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Wellsand v. Valparaiso Community School Corporation: Equal Protection for the Married Football Player

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WELLSAND v. VALPARAISO COMMUNITY SCHOOL CORPORATION: EQUAL PROTECTION FOR THE MARRIED FOOTBALL PLAYER

> I do not think differences of treatment under law should be approved on classification because of differences unrelated to the legislative purpose. The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free.[1]

Charles Wellsand, a student in Valparaiso, Indiana, was married before his final year in high school. During the prior year he had distinguished himself on the football field, thereby developing the potential for securing a full college athletic scholarship. However, an Indiana High School Athletic Association (IHSAA) rule prohibiting married students from participating in interscholastic sports was applied to Wellsand his senior year.[2] Alleging that the rule drew an irrational distinction between married and unmarried students, Wellsand petitioned a federal district court to enjoin its enforcement.[3]

State Action and Scope of Review

The complaint in *Wellsand* alleged a cause of action under 42 U.S.C. § 1983 (1970).[4] The court found that the making and enforcement of the rule by the IHSAA constituted sufficient state action to satisfy the requirements of that section. This finding of state action enabled the court to assume jurisdiction despite the defendant's contention that there could be no judicial review of rules promulgated by a voluntary organization.

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1. Railway Express Agency, Inc. v. New York, 336 U.S. 106, 115 (1949) (Jackson, J., concurring).

2. Rule K, IHSAA 1970-1971 Handbook 49:

> Married students shall not be eligible for participation in inter-school athletic competition. Students who have been divorced or whose marriages have been annuled are bound by the above rule.

3. Wellsand v. Valparaiso Community Schools Corp., No. 71 H 122(2) (N.D. Ind., Sept. 1, 1971).

4. The right to equal protection is included under the "rights, privileges or immunities" clause of § 1983: however, to come within the § 1983 requirement of "under color of any statute, ordinance, or regulation . . . of any State" there must be state action. Agencies and regulatory bodies of the states have fallen within this categorization. *Cf.*, Muhammad Ali v. Division of State Athletic Comm'n, 316 F. Supp. 1246 (S.D.N.Y. 1970), where the court found that the boxing commission's denial of a license violated equal protection. The commission was found to be part of a state agency, so that state action was involved when it issued boxing licenses.

An earlier Indiana case, *State ex rel. IHSAA v. Lawrence Circuit Court*,[5] had held that since interscholastic sports were not part of the state's educational program the IHSAA was a voluntary association,[6] and, therefore, its rules were not subject to judicial review. The case was based upon prior state decisions[7] which held voluntary associations free to enforce their rules and regulations by any means they might deem proper. Nevertheless, while admitting that the IHSAA was a voluntary association, the *Wellsand* court found that this fact alone did not preclude judicial review under § 1983 if the association's actions or rules constitute state action. The court reasoned that public high schools cannot violate the rights of students by "cloaking their activities within the framework of a purported voluntary association" such as the IHSAA.[8] Furthermore, since the IHSAA was found to be dependent upon state-financed facilities such as football bleachers and basketball gymnasiums,[9] the state action requirement was held fulfilled.

The *Wellsand* finding of state action in a voluntary association context was not without precedent. In *Smith v. Young Men's Christian Association*[10] the local YMCA's racially discriminatory admissions regulation was struck down under § 1983. The district court found that through both tax exemptions and a co-operative use of city recreational

5. 240 Ind. 114, 162 N.E.2d 250 (1959), involved petition for a writ of prohibition to prevent a suit concerning an IHSAA eligibility rule from coming to trial. The issue of the court's jurisdiction to enjoin the IHSAA from carrying out its rules was resolved in favor of the IHSAA. The court refused to interfere with the unofficial and non-governmental capacities of the association.

6. However, the IHSAA's Handbook states the association's purpose as follows:

> The proper administration of high school athletics is a prime concern of the members of this organization. The basic purpose of inter-scholastic athletics is to promote the goals of education through wholesome competition in sports. The IHSAA was created to foster athletics as a positive influence in the educational experience of high school students. Much time and effort are spent by educators throughout our state in order to accomplish this purpose.

IHSAA 1970-1971 HANDBOOK 2-3. Any school certified by the State Department of Public Instruction may join the IHSAA if it chooses and is willing to follow the rules of the association. There are 438 members of the IHSAA, of which most are public schools owned and operated by governmental subdivisions of the state. Art. 2 of the IHSAA constitution states that all activities of the association "shall remain an integral factor in the total secondary educational program." Also, the members of the governing body of the IHSAA are school principals and athletic directors, most of whom are employees of public schools. Thus, the voluntary nature of the organization diminishes when one looks at the make-up and purposes of the association.

