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Game of Thrones: Liberty & Eminent Domain

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Game of Thrones: Liberty & Eminent Domain

MITCHELL F. CRUSTO*

This Article analyzes the relationship between private property and the government's power to expropriate it. When it comes to protecting private property from governmental expropriation, our Constitution is conflicted. On the one hand, the right to private property is a foundational principle that defines the American spirit, our history, and our culture. Yet, on the other hand, the Founders adopted the government's superior authority over private property, that is, eminent domain, for public purpose and with just compensation, via the Takings Clause of the Fifth

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Amendment. This “private property conundrum” requires us to explore the limits of eminent domain relative to a person’s private property right in themselves, that is, their “persona.”

This Article advances the thesis that every person in America possesses a right to the attributes of themselves or “persona,” which is protected against governmental exploitation. It develops that seminal, normative thesis through three tasks: (1) it presents a contemporary conflict between the private property rights of National Collegiate Athletic Association (“NCAA”) athletes and state governments that operate NCAA schools; (2) it argues that eminent domain and the Takings Clause of the Fifth Amendment should not apply to persona rights, particularly name, image, and likeness (“NIL”); and (3) it proposes a model code solution that society, policymakers, and government should adopt to prohibit the use of eminent domain to exploit NIL and other attributes of persona. Consequently, this Article concludes that States that operate NCAA member schools have wrongfully taken, and continue to wrongfully take, student athletes’ right to their persona.

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INTRODUCTION

A. *The Battle*

In 2019, Chase Young was the star football player for The Ohio State University Buckeyes.¹ During his junior season, Mr. Young broke the school's single season sack record,² earned a unanimous First-Team All-American nomination,³ and received yet another defensive player of the year award.⁴ However, in November 2019, Mr. Young was suspended from play “due to a possible NCAA⁵ issue

¹ See *Demand that the U.S. Congress Guarantee Fair Pay for College Athletes in Every State*, COLOR OF CHANGE, https://act.colorofchange.org/sign/congress_fairpay?source=coc_main_website (last visited Feb. 24, 2022) (reporting several awful stories of the National Collegiate Athletic Association's (“NCAA”) mistreatment of Black athletes, including Chase Young).

² Tom VanHaaren, *Chase Young Sets Buckeyes' Single-Season Sacks Record*, ESPN (Nov. 23, 2019), https://www.espn.com/college-football/story/_/id/28147511/chase-young-sets-buckeyes-single-season-sacks-record.

³ Wyatt Crosher, *Ohio State's Chase Young and Jeff Okudah Are Unanimous First-Team All-Americans*, BUCKEYE SPORTS BULL. (Dec. 19, 2019, 4:00 PM), <https://www.buckeyesports.com/ohio-states-chase-young-and-jeff-okudah-are-unanimous-first-team-all-americans/>.

⁴ The awards included the Bronko Nagurski Trophy, Chuck Bednarik Award, Ted Hendricks Award, Chicago Tribune Silver Award, Nagurski-Woodson Defensive Player of the Year Award and the Smith-Brown Defensive Line-man of the Year. Mr. Young was also named the Big Ten Athlete of the Year and was a finalist for the Heisman Trophy. See Associated Press, *Ohio State's Chase Young Wins Nagurski Award*, ESPN (Dec. 9, 2019), https://www.espn.com/college-football/story/_/id/28263055/ohio-state-chase-young-wins-nagurski-award; *Chase Young 2019 Wins Chuck Bednarik Award*, OHIO STATE UNIV. (Dec. 12, 2019), <https://ohiostatebuckeyes.com/chase-young-wins-2019-bednarik-award/>; Jarrod Clay, *Chase Young Wins 2019 Ted Hendricks Award*, ABC 6 (Dec. 11, 2019), <https://abc6onyourside.com/sports/the-football-fever/chase-young-wins-2019-ted-hendricks-award>; Teddy Greenstein, *Chase Young Is the 2019 Chicago Tribune Silver Football Winner*, CHI. TRIB. (Dec. 6, 2019), <https://www.chicagotribune.com/sports/college/ct-chase-young-ohio-state-silver-football-20191206-imh2o6cs45cpdbj5e7b7sla4zu-story.html>.

⁵ See *National Collegiate Athletic Association*, ENCYC. BRITANNICA (Sept. 14, 2020), <https://www.britannica.com/topic/National-Collegiate-Athletic-Association> (noting the National Collegiate Athletic Association (“NCAA”) is an organization formed in that regulates college athletics); see also *What Is the NCAA?*, NCAA, <https://www.ncaa.org/sports/2021/2/10/about-resources-media-center-ncaa-101-what-ncaa.aspx> (last visited Feb. 24, 2022) (reporting that, as of March 2021, the NCAA was composed of “[n]early half a million college athletes [who]

from 2018 that the Department of Athletics [was] looking into.”⁶ In 2018, Mr. Young had borrowed money from a family friend to purchase an airline ticket for his girlfriend to attend the prestigious Rose Bowl in Pasadena, California.⁷ By the time Mr. Young was suspended in November 2019, he had already repaid the loan.⁸ Despite this, the NCAA claimed that by taking the loan Mr. Young had violated the NCAA amateurism rules⁹ (hereinafter “rules”) and

make up the 19,886 teams that send more than 57,661 participants to compete each year in the NCAA’s 90 championships in 24 sports across 3 divisions.”).

⁶ Diamaris Martino, *Ohio State’s Star Football Player Suspended for Accepting Loan*, CNBC (Nov. 8, 2019), <https://www.cnbc.com/2019/11/08/ohio-states-star-football-player-suspended-for-accepting-loan.html> (reporting on a statement made by Ohio State’s Associate Athletics Director).

⁷ Jordan Heck, “Free Chase Young”: *Criticism of the NCAA Trends on Social Media After Ohio State Star’s Suspension*, SPORTING NEWS (Nov. 9, 2019), <https://www.sportingnews.com/us/ncaa-football/news/chase-young-suspension-ohio-state-ncaa/arx41omz2l47191iwyw5ju398>.

⁸ *Id.*

⁹ “Amateurism rules” or “eligibility rules,” for purposes of this Article, refer to the body of NCAA rules, under which college teams are only allowed to compensate their athletes with scholarships that cover the costs of attending school. Moreover, under its amateurism rules, the NCAA, *inter alia*, prohibits college athletes from contracting for the use of their name, image, and likeness (“NIL”), thereby assuming and benefiting from its sole control of their NIL. *See* NCAA DIVISION I MANUAL 64–77 (NCAA, 1998) (setting forth the amateurism and athletics eligibility requirements including: (1) Athletes will lose their amateur status and become ineligible for NCAA play if he or she is compensated for his or her athletic skills in that sport; (2) an NCAA member institution or affiliate is permitted to use the physical appearance, name, and pictures of a student-athlete for both charitable and educational purposes; (3) a student-athlete will lose his or her ability to participate in NCAA sporting events if he or she either accepts or received payment from through commercial advertisement, promotion, or endorsement); *see also* Anastasios Kaburakis et al., *Is It Still “In the Game”; or Has Amateurism Left the Building? NCAA Student-Athletes’ Perceptions of Commercial Activity and Sports Video Games*, 26 J. SPORT MGMT. 295, 297 (2012). At the time of Chase Young’s violation, the NCAA required that its members adopt its policies on college student athlete compensation, called amateurism rules. Essentially, these rules do not allow for compensation for NCAA athletes. The policy provides that while in high school or secondary school, prospective student-athletes may promote or endorse a commercial product or service, provided they do not receive any compensation for doing so, “[h]owever, after student-athletes enroll at an NCAA school, they may no longer promote or endorse a product or allow their name, image or likeness to be used for commercial or promotional purposes.”

ultimately suspended him for two games, which likely caused him to lose his bid for the highly-coveted Heisman trophy.¹⁰

Mr. Young could have avoided that unfortunate episode if he had owned his name, image, and likeness (“NIL”).¹¹ However, the NCAA and particularly its member school, The Ohio State University, had prohibited Mr. Young from capitalizing on his NIL,¹² thereby denying him the fruits of his property rights.¹³ To maintain

(emphasis added) *Promoting or Endorsing Commercial Products or Services*, NCAA (July 2019), http://fs.ncaa.org/Docs/eligibility_ceter/ECMIP/Amateurism_Certification/Promoting_Endorsing_Commercial_Products_Services.pdf.

¹⁰ See Bruce Hooley, *Ohio State’s Justin Fields, Chase Young 3-4 in Heisman Voting*, SPORTS ILLUSTRATED (Dec. 14, 2019), <https://www.si.com/college/ohio-state/football/ohio-states-chase-young-justin-fields-watch-burrow-win-heisman> (reporting the Young lost the Heisman bid to Joe Burrow); Josh Planos, *Ohio State’s Chase Young Is Playing like a Heisman Contender*, FIVETHIRTYEIGHT (Oct. 29, 2019), <https://fivethirtyeight.com/features/ohio-states-chase-young-is-playing-like-a-heisman-contender/>.

¹¹ As an award-winning player, on a top college football team, Mr. Young could have had the funds available by way of advertising and promotional deals in order to purchase tickets for his friends or family to see him play at the Rose Bowl. In fact, one study shows that NCAA college football stars could be earning as much as \$2.4 million per year. See Tom Huddleston Jr., *College Football Stars Could Be Earning as Much as \$2.4 Million Per Year, Based on NCAA Revenues: Study*, CNBC (Sept. 2, 2020, 3:01 PM), <https://www.cnbc.com/2020/09/02/how-much-college-athletes-could-be-earning-study.html>; see also Tommy Beer, *NCAA Athletes Could Make \$2 Million a Year if Paid Equitably, Study Suggests*, FORBES (Sep. 1, 2020, 1:02 PM), <https://www.forbes.com/sites/tommybeer/2020/09/01/ncaa-athletes-could-make-2-million-a-year-if-paid-equitably-study-suggests/?sh=db877045499f>.

¹² See *supra* note 9 and accompanying text.

¹³ Aside from his NIL rights, Mr. Young was entitled to just compensation for the value of his labor as a player. This is the subject of a companion piece, entitled, *Blackness as State Property*, *supra* note *, which analyzes the legal history of the government’s support of the taking of the labor of young Black men. Some critics have likened the NCAA’s exploitation of its players with the enslavement of Black people or of Black labor during the era of Jim Crow. While this is a powerful analysis due to the number of Black male athletes who are negatively impacted by the NCAA amateurism rules, that is not the focus of this Article. See Brandi Collins-Dexter, *NCAA’s Amateurism Rule Exploits Black Athletes as Slave Labor*, ANDSCAPE (Mar. 27, 2018), <https://andscape.com/features/ncaas-amateurism-rule-exploits-black-athletes-as-slave-labor/>; Jay Connor, *The NCAA Is Big Business for Everybody but Black Players*, THE ROOT (Nov. 15, 2019, 12:30 PM), <https://www.theroot.com/the-ncaa-is-big-business-for->

their amateur status, student athletes were strictly forbidden from receiving funds or support from sources outside of NCAA member schools.¹⁴ By limiting student compensation and restricting their rights to their NIL, the NCAA and its member schools, which include “public” schools that are owned by States, received billions of dollars from their sports programs, mainly in the form of advertising and television media.¹⁵

everybody-but-black-player-1839890040; Brando Simeo Starkey, *College Sports Aren't like Slavery. They're like Jim Crow*, THE NEW REPUBLIC (Oct. 31, 2014), <https://newrepublic.com/article/120071/ncaa-college-sports-arent-slavery-theyre-jim-crow>. Moreover, college sports, particularly football, can be especially dangerous to the physical health and wellbeing of the students. Numerous players have sued the NCAA for its handling of concussions. See Associated Press, *Former Football Players Sue NCAA over Concussions*, USA TODAY (Sept. 4, 2013, 12:10 PM), <https://www.usatoday.com/story/sports/ncaaf/2013/09/04/former-football-players-sue-ncaa-over-concussions/2762575/>; see also Dr. Edward M. Wojtys, *The Dark Side of College Football*, 10 SPORTS HEALTH, 489, 489 (Oct. 24, 2018) (“[Thirty-four] NCAA football players have died during football activities in the past [eighteen] years; [twenty-seven] nontraumatic deaths were reported in 2017, while [six] players died from trauma to the head or neck over the same time period.”).

¹⁴ See *supra* note 9 and accompanying text.

¹⁵ See Elliott C. McLaughlin, *California Wants its College Athletes to Get Paid, but the NCAA Is Likely to Put Up Hurdles*, CNN (Oct. 2, 2019, 9:00 AM), <https://www.cnn.com/2019/10/01/us/california-sb206-ncaa-fair-pay-to-play-act/index.html/> (“With the signing of California’s Fair Pay to Play Act, Gov. Gavin Newsom acknowledges he is picking a fight—and he think he’ll win The act allows the state’s college athletes to monetize their name, image, and likeness, and sign endorsement deals and licensing contracts Exactly what the act entails monetarily is unclear, but Newsom says the law is about rebalancing a power structure in which NCAA universities receive more than \$14 billion annually and the nonprofit NCAA receives more than \$1 billion, ‘while the actual product, the folks that are putting their lives on the line, putting everyone on the line, are getting nothing.’”); Dan Murphy, *California Defies NCAA as Gov. Gavin Newsom Signs into Law Fair Pay to Play Act*, ESPN (Sept. 30, 2019), https://www.espn.com/college-sports/story/_/id/27735933/california-defies-ncaa-gov-gavin-newsom-signs-law-fair-pay-play-act (comparing the restrictive NCAA rule to California’s Fair Pay to Play Act); Tom Goldman, *College Athletes in California Can Now Be Paid Under Fair Pay to Play Act*, NPR (Sept. 30, 2019), <https://www.npr.org/2019/09/30/765834549/college-athletes-in-california-can-now-be-paid-under-fair-pay-to-play-act> (“Newsom explained why the Fair Pay to Play Act was important ‘It’s going to change college sports for the better by having now the interest, finally, of the athletes on par with the interests of the institutions.’”).

In addition to being denied their NIL rights, the benefits collegiate athletes received from their play have been grossly inadequate, especially compared to that of professional athletes.¹⁶ Under the NCAA amateurism rule, its players are restricted to school granted benefits, such as scholarships,¹⁷ which are often insufficient¹⁸ to meet a student's basic needs.¹⁹ Hence, the NCAA, its member schools, and its member State governments, have received substantial financial benefits from taking the private property of their student athletes.

Following years of litigation,²⁰ the inequitable treatment of NCAA athletes received national public attention. That litigation culminated in two major developments: (1) in September 2019, the State of California enacted legislation permitting NCAA college athletes to capitalize on their NIL and not lose their amateur status

¹⁶ See Huddleston Jr., *supra* note 11; *Paying College Athletes—Top 3 Pros and Cons*, PROCON.ORG (Jan. 21, 2022), <https://www.procon.org/headlines/paying-college-athletes-top-3-pros-and-cons/>.

¹⁷ See *supra* note 9 and accompanying text.

¹⁸ See *Paying College Athletes—Top 3 Pros and Cons*, *supra* note 16 (“College athletes are required to make up the difference between NCAA scholarships and the actual cost of living. Tuition shortfalls amount to thousands of dollars per year which leave about 85% of players to live below the poverty line About 25% of Division I athletes reported food poverty in the past year and almost 14% reported being homeless in the past year. Erin McGeoy, a former water polo athlete at George Washington University, explained, ‘a common occurrence was that we would run out of meal money halfway through the semester and that’s when I started to run into troubles of food insecurity.’”).

¹⁹ In fact, eighty-six percent of NCAA college athletes live below the poverty line. Armstrong Williams, *Time to Pay College Athletes*, NEWSMAX (Apr. 9, 2014, 7:47 AM), <https://www.newsmax.com/ArmstrongWilliams/NCAA-college-athletes-nlrb/2014/04/09/id/564508/>. These students are usually required to live on campus, attend offseason workouts, and travel to games all over the country. Therefore, they often require additional financial support beyond the scholarships allowed by NCAA rules. For example, how are they supposed to eat after the school cafeterias are closed when their only meal ticket applies to onsite school-sponsored meals? In addition to the lack of general financial support, being a college athlete comes with the inherent danger of injury. All of these factors place not only a financial burden but also an emotional and psychological strain on college athletes, especially players of color.

²⁰ See *infra* Part I.

with the NCAA;²¹ and (2) in 2021, the Supreme Court, in *NCAA v. Alston*,²² handed down a landmark ruling on “Fair Pay to Play.”²³ Following the California legislation and the *Alston* decision, several States have enacted laws that permit college athletes to capitalize on their NIL.²⁴ Consequently, these developments prompted the NCAA to adopt interim rules effective as of July 1, 2021 to reconcile the various State laws.²⁵

²¹ In September 2019, California passed the Fair Pay to Play Act, which becomes effective in 2023 and will allow students to have more control over their names and likenesses for sponsorship and endorsement purposes beyond those sanctioned by the NCAA. S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019); see McLaughlin, *supra* note 15 and accompanying text.

²² *NCAA v. Alston*, 141 S. Ct. 2141, 2155 (2021) (holding that while the NCAA could regulate its players compensation, restrictions on that compensation would be subject to antitrust scrutiny under a “rule of reason” analysis and the ordinary rule of reason’s fact-specific assessment of their effect on competition); see also *infra* Part I.

²³ “Fair Pay to Play,” for purposes of this Article, refers to the legal issue of the right of college athletes to profit from their name, image, and likeness while maintaining their amateur status with the NCAA. It is often referred to simply as “Pay to Play,” although that phrase is also used for a variety of situations in which money is exchanged for services or the privilege to engage in certain activities, particularly in reference to political corruption. See *infra* Part I.

²⁴ See *Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLL. SPORTS, (April 1, 2022), <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> (reporting that as of April 1, 2022, twenty-six states’ pro-NIL laws are now in effect, including Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, and Texas).

²⁵ See Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy> (“The policy provides the following guidance to college athletes, recruits, their families and member schools: [1] Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource on state law questions. [2] College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules relating to name, image and likeness. [3] Individuals can use a professional services provider for NIL activities. [4] Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.”). The NCAA’s interim rules make no mention of gambling

As a result of these changes, NCAA athletes are now allowed to capitalize on what was previously being taken from them by the government, both directly and indirectly through the NCAA. This is a major financial benefit to those players.²⁶ Current estimates are that this new market for college athletes will be worth \$500 million in the first year and \$1 billion annually thereafter.²⁷ Going forward, some highly marketable college athletes are expected to become instant millionaires, and even lesser known ones have a chance to cash in.²⁸ Notwithstanding, players' apparent unfettered access to this

businesses or other vice industries as being prohibited. *See Interim NIL Policy*, NCAA, http://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf (last accessed Feb. 26, 2022); *see also* Zach Braziller, *NCAA Changes College Sports Forever: 'An Entirely New Landscape'*, N.Y. POST (June 30, 2021, 8:56 PM), <https://nypost.com/2021/06/30/ncaas-new-nil-rule-changes-everything/> (“The guidelines are: [1] Deals cannot serve as recruiting inducements. [2] Athletes cannot receive benefits without services given. [3] Agents or representation are allowed for NIL benefits. [4] Schools cannot be involved in creating opportunities for their athletes. [5] Players cannot promote alcohol, legal drugs like cannabis, tobacco products, adult entertainment or gambling.”).

²⁶ *See* AJ Maestas & Jason Belzer, *How Much Is NIL Worth to Student Athletes?* ATHLETIC DIRECTOR U, <https://athleticdirector.com/articles/how-much-is-nil-really-worth-to-student-athletes/> (last visited Feb. 26, 2022) (“[F]rom a licensing standpoint, the annual NIL value per student-athlete could range from \$1,000–\$10,000, whereas professional athletes garner between \$50,000–\$400,000 for the same group usage licenses When applied to Instagram followers for college athletes from the 2019-2020 school year, annual endorsement revenue estimates would be \$700,000 for LSU’s Joe Burrow, \$440,000 for Alabama’s Tua Tagovailoa, \$390,000 for Oklahoma’s Jalen Hurts, and in the \$5–30K range for less popular athletes.”).

²⁷ *See* Justin Birnbaum & Olivia Evans, *College Athletes Are Ready to Reap the Rewards of a Billion-Dollar NIL Market. Opendorse Is Here to Help*, FORBES (June 24, 2021, 8:00 AM), <https://www.forbes.com/sites/oliviaevans/2021/06/24/college-athletes-are-ready-to-reap-the-rewards-of-the-billion-dollar-nil-market-opendorse-is-here-to-help/?sh=6b969b2c4f57>; *see also* Colin Dwyer, *NCAA Plans to Allow College Athletes to Get Paid for Use of Their Names, Images*, NPR (Oct. 29, 2019, 2:59 PM), <https://www.npr.org/2019/10/29/774439078/ncaa-starts-process-to-allow-compensation-for-college-athletes> (reporting that the NCAA is making over \$1 billion annually largely through marketing fees and TV rights from its most prominent sports and various events).

²⁸ *See* Braziller, *supra* note 25 (highlighting the endorsement deals signed by student-athletes the day after the NCAA rule change); *see also* Bill Bender, *NIL Tracker: Which College Athletes Are Signing Endorsement Deals?* SPORTING NEWS (July 1, 2021), <https://www.sportingnews.com/us/ncaa-football/news/nil->

money-making opportunity faces some restrictions with these new laws, such as how to integrate their NIL rights with the intellectual property interests, such as uniforms and logos, of their school.²⁹

B. *A Profound Issue of Private Property Rights*

The NCAA players' victory over their NIL rights raises a quintessential jurisprudential question: Does eminent domain permit the government to expropriate the attributes of a person's self, particularly their name, image, and likeness?³⁰ This Article tackles that question by analyzing the relationship between private property rights and eminent domain.

Relative to the government's power to take a person's private property, the Constitution is a precious gemstone with a dangerous, hidden flaw. On the one hand, fundamental and constitutional principles recognize a person's private property rights. While, on the other hand, the Constitution grants the government supreme authority—eminent domain—to take people's property, for public use and subject to just compensation.³¹ This requires us to raise the vexing question, does eminent domain supersede our libertarian right to own and control our private property?

This Article answers that question by contending that a person's property right in attributes of themselves or "persona,"³² particularly

tracker-college-athletes-signing-endorsement-deals/appbna8md69i1s65pvrwra
938 (tracking endorsement deals signed by student athletes).

²⁹ Murphy, *supra* note 15 (noting that the state laws contain varied restrictions on how student athletes can make money). Furthermore, there is still the issue of fairly compensating the students for their participating in playing the sports. *Id.* ("Most new state laws and the NCAA rule explicitly prohibit schools from paying athletes directly for the use of their NIL or *for any other purposes.*" (emphasis added)).

³⁰ There is the related question, whether the right to capitalize on one's NIL is merely a privilege that some States have granted to NCAA players or if it is a fundamental right that belongs to everyone? *See Right of Self, supra* note *.

