

Boycott the Games: Show Me the Money!

Mitchell F. Crusto

One would assume that the virtual attributes of themselves, including their name, image, and likeness (“NIL”) are their own private property, free from governmental or private exploitation. Unfortunately, while states provide for protection against invasion of privacy rights, such as the right of publicity and from private encroachment, it is not clear that a person is protected against governmental exploitation. Therefore, there is much to learn from the case of the National Collegiate Athletic Association’s (NCAA) past and current regulations of its players’ right to control and capitalize on their NIL. Recently, the Supreme Court in *NCAA v. Alston* took judicial notice of gross inequities in student-athletes’ compensation. Consequently, several states have enacted laws that grant NCAA players the ability to capitalize on their NIL, with some restrictions, and not lose their amateurism status. However, neither the Court nor the states have addressed three quintessential, jurisprudential questions: (1) Is there an inherent right to the attributes of oneself? (2) Is that right a property interest of the person? (3) Is that property interest beyond the reach of the eminent domain powers of the government, as recognized in the Takings Clause of the Fifth Amendment to the U.S. Constitution?

Author’s Note: This article draws from a trilogy of law review articles in which the author utilizes the NCAA players’ NIL rights issue to understand a person’s fundamental and constitutional rights to attributes of themselves. See Mitchell F. Crusto, *Right of Self*, 79 WASH. & LEE L. REV. 533 (2022) (advancing the position that everyone has an inherent, fundamental right to the attributes of self) [hereinafter *Right of Self*]; Mitchell F. Crusto, *Game of Thrones: Liberty & Eminent Domain*, 76 U. MIA L. REV. 653 (2022) (arguing a due process rationale to prohibit governmental exploitation of people’s property rights, particularly their NIL); Mitchell F. Crusto, *Blackness as State Property: Valuing Critical Race Theory*, HARV. C.R.-C.L. L. REV. (forthcoming 2022) (utilizing Critical Race Theory to explain how the American legal system has denied Black people, specifically young Black men, the right to acquire property) [hereinafter *Blackness as State Property*]. These articles are components of a broad project to critically analyze the constitutionality of the law’s treatment of people and their attributes as property. See generally Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J.C.R. & C.L. 51 (2005) (focusing on Black women’s struggle for property rights) [hereinafter *Blackness as Property*].

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This article posits that libertarian principles should apply to (1) recognize an inherent right that everyone in the United States has to own and control the attributes of themselves, (2) deem that right to be a special form of natural property, and (3) hold that that right is not subject to the government’s power of eminent domain. It applies these principles to the case of the NCAA and its members’ regulations that place restrictions on its players from fully benefitting from their NIL to argue that the NCAA and particularly its state-owned member schools are carrying out an unconstitutional exploitation of fundamental rights. Furthermore, it calls upon the general public to boycott NCAA sports until the organization and its members compensate student-athletes as professionals, not amateurs, and allow them to capitalize on their NIL without restrictions, as a matter of fundamental right and not as a mere privilege that is granted by some states. Most importantly, the NCAA players’ battle over their NIL rights is a critical precedent relating to the government’s control over people’s virtual assets.

Keywords: NCAA, NIL, inherent right, eminent domain, student-athlete

Introduction

“*Show me the money!*”¹

– Rod Tidwell (football player) to Jerry Maguire (sports agent)²

Every year, we, the public, promote a spectacle of gross injustice.³ Perhaps not as brutal as the slaughter of the gladiators in the Roman Colosseum but just as uncivilized.⁴ I’m speaking of big-name college sports.⁵ How is it that a backbone

¹ “Show Me the Money,” for purposes of this article, means that if you really appreciate what I bring to the table, then pay me accordingly. The phrase was first used in a demand made by an underpaid, unappreciated Black, outstanding athlete to his white, desperate for business, sports agent, that the agent can prove his ability to deliver on substantial compensation and appreciation.

² Jerry Mcguire (1996), https://www.imdb.com/title/tt0116695/?%20ref=fn_al_tt_1.

³ See Teresa Valerio Parrot, *Profit Motives Make Fixing College Sports Nearly Impossible*, WASH POST (April 5, 2021), <https://www.washingtonpost.com/outlook/2021/04/05/profit-motives-make-fixing-college-sports-nearly-impossible/>.

