# ARGUMENTS FOR AN NCAA PATERNITY WAIVER: A STUDENT-ATHLETE FATHER AND HIS RELATIONSHIP WITH TITLE IX AND THE EQUAL PROTECTION CLAUSE

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## I) Introduction

The National Collegiate Athletic Association's ("NCAA") member institutions must answer and be held accountable for their unquestioned adherence to NCAA bylaws and regulations. For too long public universities have shielded themselves with protections afforded to them under *NCAA v. Tarkanian*.[1] The *Tarkanian* decision has resulted in the NCAA bylaws reigning supreme in the field of collegiate athletics, even among publicly supported universities.[2] The NCAA adjudicates and governs eligibility issues, including the implications of student-athlete pregnancy, through its bylaws.[3] Universities are not usually subject to the Due Process Clause or other constitutional mandates as long as the university is acting in accordance with NCAA bylaws.[4]

Student-athlete Pregnancy has attracted media attention in recent years.[5] Media interest began around 2007 after an ESPN program, *Outside the Lines*, highlighted the difficult decision facing pregnant student-athletes: keep the child and risk losing a scholarship, or seek an abortion.[6] At its most basic level, pregnancy is an issue affecting sex, a sentiment that has been recognized by Congress.[7] Women are not the sole party affected by pregnancy. Pregnancy, and the attending responsibilities, should not be a burden borne solely by a woman, but should be ameliorated by her partner.

Currently, the NCAA's bylaws, which all member institutions must follow, make it nearly impossible for a male student-athlete to alleviate the burden on his partner when he becomes a father or is expecting a child. The NCAA permits an eligibility waiver for females who become pregnant during their college athletic career, but it fails to provide similar accommodations to a male who, similarly, is an expecting father.[8] Men deserve the opportunity to prepare for the birth of a child and the crucial life-changing period that follows. If the NCAA and its member universities are truly dedicated to amateurism and the success of their college athletes, they should draft a paternity waiver. This can be accomplished through either the NCAA or by judicial activism. Title IX or the Equal Protection Clause could serve as the basis for such judicial activism.

This Note is premised upon a hypothetical posed by Spencer H. Larche in 2008.[9] This Note will expand upon Larche's hypothetical and discuss the legal, social, and practical implications resulting from

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[1] Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).
[2] *Tarkanian*, 488 U.S. at 183.
[3] Smith v. Nat'l Collegiate Athletic Ass'n, 266 F.3d 152, 157 (2001).
[4] *Tarkanian*, 488 U.S. at 203.
[5] Deborah L. Brake, *The Invisible Pregnant Athlete and the Promise of Title IX*, REVERSING FIELD: EXAMINING COMMERCIALIZATION, LABOR, GENDER, AND RACE IN THE 21ST-CENTURY SPORTS LAW 175, 177 (andré douglas pond cummings & Anne Marie Lafaso eds., 2010).
[6] *Id.*
[7] Pregnancy Discrimination Act, 42 U.S.C.A § 2000e-(k) (1978).
[8] Nat'l Collegiate Athletic Ass'n, 2013–14 NCAA Division I Manual, art. 14.2.1.3 (2014).
[9] Spencer H. Larche, Pink Shirting: *Should the NCAA Consider a Maternity and Paternity Waiver?*, 18 MARQ. SPORTS L. REV. 393, 399–400 (2008).

> [T]he following hypothetical analysis of Butler's Title IX claim proceeds only against Kansas for its enforcement of the NCAA's rule . . . . Operating under the assumption that a court would interpret "for reasons of pregnancy" so broadly as to incorporate maternity leave (as opposed to simply the physical condition of pregnancy), Title IX seems to leave Kansas with a less justifiable reason for excluding paternity leave. For maternity leave alone to be acceptable, the university must provide a sex neutral reason for not allowing paternity leave, which may prove difficult . . . . In short, while Kansas can still argue that the physical rigors of pregnancy require a female-only exception, its argument loses luster when the exception is

a pregnancy eligibility waiver for men ("paternity waiver"). It will further discuss the legal arguments and necessary posture in which an athlete could bring a successful case. Both Title IX[10] and the Equal Protection Clause are necessary weapons in this new-age fight for gender equality. Public pressure must be applied to member universities, not necessarily to the NCAA, if the NCAA's *status quo* is to be altered.[11]

## II) The NCAA

College athletics are regulated by the NCAA, which is governed chiefly by its President and a board composed of presidents and officers of member universities.[12] The NCAA is a private, non-profit organization. As such, it is not considered a state actor for due process or equal protection purposes.[13] Additionally, because the NCAA does not accept the requisite federal funding, it is not beholden to Title IX.[14] These legal facts have led to the NCAA's wide and unencumbered regulation of its member universities, which include the majority of United States universities. The NCAA promulgates bylaws by which its member universities must follow. If a university fails to follow NCAA bylaws, the university will face sanctions from the NCAA that can include loss of awardable scholarships, probation, and suspension.[15] These sanctions can cost universities greatly, both in revenue and in other activities, such as recruitment of players.

### a) The NCAA Pregnancy Exception

Rule 14.2.1.3 of the 2013–2014 NCAA bylaws reads, "A member institution *may* approve a one-year extension of the five-year period of eligibility for a female student-athlete for reasons of pregnancy."[16] This bylaw is referred to as the "Pregnancy Exception." The Pregnancy Exception, and its most recent interpretations, is partly a product of an ESPN report, *Pregnant Pause*, which aired in 2007.[17] The ESPN report highlighted the adversities female athletes face when they become pregnant during their collegiate athletic career. Not only did the program draw attention to the problems these pregnant athletes face, but the story also drew the ire of pro-life advocates.[18] Although the Pregnancy Exception existed at this time, it was not clear whether the female athlete would be able to retain her scholarship and place on the team following the pregnancy.[19] For that reason, pro-life advocates argued that these NCAA

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> also justified as providing time to nurture and care for the new child. Males and females have an equally justifiable need to take time off from athletics to care for a new child. Therefore, to allow this time off for females and not males may prove to be a Title IX violation . . . . For a plaintiff to have a claim under the Equal Protection Clause, the defendant first must be either a public institution or a state actor . . . . In National Collegiate Athletic Ass'n v. Tarkanian, for example, the Supreme Court did not allow Coach Jerry Tarkanian to successfully sue his employer, the University of Nevada at Las Vegas, for its enforcement of an NCAA rule. Because Butler would be suing Kansas over its application of an NCAA rule, a court would most likely view the suit as Tarkanian revisited. Hence, the federal constitutional claim would almost certainly be dismissed, leaving Butler without an Equal Protection claim.