³¹ U.S. CONST. amend. V ("No person shall. . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

³² "Persona," for purposes of this Article, refers to the "natural property" rights endowed in each and every person, encompassing a person's attributes or identity, such as labor, name, image, likeness ("NIL"), and other unequivocal identifiers. It can be defined as the intersection of personal rights and property

NIL, should be absolutely protected from governmental³³ taking,³⁴ thereby completely eliminating the government's eminent domain powers³⁵ under the Takings Clause of the Fifth Amendment from

rights. Persona, moreover, is a right that a person is fundamentally, constitutionally, statutorily, or otherwise entitled to, including, but not limited to the right of privacy, the right of publicity, the right to be free from enslavement, in all mediums such as print, online, fantasy, metaverse, and the virtual universe. "Attributes," for purposes of this Article, include a person's labor, their brand, and a quality or feature regarded as a characteristic or inherent part of someone or something. For purposes of this Article, persona has two major components: (1) labor and (2) NIL. This Article focuses on NIL which incorporates the right of personality. While persona is related to the right of personality and the right of publicity, it is much broader than both legal concepts. *See infra* Part III. Compensation for students' actually playing the sport, that is, their labor, is another important aspect of persona as evaluated in this Article.

³³ The terms "government" or "governmental," for purposes of this Article, refers to all levels and aspects of the federal, state, and local authorities, as well as "agents" of the government, private individuals, organizations, and government "sponsored" entities who receive government support or benefits including anti-trust protection, non-profit status, and the like, such as that of the NCAA. The author views the NCAA as governmental because it is a nonprofit entity and many of its members are State-owned schools (colleges and universities) that operate with the approval and consensus of the citizens of a State. *See Division I—Finances*, NCAA, <https://www.ncaa.org/sports/2021/5/4/finances.aspx#:~:text=As%20a%20nonprofit%20organization%2C%20the,%20classroom%20and%20throughout%20life> (last visited April 2, 2022) (purporting that the NCAA is a nonprofit organization); *see Directory—Active Members*, NCAA, <https://web3.ncaa.org/directory/memberList?type=1> (last visited April 2, 2022) (listing all active member schools in NCAA). This categorization highlights the question that if persona, particularly NIL, is the property of the student athletes, then when a State where the athlete is enrolled takes that property, and without just compensation, is that a violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, as well as a in violation of some State Constitutions? *See, e.g.*, LA CONST. art. 1, § 4 ("Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit.").

³⁴ "Taking(s)," for purposes of this Article, refers to instances "when the government seizes private property for public use", with just compensation, pursuant to the Takings Clause of the Fifth Amendment. *See* Legal Info. Inst., *Takings*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/takings> (last visited Mar. 30, 2022) [hereinafter *Takings*]; *see also infra* Part I.

³⁵ The term "eminent domain," for purpose of this Article, is defined as a governmental taking of property. An eminent domain action typically is applied

taking a person's NIL.³⁶ This Article develops that thesis through three tasks. Part I presents a case study analysis of whether the NCAA's amateurism rules constitute a "wrongful" taking of the property of its student athletes.³⁷ Part II argues that eminent domain and the Takings Clause of the Fifth Amendment should not apply to persona rights, particularly NIL, and that the law should prohibit any and all governmental takings of persona.³⁸ Part III proposes a model code solution that governments should adopt to prohibit the use of eminent domain to exploit NIL and other attributes of persona.³⁹

C. *A Game of Thrones*⁴⁰

Before I move forward with that endeavor, I want to explain three reasons why protecting persona rights from governmental taking is an important concept worthy of exploration. First, persona is the *new* property. It is especially valuable to younger Americans and

to real property (real estate, including buildings and land), but any kind of property may be taken if done within the legal confines of the law (based on the Fifth Amendment's Takings Clause). See *History of the Federal Use of Eminent Domain*, U.S. DEP'T OF JUST., <https://www.justice.gov/enrd/history-federal-use-eminent-domain> (last updated Jan. 24, 2022).

³⁶ U.S. CONST. amend. V; see also *supra* note 31. The Fifth Amendment applies to the States through the passage of the Fourteenth Amendment. See Legal Info. Inst., *Incorporation Doctrine*, CORNELL L. SCH., https://www.law.cornell.edu/wex/incorporation_doctrine (last visited Mar. 30, 2022) ("The incorporation doctrine is a constitutional doctrine through which the first ten amendments of the United States Constitution (known as the Bill of Rights) are made applicable to the state through the Due Process clause of the Fourteenth Amendment."); see generally Janet Thompson Jackson, *What Is Property? Property Is Theft: The Lack of Social Justice in U.S. Eminent Domain Law*, 84 ST. JOHN'S L. REV. 63, 64 (2010) (contending the social justice is non-existent in eminent domain law).

³⁷ See *infra* Part I.

³⁸ See *infra* Part II.

³⁹ See *infra* Part III.

⁴⁰ "Game of Thrones," for purposes of this Article, refers to a battle for control of people's attributes or persona, including their labor and NIL, between parties with unequal bargaining positions. It reflects on the lessons learned from the popular, American fantasy drama television series, particularly how the quest for greed and power in a lawless society needlessly destroys people's lives and dreams.

is the focus of what I refer to as “Right of Property.”⁴¹ Second, developing persona as an absolute property right addresses wealth inequity between the young and the old in this country.⁴² Third, reinvigorating libertarian principles into our laws can promote social justice.⁴³

First, persona is a growing area of intellectual property. NCAA athletes are not the only people who should be protected from governmental taking of their personal property. With the development of modern technology, including the expansion of the virtual or metaverse,⁴⁴ property interests in attributes of one’s self, such as NIL, have increased in value and, therefore, are subject to greater exploitation.⁴⁵ For example, consider the financial value of an avatar in a fantasy football league.⁴⁶ Rights to NIL are of particular interest

⁴¹ “Right of Property,” for purposes of this Article, refers to “private” property, owned by private individuals, not government, both tangible or intangible, reflecting the libertarian principles of John Locke and the Founders of the United States. *See infra* Part II; *see also infra* notes 46–51 and accompanying text. *See Right of Self, supra* note *.

⁴² *See infra* notes 52–58 and accompanying text.

⁴³ *See infra* notes 59–64 and accompanying text.

⁴⁴ “Metaverse,” for purposes of this Article, refers to the virtual environment of the internet and anything associated with the Internet and the diverse Internet culture. *See* DAVID BELL ET AL., *CYBERCULTURE* 41–43 (2004).

⁴⁵ Persona is not limited to name, image, and likeness, but includes less visible attributes of an individual, such as their DNA, which, with medical technology such as gene splicing and stem cell development, raises legal issues over the ownership rights of a voluntary or involuntary donor. For example, the “HeLa cell line” is among the most important scientific discoveries of the last century and was established in 1951 from a tumor taken from Henrietta Lacks. *See* REBECCA SKLOOT, *THE IMMORTAL LIFE OF HENRIETTA LACKS* 51–52 (2010); *see also* *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 480 (Cal. 1990) (holding that Moore had no property rights to his discarded cells or to any profits made from them; however, that the research physician had an obligation to reveal his financial interest in the materials that were harvested from Moore, who could thus bring a claim for any injury that he sustained by the physician’s failure to disclose his interests).

⁴⁶ The nature of property interests in one’s persona are still being developed. There is much at stake as technology continues to monetize the “virtual” essence of a person. *See* Dora Mekouar, *Why Millions of Americans Spend Billions on This Fantasy*, *VOICE OF AMER. NEWS* (Sept. 3, 2019, 11:42 AM), https://www.voanews.com/a/usa_all-about-america_why-millions-americans-spend-billions-fantasy/6175070.html (reporting that, in 2019, the fantasy sports industry was worth over \$7 billion).

to millennials, Generation Z, and Generation A who are currently living off the fruits of their persona, due to the proliferation of social media. For example, a nineteen-year-old influencer Josh Richards made nearly a thousand dollars a minute as a TikTok star.⁴⁷ While these cultural facets of intellectual property are both timely and important, this Article focuses on only one type of property interest in persona—NIL rights.⁴⁸

Further, persona is personal and private. Imagine one morning you receive a text message from your best friend. She tells you a new “character,” who looks and talks just like you, has been added to a popular video game.⁴⁹ Upon investigation, you discover that someone has taken your image without your permission and has licensed it to a game developer,⁵⁰ and, moreover, that the government has sanctioned and benefitted financially from the taking of your

⁴⁷ See Jade Scipioni, *Here’s How Many Social Media Followers You Need to Make \$100,000*, CNBC (May 20, 2021, 6:08 PM), <https://www.cnbc.com/2021/04/30/how-much-money-you-can-make-off-social-media-following-calculator.html>; Raktim Sharma, *How Do Influencers Make Money on Instagram?*, YA-HOO! FIN. (Mar. 31, 2021), <https://ca.sports.yahoo.com/news/how-do-influencers-make-money-through-instagram-083707019.html> (discussing how influencers use their persona as branding to influence marketing, promotional, and affiliate deals).

⁴⁸ These unexplored attributes of persona have legal aspects that have been widely undeveloped by our legal system. See, e.g., *Shaw Fam. Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309, 314 (S.D.N.Y. 2007) (holding that neither New York nor California has a right of publicity applicable to a decedent); Michael Decker, *Goodbye, Norma Jean: Marilyn Monroe and the Right of Publicity’s Transformation at Death*, 27 CARDOZO ARTS & ENT. L.J. 243, 252 n. 69, 253–54 n.77 (2009) (noting that many states now have common law and/or statutory rights of publicity that apply postmortem).

⁴⁹ Juventus footballer Edgar Davids brought a lawsuit against Riot Games Europe Holdings Ltd, stating that a player named Lucian in their League of Legends game infringed Davids’s likeness. Monika A. Gorska & Lena Marcinoska-Boulangé, *Likeness in Computer Games: Real-Life People*, NEWTECH.LAW (Apr. 8, 2021), <https://newtech.law/en/likenesses-in-computer-games-real-life-people/>. Similarly, Booker T. Huffman sued Activision, claiming that the Call of Duty character David “Prophet” Wilkes is based upon a character he appeared as in the early days of his wrestling career named G.I. Bro. Andy Chalk, *Activision Smacks down Pro Wrestler Booker T. in Call of Duty Copyright Lawsuit*, PC GAMER (June 25, 2021), <https://www.pcgamer.com/activision-beats-pro-wrestler-booker-t-in-call-of-duty-copyright-lawsuit/>.

⁵⁰ *Id.* In each of the above cases, the game developers used the person’s likeness in their video game without their permission.

image. This battle over persona is not new and is a very real problem, which compels us to assess a person's private property right in their NIL. That is the goal of this Article.

Second, the NCAA athletes' controversy should be public concern because it further highlights the need to address wealth inequity,⁵¹ especially at the intersection of age, race, gender, and class.⁵² This inequity results from a conscious and unconscious transfer of wealth from young people,⁵³ of both their nonvirtual and virtual

⁵¹ See Matthew Yglesias, *New Federal Reserve Data Shows How the Rich Have Gotten Richer*, VOX (June 13, 2019), <https://www.vox.com/policy-and-politics/2019/6/13/18661837/inequality-wealth-federal-reserve-distributional-financial-accounts> (“[T]he rich have gotten richer and inequality has grown[.]” In fact, the Federal Reserve data indicates that from 1989 to 2019, wealth became increasingly concentrated in the top 1% and top 10% and that the gap between the wealth of the top 10% and that of the middle class is over 1,000%; and increases another 1,000% as compared to the top 1%, hence the term “wealth gap.”).

⁵² See, e.g., Vanessa Williamson, *Closing the Racial Wealth Gap Requires Heavy, Progressive Taxation of Wealth*, BROOKINGS INST. (Dec. 9, 2020), <https://www.brookings.edu/research/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/> (“The median white household has a net worth 10 times that of the median Black household The total racial wealth gap, therefore, is \$10.14 trillion.”).

⁵³ See Christopher Ingraham, *The Staggering Millennial Wealth Deficit, in One Chart*, WASH. POST (Dec. 3, 2019), <https://www.washingtonpost.com/business/2019/12/03/precarioussness-modern-young-adulthood-one-chart/> (“[Millennials’] financial situation is relatively dire. They own just 3.2 percent of the nation’s wealth. To catch up to Gen Xers, they’d need to triple their wealth in just four years. To reach boomers, their net worth would need a sevenfold jump.”).

selves,⁵⁴ to upper-class, white adults.⁵⁵ I refer to this phenomenon as “intergenerational wealth displacement.”⁵⁶ One example of a nonvirtual, inequitable transfer of wealth is the high debt load that many students pay for college, graduate, and professional schools and its subsequent negative impact on their quality of life.⁵⁷

⁵⁴ This “exploitation” includes the lawful and unlawful commercial use of virtual or digital images, data, and information, referred to as “personally identifiable information,” usually by big business or government. See Christos Giakoumopoulos et al., *Handbook on European Data Protection Law*, E.U. AGENCY FUNDAMENTAL RTS., 29–31 (2018), https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-edps-2018-handbook-data-protection_en.pdf (protecting data rights among EU Member States for individuals, strengthening mandated data protection requirements, and imposing significant legal responsibilities on entities handling personal data). No similar protections exist in U.S. law, except for the State of California’s California Consumer Privacy Act (CCPA). See Office of the Attorney General, *California Consumer Privacy Act (CCPA) Fact Sheet*, CAL. DEP’T OF JUST. (2019), https://www.oag.ca.gov/system/files/attachments/press_releases/CCPA%20Fact%20Sheet%20%2800000002%29.pdf.

⁵⁵ Parenthetically, this Article will also shine light on the unconscious cause of systemic racism. That focus is explored in *Blackness as State Property*, *supra* note *. “Systemic racism,” or “institutional racism,” for purposes of this Article, refers to the conscious and unconscious institutionalization of and the continuation of the oppression of Black people. See STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 4 (Vintage Books 1992 ed. 1967) (“[Institutional racism] originates in the operation of established and respected forces in the society, and thus receives far less public condemnation than [individual racism].”).

⁵⁶ “Intergenerational wealth displacement,” for purposes of this Article, is defined as legal and illegal, conscious and unconscious, transfer of wealth from younger Americans, particularly those from disadvantages communities, to adults, particularly wealth, senior, white males, as one dynamic that resulted in an aged-related wealth gap. Households headed by people aged sixty-five or older are forty-seven times wealthier than households where the median age is thirty-five years or younger. See Annalyn Censky, *Older Americans Are 47 Times Richer than Young*, CNN (Nov. 28, 2011, 3:09 PM), https://money.cnn.com/2011/11/07/news/economy/wealth_gap_age/index.htm.

⁵⁷ Censky, *supra* note 56 (“Some of those trends come hand in hand with more young people attending college, which can be a double-edged sword. While those college credentials could lead to income gains for many young people down the road, surging tuition costs are also leaving them burdened by more student loans than prior generations.”).

Third, reinvigorating libertarian⁵⁸ or natural law⁵⁹ principles into our civil laws⁶⁰ can promote social justice. This point is a personal one and explains my motivation for writing this Article. Years ago, in preparing for my first class at Yale Law School, I reflected on the hollowed words of Oliver Wendell Holmes⁶¹: “The life of the law has not been logic: it has been experience.”⁶² I was both

⁵⁸ “Libertarian view,” for purposes of this Article, means to strongly value individual freedom and civil liberties, endorse a free-market economy based on private property, and freedom of contract. See *Libertarianism*, STAN. ENCYC. OF PHIL. (Jan. 28, 2019), (<https://plato.stanford.edu/entries/libertarianism/>; see also *Individual Rights*, LIBERTARIANISM.ORG, <https://www.libertarianism.org/topics/individual-rights> (last visited Mar. 23, 2022) (“[L]ibertarian doctrines of individual rights are often cast in terms of a fundamental right of self-ownership.”). This Article reflects libertarianism based on deontological ethics—the theory that all individuals possess certain natural or moral rights, mainly the right of “individual sovereignty” or “self-ownership,” which is a property in one’s person, with possession and control over oneself, as they exercise over the possessions they own. See *infra* Part II; see generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 42–43 (2013 ed. 1974) (defending a political theory entrenched in the rights of individuals); DAVID BOAZ, THE LIBERTARIAN MIND 27 (2015); G.A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY 15 (1995).

⁵⁹ “Natural law” or “natural law theory of property,” for purposes of this Article, is defined as the jurisprudential theory by which there are “natural rights” (1) that are fundamental or natural, as derived from God or nature, (2) to which all people are equally entitled, (3) that are inalienable, meaning they cannot be bargained or legislated away from people, and (4) that apply to life, liberty, and property. See *The Natural Law Tradition in Ethics*, STAN. ENCYC. OF PHIL. (May 26, 2019), (<https://plato.stanford.edu/entries/natural-law-ethics/>; see *Natural Law*, FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/natural+law>.

⁶⁰ See *infra* Part II. Parenthetically, this Article focuses on the *civil* rights protections of these laws, recognizing that they also protect liberty, in the form of rights against *criminal* infringements. That is not to exclude the fundamental right of privacy. See Legal Info. Inst., *Publicity*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/publicity> (last visited Mar. 1, 2022) (“In the United States, the right of publicity is largely protected by state common or statutory law. Only about half the states have distinctly recognized a right of publicity. Of these, many do not recognize a right by that name but protect it as part of the Right to Privacy.”); *Statutes & Interactive Map*, RIGHT OF PUBLICITY, <https://rightofpublicity.com/statutes> (last visited Mar. 1, 2022) (indicating that “a statute is not a prerequisite for the Right of Publicity to be enforceable” as a number of states have an enforceable Right of Publicity by way of common law).

⁶¹ See Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD., 409, 424–26 (2000) (identifying Holmes as the third-most cited American legal scholar of the 20th century).

⁶² OLIVER WENDELL HOLMES, THE COMMON LAW 3 (1881).

bewildered and disappointed by those words. Bewildered that my chosen field of study seemed pedantic, and disappointed by Holmes's view of law being devoid of the search for a higher purpose, such as justice or the betterment of humanity. Subsequently, over twenty-five years of teaching law, I have found many law students share my thirst for using law as a means to achieve social justice. Consequently, this Article is written to challenge Oliver Wendell Holmes's view of the law. I believe that the "life of the law" has been and should be the quest to protect individual rights from governmental infringement.⁶³ As such, this Article seeks to establish a constitutional and jurisprudential basis for positive social change.

Hence, I believe that there is a void in the development of civil liberties that will redress wealth inequities.⁶⁴ This requires a transformational development in our understanding of our rights. Such a development could promote the growth of new markets for intellectual property generated through the often-virtual world of the metaverse.⁶⁵ The dire need for that development is presented next through a case study relating to the NIL rights of college athletes.

D. *Sports as a Window into Culture & Values*

Before we present that case study, it is appropriate to explain why the battle over college student athletes' rights to control their NIL is vital to exhibit the transformational value of Right of Property. First, sports provide invaluable insight into our culture and values.⁶⁶ Second, Justices and other constitutional scholars have

⁶³ See *infra* Part II.

⁶⁴ Rakim Brooks, *The Racial Wealth Gap is a Civil Liberties Issue*, ACLU (Mar. 11, 2021), <https://www.aclu.org/news/racial-justice/the-racial-wealth-gap-is-a-civil-liberties-issue/>.

⁶⁵ See Tim Chheda, Comment, *Intellectual Property Implications in a Virtual Reality Environment*, 4 J. MARSHALL REV. INTELL. PROP. L. 483, 483, 507 (2005) (predicting a future that we now live in and calling on lawmakers to adjust the laws with the changes in technology).

⁶⁶ See Kenneth J. Marci, *Not Just a Game: Sport and Society in the United States*, 4 INQUIRIES J. no. 8, 2012, at 1 ("Sport coincides with community values and political agencies, as it attempts to define the morals and ethics attributed not only to athletes, but the totality of society as a whole.").

analogized the judicial function in sports terms.⁶⁷ And third, Right of Property as applied to college students is an important example of intergenerational wealth displacement.⁶⁸

In summary, this Article utilizes a libertarian lens to support the proposition that every person in America possesses a unique type of natural property⁶⁹ right⁷⁰ to their persona that should be absolutely protected from governmental taking, pursuant to the philosophy of John Locke⁷¹ and the spirit of the Declaration of Independence.⁷² Further, it explores the question of whether State governments that

⁶⁷ See generally Megan E. Boyd, *Riding the Bench—A Look at Sports Metaphors in Judicial Opinions*, 5 HARV. J. SPORTS & ENT. L. 245, 246 (2014) (providing insight into the various ways that the court has used sports analogies and metaphors). Chief Justice John Roberts, during his appearance before the Senate Judiciary Committee, once stated: “Judges are like umpires. Umpires don’t make the rules; they apply them . . . I will remember that it’s my job to call balls and strikes and not to pitch or bat.” *Id.* at 248. Justice Stevens also expressed his frustration on a decision by stating that the majority “punted” on an issue of importance in *Morse v. Frederick*. *Id.* at 251.

⁶⁸ See Rohan Nadkarni, *Study: NCAA ‘Robs Predominantly Black Athletes’ of Opportunity to Build Generational Wealth*, SPORTS ILLUSTRATED (July 31, 2020), <https://www.si.com/college/2020/07/31/ncaa-athlete-compensation-cost-revenue-study> (“The NCAA’s steadfast refusal to pay players is costing its largely Black labor force an opportunity to create substantial generational wealth.”); see notes 45–51 and accompanying text.

⁶⁹ “Property,” for purposes of this Article, is defined using the ambiguous and sometimes contradictory theories of private property. See generally JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 26 (1988); STEPHEN MUNZER, *A THEORY OF PROPERTY* 1 (1990); MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 35–36 (1993).

⁷⁰ See Joshua Getzler, *Theories of Property and Economic Development*, 26 J. INTERDISC. HIST. 639, 641 (1996) (“[t]here is a notion of property as presocial, a natural right expressing the rights of persons which are prior to the state and law, this being the view of Hugo Grotius, Samuel von Pufendorf, John Locke, Immanuel Kant, and George W. F. Hegel; and there is a notion of property as social, a positive right created instrumentally by community, state, or law to secure other goals—the theory of Thomas Hobbes, David Hume, Adam Smith, Jeremy Bentham, Emile Durkenheim, and Max Weber.”).

⁷¹ “[E]very man has *Property* in his own *Person*. This no Body has any Right to but himself.” JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, 116 (Rod Hay ed., McMaster University 1823) (1690).

⁷² THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

operate NCAA member schools have and are wrongfully expropriating student athletes' NIL rights. Part I next presents a case study of the NCAA players' battle for their NIL rights and seeks to answer that question.

I. PYRRHIC VICTORY

*If you think this has a happy ending, you haven't been paying attention.*⁷³

— Ramsay Bolton

That *Game of Thrones* quote of Ramsay's sadistic torture of the captured Theon Greyjoy illustrates two points that are relevant to the next part of this Article. (1) It shows how individuals often suffer from lawlessness in society. Being aware of such abuse of power and in seeking "a more perfect Union," the Founders of the United States established a Nation governed by laws, not by power. Hence, the U.S. Constitution provides a strong framework to protect individual rights and liberties from lawless struggle for power and avarice. (2) It warns that what appears to be a happy ending is merely a prelude to continuing abuse. The lesson here for NCAA players is the granting of NIL privileges does not end the NCAA's continued exploitation of its players.

