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RETHINKING GENDER OPPORTUNITIES: NONTRADITIONAL SPORTS SEASONS AND LOCAL PREFERENCES

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In Communities for Equity v. Michigan High School Athletic Association, *the Court of Appeals for the Sixth Circuit affirmed a district court decision, holding that the scheduling of high school girls' sports in "nontraditional" seasons in Michigan violated the Equal Protection Clause. The Supreme Court of the United States, granting certiorari, vacated and remanded this case back to the Sixth Circuit. This Note suggests reasons why the Sixth Circuit and/or the United States Supreme Court should protect the Michigan High School Athletic Association's (MHSAA) current scheduling of sports seasons. Specifically, using the model provided by* Romer v. Evans *and* Washington v. Seattle School District, *MHSAA should be afforded local control over high school sports seasons. This Note also discusses legal and policy implications resulting from MHSAA's loss of control in this arena and the possible harms associated with this proposed change.*

I. INTRODUCTION

For years the battle over nontraditional sports seasons in Michigan has commanded public attention. As an issue that touches on gender, race, and local control aspects of high school sports, nontraditional sports scheduling has evoked significant legal and policy debate. Recently, in *Communities for Equity v. Michigan High School Athletic Association*,[1] the Court of Appeals for the Sixth Circuit affirmed a district court decision, holding that the scheduling of high school girls' sports in "nontraditional" seasons in Michigan violated the Equal Protection Clause. The Supreme Court of the United States, granting certiorari, vacated and remanded this case back to the Sixth Circuit.[2] This Note suggests reasons why the Sixth

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1. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 377 F.3d 504 (6th Cir. 2004).

2. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 125 S. Ct. 1973 (2005). The case is to be decided in accordance with *City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453 (2005). *See infra* notes 20–27 and accompanying text. At the time this Note went to print, the Sixth Circuit had heard oral arguments on the remanded case, but had not yet issued an opinion.

Circuit and/or the United States Supreme Court should protect the Michigan High School Athletic Association's (MHSAA) current scheduling of sports seasons.

Part II gives an overview of *Communities for Equity*,[3] the claims advanced in this class action, and the defenses presented by MHSAA. Part III argues that in this case, the decision regarding Michigan's high school sport seasons should be left to MHSAA, using the model provided by *Romer v. Evans*[4] and *Washington v. Seattle School District*.[5] In support of this position, this Part explores the local nature of MHSAA as well as Michigan's athletic participation rates. Part IV suggests policy and legal implications of a change in Michigan's sports seasons. In particular, this Part shows how the decision to take local control away from MHSAA can in fact hurt high school athletes, both male and female.

II. THE CASE: *Communities for Equity v. Michigan High School Athletic Association*

A. Overview

In June 1998, an organization, Communities for Equity, and two mothers of female student athletes, on behalf of their minor daughters, filed a class action alleging that MHSAA had discriminated against female athletes.[6] The complaint stated that MHSAA discriminated against females in a variety of ways,[7] which violated Title IX,[8] the Equal Protection Clause,[9] and Michigan's Elliot-Larsen Civil Rights Act (ELCRA).[10] All the plaintiffs' claims were settled through court-ordered mediation during the summer of 2001 except for the claim alleging inequitable treatment of female high school students through the scheduling of sports seasons in

3. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 178 F. Supp. 2d 805 (W.D. Mich. 2001), *aff'd* 377 F.3d 504 (6th Cir. 2004).

4. Romer v. Evans, 517 U.S. 620 (1996).

5. Washington v. Seattle Sch. Dist., 458 U.S. 457 (1982).

6. *Cmtys. for Equity*, 178 F. Supp. 2d 805.

7. For example, plaintiffs complained that MHSAA sponsored too few state tournaments for girls' sports, and provided inferior benefits, playing rules, and publicity for girls' sports. *See* Neena K. Chaudhry & Marcia D. Greenberger, *Essay: Seasons of Change:* Communities for Equity v. Michigan High School Athletic Association, 13 UCLA WOMEN'S L.J. 1, 12 (2003).

8. 20 U.S.C. §§ 1681–1688 (2000).

9. U.S. CONST. amend. XIV, § 1.

10. MICH. COMP. LAWS §§ 37.2101–37.2701 (2001).

the state of Michigan.[11] Specifically, the plaintiffs claim that MHSAA schedules seasons and tournaments for six girls' sports during less advantageous seasons than boys' sports.[12] It is this claim that this Note addresses.

In December of 2001, the district court held that the then current scheduling of athletic seasons violated the Equal Protection Clause, Title IX, and ELCRA.[13] In reaching this decision, the court examined six girls' sports—basketball, volleyball, soccer, golf, swimming and diving, and tennis—as compared with the corresponding boys' sports, which were often in different seasons. From this analysis, the court determined that, for the most part, girls were competing in the "nontraditional"[14] and less advantageous seasons. To determine the less advantageous season, the court examined several factors. For example, the court took into account when the corresponding college season is played, the ease of recruitment for college sports, weather considerations, length of season, and the possibility for interstate competition.[15]

The district court then ordered MHSAA to submit a compliance plan, and maintained jurisdiction over the case to ensure that the remedy was carried out.[16] On appeal, the Sixth Circuit, finding a violation of the Equal Protection Clause, affirmed the district court's decision and declined to address either the Title IX or the ELCRA claims.[17]

The United States Supreme Court granted certiorari only to vacate and remand the case back to the Sixth Circuit in light of a recent opinion,[18] *City of Rancho Palos Verdes v. Abrams.*[19] In that case, the Supreme Court held that an individual may not enforce a municipality's zoning ordinance through a § 1983 action[20] when the

11. *Cmtys. for Equity*, 178 F. Supp. 2d at 807.

12. *Id.* at 807.

13. *Id.* at 862.

14. The court defines a "traditional" season in the following way: "For most sports, it is common knowledge when tradition dictates that a sport will be played." *Id.* at 808. Typically, the traditional season corresponds with the season in which the majority of states sponsor that particular sport.

15. The court did not apply a strict formula when addressing each sport, but looked at these factors as well as others. *See, e.g., id.* at 832 (indicating that golf playing habits of the general public influenced whether a high school season was advantageous because in the spring everyone is trying to go outside and play, while in the fall, it is easier to secure tee times because people have put their clubs away).

16. *Id.* at 862. *See infra* notes 81–91 and accompanying text.

17. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 377 F.3d 504, 514 (6th Cir. 2004).

18. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 125 S. Ct. 1973 (2005).

19. City of Rancho Palos Verdes v. Abrams, 125 S. Ct. 1453 (2005).

20. 42 U.S.C. § 1983 (1996) ("[E]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

claim should have been brought through the Telecommunications Act of 1996 (TCA).[21] In *City of Rancho Palos Verdes*, the TCA provided a judicial remedy different from § 1983, and as a result, precluded plaintiff's resort to § 1983.[22] In the court's words, "[t]he provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983."[23]

In affirming the district court in *Communities for Equity*, the Sixth Circuit found a violation of the Equal Protection Clause of the Fourteenth Amendment, pursuant to 42 U.S.C. § 1983.[24] In vacating and remanding this case in light of *City of Palos Verdes*, the Supreme Court may have hinted that Title IX, not § 1983, is the appropriate mechanism through which plaintiffs should bring their claim since Title IX, as a comprehensive federal statute, provides a remedy.[25] The Sixth Circuit will again decide this case. It is likely that a petition for certiorari will be filed after the Sixth Circuit's decision and there is a chance the United States Supreme Court will again grant certiorari, but this time rule on the merits of this case. This Note presents arguments why the Supreme Court, or the Sixth Circuit for that matter, should find in favor of MHSAA.