[10] Title IX, 20 U.S.C.A. § 1681(a) (1972).
[11] See *infra* Part II.b.
[12] *Tarkanian*, 488 U.S.at 192–93.
[13] *See, e.g.*, *Tarkanian*, 488 U.S. 179.
[14] *See* National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 468 (1999).
[15] *See, e.g.*, *Tarkanian*, 488 U.S. 179 (The NCAA has handed down many forms of discipline to many universities.).
[16] Nat'l Collegiate Athletic Ass'n, 2013–14 NCAA Division I Manual, art. 14.2.1.3 (2014) (emphasis added).
[17] Brake, *supra* note 5, at 176.
[18] *Id*. at 177.
[19] Brake, *supra* note 5, at 177.

regulations forced a pregnant female athlete to choose between terminating the pregnancy and risking the loss of her scholarship.[20]

Scholarship retention is a more complicated area of the bylaws. Typically, universities award athletic scholarships on a year-to-year basis rather than awarding scholarships for multiple years.[21] Following the ESPN report, the Office for Civil Rights ("OCR"), a division of the Department of Education, informed all publicly funded institutions of their duties owed to pregnant student-athletes.[22] Finding footing in Title IX, OCR mandated that pregnant athletes receive the same treatment as students with medical conditions or other disabilities.[23] Therefore, if a university allows disabled athletes, or athletes with medical conditions, to retain their scholarship, the university must extend the same consideration to pregnant athletes.[24] The OCR opinion permits the retention of scholarships for most pregnant student-athletes, at least for the year. Furthermore, OCR also indicated that, regardless of a university's treatment of disabled athletes, a university may not terminate or reduce a pregnant athlete's scholarship based upon her pregnancy.[25] Pregnant student-athletes now have far more rights than they did just a decade ago. This progress provides the backdrop for the argument to extend a male student-athlete's rights and privileges as a father.

With the context of this rule in hand, it is important to highlight several aspects of the Pregnancy Exception before proceeding to a meaningful analysis. First, it is necessary to note that the rule states that "a member institution *may* approve . . . ."[26] This permissive language effectively gives the university the choice of whether or not to approve the exception. Second, the rule states that this exception is available only to females, which effectively precludes the males from enjoying this exception.[27] Finally, the rule permits the exception only "for *reasons* of pregnancy."[28]

### b) Tarkanian and the Relationship Between the NCAA and Its Member **Institutions**

To understand why an athlete must bring a suit against a member university, not the NCAA, one must look to *Tarkanian*.[29] In *Tarkanian*, the United States Supreme Court ruled that the NCAA is not a state actor for due process purposes.[30] The case traversed decades. It began with an investigation in 1972,[31] and the final disposition of the case did not conclude until 1996.[32]

In 1977, following a lengthy investigation by both the NCAA and the state of Nevada, the NCAA informed the University of Nevada, Las Vegas ("UNLV") that it must suspend its head basketball coach,

[20] *Id.*
[21] Nat'l Collegiate Athletic Ass'n, 2013–14 NCAA Division I Manual, art. 15.02.8 (2014) (emphasis added) (This has been true until recently. Now, according to NCAA bylaw 15.02.8, revised in October of 2011, an institution *may* award financial aid in excess of one year at a time, but the award cannot exceed the athlete's five-year period of eligibility.).
[22] Brake, *supra* note 5, at 184.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] Nat'l Collegiate Athletic Ass'n, 2013–14 NCAA Division I Manual, art. 14.2.1.3 (2014).
[27] *Id.*
[28] *Id.* (emphasis added).
[29] *See generally Tarkanian*, 488 U.S. 179.
[30] *See Tarkanian*, 488 U.S. at 196.
[31] *Id.* at 185.
[32] University of Nevada v Tarkanian, 110 Nev. 581 (1994) (This was the final ruling in the *Tarkanian* series of cases).

Jerry Tarkanian, for alleged NCAA rule violations.[33] Furthermore, the NCAA put UNLV's basketball team on probation for two years.[34] It also charged UNLV to show "cause" as to why the NCAA should not impose additional penalties if the University did not to sever all ties with Coach Tarkanian.[35] UNLV appealed this decision to the NCAA Council, which granted a hearing; however, the Council unanimously approved the investigation and sanctions.[36] UNLV's president subsequently held a hearing to decide how the University should proceed. He concluded that the University had three options:

1. Reject the sanction requiring [the University] to disassociate Coach Tarkanian from the athletic program and take the risk of still heavier sanctions, *e.g.*, possible extra years of probation.

2. Recognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters, thus reassigning Mr. Tarkanian from his present position-though tenured and without adequate notice-even while believing that the NCAA was wrong.

3. Pull out of the NCAA completely on the grounds that [the President of the University] will not execute what [the President of the University] hold[s] to be [the NCAA's] unjust judgments.[37]

At this point, the University was obviously not pleased with the NCAA's findings, decisions, and sanctions. Nonetheless, the President of the University decided that UNLV should sever ties with Coach Tarkanian rather than subject the University to further sanctions by the NCAA.[38]

Before his suspension was effective, Coach Tarkanian filed suit in a Nevada court alleging that his suspension and termination deprived him of his due process rights under the Fourteenth Amendment.[39] A trial court enjoined UNLV from suspending Tarkanian, but the NCAA, a previously unnamed party, contended that it was a necessary party in the suit.[40] The Supreme Court of Nevada agreed and remanded the case so that the NCAA could be joined as a party.[41] Once the NCAA was joined as a party, the case remained in state court for several proceedings, but it eventually made it to the United States Supreme Court.[42]

Once the NCAA became a named party, the controversy put before the Nevada Court was to determine whether the NCAA had become so entwined with the state university that the NCAA, itself, had become a state actor for due process purposes.[43] The Nevada Court ruled, and the Nevada State Supreme Court affirmed, that the NCAA had engaged in state action for three reasons. First, it found that the sanctions were more than proposed or *recommended* sanctions.[44] Second, many NCAA universities are publicly supported, and the NCAA seeks to regulate them.[45] Third, disciplining state employees is

[33] *Tarkanian*, 488 U.S. at 181.
[34] *Id.* at 186.
[35] *Id.*
[36] *Tarkanian*, 488 U.S. at 181.
[37] *Id.* at 187.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 188.
[41] *See generally* University of Nevada v. Tarkanian, 95 Nev. 389 (1979).
[42] *Tarkanian*, 488 U.S. at 188.
[43] *Id.*
[44] *Id.* at 190 (emphasis added).
[45] *Id.*

traditionally a prerogative of the state, and the state university cannot simply escape its responsibility by delegating that duty to a third party, meaning the NCAA.[46]

When the case was put before the United States Supreme Court on appeal, the Court held that the NCAA is not a state actor. Based upon precedent,[47] the NCAA failed to meet the standard of a state actor.[48] Ignoring the practical and financial ramifications of such an action,[49] the United States Supreme Court found that UNLV had the ability to withdraw from the NCAA at any time.[50] Furthermore, the Court noted that UNLV never directly delegated any power to the NCAA for the purpose of disciplining a state employee, nor did the NCAA enjoy any state investigative powers.[51]

Finally, and of critical importance for the purpose of this Note, the Court found that UNLV was *insulated from a suit for deprivation of due process* because UNLV was acting under the color of NCAA policies, rather than under the color of Nevada law.[52] Notably, the Court based this decision in practicality, stating, "It would be ironic indeed to conclude that the NCAA's imposition of sanctions against UNLV . . . is fairly attributable to the State of Nevada."[53] The Court based this conclusion largely on the fact that UNLV and Nevada fought the NCAA's imposition of sanctions throughout the entire course of litigation.[54] For the foregoing reasons, if one is going to bring a constitutional cause of action claim arising out of NCAA bylaws, one should begin by bringing such a claim against the university, or state actor, rather than the NCAA.[55]

**c) Butler v. NCAA: Eric Butler's Claim for a Paternity Waiver**

*Butler v. Nat'l Collegiate Athletic Ass'n* was decided in 2006, and it is currently the only case in which a male athlete has sought a paternity waiver from the NCAA to extend his eligibility.[56] Eric Butler sought a temporary restraining order to enjoin the University of Kansas from enforcing the NCAA's decision to deny his request for an additional year of eligibility.[57] The Kansas District Court refused to grant the temporary restraining order.[58]