This Part critically assesses whether the current granting of NCAA players the ability to capitalize on their NIL is a true victory for players' rights. This Part is divided into three sections: First, it provides a background of the players' legal struggles to assert their constitutional rights to be compensated and benefit from their NIL. Second, it analyzes the Supreme Court decision in *Alston*⁷⁴ and the subsequent State laws granting NCAA players their NIL rights. Third, it assesses the NCAA amateurism rules from the perspective of the Fifth Amendment's Takings Clauses to determine whether those rules constitute a "rightful" or "wrongful" taking.

⁷³ Kim Renfro, *5 Time 'Game of Thrones' Has Broken the Fourth Wall*, BUS. INSIDER (Apr. 19, 2016, 12:41 PM), <https://www.businessinsider.com/game-of-thrones-breaks-fourth-wall-2016-4>; see generally *Game of Thrones*, HBO, <https://www.hbo.com/game-of-thrones> (last visited Mar. 5, 2022).

⁷⁴ See *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

A. *Battle over NIL*

This section describes the history of the NCAA rules that greatly restricted players' compensation and denied them the right to capitalize on their NIL. Further, it presents the apparent victory for the players who, following a landmark Supreme Court decision, are being granted the privilege of benefitting from their NIL but not from their labor.

Historically, the NCAA rules required that student-athletes who play for NCAA-member colleges must agree to forego benefitting from the commercial use of their NIL, as well as other restrictions on their compensation.⁷⁵ This resulted in the NCAA and their university members exploiting substantial financial compensation from their students, mainly in the form of advertising and television media.⁷⁶ In the last several years, these NCAA rules have been under attack from various sources⁷⁷ and the NCAA itself reported that it was planning to provide a reform.⁷⁸ Needless to say, these restrictive rules have a disproportionate impact on students of color, many of whom come from impoverished families.⁷⁹

To appreciate the battle over NIL, one needs to understand the history and rationale behind the NCAA's rules, at least from the viewpoint of the NCAA—the past and current potential for abuse when college athletics becomes commercialized. In the Supreme Court decision *NCAA v. Alston*,⁸⁰ the Court provided a history of past corruption and gaming that led the NCAA to introduce and continue to enforce these rules.⁸¹ In particular, the Court reported on the

⁷⁵ See Stanton McManus, *Another NCAA Upset: Rethinking the Playbook for Compensating Student-Athletes*, MINN. L. REV.: DE NOVO BLOG (Apr. 23, 2019), <https://minnesotalawreview.org/2019/04/23/another-ncaa-upset-rethinking-the-playbook-for-compensating-student-athletes/>.

⁷⁶ See *supra* Part I.

⁷⁷ See, e.g., *Tracker: Name, Image and Likeness Legislation by State*, *supra* note 24.

⁷⁸ See Greta Anderson, *Court Panel Rules Against NCAA Restrictions on Athlete Pay*, INSIDE HIGHER ED (May 19, 2020), <https://www.insidehighered.com/quicktakes/2020/05/19/court-panel-rules-against-ncaa-restrictions-athlete-pay> (reporting on the NCAA's process of reviewing its policies related to how to compensate players for names and likenesses).

⁷⁹ See *supra* note 1 (reporting on several awful stories of the NCAA's mistreatment of Black athletes).

⁸⁰ See generally *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

⁸¹ *Id.* at 2148–51.

NCAA's program to address under-the-table pay to players and regulate player compensation.⁸² The Court then explained that the rules regarding student-athlete compensation have evolved ever since,⁸³ in ways in which the players claim are inadequate, unfair, and inequitable. As a result, the NCAA rules on student compensation eventually permitted payments to include room, board, books, fees, and "cash for incidental expenses such as laundry";⁸⁴ paid professionals in one sport to compete on an amateur basis in another sport;⁸⁵ and athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance.⁸⁶ The NCAA created the "Student Assistance Fund" and the "Academic Enhancement Fund" to "assist student-athletes in meeting financial needs," "improve their welfare or academic support," or "recognize academic achievement";⁸⁷ allowed payments "incidental to athletics participation," including awards for "participation or achievement in athletics" (like "qualifying for a bowl game") and permitted certain "payments from outside entities," such as for "performance in the Olympics";⁸⁸ permitting its member schools to award up to (but no more than) two annual "Senior Scholar Awards" of \$10,000 for students to attend graduate school after their athletic eligibility expires;⁸⁹ and finally, allowing schools to fund travel for student-athletes' family members to attend "certain events."⁹⁰

At first glance, it appears that the NCAA provides substantial benefits to its athletes. However, when viewed through the eyes of

⁸² *Id.* at 2149 (explaining that the NCAA "adopted the 'Sanity Code'" in 1948, authorizing schools to pay for athletes' tuition, while providing for "suspension or expulsion" of those students who received other forms of compensation).

⁸³ *Id.* at 2149–50.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* ("In 2018, the NCAA made more than \$84 million available through the Student Activities Fund and more than \$48 million available through the Academic Enhancement Fund. Assistance may be provided in cash or in kind, and there is no limit to the amount any particular student-athlete may receive.") (internal citations omitted).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

many of its most sought-after players,⁹¹ one would agree that the NCAA and its member schools are reaping substantial financial benefits by exploiting the labor and persona of those athletes.

In 2014, in a landmark class-action lawsuit *O'Bannon v. NCAA*,⁹² numerous college athletes claimed that the NCAA and its colleges were reaping the profits off their names and likenesses, in violation of the Sherman Act and antitrust law.⁹³ The district court ruled in part for the plaintiffs, and the NCAA agreed to allow student-athletes to receive full scholarships for academics in light of the use of the students' names and likenesses.⁹⁴ While the college athletes received some benefits from the *O'Bannon* decision, the courts still failed to recognize the students' property rights in their NIL. As a result, students continued to challenge the fairness of the NCAA's compensation rules.

Following the *O'Bannon* decision, in 2019, several former NCAA players filed several lawsuits in federal court, which were consolidated under *NCAA v. Alston*,⁹⁵ challenging the NCAA restrictions on educational compensation for athletes.⁹⁶ In March of 2019, a federal judge ruled that the NCAA restrictions on "non-cash education-related benefits" violated antitrust law under the Sherman Act.⁹⁷ The court required the NCAA to allow for certain types of academic benefits beyond the previously-established full scholarships from *O'Bannon*, such as for "computers, science equipment, musical instruments, and other tangible items not included in the

⁹¹ See, e.g., Huddleston Jr., *supra* note 11; Beer, *supra* note 11.

⁹² *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015).

⁹³ *Id.* at 963. The Sherman Antitrust Act, 15 U.S.C. §§ 1–7, is a United States antitrust law that prescribes the rules of free competition for those engaged in interstate commerce. See LEGAL INFO. INST., *Sherman Antitrust Act*, CORNELL L. SCH., https://www.law.cornell.edu/wex/sherman_antitrust_act (last visited Apr. 1, 2022).

⁹⁴ See Hosick, *supra* note 25; Michael McCann, *Why the NCAA Lost its Latest Landmark Case in the Battle Over What Schools Can Offer Athletes*, SPORTS ILLUSTRATED (Mar. 8, 2019), <https://www.si.com/college/2019/03/09/ncaa-antitrust-lawsuit-claudia-wilken-alston-jenkins>.

⁹⁵ See *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1065 (N.D. Cal. 2019).

⁹⁶ *Id.* at 1062.

⁹⁷ *Id.* at 1110.

cost of attendance calculation but nonetheless related to the pursuit of academic studies.”⁹⁸

Moreover, the district court in *Alston* barred the NCAA from preventing athletes from receiving “post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; tutoring; expenses related to studying abroad that are not included in the cost of attendance calculation; and paid post-eligibility internships.”⁹⁹ However, the court held that the conferences within the NCAA may still limit cash or cash-equivalent awards for academic purposes.¹⁰⁰ The court based the decision on the large compensation discrepancy amongst the NCAA and the students.¹⁰¹ The NCAA appealed to the U.S. Ninth Circuit.

In response to pending litigation and public opinion in favor of players having control over their NIL,¹⁰² California passed the Fair Pay to Play Act (S.B. 206), which permits athletes to capitalize on their NIL for sponsorships and endorsements, free from the NCAA rules.¹⁰³ The new law also prohibits universities from implementing rules that prohibit student-athletes from earning compensation or

⁹⁸ *Id.* at 1088.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1089.

¹⁰² Michael T. Nietzel, *Americans Now Overwhelmingly Support College Athletes Earning Endorsement and Sponsorship Money*, FORBES (Feb. 11, 2020, 8:43 AM), <https://www.forbes.com/sites/michaelt Nietzel/2020/02/11/americans-now-overwhelmingly-support-college-athletes-earning-endorsement-and-sponsorship-money/?sh=7c4c8a02648e>.

¹⁰³ S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019) (“[Under S.B. 206] an athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, shall not prevent a student of a postsecondary educational institution participating in intercollegiate athletics from earning compensation as a result of the use of the student’s name, image, or likeness.”); see also *Governor Newsom Signs SB 206, Taking on Long-Standing Power Imbalance in College Sports*, CAL. STATE PORTAL: OFF. OF GOVERNOR GAVIN NEWSOM (Sept. 30, 2019), <https://www.gov.ca.gov/2019/09/30/governor-newsom-signs-sb-206-taking-on-long-standing-power-imbalance-in-college-sports/>; Gregg E. Clifton & Nicholas A. Plinio, *New Jersey Grants Name, Image, Likeness Rights to Collegiate Student-Athletes*, JACKSON LEWIS: COLLEGIATE & PRO. SPORTS BLOG (Sept. 15, 2020), <https://www.collegeandprosportslaw.com/uncategorized/new-jersey-grants-name-image-likeness-rights-to-collegiate-student-athletes/>.

denying scholarships to athletes who choose to market their NIL.¹⁰⁴ S.B. 206 does not require universities to pay student-athletes themselves; as a result, the net cost to the NCAA and its collegiate members would be zero, as all compensation is paid for by third-party endorsers.¹⁰⁵ The law seems to be based on an equal protection argument that, relative to benefiting from their NIL, NCAA schools cannot treat athletes differently from other college students.¹⁰⁶

In May of 2020, the Ninth Circuit ruled on the district court's decisions in *Alston* and upheld its decisions.¹⁰⁷ The Ninth Circuit noted that the NCAA had a necessary interest in "preserving amateurism and thus improving consumer choice by maintaining a distinction between college and professional sports."¹⁰⁸ Moreover, the Court agreed with the district court that the NCAA practices relative to some specific restrictions violated antitrust law,¹⁰⁹ while Judge Smith penned a concurrence and likened the NCAA to a cartel.¹¹⁰ Subsequently, the NCAA started a review of its policies related to players' compensation for NIL.¹¹¹ However, the NCAA appealed to the U.S. Supreme Court. On March 31, 2021, the Supreme Court heard arguments in *NCAA v. Alston*.¹¹² The centerpiece of this case

¹⁰⁴ See S.B. 206.

¹⁰⁵ *Id.*

¹⁰⁶ For example, while a film major who doesn't play a varsity sport is permitted to generate income making YouTube videos, a film major who is also an athlete may not. See Billy Witz, *A State Skirmish Over N.C.A.A. Amateurism Rules Has Quickly Become a National Battle*, N.Y. TIMES (June 21, 2021), <https://www.nytimes.com/2020/12/28/sports/ncaa-amateurism-rules.html>.

¹⁰⁷ *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1244 (9th Cir. 2020).

¹⁰⁸ Wolters Kluwer trade report (Trade Reg. Rep. P 81227 (C.C.H.), 2020 WL 3549287).

¹⁰⁹ *Id.*

¹¹⁰ According to Judge Smith, "The treatment of Student-Athletes is not the result of free market competition. To the contrary, it is the result of a cartel of buyers acting in concert to artificially depress the price that sellers could otherwise receive for their services. Our antitrust laws were originally meant to prohibit exactly this sort of distortion." *Id.* at 1267 (Smith, J., concurring).

¹¹¹ See Hosick, *supra* note 25.

¹¹² *NCAA v. Alston*, 141 S. Ct. 2141 (2021). This case is an appeal from the Ninth Circuit's ruling that affirmed a district court's March 2019 holding that that the NCAA's restrictions on non-cash education-related benefits violated the Sherman Act and, as a result, that the NCAA must allow for certain types of academic

was the antitrust protection under *NCAA v. Board of Regents*,¹¹³ as it relates to the NCAA's eligibility standards and compensation.¹¹⁴

As is sometimes the case, a Supreme Court decision's impact goes beyond the specific holding of the case. This is true about the Supreme Court's decision in *Alston*.¹¹⁵ In 2021, Justice Neil Gorsuch, writing for a unanimous Court, affirmed the lower court's injunction against the NCAA's restrictions on players' compensation.¹¹⁶ However, the Court explicitly stated that since the student-athletes did not renew their "across-the board challenge to the NCAA's compensation restrictions,"¹¹⁷ the Court's review was limited to "those restrictions now enjoined."¹¹⁸ However, Justice Kavanaugh's concurring opinion, while upholding the NCAA's power over the eligibility of its players, noted that "the NCAA's current compensation regime raises serious questions under the antitrust laws."¹¹⁹

On the one hand, the Court agreed with the district court's enjoining of certain NCAA rules limiting the education-related

benefits beyond the previously-established full scholarships. *In re NCAA*, 958 F.3d 1239 (9th Cir. 2020).

¹¹³ *NCAA v. Bd. of Regents*, 468 U.S. 85, 101, 119–20 (1984) (invalidating NCAA's restrictive television licensing scheme under rule of reason standard but noting that college sports is "an industry in which horizontal restraints on competition are essential if the product is to be available at all").

¹¹⁴ See generally Robert Barnes & Rick Maese, *Supreme Court Will Hear NCAA Dispute Over Compensation for Student-Athletes*, WASH. POST (Dec. 16, 2020), https://www.washingtonpost.com/politics/courts_law/supreme-court-ncaa/2020/12/16/90f20dbc-3fa9-11eb-8db8-395dedaaa036_story.html (reporting the NCAA oversees rules related to student athletes that play in their athletics programs, which, *inter alia*, limit the type of compensation that the school could give to student athletes as to distinguish college athletics from professional sports, disallowing "non-cash education-related benefits" such as scholarships and internships so that there is no apparent "pay to play" aspects).

¹¹⁵ *Alston*, 141 S. Ct. at 2141 (2021).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2151.

¹¹⁸ *Id.* at 2162–63 (holding that the district court's injunction did not invite future courts to "micromanage" the NCAA, but rather constituted a permissible antitrust remedy). See generally *NCAA v. Alston*, 135 HARV. L. REV. 471 (Nov. 10, 2021) (analyzing the antitrust aspects of the majority decision).

¹¹⁹ *Alston*, 141 S. Ct. at 2169 (2021) (Kavanaugh, J., concurring).

benefits schools may make available to student-athletes.¹²⁰ Yet, most importantly, the Court advised the NCAA that it could not use the federal antitrust laws as a justification for its rules regulating players' compensation.¹²¹ Specifically, the Court affirmed the district court's injunction on the NCAA's restrictions on "non-cash education-related benefits."¹²²

Equally important is the Court's dicta on the issue of "pay to play." In favor of the players' position, the Court noted that colleges have leveraged sports to bring in revenue, attract attention, boost enrollment and raise money from alumni.¹²³ The Court highlighted that the profitability of this sports-driven enterprise relies on "amateur" student-athletes competing under rules that restrict how the schools may compensate them for their play.¹²⁴ This observation is consistent with the claims brought in this case by former student-athletes that the NCAA rules depress compensation for at least some

¹²⁰ *Id.* at 2166 (affirming the district court's decisions (1) not to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance, (2) while, at the same time, finding as unlawful and thus enjoined certain NCAA rules limiting the education-related benefits schools may make available to student-athletes, and (3) as consistent with established anti-trust principles when it subjected the NCAA's compensation restrictions to antitrust scrutiny under a "rule of reason" analysis). Tangentially, this case shows that, contrary to Alexander Hamilton's belief that the United States Supreme Court is the "weakest" branch of government, judicial review can produce profound social, economic, and political outcomes. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

¹²¹ *Alston*, 141 S. Ct. at 2165.

¹²² *Id.* at 2165 ("Under the current decree, the NCAA is free to forbid in-kind benefits unrelated to a student's actual education; nothing stops it from enforcing a 'no Lamborghini' rule. And, again, the district court invited the NCAA to specify and later enforce rules delineating which benefits it considers legitimately related to education. To the extent the NCAA believes meaningful ambiguity really exists about the scope of its authority—regarding internships, academic awards, in-kind benefits, or anything else—it has been free to seek clarification from the district court since the court issued its injunction three years ago. The NCAA remains free to do so today. To date, the NCAA has sought clarification only once—about the precise amount at which it can cap academic awards—and the question was quickly resolved. Before conjuring hypothetical concerns in this Court, we believe it best for the NCAA to present any practically important question it has in district court first.").

¹²³ *Id.* at 2149.

¹²⁴ *Id.* at 2144

student-athletes below what a competitive market would yield.¹²⁵ Moreover, the plaintiffs claimed the NCAA's rules violate the Sherman Act, which prohibits contracts, combinations, or conspiracies "in restraint of trade or commerce."¹²⁶ Courts have interpreted the Sherman Act's prohibition on restraints of trade to prohibit only restraints that are "undue."¹²⁷ For the most part, Courts assess whether a restraint is undue using the "rule of reason" standard,¹²⁸ which requires a fact-finding of market power and structure to decide what a restraint's actual effect is on competition.¹²⁹

The Court also responded to the NCAA's argument that its business should enjoy a special exception that excludes it from antitrust law or at least it be given special leeway under antitrust law.¹³⁰ On this, the Court disagreed, stating that college sports is a trade and, therefore, cannot unduly restrain athletes from the marketplace.¹³¹ However, this is where the Court relented in its attack of the NCAA. The Court affirmed the district court's findings of undue restraints in certain NCAA rules limiting the education-related benefits schools otherwise could make available to student-athletes, including paid internships, post-graduate scholarships, tutoring or education abroad.¹³² Unfortunately, and perhaps illogically, the Court failed to rule on the NCAA's rules limiting players' education-related benefits.¹³³ Moreover, the Court expressly stated that it is not an undue restraint for the NCAA, or conferences within it, to define what those educational benefits are,¹³⁴ leaving the restrictions on amateur status partially undisturbed.

Hence, the unanimous decision by the Court did not free NCAA-member college athletes from their contractual relationship with their colleges and universities. On the contrary, the decision was narrowly tailored to address the issues on appeal, namely, the scope

¹²⁵ *Id.* at 2154.

¹²⁶ *Id.* at 2151 (quoting 15 U.S.C. § 1).

¹²⁷ *Id.* (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018)).

¹²⁸ *Id.* (quoting *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006)).

¹²⁹ *Id.* at 2151 (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)).

¹³⁰ *Id.* at 2159.

¹³¹ *Id.*

¹³² *Id.* at 2164.

¹³³ *Id.* at 2147.

¹³⁴ *Id.* at 2165.

of the antitrust laws as applied to the athletes' education-related benefits.¹³⁵

While the *Alston* decision is herein regarded as a landmark decision that supports the right for student-athletes to profit from their NIL, the Court's *Alston* decision did not directly answer the question of whether the NCAA players are legally entitled to their NIL and whether it is a matter of right, federally protected, rather than a privilege. One interpretation would be that following *Alston*, NCAA players are, at best, entitled to the *privilege* of receiving commercial compensation from their NIL and still maintain their amateur status.

B. *Unanswered Questions*

As a result of *Alston*, and following California's pre-*Alston* lead,¹³⁶ numerous States enacted laws that permit college athletes to capitalize on their NIL and maintain their amateur status with the NCAA.¹³⁷ These developments prompted changes in the NCAA rules to comply with the State laws.¹³⁸ These statutory changes in NIL for NCAA players, though not enacted by every State,¹³⁹ represent a major financial opportunity for the top college athletes,¹⁴⁰ allowing them to enjoy what other students and perhaps every American enjoys—the right to benefit from their NIL free of governmental taking.

Equally important to the NCAA players' compensation from their NIL right, *Alston* represents an important step forward in the recognition and protection of a universal right to their NIL. Unfortunately, the *Alston* Court and the state laws favoring players' ownership of their NIL raise more questions about the existence of a property right that players have in their NIL than they answered.

1. OVERALL OBSERVATIONS AND QUESTIONS

The following observations and questions result from an analysis of the current state laws that grant NCAA college athletes control over the commercial use of their NIL. Those new laws: (1) apply

¹³⁵ *Id.*

¹³⁶ S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019).

¹³⁷ *See* Hosick, *supra* note 25.

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ *See* Huddleston Jr., *supra* note 11; Beer, *supra* note 11.

only to collegiate athletes,¹⁴¹ relative to eligibility rules¹⁴² and are subject to certain restrictions,¹⁴³ which raises the question why the new laws do not apply universally to all Americans; (2) lack an expressly stated jurisprudential rationale, beyond to protect the players, which raises the question whether the players have a property or constitutional “right” to their NIL, or if it is merely a “privilege” granted by the legislature which can be revoked at a later time; (3)

¹⁴¹ See, e.g., ARIZ. REV. STAT. § 15-1762(5) (defining “intercollegiate sport” as a sport “for which eligibility requirements for participation by a student athlete are established by a national association for the promotion or regulation of collegiate athletics.”); MISS. CODE ANN. § 37-97-103(c) (2021) (stating “intercollegiate athletics program” means “an intercollegiate athletics program played at the collegiate level for which eligibility requirements for participation by a student-athlete are established by a national association for the promotion or regulation of collegiate athletics”); NEB. REV. STAT. § 48-3602(2) (“Collegiate athletic association means any athletic association, conference, or other group or organization with authority over intercollegiate sports.”); NEV. REV. STAT. § 398A.050 (2021) (defining “intercollegiate sport” as “a sport played at the collegiate level for which eligibility requirements for participation . . . are established by a national association that . . . regulates college athletics”).

¹⁴² See e.g., MICH. COMP. LAWS § 390.1732(a) (2021) (providing that an athletic association, such as the NCAA, shall not “[p]revent a student of a postsecondary educational institution from fully participating in intercollegiate athletics based upon the student earning compensation as a result of the student’s use of his or her name, image, or likeness rights”); MISS. CODE ANN. § 37-97-107(2) (2021) (The “[NCAA] . . . shall not prevent . . . a student-athlete of a postsecondary educational institution from earning compensation as a result of the use of the student-athlete’s name, image or likeness.”); MONT. CODE ANN. § 20-1-232(c) (2021) (stating an athletic association may not “prohibit a student-athlete from participating in an intercollegiate sport for exercising the student-athlete’s rights”); NEB. REV. STAT. § 48.3603(3) (2021) (“No collegiate athletic association shall . . . prevent a student-athlete from fully participating in an intercollegiate sport . . . because such student-athlete earns compensation for the use of such student-athlete’s name, image, or likeness rights or athletic reputation.”).