B. MHSAA Defenses

MHSAA set forth four main justifications for keeping boys' and girls' sports in their currently scheduled seasons: 1) logistical realities require putting sexes into different seasons to maximize participation in every sport; 2) girls prefer the seasons as they are; 3) member schools prefer the seasons as they are; and 4) independent seasons help create an "independent identity" for girls'

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subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .").

21. Telecommunications Act of 1996, 47 U.S.C. § 609 (2006); *City of Rancho Palos Verdes*, 125 S. Ct. at 1462.

22. *City of Rancho Palos Verdes*, 125 S. Ct. at 1462.

23. *Id.* at 1458.

24. Cmtys. for Equity v. Mich. High. Sch. Athletic Ass'n, 377 F.3d 504, 513 (6th Cir. 2004).

25. Congress enacted Title IX as part of the Education Amendments of 1972 in response to a long history of sex discrimination in education. 20 U.S.C. §§ 1681–1688 (2006). While Title IX prohibits sex discrimination in all federally funded education programs and activities, much of the Title IX litigation has centered on athletic issues. *See, e.g.*, Chaudhry & Greenberger, *supra* note 7, at 4.

programs.[26] The district court held that MHSAA had not shown any of these justifications to be "exceedingly persuasive," and as a result did not pass muster under the intermediate scrutiny standard applied to gender-based distinctions.[27]

The court most seriously considered MHSAA's justification that because officials, facilities, and coaches are limited, MHSAA is able to maximize participation of high school athletes by separating the male and female seasons of the same sport. If boys' and girls' teams of the same sport are played in the same season, MHSAA argued, facilities and resources specific to those sports would be exhausted, consequently reducing the number of students able to play those sports and the number of schools able to offer those sports.[28] The court, however, found that MHSAA did not meet its burden of production and persuasion on this point because the evidence was insufficient to show that schools have inadequate facilities, and most of the evidence was anecdotal.[29]

III. HIGH SCHOOL SPORTS SEASONS AS A MATTER OF LOCAL CONCERN AND CONTROL

This Part argues two rationales for why MHSAA should be allowed to maintain nontraditional sports seasons in Michigan. First, the scheduling of sports seasons should be treated as a matter of local concern, in the same way that the Supreme Court held busing in *Washington v. Seattle School District*[30] and non-discrimination ordinances in *Romer v. Evans*[31] to be areas of local concern.[32] Second, this Part argues in the alternative that if MHSAA is found to be a

26. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 178 F. Supp. 2d 805, 839 (W.D. Mich. 2001).

27. *Cmtys. for Equity*, 178 F. Supp. 2d at 848. Because of the gender-based distinction in this case, MHSAA was required to give an "exceedingly persuasive" justification to pass "intermediate scrutiny" of the Equal Protection Clause. United States v. Virginia, 518 U.S. 515, 523–33 (1996). Specifically, this means that the plaintiffs had to show that MHSAA treats high school boys differently from high school girls. Once this had been shown, MHSAA then had the burden of showing that the particular gender classification " 'serves important governmental objectives,' and the chosen scheduling is 'substantially related to the achievement of those objectives.' " *Id.* at 533. MHSAA's justification must be "exceedingly persuasive." *Cmtys. for Equity*, 178 F. Supp. 2d at 848.

28. *Cmtys. for Equity*, 178 F. Supp. 2d at 840.

29. *Id.*

30. Washington v. Seattle Sch. Dist., 458 U.S. 457 (1982).

31. Romer v. Evans, 517 U.S. 620 (1996).

32. *See, e.g.*, Lawrence Rosenthal, Romer v. Evans *as the Transformation of Local Government Law*, 31 URB. LAW. 257 (1999).

state, and not local, actor,[33] MHSAA can show that the scheduling of sports seasons in nontraditional sports seasons serves an important governmental objective and that there is an exceedingly persuasive justification for treating boys and girls differently in this area.[34]

A. The Supreme Court Has Provided for Local Control within the Equal Protection Clause

As an association representing local school district concerns, MHSAA should be entitled to the same type of local protection granted by the United States Supreme Court in both *Romer v. Evans*[35] and *Washington v. Seattle School District*.[36] In *Romer*, the Court held that an amendment to Colorado's state constitution, which limited whether local governments could enact "homosexual protection" laws, was invalid as a violation of the United States Constitution's Equal Protection Clause.[37] Commentators have heralded this decision as confirming the power of local governments by identifying local governments as something more than merely agents of a state.[38] The Court in *Seattle School District* held that a Washington State initiative that disallowed school busing to combat racial imbalance in schools was unconstitutional under the Equal Protection Clause.[39]

1. Protecting Local Concerns: Romer, Seattle School District, and Communities for Equity—Different local institutions in *Romer, Seattle School District,* and *Communities for Equity* have asserted their power to eliminate the inequitable treatment of a particular group of persons. In Romer, various Colorado municipalities had enacted ordinances banning discrimination based on sexual orientation.[40] In *Seattle School District,* Seattle School District No. 1 decided to implement a desegregation program, which used busing to "alleviate the isolation of minority students."[41] Similarly, MHSAA, represent-

33. MHSAA was previously found to be a state actor. *Cmtys. for Equity*, 178 F. Supp. 2d at 846–48.

34. This standard is outlined in United States v. Virginia, 518 U.S. 515, 523–33 (1996). *See supra* note 27.

35. *Romer*, 517 U.S. 620.

36. Washington v. Seattle Sch. Dist., 458 U.S. 457 (1982).

37. *Romer*, 517 U.S. 620.

38. *See, e.g.*, Rosenthal, *supra* note 32.

39. *Seattle Sch. Dist.*, 458 U.S. 457.

40. *Romer*, 517 U.S. at 624.

41. *Seattle Sch. Dist.*, 458 U.S. at 460.

ing the voices of individual member schools, has scheduled sports seasons to ensure that the maximum number of high school students can participate,[42] thus proving advantageous for females who traditionally did not have equal opportunities to participate in athletics. MHSAA should be afforded the same freedom to decide issues of local concern as the localities at issue in *Romer* and *Seattle School District.*

Local institutions play an important role in eradicating discrimination against particular groups in the United States. The Court in *Romer* explained the role of municipal laws in prohibiting discrimination in the area of public accommodations and concluded that the common law rules, which prohibited discrimination from public accommodations, were insufficient in many instances to protect particular groups in need of protection.[43] Additionally, the Court noted that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodation.[44] Consequently, state and local municipalities were allowed, and even invited to counter discrimination by enacting statutes to this end.[45]

These local and state statutes, like those targeting discrimination in other states, often enumerate the groups or persons they are designed to protect.[46] The Court describes "[e]numeration [as] the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply."[47] The local Colorado statutes protect groups not yet given heightened equal protection scrutiny by the Supreme Court.[48] The Court, by striking down the Colorado amendment, implicitly recognizes the power of the municipalities to enact provisions and protect groups that, for one reason or another, have not been as protected at a national level.[49] Thus, the Court recognizes the authority of the state and local governments to prohibit discrimination, perhaps more aggressively than the federal government in some areas.