Eric Butler, a football player at Kansas University, sought a waiver from the NCAA to extend his eligibility. Butler's girlfriend, and eventual wife, became pregnant before the 2001 football season while Butler was contemplating trying out and playing football at Northwestern Missouri State University

[46] *Id.*
[47] Lugar v. Edmonson Oil Co., Inc., 457 U.S. 922, 923 (1982) ("In determining the question of 'fair attribution,' (a) the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by it or by a person for whom it is responsible, and (b) the party charged with the deprivation must be a person who may fairly be said to be a state actor….").
[48] *Tarkanian*. 488 U.S. at 194.
[49] *See Tarkanian*, 488 U.S. at 198-99 (I note this only to assert the point that withdrawing from the NCAA would have dire financial and competitive consequences to any university. Consequently, a state university has no practical choice but to adhere to NCAA sanctions. This was an argument raised by Tarkanian, but was quickly dismissed by the Court.).
[50] *Tarkanian*, 488 U.S. at 194–95.
[51] *Id.* at 195–97.
[52] *Id.* at 198-99.
[53] *Id.* at 199.
[54] *Id.*
[55] *See infra* Part II.c.2.
[56] Butler v. Nat'l Collegiate Athletic Ass'n, No. 06-2319, 2006 WL 2398683 (D. Kans. Aug. 15, 2006).
[57] *Id.* at 1.
[58] *Id.* at 5.

("NMSU").[60] NMSU required that Butler live on campus his first two years of school, but infants were not permitted in the dormitories.[61] Therefore, he left NMSU and enrolled for a semester as a full-time student at DeVry University in Kansas City, meaning that his period of eligibility began to run.[62] Butler did not attend school the following semester, but enrolled at Avila University the next semester, where he played football for one season.[63] He then married the mother of his child and enrolled at the University of Kansas ("KU") where he earned a walk-on spot to the football team in the spring of 2005.[64] KU petitioned the NCAA for an eligibility waiver when it realized that Butler's eligibility would expire in 2006.[65] The NCAA subsequently denied KU's eligibility waiver.[66] Eric Butler claimed that he would have been granted a waiver under the pregnancy exception if he were a female[67] and filed for a temporary injunction under Title IX[68] and the Equal Protection Clause.[69]

1) The Problems Realized When Claimant Only Seeks an Injunction

Eric Butler was seeking only a temporary restraining order.[71] Furthermore, Eric Butler's case was not a jury or bench trial with extensive evidence and testimony. It is necessary to review the District Court's holding and reasoning if there is the possibility of similar litigation in the future. A player should bring a cause of action for a paternity waiver earlier in his career, when urgency is not required, so that he can introduce more persuasive arguments and evidence. For example, if a male athlete takes a year off for paternity reasons, the irreparable harm to his eligibility will only manifest itself once his eligibility expires after five years. Therefore, if an athlete requires a year of leave toward the beginning his college career, he can initiate a suit seeking an injunction before the harm to his eligibility occurs. This would provide the opportunity for a male student-athlete to more fully develop a meaningful case and record before a court.

The *Butler* court applied the Tenth Circuit's test for a temporary restraining order.[73] The analysis included a determination of: (1) Butler's substantial likelihood of prevailing on the merits; (2) whether Butler will suffer irreparable injury unless the temporary restraining order issues; (3) whether the threatened injury outweighs whatever damage the proposed restraining order may cause defendants; and (4) whether the temporary restraining order, if issued, will not be adverse to the public interest.[74]

The court in *Butler* decided all four factors in favor of the NCAA.[75] The court found that the second factor, irreparable injury, was not met because Butler's financial aid was not based upon athletics, and any future National Football League ("NFL") earnings were speculative at best.[76] Although Butler was prevented from auditioning his skills before NFL scouts, the court balanced hardships, the third

[60] *Id.* at 2.
[61] *Id.*
[62] *Id*. at 4.
[63] *Id*. at 5.
[64] *Id*.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 2.
[68] *Id.* at 1.
[69] *Id.* at 3.
[71] *See, e.g., Id.*
[73] Tri-State Generation & Transmission Ass'n., Inc. v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986).
[74] *Butler*, 2006 WL 2398683, at 2.
[75] *Id.* at 3–4.
[76] *Id.* at 4.

factor, in favor of the NCAA due to the possibility of a negative impact on KU, its current players, and the competitive nature of the NCAA.[77] If a court granted the temporary restraining order and Butler ultimately failed, KU may be subject to sanctions and fines under the NCAA's "restitution rule," which would force KU to retroactively pay fines and penalties to the NCAA for eligibility violations.[78] The court stated that this could negatively affect the competitive nature of KU and the NCAA.[79] The court found in favor of the NCAA on the fourth factor, public interest, because a temporary restraining order would inhibit the NCAA's ability to enforce its rules.[80]

Regarding the most important factor, the first factor, substantial likelihood of success on its merits, the court provided some insight as to the merits of the case. The court dismissed Butler's Title IX argument because the Pregnancy Exception states that the exception is "for reasons of pregnancy,"[81] not for maternity or paternity leave, and is only applicable to female student-athletes.[82] The court dismissed Butler's equal protection claim because the judge found that the classification is related to an "important government objective[]."[83] For these reasons, the court found factor one in favor of the NCAA.

More importantly, the court stated in its conclusion of factor one, the substantial likelihood of success analysis, that "the analysis awaits further development by the parties and the Court . . . ,"[84] thus signaling that Butler had simply failed to meet his burden of proof based upon the scant evidence he was able to present in the short amount of time given. Therefore, if a future plaintiff is able to present more voluminous evidence and testimony, he may prevail on a similar argument.

The court's haphazard "four factor" test for a temporary restraining order greatly reduced the chances of Butler's success because the *actual merit* of the case is just one of the four factors used in a court's decision, and a court is further forced to speculate as to the *substantial likelihood of success* of the case. More formal injunction proceedings would allow a court to rule simply on the merits of the case, rather than also being required to consider irreparable injury, consider policy, and employ a balancing test.

### 2) **One Must Bring** a **Suit of This Nature Against an Institution, Not the NCAA**

A suit of this nature must originate with a university because the NCAA is not considered a state actor when the cause of action arises from the implementation of its bylaws.[85] Virtually all public universities are state actors and are also subject to Title IX requirements.[86] The NCAA may nevertheless decide to intervene in order to protect its policy promulgation and enforcement right, as it did in *Tarkanian*.[87] A university should nonetheless be the named party rather than the NCAA. Although the

[77] *Id.*
[78] *Id.* ("[A] temporary restraining order could subject KU to sanctions under the restitution rule if the temporary restraining order is later vacated or reversed, and it will adversely affect competitive equity on the football field….").
[79] *Id.*
[80] *Id.*
[81] Nat'l Collegiate Athletic Ass'n, 2013–14 NCAA Division I Manual, art. 14.2.1.3 (2014) (emphasis added).
[82] *Butler*, 2006 WL 2398683, at 3.
[83] *Id.* at 3 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982)).
[84] *Id.*
[85] *See supra* Part II.b.
[86] Title IX, 20 U.S.C. § 1681(a) (1972) (due to acceptance of federal financial aid).
[87] *Tarkanian*, 488 U.S. at 188.

NCAA may become involved in the case, the university will still have to answer for violations under Title IX and for any decisions or actions taken that do not fall under the color of NCAA policies.

