 (1989).

bly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."[76]

Indiana case law is replete with examples of protections provided by the Indiana Constitution not supported by the Federal Constitution. As early as 1820, in *State v. Laselle*, the Indiana Supreme Court held that "our constitution intended a total and entire prohibition of slavery in this State."[77] More than 100 years before *Gideon v. Wainwright*[78] was decided by the United States Supreme Court, the Indiana Supreme Court held that a criminal defendant who could not afford an attorney had the right to representation at public expense.[79] To this day, the Indiana Supreme Court is willing and anxious to announce and protect rights which emanate from the state constitution.

In his speech, *Second Wind for the Indiana Bill of Rights*, Randall Shepard, Chief Justice of the Indiana Supreme Court, laments that in appellate proceedings attorneys base their arguments solely on the United States Constitution.[80]

> The rights of Americans cannot be secure if they are protected only by courts or only by one court. Civil liberties protected only by a U.S. Supreme Court are only as secure as the Warren Court or the Rehnquist Court wishes to make them. The protection of Americans against tyranny requires that state supreme courts and state constitutions be strong centers of authority on the rights of the people. I am determined that the Indiana Constitution and the Indiana Supreme Court be strong protectors of those rights.[81]

Shepard also suggested that in cases without remedy under the Federal Constitution, failure to argue a claim based on the state constitution may preclude otherwise appropriate relief on those grounds. In *Sturrup* there is no clear indication of why the court would choose to apply enhanced rational basis scru-

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76. IND. CONST., art. I, § 23. *See infra* text accompanying note 95 for a discussion of an appellate court decision suggesting that *Sturrup* may have been properly decided based on the Indiana State Constitution.

77. State v. Lasselle, 1 Blackf. 60, 62 (Ind. 1820) *as cited in* Shephard, *supra* note 75, at 577.

78. Gideon v. Wainwright, 372 U.S. 335 (1963).

79. Webb v. Baird, 6 Ind. 13, 18 (1854), *as cited in* Shepard, *supra* note 75, at 578.

80. Shepard, *supra* note 75, at 584.

81. *Id.* at 586.

tiny, or what precedent within Indiana state law would support such an analysis. But there is ample precedent to support the finding of protections under the Indiana State Constitution not available under the Federal Constitution.

V. *Sturrup* AS LEGAL PRECEDENT

Despite the lack of clarity in *Sturrup* itself, that decision has been relied on extensively in cases involving the IHSAA. Two appellate court cases illustrate problems faced by Indiana courts when applying *Sturrup*, and what the Indiana Supreme Court might do to clarify the constitutional questions surrounding eligibility for high school athletics.

A. *Indiana High School Athletic Association v. Schafer*[82]

1. *Facts of the case*

During the 1990-91 school year, Shane Schafer was a junior at Andrean High School in Merrillville, Indiana.[83] Schafer attended school during the entire fall semester. Early in the spring semester, Schafer was forced to withdraw from school due to a very serious sinus infection which had plagued him throughout the school year.[84] Because of the cumulative nature of his courses, Schafer would be forced to repeat his fall semester courses in order to be prepared for the subsequent spring classes.[85] In June of 1991, Schafer wrote to the IHSAA and requested that his 1990-91 school term not be counted against his eligibility for varsity basketball.[86] Schafer's request was denied, based on several provisions of the IHSAA bylaws.

Most significant was Rule 18-1 on Scholarship.[87] Rule 18-1 states: "To be eligible scholastically, students must have received passing grades at the end of their last grading period in school in at least five full credit subjects or the equivalent and must be currently enrolled in at least five full credit subjects or the equivalent. Semester grades take precedence.[88] Subpart

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82. Indiana High Sch. Athletic Ass'n v. Schafer, 598 N.E.2d 540 (Ind. Ct. App. 1992).

83. *Id.* at 542.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 543.

88. *Id.*

18-1.5 interprets the rule: "[a] subject for which credit has previously been granted may not, if repeated, be counted to satisfy this rule."[89] Rule 18-1 was designed to prevent athletes from retaking classes which they had already mastered in order to gain more practice time.

2. Procedural history

The IHSAA ruled Schafer ineligible because he would not be enrolled in five full credit subjects during the Fall semester, as he planned to repeat classes for which credit had already been given.[90] Schafer challenged his ineligibility ruling in district court.[91] Schafer won his prayer for declaratory relief at the trial level, after which the IHSAA appealed.[92] As in *Sturrup*, the standard of review employed by the court was a major issue and proved to be largely determinative of the outcome.