⁴ College sports, particularly football, can be especially dangerous to the physical and emotional health and wellbeing of the students. See, e.g., Dr. Edward M. Wojtys, *The Dark Side of College Football*, SAGE JOURNALS (October 24, 2018), <https://journals.sagepub.com/doi/10.1177/1941738118805694> (reporting that 34 NCAA football players have died during football activities in the past 18 years; 27 nontraumatic deaths were reported in 2017, while six players died from trauma to the head or neck over the same time period).

⁵ See *supra* note 3 (noting that athletic departments across all divisions reported \$18.9 billion in revenue in 2019; most of which came from the only two Division I men’s sports — football and basketball).



of American culture and society⁶ is so totally inequitable⁷ as to demand radical consumer activism? The answer is found in the following story.

In 2019, Chase Young was the star football player for The Ohio State University Buckeyes.⁸ In 2018, he borrowed money from a family friend to purchase an airline ticket for his girlfriend to attend the prestigious Rose Bowl.⁹ In 2019, the National Collegiate Athletic Association (NCAA)¹⁰ claimed that, by taking the loan, Young had violated its amateurism rules¹¹ (hereinafter “rules”). The NCAA required that to maintain their amateur status, student-athletes are strictly forbidden from receiving funds or support from sources outside of NCAA member schools.¹² The league ultimately suspended Young for two games,¹³ which could have caused him to lose his bid for the highly coveted Heisman trophy.¹⁴

⁶ See Kenneth J. Marci, *Not Just a Game: Sport and Society in the United States*, 4 INQUIRIES JOURNAL/STUDENT PULSE 8, 2012, <http://www.inquiriesjournal.com/articles/1664/not-just-a-game-sport-and-society-in-the-united-states> (arguing that “[s]port 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.”).

⁷ See *infra* Part I.

⁸ 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 Aug. 5, 2021) (reporting on several awful stories of the NCAA’s mistreatment of Black athletes, including that of Chase Young).

⁹ See 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/ark41omz2l47191iwyyw5ju398> (noting that by the time he was suspended in November 2019, Young had repaid the loan).

¹⁰ See NCAA, *What Is the NCAA?*, ncaa.org (accessed Mar. 1, 2021) (reporting that, as of March 2021, the NCAA was composed of “[n]early half a million college athletes [who] 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.”).

¹¹ “Amateurism rules,” for purposes of this article, refers 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. Essentially, these rules severely restrict the compensation that NCAA athletes can receive. See NCAA Division I Manual (Overland Park, KS: NCAA, 1998); Bylaw 12 (1).

¹² See *supra* note 11.

¹³ See Dimaris 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 tweet from Ohio State’s Associate Athletics Director).

¹⁴ 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/ohiostate/football/ohio-states-chase-young-justin-fields-watch-burrow-win-heisman>.



Fortunately, Young did possess something of great value—his name, image, and likeness (“NIL”).¹⁵ However, the NCAA and particularly its member school that Young attended, the Ohio State University, had prohibited Young from capitalizing on his NIL,¹⁶ thereby denying him the fruits of his property rights.¹⁷ Under the NCAA rules at the time, its players were restricted to school-granted benefits, such as scholarships,¹⁸ which are often insufficient¹⁹ to meet a student’s basic needs.²⁰ The benefits these student-athletes receive are often inadequate, especially compared to that of professional athletes. By limiting student-athlete compensation and restricting their rights to their NIL, the NCAA and its member schools, which includes “public” schools that are owned by states, receive billions of dollars from their sports programs, mainly in the form of advertising and television media rights.²¹ Hence, the NCAA, its member schools, and its member state governments greatly benefit financially from their taking of the private property of its student-athletes.²²

¹⁵ See Tommy Beer, *NCAA Athletes Could Make \$2 Million a Year if Paid Equitably*, *Study Suggests*, FORBES (Sep. 1, 2020), <https://www.forbes.com/sites/tommybeer/2020/09/01/ncaa-athletes-could-make-2-million-a-year-if-paid-equitably-study-suggests/?sh=db877045499f>.

¹⁶ See *supra* note 11. NCAA Division I Manual (Overland Park, KS: NCAA 1998); Bylaw 12 (1) ([A]fter 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.”), http://fs.ncaa.org/Docs/eligibility_center/ECMIP/Amateurism_Certification/Promoting_Endorsing_Commercial_Products_Services.pdf.

¹⁷ Parenthetically, college athletes should also be entitled to the value of their labor as a player. See generally Billy Hawkins, *THE NEW PLANTATION: THE INTERNAL COLONIZATION OF BLACK STUDENT-ATHLETES* (2001); Jay Connor, *The NCAA Is Big Business for Everybody but Black Players*, *THE ROOT* (Nov. 15, 2019), <https://www.theroot.com/the-ncaa-is-big-business-for-everybody-but-black-player-1839890040>.