Admittedly, this approach could effectively put a university into a tough position with the NCAA. The university may be forced to violate NCAA bylaws in order to bring itself into constitutional compliance. However, one should remember that the NCAA is governed primarily by the presidents of NCAA member universities. These institutions, especially public universities, should no longer be permitted to shield themselves from constitutional requirements by hiding behind the shield of NCAA bylaws. For a paternity waiver suit to have any chance, the plaintiff must file suit against a university and force it to answer for any constitutional or Title IX violations. Still, bringing such a suit will undoubtedly be an uphill battle because when enforcing NCAA bylaws, universities are typically acting under the color of NCAA policies rather than under the color of state law. Therefore, one must distinguish the facts in *Tarkanian* from a paternity waiver at bar.

**III) Title IX and Title VII**

Congress enacted both Title VII and Title IX to protect the rights of individuals who frequently face discrimination. Both Titles are relevant and applicable in the argument for a paternity waiver because Title VII provides guidance for the interpretation and analysis of Title IX claims.[88]

Title IX is rather straightforward and provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[89] Thus, virtually every undergraduate institution is subject to Title IX due to its acceptance of federal financial aid. The United States Supreme Court has held that Title IX creates an implied private right of action.[90]

Title VII applies to employment and provides that it is unlawful for any employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[91] Admittedly, the prevailing notion is that student-athletes are not employees;[92] however, courts have generally agreed that Title IX cases should be analyzed in a similar manner to Title VII cases.[93] Title VII addresses pregnancy and pregnancy issues. Because courts should analyze Title IX claims in the same manner as Title VII claims, and Title VII more explicitly addresses pregnancy, Title VII is applicable in the analysis and argument in support of a paternity waiver.

**a) Precedent Has Allowed for Title IX Claims to be Analyzed Similar to Title VII Claims**

Although never addressed specifically by the United States Supreme Court,[94] the federal circuits generally agree that courts should analyze Title IX cases in a similar manner to Title VII cases.[95] Many of

[88] *See infra* Part III.a.
[89] Title IX, 20 U.S.C. § 1681(a) (1972).
[90] Cannon v. University of Chicago, 441 U.S. 677 (1979).
[91] Title VII, 42 U.S.C. § 2000e-2(a)(1) (1964).
[92] *See* Waldrep v. Texas Employers Insurance Ass'n, 21 S.W.3d 692, 698 (Tex. Ct. App. 2000) (A jury ruled that Waldrep was not an employee in his capacity as a college football player. This holding was affirmed on appeal).
[93] *See supra* Part III(a).
[94] Franklin v. Gwinnett County Public Schools, 503 U.S. 60, n.4 (1992).
[95] *See, e.g.*, Brine v. Univ. of Iowa, 90 F.3d 271, 276 (8th Cir. 1996) ("Other circuits have explicitly declared that for employment discrimination cases, 'the Title VII standards for proving discriminatory treatment should apply to

these cases have dealt with employment law under Title IX, and some circuits have declined to apply a Title VII analysis due to the complexity of a case.[96] However, the Eighth Circuit has gone so far as to state that "the Title VII standards for proving discriminatory treatment should apply to claims arising under Title IX."[97]

When discussing Title VII standards for analysis, the obvious analytical tool employed by a court is burden shifting. The most prominent example of burden shifting is found in the well-known case of *McDonnell Douglas*.[98] Under a *McDonnell Douglas* analysis, a plaintiff must first make a *prima facie* showing of discrimination.[99] After the plaintiff establishes a *prima facie* case of discrimination, the employer has the opportunity to rebut with a legitimate, nondiscriminatory, reason for its actions.[100] After the employer's rebuttal, the plaintiff still has an opportunity to show that the nondiscriminatory reason given by the employer was merely a pretext.[101] A similar, but not identical, burden shifting analysis has been utilized in a Title VII *and* Title IX context.[102]

The argument for a paternity waiver does not on its face require a burden shifting analysis.[103] The burden shifting analysis, as it relates to employment, has been the foundation upon which many of the arguments advanced on behalf of applying Title VII standards to Title IX claims have been built. However, the *substantive* aspects, not just to procedural aspects, of Title VII law should be, and have been, applied to Title IX claims. In *Mabry*, the Tenth Circuit applied substantive Title VII law to Title IX claims by stating that "[it] find[s] no persuasive reason not to apply Title VII's substantive standards regarding sex discrimination to Title IX suits."[104] Therefore, there is no reason why Title VII's substantive law regarding pregnancy should not be extended to pregnancy in a Title IX context. Thus, Title VII should be examined.

**b) The Title VII Paradigm**

The substantive aspects of pregnancy under Title VII employment law should be addressed because the substantive law of Title VII can and should be applied to Title IX cases. Again, Title VII provides that it is unlawful for any employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[105]

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claims arising under Title IX'"); Preston v. Com. of Va. Ex rel New River Community College, 31 F.3d 203, 207 (4th Cir. 1994) ("We agree that Title VII, and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX.").

[96] Franklin v. Gwinnett, 911 F.2d 617, 622 (11th Cir. 1990) *rev'd on other grounds*, Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

[97] Brine v. University of Iowa, 90 F.3d 271, 276 (8th Cir. 1996).

[98] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[99] *McDonnell*, 411 U.S. at 802–04.

[100] *Id.*

[101] *Id.*

[102] *Brine*, 90 F.3d at 274 (This case alleged both Title VII and Title IX violations, and the Court implemented burden shifting.).

[103] It would be unusual to apply a burden shifting analysis to a paternity waiver claim under Title IX. For example, a court may consider the elements of a *prima facie* case, but it would be nearly impossible to show a pretext. Further, it would be rare for a pretext analysis to ever become applicable. Burden shifting is relevant in an employment context, but is not quite as applicable or appropriate when making an argument for a paternity waiver.

[104] Mabry v. State Bd. Of Cmty. Coll. and Occupational Educ., 813 F.2d 311, 316 (10th Cir. 1987) (discussing federal financial assistance).

[105] Title VII, 42 U.S.C. § 2000e-2(a)(1) (1964).

Men can also be discriminated against under Title VII, as Title VII applies to all classes, not simply "protected classes."[106]

**1) The Accepted Disability Period of Pregnancy under Title VII**

Congress enacted the Pregnancy Disability Act in 1978.[107] Title VII includes the language "because of sex" and "on the basis of sex." The Pregnancy Discrimination Act broadens the phrases "because of sex" and "on the basis of sex" to include pregnancy. This Act makes it illegal for an employer to discriminate against a woman for reasons of pregnancy. Although not explicitly stated, the Pregnancy Disability Act classifies pregnancy as a disability.[108] As such, if an employer extends disability leave to male employees, or non-pregnant female employees, the employer must offer the same leave to pregnant employees.[109] Therefore, it is important to examine the disability period resulting from pregnancy in order to determine how much leave an employer is required to provide to a pregnant woman.