3. Court of appeals

The court of appeals stated that Rule 18 rationally related to a legitimate state interest. But the court held that their equal protection analysis had not "run its course," because the decision in *Sturrup* mandates further inquiry.[93] Judge Barteau, writing for the court, stated that *Sturrup* required an "overbreadth" analysis on top of traditional rational basis scrutiny, despite the fact that "federal decisions hold that under traditional equal protection scrutiny a rule may not be invalidated due to overbreadth."[94] To the extent that the rule in question does not raise problems of "suspect classifications," the weight of precedent from other jurisdictions suggests that overbreadth scrutiny is inappropriate.[95]

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89. *Id.*
90. *Id.*
91. *Id.* at 545.
92. *Id.* at 546.
93. *Id.* at 552.
94. *Id.* at 552-53. *See also* Walsh v. Louisiana High Sch. Athletic Ass'n, 449 U.S. 1124 (1981); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 813 (1976); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955).
95. *See* Berschback v. Grosse Point Pub. Sch. Dist., 397 N.W.2d 234, 240 (Mich. Ct. App. 1986); Cooper v. Oregon Sch. Activities Ass'n, 629 P.2d 386, 395 (Or. Ct. App. 1981).

Despite a recognition that *Sturrup* is "out of the mainstream of case law on equal protection analysis"[96] and while hinting its disapproval of overbreadth scrutiny in this class of cases, the court held that it was necessary to follow the Indiana Supreme Court. Barteau wrote: "This obligation binds us even where our supreme court has explained neither the rationale nor the 'constitutional implications' of its decisions."[97]

The court went on to suggest a possible rationale for the Indiana Supreme Court's decision in *Sturrup*. "[I]t is conceivable that our Supreme Court could decide that a *Sturrup*-like overbreadth analysis in equal protection cases is proper under our Indiana Constitution, even if such analysis is not available under the U.S. Constitution."[98] As noted earlier, this possible rationale is supported by a long line of Indiana cases, but not suggested in *Sturrup* itself.

4. Problems with the application of Sturrup

As illustrated by Judge Barteau, *Sturrup* suffers from all of the deficiencies associated with rational basis with teeth analysis generally. *Sturrup* created confusion as to what standard of review should be applied in athletic eligibility cases. The *Sturrup* court's failure to identify the factors which justify using heightened scrutiny makes the decision seem arbitrary, and akin to the judicial interventionism associated with the *Lochner* era.[99] During the *Lochner* era, the U.S. Supreme Court applied a highly subjective substantive due process analysis to the objectives, means and effects of legislation. In *Schafer*, it appears that Judge Barteau did not understand the rationale for employing an overbreadth analysis. He could not identify any special classification or interest involved that would trigger a level of review less deferential than rational basis scrutiny. Yet rational basis with teeth resembles intermediate scrutiny without an accompanying justification for its

96. *Schafer*, 598 N.E.2d at 553.

97. *Id.*; *See also* Patton v. State, 507 N.E.2d 875, 878-79 (Ind. Ct. App. 1987).

98. *Schafer*, 598 N.E.2d at 554, n.9.

99. Lochner v. New York, 198 U.S. 45 (1905) (law limiting maximum hours for bakery employees violates 14th Amendment); Coppage v. Kansas, 236 U.S. 1 (1915) (state law requiring employees to agree not to join a labor union invalidated under 14th Amendment); Adkins v. Children's Hosp., 261 U.S. 525 (1923) (minimum wage law invalidated under 14th Amendment); Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926) (state law banning all use of shoddy fabrics for bedding invalidated under 14th Amendment).

application of the "substantially related to an important state interest" standard. By employing overbreadth analysis, Judge Barteau, in effect, used the same standard as that used in many intermediate scrutiny cases. This, of course, would not be a problem if all high school athletics cases looked exactly like *Sturrup*. Yet, as illustrated in *Schafer* and, more clearly, in *Thomas v. Greencastle Community School Corp.*,[100] *Sturrup* did not create a rule which could be applied with any consistency or predictability.

B. Thomas v. Greencastle Community School Corp.[101]

1. Facts of the case

During his junior year, Shane Thomas was an outstanding running back for the Greencastle High School football team.[102] As a result of a learning disability, Thomas had repeated the second grade.[103] Therefore, Thomas turned 19 years of age during the summer before his senior year.[104] According to IHSAA Rule 4, any student turning 19 before August 15 could not participate in varsity athletics.[105] Thomas challenged his ineligibility on a theory that the class was underinclusive and violated his right to equal protection of the law.[106] For example, while Thomas was being excluded from varsity football due to advanced age, the rule would still allow a student born on August 16 to compete in varsity baseball 6 to 8 months after his 19th birthday.[107]