Similarly, *Seattle School District* demonstrates the ability of a local institution, here the Seattle School District, to enact programs that affirmatively target discrimination. The District was faced with a

42. *Cmtys. for Equity*, 178 F. Supp. 2d at 839.
43. *Romer*, 517 U.S. at 627–28.
44. *Id.* at 628.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 629.
49. *Id.* For example, many of these statutes also protect on the basis of "age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates." *Id.*

situation where the segregated housing patterns within Seattle had created racially imbalanced schools.[50] In response, beginning in 1963, the District allowed students to transfer from their neighborhood schools to help solve the racial imbalance throughout the District.[51] Community organizations and the mayor encouraged the District to implement a more effective integration scheme, and the District responded with the "Seattle Plan" for desegregation, which relied on mandatory reassignments and busing.[52] This program was effective. The district court found that the Seattle Plan "has substantially reduced the number of racially imbalanced schools in the district and has substantially reduced the percentage of minority students in those schools which remain racially imbalanced."[53]

After the activation of the Seattle Plan, Initiative 350, which proscribed the use of busing for purposes of racial integration, passed statewide. However, two state legislative districts, both in Seattle, did not support the Initiative.[54] The Seattle District then brought suit, and the United States intervened against the State, challenging the constitutionality of Initiative 350 under the Equal Protection Clause.[55] In holding that the State had overstepped its bounds, the Court implied a great amount of local power to combat discrimination. While the Initiative had garnered sixty-six percent of the vote statewide, the Court basically upheld the power of the District to independently access the needs of its community and to act accordingly.[56] The Supreme Court found that the State's Initiative usurped authority from local governments relating to the local responsibility to "devise and tailor educational programs to suit local needs."[57]

Using *Romer* and *Seattle School District* as models of local power, one can see how MHSAA's decision to assign boys' and girls' sports to different seasons is a use of its local discretion to affirmatively protect females from discrimination in sports.[58] MHSAA defends its

50. Washington v. Seattle Sch. Dist., 458 U.S. 457, 460 (1982).

51. *Id.*

52. *Id.* at 460–62.

53. Seattle Sch. Dist. v. State, 473 F. Supp. 996, 1007 (W.D. Wash. 1979), *quoted in Seattle Sch. Dist.*, 458 U.S. at 461.

54. *Seattle Sch. Dist.*, 458 U.S. at 462–64.

55. *Id.* at 464.

56. *Id.* at 463.

57. *Id.* at 477–78.

58. *Communities for Equity* is a little different than *Romer* and *Seattle School District* because the district court found MHSAA to be a state actor. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 178 F. Supp. 2d 805, 847 (W.D. Mich. 2001). While this does not negate the "local concerns" argument, the relationship of MHSAA to individual school districts is discussed *infra* at Part III.A.2.

policy on the grounds that local circumstances prohibit the maximum participation of high school athletes if sports seasons are scheduled concurrently.[59] For example, MHSAA argues that there are insufficient gymnasiums, soccer fields, and pools to schedule basketball, soccer, and swimming in the same seasons for boys and girls.[60] This is a local concern. The same might not be true for states which do not deal with the same weather considerations as Michigan. For instance, in warmer climates, high school basketball teams might be able to practice outside of gymnasiums, and swim teams in outdoor pools.

In addressing these claims, the district court directs its attention to other states instead of focusing on the positive effect this policy is having on girls in the state of Michigan. The court errs in doing this because the policies of the other states often do not permit the same degree of female participation in athletics as the scheduling by MHSAA.[61] The Supreme Court has acknowledged a role for local institutions to play in affirmatively fighting discrimination in local communities. MHSAA's scheduling of sports seasons fits this description of local power.

2. MHSAA as a Local Actor—While *Romer* and *Seattle School District* preserved strictly local preferences under the threat of state action, *Communities for Equity* is a little different in that MHSAA contains elements of both the State of Michigan and local school districts. Despite the involvement of the State, courts should still defer to MHSAA on issues of local control, such as scheduling sports seasons, much in the same way that the Court deferred in *Romer* and *Seattle School District.*

a. MHSAA Structure and Organization—When first created in 1924, MHSAA was blatantly run by the State of Michigan. The Superintendent of Public Instruction had control of "interscholastic athletic activities of all schools of the state."[62] In addition, MHSAA was housed within the Michigan Department of Education, and the Executive Director was called the "State Director of Athletics."[63] The handbook, regulations, and rules produced by MHSAA were imbedded in official state materials; they were included in the Administrative Code of the State of Michigan.[64]

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59. *Cmtys. for Equity*, 178 F. Supp. 2d at 839.
60. *Id.* at 840.
61. See *infra* notes 113–132 and accompanying text.
62. *Cmtys. for Equity*, 178 F. Supp. 2d at 810 (quoting the 1978–79 MHSAA Handbook Foreword).
63. *Id.*
64. *Id.* at 811.

Since the initial creation of MHSAA, however, the Michigan State Legislature has transferred more and more control of MHSAA from the State to local school districts.[65] First, in 1972, the Michigan Legislature moved the authority of interscholastic athletics from the State Board of Education to the individual school districts.[66] With this structure, districts could join MHSAA as long as one representative of the State was on the governing board.[67] Also at this time, the State Legislature designated MHSAA as the official athletic association of the State, thus maintaining an official designation for MHSAA.[68] The same year, MHSAA incorporated itself and opened membership to all secondary schools in Michigan.[69]

The next big change came in 1995 when the Legislature amended the school code to remove the official designation from MHSAA.[70] However, the Legislature did relate that school districts were still authorized, if they wished, to join organizations like MHSAA as part of operating a school district.[71] Today, MHSAA is a private, non-profit corporation, which does not receive any funding from either the State of Michigan or the federal government.[72] In addition, members do not pay dues to MHSAA and membership is completely voluntary.[73] Non-member schools may also compete in the regular season against member schools.[74] This brief history suggests that while MHSAA still maintains and supervises interscholastic athletic programs, the State Legislature has made explicit transfers of power from the State to local school districts since its inception in 1924. In addition, because membership into MHSAA is voluntary, and MHSAA receives no state or federal funding, MHSAA is significantly distinct from the State of Michigan.

b. Control of MHSAA—In addition to the organizational structure, the control the member schools maintain over MHSAA contributes to its identity as a local actor. Control of MHSAA is vested in a Representative Council, an Executive Council, and an Executive Officer. The Representative Council has general control over MHSAA policies. This council is made up of nineteen voting

65. *Id.*
66. *Id.*
67. *Id.* (citing 1972 Mich. Pub. Acts 7 (repealed 1976); MICH. COMP. LAWS § 380.1289 (1976) (amended 1995)).
68. *Cmtys. for Equity*, 178 F. Supp. 2d at 811.
69. *Id.*
70. *Id.* (citing MICH. COMP. LAWS § 380.11a(4) (2001)).
71. *Cmtys. for Equity*, 178 F. Supp. 2d at 811.
72. MHSAA: History, http://www.mhsaa.com/about/history.html (last visited Jan. 24, 2006) (on file with the University of Michigan Journal of Law Reform).
73. *Id.*
74. *Id.*

members, fourteen of which are elected by member schools, four appointed by the Representative Council, and one representative of the State Superintendent of Education.[75] In addition, there is an Executive Committee, which creates the rules to enforce policies decided on by the Representative Council.[76] This committee is made up of five Representative Council members, three elected officers, and two members appointed by the president.[77] The Executive Director is "responsible for investigating, deciding and penalizing violations of MHSAA's rules and regulations," although this power is subject to review by the Representative Council and the Executive Council.[78] The structure of MHSAA suggests that while there are aspects of state presence, local voices and concerns decide important issues relating to interscholastic athletic policies.