Medical textbooks agree that the disability period resulting from pregnancy is roughly six weeks.[110] This is the generally accepted timeframe for the healing of reproductive organs.[111] Assuming that there are no complications with the pregnancy, the pregnancy related disability period lasts for six weeks under employment law. For the disability period to extend more than six weeks, the woman must show additional hardships or complications and "actual physical disability."[112]

**2) Maternity/Paternity Leave under Title VII**

The difference between disability leave for pregnancy related medical issues and maternity leave is critical for this argument. If an employer does not offer disability leave to its employees, it may still offer leave to a pregnant employee so long as the leave is based upon "actual physical disability."[113] An employer may provide more favorable treatment to pregnant employees, but only in regard to the period of physical disability.[114]

Because the pregnancy related disability period only extends six weeks,[115] any additional leave constitutes maternity leave. In 1990, the Equal Employment Opportunity Commission published a policy effectively distinguishing two types of leave: leave for the recuperation from childbirth and leave for the care of a new child.[116] That same year, the Third Circuit ruled that preferential treatment for pregnant women is permissible, but only as it relates to the actual disability period.[117] That Court noted that there

[106] *See, e.g.*, McDonald v. Santa Fe Transp. Co., 427 U.S. 273 (1976).
[107] Pregnancy Discrimination Act, 42 U.S.C. § 2000e-(k) (1978).
[108] *Id.* ("women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .").
[109] *See* Sarah McCarthy, *The Legal and Social Implications of the NCAA's "Pregnancy Exception" – Does the NCAA Discriminate Against Male Student-Athletes?*, 14 VILL. SPORTS & ENT. L.J. 327, 343 (2007).
[110] Kathryn Frueh Patterson, *Discrimination in the Workplace: Are Men and Women Not Entitled to the Same Parental Leave Under Title VII?* 47 SMU L. REV. 425, 436 (citing Lorraine Tulman & Jacqueline Fawcett, *Return of Functional Ability after Childbirth*, NURSING RESEARCH 77 (March/April 1988)).
[111] *Id*.
[112] McCarthy, *supra* note 109, at 343.
[113] *Id*.
[114] California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 290 (1987).
[115] *See supra* at Part III.b.1.
[116] Patterson, *supra* note 110, at 433.
[117] Schafer v. Bd. of Pub. Educ. of the Sch. Dist. of Pittsburgh, PA., 903 F.2d 243, 248 (3d Cir. 1990).

was "no evidence in the record that suggests that the normal maternity disability due to 'pregnancy, childbirth, or related medical conditions' extend to one year."[118] An employer cannot legally provide leave in excess of the six-week disability period to a mother and fail to extend similar leave to fathers.[119] Therefore, an employer must offer the same amount of paternity leave to a man as it provides maternity leave to a woman.[120]

It is noteworthy that, in the eyes of the law, a father's paternity leave and related time spent with his new child is equally as important as it is to the mother. The Civil Rights Act reflects the notion of equality. Courts have held that Title IX claims should be evaluated similar to Title VII claims for this very reason.[121]

## IV) The Title IX Cause of Action Supporting the Adoption of a Paternity Waiver

If a male student-athlete seeks a judicially mandated paternity waiver, a suit under Title IX would be his best avenue for success. However, this Note also discusses a cause of action arising under the Equal Protection Clause,[122] although a claim under Title IX is more persuasive. Obviously, prevailing on this sort of claim will not in and of itself create a "paternity waiver," but would almost assuredly require NCAA member universities to create some sort of "paternity waiver" process. Applying pregnancy standards applicable in Title VII, especially regarding maternity and paternity leave, one can make a persuasive argument that the NCAA's Pregnancy Exception is discriminatory and violates Title IX when enforced by NCAA member universities.

### a) A Brief Parsing of the NCAA Pregnancy Exception and Title IX

A meticulous reading of both the NCAA's Pregnancy Exception and Title IX is necessary before making a persuasive argument for a paternity waiver. The language employed in Title IX, and, more importantly, the NCAA Pregnancy Exception is extremely critical in making the argument that an exception available only to women violates Title IX.

#### 1) The NCAA Pregnancy Exception Examined

The NCAA Pregnancy Exception provides that "[a] member institution may approve a one-year extension of the five-year period of eligibility for a female student-athlete for reasons of pregnancy."[123] There are three important aspects of this bylaw. First, the bylaw specifically states that this exception is only available to female student-athletes. On its face, this bylaw is discriminatory because it provides a benefit[124] to a female student-athlete, but not to a male student-athlete. Second, the bylaw provides that "[a] member institution *may* . . . ."[125] The permissive language of "may" provides the member university with a choice as to whether or not to extend the Pregnancy Exception to its female student-athletes in the first place. Through this permissive language, the NCAA has effectively delegated this decision to its member universities. Third, and most contested, is the language, "for reasons of pregnancy." Does "for

[118] *Id.* (emphasis added) (noting that the disability period contemplated was six weeks).
[119] McCarthy, *supra* note 109, at 344.
[120] *Id.*
[121] *See supra* Part III.a.
[122] *See infra* Part V.
[123] Nat'l Collegiate Athletic Ass'n, 2013–14 NCAA Division I Manual, art. 14.2.1.3 (2014) (emphasis added).
[124] *See infra* Part IV.a.2.
[125] Nat'l Collegiate Athletic Ass'n, 2013–14 NCAA Division I Manual, art. 14.2.1.3 (2014) (emphasis added).

reasons of pregnancy" mean only the disability period associated with pregnancy, or can "for reasons of pregnancy" be read broadly as to implicate maternity leave?[126]

**2) Title IX Examined**

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[127] In addition to Title IX prohibiting general discrimination, it also prohibits the denial of *benefits* by an education program receiving federal funding. Also, a Title IX suit is available to males as well as females. Title IX provides that it is illegal for an institution to discriminate on the basis of sex, but does not enumerate any protected classes. Although unsuccessful, men brought a Title IX claim against California State University, Bakersfield ("CSUB") regarding reverse discrimination when CSUB cut men's teams in order to comply with the equal funding requirement of Title IX.[128] The cause of action was recognized, and the case was decided on its merits. Therefore, men can bring Title IX claims.

**b) A Purely Linguistic Reading of the Pregnancy Exception Provides for a Broad Interpretation**

The most substantial hurdle to overcome when arguing for a paternity waiver is persuading a court to accept a broad reading of the NCAA Pregnancy Exception. As mentioned above,[129] does the "for reasons of pregnancy" language in the NCAA Pregnancy Exception mean solely for the disability period, or does it mean "reasons," which would be more analogous to maternity leave? When practicality is considered, Title IX justifies a broad reading of the Pregnancy Exception. A "broad reading" means persuading a court that "for reasons of pregnancy" should encompass all aspects of pregnancy and motherhood, including maternity. Several arguments support this contention.

First is a purely linguistic argument. The Pregnancy Exception provides a benefit for "*reasons* of pregnancy."[130] Note that the word "reasons" is plural. "Reasons of pregnancy" should be interpreted as more than just a disability because the word "reasons" is plural, which means that there would be more than one "reason" that would fall under the exception. If the promulgators of the NCAA bylaws intended to provide a benefit only for disability, then the bylaw would read "*reason* of pregnancy." But, it does not. The plural nature of "reasons" would indicate a multitude of purposes for the exception, certainly including maternity.

Second, the Pregnancy Exception provides a *benefit*, a one-year extension of eligibility, and currently only to females. When examining the substantive nature of this one-year benefit, it becomes apparent that one-year far exceeds the disability period allowed for pregnancy by most employers under Title VII, which is six weeks.[131] This language appears to be more analogous to maternity leave, and thus justifies a broader reading of "for reasons of pregnancy."

[126] *See infra* IV.b.
[127] Title IX, 20 U.S.C. § 1681(a) (1972).
[128] *See, e.g.,* Neal v. Board of Trustees, 198 F.3d 763 (9th Cir. 1999).
[129] *See supra* Part IV.b.
[130] Nat'l Collegiate Athletic Ass'n, 2013–14 NCAA Division I Manual, art. 14.2.1.3 (2014) (emphasis added).
[131] *See supra* Part III.b.1.