¹⁴³ See, e.g., LA. STAT. ANN. § 17:3703(E) (2021) (naming certain contracts that postsecondary institutions can prohibit); MICH. COMP. LAWS § 390.1736 (2021) (preventing college-athletes from entering into apparel contracts that are in conflict with the student’s team contract); MISS. CODE ANN. § 37-97-107 (2021) (setting limitations on the dates and times student-athletes may endorse products and receive compensation for their NIL); MO. REV. STAT. § 173.280 (2021); MONT. CODE ANN. § 20-1-232(3)(a) 2021) (setting out that student-athletes may not enter into contracts that “conflict with the student-athlete’s team rules . . .”); NEB. REV. STAT. § 48.3605(1) (2021) (restricting the kinds of contracts student-athletes may enter into).

apply only to the players' NIL,¹⁴⁴ which ignores the question of whether the students are entitled to compensation for their labor as athletes¹⁴⁵; (4) take effect as of a given date and going forward, which raises the question as to whether present and past NCAA players are entitled to retroactive compensation for past denial of their NIL rights; (5) fail to specify whether the players' control over

¹⁴⁴ See, e.g., ARK. CODE ANN. § 4-75-1303(a) (2022) (“A student athlete may enter into a contract and receive compensation for the commercial use of the student-athlete’s publicity rights.”); CAL. EDUC. CODE § 67456 (2020) (educational institutions and athletics associations cannot prevent student athletes from earning compensation from their NIL); FLA. STAT. § 1006.74(a) (student athletes may earn compensation for their NIL); LA. STAT. ANN. § 17:3703(A)(1) (2021) (establishing that “[a]n intercollegiate athlete at a postsecondary education institution may earn compensation for the use of the athlete’s name, image, or likeness . . .”); MICH. COMP. LAWS § 390.1731(2) (2021) (discussing that postsecondary educational institutions may not prevent student-athletes from “earning compensation as a result of the student’s use of his or her name, image, or likeness rights”); MISS. CODE ANN. § 37-97-105 (2021) (asserting that student-athletes may “[e]arn compensation . . . for the use of the name, image, or likeness of the student-athlete while enrolled at a postsecondary educational institution”); MO. REV. STAT. § 173.280(2)(1) (2021) (prohibiting public and private institutions of higher education from preventing student-athletes to earn compensation based on their “name, image, likeness rights, or athletic reputation”); MONT. CODE ANN. § 20-1-232(3)(a) (2021) (dictating that postsecondary institutions may not prevent student-athletes from “earning compensation for the use of the student-athlete’s name, image, or likeness . . .”); NEB. REV. STAT. § 48.3603(1) (2021) (“No postsecondary institution shall uphold any rule, requirement, standard, or limitation that prevents a student-athlete from fully participating in an intercollegiate sport for such postsecondary institution because such student-athlete earns compensation for the use of such student-athlete’s name, image, or likeness rights or athletic reputation.”).

¹⁴⁵ In fact, in one of the America’s first publicity cases, a judge likened the “taking” of a person’s image as analogous to the American enslavement of people of African descent. See *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 220 (Ga. 1905) (“The knowledge that one’s features and form are being used for such a purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him; and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and *that he is in reality a slave, without hope of freedom, held to service by a merciless master*; and if a man of true instincts. or even of ordinary sensibilities, no one can be more conscious of his enthrallment than he is.” (emphasis added)).

their NIL extends to their estates when they die;¹⁴⁶ (6) fail to provide effective remedies for noncompliance, beyond minor civil remedies;¹⁴⁷ and (7) fail to account for the intersectionality of race, gender, status, and wealth as it relates to its actual impact on vulnerable, historically disadvantaged populations such as African Americans.¹⁴⁸ This analysis shows that these pro-NIL laws are a starting point in the matter and will require follow-up rules and regulations.

2. SCOPE OF EMINENT DOMAIN

What can we learn from the NCAA players' battle for their NIL rights, specifically relative to limits on the government's power of eminent domain? The following observations show the complexity of the problem of restricting the government's expropriation of persona, including NIL. Just to be clear, those observations are purely mine and are not expressly stated in the NIL legislation.¹⁴⁹

¹⁴⁶ See, e.g., *Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309 (S.D.N.Y. 2007) (holding that the New York right of publicity does not apply to a deceased person); Decker, *supra* note 48 (noting that many states now have common law and/or statutory rights of publicity that apply postmortem); LA. STAT. ANN. § 17:3703 (2021) (failing to include whether players' control over their NIL extends to their estates when they die); MD. CODE ANN., Education § 15-131 (LexisNexis 2021) (same); MICH. COMP. LAWS § 390 (2021) (same); MO. REV. STAT. § 173.280 (2021) (same); MONT. CODE ANN. § 20-1-232 (2021) (same); NEB. REV. STAT. § 48.3600 (2021) (same).

¹⁴⁷ See e.g., FLA. STAT. § 1006.74 (lacking remedies for noncompliance); MONT. CODE ANN. § 20-1-232 (2021) (same); LA. STAT. ANN. § 17:3703 (2021) (same); MD. CODE ANN., Education § 15-131 (LexisNexis 2021) (same); MICH. COMP. LAWS § 390 (2021) (same). *But see* ARIZ. REV. STAT. § 15-1775(A) (providing a cause of action for educational institutions against student athletes for violating the statute); ARK. CODE ANN. § 4-75-1308 (2022) (providing civil remedies for violation of the statute); MO. REV. STAT. § 173.280(8)(1) (2021) (allowing "any athlete to bring a civil action for appropriate injunctive relief or actual damages, or both against third parties violating this provision in the county that the violation occurs"); NEB. REV. STAT. § 48.3608(1) (2021) (explaining that a student-athlete may bring a civil action against the postsecondary institution or collegiate association and receive certain remedies).

¹⁴⁸ See, e.g., MD. CODE ANN., Education § 15-131 (LexisNexis 2021) (same); LA. STAT. ANN. § 17:3703 (2021) (abstaining from mentioning race, gender, status, and wealth); MISS. CODE ANN. § 37-97 (2021) (same); MICH. COMP. LAWS § 390 (2021) (same); MO. REV. STAT. § 173.280 (2021) (same); MONT. CODE ANN. § 20-1-232 (2021) (same); NEB. REV. STAT. § 48.3600 (2021) (same); NEV. REV. STAT. § 398A (2021) (same).

¹⁴⁹ *Tracker: Name, Image and Likeness Legislation by State*, *supra* note 24.

(1) The NIL legislation fails to address the governmental action of the NCAA and its members, particularly those State-owned schools. As a result, the legislation ignores the taking issue.

(2) The NIL legislation fails to address whether the NCAA's rules constitute a taking for which just compensation is constitutionally mandated. As a result, the legislation ignores the question as to whether the NCAA and its members are justly compensating its players.

(3) The NIL legislation, by failing to address the takings question, also fails to address the 14th Amendment Due Process Clause, which likely would require more than merely "just compensation." As a result, the legislation ignores the failure of the law to provide college athletes the same equal protection afforded to college students who are not NCAA athletes.

(4) The NIL legislation represents a "privilege" that is being granted to the players by the legislature, and is not stated to be a right of which the players are entitled. As a result, the players' NIL benefits are subject to the whims of the legislation and are not based on the Constitution.

(5) Neither the legislation, nor the *Alston* Court,¹⁵⁰ addresses the retroactivity of benefits that current and future players are entitled. As a result, the law fails to provide any remedy or compensation to past player for the expropriation of their NIL.

(6) The legislation fails to provide college athletes, many of whom are racial minorities from underprivileged communities, any meaningful remedies for their historical mistreatment and continuing exploitation of their labor.

Hence, even in the face of reform, college athletes are left holding a hat in hand begging for a handout, rather than being protected from governmental overreaching.

C. *Wrongful Taking*

Further, those pro-NIL laws raise a most pertinent issue of constitutional law. That is, do the NCAA amateurism rules constitute a "taking" that requires "just compensation," pursuant to the Taking Clause? One might ask how can the Takings Clause, which relates to the government's expropriation of private property, relate to the

¹⁵⁰ See *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

NCAA rules? The answer to that question requires three findings: (1) that the NCAA rules are subject to the Takings Clause, (2) that such a taking was not justly compensated, and (3) that the Takings Clause applies to persona rights, namely NIL. While this matter has not been litigated, it appears that the facts support the finding that the NCAA rules might constitute a “taking” within the laws interpreting the Takings Clause of the Fifth Amendment. The following argues that (1) the NCAA rules constitute a governmental taking and (2) they are a wrongful taking because they arguably fail to provide just compensation. That will leave open the question whether NIL is subject to eminent domain, which is discussed in Part II.

1. “RIGHTFUL TAKING”

As this section discusses the Fifth Amendment’s Takings Clause, a brief presentation of the elements of “rightful” taking under that Clause is appropriate.¹⁵¹ In a nutshell, for there to be a “rightful” taking,¹⁵² the following doctrinal elements must be met: (1) Any level of government, federal, state, or local government¹⁵³ can exercise a taking for a public purpose, although a private party may receive the benefit of a taking.¹⁵⁴ (2) The Government must

¹⁵¹ See *Takings*, *supra* note 34 (defining a “taking” as “when the government seizes private property for public use”).

¹⁵² “Rightful taking,” for the purpose of this Article, means where a governmental expropriation complies with the constitutional requirements of a taking under such Fifth Amendment jurisprudence.

¹⁵³ The Takings Clause of the Fifth Amendment originally applied only to the federal government. However, the Supreme Court in *Chicago, Burlington & Quincy R.R. Co. v. Chicago* decided that the Fourteenth Amendment incidentally extended the effects of that provision to the State and local governments. 166 U.S. 226, 235 (1897). Justice Harlan argued that the concept of due process of law required fair compensation to be given for any private property seized by the state. “In determining what is due process of law, regard must be had to substance, not to form.” *Id.*

¹⁵⁴ See *Takings*, *supra* note 34 (indicating that the government is required to provide just compensation to the individual subject to the taking and that the government is permitted seize private property “if doing so will increase the general public welfare” even in the form of economic developments).

“take”¹⁵⁵ private property,¹⁵⁶ but not as a criminal penalty¹⁵⁷ or civil penalty.¹⁵⁸ (3) The property subject to a taking can include “tangible” property, such as land and houses, as well as intangible property, such as contract rights.¹⁵⁹ (4) A taking may be “physical,” where the government takes title to property, such as land, from its owner, or may be “constructive” or “regulatory taking,” when the government restricts the owner’s rights so much that the governmental action becomes the functional equivalent of a physical seizure.¹⁶⁰ (5) A taking must be for “public use” or “public purpose,”

¹⁵⁵ See *id.* (describing that a taking can either be a physical taking where “the government literally takes the property from its owner” or a constructive taking where “the government restricts the owner’s rights” so much as to be “the functional equivalent of a physical seizure”).

¹⁵⁶ See Legal Info. Inst., *Private Property*, CORNELL L. SCH., https://www.law.cornell.edu/wex/private_property (last visited Mar. 5, 2022) (defining private property as “property owned by private parties—essentially anyone or anything other than the government”).

¹⁵⁷ See generally *Types of Federal Forfeiture*, U.S. DEP’T OF JUST., <https://www.justice.gov/afms/types-federal-forfeiture> (last updated Feb. 17, 2022) (describing civil forfeiture as an action against property where no criminal conviction is required); see also FED. R. CRIM. P. 32.2.

¹⁵⁸ See *Takings*, *supra* note 34.

¹⁵⁹ See *id.* (“In *United States v. Dickinson*, 331 U.S. 745 (1947), the Supreme Court held that even if the government does not physically seize private property, the action is still a taking ‘when inroads are made upon an owner’s use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time.’”). This includes both tangible and intangible property, such as franchises and contracts. For example, the City of Oakland notoriously tried to claim the Raiders National League Football team through eminent domain. See *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 63 (Cal. 1982). In *Lynch v. United States*, the Supreme Court held that valid contracts of the United States are property, and the rights of private individuals arising out of them are protected by the Fifth Amendment, noting that “[t]he Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.” 292 U.S. 571, 579 (1934) (internal citations omitted).

¹⁶⁰ See *Takings*, *supra* note 34 (“Many regulatory takings disputes arise in the context of land use regulation. The Supreme Court held that there is not a requirement for government compensation where such regulations ‘substantially

which the U.S. Supreme Court in *Kelo v. City of New London* broadly interpreted to mean “rationally related to a conceivable public purpose,”¹⁶¹ although many states responded by enacting more restrictive laws.¹⁶² (6) The Fifth Amendment mandates that if the government takes private property for public use, the government must provide “just compensation,” which is typically compensatory as determined by an appraisal of the property’s fair market value.¹⁶³

advance legitimate governmental interests,’ and as long as the regulations do not prevent a property owner from making ‘economically viable use of his land.’”) (internal citation omitted).

¹⁶¹ See *id.* (“In *Kelo v. City of New London*, 545 U.S. 469 (2005), the Supreme Court allowed a taking when the government used eminent domain to seize private property to facilitate a private development. The Court considered the taking to be a public use because the community would enjoy the furthering of economic development. Further, the *Kelo* court determined that a governmental claim of eminent domain is justified if the seizure is rationally related to a conceivable public purpose.”) In the dissent, Justice Sandra Day O’Connor argued that the majority opinion eliminates “any distinction between private and public use of property—and thereby effectively delete[s] the words ‘for public use’ from the Takings Clause of the Fifth Amendment” and benefits the rich at the expense of the poor. *Kelo*, at 494 (O’Connor, J., dissenting). In *Berman v. Parker*, a landmark decision that laid the foundation for *Kelo*, Justice Douglas expanded the definition of “public use” to include “public purpose” based on physical, aesthetic, and monetary benefits, such as urban blight. 348 U.S. 26, 33 (1954).

¹⁶² See *Takings*, *supra* note 34 (“The *Kelo* decision significantly broadened the government’s takings power. This caused significant controversy, and states were quick to act to quell concerns about this expansion of power. In response to *Kelo*, many states have passed laws which have restricted governments’ takings abilities (such as implementing a stricter definition of what constitutes a ‘public use,’ requiring heightened levels of scrutiny to justify an action categorized as a taking, etc.).”).

¹⁶³ See *id.* (explaining that “the appropriate remedy for a taking will typically consist of compensatory damages.”) (internal citations omitted). If the property is taken before the payment is made, “interest” accrues (although the courts have refrained from using the term “interest”). See *United States v. Fifty Acres of Land*, 469 U.S. 24, 26 (1985). The Court held the Fifth Amendment does not require consequential damages when the market value of the condemned property is ascertainable and when there is no showing of manifest injustice. *Id.* at 33. The Court declined to award consequential damages for the costs of the substitute facility, where there was a duty to replace the condemned facility. *Id.* at 26.

Hence, if a taking fails to comply with any of those six elements, then I deem such a taking to be a “wrongful” taking.¹⁶⁴

2. NCAA RULES ARE GOVERNMENTAL

For there to be a taking, such an action must result from a governmental expropriation, although such action can benefit private enterprises. Here, I argue that the NCAA rules are governmental. (1) The NCAA is in “agency” and/or “partnership” with all levels of government, which makes their actions governmental. This is evidenced by the fact that many of the NCAA member schools are State-owned educational institutions that operate with the approval and consensus of the citizens of those States.¹⁶⁵ (2) The NCAA benefits from non-profit tax status, which means that their tax-free profits are being subsidized by other taxpayers.¹⁶⁶ (3) The NCAA, and particularly its state-owned member schools, utilize publicly-owned and financed state-owned university stadiums, and other assets and staff, to produce its sports product.¹⁶⁷ (4) The NCAA has sought an

¹⁶⁴ Takings that are not “for public use” are not directly covered by Takings Clause doctrine; however, such a taking might violate due process rights under the Fourteenth amendment, or other applicable law. *See* *Chicago, Burlington, & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). Arguably, a due process claim might allow for remedies beyond merely just compensation. There are also the questions of whether state constitutions protect against the state government’s taking of property without just compensation, and whether the granting of non-profit status to the NCAA and special tax exemptions makes the NCAA an agent of the federal government for purposes of taking analysis.

¹⁶⁵ This highlights the question that if persona, particularly NIL, is the property of the student athletes, then the State where the athlete is enrolled is taking that property, and without just compensation, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, as well likely in violation of various State Constitutions. *See, e.g.*, LA. CONST. art I, § 4 (“Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit.”).

¹⁶⁶ *See generally* John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109 (2010), <http://www.illinoislawreview.org/wp-content/ilr-content/articles/2010/1/Colombo.pdf?msclid=e861bb62cbfb11ec8a17d68c8c285cea>.

¹⁶⁷ *See, e.g.*, Drew Nantais, *LSU Showcases Insane New Football Facility after \$28 Million Renovation*, SPORTING NEWS (July 22, 2019), <https://www.sportingnews.com/us/ncaa-football/news/lsu-showcases-insane-new-football-facility-after-28-million-renovation/1m9r8ntste1s713dge0mq80nat?msclid=c5b9b007c>

exemption from the federal antitrust laws to avoid the player compensation issue.¹⁶⁸ And (5) the NCAA and its members have employed its eligibility rules to expropriate the private property of its student-athletes, namely their NIL.

Hence, one might conclude that the NCAA rules constitute governmental action that is subject to the Takings Clause. That leads the discussion to the question, of whether those takings are wrongful, that is, whether the players have been justly compensated.

3. UNJUST COMPENSATION

Although the *Alston* Court relied on neither a Fifth Amendment Takings analysis, nor Fourteenth Amendment Due Process principles,¹⁶⁹ it nevertheless highlighted the inequity in the players' compensation. That inequity is clear evidence that the players are not being justly compensated for the expropriation of their labor and/or for their NIL, as is provided in the dicta of the majority decision in *Alston* and in the concurring opinion of Justice Brett Kavanaugh, as described next.¹⁷⁰

In Justice Gorsuch's majority opinion, he pointed out that the historical rationale for the NCAA amateurism rules have become questionable in today's economic environment.¹⁷¹ While recognizing the benefits that the NCAA and its members bestow on its athletes, Justice Gorsuch noted that the NCAA has become a "sprawling enterprise" and "a massive business."¹⁷² The Court documented the obvious inequities in compensation between what the leadership of the NCAA receives, what some member schools receive, and what some coaches receive, as compared to what the athletes receive:¹⁷³

bfd11ecab254b43a829d55b. Arguably, state-owned, member schools have a marked disadvantage over NCAA schools that are privately funded.

¹⁶⁸ See Marc Edelman, *Why Congress Would Be Crazy to Grant the NCAA an Antitrust Exemption*, FORBES (May 6, 2020), <https://www.forbes.com/sites/marcedelman/2020/05/06/why-congress-would-be-crazy-to-grant-the-ncaa-an-antitrust-exemption/?msclkid=a7a9983acbf11ec946155d4ddeeddc2&sh=4ec25aff70a9>.

¹⁶⁹ See *NCAA v. Alston*, 141 S. Ct. 2141, 2154 (2021).

¹⁷⁰ *Id.* at 2168 (Kavanaugh, J., concurring).

¹⁷¹ *Id.* at 2150.

¹⁷² *Id.*

¹⁷³ *Id.* at 2151.

The president of the NCAA earns nearly \$4 million per year. Commissioners of the top conferences take home between \$2 to \$5 million. College athletic directors average more than \$1 million annually. And annual salaries for top Division I college football coaches approach \$11 million, with some of their assistants making more than \$2.5 million.¹⁷⁴

On the other end of the spectrum, college athletes of NCAA member colleges are severely limited to what they are compensated, usually to the cost of tuition, room, board, and fees.¹⁷⁵ In the recent *Alston* case, these former college athletes argued that their compensation was grossly unfair, and that the NCAA is a monopoly with an unfair competitive advantage.¹⁷⁶

Less subdued than Justice Gorsuch's majority opinion,¹⁷⁷ Justice Kavanaugh, stated that "Today... the Court holds that the NCAA has violated the antitrust laws."¹⁷⁸ He "adds [his] concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws."¹⁷⁹

What follows, in his opinion, is Justice Kavanaugh's scathing attack on the inequities in the NCAA's compensation of the players. He points out the following: (1) The NCAA has a monopoly on the

¹⁷⁴ *Id.*

¹⁷⁵ See generally David J. Berri, *Paying NCAA Athletes*, 26 MARQ. SPORTS L. REV. 479, 479 (2016); Comment, *Ending the Amateurism Façade—Pay College Athletes*, 9 HOUS. L. REV. 158, 167 (2019).

¹⁷⁶ Joel Mitnick & Ngoc Pham Hulbig, *Supreme Court to Weigh in College Sports: The Intersection of Antitrust and "Amateurism,"* 12 NAT'L L. REV., no. 99, 2020, <https://www.natlawreview.com/article/supreme-court-to-weigh-college-sports-intersection-antitrust-and-amateurism> (explaining that plaintiffs in *Alston* argued "that the top athletic teams are operating a system that acts as a classic restraint of trade in violation of Section 1 of the Sherman Act" and that, absent those restraints "student-athletes would be compensated at a level more commensurate with their value to their universities, conferences, and the NCAA.").

¹⁷⁷ See *id.* at 2147–66.

¹⁷⁸ *Id.* at 2166 (Kavanaugh, J., concurring).

¹⁷⁹ *Id.* at 2166–67 ("[T]here are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny.").

college sport market, which suppresses players' compensation;¹⁸⁰ (2) "The NCAA's business model would be flatly illegal in almost any other industry in America";¹⁸¹ and (3) "Price-fixing labor is price-fixing labor."¹⁸²

In reference to the inequity in what the NCAA top executives, coaches, and university administrators are paid compared to what the players receive, Justice Kavanaugh stated: "It is highly questionable whether the NCAA and its member colleges can justify not paying students athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes."¹⁸³ This observation was very explicit when he observed:

The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing.¹⁸⁴

Justice Kavanaugh's critique of the gross wealth inequities in college athletics is evidence of unjust compensation in takings analysis or unjust enrichment under equitable principles.

The concurring opinion ends on a warning message to the NCAA and its members:

¹⁸⁰ *Id.* at 2168 ("The NCAA acknowledges that it controls the market... set the price for student athlete labor... that the student athletes currently have no meaningful ability to negotiate with the NCAA over the compensation rules.").

¹⁸¹ *Id.* at 2167 ("Law firms cannot conspire to cabin lawyers salaries in the name of providing legal services out of a 'love of the law.'").

¹⁸² *Id.* at 2168 ("Or to put it in more doctrinal terms, a monopoly cannot launder its price-fixing of labor by calling it product definition.").

¹⁸³ *Id.* at 2168.