7. *See* North Dakota v. North Cent. Ass'n, 23 F. Supp. 694 (E.D. Ill. 1938); State *ex rel.* Givens v. Marion Super. Ct., 233 Ind. 235, 117 N.E.2d 553 (1954).

8. Slipsheet at 5.

9. *Id.* at 6.

10. 316 F. Supp. 899 (M.D. Ala 1970). The association was tax-exempt and had entered into an agreement with the city to co-ordinate recreational facilities and programs.

facilities, the organization had become so entwined with governmental policies and so impregnated with governmental character as to be subject to constitutional limitations grounded upon state action. Similarly, in *Louisiana High School Athletic Association v. St. Augustine High School*,[11] the Court of Appeals for the Fifth Circuit found that the regulations of the state athletic association satisfied the state action requirement because 85 per cent of the association's members were state-supported schools. The finding of state action in *St. Augustine* was further supported since high school principals were association officers, since funds from games played on state-owned facilities financed the organization and since the school's work and association's functions were highly interrelated.

In effect the *Wellsand* and *St. Augustine* courts relied upon the "public function" concept utilized by Mr. Justice Black in *Marsh v. Alabama*.[12] In finding the actions of a company town's management to be state action, Justice Black stated:

> Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.[13]

Therefore, the rules or actions of any group constitute state action if their implementation might affect the use of facilities built and operated primarily to benefit the public. While recognizing that state educational programs only provide for physical education classes and leave interscholastic sporting events to voluntary associations, both *Wellsand* and *St. Augustine* extended the "public function" rationale to such associations. Interscholastic athletics perform a public function since public facilities are used and public schools are association members. Therefore, efforts to control high school athletics constitute state action.

By broadening the public function concept to include associations operating on the periphery of state school systems, *Wellsand* narrows

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11. 396 F.2d 224 (5th Cir. 1968). Negro students sought to enjoin the association from enforcing a racially segregated system of high school athletics in the state. The association's plea of no state action was dismissed. *See* Comment, *Current Developments in State Action and Equal Protection of the Law*, 4 GONZAGA L. REV. 233, 251 (1969).

12. 326 U.S. 501 (1946). This "public function" rationale was later used in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). By so ruling, *Burton* went further than *Marsh* had gone in extending state action because it held that if any substantial connection existed between the association and a public agency, state action existed. *Burton* also held that blacks could not be denied entrance to a restaurant located in a publicly owned parking garage leased from the parking authority. State action existed because the "restaurant was an integral part of a public building." *Id.* at 723.

13. 326 U.S. at 506.

the state action limitation upon federal intrusion into the private sector. Therefore, the application of the equal protection clause to other voluntary associations should be facilitated. Rules and actions of organizations such as the Jaycees, Veterans of Foreign Wars and the Chamber of Commerce could arguably be sufficiently "entwined" with city or state governments to constitute state action. Therefore, the impact of *Wellsand* may extend beyond the IHSAA and married football players.

MARRIED STUDENTS' RIGHT TO EQUAL PROTECTION AND THE "RATIONAL BASIS" TEST

Finding the "marriage rule" to be prima facie invalid because of its discrimination between married and unmarried students, Judge Eschbach placed upon the IHSAA the burden of proving that married student participation in interscholastic athletics should be prohibited.[14] The association put forward six reasons to justify its rule.

Initially, the IHSAA alleged that the rule would have "minimal impact" because few students would be affected. The court found this justification unpersuasive since "[e]qual protection of the law is designed to protect all persons, not just the majority."[15] As a second argument, the IHSAA contended that the rule created more team positions for unmarried students. Though recognizing the factual basis of this argument, the court found that it provided no rational basis for such a classification. The court did not further discuss these two arguments, apparently recognizing that they were statements that the distinction existed rather than reasons for its existence.