MHSAA schedules are created pursuant to member preferences. This deference to members was shown when MHSAA had to determine which sports to switch when submitting a compliance plan. When the district court ordered MHSAA to submit a compliance plan,[79] MHSAA conducted a survey of member schools, of which eighty-six percent (649 schools) responded.[80] The results support the view that schools and districts have an affinity for separate season sports scheduling. Of the 649 responding schools, 509 picked basketball as the one girls' sport they least wanted to move to another season.[81] In response to a question regarding the combining of seasons, seventy-five percent of the schools picked basketball as the sport they would least like to see combined.[82] MHSAA then submitted the first compliance plan, which reflected these local preferences while still maintaining compliance with the district court's opinion.[83]

Judge Enslen[84] did not heed these local preferences. While the initial plan met the Judge's mandate that the girls and boys share

75. *Cmtys. for Equity*, 178 F. Supp. 2d at 812.

76. *Id.* at 812–13.

77. *Id.* at 812.

78. *Id.* at 813.

79. *Id.* at 862.

80. *See* Press Release, Michigan High School Athletic Association, Sports Seasons Survey Results (May 22, 2002), *available at* http://www.mhsaa.com/news/02survey.pdf (on file with the University of Michigan Journal of Law Reform).

81. *Id.* Girls' basketball is played in the fall in Michigan and boys' basketball is played in the winter.

82. *Id.*

83. Michigan High School Athletic Association, *Compliance Plan of the MHSAA for the U.S. District Court, available at* http://www.mhsaa.com/news/02plan.pdf (on file with the University of Michigan Journal of Law Reform) [hereinafter *First Compliance Plan*].

84. The district court judge for *Cmtys. for Equity*, 178 F. Supp. 2d at 805.

the advantages and disadvantages of the new seasons equitably,[85] the court did not accept the plan. The initial plan proposed a switch of boys' and girls' seasons in three sports—tennis, swimming and golf—[86] but the court was not satisfied by this proposal and ordered MHSAA to switch girls' basketball and volleyball seasons.[87] The second plan,[88] mandated by the court, switched girls' basketball and volleyball seasons, effectively silencing the local preferences of a majority of MHSAA member schools who had expressly rejected such a plan.[89]

This example shows that MHSAA protects local preferences. It may be argued that local preference is merely a protection of the status quo and if the seasons had been scheduled as most other states schedule their seasons, schools would have fought to keep the status quo in that instance as well. This could be true. However, since schools determine the sports seasons in Michigan, schools have determined what the status quo should be. MHSAA member schools decide individually what sports they offer and in what seasons they are played.[90] Additionally, majority vote of MHSAA members determine MHSAA post-season tournaments.[91] This procedure explains how, pursuant to local preferences, some schools in the Upper Peninsula of Michigan play two sports seasons at a different time than most other schools in the State.[92]

Moreover, schools had expressed these preferences long before the latest survey in 2002. The most recent survey is at least the sixth time in the last twenty-four years that MHSAA has solicited input when determining the season for the girls' basketball post-season tournament.[93] Specifically, MHSAA Executive Director relayed that, "[a] 1998 survey of MHSAA member schools shows that more than 82 percent of respondents favor the current schedule and do not want to change the seasons to coincide with colleges. The scheduling of volleyball and basketball has been surveyed with similar

85. *Id.* at 862.

86. *First Compliance Plan*, *supra* note 83, at 4.

87. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, No. 1:98-CV-479, 2002 U.S. Dist. LEXIS 14220, at *20 (W.D. Mich. Aug. 1, 2002).

88. Michigan High School Athletic Association, *Amended Compliance Plan* (Oct. 30, 2002), *available at* http://www.mhsaa.com/news/amendplan.pdf (on file with the University of Michigan Journal of Law Reform).

89. *First Compliance Plan*, *supra* note 83, at 2–2–2.

90. *Id.* at 2.

91. *Id.*

92. *Id.*

93. Press Release, Michigan High School Athletic Association, Federal Court Realigns Sports In Seasons Case: Executive Director John E. "Jack" Roberts Issues Statement (Aug. 1, 2002), *available at* http://www.mhsaa.com/news/02ruling.html (on file with the University of Michigan Journal of Law Reform).

results five other times in the past."[94] MHSAA does not create policy and apply it to schools in a top-down manner. Instead, MHSAA provides an avenue for coordinating local preferences.

c. MHSAA and TSSAA—Consequences of Being a State Actor— Despite the local nature of this association, the district court found MHSAA to be a state actor, and thus liable under the Equal Protection Clause of the Fourteenth Amendment.[95] State actor status is important in two regards for this matter. First, if MHSAA is a state actor, the argument for local control under *Romer* and *Seattle School District* becomes clouded. Second, as a state actor, MHSAA can be found liable under different legal claims, such as the Equal Protection Clause. On remand, the state actor question will still matter, despite the expected Title IX inquiry instead of the § 1983 Equal Protection Clause claim.

In determining that MHSAA is a state actor, the court looked to *Brentwood Academy v. Tennessee Secondary School Athletic Association*,[96] a 2001 Supreme Court case that found the Tennessee Secondary School Athletic Association (TSSAA) is a state actor after finding "entwinement" between the State and the private organization. In *Tennessee Secondary School Athletic Association*, the Court stated, "[e]ntwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it."[97] However, when determining the level of entwinement, the Court outlined a fluid standard:

> [T]he criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some

94. Press Release, Michigan High School Athletic Association, A Commentary by MHSAA Executive Director John E. "Jack" Roberts: How The MHSAA Operates (Dec. 14, 2001), *available at* http://www.mhsaa.com/news/00jackoperates.html (on file with the University of Michigan Journal of Law Reform).

95. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 178 F. Supp. 2d 805, 847 (W.D. Mich. 2001). Under the Fourteenth Amendment,

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

96. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001).

97. *Id.* at 302.

countervailing reason against attributing activity to the government.[98]

The district court in *Communities for Equity* found many similarities between TSSAA and MHSAA and thus determined that MHSAA deserved "state actor" status as well.[99] However, using the Supreme Court's reasoning above, MHSAA is not necessarily a state actor for two reasons. First, the criteria for finding "entwinement" are not well settled. The court should engage in a more searching review of MHSAA's state actor status, focusing on its structure, organization, and control by local school districts. Through this thorough investigation, MHSAA's status as a local, and not state, actor could be determined.