**c) Applying the Facts and Realities to Make a Title IX Argument in Favor of a Paternity Waiver**

An argument in favor of a paternity waiver begins to take shape once the practical facts are applied to the rules of law previously discussed. This Part will approach a Title IX claim for a paternity waiver step-by-step. It is important to note that under a Title IX analysis, no state action analysis is necessary.

To begin, Title IX applies to all educational programs that accept federal financial aid, which is most. Title IX provides in pertinent part that no educational program shall discriminate or deny a benefit on the basis of sex. In this case, the Pregnancy Exception is providing a benefit to females that it is not providing to males. The bylaw goes as far as to state that the exception is only available to female student-athletes, which is on its face discriminatory.

Next, any time the government or a governmental entity classifies by gender, as both state and private universities do when implementing the Pregnancy Exception, a court will apply intermediate scrutiny to its analysis.[132] Therefore, intermediate scrutiny is appropriate whenever dealing with Title IX issues.[133] To survive an intermediate scrutiny analysis, a university must show that the classification is related to an important government interest, which requires an "exceedingly persuasive" justification.[134]

The most probable justification that a university would present to justify its classification is the physiological condition women experience during pregnancy, which is not a condition experienced by men. This would essentially be a disability argument. To counter a university's argument, a court must be persuaded to adopt a broad reading of the Pregnancy Exception, meaning to include maternity.[135] If a court adopts a broad reading of the Pregnancy Exception, an "extremely persuasive" justification will be difficult for a university to produce. A court must first be persuaded to adopt the broad reading.

One should begin with the linguistic arguments and the practical effect of the one-year exception, as previously mentioned, and provided for in the Pregnancy Exception to argue for a broad reading of the Pregnancy Exception.[136] Furthermore, courts should examine employment law under Title VII. Courts have ruled that Title IX claims can be analyzed in a similar manner to Title VII claims, even the substantive aspects.[137]

The disability period resulting from pregnancy lasts roughly six weeks, which Title VII case law, OCR interpretations, medical experts, and commonly accepted business practices all support.[138] Any leave in excess of six weeks will constitute maternity leave, and the same leave must be extended to men in the form of paternity leave.[139] The Pregnancy Exception creates an eligibility extension for one year. In an employment context, this would equate to six weeks of disability leave under the Pregnancy Discrimination Act and forty-six weeks of maternity leave. In the Title VII context, the Third Circuit noted that "no evidence . . . suggests that the normal maternity disability due to 'pregnancy, childbirth, or

[132] Neal v. Board of Trustees, 198 F.3d 763, 772 (9th Cir. 1999).
[133] *See Id.*
[134] *Id.* (citing Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 702 (9th Cir.1997)).
[135] *See supra* Part IV.b.
[136] *See supra* Part IV.b.
[137] *See supra* Part III.a.
[138] *See supra* Part III.b.1.
[139] *Id.*

related medical conditions' extend to one year,"[140] but the NCAA Pregnancy Exception provides for one full year. When applying these employment law doctrines to a Title IX paternity claim, "for reasons of pregnancy" gives way to a broad reading of the Pregnancy Exception because the benefit of the exception extends well beyond six weeks.

If a court adopts a broad reading, it will equate a portion of the Pregnancy Exception with maternity leave. Again, applying employment law, if an employer offers maternity leave to women, the employer must provide an equal amount of paternity leave to men. Furthermore, "maternity leave" will be implicated if a broad reading of the exception is adopted. A university will have an extremely difficult time in providing a persuasive justification for denying men equal paternity leave. Men should be granted equal paternity leave under the law as more and more men are becoming involved in child rearing in the twenty-first century.[141] This argument provides both a rational and legal justification for the adoption of a paternity waiver.

## V) The Equal Protection Cause of Action Supporting the Adoption of a Paternity Waiver

The few scholars who have written on this precise and narrow subject have contended that the Supreme Court's holding in *Tarkanian* precludes a claim under the Equal Protection Clause.[142] This Part will distinguish the facts giving rise to a paternity waiver from the set of facts in *Tarkanian* and further provide a series of arguments in favor of a paternity waiver arising under the Equal Protection Clause.

### a) Distinguishing *Tarkanian* for State Action Purposes

The set of facts that would lead to the adoption of a paternity waiver are distinguishable from the set of facts in *Tarkanian*. Recall that *Tarkanian* held that the NCAA is not a state actor for Due Process Clause purposes, but also held that it would not be equitable to hold UNLV as a state actor for Due Process Clause purposes when it was acting under the color of NCAA bylaws.[143] When adhering to NCAA bylaws, mandates, and rulings, the University was acting under the color of NCAA policies and was not acting under the color of state law. Because a university is not a state actor when following NCAA bylaws, scholars have argued that *most any* action challenging a university under the Equal Protection Clause would not be successful.

The facts here are distinguishable. In *Tarkanian*, the Court considered the fact that UNLV fought the NCAA throughout the entirety of the case.[144] UNLV did not wish to comply with the judgments; however, the University would have faced massive fines, probations, and disciplinary actions if it did not comply. It was not until UNLV lamented and adhered to the NCAA's demands that Coach Tarkanian initiated the suit.[145] In *Tarkanian*, UNLV did not have to make a decision; the decision was made for it by the NCAA.

In the case at bar, the NCAA Pregnancy Exception bylaw is written permissively; a university *may* decide whether or not it adopts the Pregnancy Exception.[146] In this sense, a university is not acting

[140] Schafer v. Bd. of Pub. Educ. of the Sch. Dist. of Pittsburgh, PA., 903 F.2d 243, 248 (3d Cir. 1990).
[141] Rong Wang & Suzanne M. Bianchi, *ATUS Fathers' Involvement With Childcare*, 93 SOC. INDIC. RES. 141–145 (2009); *see also infra* Part VI.a.
[142] *See supra* Part II.b.
[143] *Id.*
[144] Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 196 (1988).
[145] *Id.* at 187 (noting that the suit was initiated the day before Tarkanian's suspension was to begin).
[146] *See supra* Part IV.a.1.

under the color of NCAA policies, as the decision as to whether to discriminate[147] is left to the university. Can a university now be considered a state actor because it, not the NCAA, has made the discriminatory decision? United States Supreme Court case law provides a persuasive argument.

The United States Supreme Court case of *Lugar*[148] provides a test to determine whether a state action has occurred when a private and state entity's actions are closely entwined.[149] The *Lugar* Court discusses "fair attribution" and provides a two-part test for the determination of state action.[150] "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible."[151] "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official . . . ."[152] Ironically, *Tarkanian* employed this test, but again, the facts required for a successful paternity waiver case differ from the facts in *Tarkanian*.[153] The *Tarkanian* Court was charged with adjudicating a completely different NCAA bylaw.