The IHSAA's third argument was that the rule would reduce the divorce rate. Judge Eschbach likewise found this position untenable, stating that the valid functions of the Association did not include attempt-

14. Although *Wellsand* does not state directly that the burden rested on the IHSAA, the fact that it was necessary for the IHSAA to show rational justification meant that the usual presumption of validity attached by courts to such rules was overridden by the prima facie arbitrariness of the rule. This same result was reached in Alexander v. Thompson, 313 F. Supp. 1389 (C.D. Cal. 1970). The court stated:

> The burden of prosecuting in the state courts their alleged authority to deprive a California high school student of his right to a public education merely because of the length of his sideburns must fall on the defendants. The plaintiff has demonstrated in this court such a degree of arbitrary conduct on the part of the defendants that justice required that the burden of expelling him must rest with the defendants.

Id. at 1399. *See also,* Fujii v. State, 38 Cal.2d 718, 242 P.2d 617 (1952). In a case involving a suspect category, the ordinary presumption of validity is reversed, and the state has the burden rather than the challenging party. *Developments in the Law: Equal Protection,* 82 HARV. L. REV. 1065, 1101 (1969) [hereinafter cited as *Equal Protection*].

15. Slipsheet at 7.

ing to affect the divorce rate in such an "untested manner."[16] A similar analysis was used to dismiss the Association's contention that the drop-out rate would increase if married students were allowed to participate in interscholastic athletics.[17] In dismissing these contentions, the *Wellsand* court relied upon the "rational basis" test since nonfundamental rights and nonsuspect classifications were involved.[18] This test, as delineated in *McGowan v. Maryland*,[19] allows state governmental organs wide discretion in enacting laws and regulations which affect groups of citizens differently. The *McGowan* court stated:

> Neither the Due Process nor the Equal Protection Clause demands logical tidiness. . . . No finicky or exact conformity to abstract correlation is required of legislation. The Constitution is satisfied if a legislature responds to the practical living facts with which it deals. Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial re-examination. It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded. And what degree of uniformity reason demands of a statute is, of course, a function of the complexity of the needs which the statute seeks to accommodate.[20]

Under the *McGowan* formula, only classifications resting upon grounds wholly irrational, unreasonable or irrelevant to the achievement of the state's objective are violative of the fourteenth amendment.[21] In applying *McGowan*, therefore, courts have not found it necessary that every

16. Slipsheet at 11. The court refused to allow this justification because no statistical evidence was offered and no "tests" were offered in evidence to show that the "marriage rule" actually reduced divorce.

17. Slipsheet at 10.

18. A right is non-fundamental when it is not sufficiently important for courts to scrutinize with utmost care in order to determine if deprivations have occurred. A classfication is non-suspect when the means used to classify are not as invidious as sex or race. *See* note 34 *infra* and text accompanying.

19. 366 U.S. 420 (1961). *See also* Southway Discount Center, Inc. v. Moore, 315 F. Supp. 617 (N.D. Ala. 1970), where the court applied the *McGowan* rule to uphold a "Sunday closing" law that classified commercial establishments by the number of employees per firm.

20. 366 U.S. at 424.

21. 366 U.S. at 424-25. The Court stated that the constitutional principle is offended only if the classification rests on grounds wholly irrelevant to achievement of the state's objective. Statutory discrimination will not be set aside if any state of facts can be conceived to justify it reasonably.

policy decision made by school boards be supported by statistical information to substantiate the rational basis.[22]

Since no statistical evidence[23] was presented in *Wellsand,* it was not clear that there was any correlation between the divorce or drop-out rates and the participation of married students in interscholastic athletics. Therefore, the Association's classification was deemed "irrational" and violative of the *McGowan* test. The court's reasoning seems to require that such classifications be based upon school authorities' observations of the actual effect of married student athletic participation upon divorce or drop-out rates.

Judge Eschbach's reasoning indicates that he was following *McGowan.* The judge stated:

> In the case at bar, it is unnecessary to decide which test should be applied because . . . the reasons to justify the rule fail to satisfy the more lenient "rational basis" test.[24]

Nevertheless, it is possible that his opinion goes beyond that theory by requiring statistical proof to be presented in addition to other evidence presented by the IHSAA. In refusing to give credence to the defendant's drop-out argument, Judge Eschbach appears to be approximating the "balancing of interests" approach used in substantive due process.[25] In fact the court may have decided that marriage outweighs any interest which the IHSAA may have in maintaining the "marriage rule."[26]

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22. *See* Estay v. La Fourche Parish School Bd., 230 So. 2d 443 (La. 1969), where the court upheld a similar marriage rule and required no statistical proof to reinforce the policy decision of the school board forbidding married students' participation in extracurricular activities.