¹⁸⁴ *See id.*

[T]raditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student-athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law."¹⁸⁵

What follows is my elaboration of what the *Alston* Court's view of the unjust compensation that the NCAA players receive, compared to the that of the NCAA executive, coaches, and the school leadership. In its fiscal year that ended August 31, 2019, the NCAA, a private, nonprofit enterprise, reported revenues of over \$1.1 billion, with a positive increase in net assets of \$70 million, and net assets of just under a half of a billion dollars.¹⁸⁶ It receives most of its annual revenue from two sources: television and marketing rights for the Division I Men's Basketball Championship and ticket sales for all championships.¹⁸⁷ It proudly reported that about sixty percent of its annual revenue—around \$600 million—is annually distributed directly to Division I member schools and conferences, while more than \$150 million funds Division I championships.¹⁸⁸ At the same time, close to \$170 million, or about fifteen percent of its annual revenue, went to student athlete services and championship support, including costs for insurance, drug testing and additional support (nearly \$65 million), general and administrative expenses (nearly \$45 million), and association-wide expenses, including legal services (nearly \$60 million).¹⁸⁹ NCAA President Mark Emmert's base salary for the calendar year 2019 was \$2.5 million and his total

¹⁸⁵ *Id.* at 2169.

¹⁸⁶ NAT'L COLLEGIATE ATHLETICS ASS'N, NCAA CONSOLIDATED FINANCIAL STATEMENTS: AUGUST 31, 2020 & 2019 (2020), https://ncaaorg.s3.amazonaws.com/ncaa/finance/2019-20NCAAFIN_FinancialStatement.pdf.

¹⁸⁷ *Finances*, NCAA, <https://www.ncaa.org/finances> (last visited Feb. 14, 2022).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

compensation was \$2.9 million, according to the association's latest federal tax return.¹⁹⁰

Similarly, states and their college-level educational institutions reap substantial financial benefits from their membership with the NCAA. For example, a state like California receives millions every year from the NCAA, through its state-owned member colleges.¹⁹¹ California's Governor Gavin Newsom, in supporting college athletes' rights, noted that the Fair Pay to Play Act would rebalance a power structure in which NCAA universities receive more than \$14 billion annually, and the nonprofit NCAA receives more than \$1 billion, "while the actual product, the folks that are putting their lives on the line . . . are getting nothing."¹⁹²

Then there are the incredible salaries¹⁹³ paid to some NCAA coaches of *state-owned* schools,¹⁹⁴ which rival the highest paid

¹⁹⁰ See Steve Berkowitz, *NCAA President Mark Emmert Credited with \$2.9 Million in Total Pay for 2019 Calendar Year*, USA TODAY (July 19, 2021, 8:04 PM), <https://www.usatoday.com/story/sports/college/2021/07/19/ncaa-mark-emmert-total-pay-2019/8015855002/>.

¹⁹¹ See Murphy, *supra* note 15; Goldman, *supra* note 15.

¹⁹² See McLaughlin, *supra* note 15.

¹⁹³ Salaries are only one form of financial benefit that these coaches receive. For instance, they have major endorsement contracts, consulting contracts, shoe contracts, as well as directors on corporate board, which come close to or exceed their contracts with their schools. As a result, many of the top coaches have tremendous net worth. See, e.g., *Nick Saban Net Worth*, CELEBRITY NET WORTH, <https://www.celebritynetworth.com/richest-athletes/richest-coaches/nick-saban-net-worth/> (last visited Feb. 14, 2022); see also Anthony Riccobono, *Nick Saban Net Worth: Salary, Contract Extension Put Alabama HC Among Highest-Paid Coaches*, INT'L BUS. TIMES (June 7, 2021, 3:38 PM), <https://www.ibtimes.com/nick-saban-net-worth-salary-contract-extension-put-alabama-hc-among-highest-paid-3219602> (reporting that Saban signed an eight-year deal worth at least \$74.4 million in the summer of 2018 and that, with his \$9.1 million salary and \$950,000 in bonuses, Saban became the first college football coach to make over \$10 million in a season last year).

¹⁹⁴ These salaries highlight State-owned schools to emphasize the governmental takings of players' persona. Nevertheless, the coaches private school members of the NCAA make comparably, incredibly high salaries. For example, Duke University's basketball coach Mike Krzyzewski received total annual pay of \$7,044,221. See *2021 NCAA Basketball Coach Pay*, USA TODAY (Mar. 9, 2021), <https://sports.usatoday.com/ncaa/salaries/mens-basketball/coach>. Texas Christian University's football coach Gary Patterson received total annual pay of \$6.1 million. See *NCAAF Coaches Salaries*, USA TODAY (Nov. 17, 2021), <https://sports.usatoday.com/ncaa/salaries>.

salaries of professional coaches.¹⁹⁵ For example, in 2020, the top ten highest paid football coaches for *state-owned* NCAA institutions ranged from \$6 million to \$9.3 million.¹⁹⁶ Moreover, the 2020 NCAA men's basketball coach salaries for *state* schools in the top ten are equally shocking, ranging from \$4 million to \$8 million.¹⁹⁷ With these salaries, it is hard to argue that college sports have not become highly commercialized and extremely profitable for some.

In the *Alston* case,¹⁹⁸ some former college athletes argued that their compensation was grossly unfair, and that the NCAA is a monopoly with an unfair competitive advantage.¹⁹⁹ As previously noted, Justice Kavanaugh agreed with their contention. One scholarly analysis found that while players are valued or worth millions to these Universities and the NCAA, eighty-six percent of college athletes live below the poverty line, with many qualifying and receiving government Pell Grants.²⁰⁰ In addition to devaluing their labor, the players claimed they were negatively impacted by the NCAA's former prohibition on their receiving funds from their NIL.²⁰¹ These claims were advanced in litigation in which the players sought to enhance their compensation for their play, through a demand that they are permitted to benefit financially from their NIL.²⁰²

In conclusion, both the *Alston* decision, as well as the subsequent laws granting players some NIL privileges, miss the big picture, which is the constitutionality of the NCAA amateurism rules. Further, it is clear that while the NCAA rules are subject to the Takings

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (reporting salaries for Nick Saban of Alabama (\$9.3 million), Ed Orgeron of LSU (\$8.9 million), Dabo Swinney of Clemson (\$8.3 million), Jim Harbaugh of Michigan (\$8 million), Jimbo Fisher of Texas A&M (\$7.5 million), Kirby Smart of Georgia (\$6.9 million), Lincoln Riley of Oklahoma (\$6.5 million), and Dan Mullen of Florida (\$6 million)).

¹⁹⁷ *2021 NCAA Basketball Coach Pay*, *supra* note 194 (reporting salaries for John Calipari of Kentucky State (\$8 million), Chris Beard of Texas Tech (\$5 million), Rick Barnes of Tennessee (\$4.9 million), Roy Williams of North Carolina (\$2.5 million), Tom Izzo of Michigan State (\$4 million), and Fred Hoiberg of Nebraska (\$4 million)).

¹⁹⁸ *See NCAA v. Alston*, 141 S. Ct. 2141, 2155 (2021).

¹⁹⁹ *See Mitnick & Hulbig*, *supra* note 176.

²⁰⁰ *See Williams*, *supra* note 19.

²⁰¹ *Mitnick & Hulbig*, *supra* note 176.

²⁰² *Id.*

Clause, that those rules violate the Takings Clause, because the players are not being justly compensated for the taking of their NIL and/or their labor. Additionally, the *Alston* decision, as well as the subsequent laws granting players some NIL privileges, fail to recognize the property rights of the athletes. That raises the remaining, important question: Do NCAA players possess a property right in their NIL, and is that right protected against the reach of eminent domain?

II. RIGHT OF PROPERTY

[E]very man has a property in his own person: this no Body has any Right but to himself.

— John Locke²⁰³

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society.²⁰⁴

Part I identified how both the *Alston* decision and the pro-NIL state laws fail to address whether college athletes possess a property right to their NIL that is protected from governmental exploitation. I explore that thesis through the lens of a libertarian “rights’

²⁰³ LOCKE, *supra* note 71 (“For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is one joyed to, at least where there is enough and as good left in common for others.”); *cf.* JEREMY BENTHAM, *THEORY OF LEGISLATION* 111 (Richard Hildreth trans., 1840) (1802) (providing the most influential utilitarian justification for private property: “Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it”).

²⁰⁴ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

paradigm,”²⁰⁵ as a counterbalance to the law as a vehicle of social oppression²⁰⁶ or “privilege paradigm.”²⁰⁷ This Part supports the thesis that both (1) NCAA players’ NIL and (2) everyone’s persona is outside the scope of the government’s eminent domain powers, and thereby warrant protection from governmental expropriation. That thesis serves to answer two relevant questions: (1) Do the NCAA’s eligibility rules that regulate its players’ use of their NIL constitute a wrongful exercise of eminent domain, even if there is just compensation for the taking? (2) Are NCAA players’ NIL in particular, and everyone’s persona in general, beyond the reach of eminent domain?

This Part supports my “persona is outside of eminent domain” thesis by arguing for three suppositions: (1) Libertarian principles as embodied in the Constitution reserve to the people rights not expressly granted to the government by the Constitution; (2) NIL in particular, and persona in general, are not the kind of property the Founders envisioned as the subject of a taking and should never be the subject of the “public purpose” requirement of the Takings Clause; and (3) Governmental expropriation of persona, including NIL, is a violation of the Due Process Clause of the Fourteenth

²⁰⁵ “Rights’ paradigm,” for purposes of this Article, means a view of the legal system as one which identifies and embraces the idea that people are entitled to control their own destiny, through the ownership and control of their own selves, free from the indiscretions of the powerful and protected against unfair infringements. This rights-based approach to private property reflects former U.S. Supreme Court Justice Sandra Day O’Connor’s vision of federalism, as a means to protect individuals from undue federal governmental intrusion. See Bradley W. Joondeph, *The Deregulatory Valence of Justice O’Connor’s Federalism*, 44 HOUS. L. REV. 507, 541 (2007).

²⁰⁶ Law has been a tool of oppression, combined with force, claims of God-given rights, title, tradition, culture, religion, and government. See generally Eleanor Taylor, *Groups and Oppression*, 31 HYPATIA 520, 520–21 (2016) (“Oppression is a form of injustice that occurs when one social group is subordinated while another is privileged, and oppression is maintained by a variety of different mechanisms including social norms, stereotypes and institutional rules.”); Lynn Weber, *A Conceptual Framework for Understanding Race, Class, Gender, and Sexuality*, 22 PSYCH. OF WOMEN Q. 13, 20 (1998).

²⁰⁷ “Privilege paradigm,” for purposes of this Article, means a view of the legal system that artificially uses apparent majoritarian authority as a veil to protect and enforce the social and financial interest of the powerful, compared to a legal system wherein rights are guaranteed against exploitation regardless of age, class, race, gender, or other socioeconomic status.

Amendment and should be judged under the “strict scrutiny” lens of Supreme Court jurisprudence.

A. *Foundational Libertarian Principles*

When it comes to protecting private property from governmental expropriation, our Constitution is conflicted. On the one hand, as explained below, the right to private property is a foundational principle that defines the American spirit, our history, and our culture.²⁰⁸ Yet, on the other hand, the Founders adopted the government’s superior authority over private property—that is, eminent domain—as long as it uses that property for a public purpose and provides the property’s owner with just compensation, via the Takings Clause of the Fifth Amendment.²⁰⁹ Hence, when it comes to the boundaries of eminent domain, the Constitution presents us with a conundrum. Does the government have an absolute right to take private property or are there some property rights that the government should be prohibited from taking for public purpose?

Let’s start with an exploration of the fundamental right to private property.²¹⁰ I contend that the Right of Property lies at the intersection of personal and property rights, and that every person is fundamentally and constitutionally entitled to this right. Most importantly for purposes of this Article, Right of Property includes a natural property right in one’s “self”—encompassing a person’s attributes or identities, such as labor, name, image, likeness, and other unequivocal identifiers.²¹¹

The Right of Property is not new; it defines our constitutional history and culture.²¹² Since the establishment of the Republic, the

²⁰⁸ See *infra*, Part II, A.

²⁰⁹ See U.S. CONST. amend. V.

²¹⁰ See *supra* note 41 and accompanying text.

²¹¹ “Attributes” of a person include things like the fruits of their labor, their brand, or any other quality or feature regarded as a characteristic or inherent part of someone (both tangible and intangible). But rights that protect the attributes of a person are not limited to the right of privacy, the right of publicity, and the right to not be enslaved. These rights extend to all mediums such as print, online, fantasy, cyberspace, and the virtual universe. See *Right of Self*, *supra* note *.

²¹² See *supra* Part I. The observation does not ignore the ongoing political and constitutional law tensions that historically and currently surround issues relating to self. For example, the rights to “body autonomy” or “body integrity,” which

United States Constitution has slowly, yet continuously, moved towards realizing a libertarian vision of the Right of Property, protected from governmental takings.²¹³ Constitutional restrictions on eminent domain are arguably based on jurisprudential principles, including principles espoused in groundbreaking Supreme Court decisions, as well as constitutional principles found in the Fourth, Fifth, Ninth, Thirteenth, and the Fourteenth Amendments.²¹⁴

relate to a woman's freedom of choice, to a person's right to deny medical treatment, such as vaccination against COVID-19, and the right of privacy. *See generally* RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES AND MATERIALS* (2d ed. 2002).

²¹³ The issue of who "controls" or "owns" one's property is as old as the founding of the Republic. Relative to the exploitation of labor, there was a historic battle over who controls the property in oneself, particularly the self of enslaved people of African descent. While the concept of liberty was a fundamental principle of the new Republic, it was not "universal". *See* Elizabeth C. Tucker, Comment, *Has the Supreme Court Taken a Wrong Turn? An Analysis of the Supreme Court's Decision in Atwater v. City of Lago Vista*, 107 DICK. L. REV. 675, 695 (2003) ("Racial concerns were not an issue at common law; thus, the Framers of the United State Constitution did not explicitly provide for protection of minorities in the Bill of Rights."); *see also* *Blackness as State Property*, *supra* note *. As we know, it took a Civil War and the adoption of the Thirteenth Amendment to constitutionally guarantee Right of Property, relative to the expropriation of a person's liberty, labor, and property, against the state-sponsored oppression called "slavery." The term "slavery" has been aptly replaced with the term "enslavement" to better describe the horrific abuses that the victims or enslaved had to ensure by their enslavers, who were backed by the government.

²¹⁴ U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*" (emphasis added)); U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."); U.S. CONST. amend. XIV, § 1 ("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

The rights protected by these amendments suggest the Founders favored the protection of private property over the government's right to eminent domain. Therefore, I contend that Right of Property is a libertarian vision which entitles the property of the powerless to legal protections against governmental expropriation.²¹⁵ Without a strong libertarian view of Right of Property, the powerful will continue to use the legal system to exploit the powerless, widening the wealth gap and destroying the middle class.

When one closely studies the historical and philosophical development of the Constitution, one would conclude that protecting persona from eminent domain takings embraces the Founder's belief and adoption of libertarian principles. The closest historical reference to persona rights is embodied in the concept of "liberty." A brief legal history of the American Revolution, the establishment of the Republic, and development of the U.S. Constitution and the Bill of Rights shows that the Founders believed in Right of Property in the form of persona.²¹⁶ On July 7, 1776, the Continental Congress voted to adopt the Declaration of Independence, written mainly by Thomas Jefferson.²¹⁷ On July 4, 1776, the Declaration, which was unanimously adopted by all the thirteen colonies, proclaimed that *life, liberty, and the pursuit of happiness* is a fundamental right: self-evident, inalienable, and endowed by the Creator.²¹⁸ A movement

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.").

²¹⁵ See *infra* INTRODUCTION.

²¹⁶ See generally GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 189–212 (1993); Alan Freeman & Elizabeth Mensch, *Property, in A COMPANION TO THE AMERICAN REVOLUTION* 638, 642–43 (Jack P. Greene & J. R. Pole eds., 2000) (noting the Constitution of 1787 and Alexander Hamilton's *The Federalist no. 78* "provided the basis for an inviolable right of property"); GORDON S. WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* (2006); GARRY WILLIS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 207–17 (1978).

²¹⁷ See *Continental Congress*, HISTORY (Jan. 14, 2020), <https://www.history.com/topics/american-revolution/the-continental-congress> ("The committee consisted of five men, including John Adams and Benjamin Franklin . . . of Pennsylvania. But the declaration was primarily the work of one man, Thomas Jefferson . . .").

²¹⁸ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

subsequently developed for constitutional reform, culminating in the Philadelphia Convention of 1787 where delegates decided to create a new system of government.²¹⁹ This government recognized a Right of Property.²²⁰

The Founders clearly adopted the libertarian principles of John Locke,²²¹ David Hume,²²² Adam Smith,²²³ and Immanuel Kant.²²⁴ The hallmark of libertarianism is self-autonomy or the sovereignty of the individual as right-holders, including the right in themselves and a right in their property.²²⁵

²¹⁹ *Continental Congress*, *supra* note 217 (“The delegates at the convention decided to scrap the Articles of Confederation completely and create a new system of government.”).

²²⁰ *Cf. Freeman & Mensch*, *supra* note 216, at 642 (“The new conception of property as private right reached its fruition through the Constitution of 1787 . . .”).

²²¹ *See* LOCKE, *supra* note 71, at 116 (“[E]very Man has a *Property* in his own *Person*. This no Body has any Right to but himself.”).

²²² *See* DAVID HUME, *A TREATISE OF HUMAN NATURE: BEING AN ATTEMPT TO INTRODUCE THE EXPERIMENTAL METHOD OF REASONING INTO MORAL SUBJECTS* 394 (The Floating Press 2009) (1740) (“[S]elf or person is not any one impression, but that to which our several impressions and ideas are supposed to have a reference.”).

²²³ Samuel Fleishacker, *Adam Smith’s Moral and Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. ARCHIVE, <https://plato.stanford.edu/archives/win2020/entries/smith-moral-political/> (last updated Nov. 11, 2020) (“A central thread running through [Smith’s] work is an unusually strong commitment to the soundness of the ordinary human being’s judgments, and a concern to fend off attempts, by philosophers and policy-makers, to replace those judgments with the supposedly better ‘systems’ invented by intellectuals.”).

²²⁴ *See* *Libertarianism*, *supra* note 58 (“[L]ibertarian theory is closely related to . . . Immanuel Kant.”); *see also* Daniel Russell, *Self-Ownership as a Form of Ownership*, in *THE OXFORD HANDBOOK OF FREEDOM* 21–39 (David Schmidtz & Carmen Pavel eds., 2018).

²²⁵ *See* *Libertarianism*, *supra* note 58 (noting “the idea of self-ownership” is the focus of most libertarians). Right of Property captures this key feature of libertarianism: “[T]he key libertarian starting point is that people have a very stringent (perhaps the most stringent possible) set of rights over their persons, giving them the kind of control over themselves that one might have over possessions they own. This includes (1) rights to control the use of the entity: including a liberty-right to use it as well as a claim-right that others not use it without one’s consent, (2) rights to transfer these rights to others (by sale, rental, gift, or loan), (3) immunities to the non-consensual loss of these rights, (4) compensation rights in case others use the entity without one’s consent, and (5) enforcement rights

The Founders used libertarianism to challenge the traditional sources of control over individual rights by establishing the central role of “natural” or God-given individual rights,²²⁶ including “the rights to life, liberty, private property, freedom of speech and association, freedom of worship, government by consent, equality under the law, and moral autonomy”²²⁷ The purpose of government, according to liberals, is to protect these and other individual rights, and in general, liberals have contended that government power should be limited to that which is necessary to accomplish this task.²²⁸

The Founders who wrote the Virginia Declaration of Rights, including George Mason and Thomas Jefferson, the latter of which was the primary author of the Declaration of Independence, were

(e.g. rights to restrain persons about to violate these rights.)” *Id.* (discussing Robert Nozick’s theory of self-ownership and its relation to libertarianism).

²²⁶ See David Boaz, *Libertarianism*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/libertarianism-politics> (last visited Mar. 05, 2022). Some of the sources of control the Founders sought to challenge included monarchic government, an overbearing and overtaxing King George III, state-established religion, the Church of England, and government-sponsored monopolies such as the East Indian Tea Company. See *infra* note 239 (discussing the “real life, pragmatic” reasons the Founders revolted from English rule).

²²⁷ Boaz, *supra* note 226 (“The first well-developed statement of libertarianism, *An Agreement of the People* (1647), was produced by the radical republican Leveler movement during the English Civil Wars (1642–51). . . . [It] included the ideas of self-ownership, private property, legal equality, religious toleration, and limited, representative government.”).

²²⁸ There were real life, pragmatic, and not purely philosophical reasons why the American colonists revolted from English rule; for example, colonists felt they should not be taxed since they did not take part in voting for members of Parliament in England. See *Continental Congress*, *supra* note 217. These taxes led to the infamous Boston Tea Party, where “a group of frustrated colonists protested taxation without representation by dumping 342 chests of tea into Boston Harbor.” *Id.* On September 5, 1774, the First Continental Congress issued a Declaration of Rights which “affirm[ed] its loyalty to the British crown but disput[ed] the British Parliament’s right to tax it.” *Id.* On October 14, 1774, in response to British Parliament’s enacting the Intolerable Acts, the First Continental Congress declared that citizens were “entitled to life, liberty, and property.” Declaration and Resolves of the First Continental Congress, YALE L. SCH.: THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/resolves.asp (last visited Feb. 25, 2022) (“That they are entitled to life, liberty, and property: and they have never ceded to any foreign power whatever, a right to dispose of either without their consent.”).

clearly influenced by the philosophies of John Locke.²²⁹ In 1689, Locke argued in his *Two Treatises of Government* that political society existed for the sake of protecting “property,” which he defined as a person’s “life, liberty, and estate”²³⁰ In “A Letter Concerning Toleration,” Locke elaborated on the relationship between libertarianism and the limitations of government when he wrote that the magistrate’s power was limited to preserving a person’s “civil interest,” which he described as “life, liberty, health, and indolency of body; and the possession of outward things”²³¹ Hence, the Founders’ adoption of their belief in the enjoyment of life, liberty, and the pursuit of happiness as a property right²³² echoes Locke’s view of the universality of natural law and its relationship to property rights.²³³

²²⁹ See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 22–54 (1967) (concluding major themes of eighteenth-century libertarianism were brought to realization in written constitutions, bills of rights, and limits on executive and legislative powers). These ideas and beliefs inspired both the American Revolution and the French Revolution. These were not superfluous words on paper, but, rather, reflected the Founders’ personal beliefs that the right to the enjoyment of attributes of self was fundamental. For example, Samuel Adams stated that “[a]mong the Natural Rights of the Colonists [were] . . . a right to life . . . liberty . . . [and] property” *Rights of the Colonists: November 20, 1772, REVOLUTIONARY WAR AND BEYOND*, <https://www.revolutionary-war-and-beyond.com/rights-of-the-colonists-november-20-1772.html> (last visited Feb. 22, 2022). George Mason also expressed his belief in libertarianism: “[A]ll men . . . when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life” *The Virginia Declaration of Rights*, NAT’L ARCHIVES (Sept. 29, 2016), <https://www.archives.gov/founding-docs/virginia-declaration-of-rights>.

²³⁰ LOCKE, *supra* note 71, at 141 (“[N]o political society can be, nor subsist, without having the power to preserve the property”).

²³¹ JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 6–7 (1689) (“It is the duty of the civil magistrate, by the impartial execution of equal laws, to secure unto all the people . . . the just possession of these things belonging to this life.”).