Second, even if a court determined that an organization had the characteristics of a state actor, a court could deny state actor status if there is "some countervailing reason against attributing activity to the government."[100] In this instance, MHSAA should not be considered a state actor because this status could jeopardize the local power afforded in cases like *Romer* and *Seattle School District.* As mentioned previously, the Supreme Court encouraged local institutions to affirmatively fight discrimination in both *Romer* and *Seattle School District.* This rationale provides the "countervailing reason against attributing activity to the government" and as a result, MHSAA should not be found to be a state actor.

B. An "Exceedingly Persuasive" Justification

This paper advances two reasons why MHSAA should be able to continue scheduling in nontraditional sports seasons. The first, discussed above, argues for local control of the type protected in *Romer* and *Seattle School District.* The second reason, discussed in this Section, is that MHSAA, if deemed a state actor, can show an exceedingly persuasive justification for scheduling sports in this way. The analysis in this Section of the paper focuses on the Equal Protection claim examined by both the district court and the Sixth Circuit. As mentioned previously, when the Sixth Circuit decides the case on remand, it must do so in light of *City of Rancho Palos Verdes.*[101] As a result, the Sixth Circuit might focus on the Title IX

98. *Id.* at 295.
99. *Cmtys. for Equity*, 178 F. Supp. 2d at 847.
100. *Brentwood Acad.*, 531 U.S. at 285.
101. *See supra* notes 18–25 and accompanying text.

claim, requiring a different analysis. The potential Title IX approach by the court is speculative and as a result will not be addressed in this Note.[102]

Using the Equal Protection analysis, the district court found that MHSAA had not shown an "exceedingly persuasive" justification for treating boys and girls separately. The court commented that "MHSAA presented insufficient evidence . . . that logistical concerns could not be resolved if both sexes played in the same season"[103] and did not "present enough evidence at trial to demonstrate how many schools have inadequate facilities . . . ."[104] MHSAA did not meet its burden of proof and persuasion in this case, but this does not necessarily mean that practices like those of MHSAA are in violation of the Equal Protection Clause. A more thorough review of Michigan's student athlete participation reflects that MHSAA's system promotes its mission of providing athletic opportunities to the maximum number of student athletes.[105]

While not a legal standard, this paper will also argue that in *New State Ice Co. v. Liebmann*,[106] Justice Brandeis presents a framework through which to view MHSAA's actions. Under this view, MHSAA should be encouraged to challenge accepted norms—the system used by the majority of states—in order to remedy social problems. In this case, the social problem is providing athletic opportunities to all of Michigan's willing high school students and MHSAA's creative solution has been to use nontraditional seasons.

1. Michigan's Student Athlete Participation—MHSAA can show that one of the reasons for using nontraditional sports seasons, to promote high youth participation in athletics, is an exceedingly persuasive justification for the scheduling and therefore passes the intermediate scrutiny standard.[107] MHSAA argues that Michigan's

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102. For further information on this case and the Title IX analysis, *see generally* Courtney E. Shafer, Note, *Following the Law, Not the Crowd: The Constitutionality of Nontraditional High School Athletic Seasons*, 53 DUKE L.J. 223 (2003).

103. *Cmtys. for Equity*, 178 F. Supp. 2d at 839.

104. *Id.* at 840.

105. For example, MHSAA Communications Director John Johnson comments on the "reason school sports—educational athletics—exist. Not to cater to elite athletes. Not to be a feeder system for colleges and clubs. Rather, to be there for every athlete who's willing and able to play by school rules. To be there to complement a students' [sic] classroom experience." Press Release, Michigan High School Athletic Association, An MHSAA Commentary By Communications Director John Johnson: Hearing the Cheers (May 13, 2005), *available at* http://www.mhsaa.com/news/05jjcommentary.htm (on file with the University of Michigan Journal of Law Reform).

106. New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

107. *See supra* note 27 for a discussion of intermediate scrutiny as announced in United States v. Virginia, 518 U.S. 515 (1996). In addition, *see supra* Part II.B for a discussion of MHSAA's defenses.

high ranking (sixth)[108] among the states of total participation by male and female high school athletes shows that the current scheduling of seasons maximizes student athletic participation. MHSAA also points to states that schedule both sexes in the same season and their lower participation rates to suggest that concurrent seasons decrease participation opportunities for students.[109] The district court dismisses this suggestion as "circumstantial evidence that simply proves little."[110]

A closer look begs the question of whether this really is circumstantial evidence. The district court stresses that since Michigan has the eighth highest state population,[111] one would expect Michigan to rank in the top ten for the number of student athletes in each sport.[112] The court further warns that even in sports where Michigan ranks higher than eighth, there are an unlimited number of outside factors that could explain the high level of participation.[113] This may be true, but the number of Michigan female participants in the six sports that the court examines is quite impressive nonetheless. In none of those six sports does Michigan rank lower than sixth for female participation across states. In fact, Michigan ranks third in female participation in basketball and tennis.[114]

In addition, there does seem to be a link between scheduling and the availability of facilities and resources for other states. In more than half the states where basketball is played in the same season, freshman or junior varsity teams have been eliminated in

108. National Federation of State High School Associations, *NFHS 2003–04 High School Athletics Participation Survey* (2004), http://www.nfhs.org/scriptcontent/VA_Custom/SurveyResources/2003_04_Participation.pdf (on file with the University of Michigan Journal of Law Reform) [hereinafter *Athletics Participation Survey*]. Michigan ranked sixth in 2003–2004. The author is unclear which years were presented as evidence at trial, so the author will use this figure for overall participation.

109. *Cmtys. for Equity*, 178 F. Supp. 2d at 841.

110. *Id.*

111. *See* U.S. CENSUS BUREAU, RANKING TABLES FOR STATES: 1990 AND 2000, TABLE 1: STATES RANKED BY POPULATION: 2000 (2001), *available at* http://www.census.gov/population/cen2000/phc-t2/tab01.pdf [hereinafter 2000 CENSUS].

112. *Cmtys. for Equity*, 178 F. Supp. 2d at 841.

113. *Id.* at 842. For example, school and athletic program funding, the number of schools in a state sponsoring a certain sport, and cultural attitudes are factors that could contribute to high levels of participation.

114. *Athletics Participation Survey*, *supra* note 108. The author is using the numbers for the 2003–2004 school year, which the court did not review, but which are probably indicative of the numbers the court would have seen. Basketball and tennis ranked third in participation, behind only the heavily populated states of California and Texas. In addition, Michigan volleyball and golf ranked fourth. Michigan girls' soccer and swimming and diving were sixth highest in the nation for female participation.

order to meet the demands on facilities, coaches, and officials.[115] Using Kentucky, which schedules boys' and girls' basketball at the same time, as an example, one can see how concurrent scheduling might work to disadvantage female athletes.[116] While 20,661 girls in Michigan participated in high school basketball in 2003–2004, only 5,950 participated in Kentucky.[117] These numbers, viewed in a vacuum, are deceptive because Kentucky has less than half the population of Michigan.[118] However, the number of girls who play basketball per school in each state paints an accurate picture. Kentucky averages only twenty-one players per school, which likely fields two teams, as compared with Michigan's average of twenty-nine players per school, equating to roughly three teams.[119] Kentucky is not alone; Tennessee has fourteen players per school, Oklahoma has fifteen, Alabama fifteen, Florida twenty-one, Ohio twenty-three, New York twenty-four, Iowa twenty-four, and Missouri twenty-four.[120] These figures suggest that the district court may have given too much weight to "the way other states do it" in determining the best arrangement for Michigan athletes. Michigan, in fact, may be doing it better than other states by giving more girls a chance to play.