23. In Board of Directors v. Green, 259 Iowa 1260, 1269, 147 N.W.2d 854, 859 (1967), statistics were presented to and accepted by the court to justify barring a married student from playing basketball. The survey showed that for the years 1960-1965, 97 out of 139 married students were dropouts. Also, in Kissick v. Garland Indep. School Dist. 330 S.W.2d 708, 711 (Tex. Civ. App. 1959), the court recognized that 24 out of 62 married students in the district dropped out of school. The court then recognized this as a factor justifying a marriage rule.

24. Slipsheet at 6.

25. *See Equal Protection, supra* note 14, at 1131; Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C. L.A. L. REV. 716 (1969) [hereinafter cited as Karst].

See also Shapiro v. Thompson, 394 U.S. 618 (1969), where the Supreme Court held that neither deterring indigents from migrating to the state nor limiting welfare benefits to those contributing to the state is a constitutionally permissible state objective for supporting a one-year welfare waiting period; Pease v. Hansen, 40 U.S.L.W. 3238 (Nov. 16, 1971), where the Court, in a per curiam opinion, held:

> Whether a welfare program is or is not federally funded is irrelevant to the constitutional principles enunciated in Shapiro. . . .

26. For a recent use of a similar due process argument see Mr. Justice Harlan's majority opinion in Boddie v. Connecticut, 401 U.S. 371 (1971), upholding an indigent's

The court noted that an Indiana statute[27] allows men over eighteen years of age to enter into marriage freely. The Association's "marriage rule" undermines the policy of this statute by attaching a punitive sanction to certain marriages. Judge Eschbach reasoned that rather than eliminating the whole class of married students from interscholastic sports and, thereby, discouraging the institution of marriage, attempts to control the drop-out problem should focus on specific solutions to the high attrition rate.[28] As to the divorce rate argument, the court seems to be saying that school boards and associations may not determine and enforce societal values.[29] In dicta the opinion indicated that the divorce rate contention, even if supported by statistical evidence, would be an insufficient justification for such a classification. The court stated:

> If the schools are to have a part in decreasing the divorce rate, such part must be in educating and preparing students for entering the marital relationship.[30]

This approach would limit the historic power of school boards and associations to affect student behavior through rules and regulations and,

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right to obtain a divorce without paying court fees and costs for service of process as a condition precedent to access to the courts.

27. IND. CODE § 31-1-1-1 (1971), IND. ANN. STAT. § 44-101 (1965).

28. *Contra,* Estay v. La Fourche Parish School Bd., 230 So.2d 443 (La. 1969). This case accepted the drop-out rationale as a reasonable justification and added that a student had no right to compel a board of education to exercise discretion to his personal advantage. Starkey v. Board of Educ., 14 Utah 2d 227, 381 P.2d 718 (1963), held that the rule against participation by married students in extracurricular activities bore a reasonable relation to the problem of "dropouts" and did not constitute abuse of discretion.

29. *See* Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Non Constitutional Analysis,* 117 U. PA. L. REV. 373, 387-422 (1969) [hereinafter cited as Goldstein]. Goldstein divides the function of control over education into two categories: (1) education per se and (2) serving as a host to the pupils. The divorce justification falls into neither category because it puts the school board into the position of determining and enforcing societal values. Even conceding that divorce rates actually rose, the value judgment made by the board in *Wellsand* forced students to conform to a value system imposed by the officers of a voluntary athletic association which does not have the governmental functions of the legislature.

See also Alexander v. Thompson, 313 F. Supp. 1389 (C.D. Cal. 1970), where the court in the context of a regulation on hair stated:

> Basic to our societal and governmental structures is the assumption that certain areas of conduct, if subject to any governmental regulation at all, should be regulated by the Legislature. The presumptions of our system of government also require that such regulations be as explicit as possible where delegation to an administrative agency is involved. Hence, a general grant of power to a local school board should not be construed to enable it to make decisions of the type that are generally and more appropriately reserved for the legislature.

Id. at 1395.

30. Slipsheet at 11-12.

thereby, limit their power of discretion.

A fifth justification advanced by the IHSAA was that the "marriage rule" prevented "undesirable interrelations between married and unmarried students."[31] The sixth contention argued that the "marriage rule" forced the married student to discontinue athletics and fulfill his economic and family responsibilities.[32] To answer these two contentions the *Wellsand* court could have used any one of several theories.