Courts have subsequently applied the *Lugar* test in the NCAA context.[154] Even after *Lugar*, "[t]here is no precise formula to determine whether otherwise private conduct constitutes 'state action.'"[155] *Arlosoroff* presents the question of whether the NCAA's eligibility decisions constitute state action.[157] In *Arlosoroff*, the NCAA's bylaws prevented Chaim Arlosoroff from playing tennis past his first year of college due to the fact that he had played organized tennis in Europe for three years following his twentieth birthday.[158] Arlosoroff filed suit against both Duke University and the NCAA alleging deprivation of both the Due Process Clause and the Equal Protection Clause.[159] The court found that state action was *not* present.[160] In making that determination, the court noted that determining athletic eligibility is not function traditionally reserved to the state.[161] The court further considered that the state institution did not control or direct the result.[162] For state action in this context, the state institution must order or cause the action complained of, and the function implicated must be one traditionally reserved for the state.[163]

When applying the *Lugar* two-prong test to the case at bar, an argument can be made that the permissive language contained in the NCAA Pregnancy Exception functions to maintain a university's status as a state actor. Here, the action complained of is caused by a decision made by the state to provide, or not to provide, an exception for pregnancy.[164] This exception is discretionary and permitted by NCAA

[147] The term "discriminate" is used loosely in this sense. Nonetheless, by definition, a university is discriminating.
[148] Lugar v. Edmondson Oil Co. Inc., 457 U.S. 922 (1982).
[149] *Lugar*, 457 U.S. at 925–26.
[150] *Id.* at 937.
[151] *Id.*
[152] *Id.*
[153] Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 190 (1988).
[154] *See* Arlosoroff v. Nat'l Collegiate Athletic Ass'n, 746 F.2d 1019 (4th Cir. 1984).
[155] *Id.* at 1021.
[157] *See generally Arlosoroff*, 746 F.2d 1019.
[158] *Id.* at 1020. (The bylaw provided: "organized competition in a sport during each twelve month period after the student's 20th birthday and prior to matriculation with a member institution should count as one year of varsity competition in that sport.").
[159] *Id.*
[160] *Id.* at 1022.
[161] *Id.* at 1021.
[162] *Id.* at 1022.
[163] *Id.*
[164] Nat'l Collegiate Athletic Ass'n, 2013–14 NCAA Division I Manual, art. 14.2.1.3 (2014).

bylaws, not required.[165] Due to the permissive language of the bylaw, a state imposes and enforces the exception. Thus, the first prong of the test can be met. Second, a university athletic director or president, undoubtedly a state actor, would make the decision to implement, or not to implement, the bylaw. Furthermore, it would be absurd to allow state officials, or athletic directors, to legislate decisions implicating pregnancy and reproductive rights while skirting due process and equal protection requirements through exceptions made for the NCAA bylaws. Thus, the second prong can and should be satisfied. For these reasons, a plaintiff can satisfy the *Lugar* test and maintain state action for an Equal Protection Clause cause of action.[166]

**b) Applying the Facts of the Case to Make a Persuasive Equal Protection Argument**

The Equal Protection Clause of the Fourteenth Amendment Provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall 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.[167]

To implicate the Equal Protection Clause, the disputed action must be taken by a state actor.[168] There is a persuasive argument, based upon *Lugar*, that a university is a state actor, even when interacting with NCAA bylaws.[169]

Next, if a state actor creates a classification based upon gender, as is done within the NCAA Pregnancy Exception, the government (or university) must meet intermediate scrutiny; it must show that the classification serves an important government objective.[170] A university would most likely argue that this gender-based classification accomplishes the government's objective of providing female athletes with time to recover from childbirth without penalizing them. As with the aforementioned Title IX argument, it is imperative that a court adopt a broad reading of the NCAA Pregnancy Exception.

A broad reading of the NCAA Pregnancy Exception would essentially recognize at least forty-six weeks of the one-year exception to eligibility as maternity leave.[171] This is due to accepted recovery times and prevailing employment practices.[172] Any holding will naturally recognize that a portion of the exception constitutes maternity leave if a broad reading is adopted. If maternity leave is recognized, it will be hard for a university to proffer an important government interest in allowing maternity leave to women, while denying equal paternity leave to men. This concern becomes more apparent as more men

[165] *Id.*
[166] *Lugar*, not *Rendell-Baker* or *Blum*, is the appropriate paradigm here. *Rendell-Baker* and *Blum* were decided by the United States Supreme Court on the same day as *Lugar* and dealt with similar questions. In *Rendell-Baker* and *Blum*, the challenged decision was made by the private organization, and the private organization only. Here, the decision, based upon the NCAA bylaw, is a decision left to the state institution. Thus, *Lugar* is appropriate.
[167] U.S. Const. amend. XIV, § 1 (1868).
[168] *Id.*
[169] *See supra* Part V.a.
[170] Craig v. Boren, 429 U.S. 190, 197 (1976).
[171] Fifty-two weeks in one year less the six weeks of pregnancy related disability leave.
[172] For a more detailed explanation and rigorous analysis of the arguments for a "broad reading" and the establishment of maternity, see supra Part IV.b. *See also supra* Part IV.a.1.

are taking an active role in child rearing.[173] This issue becomes more difficult when examining the realities of being a student-athlete.[174] When a state actor has permitted a female athlete maternity leave and not offered commiserate paternity leave to a male athlete, it has denied him equal protection under the law. The foregoing is the most persuasive Equal Protection Clause argument in favor of a paternity waiver.

## VI) Practical Realities Surrounding the Issue of an NCAA Paternity Waiver

This issue is important because, as a society, men are becoming more instrumental in child rearing. The NCAA is committed to amateurism. As such, the NCAA's bylaws should reflect this commitment through more inclusive exceptions and waivers, not more restrictive ones.

### a) The NCAA's Mission

The NCAA consistently seeks to preserve amateurism[175] and promote academics[176] through its bylaws. The NCAA should seek to give its amateur student-athletes the exceptions necessary to excel academically, and in life. Therefore, the NCAA should hand out its waivers and exceptions more liberally, so long as its member institutions do not blatantly abuse the exceptions.

#### 1) Practical Effects of Collegiate Athletics on Meaningful Fatherhood

Under the current NCAA bylaws, it is nearly impossible for a young man to balance athletics, school, and a new child. The NCAA bylaws allow student-athletes to practice twenty hours a week with a limitation of four hours in any given day.[177] It is also a reality that coaches expect athletes to train on their own, outside of officially recognized practice times. Furthermore, a student-athlete must continue to attend classes in order to maintain athletic eligibility. When one considers twenty hours of practice a week, personal training, and a full-time class schedule, little time is left for parenthood. Not only is a father's time important in child rearing, but in other activities such as work (to support a child) and time to care for the child. Under the current bylaws, adequate family time is non-existent, and support for the athlete's partner can become sparse at best.

#### 2) Paternity Waiver from a Female Point of View

It would be remiss to discuss this issue but fail to briefly address the ways in which the lack of an NCAA paternity waiver has indirect implications on women. Due to a male student-athlete's time constraints with practice, training, and classes, the athlete's partner is forced to "pick up the slack." This could mean dropping out of school, or it could necessitate leaving a promising job. The NCAA should therefore permit, and even incentivize, its amateur student-athletes to "do the right thing." Granted, an athlete can only receive a waiver for one year. But, that one year would give a couple the much needed time to assess their situation and plan for the future, while also not forfeiting a year of eligibility.

[173] *See, e.g.*, Rong, *supra* note 141.
[174] *See infra* Part VI.a.
[175] *See* Nat'l Collegiate Athletic Ass'n, 2013–14 NCAA Division I Manual, art. 12 (2014); *See, e.g.*, Bloom v. NCAA, 93 P.3d 621 (Colo. App. 2004).
[176] *See, e.g.*, Pryor v. NCAA, 288 F.3d 548 (3d Cir. 2002).
[177] Nat'l Collegiate Athletic Ass'n, 2013–14 NCAA Division I Manual, art. 17.1.6.1 (2014).