2. Procedural history

Thomas anticipated that the IHSAA would declare him ineligible for varsity athletics during his senior year.[108] Therefore, Thomas proposed a rule change that would allow him to play football the following year.[109] The IHSAA rejected

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100. Thomas v. Greencastle Community Sch. Corp., 603 N.E.2d 190 (Ind. Ct. App. 1992).
101. *Id.*
102. *Id.* at 191.
103. *Id.* at 191-92.
104. *Id.* at 191.
105. *Id.*
106. *Id.* at 193-94.
107. *Id.* at 194.
108. *Id.* at 192.
109. *Id.*

his proposal.[110] Thomas responded by filing a complaint for injunctive and declaratory relief in which he sought to bar enforcement against him of IHSAA Rule 4.[111] The IHSAA was granted summary judgment at the trial level. The trial court concluded that Rule 4 was rationally related to the objectives of promoting the health and safety of participants in varsity sports.[112]

3. Court of appeals

Thomas based his appeal on *Sturrup* and *Schafer*, contending that IHSAA rules were properly reviewed using a rational basis with teeth analysis.[113] He argued that under-inclusiveness should be just as offensive and actionable as the over-inclusive rules struck down earlier.[114] But Judge Sharpnack, writing the opinion of the court, interpreted *Sturrup* and *Schafer* narrowly. He wrote: "We read . . . *Sturrup* to require the application of a modified rational basis test whereby we first examine whether the rule is rationally related to a legitimate goal, and, if so, whether it sweeps too broadly."[115] Since the IHSAA rules implicated in *Schafer* were very similar to those involved in *Sturrup*, the *Schafer* court was constrained to follow the *Sturrup* methodology. But, concerning binding precedent for *Thomas*, Sharpnack wrote:

> However, because the *Sturrup* court gave no reason for its departure from traditional equal protection analysis and did not provide any guidance as to its future implications, we read *Sturrup* and *Schafer* narrowly. Where we are presented with a rule similar to the ones involved in those cases, we will examine them for rationality and broad over-inclusiveness, but no more.[116]

Thus, the court of appeals employed traditional rational basis scrutiny to Rule 4, finding that it bears a rational relationship to a legitimate state interest.[117] The court further held that a

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110. *Id.*
111. *Id.* at 191-92.
112. *Id.* at 192.
113. *Id.*
114. *Id.* at 193-94.
115. *Id.* at 193.
116. *Id.*
117. *Id.* at 194.

classification may be substantially under-inclusive and still rationally relate to its stated objective.[118]

4. Problems with the application of Sturrup

Like *Schafer*, this application of *Sturrup* also suffers from all of the deficiencies associated with rational basis with teeth analysis. Since the *Sturrup* court did not identify a quasi-suspect classification, or even the factors which justify using heightened scrutiny, the *Thomas* court did not feel constrained to employ a modified rational basis scrutiny analysis. Since *Thomas* dealt with an under-inclusive classification, rather than a *Sturrup*-like over-inclusive one, the court of appeals had no guidance as to whether enhanced rational basis scrutiny should apply.

VI. CONCLUSION

Sturrup has led to much confusion in Indiana's lower courts. Although it may be argued that *Thomas* and *Schafer* are distinguishable, the mysterious underlying constitutional principles of *Sturrup* cannot be cited as authority for such a distinction. A fundamental problem with *Sturrup* and its progeny is that either no one knows the constitutional philosophy behind modified rational basis scrutiny of certain IHSAA rules, or no one has expressed it. It would appear that either the *Sturrup* court's decision was constitutionally unjustifiable and arbitrary or simply short-sighted and poorly drafted. As lower courts are forced to follow Indiana Supreme Court precedent, *Sturrup* will continue to be of only limited value because its enigmatic drafting only allows it to be applied to cases very similar to *Sturrup* itself.

With *Sturrup* the Indiana Supreme Court may have recognized a new class of people deserving of special judicial protection. Although not provided for by the Federal Constitution, such protection might be derived from the Indiana Constitution. On the other hand, *Sturrup* may have been a prime example of sloppy, ends-oriented judicial rulemaking at its worst. What the courts of Indiana, and concerned observers elsewhere, deserve and expect is clarification of the issue from the court promulgating the ruling. The Indiana Supreme Court should grant certiorari to consider another case dealing with IHSAA

118. *Id.*

bylaws and either satisfactorily explain its *Sturrup* decision, or overturn it. In the meantime, however, the lower courts in Indiana should follow the age-old practice of narrowly interpreting an unpopular, unclear or poorly reasoned rule. As *Thomas* and *Schafer* illustrate, the rule will not clarify itself merely through the passage of time.

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