Initially, the court could have utilized a "compelling state interest"[33] theory of equal protection. Under such an approach only a "compelling state interest" can justify the denial of equal protection based on a "suspect classification" or the abridgment of a "fundamental right."[34] The showing of a "suspect classification" may be difficult since governments often classify persons for income tax purposes according to their marital status.[35] However, it would be possible to categorize the right to marry as "fundamental." In *Loving v. Virginia*[36] the Supreme Court stated:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

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31. *Id.* at 9.

32. *Id.* at 7.

33. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942), where the Court found Oklahoma's "habitual criminal" sterilization act violative of equal protection:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects. . . . He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that *strict scrutiny of the classification which a state makes in a sterilization law is essential,* less unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.

Id. at 541 (emphasis added). *See also* Shapiro v. Thompson, 394 U.S. 618 (1969), where the Court holds that any classification that serves to penalize the exercise of a constitutional right, unless shown to be necessary to support a compelling governmental interest, is void.

34. Cases using the "fundamental right" theory include: Shapiro v. Thompson, 394 U.S. 618 (1969); Skinner v. Oklahoma, 316 U.S. 535 (1942). *See* Karst, *supra* note 25, at 744.

Cases terming classifications suspect and open to strict scrutiny by the judiciary include: Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); McLaughlin v. Florida, 379 U.S. 184 (1964); Griffin v. Illinois, 351 U.S. 12 (1956); Korematsu v. United States, 323 U.S. 214 (1944).

35. Married persons have the advantage of filing a joint return and, thus, take advantage of lower tax rates. INT. REV. CODE of 1954, §§ 1(a), 6013.

36. 388 U.S. 1 (1967).

> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. . . . To deny this fundamental freedom on so unsupportable a basis . . . is surely to deprive all the State's citizens of liberty without due process of law.[37]

Furthermore, the situation in *Wellsand* can be analogized to that in *Breen v. Kahl*[38] in which the court found the plaintiff's desire to wear long hair a "fundamental right," the regulation of which could be justified only by the showing of a "compelling state interest." An analogy can be drawn between the right to wear long hair and the right to participate in interscholastic sports while married. Both involve choices within the scope of private decision making. Regulation of neither may be justified as preventing disruption of the educational process. No violence or disruption has resulted from married student participation in interscholstic sports, and there is no reason to believe that such disruption will occur in the future.

As a second alternative, the *Wellsand* court could have utilized the "forced choice" theory found in *Shapiro v. Thompson*[39] to enjoin enforcement of the "marriage rule." In *Shapiro* the Supreme Court held that indigents have a fundamental right to interstate travel. A one-year residency requirement for receipt of welfare payments was found to necessitate a choice between receipt of those benefits and the exercise of that right.[40] Such a forced choice was found effectively to abridge an indigent's right to travel interstate. The same rationale could have been used in *Wellsand* by holding that the right to marry was burdened by a forced choice between marriage and interscholastic athletic participation. While this argument is implicit in the court's dicta,[41] Judge Eschbach avoided reliance upon the theory, possibly because he did not consider

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37. *Id.* at 12.

38. 419 F.2d 1034 (7th Cir. 1969). The court stated in regard to a student's freedom to choose the length of his hair:

> To limit or curtail this or any other fundamental right, the state has a "substantial burden of justification."

Id. at 1036.

39. 394 U.S. 618 (1969).

40. The Court found that the effect of the waiting-period requirement was to create two classes of needy families. One was composed of indigents who had resided a year or more in the jurisdiction, the second consisted of those who had resided in the state for less than a year. The denial of welfare to the second group in effect forced them to forego traveling into the jurisdiction because this would cause them to lose their welfare payments.

41. *See* text accompanying notes 24-28 *supra.*

the loss of athletic eligibility to be as important as the loss of economic benefits.

The third approach, and the one which the court adopted, was the "rational basis" test.[42] While recognizing that both the avoidance of "undesirable interrelations" and the fostering of "economic and family responsibility" were valid functions of the IHSAA, the court rejected the classifications implementing these purposes as being either over- or under-inclusive. In analyzing the "undesirable interrelations" justification, the court found that such interrelation could take place absent any participation in interscholastic athletics.[43] The classification, therefore, was under-inclusive.[44] Similarly, Judge Eschbach's analysis of the proposed "economic and family responsibility" justification led him to conclude that it was overinclusive because not all married students have to devote time to employment in order to fulfill their economic obligations. This same justification was also found to be underinclusive since many unmarried students must assume economic responsibilities.