The numbers also suggest that this switch could end up hurting volleyball players, the sport the court took such pains to protect. There seems to be a trend; many states that offer boys' and girls' basketball at the same time do not offer volleyball. In Georgia, 203 of the schools that sponsor girls' basketball do not sponsor girls' volleyball.[121] The numbers are equally as frightening for Oklahoma (380), Texas (238), and New Jersey (240) for the number of schools that sponsor boys' and girls' basketball in the same season and do not sponsor volleyball.[122] While Michigan will not necessarily have to cut back on volleyball programs,[123] switching girls'

115. Bob Becker, *Ruling Thursday Could Change Girls Sports Landscape: District Judge to Decide on MHSAA Scheduling Plan*, GRAND RAPIDS PRESS, July 31, 2002, at E1, *available at* 2002 WLNR 11942312 (on file with the University of Michigan Journal of Law Reform).

116. This analysis was presented by Schafer, *supra* note 102, at 250.

117. *Athletics Participation Survey*, *supra* note 108.

118. *See* 2000 CENSUS, *supra* note 111.

119. *Athletics Participation Survey*, *supra* note 108, at 56; Schafer, *supra* note 102, at 251.

120. Becker, *supra* note 115.

121. *Id.*

122. *Id.*

123. Just because other schools and states did not develop volleyball as a popular sport for girls does not mean that Michigan will have to drop its volleyball programs. The sport is strong in the State of Michigan and the numbers reflect this preference. Michigan has the fourth highest number of volleyball players in the nation, suggesting that school districts may make certain sacrifices to maintain their volleyball programs. *Athletics Participation Survey*, *supra* note 108, at 60.

basketball and volleyball seasons is not a solution immune from challenges.

The above analysis suggests that MHSAA's justification for scheduling sports in nontraditional seasons is exceedingly persuasive. Not only do more students generally play sports in Michigan, but more females play sports in Michigan. As the district court pointed out, this may not be a causal connection. Michigan's scheduling of seasons may not have induced more students to play sports. It does show, however, that the policy of using nontraditional seasons does not hurt the number of high school athletes, a likely consequence if both boys' and girls' seasons for a particular sport were the same.

MHSAA made a decision to create the maximum amount of athletic opportunities for all students. The district court, however, does not evaluate this case in light of that goal, but rather focuses on a sub-group of female athletes in Michigan, those who play club sports[124] or those who want to continue competing in that sport after high school. While these goals are admirable, they are not the goals of MHSAA, which sought to provide the most benefits to the most students through athletics. MHSAA should have been given more deference to work for this goal.

2. MHSAA and "Experimentation"—This Note now introduces Justice Brandeis' idea of using states as laboratories of experimentation. While Brandeis' view is not of precedential value, it is a common sense solution presented by an influential Supreme Court Justice. As such, it provides a valuable approach to support MHSAA's scheduling.

New State Ice Co. v. Liebmann[125] concerns an ice manufacturer who violated a state statute by creating ice when he did not have state permission to do so.[126] In response, the Court held that Liebmann had a right to make ice and therefore could not be regulated in this way by the Oklahoma Legislature.[127] Brandeis, in his dissent, came to the defense of the Oklahoma Legislature arguing that so long as its rules were not arbitrary, the Legislature should be able to enact its own laws, regardless of whether the Court thought them wise.[128]

This case was decided during the Great Depression, which influenced Brandeis's dissent. Because the nation was facing an

124. Club sports are those that are not sponsored by the school.

125. New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

126. For a summary of Brandeis's dissent, *see* Adam Cohen, *Brandeis's Views on States' Rights, and Ice Making, Have New Relevance*, N.Y. TIMES, Dec. 7, 2003, § 4, at 12.

127. *New State Ice Co.*, 285 U.S. at 280.

128. *Id.* at 285 (Brandeis, J., dissenting).

"emergency more serious than war,"[129] Brandeis encouraged "experimentation" and "trial and error"[130] to fix the economic and social situation of the United States at that time. Specifically, Brandeis spoke of the role of the states in this process:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[131]

Brandeis thus encouraged the states to "experiment" to find solutions to social and economic problems. He also supported the notion of the states as separate entities to be evaluated individually.

Communities for Equity should be evaluated using this idea because Michigan, through MHSAA, has been a state "experimenting" with a solution to a social problem; females nationwide were afforded fewer opportunities than males to play and thus benefit from increased athletic opportunities. In response to this social ill, and in large part motivated by Title IX, individual schools and states began adding girls' teams and competitions.[132]

As far as scheduling is concerned, there appears to be two state responses to the increase in female athletics in accommodating both boys' and girls' sports. The first is to put the same sports in the same season and the second is Michigan's response: keep many of the sports from being in the same season in an attempt to provide the most resources to the most student athletes. The court in *Communities for Equity* seems to give value to the first listed response, to put both sexes in the same season. The reason for the court's support of this position revolves mostly around interstate

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129. *Id.* at 306.

130. *Id.* at 310.

131. *Id.* at 311.

132. In recent decades, there have been nationwide increases in the number of female participants in athletics. For example, in 1971, a year before the passing of Title IX, fewer than 295,000 girls participated in high school sports, which accounted for only 7% of high school athletes at that time. NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, TITLE IX AT 30: REPORT CARD ON GENDER EQUITY 14 (2002), *available at* http://www.aahperd.org/nagws/pdf_files/title930.pdf (on file with the University of Michigan Journal of Law Reform). Fortunately, the numbers have changed dramatically. Thirty years later, in 2001, a reported 2,784,154 high school girls participated in sports, accounting for 41.5% of high school athletes in the United States, showing an increase of more than 847% from 1971. *Id.* at 15.

competition and national rankings.[133] However, the choice of other states to place both sexes in the same season should not, without more, indicate that Michigan's scheduling system is inferior or discriminatory.

Of course, the court should not uphold the experimentation if it violates the law. However, as shown above, MHSAA's policies can be shown not to violate the Equal Protection Clause. At the very least, Brandeis's ideas should give today's Justices pause. Within the federal and state system, there is room for states to act individually to correct state problems.

IV. IMPLICATIONS OF THE SIXTH CIRCUIT'S DECISION

The Sixth Circuit's opinion purports to help females, as a protected class of persons.[134] The court, however, failed to account for two other groups—minority student athletes in Michigan and current student athletes in Michigan. This Part will explore the policy considerations as well as potential legal claims that the court should have addressed when invalidating the current MHSAA scheduling.

A. Minority Athlete Concerns

The first group—minority student athletes—could be harmed by a change to house both boys and girls teams of a particular sport in the same season. This argument relies on un-tested assumptions. While there is no specific data to rely on, the possible implications of such a change are serious. As argued previously, a mandate to have both boys' and girls' teams of a particular sport in the same season could reduce the number of Michigan student athletes as a result of limited playing fields, practice times, officials, and coaches.[135] Intuitively, this change would most drastically affect those school districts with limited resources. Resources in this context include, but are not limited to, volunteers, coaches, money, and equipment. It follows that when schools have minimal resources, and two teams have to share these resources in one

133. *E.g.*, Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 178 F. Supp. 2d 805, 819–20 (W.D. Mich. 2001) (discussing the benefits of playing girls' basketball in the winter).