²³² See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

²³³ See *Libertarianism*, *supra* note 58 (“The most famous account of how unilateral original acquisition is possible remains Locke’s labor theory. . . . The precise nature of Locke’s argument . . . seeks to ground property in the (prior) rights of self-ownership.”).

After the U.S. Constitution went into effect in 1789, the Continental Congress adjourned and was replaced by the U.S. Congress.²³⁴ Shortly thereafter, Congress ratified a Bill of Rights consisting of the first ten amendments to the Constitution, guaranteeing the fundamental rights which were used as justifications for the Revolution.²³⁵ Additionally, as evidenced by their drafting the Declaration of Independence and the Constitution, the Founders were aware the English common law identified a right to the natural attributes of self as an inherent natural right, entitled to protection from wrongful governmental infringement—as digested in Blackstone’s Commentaries.²³⁶ Blackstone noted that the “right of personal security” included “enjoyment of life” and that “[l]ife is an immediate gift of God, a right inherent by nature in every individual.”²³⁷ He also emphasized that the government could not take a person’s life, liberty, or property arbitrarily or without the express warrant of law.²³⁸

²³⁴ *Continental Congress*, *supra* note 217.

²³⁵ *See Bill of Rights (1791)*, BILL OF RIGHTS INST., <https://www.billofrights.institute.org/primary-sources/bill-of-rights> (last visited Mar. 5, 2022) (“[T]he Bill of Rights . . . list[s] specific prohibitions on governmental power, in response to calls from several states for greater constitutional protection for individual liberties.”). The concepts codified in these amendments are built upon those in earlier documents. *Id.* *See* THE VIRGINIA DECLARATION OF RIGHTS § 1 (1776) (“[T]hey cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property”); NORTHWEST ORDINANCE art. 2 (1787) (“No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land”); ENGLISH BILL OF RIGHTS (1689) (listing the rights of the subjects of the seventeenth century English monarchy); MAGNA CARTA (1215) (“We furthermore grant and give to all the freemen of our realm for ourselves and our heirs in perpetuity the liberties written below”).

²³⁶ *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 118–20 (1765–1769), (“[T]he rights of persons that are commanded to be observed by the municipal law . . . are due *from* every citizen . . . and . . . belong *to* him”).

²³⁷ *Id.* at 125–29 (“The right of personal security consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. Life is the immediate gift of God, a right inherent by nature in every individual This natural life being, as was before observed, the immediate donation of the great creator, cannot legally be disposed of or destroyed by any individual”).

²³⁸ *Id.* at 129–30 ([I]t is enacted by the statute 5 Edw. III. c. 9. that no man shall be forejudged of life or limb, contrary to the great charter and the law of the

Furthermore, when drafting the Constitution, the Founders borrowed from various previously established state constitutions that expressly provided that the right to one's enjoyment of attributes of self was a fundamental right.²³⁹ The Founders deemed this right so fundamental that they thought it unnecessary to repeat it in the U.S. Constitution itself; nonetheless, the Anti-Federalists insisted in the protection of self, leading to the adoption of the Bill of Rights. Moreover, many state constitutions have such a provision today.²⁴⁰

While the Constitution did not expressly provide for Right of Property, the Fifth Amendment comes close by stating that "[n]o person shall . . . be deprived of life, liberty, or property . . . nor shall private property be taken for public use, without just compensation."²⁴¹ Later, the Fourteenth Amendment expressly provides that States cannot deprive a person of "life, liberty, or property . . . nor deny any person . . . the equal protection of the laws."²⁴²

Taken together, these Due Process Clauses provide two different types of protection against actions by the state and federal governments: (1) procedural due process, which requires that before depriving a person of life, liberty, or property, the government must follow certain procedures; and (2) substantive due process, which requires that if depriving a person of life, liberty, or property, the

land: and again, by statute 28 Ed. III. c. 3. that no man shall be put to death, without being brought to answer by due process of law.").

²³⁹ For example, the Pennsylvania Declaration of Rights adopted in 1776 proclaimed "[t]hat all men . . . have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty." PA. CONSTITUTION OF 1776, art. I ("That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.").

²⁴⁰ See, e.g., VA. CONST. art. I, § 1 ("[A]ll men . . . have certain inherent rights . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property . . ."); VA. CONST. art. I, § 11 ("That no person shall be deprived of his life, liberty, or property without due process of law . . .").

²⁴¹ See *infra* Part II.B.1.

²⁴² U.S. Const. amend. XIV, § 1 ("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.").

government must have sufficient justification.²⁴³ The “enjoyment of life, liberty, and the pursuit of happiness” should include the enjoyment of financial benefits one can generate using their own attributes, including one’s labor, NIL, and other real and virtual features of self.

Therefore, Right of Property as embodied in the principles of “life, liberty, and pursuit of happiness”²⁴⁴ supports that proposition that persona in general and NIL in particular is fundamental and should supersede the government’s eminent domain powers.

B. *Beyond the Scope of Eminent Domain*

There are two arguments to support the proposition that persona is outside the scope of eminent domain. The first is that persona is “natural property” that by its nature should not be subject to eminent domain. The second is that persona is a corollary to the fundamental right of privacy. Either of these arguments is sufficient to prove up the proposition.

1. NATURAL PROPERTY

As the Constitution creates a conundrum relative to the scope of eminent domain, it is necessary to explore the scope of eminent domain to determine its limits. The Fifth Amendment’s Takings Clause expressly establishes limitations on eminent domain by restricting the scope of the government’s eminent domain powers to “private property [] taken for public use”²⁴⁵ Nonetheless, over the years, the Supreme Court has taken an expansive view of what constitutes “public use.” This expansion of the meaning of public use has been sharply criticized by constitutional scholars²⁴⁶ and

²⁴³ *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (explaining that although a literal reading of the due process clause might be understood to regulate the “process” by which the state deprives a person of a protected interest, the Court has read the clause to contain a “substantive component” for more than 134 years).

²⁴⁴ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²⁴⁵ U.S. CONST. amend. V.

²⁴⁶ *See, e.g.*, Richard A. Epstein, *Epstein on Kelo*, UNIV. CHI. L. SCH. (June 27, 2005), <https://www.law.uchicago.edu/news/epstein-kelo> (“Last week’s regrettable decision in *Kelo v. City of New London* marks a new low point in the Supreme Court’s takings jurisprudence.”).

rebuked by numerous state governments.²⁴⁷ However, what is clear from the Court's Takings jurisprudence is that the government's eminent domain power does, in fact, have limits. The question is whether *persona*, particularly NIL, is outside of the limits of eminent domain. This Article posits that it is.

The question is, as the Founders placed strict limits on eminent domain, is *persona* outside of those limits? Historically, the Takings Clause was meant to apply to the government's taking of *real* property.²⁴⁸ Subsequently, most of the takings cases involve the expropriation of the private ownership of real property for a public purpose.²⁴⁹ For example, following Hurricane Katrina in 2005,²⁵⁰ the government took several acres of private property in New Orleans, including homes and businesses in a Mid-City neighborhood, to facilitate the construction of two hospitals.²⁵¹ Nonetheless, the

²⁴⁷ See, e.g., Brief of Oklahoma, Arizona, Arkansas, Kentucky, Missouri, Nebraska, and Texas as *Amici Curiae* in Support of Petitioners at 1, *Cedar Point Nursery v. Hassid*, No. 20–107 (U.S. Nov. 13, 2020) (“The *Amici* States also want to protect their own property rights against the federal government. The increasing power of the federal government will harm state property interests directly if the federal Takings Clause is unmoored from its traditional roots.”).

²⁴⁸ See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (“The original understanding of the Takings Clause was, very simply, that the federal government had to compensate the property owner when it physically took property—such as when it took land to build a fort. The clause did not require compensation for regulations under any circumstances.”).

²⁴⁹ See *History of the Federal Use of Eminent Domain*, DEP'T OF JUST., <https://www.justice.gov/enrd/history-federal-use-eminant-domain> (last updated Jan. 24, 2022) (“Properties acquired . . . touch the daily lives of Americans by housing government services, facilitating transportation infrastructure and national defense and national security installations, and providing recreational opportunities and environmental management areas.”).

²⁵⁰ See generally *Hurricane Katrina*, BRITANNICA, <https://www.britannica.com/event/Hurricane-Katrina> (last visited Mar. 5, 2022) (discussing Hurricane Katrina and its aftermath).

²⁵¹ See Dough Maccash, *In Hospital Footprint, Sculptures Recall Lost Neighborhood Demolished after Hurricane Katrina*, NOLA (Jan. 14, 2020, 08:30 AM), https://www.nola.com/entertainment_life/arts/article_4e006e80-2dae-11ea-9afc-a711259c4d30.html (“The stretch of Mid-City was flooded by the levee failures following Hurricane Katrina in 2005. Blocks of homes were demolished to make room for the medical complex[es] . . . Homeowners were bought out . . .”). One of these hospitals was dedicated to serving veterans. See *id.* (noting the New Orleans Veterans Affairs Medical Center opened in 2016).

Supreme Court has expanded the understanding of what constitutes a “taking” over the years to include instances where governmental regulations negatively impact property rights.²⁵²

Even with this expanded definition of what constitutes a “taking,” some might argue that persona should not be subject to takings law because it is neither real property, nor a regulatory taking of an interest in real property. Similarly, others might argue that persona, particularly NIL, is a type of intellectual property and, therefore, should not be the subject of a taking; however, there is precedent for holding that some forms of intellectual property—intangibles including franchises and contracts—can be the subject of a taking. For example, the City of Oakland, California, claimed that the Oakland Raiders National League Football team through eminent domain.²⁵³ Additionally, in *Lynch v. United States*,²⁵⁴ the U.S. Supreme Court held that valid contracts of the United States are property, and the rights of private individuals arising out of these valid contracts are protected by the Fifth Amendment.²⁵⁵ Thus, persona is not automatically outside of the government’s eminent domain powers simply because it is intellectual property.

If governmental restrictions on a person’s persona and intellectual property, such as NCAA eligibility rules, are subject to the Takings Clause, is persona an exception to eminent domain? Consistent with the foundational principles of our democracy, the strongest argument prohibiting the government from “taking” persona rests on the fact that persona rights are a peculiar type of property. Unlike the definition of “property” under the Fifth Amendment envisioned by the Founders, persona rights are not *real* property; instead, persona is an intrinsic attribute of a human being. As previously discussed, the American Revolution, the Constitution, and the

²⁵² See generally *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922) (establishing regulatory taking doctrine).

²⁵³ See *City of Oakland v. Oakland Raiders*, 32 Cal.3d 60 (1982) (ruled that summary judgment was not appropriate and remanded the case for a trial on the merits).

²⁵⁴ *Lynch v. United States*, 292 U.S. 571 (1934).

²⁵⁵ *Id.* at 579 (“Valid contracts are property Rights against the United States arising out of a contract with it are protected by the Fifth Amendment When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.” (citations omitted)).

development of constitutional law evidence the primacy of the protection of human rights from governmental intrusion.²⁵⁶ The Founders and our jurisprudence also believed in the importance of natural law and the nature of natural property.

As they reflect the attributes of a person, persona rights are uniquely “natural property,”²⁵⁷ which is not “property” in a traditional sense.²⁵⁸ Throughout our history, natural law has continued to serve as a guiding, foundational principle that continues as a major tenet of our belief system.²⁵⁹ This distinction, between a “natural property” right and a “positive”²⁶⁰ or “manmade”²⁶¹ property right, is critical to appreciating the essential nature of a person’s rights to the attributes of themselves.²⁶² By adopting Locke’s “natural law” approach over Bentham’s utilitarian approach,²⁶³ it is clear the Founders did not envision persona as the kind of property subjected to eminent domain.

Right of Property posits that the “enjoyment of life, liberty, and property” is a property right—and thus recognizes that the

²⁵⁶ See *supra* note 249 and accompanying text.

²⁵⁷ See “Natural Law,” *supra* note 59.

²⁵⁸ See “Property,” *supra* note 69.

²⁵⁹ This is evidenced by the Supreme Court’s 1988 recognition of the importance of natural law’s influence in early U.S. law. *Powell v. Pennsylvania*, 127 U.S. 678, 692 (1888) (stating that the “right to pursue one’s happiness is placed to the Declaration of Independence among the inalienable rights of man . . . not by the grace of emperors or kings, or by the force of legislative or constitutional enactments, but by their Creator . . .”).

²⁶⁰ See *generally Positive Law*, BLACK’S LAW DICTIONARY (11th ed. 2019) (in general, the term “positive law” connotes statutory law that has been enacted by a duly authorized legislature).

²⁶¹ See Akpotor Eboh, *Natural Law and Man-Made Laws: Criticizing the Latter by Appealing to the Former*, 4 INT’L J. OF INNOVATIVE HUM. ECOLOGY & NATURE STUDIES 13, 16 (2019) (“Man-made law is law that is made by humans, usually considered in opposition to concepts like natural or divine law.”).

²⁶² See, e.g., JEREMY BENTHAM, THEORY OF LEGISLATION 111–12 (R. Hildreth trans., 5th ed. 1887) (“Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it.”).

²⁶³ See BENTHAM *supra* note 262 (providing the most influential utilitarian justification for private property). Unlike Bentham’s utilitarian justification for property, Locke’s natural law approach protects the self. See Eboh, *supra* note 261, at 17 (discussing the “natural right of self-preservation in the natural right of property.”).

enjoyment of persona and protection of property are fundamental. The relationship between the enjoyment of liberty as a property right and persona requires some explanation. For example, while the Bill of Rights focuses primarily on rights that protect individual liberties during criminal investigations and prosecutions, its underlying principles also protect against the government's abuse of a person's *civil rights or liberties*.

Furthermore, specific provisions in the Constitution seek to protect citizens' persona as a property right from state deprivation, via the use of criminal law and the due process of law.²⁶⁴ The third clause of Article I, Section 9 prohibits the federal government from passing bills of attainder or *ex post facto* laws.²⁶⁵ Similarly, the first clause of Article I, Section 1 prohibits the state governments from passing bills of attainder or *ex post facto* laws.²⁶⁶

Moreover, an analysis of the Bill of Rights shows a very strong conviction to Right of Property. The First Amendment prohibits the establishment of religion,²⁶⁷ and protects against restraints of the free exercise of religion, abridgment of the freedom of speech, infringement on the freedom of the press, interference with the right to peaceably assemble, or prohibition of petitioning for a governmental redress of grievances.²⁶⁸ The Second Amendment provided citizens the right to personally protect their Right of Property through the right to keep and bear arms.²⁶⁹ The Fourth Amendment guards people's privacy against wrongful governmental

²⁶⁴ See Paul Pauker, *The Constitution, Deprivation of Life, and Personhood*, AM. THINKER (May 12, 2012), http://www.americanthinker.com/articles/2012/05/the_constitution_deprivation_of_life_and_personhood (“[T]he Constitution contains two provisions that provide absolute protections of life.”).

²⁶⁵ U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”).

²⁶⁶ U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder [or] ex post facto Law . . .”).

²⁶⁷ U.S. CONST. amend. I.

²⁶⁸ *Id.* (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

²⁶⁹ U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

infringement.²⁷⁰ The Fifth Amendment has two protections of Right of Property that are strong, definitive statements of libertarian principles: the Due Process Clause and the Takings Clause.²⁷¹ Most importantly, the Ninth Amendment expressly provides that the enumeration of any rights in the Constitution does not deny or negate other rights reserved in the people.²⁷² The Tenth Amendment reserves any powers not delegated to the United States by the Constitution, as reserved to the states, or respectively to the people.²⁷³ Over the years, the Supreme Court has found that there are some fundamental, “unenumerated” rights, some of them within the penumbras of the Constitution, as implied by the Ninth Amendment.²⁷⁴ Hence, the Ninth and Tenth Amendments, combined with Supreme Court precedents, support the proposition that the Founders believed in

²⁷⁰ U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

²⁷¹ U.S. CONST. amend. V. (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . .”). The Due Process clause prohibits the federal government from depriving a person of “life, liberty, or property, without due process of law.” *Id.* The Takings Clause prohibits the federal government from taking private property “for public use, without just compensation.” *Id.*

²⁷² U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”). James Madison proposed the Ninth Amendment to ensure that the enumerated rights in the Bill of Rights would not be read to preclude the existence of other rights reserved to the people of the United States. LEGAL INFO. INST., *Ninth Amendment*, CORNELL L. SCH., https://www.law.cornell.edu/constitution/ninth_amendment (last visited Feb. 14, 2022).

²⁷³ U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

²⁷⁴ *See, e.g.,* *Griswold v. Connecticut*, 381 U.S. 479, 488 (1964) (“The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.”).

three principles of constitutional power: (1) that all rights not transferred to the government, including the right of self, continue to reside in the people; (2) that additional fundamental rights exist outside of the Constitution; and (3) that the rights enumerated in the Constitution are not an explicit and exhaustive list of individual rights.²⁷⁵

The Founders' belief in these three principles is evidenced by the Takings Clause of the Fifth Amendment, which protects a person's property from wrongful governmental takings. The Takings Clause is reinforced by the Thirteenth Amendment's prohibition against the taking of a person's liberty and labor by way of enslavement and by the Fourteenth Amendment's securing of citizenship rights against all wrongful governmental infringements.

However, the Takings Clause requires the government take private property for "public use" in order to effectuate a "taking" under the Fifth Amendment. While not impossible to imagine, it is extremely unlikely that the government would have a public need to take a person's NIL, with or without just compensation. After a consideration of NIL in the context of the Takings Clause, the case for prohibiting the government's taking of other attributes of a person, such as their labor, brand, or personal identifier, is compelling. Therefore, because persona is a natural attribute of a person, constitutional principles demand its total protection from governmental expropriation under the Fifth Amendment.

2. COROLLARY TO PRIVACY AND PERSONALITY RIGHTS

Contrary to the Takings Clause, governmental expropriation of persona, including NIL, is a violation of the Due Process Clause of the Fourteenth Amendment and should be judged under the "strict scrutiny" lens of Supreme Court jurisprudence. This conclusion is based on the Supreme Court's jurisprudence on privacy and personality rights.

²⁷⁵ U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

i. Liberty, Dignity, and Privacy

While the Court has not expressly recognized persona rights, it has recognized the existence of several rights within the penumbras of the Constitution that arguably support a right to one's persona. For example, the Fourteenth Amendment of the Constitution recognizes several unenumerated fundamental rights,²⁷⁶ all of which are "deeply rooted in this Nation's history and tradition."²⁷⁷ Further, while the Court has not yet expressly recognized persona, including NIL, it is arguably encapsulated in previously recognized rights to personal autonomy,²⁷⁸ privacy,²⁷⁹ and informational privacy.²⁸⁰

The "right to privacy" is often traced to an 1890 article in the Harvard Law Review authored by Samuel D. Warren and Louis D. Brandeis.²⁸¹ There, Warren and Brandeis recognize the right to

²⁷⁶ See *infra* Part II.C.

²⁷⁷ Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (discussing "the sanctity of the family"); There are many other theories regarding what makes a right "fundamental. See JOHN HART ELY, DEMOCRACY AND DISTRUST 59 (1980) (arguing the Court should only recognize non-textual rights that ensure adequate representation and the effective operation of the political process); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 284 (1973) ("The Court's task is to ascertain the weight of the principle in conventional morality and to convert the moral principle into a legal one by connecting it with the body of constitutional law."). See generally HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION (1994) (arguing the Court should use natural law principles to decide whether a right is fundamental).

²⁷⁸ See Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897). In *Allgeyer*, the Court described due process liberty guarantees in terms of personal autonomy, including the right "to be free in the enjoyment of all . . . faculties [and] to be free to use them in all lawful ways . . .". *Id.*

²⁷⁹ See Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (concluding rights guaranteed by the First, Third, Fourth, Fifth, and Ninth Amendments create "zones of privacy").

²⁸⁰ *But see* Whalen v. Roe, 429 U.S. 589, 605 (1977) ("We are not unaware of the threat to privacy implicit in the accumulation of vast amount of personal information . . . nevertheless New York's statutory scheme . . . evidence[s] a proper concern with, and protection of, the individual's interest in privacy.").

²⁸¹ See Warren & Brandeis, *supra* note 204, at 193 ("That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.").

privacy as ““a right to be let alone.””²⁸² In addition, Supreme Court cases have found the right of privacy to be fundamental. For example, in *Meyer v. Nebraska*,²⁸³ the Court applied the Due Process Clause and defined the liberty interest.²⁸⁴ One commentator has identified eight broad categories of constitutional analyses where the Supreme Court has invoked the concept of dignity rather consistently.²⁸⁵

More to the point, the Court has found that the Constitution safeguards the right of privacy and personal autonomy.²⁸⁶ The Supreme Court has interpreted the Constitution to protect these rights, specifically in the areas of (1) marriage, (2) procreation,²⁸⁷ (3) abortion,²⁸⁸ (4) private consensual homosexual activity,²⁸⁹ (5) some types of

²⁸² *Id.* at 195 (“Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual . . . the right ‘to be let alone.’” (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1879))).

²⁸³ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

²⁸⁴ *Id.* (stating that the “liberty” protected by the Due Process Clause “[w]ithout doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”).

²⁸⁵ See Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 789 (2006) (advocating that the Supreme Court should expressly recognize human dignity as underlying certain constitutional rights).

²⁸⁶ See *id.*

²⁸⁷ See *Eisenstadt v. Baird*, 405 U.S. 438, 464–65 (1965) (expanding the scope of sexual privacy rights to include all procreative sexual intercourse, not just sex between married partners).

²⁸⁸ See *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (holding that there is a fundamental right to privacy under the Due Process Clause of the Fourteenth Amendment protecting women who wish to terminate their pregnancies, but only before a fetus is viable outside the womb).

²⁸⁹ See *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (striking down the criminal prohibition of homosexual sodomy in Texas and holding that substantive due process protects adults’ freedom to engage in consensual sexual acts).

pornography,²⁹⁰ and (6) medical treatment.²⁹¹ For example, in *Griswold v. Connecticut*,²⁹² the state of Connecticut convicted two persons as accessories for giving a married couple information about birth control and a prescription for a birth control device.²⁹³ There, the Supreme Court overturned the convictions and found the Connecticut law to be unconstitutional because it violated the right to privacy in the marital relation, noting that a line of Supreme Court cases suggests that specific guarantees in the Bill of Rights have penumbras, which cover the marital relationship.²⁹⁴ The right to privacy has justified decisions involving a wide range of civil liberties cases, including *Pierce v. Society of Sisters*,²⁹⁵ which invalidated a successful 1922 Oregon initiative requiring compulsory public education.²⁹⁶

As the basis of private tort action, the right to privacy includes (1) the right of persons to be free from unwarranted publicity, (2) the right to be free from the unwarranted appropriation of one's personality, (3) the right to publicize one's private affairs without a legitimate public concern, and (4) the right to be free from the wrongful intrusion into one's private activities.²⁹⁷ For example, in 2018, California enacted the California Consumer Privacy Act ("CCPA").²⁹⁸ The CCPA is a privacy law protecting the residents of California and their personal identifying information.²⁹⁹ The law enacts regulation over all companies regardless of operational geography protecting the six "intentional acts" included in the law.³⁰⁰

²⁹⁰ See *Stanley v. Georgia*, 394 U.S. 557, 568 (2003) (invalidating state laws that prohibit the private possession of obscene materials depicting adults over age 18, based on rights granted by the First and Fourteenth Amendments).