By seemingly requiring the "marriage rule" to remedy all problems of "undesirable interrelations" and "economic and family responsibilities," a strict correlation requirement appears to emerge.[45] This requirement

42. This test is discussed in *Equal Protection, supra* note 14, at 1077. For examples of the application of this test, see McGowan v. Maryland, 366 U.S. 420 (1961); Southway Discount Center, Inc. v. Moore, 315 F. Supp. 617 (N.D. Ala. 1970).

43. The IHSAA argued that married students would "infest" the minds of other players while in the locker room with stories relating to the married students' sexual experiences. Slipsheet at 9. In Board of Directors v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967), the Iowa Supreme Court recognized that the personal relationships of married students are different from those of non-married students and that non-married students can be unduly influenced as a result of relationships with married students. The court decided that the rule barring married students from participating in extracurricular activities was neither "arbitrary, unreasonable, irrational, unauthorized, nor unconstitutional." *Id.* at 1271, 147 N.W.2d at 860.

44. Given that married students cause certain mischief in the athletic locker rooms, the classification would be underinclusive in that no regulations were in effect that prohibited similar mischief in the cafeteria, physcal education classes and after school hours. If the defining trait is the possibility of undesirable interrelations, the classification is prima facie in violation of equal protection because it does not include other "interaction points." This traditional limited judicial scrutiny approach is discussed in Tussman & ten Broek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949).

45. In Levy v. Louisiana, 391 U.S. 68 (1968), a case involving the rights of bastards under Louisiana's wrongful death statute, Mr. Justice Douglas stated the equal protection test in terms of the rationality of the line drawn. However, Justices Black, Harlan and Stewart, in dissent, contended that no exactness was required between the classifications and what the Court felt was a proper purpose. The Court should not have stricken the statute, according to the dissenters, because better lines might have been drawn, especially where the rights involved were non-fundamental and the classifications non-suspect. However, *Wellsand* seems to require an exactness between the classification and the purpose. This strict correlation goes beyond the "rationality of the line drawn" and seems to require a stricter test of equal protection.

differs from the traditional view that underinclusion, when administratively necessary or experimentally desired, does not deny equal protection under the "rational basis" test.[46] Judge Eschbach, therefore, appears to have based his conclusion on either or both of two possibilities: (1) the underinclusion was administratively unnecessary and not stifling of experimentation;[47] (2) the strict correlation required was more akin to the "compelling state interest" test utilized in *Shapiro* than to the "rational basis" test.[48]

A parallel can be drawn between *Wellsand* and *Levy v. Louisiana*.[49] The Court in *Levy* found the state's classification of children into "legitimate" and "illegitimate" for the purpose of determining eligibility to bring an action for the wrongful death of the children's mother was an invidious discrimination when no action, conduct or demeanor of the children was possibly relevant to the harm that was done the mother. In both *Wellsand* and *Levy* "non-fundamental" rights were involved. Justice Douglas in *Levy* states that the classification must have relation to the wrong allegedly prevented by the rule:

> Though the test has been variously stated, the end result is whether the line drawn is a rational one. . . .
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> . . . .

46. *Equal Protection, supra* note 14, at 1084.

47. The marriage rule was not administratively necessary because married students, in playing sports, caused no problems that were not also present when the students ate in the school cafeteria or went to physical education classes together. That there was no stifling of experimentation to justify underinclusion was evidenced by the long duration of the rule. If the school wished to experiment, it should do so in the opposite direction—allowing married students to participate in order to see if any new problems arose.

48. The difference between this "strict correlation" test (which closely approximates a "compelling interest" standard) and the "rational basis" test can best be demonstrated by using an example. Hypothesize two students, *A* and *B*, whose families are experiencing economic problems. *A* is married, and his economic responsibility is toward his wife (and children, perhaps). *B* is unmarried, but he is the oldest of ten children, and his father is crippled and unemployed. The sole purpose of the "marriage rule" is to make it more likely that students like *A* will devote their spare time to fulfilling their economic obligations by compelling them not to spend that time playing interscholastic sports. Under the "rational basis" rule, this classification is permissible becaue it fulfills the purpose of the law-making body. Under the *Wellsand* reasoning, however, the "marriage rule" would fall because it does not similarly coerce the group of students represented by *B*, who are just as much in "need" of the rule's compulsion. *Wellsand* forbade the IHSAA and the school corporation to attempt partial solutions by requiring that they choose between no rule and one reasonably designed to remedy all problems that correlate with the mischief they seek to overcome. In doing so, the court applied a "strict correlation."