134. Gender classifications are subject to intermediate scrutiny. *See supra* note 27.

135. *See supra* notes 115–123 and accompanying text.

season, there could be a reduction of student athletes.[136] It also follows that the number of student athletes will remain constant for schools that have an abundance of resources. For example, if a school is able to build another gym to provide another playing surface for their student athletes, practice and game time will not be affected, and it is less likely that teams will be cut or that the number of student athletes at that particular school will decrease.

The story is not as optimistic in places where there are limited resources. In Michigan, Detroit tells this story. Detroit's public school system has struggled both financially and in maintaining enrollment numbers.[137] For example, in the fiscal year 2004, Detroit public schools faced a $198 million shortfall in the budget.[138] In recent years, Detroit schools appeared to need much help: from 1999 to 2003, the State took control of the Detroit public schools by appointing a "reform board."[139] While control of public schools has recently been given back to the City of Detroit,[140] financial troubles remain.

Detroit public schools are not likely to provide additional resources to sports when struggling to keep schools open and to prevent layoffs.[141] There is simply no surplus of funds from which to make these accommodations. Therefore, switching sports seasons may result in a lower number of student athletes in places with fewer resources—places like Detroit. It appears that some municipalities may feel the effects of the Sixth Circuit's ruling more forcefully than others.

In addition to differences between cities, the switching of seasons could also lead to differences between races or between the rich and poor of Michigan. The population of Detroit in 2004 was made up of approximately eighty-five percent Black or African American individuals.[142] Meanwhile, the Black or African American population in the entire state of Michigan is only about fourteen

136. *Id.*

137. *See, e.g.*, John Gehring, *Detroit Schools Facing Massive Cuts, Layoffs*, EDWEEK.ORG, Dec. 1, 2004, http://www.edweek.org/agentk-12/articles/2004/12/01/14detroit.h24.html# (on file with the University of Michigan Journal of Law Reform).

138. *Id.*

139. *Id.*

140. *Id.*

141. In 2004, some estimated a layoff of as many as 4,000 public school employees and the closing of as many as forty schools. *See* Gehring, *supra* note 137.

142. U.S. CENSUS BUREAU, DETROIT CITY, MICHIGAN—FACT SHEET—AMERICAN FACTFINDER (2004), http://factfinder.census.gov/home/saff/main.html?_lang=en (type "Detroit" in the text box and select "Michigan" in the list of states; click "GO" and follow the link to "Detroit city, Michigan"; click on "2004" tab) (on file with the University of Michigan Journal of Law Reform).

percent.[143] While further analysis of these numbers and statistics is outside the scope of this paper, the possibility of a particular race facing a larger reduction in student athletes than another race, as a result of a change in sports season scheduling, is cause for concern.[144]

1. Policy Considerations—As discussed previously, the Sixth Circuit's mandate that MHSAA switch sports seasons may have a harsher effect on particular groups of student athletes, namely those in districts with fewer resources, and perhaps some minority students. This disparate impact may or may not provide a basis for a legal claim. It should, however, provide incentives for the Court to reexamine the Sixth Circuit's decision and the possible aftermath of it. If the switch of seasons really will result in fewer opportunities for student athletes and may largely affect minority districts, like Detroit, is this the sort of policy the state should be made to adopt? A quick look at the benefits of sports for females should help convince the court of MHSAA's goal to maximize athletic participation in high schools.

Athletic opportunities provide benefits to females.[145] For example, athletes in general are less likely to smoke or use drugs.[146] Adolescent female athletes have lower rates of pregnancy and sexual activity, higher grades and graduation rates than non-athletic students, and develop their mental and physical health through sports.[147] These benefits are also very important for minority females.[148] Like all female adolescent athletes, minority female athletes get better grades than minority non-athletes.[149] These benefits reach beyond the school grounds as well, as minority female athletes are more likely than non-athletes to be involved in

143. U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: 2003 ACS TABULAR PROFILE FOR MICHIGAN—TABLE 1 (2003), *available at* http://www.census.gov/acs/www/Products/Profiles/Single/2003/ACS/Tabular/040/04000US261.htm (on file with the University of Michigan Journal of Law Reform).

144. Using the same analysis, possible discrimination can also exist for economically disadvantaged communities.

145. For a comprehensive review of benefits to females, *see* DON SABO ET AL., WOMEN'S SPORTS FOUNDATION, THE WOMEN'S SPORTS FOUNDATION REPORT: HER LIFE DEPENDS ON IT: SPORT, PHYSICAL ACTIVITY AND THE HEALTH AND WELL-BEING OF AMERICAN GIRLS (2004), *available at* http://www.womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/990.pdf (on file with the University of Michigan Journal of Law Reform).

146. *See, e.g.*, Chaudry & Greenberger, *supra* note 7, at 5.

147. *Id.* at 5–6 (explaining that "playing sports helps young women develop self-confidence, perseverance, [and] dedication" and "[y]oung women who play sports have a higher level of self-esteem, a lower incidence of depression, and a more positive body image").

148. *Id.*

149. *Id.*

extracurricular activities and more likely to be acting as leaders in their communities.[150] Whether or not sports benefit minority populations more than non-minority populations is a conversation yielding mixed results,[151] but sports are at least as beneficial for minority athletes as for non-minority athletes.

2. Legal Claims: Equal Protection, Title VI, or ELCRA?—The decision to reschedule Michigan's sports seasons could implicate more than a harmful social policy; it might also be against the law. This Section will briefly introduce three distinct legal claims that could be advanced in response to switching sports seasons. While far from a complete legal analysis, this discussion serves to introduce possible legal complications with the Sixth Circuit's decision.[152]

First, can minority athletes bring an Equal Protection claim[153] if schools in largely minority districts are forced to cut back on teams as a result of limited resources when schools in non-minority districts need not make these same cutbacks? If such a claim could be advanced in American legal jurisprudence, it would be a disparate impact claim requiring a showing that an otherwise facially neutral policy has a discriminatory effect on members of a protected class. Generally, courts addressing race-based distinctions apply strict scrutiny.[154] However, this heightened scrutiny may not benefit plaintiffs with disparate impact claims, such as the claim advanced above. The Supreme Court notes that "[a]lthough disparate impact may be relevant evidence of racial discrimination, such evidence alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny."[155] Moreover, evidence of disparate impact in this case would probably be insufficient to show an Equal Protection violation, even if the state's action was

150. *Id.*

151. *See, e.g.*, DON SABO ET AL., WOMEN'S SPORTS FOUNDATION, THE WOMEN'S SPORTS FOUNDATION REPORT: MINORITIES IN SPORTS: THE EFFECT OF VARSITY SPORTS PARTICIPATION ON THE SOCIAL, EDUCATIONAL AND CAREER MOBILITY OF MINORITY STUDENTS (1989) (on file with the University of Michigan Journal of Law Reform); Don Sabo, *Mexican-American Girls And High School Sports*, http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/part/article.html?record=46 (last visited Mar. 10, 2006); Jeanne Weiler, *The Athletic Experiences of Ethnically Diverse Girls*, PARENTSASSOCIATION.COM, http://www.parentsassociation.com/sports/athletic_experience.html#ewi (last visited Mar. 10, 2006).