²⁹¹ See *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 284 (1990) (holding that adults have the right to personal autonomy in matters relating to their own medical care, have the right to refuse medical treatment, which includes life-saving medical treatment, but holding that a state may require clear and convincing evidence that a person wanted treatment ended before it allows termination).

²⁹² 381 U.S. 479 (1965).

²⁹³ *Id.* at 480.

²⁹⁴ *Id.* at 484–85.

²⁹⁵ 268 U.S. 510, 510 (1925).

²⁹⁶ *Id.* at 510.

²⁹⁷ Restatement (Second) of Torts § 652 (Am. Law Inst. 1977).

²⁹⁸ S.B. 1121, 2018 Legis. Serv., Ch. 735 (Cal. 2018).

²⁹⁹ *Id.*

³⁰⁰ *Id.*

Further, some State constitutions afford greater privacy protections than does the Federal Constitution.³⁰¹

Hence, based on numerous Supreme Court decisions and recent statutory developments relating to privacy rights, one may argue that persona should be protected from governmental intrusion as a corollary to privacy, liberty, and human dignity.

ii. Personality Rights

While this Article focuses on the limitation on the government's use of eminent domain, it is useful to note that the private law has developed persona protections against private exploitation. Similar to the law on privacy rights, the law has developed a private right of action based on the protection of one's "personality rights."³⁰² Personality rights are nearly identical to persona rights.³⁰³

"Personality rights" consist of two types of rights: the right to privacy and the right of publicity. The right to privacy, which includes protection against misappropriation, is designed to guard individuals' personal rights against emotional distress.³⁰⁴

By comparison, the "right of publicity"³⁰⁵ is a right to legal action designed to protect the names and likenesses of celebrities

³⁰¹ Ten states have explicit privacy clauses in their constitutions. *See, e.g.*, ALASKA CONST. art. I, § 22 (amended 1972) ("The right of the people to privacy is recognized and shall not be infringed."); ARIZ. CONST. art. II, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without due process of law."); CAL. CONST. art. I, § 1 (listing privacy as an inalienable right granted to "all people"); FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from government intrusion into the person's private life except as otherwise provided herein."); HAW. CONST. art. I, § 6 (recognizing a right to privacy that cannot be infringed "without the showing of a compelling state interest"); ILL. CONST. art. I, § 12 ("Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his . . . privacy . . ."); LA. CONST. art. I, § 5 ("Every person shall be secure . . . against unreasonable . . . invasions of privacy.").

³⁰² *See generally Right of Publicity*, INT'L TRADEMARK ASS'N, <https://www.inta.org/topics/right-of-publicity/> (discussing the right against misappropriation of a person's name and likeness).

³⁰³ *See id.*

³⁰⁴ *Publicity*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/publicity> (last visited Mar. 5, 2022).

³⁰⁵ Federal appeals court Judge Jerome N. Frank coined the term "the right of publicity" in the case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,

against unauthorized exploitation for commercial purposes.³⁰⁶ Critics of the right of publicity argue that the concept has been unevenly applied.³⁰⁷ Alex Wyman argues that variations in state laws and the wide variation in their application and interpretation call for a common national standard.³⁰⁸ On the other hand, Eric E. Johnson argues that the current doctrine actually embraces at least three different concepts, “the endorsement right, the merchandizing entitlement, and the right against virtual impressment.”³⁰⁹

In the United States, the right of publicity is based on state law rather than federal law.³¹⁰ As such, recognition of the right can vary from state to state.³¹¹ The rationale underlying the right of publicity in the United States is rooted in both privacy and economic exploitation.³¹² A commonly-cited justification for this doctrine from a policy standpoint, is the notion of natural rights and the idea that every individual should have a right to control how their right of publicity is commercialized by a third party.³¹³ The right of publicity

202 F.2d 866 (2d Cir. 1953), which recognized a baseball player’s interest in his photograph on a baseball card. *Id.* at 868–69. To date, the right of publicity has been recognized either in state common (judge-made) law or in state statutes, with more than half the states recognizing the right in one form or another.

³⁰⁶ John. Vile, *Right of Publicity*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1011/right-of-publicity> (last visited March 5, 2022).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ See *Statutes & Interactive Map*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/statutes> (last visited Feb. 9, 2022). Indiana has one of the strongest right of publicity statutes in the U.S., providing recognition of the right for 100 years after death, and protecting not only a person’s “name, image and likeness,” but also signatures, photographs, gestures, distinctive appearances, and mannerisms. See *id.*

³¹² Mark Roesler & Garrett Hutchinson, *What’s in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, A.B.A. (Sept. 16, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/.

³¹³ Often, although certainly not always, the motivation to engage in such commercialization is to help propel sales or visibility for a product or service, which usually amounts to some form of commercial speech, which in turn receives the lowest level of judicial scrutiny. See *Zacchini v. Scripps-Howard*

is defined as the right of all individuals to control commercial use of their NIL, or other identifying aspects of their identities.³¹⁴ In certain contexts, the right of publicity is limited by the First Amendment. The right of publicity can be referred to as publicity rights or even personality rights.³¹⁵

Therefore, persona rights, particularly NIL, are a peculiar type of property that should place them beyond that reach of eminent domain. They are akin to the concept of liberty in that they are “natural rights,” and are protected by the Court’s privacy jurisprudence. This raises the follow-up question: If the government’s expropriation of persona, such as a person’s NIL, is outside the scope of the Takings Clause, does the Constitution protect a person’s persona from governmental expropriation in other ways?

C. *Due Process*

Four score and seven years ago our fathers brought forth upon this continent, a new nation, conceived in Liberty . . . that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.³¹⁶

Assuming that the expropriation of persona rights is outside of the protection of the Takings Clause, does that mean that the government can freely exploit a person’s NIL without compensation?

Broad. Co., 433 U.S. 562, 578–79 (1977) (holding that the First and Fourteenth Amendments do not immunize the news media from civil liability when they broadcast a performer’s entire act without his consent, and the Constitution does not prevent a state from requiring broadcasters to compensate performers).

³¹⁴ Roesler & Hutchinson, *supra* note 312.

³¹⁵ See generally Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

³¹⁶ The “Gettysburg Address” was delivered during the Civil War at the dedication of the Soldiers’ National Cemetery in Gettysburg, Pennsylvania, on the afternoon of November 19, 1863, four and a half months after the Union armies defeated those of the Confederacy at the Battle of Gettysburg. See *an Online Exhibition of The Gettysburg Address*, SMITHSONIAN NAT’L MUSEUM OF AM. HIST., https://americanhistory.si.edu/documentsgallery/exhibitions/gettysburg_address_2.html (last visited Feb. 9, 2022).

The answer is “no,” because the protection of fundamental rights is not limited to the Takings Clause.³¹⁷ That protection includes both textual and non-textual sources.³¹⁸ One textual source is the Due Process Clause of the Fourteenth Amendment and its subsequent jurisprudence.³¹⁹

1. THE FOURTEENTH AMENDMENT

Throughout United States history, we have grappled with when to apply positive law property rules to exploit people as property.³²⁰ Beginning in 1619, even before the formal creation of the United

³¹⁷ See Antonin Scalia, *Is There an Unwritten Constitution?*, 12 HARV. J.L. & PUB. POL’Y 1, 2 (1989).

³¹⁸ See *id.* (discussing three alternative sources of nontextual constitutional rights: history, natural rights, and the evolving consensus of society); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (stating that “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”); see also NORMAN REDLICH, ET AL., UNDERSTANDING CONSTITUTIONAL LAW 322–341, 487–492 (3d ed. 2005) (noting that the Supreme Court has extended fundamental rights to include the right to interstate travel, the right to parent one’s own children, protection on the high seas from pirates, the right to privacy, and the right to marriage); see also *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL’Y 795, 813 (1996). Right of Property in one’s persona as a fundamental right is also evidenced in international human rights principles and treaties adopted and ratified by the United States. See generally International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. TREATY DOC NO. 95-20 (1978), 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, S. TREATY DOC NO. 95-18 (1978), 660 U.N.T.S. 195, 212; S. Treaty Doc. 95-18; 660 U.N.T.S. 195, 212.

³¹⁹ U.S. CONST. amend. XIV, § 5.

³²⁰ See, e.g., THE DECLARATION OF INDEPENDENCE (U.S. 1776); see also *Powell v. Pennsylvania*, 127 U.S. 678, 692 (1888) (recognizing the importance of natural law’s influence in early U.S. law stating that the “right to pursue happiness is placed by the Declaration of Independence among the inalienable rights of man, not by the grace of emperors or kings, or by the force of legislative or constitutional enactments, but by the Creator.”).

States,³²¹ until post-Civil War Reconstruction,³²² the law wrongfully applied the property advantages that derived from a “thing” to include those derived from the enslavement of human beings,³²³ based on race.³²⁴

From the inception of the Republic, the Founders were aware of the inherent contradiction between their belief in libertarianism and their ownership of people of African descent.³²⁵ For centuries, the people of the United States benefited from the European, legally-sanctioned and religiously-sanctioned enslavement of African people as property.³²⁶ Rather than extend liberty to enslaved people, the Founders chose to use the Constitution to *support* the enslavement of Black people.³²⁷ Developing a prosperous economy built on the

³²¹ Meilan Solly, *158 Resources to Understand Racism in America*, SMITHSONIAN MAG. (June 4, 2020), <https://www.smithsonianmag.com/history/158-resources-understanding-systemic-racism-america-180975029/>.

³²² See KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 125–30 (1956).

³²³ Paul Finkelman, *Slavery in the United States: Persons or Property?* in *THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY* 105–34 (Jean Allain ed., 2012).

³²⁴ An ongoing initiative from The New York Times Magazine that began in August 2019—the 400th anniversary of the beginning of American enslavement—aims to reframe the country’s history by placing the consequences of enslavement and the contributions of Black Americans at the very center of our national narrative). *The 1619 Project*, N.Y. TIMES MAG., <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> (last visited Feb. 12, 2022); see also Mitchell F. Crusto, *Blackness as Property*, *supra* note *.

³²⁵ Finkelman, *supra* note 323, at 103–06.

³²⁶ *Id.*

³²⁷ Prior to the Civil War, the Constitution protected the institution of enslavement and did not consider Black people as U.S. citizens. See U.S. CONST. art I, § 2, cl. 3. U.S. CONST. art I, § 9 protected the legalization of the trade and the importation of enslaved persons of African descent (stating that “The Migration and Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”). U.S. CONST. art IV, § 2, cl. 3, or the Fugitive Slave Clause, stated: “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom Service or Labour may be due.”

backs and brains of enslaved labor, the Nation found it nearly impossible to reconcile its libertarian principles with its mistreatment of Black people.³²⁸ Hence, Black people were deemed to be the property of white enslavers and were not considered U.S. citizens.³²⁹

However, the foundational libertarian principles of liberty and the natural rights of all people would ultimately win over the nation's addiction to the power and wealth derived from the enslavement of people of African descent. This formal structure of enslavement, the failure to provide citizenship rights to Black people,³³⁰ and the battle over the expansion of enslavement into territories³³¹ resulted in a bloody Civil War between the Confederate insurrectionists and the United States in 1861.³³²

Following the United States' victory over the Confederacy, the "Reconstruction Amendments" to the Constitution were eventually enacted, which restated the broad application of the libertarian principles at the core of the American ethos.³³³ In 1865, the Thirteenth Amendment sought to guarantee that the persona rights—particularly the right of self-determination and the right to labor—of every American would be protected from most, although not all, forms of private and public exploitation.³³⁴ It formally abolished the *de jure* institution of slavery.³³⁵ However, through the criminal due process

³²⁸ Finkelman, *supra* note 323, at 180–82.

³²⁹ See *Scott v. Sandford*, 60 U.S. 393, 590 (1857) (holding that the Constitution was not meant to include American citizenship for people of African descent, regardless of whether they were enslaved or free, and thus, the rights and privileges that the Constitution confers upon American citizens could not apply to people of African descent).

³³⁰ *Id.*

³³¹ *Civil War*, HIST., <https://www.history.com/topics/american-civil-war/american-civil-war-history#:~:text=The%20Civil%20War%20in%20the%20United%20States%20began,of%20America%3B%20four%20more%20states%20soon%20joined%20them> (last visited Feb. 12, 2022).

³³² *Id.*

³³³ See U.S. CONST. amend. XIII; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV.

³³⁴ U.S. CONST. amend. XIII (stating “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

³³⁵ *Id.*

exception in the Thirteenth Amendment,³³⁶ the government permitted private and public mistreatment of people as *state property*.³³⁷

As the Confederate leadership regained power in the South, southern legislatures enacted “black codes”—state-sanctioned, racially-based rules and restrictions on the lives, liberty, and property rights of Black people.³³⁸ In direct response to the black codes, the nation adopted two additional constitutional amendments granting citizenship rights³³⁹ to newly-freed Black people and voting rights to Black males, respectively.³⁴⁰ The federal government’s protection of Black people and their rights was short lived.³⁴¹ Following Reconstruction and the restoration of southern white supremacy,³⁴² the Supreme Court diminished the protective impact of the Fourteenth Amendment,³⁴³ again exposing Black lives to renewed exploitation, oppression, and abuses.

After nearly another century of racial abuse and inequality, in 1954, the Supreme Court issued the landmark decision of *Brown v.*

³³⁶ *Id.*

³³⁷ *See generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); *see also* 13TH (Kandoo Films 2016).

³³⁸ *See generally* DOUGLAS BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).

³³⁹ *Id.* at 52.

³⁴⁰ *Id.*

³⁴¹ *See generally* JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS, 1954–1965* (1987) (documenting the Black struggle for civil rights).

³⁴² *Id.*

³⁴³ *See, e.g.*, the Slaughter-House Cases, 83 U.S. 36, 81–82 (1872) (limiting Fourteenth Amendment’s application Fourteenth Amendment to the Constitution to federal rights, such as the right to interstate travel, but not “state rights” such as intra-state travel); *United States v. Cruikshank*, 92 U.S. 542, 552–53 (1875) (limiting Fourteenth Amendment’s applicability to state governments when white mob killed one hundred Black people but nevertheless evaded criminal punishment). However, in the 1920s, the Supreme Court began a series of decisions that interpreted the Fourteenth Amendment to “incorporate” most portions of the Bill of Rights, making these portions, for the first time, enforceable against the State governments. *See, e.g.*, *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (expressly holding that States were bound to protect freedom of speech).

Board of Education.³⁴⁴ That case held that racially segregated public schools were unconstitutional.³⁴⁵ This decision restored the nation's commitment to applying our founding libertarian principles to Black people. Consequently, Black people believed that the federal government and the courts would once again be allies in their struggle for equal justice.³⁴⁶

In the 1960s, Black people advocated for their constitutional rights through peaceful civil rights protests, marches, and sit-ins,³⁴⁷ resulting in President Lyndon B. Johnson signing into law the Civil Rights Act of 1964.³⁴⁸ Hence, the federal government has both a constitutional and a statutory duty to protect Black people's right to be free from expropriation. The law provides federal courts with the jurisdiction to protect Black lives, recognizing that throughout our history, Black people have been particularly vulnerable to governmental abuse and should be afforded special, federal protection.³⁴⁹ Yet, even today, there is no federal statute that expressly prohibits the expropriation of Right of Property for Black people. This is particularly troublesome for those student athletes who play for NCAA teams and yet fail to see the fruits of their labor, as many of them struggle to afford basic necessities.

As reflected in the Black struggle for equality in America, constitutional law continues to develop in a manner that seeks to ensure the fulfillment of our libertarian vision of individual rights under the law. Today, the Constitution expressly provides this protection in the Thirteenth Amendment's prohibition of enslavement of people,

³⁴⁴ 347 U.S. 483, 495 (1954), *supplemented sub nom. Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (ruling that state laws establishing racial segregation in public schools are unconstitutional, even if the segregated schools are otherwise equal in quality). This was followed by decades of the battle of the desegregation of public schools, including universities. *See generally* JACK BASS, UNLIKELY HEROES 17 (1990) (documenting the role federal circuit court judges played in the implementation of the *Brown* decision).

³⁴⁵ *Brown*, 347 U.S. at 495.

³⁴⁶ BASS, *supra* note 344, at 17.

³⁴⁷ *See generally Civil Rights Act of 1964*, HIST., <http://www.history.com/topics/black-history/civil-rights-act> (last updated Jan. 20, 2022).

³⁴⁸ U.S. federal anti-discrimination law protects groups of people with common characteristics from discrimination on the basis of those characteristics, which include race, color, religion, national origin, and other such categories. *See generally Civil Rights Act of 1964*, P.L. 88-352, 78 Stat. 241 (1964).

³⁴⁹ *See WILLIAMS, supra* note 341, at 17.

protecting the person and their labor,³⁵⁰ and the citizenship rights expressly provided for in the Fourteenth Amendment.³⁵¹ Moreover, the Constitution provides additional protections in the Takings Clause of the Fifth Amendment,³⁵² and in the reservation of rights to the individual pursuant to the Ninth Amendment.³⁵³ Hence, there are strong constitutional provisions that functionally recognize and protect the persona rights of individuals, which includes those of Black people.

As the Fourteenth Amendment expressly grants Congress the authority to guarantee the effectiveness of that Amendment, Congress is authorized to enact protections for persona rights.³⁵⁴ Therefore, Congress has a constitutional mandate to enact laws that protect personal liberties from governmental and private exploitation.

2. FUNDAMENTAL RIGHTS

Another argument supporting the proposition that persona is protected against government exploitation is the Supreme Court's expansion of the rights it deems to be fundamental. Since 1925, the Court has expanded the number of unenumerated or fundamental rights and civil liberties that protect individuals against federal and state infringements.³⁵⁵ To determine whether an unenumerated right is fundamental, the Court looks to "history, legal traditions, and practices [to] provide the crucial guideposts for responsible decision making."³⁵⁶ As previously discussed, persona embodies the

³⁵⁰ U.S. CONST. amend. XIII.

³⁵¹ U.S. CONST. amend. XIV.

³⁵² U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*" (emphasis added)).

³⁵³ U.S. CONST. amend. XIV.

³⁵⁴ See U.S. CONST. amend. IX.

³⁵⁵ See *Gitlow v. People*, 268 U.S. 652, 652 (1925) (internal quotation marks omitted) (holding the Fourteenth Amendment extended the First Amendment's provisions protecting freedom of speech and freedom of the press to apply to the governments of U.S. states).

³⁵⁶ See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("[W]e 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.") (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

foundational, libertarian principles found in the Bill of Rights and in the Reconstruction Amendments.³⁵⁷

Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.”³⁵⁸ The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights.³⁵⁹ In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.³⁶⁰ The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, “has not been reduced to any formula.”³⁶¹ Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them their respect.³⁶² That process is guided by many of the same considerations relevant to analyses of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries.³⁶³ That method respects our history, and learns from it, without allowing the past alone to rule the present.

In 2015, in the landmark case of *Obergefell v. Hodges*,³⁶⁴ the Supreme Court formulated a test for determining whether a right is fundamental.³⁶⁵ In that case, the Court identified “four principles

³⁵⁷ See *supra* Section III.A.

³⁵⁸ U.S. Const. amend. XIV, § 1.

³⁵⁹ See *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

³⁶⁰ See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1965); see also *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965).

³⁶¹ *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

³⁶² See *id.*

³⁶³ See *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

³⁶⁴ *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015) (holding that fundamental right to marry applies “with equal force to same-sex couples”).

³⁶⁵ See *id.* Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968). In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., *Eisenstadt v. Baird*, 405

and traditions [that] demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”³⁶⁶ While two of these principles are specific to marriage, two are not. The Court provided a two-prong test to determine whether persona rights are fundamental: (1) are persona rights inherent in the concept of individual autonomy; and (2) are persona rights a keystone of our social order?³⁶⁷ The answer to both questions is “yes.”

As noted previously in Section II.A, persona is synonymous with personal liberty, which is *the* cornerstone of our social order, is inherent to our concept of individual autonomy, and underlies our culture and traditions. In addition to the express provisions in the Constitution protecting Right to Property, the Supreme Court has also recognized personal liberty in several key cases. Thus, the Court reiterated a substantive due process aspect of persona inherent in the Fourteenth Amendment, explaining that its prior cases held that the amendment guarantees “more than fair process,” to include a “substantive sphere” which bars “certain government actions regardless of the fairness of the procedures used to implement them.”³⁶⁸

As presented above, the protection of persona against state infringement meets the Supreme Court’s criteria for what constitutes a fundamental right, as established in *Obergefell* and other key fundamental rights decisions.

U.S. 438, 453 (1965); *see also* *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965). The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, “has not been reduced to any formula.” *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them their respect. *See id.* That process is guided by many of the same considerations relevant to analyses of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. *See Lawrence v. Texas*, 539 U.S. 558, 572 (2003). That method respects our history and learns from it without allowing the past alone to rule the present.

³⁶⁶ *Obergefell*, 576 U.S. at 665, 669.

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 438-429.

3. STRICT SCRUTINY

Furthermore, because the Court has adopted strict scrutiny analysis in cases where governmental action wrongfully infringes on persona in the name of liberty, any governmental action that wrongfully infringes on a persona right is suspect.³⁶⁹ Hence, any governmental expropriation of personal rights must be viewed from a strict scrutiny standard of review, due to its status as a fundamental right.

In *Washington v. Glucksberg*,³⁷⁰ the Court articulated a two-step test on how to protect fundamental rights: (1) the Due Process Clause “specially” protects rights and liberties deeply rooted in tradition and implicit in the concept of ordered liberty; and (2) a ‘careful description’ of the asserted fundamental liberty interest is required.³⁷¹ The *Glucksberg* Court also acknowledged a line of cases which applied heightened scrutiny while invoking either fundamental rights or liberty interests.³⁷² It concluded “[t]he ‘liberty’ guaranteed by the due process clause of the fourteenth amendment . . . may not be interfered with [by] legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to affect . . . the individual has certain fundamental rights which must be respected.³⁷³

Hence, the Fourteenth Amendment’s Due Process Clause provides a meaningful alternative to the Takings Clause when it comes to analyzing the limitations on the government’s power of eminent domain. It also provides both a judicial basis for assessing the exploitation of individual rights outside the Takings Clause, and arguably provides for more remedies, and more comprehensive compensation, than does the “just compensation” provision of the Fifth Amendment.³⁷⁴

³⁶⁹ *Washington v. Glucksberg*, 521 U.S. 702, 703, 721 (1997).

³⁷⁰ *Id.* at 703.

³⁷¹ *Id.* at 721.