49. 391 U.S. 68 (1968). *See* note 45 *supra*.

> Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. . . .[50]

Similarly, Judge Eschbach placed emphasis both on the fact that the "marriage rule" had little direct relation to its alleged purposes and that a higher standard of "rationality" is required for validating such a rule. The type of analysis used in these cases, however, is open to the criticism that the courts are engaging in exercises of a legislative character.[51]

FUTURE POSSIBILITIES FOR EQUAL PROTECTION

Regulations promulgated by athletic associations and school boards are ripe for attack under the *Wellsand* reasoning.[52] One such vulnerable regulation is an eligibility rule of the IHSAA which requires high school students who have transferred schools without an accompanying move by their parents to wait one year before becoming eligible to participate in interscholastic sports.[53] The curtailment of high school athletic recruitment is apparently the purpose behind this rule. Under the traditional "rational basis" analysis any court would most likely find that the classification implemented a valid purpose and violated no constitutional rights. Therefore, the discretion of the principal in enforcing the rule and that of the IHSAA in drafting it would not be disturbed. Under *Wellsand,* however, such a rule may now violate the mandate of equal protection.

Initially, the transfer student rule is both under- and overinclusive.

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50. 391 U.S. at 71-72.

51. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (Black, J., dissenting).

52. For a case in which the plaintiff attempted to use a similar equal protection rationale but failed, see Haas v. South Bend Community School Corp., No. 32028 (Marshall [Ind.] Cir. Ct., Apr. 29, 1971). The case involved IHSAA Rule 9, § 7, which states:

> Boys and girls shall not be permitted to participate in inter-school athletic games as mixed teams, nor shall boys' teams and girls' teams participate against each other in inter-school athletic contests.

The IHSAA constitution, art. 3, provides that if any member is unable to comply with an association rule the school is automatically suspended from the association unless there has been a court hearing.

The court upheld the IHSAA rule prohibiting "mixed teams" as justified by differences in athletic abilities between the sexes. Prohibition of female participation in sports such as tennis, golf and track is more difficult to justify than in others because such sports lack the physical contact that has been cited to justify sexual classification in sports like basketball and football. *Haas* may be a stronger equal protection case than *Wellsand* since classifications based on sex may more easily fall under the stricter test applied to "suspect" classifications. This case is being appealed to the Indiana Supreme Court. The decision of the United States Supreme Court in Reed v. Reed, 40 U.S.L.W. 4013 (Nov. 22, 1971), would almost seem to compel reversal in *Haas.*

53. IHSAA 1970-1971 HANDBOOK, rule 22.

If prevention of recruiting is its purpose, the rule is underinclusive since coaches and principals may avoid it by convincing parents to move into a certain school district in order to make their son eligible to compete. However, the real evil in such a rule is its overinclusive effect. Students who have not been recruited are still required to wait a full year before becoming eligible. In *Sturrup v. Mahan*[54] a student transferred from a Florida to an Indiana high school, moving in with his brother who had been declared his legal guardian. The IHSAA declared the athlete ineligible because the rule required either an accompanying parental move or a showing of extreme hardship, and compliance with neither requirement could be demonstrated. No evidence was ever presented that the student had been recruited. Under the reasoning in *Wellsand,* it would seem that the IHSAA's classification bears no "strict correlation" to the purpose of the rule.[55] Furthermore, at least as to out-of-state students, the rule seems to impede interstate travel in the same way as the Connecticut residency statute was held to do in *Shapiro.*

Another educationally related application of *Wellsand* could be to school board rules requiring students to leave school immediately upon discovery of pregnancy.[56] While such rules have been upheld as being in the interest of the student, many cases exist in which the young woman's safety could not have been impaired by attending classes during the early stages of her pregnancy. Such a classification may be attacked as an attempt by school officials to force their own standards of morality upon students.[57] Any health dangers which may be present in a classroom are

54. No. S 71 C779 (Monroe [Ind.] Super. Ct., Oct. 8, 1971) (temporary restraining order granted) and No. 71 C160 (Owen [Ind.] Cir. Ct., Oct. 15, 1971) (after change of venue, preliminary injunction denied).

55. The purpose of the rule is obviously to prevent high schools from recruiting athletes from outside the school district. It is overinclusive because it subjects to its strictures both recruited athletes and students who have moved for legitimate reasons.