152. Because the district court in *Communities for Equity* determined that MHSAA is a state actor, MHSAA is subject to Equal Protection scrutiny.

153. Pursuant to the Equal Protection Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1.

154. Grutter v. Bollinger, 539 U.S. 306, 326 (2003). The Supreme Court describes this standard as meaning "that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Id.*

155. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372–73 (2001) (internal citation omitted).

subject to strict scrutiny, which is unlikely since a change in sports season scheduling would not constitute a racial classification.

Second, Title VI of the Civil Rights Act of 1964[156] may provide a basis for a valid claim. This Title prohibits discrimination on the basis of race, color, or national origin under programs receiving federal financial assistance. Schools in Michigan are covered by Title VI in the same way that Title IX applies to state schools because of federal financial assistance. However, unlike the original Title IX claim at issue in this case, effects merely felt by minority athletes, and not explicitly required by MHSAA, may not constitute a legal claim under Title VI.[157] This is because the Supreme Court held that disparate impact claims under the regulations promulgated[158] pursuant to Title VI § 602 do not support a private right of action.[159] Since Title VI itself prohibits only intentional discrimination,[160] a disparate impact claim would need a different legal basis. The regulations do not provide this basis.[161] Justice Stevens, however, argues that disparate impact claims can still be brought pursuant to Title VI so long as they are brought under 42 U.S.C. § 1983.[162] The Supreme Court has not determinatively decided whether a disparate impact claim can be brought in relation to Title VI. As a result, there is a possibility that minority athletes whose teams have been cut back, when non-minority teams have not been cut back, could bring a disparate impact claim under the regulations promulgated pursuant to Title VI so long as the claim is brought through 42 U.S.C. § 1983.

Third, minority student athletes who feel the effects more harshly than non-minority students may be able to bring a claim under Michigan's own civil rights statute, The Elliot-Larsen Civil Rights Act.[163] The Michigan Supreme Court has held that under ELCRA, a plaintiff may bring an employment discrimination claim in one of two categories: disparate treatment or disparate impact.[164] Plaintiffs bringing a claim for other civil rights actions pursuant to

156. 42 U.S.C. § 2000d (2006). "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

157. *See generally* Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 73 n.107 (2001).

158. 28 C.F.R. § 42.104(b)(2) (2000).

159. Alexander v. Sandoval, 532 U.S. 275 (2001).

160. *Id.* at 280.

161. *Id.*

162. *Id.* at 300 (Stevens, J., dissenting).

163. MICH. COMP. LAWS §§ 37.2101–37.2804 (2005).

164. Lytle v. Malady, 458 Mich. 153, 177 n.26 (1998) (analyzing an age discrimination case).

ELCRA, however, must show either disparate treatment or intentional discrimination,[165] making it more difficult for a plaintiff to bring a non-employment related claim, such as the one in this instance. As a result, minority athletes feeling the effects of the changed season more than non-minority athletes probably will not be able to bring an ELCRA case based on disparate impact.

Regardless of the success of possible legal claims targeting the season switch, Sixth Circuit justices should consider the effects of such a switch. The district court in *Communities for Equity* failed to take into account how the switching of seasons could impact Michigan's minority females. The court assessed the relationship between athletes and club sports,[166] but never addressed the fact that minority girls are much more likely to participate in sports sponsored through their schools than through private, or club organizations.[167] While rearranging Michigan's high school sports seasons may benefit those who are able to play club sports, through alleged increased recruiting opportunities, this change could negatively impact those students who depend on their school to provide athletics if less opportunities for "playing" are available.[168] Moreover, what of the students who cannot afford to participate in private organizations? Equipment and travel costs are expensive and many students and their families are unable to afford them, but instead rely on schools to facilitate and subsidize competition.

B. Student Athletes Today

Current students of grade school, middle school, and high school age are another group that may be harmed by the Sixth Circuit's opinion. Both boys and girls in Michigan have relied on the current sport scheduling to pick "their" sports. Many grade school and middle school students may pick a few sports early in which to specialize, relying on the current season scheduling. In changing the seasons from their current scheduling, the court's decision harms those who have already trained and focused on particular sports.

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165. Clarke v. K-Mart Corp., 197 Mich. App. 541, 545 (Mich. Ct. App. 1992).

166. *See, e.g.*, Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 178 F. Supp. 2d 805, 822–24, 830 (W.D. Mich. 2001).

167. Chaudry & Greenberger, *supra* note 7, at 6 (citing THE WOMEN'S SPORTS FOUNDATION, THE WILSON REPORT: MOMS, DADS, DAUGHTERS AND SPORTS 5 (1988)).

168. *See supra* notes 115–123 and accompanying text.

Current high school athletes face one of three situations when sport season scheduling is changed. First, a current athlete may have an opportunity to play a new sport. Second, a current athlete may have to cease playing a particular sport. Third, participation on sports teams could remain unchanged. Of these three possibilities, the second presents an unfortunate effect of the Sixth Circuit's current decision.

In trying to "fix" the system, the court should pay attention to all current athletes. The change may mean that student athletes, boys and girls alike, have to drop one of "their" sports due to a scheduling conflict. Initially, there seems to be no problem. Those choosing to play more than one sport can just pick up another sport. However, the solution is not that simple. Many students focus only on two or three sports. Skill and athleticism in one sport do not transfer into All-Star status in another sport. Yes, these students could pick up a new sport during high school. However, they may not be very good at the new sport, or some students may chose not to pick up another sport this late in their high school careers. This could harm Michigan's current athletes' chances at college athletic scholarships.

Less harmed, but still inconvenienced, are middle and grade school students. Many of these students have begun molding themselves to be great golfers, soccer players, or swimmers, or to play any combination of other sports. With a switching of the sports seasons, younger students may find themselves trying a new sport or sadly choosing between two favorite sports. The court should not forget the students currently involved with or relying on the current scheduling system when determining Michigan's seasons.

V. CONCLUSION

Courts today should heed Brandeis's words from 1932 which warn of stunting creativity in solving social problems: "Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise."[169] MHSAA, and Michigan more generally, has created a system which addresses the needs of the community in a non-discriminatory manner. Instead

169. New State Ice Co. v. Liebmann, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting).

of viewing the system as a negative outlier from the rest of the nation, the court instead should see the scheduling system as a means to enable female participation in high school sports.

MHSAA should have the power to authorize this scheduling as a local actor under decisions like *Romer* and *Seattle School District*; MHSAA is run by school districts, controlled by school districts, and reflects the preferences of school districts. Even under an "exceedingly persuasive" Equal Protection standard, MHSAA's scheduling should be allowed. This scheduling keeps participation numbers maximized for both boys and girls in Michigan.

Changing the season scheduling, and in particular putting both boys' and girls' teams of a same sport in the same season, could hurt Michigan student athletes. In addition, the court should be careful of using mandates which may prove to disparately impact the poor or minority student athletes. MHSAA has created a system designed to maximize athletic opportunities for all student athletes. The court should focus on the benefits this system provides within the State of Michigan to both boys and girls alike.