³⁷² *See id.* (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *Eisenstadt v. Baird*, 405 U.S. 438, 464-65 (1965); *Loving v. Virginia*, 388 U.S. 1, 11 (1967)); *Griswold v. Connecticut*, 381 U.S. 479, 503-04, 511 (1965); *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 534-36 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400, 403 (1923)).

³⁷³ *Meyer v. Nebraska*, 262 U.S. 390, 400, 401 (1923).

³⁷⁴ *See* U.S. CONST. amend. V.

In summary, there are three reasons why the government should not be permitted to expropriate persona. First, persona embraces foundational, libertarian principles that place the right of the individual over the whims of the government.³⁷⁵ Second, persona, particularly NIL, is a peculiar type of property—“natural property”—that should never be the subject of “public purpose.” Third, the governmental exploitation of persona is a violation of the Due Process Clause of the Fourteenth Amendment. This violation should be judged under the “strict scrutiny” lens and should be *adequately*—not “justly”—compensated.

Relative to the particular case of the NCAA and its government partners’ expropriation of college athletes’ persona, including their NIL, such wrongful behavior must be stopped and the harm redressed. The reasons are clear: (1) NCAA students’ NIL rights, and other persona rights, should not be subject to eminent domain; (2) the students’ rights should never be taken for public purpose; and (3) such expropriation stifles the development of a billion-dollar industry and denies these players the opportunity to acquire wealth.³⁷⁶ Failing to take action means that collegiate athletes will continue to be uncompensated for the expropriation of their NIL, some of them will continue to live on college campuses in poverty, and the Nation will continue to face the moral disgrace of the compensation inequity between players and the NCAA executives and coaches.

III. THE PERSONA PROTECTION ACT³⁷⁷

Recognizing a dire need to protect persona, including NIL, from governmental overreach, Part III provides a proposed code in the

³⁷⁵ See Nimmer, *supra* note 315, at 215–16.

³⁷⁶ *Paying College Athletes—Top 3 Pros and Cons*, PROCON.ORG (Jan., 21, 2022), <https://www.procon.org/headlines/paying-college-athletes-top-3-pros-and-cons/> (finding that “[t]he player-level analysis reveals that the existing limits on player compensation effectively transfers resources away from students who are more likely to be black and more likely to come from poor neighborhoods towards students who are more likely to be white and come from higher-income neighborhoods.”).

³⁷⁷ This Act benefited from the Senate bill, Players Bill of Rights, and ABA proposal, the right of publicity, right of personality, personality. See generally Booker, *Senators Announce College Athletes Bill of Rights*, CORY BOOKER (Aug.

form of a federal legislative solution. The following shows how such federal legislation would apply to the NCAA players controversy, responds to critiques of the proposed legislation, and proposes reparations as the equitable remedy.

A. *Solution*

In response to the problem of the private property-*eminent domain* conundrum, it is imperative to protect the expectation of the natural property rights of *persona* from governmental expropriation. The “*Persona Protection Act (“PPA”)* is the proposed solution to the questions remaining after the *Alston* decision and numerous state laws dealing with protecting NIL from governmental takings. This legislation reflects the normative claim that every person in this country has the constitutional right to be free from government control over one’s *persona*.³⁷⁸ Additionally, the Act provides legal and equitable remedies if the government does, in fact, expropriate one’s *persona*.³⁷⁹ These remedies are broader and more equitable than the “just compensation” that is provided by the Takings Clause.³⁸⁰ The specific provisions of PPA follow the main text of this Article as an Appendix. Three tenets reflected in the provisions of the PPA are as follows:

First, PPA recognizes that by enacting the Takings Clause in the Fifth Amendment, the Founders indirectly adopted the principle of *eminent domain* by which the government has the power to take private property for public purposes. Additionally, PPA recognizes the Takings Clause expressly restricts the government’s *eminent domain* powers to takings for public purposes and subject to just compensation.

13, 2020), <https://www.booker.senate.gov/news/press/booker-senators-announce-college-athletes-bill-of-rights>; Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, ABA (Aug. 1, 2021), https://www.americanbar.org/content/dam/aba/publications/communications_lawyer/august2011/why_federal_right_publicity_statute_is_necessary_comm_law_28_2.pdf.

³⁷⁸ See Joondeph, *supra* note 205, at 541.

³⁷⁹ As both the Fifth Amendment and the Fourteenth Amendment expressly grant Congress the authority to guarantee their effectiveness is authorized to enact the PPA. See U.S. CONST. amend. V, § 2; see also U.S. CONST. amend. XIV, § 5.

³⁸⁰ See U.S. CONST. amend. V.

Second, notwithstanding the constitutional restrictions on eminent domain, PPA recognizes that the government, both at the state and federal levels, has wrongfully expropriated—and continues to wrongfully expropriate—people’s persona, or the virtual attributes of oneself. Particularly, through the use of the NCAA, which the government has granted tax-preferred, non-profit status, state and local governments, especially those that own and operate NCAA member schools, have robbed its member athletes of their persona rights, including the right to capitalize on their NIL. This exploitation has been both direct and indirect. Governments have directly exploited members by exploiting players’ labor. Governments have indirectly exploited members through the NCAA’s eligibility rules. Following the *Alston* decision, and state laws prohibiting such exploitation, there is an obvious need to address this issue broadly.

Third, PPA seeks to broadly address the need to absolutely prohibit the government’s eminent domain powers from applying, directly or indirectly, to the past, present, and future expropriation of persona, particularly, but not limited to NIL. In further response to this situation, PPA seeks to remedy past, present, and future expropriation of persona by providing all legal, equitable, and special (such as punitive damages) remedies, beyond and not limited to “just compensation.” These remedies include the use of injunctive relief and constructive trusts (including a Victims’ Compensation Fund), as well as the right to pursue claims under the Due Process Clause.

In conclusion, PPA provides a transformative solution: the absolute ban on the application of eminent domain to persona rights. PPA constitutes a win-win, as it protects the privacy of individuals while providing clear guidance to the government which avoids needless litigation. This change will deliver both justice and peace of mind for owners of persona rights.

B. *Application*

The ultimate goal of PPA is to protect the persona rights of every American, not only NCAA players. However, it is useful to show how PPA would address the current debate over NCAA athletes’ right to their NIL. When we apply PPA to the “pay-to-play” issue, the practical challenge is attracting more support for state or federal legislation embracing PPA. A federal PPA would address several of

the problems that were identified in the case study of the NCAA players' battle over their NIL,³⁸¹ including a lack of uniformity, an unequal playing field, and the obstacles of developing a national media market for NIL. While a federal solution might be ideal, it is equally plausible for PPA to be the subject of state referendum, state legislation, or judicial action. However, there are several advantages to enacting a *federal* statute.

First, a federal PPA would add uniformity to the law on players' NIL rights. There is a lack of uniformity in the current laws as several, but not all,³⁸² states have passed Fair-Pay-to-Play ("Fair Play") laws.³⁸³ This raises two sets of problems: those that relate to how each Fair Play law compares to one another, and those that relate to how the law in a Fair Play state compares to and applies in a state that has not yet enacted Fair Play laws. In regard to the first problem, varying State laws interpreted by their respective state courts will likely produce different rules which might create inequities. The second problem, one of comity, raises the difficulties when an athlete enrolled in a Fair Play school plays in a game hosted by and located in a non-Fair Play state. A federal PPA would address these problems by providing a single, superseding body of rules that would make for a better, more predictable operation of college sports.

Second, a federal PPA would level the playing field from state to state. Currently, there are more states that have not enacted Fair Play law than states that have enacted such laws.³⁸⁴ This causes a problem of fair competition in recruiting players, giving Fair Play schools a competitive edge over non-Fair Play schools. The most sought-after players would gravitate toward a NCAA school in that state that allows that player to compensation for their NIL. As a result, schools in Fair Play States would have a major competitive advantage over schools in non-Fair Play States. Not only would this create powerhouse teams, but it would also weaken the attraction of college sports as the competition would be lopsided. Moreover, as

³⁸¹ See *infra* Part I.

³⁸² Andrew Smalley, *Student-Athlete 'Pay for Play' Gets Lawmakers' Attention*, NCSL (May 24, 2021), <https://www.ncsl.org/research/education/student-athlete-pay-to-play-gets-lawmakers-attention-magazine2021.aspx>.

³⁸³ *Id.*

³⁸⁴ *Id.*

successful college sports teams drive revenue in many forms, including media, advertising, ticket sales, and increased student enrollment, Fair Play schools would receive an increase in financial benefits. This problem is aggravated by the NCAA interim rules relating to NIL, which narrowly applies if a student plays for a school that is located in a state that has enacted a Fair Play law.

Third, a federal PPA would facilitate and promote an orderly market for college athletes' NIL because that market is a national one, involving interstate commerce under federal jurisdiction. Because media is interstate, sports are played in various states, and players are required to cross state boundaries, the federal government has jurisdiction over college sports.³⁸⁵ Moreover, it is incumbent on the federal government to protect and defend the NIL rights of college athletes. The enactment of a federal PPA would spell out this fact and would clarify issues including enforceability, fines and penalties for noncompliance, retroactivity, defeasibility, and other details. Most importantly, a federal PPA would mean that players would be entitled to their NIL as a matter of right rather than as a privilege granted by the NCAA and certain state governments, which would advance the concept of persona as a universal right, protected against all wrongful exploitation.

Hence, the enactment of a federal PPA, relative to the pay-to-play issue, would address the issues of uniformity, an unequal playing field, and the development of a national media market for NIL. A federal PPA would declare that college athletes have a right to their NIL and would protect that right against wrongful private and public exploitation. In doing so, a federal PPA would preempt both inconsistent state Fair Play laws and NCAA amateurism rules, promote the vitality of college sports by ensuring a level playing field, and enhance the value of NIL by protecting its national marketability. Furthermore, this development would add permanency and stability to such a right and promote a strong, lasting market for all attributes of persona from which every American can enjoy and financially benefit.

³⁸⁵ LEGAL INFO. INST., *Sports Law*, CORNELL L. SCH., https://www.law.cornell.edu/wex/sports_law (last visited Feb. 14, 2022).

C. Critiques

This section briefly responds to several arguments against PPA as a proposed solution to the need to restrict the government's power of eminent domain. Each critique is accompanied by a response, which argues that the benefits of PPA outweigh its possible shortcomings.

First, some critics of PPA might argue that it is flawed because it is based on the premise that if persona is a right, it cannot be voluntarily contracted away or waived, which is what the college athletes agree to do when they agree to play for a NCAA team.³⁸⁶ In response to this critique, this Article posits that as a personal right, persona is alienable by its owner to another person or entity. Moreover, it concedes that a player has a choice to play for a NCAA team and derives a substantial increase in the value of its brand as a result of doing so. However, it contends that the NCAA rules are overbearing and does not allow for fair and open negotiation, and competition for a player's talent; and therefore, is a wrongful expropriation by government.

Second, some critics of PPA might argue that its enactment would destroy college athletics by turning it into a highly competitive, uncongenial activity, which is unbecoming of college life. There is no reason to believe this would be the outcome of the abolition of the amateurism rules. The abandonment of a similar amateurism rule in the Olympic Games shows that this is unlikely to be the case.³⁸⁷ There, Olympic athletes are reasonably competitive; however, they are still collegial. Moreover, this critique is flawed because the coaches of NCAA member schools are often highly compensated as professionals.³⁸⁸ That has not resulted in unprofessional behavior. Furthermore, following the enactment of PPA, college athletes would be permitted to hire professional agents, which would result in an increase in the earning opportunities for all athletes.

³⁸⁶ See Victoria L. Jackson, *Opinion: It's Time to End the Notion of NCAA Amateurism*, GLOBAL SPORT MATTERS (Apr. 10, 2018), <https://globalsportmatters.com/culture/2018/04/10/opinion-its-time-to-end-the-notion-of-ncaa-amateurism/>.

³⁸⁷ *Id.*

³⁸⁸ *Id.*

Third, some critics might argue that the government's eminent domain powers allow it to take intellectual property for a public purpose with just compensation. In the case of the NCAA, if it was determined to be a governmental entity or that its rule constitute a taking, the players are justly compensated for waiving their NIL rights. This compensation comes in both direct and indirect forms and is invaluable. In addition to a free education and room and board, the players receive the benefit of the status of playing on an NCAA team, including media exposure. Moreover, in the case of the NCAA, critics might argue that there is no taking because the players have consented by waiving their NIL rights. In response, as to the consent issue, it is clear that the NCAA and its players have unequal bargaining positions.³⁸⁹ Furthermore, in light of the enormous financial benefits the NCAA and its members receive, the compensation given to the players is anything but fair. Others would argue that PPA wrongfully deprives state legislatures of the power to determine the property rights of college athletes in their states. I argue that these state governments are currently benefiting from the wrongful expropriation of the property rights of college athletes, and therefore, are conflicted from making such a determination.

Therefore, PPA embodies both constitutional principles and good public policy. Contrary to the views of many critics, PPA will not result in a less collegial environment on college campuses. PPA does not mean that persona rights are inalienable; rather, PPA places the value of persona in the hands of the person whose NIL is being commercially used. Neither of those critiques negates the positive impact of PPA in recognizing and protecting the NIL and persona rights of all people who live in the U.S. Furthermore, prohibiting the government from using eminent domain relative to persona will likely promote a greater and richer marketplace for virtual assets, which will enhance the income and wealth of its owners, who may include young people who are socially and economically disadvantaged.

³⁸⁹ Moreover, there is the question of whether NCAA athletes, some of whom are minors, have the legal capacity, let along the emotional maturity, to contract away their rights.

D. *Reparations*

Hence, one might conclude that the government, at all levels, directly and in agency or partnership with the NCAA, has wrongfully exercised its eminent domain power over the property rights of college athletes and without just compensation. If one accepts such an obvious, yet un-litigated, conclusion, what is the appropriate remedy for such infringements on the players' rights? NCAA athletes are at the mercy of the government to provide adequate, meaningful remedial relief to athletes. Moreover, the remedy for a taking is just compensation, which is woefully inadequate and does not address the punitive nature of the exploitation.

Therefore, this Article recommends a more equitable remedy is in the form of reparations—that is, a “Student Athlete Victims’ Compensation Fund.” Such a fund would compensate present and former players, as well as remediate the negative effects of current and past expropriation of the players’ persona. Such remedies should include damages to the players themselves, their families, and their communities. Reparations should aggressively erase the direct and collateral effects of the wrongful expropriations. However, some critics might argue that a victims’ reparations fund is too expensive to implement and will destroy college football.

Returning to the libertarian thesis of this Article, the *Alston* case evidences that libertarianism—the recognition and protection of the right of self—is present in the Supreme Court’s jurisprudence. However, it is just barely present. While Justice Gorsuch and Justice Kavanaugh are the most libertarian-leaning justices on the Court today, they are far from truly embracing a Right of Property in oneself, as advanced in *Alston*. If those Justices were true libertarians, they would have recognized the players’ rights to their persona, including to their NIL, and the fundamental right to its protection against *present and future* private and governmental exploitation. Accordingly, the Justices would have awarded the students remediation for the *past* takings of their property rights. Consequently, we need a robust conversation on the status of our fundamental rights, and

particularly the role of the federal courts in protecting those rights against eminent domain within our federalist system of government.³⁹⁰

CONCLUSION

Eminent domain is an anti-libertarian concept that violates the most basic and sacred of our fundamental rights—private property ownership. This Article posits that persona, which includes NIL, is an inherent “natural” property right that every person in the U.S. possesses and which is beyond the reach of the government’s eminent domain powers. Further, it concludes that any governmental expropriation of persona is subject to Fourteenth Amendment Due Process protections.

The NCAA college athletes’ battle for control of their NIL is on the front lines of this important issue. State laws recognizing NCAA players’ NIL rights provide a foundation for protecting those rights for everyone, not just NCAA athletes. To protect those rights from governmental takings, this Article offers a legislative solution which prohibits the government from expropriating persona.

It is time for the next generation of law students and lawyers to revise the words of Oliver Wendell Holmes, to conclude that the life of the law was, and is, the constant pursuit of justice and protection of individual rights from wrongful expropriations by the government.

³⁹⁰ See generally *Dombrowski v. Pfister*, 227 F. Supp 556, 558 (E.D. La. 1964), *rev’d*, 380 U.S. 479, 559 (1965) (involving a civil rights criminal prosecution regarding segregation activities). Judge John Minor Wisdom, dissenting, argues: “[T]he crowning glory of American federalism . . . is the protection the United States Constitution gives to the private citizen against all wrongful governmental invasion of fundamental rights and freedoms . . . it makes federalism workable.” *Id.* at 570–71 (Wisdom, J., dissenting) (footnotes and emphasis omitted).

APPENDIX

Part III of this Article introduces the three tenets of the Persona Protection Act.³⁹¹ The following provides the specific provisions of the Act.

A. *Preamble*

There is an inherent Right of Property in which every American possesses and controls the attributes of self as a property right. The “Persona Protection Act” (“PPA”) is the proposed code that would guide government and policymakers to identify and enforce the prohibition of the government’s exercise of eminent domain to exploit virtual aspects of a person’s self, particularly their NIL, referred to herein and defined as “persona.”³⁹² Additionally, PPA provides legal and equitable remedies for the wrongful exploitation of persona.³⁹³

This Act recognizes that the right of private property is one of the cornerstones of our democracy. It is a fundamental belief of the Founders and is embodied in both the Declaration of Independence and the Bill of Rights. Despite its abuse in the ownership of people of African descent, the Right of Property was reiterated and expanded in the Reconstruction Amendments. In accordance with the Ninth Amendment to the U.S. Constitution, all rights not expressly superseded by the federal or state governments are reserved to the people.

However, in the Fifth Amendment, the Founders intentionally, or unintentionally, recognized the government’s eminent domain over private property, albeit for limited public purpose. This created a conundrum of the extent to which eminent domain applies to private property.

To protect Right of Property, this Act provides that the government be prohibited from exploiting its eminent domain power to appropriate one’s persona. Further, any such exploitation shall not be governed by the Fifth Amendment. Instead, any such exploitation is a violation of this Act, and shall be measured by strict scrutiny as a violation of the Due Process Clause of the Fourteenth Amendment.

³⁹¹ See *supra* Part III.

³⁹² See “Persona,” *supra* note 32.

³⁹³ See *supra* note 379.

Furthermore, this Act recognizes that the natural rights theory of property, as embodied in The Declaration of Independence and in the U.S. Constitution, embraces the fundamental principle that we are all endowed with certain natural or God-given rights that are inalienable. This right encompasses the possession and control of the virtual attributes of self, including one's name, image, and likeness.

Moreover, this Act seeks to protect people, particularly minors of color from disadvantaged communities, from exploitation of their virtual selves, by granting legal and equitable remedies to victims of such exploitation. Those remedies shall include injunctive relief and constructive trusts, as well as compensatory and punitive damages, including private, governmental, and governmental-sponsored expropriation.³⁹⁴

Additionally, this Act seeks to remedy past, present, and future expropriation of Right of Property by providing remedial solutions to the past exploitation and expropriation of the virtual aspects of self, by intentionally providing compensation and reparations for past and current exploitation, such as that of NCAA college athletes, through the establishment of a Victims' Compensation Fund. It is expected that this Act will guide society, corporations, and government to avoid needless, costly litigation. This change will deliver both justice and peace of mind for those who wish and/or need to protect their persona from governmental expropriation.

B. *The Provisions*

Whereas, the right to persona is fundamental and should be constitutionally protected against direct and indirect private, industry, and governmental exploitation of self;

Whereas, the federal government, via its non-profit status granted to the National Collegiate Athletic Association ("NCAA"), have taken and continues to expropriate the rights of college athletes without impunity and without just compensation;

Whereas, State governments, particularly those NCAA members, have and continue to receive huge direct and indirect revenue and other benefits from their wrongful taking of college athletes' rights;

³⁹⁴ See *supra* note 390; Ilya Somin, *Libertarianism and Federalism*, 751 CATO INST. POL'Y ANALYSIS 1, 1–2 (2014).

Whereas, the NCAA's amateurism rule diminishes the value of attributes of college athletes, by monopolizing its development in an anticompetitive environment;

Whereas, recently, the U.S. Supreme Court in a unanimous decision, signaled to the NCAA that the growing view that its amateurism rules are unfair;

Whereas, several States have passed legislation seeking to protect college athletes' NIL rights;

Whereas, while NIL rights represent millions of dollars in potential compensation to a selective few, high profile NCAA college athletes, the NCAA and its members will continue to keep and continue to generate billions of dollars from the labor of its athletes;

Whereas, the current discussion about easing the restrictions on NCAA college athletes' NIL fails to ensure the property rights of those athletes, as they represent privileges under the control of the NCAA;

Whereas, the legal analysis of the NCAA's amateurism rules focuses on questions of antitrust rules, athlete compensation, and equal treatment compared to non-athlete college students. While these legal lenses are important, they fail to provide college athletes, many of whom are racial minorities from underprivileged communities, any meaningful remedies for their mistreatment and inferior status.

Whereas, those analytical lenses fail to create an effective, transformative narrative that would free college athletes, some of whom are legal minors, from economic exploitation and the lack of human dignity they suffer (and have suffered) by being treated as the property of the NCAA and its member schools. Hence, even in the face of reform, college athletes are left seeking a handout from their exploiters, rather than being empowered by a constitutional right to own and control the attributes of their self;

Whereas, without a rights-based analysis of relationships between parties, the powerful are consciously or unconsciously allowed to exploit the political, economic underdogs, particularly Black people. The benefits that the underdogs receive are "privileges" granted to them by the powerful, and not rights guaranteed to them by the Constitution;

Therefore, It Is Hereby Pronounced that PPA provides the following:

(1) PPA recognizes that the natural rights theory of property, as embodied in the Declaration of Independence and in the Constitution and embraces the fundamental principle that we are all endowed with certain natural or God-given rights that are inalienable, including labor, NIL, and virtual attributes.

(2) PPA's primary goal is the end of private, industry, and governmental exploitation of attributes of a person's self, by banning their authority to so, and by granting those being exploited with special legal and equitable remedies including the use of injunctive relief and constructive trusts, to protect the owner for the present and future wrongful taking of oneself.

(3) PPA seeks to remedy past, present, and future expropriation of self by intentionally providing compensation and reparations of the past and current takings of attributes of self of all Americans, particularly NCAA college athletes.

(4) All levels and branches of government, to the highest extent of their powers and authorities, are hereby mandated to abolish all direct or indirect taking of self. This mandate is self-evident and does not require supplemental action other than the immediate endeavors needed to facilitate these requisites.

(5) The Justice Department is hereby authorized to investigate alleged incidents of such expropriations.

(6) PPA shall be subject to strict judicial scrutiny. The legal standard for assessing liability shall be whether the government or its agents are, or have taken, attributes of self puts the burden on the government as a fiduciary of self.

(7) Any such past expropriation, exploitation, use, and infringement on attributes of self shall be enjoined from the adoption of this Act, and that such abuses be retroactively compensated to the full extent of the current market value of the abuse.

(8) PPA establishes a Victims' Compensation Fund to redress the past and present wrongful governmental taking of people's persona rights, particularly of NCAA players, their families, and their communities.