**b) The Possible Unintended Consequences of a Paternity Waiver**

A new law or bylaw creates unintended consequences. This section will spot some of these issues and address the surrounding circumstances. At the outset, two unintended and negative consequences become apparent. First, would universities, when faced with the decision to grant an exception to a woman, decide against granting a waiver to negate the requirement of extending a paternity waiver to men? Second, would a paternity waiver incentivize student-athlete parenthood in an attempt to retain a year of eligibility?

1) Will a Paternity Waiver Dissuade Universities from Offering a Pregnancy **Exception?**

A paternity waiver requirement could dissuade universities from providing pregnant female athletes with the Pregnancy Exception permitted by the NCAA. If a court were to adopt a broad reading of the Pregnancy Exception and decide that the exception constitutes maternity leave, paternity leave would also be required.[178] Because the language in the NCAA Pregnancy Exception is permissive,[179] universities may restrict the exception for pregnant women so that it would not need to offer a paternity waiver to men.

In 2007, the Office of Civil Rights ("OCR") wrote a letter to all universities receiving federal financial aid to inform them of their duties regarding pregnant athletes.[180] Due to its status as an agency, OCR has a considerable amount of influence in pregnancy cases. Courts should typically defer to the interpretation of the agency in charge of administering the statute, so long as it is reasonable, when reviewing a statute.[181] Therefore, as an agency, an OCR interpretation carries heavy weight.

The OCR letter was comprehensive but stated in pertinent part that pregnancy should be treated the same as any other medical condition.[182] Therefore, if a university offered a non-pregnant athlete leave due to an injury or medical condition, the university should offer the same leave to a pregnant athlete.[183] The letter also took the position that universities were required to accommodate pregnant athletes, which includes reasonably necessary medical leave.[184] Granted, these OCR interpretations do not necessarily implicate eligibility, but pregnant athletes now have more rights than ever, and universities must provide accommodations. Further, the elimination of the Pregnancy Exception would create a publicity nightmare for the NCAA, which is something that it would likely seek to avoid.[185] Therefore, regardless of the outcome of a paternity waiver case, the Pregnancy Exception available to women should remain intact.

[178] *See supra* Part IV.c (provides the base of this Note's argument).
[179] *See supra* Part IV.a.1.
[180] Brake, *supra* note 5, at 184.
[181] Pennington v. Didrickson, 22 F.3d 1376, 1383 (7th Cir. 1994) ("[The court is] obliged to defer to the interpretation given a statute by the agency charged with the responsibility for administering it so long as the agency's interpretation of the statute is based upon a permissible reading of that statute."); *but see generally* Smith v. Metropolitan School Dist. Perry Tp, 128 F.3d 1014 (7th Cir. 1997) (declining to follow OCR interpretation).
[182] Brake, *supra* note 5, at 184.
[183] *Id.*
[184] *Id.*
[185] *Id.* at 177 (A 2007 ESPN program focused on the NCAA's insufficient policy on pregnancies of student-athletes. The program exposed the way pregnant athletes were discriminated against and how some were forced to make difficult decisions as to whether or not to continue the pregnancy. This drew the attention of many pro-life groups and created a "firestorm of controversy.").

**2) Will a Paternity Waiver Promote Parenthood to Preserve Eligibility?**

The adoption of a paternity waiver may encourage young male athletes to become fathers in order to preserve a year of eligibility. For example, an up-and-coming quarterback may wish to preserve a year of eligibility if the team already has an older and more talented starting quarterback. Two arguments cut against this assertion, one practical and one legal.

First, it is unreasonable to believe that a man would take on the responsibility of becoming a parent solely to preserve a year of eligibility. The athlete seeking to retain eligibility would also have to find an agreeable partner. Furthermore, he and his partner would have to plan their actions many months in advance. Due to these barriers, this negative consequence seems unlikely.

Second, under the aforementioned legal principals, if an institution has classified on the basis of sex, the institution must withstand intermediate scrutiny. A university will then have the opportunity to proffer an exceedingly persuasive justification for the gender classification that furthers an important government objective.[186] If a university has evidence that men have been using a paternity waiver for the sole reason of preserving eligibility, the university would then have an exceedingly persuasive justification and would be able to limit the exception solely to women. It would be disappointing if this became a practice, but universities would have some legal recourse against the abuse of the rule change.

c) Couldn't the NCAA Just Remove the Permissive Language and Require the Member Institutions to Apply the Pregnancy Exception?

If the NCAA removed the permissive language in the Pregnancy Exception universities would no longer be the party making the decision for state action purposes under an Equal Protection Clause paradigm, but this outcome is unlikely. As a private organization, the NCAA's member institutions include universities, such as Brigham Young University ("BYU"), which are closely associated with religious organizations and beliefs. BYU strictly enforces its Honor Code, which emphasizes "morality" and forbids its students from engaging in premarital sexual relations.[187] In 2011, BYU applied its dedication to morality when it suspended a star basketball player, Brandon Davies, after he admitted to having premarital sex with his girlfriend, a clear violation of BYU's Honor Code.[188] This incident was especially significant because BYU was in the midst of an unexpectedly successful season at the time.[189]

The NCAA may draft the Pregnancy Exception in a permissive manner in order to accommodate schools with higher morality standards, such as BYU. Practically speaking, the NCAA would have a difficult time requiring religious based universities to adopt the Pregnancy Exception from a public relations perspective. Such an action would also cause unrest among the other NCAA member universities that are faith based. For this reason, the NCAA will not likely remove this permissive language from the pregnancy exception.

[186] *See supra* Part IV.c.
[187] *See* Brigham Young University, 2011–12 Church Education System Honor Code (2011), *available at* http://saas.byu.edu/catalog/2011-2012ucat/GeneralInfo/HonorCode.php#HCOfficeInvovement (last visited Apr. 5, 2014).
[188] Brad Knickerbocker, *BYU Basketball Player Suspended: Sports World Shocked – and Impressed*, THE CHRISTIAN SCIENCE MONITOR, Mar. 3, 2011, *available at* http://www.csmonitor.com/USA/Sports/2011/0303/BYU-basketball-player-suspended-sports-world-shocked-and-impressed.
[189] *Id.*

**VII) Conclusion**

The NCAA should adopt a paternity waiver, not only because it is legally justifiable, but also because it would further promote the NCAA's stated mission. The practical constraints on a student-athlete's time and other sports related obligations justify the adoption of a paternity waiver. Further, the NCAA's commitment to amateurism and academics cuts in favor of the adoption of a paternity waiver, and a balanced life should be sacrosanct to the amateur athlete.

The NCAA Pregnancy Exception for women was a step in the right direction, now it is time to take the next step. The adoption of a paternity waiver is supported by Title IX, the Equal Protection Clause, and the notions of equality that are embodied within the Civil Rights Act. As gender roles continue to evolve, progress can only be effectuated by creating a more equal system in all aspects of life, especially in child rearing. Men should be given equal opportunities to be a part of their child's life. Paternity leave should be available just as freely as maternity leave. A court must adopt a broad reading of the Pregnancy Exception so as to equate it with maternity leave. A broad reading then would allow for a successful cause of action under Title IX and the Equal Protection Clause for the adoption of a paternity waiver. As public institutions, universities have the obligation to provide equal treatment to their students, and, as institutions of higher learning, universities should be on the cutting edge of progress toward equality.