Another purpose may be to keep star athletes from moving into the school district with the sole intent to create a state championship team. But again the purpose is implemented by a classification (parents move/parents do not move with student) that is overinclusive in that it includes students who fit the classification, but who had no intent of forming championship teams. Thus, there is no "strict correlation" between the rule's purpose and its effect. *See* note 48 *supra.*

56. A school board rule forcing pregnant students, whether married or unmarried, to quit school immediately upon discovering their pregnancy and giving school officials the power to demand a doctor's examination in questionable cases was upheld in State *ex rel.* Idle v. Chamberlain, 39 Ohio Op. 2d 262, 175 N.E.2d 539 (Butler County C.P. 1961). The Attorney General of Ohio rendered an opinion that such a rule was contrary to the policy of Ohio, but the court dismissed his opinion and stated that the board was acting in the interest of the girl's safety.

57. Goldstein, *supra* note 29, at 426, concludes that the statutory grant of power to school boards never contained the power to regulate all matters concerning education, much less matters concerned with other social interests. The *Wellsand* court answers

also present when the student walks to the corner grocery. Such a classification denies her an opportunity to finish her education at a time when doing so may be of the greatest importance. Bearing children is a private matter. Therefore, the realm of private choice is extremely limited when such decisions are influenced by a school board rule which forces a young student to choose between bearing a child and finishing her formal education. The school board may try to justify such a rule as a means of discouraging premarital sex. Nevertheless, such a rule is overinclusive since it includes married students. The *Wellsand* court's dicta indicates that while such a purpose may be valid, sexual education classes rather than an overinclusive classification is the proper means of achieving it. At least *Wellsand* seems to indicate that school officials may have to demonstrate by statistical proof that their rule will have the intended effect.

School boards and school-related voluntary associations will probably not remain passive while courts strike down their rules.[58] A method available for preventing judicial intrusions is to abandon broad classification schemes like male/female, married/unmarried, pregnant/nonpregnant and to adopt regulations based on categories characterized by a greater correspondence between the mischief to be controlled and the classification used. In this manner the school-related voluntary organization could maintain some control over the mischief yet avoid any equal protection attack.[59] For example, if the IHSAA recognized an acute problem of married athletes dropping out of a particular school, it could, in conjunction with the local school board, promulgate a local rule giving discretion to the principal or the coach to decide whether certain married individuals could participate in interscholastic sports. Thus, policies un-

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his question as to who will determine the existence or nonexistence of harm and, thus, opens the way for future court evaluation of school policies in the areas of personal freedom and personal decision making.

58. The IHSAA is appealing the *Wellsand* decision, but it avoided possible conflict with the preliminary injunction issued by Judge Eschbach by amending its constitution eight days after the injunction took effect. The original constitution would have forced dismissal of the Valparaiso school from the IHSAA (*See* note 52 *supra*). However, the injunction expressly forbade the IHSAA to "impos[e] any sanctions or prohibitions against the defendant Valparaiso Community Schools Corporation." Slipsheet at 13. The IHSAA amended art. 3 of its constitution to comply with the preliminary injunction by allowing member schools to obey any court order issued after a hearing.

59. In Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970), school officials admitted that the health and safety objectives allegedly threatened by a student's long hair could be attained through narrower rules directed specifically at problems created by long hair. Thus, the officials failed to sustain the substantial burden of justifying the exclusion of a long-haired student from class, and their action denied equal protection to male students.

enforceable through broad, irrational categories like sex or marriage could be implemented by the particularized and highly rational decisions of the local school board. If the equal protection objections voiced by the *Wellsand* court are solved by making such nondiscriminatory classifications, the courts might once again defer to the associations. However, if the courts were still dissatisfied with the actions of the associations, they might be prompted to abandon the equal protection clause as a method of evaluating the arbitrariness of the classification. The courts may then directly examine the function and scope of such voluntary associations in promulgating rules affecting the rights of high school students.[60] Whatever the means ultimately adopted, the *Wellsand* decision renders it likely that school boards and other voluntary organizations will no longer be able to rely upon judicial support for broad discretionary classifications.

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60. It has been suggested that equal protection has taken over where substantive due process left off. *Equal Protection, supra* note 14, at 1131-32. This development of equal protection as a ratio decidendi for due process may stop when classifications are in tune with the mischief sought to be remedied. The courts may then be compelled to revert back to using substantive due process.