¹⁸ See *supra* Part I.

¹⁹ See *Paying College Athletes – Top 3 Pros and Cons*, [ProCon.org](https://www.procon.org/headlines/paying-college-athletes-top-3-pros-and-cons/) (last updated on July 21, 2021), <https://www.procon.org/headlines/paying-college-athletes-top-3-pros-and-cons/> (visited Aug. 5, 2021) (reporting that college athletes are required to make up the difference between NCAA scholarships and the actual cost of living, amounting to thousands of dollars per year, which leave about 85% of players to live below the poverty line, and that about 25% of Division I athletes reported food poverty in the past year and almost 14% reported being homeless in the past year).

²⁰ *Ibid.*

²¹ 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), <https://www.cnn.com/2019/10/01/us/california-sb206-ncaa-fair-pay-to-play-act/index.html/> (reporting that California 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, putting everything on the line, are getting nothing.”).

²² See *infra* Part I.



In light of the NCAA's exploitation of college students, there is a compelling need to analyze the current state of the protection of everyone's, not just NCAA athletes', rights to attributes of themselves, particularly NIL, against governmental exploitation. This article argues that (1) everyone in the United States has an inherent right to own and control the attributes of themselves, which I refer to as "persona,"²³ (2) everyone in the U.S. possesses a natural property right in attribute of themselves, which I refer to a "right of self,"²⁴ and (3) right of self is beyond the government's eminent domain²⁵ powers and should be absolutely protected against governmental²⁶ exploitation,²⁷ pursuant to foundational libertarian principles.²⁸ Before outlining this article, one needs to understand why this issue is of general importance and how the NCAA and its rules are governmental.

²³ "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, in all mediums such as print, online, fantasy, metaverse, and the virtual universe. "Attributes" of a person includes their labor, their brand, and a quality or feature regarded as a characteristic or inherent part of someone.

²⁴ Crusto Right of Self, add in full cite since this was just listed in the introductory bio. Mitchell F. Crusto, *Right of Self*, 79 WASH. & LEE L. REV. 533 (2022), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4769&context=wlulr>

²⁵ The term "eminent domain," for purpose of this article, is defined as a governmental taking of property. An eminent domain action typically is applied 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. DEPT OF JUST., <https://www.justice.gov/enrd/history-federal-use-eminent-domain> (last updated Jan. 24, 2022).

²⁶ 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 antitrust protection, non-profit status, and the like, such as that of the NCAA.

²⁷ "Exploitation," for purposes of this article, means 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 *The General Data Protection Regulation* (EU) 2016/679 (GDPR), https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-edps-2018-handbook-data-protection_en.pdf (protecting data rights 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 under the California Consumer Privacy Act (CCPA), https://www.oag.ca.gov/system/files/attachments/press_releases/CCPA%20Fact%20Sheet%20%2800000002%29.pdf).

²⁸ "Libertarian principles," 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. 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 generally Robert Nozick, ANARCHY, STATE, AND UTOPIA (1974). See *infra* Part II.



First, with the proliferation of social media, the NIL rights of college athletes raise a quintessential jurisprudential question: Do we possess the right to own and control the use of persona? The legal nature of persona rights requires some discussion. Persona is a growing area of property law, in particular NIL.²⁹ With the development of modern technology, including the expansion of the virtual or metaverse,³⁰ property interests in attributes of oneself, such as NIL, have increased in value and, therefore, is subject to greater exploitation.³¹ Persona rights are of particular interest to millennials, Generation Z, and Generation A who are currently living off the fruits of their persona, due to the proliferation of social media.³² Furthermore, 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.³³ Upon investigation, you discover that someone has taken your image without your permission and has licensed it to a game developer,³⁴ and that the government has

²⁹ Persona is not limited to name, image, and likeness, but includes medical technology such as gene splicing and stem cell development. *See generally* Rebecca Skloot, *THE IMMORTAL LIFE OF HENRIETTA LACKS* (2010) (documenting the history of the “HeLa cell line,” among the most important scientific discoveries of the last century, which was established in 1951 from a biopsy of cervical cancer taken from Henrietta Lacks, a 31-year-old, working-class African-American woman and mother of five, without her knowledge or permission).

³⁰ “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 generally* David Bell, Brian D. Loader, Nicholas Pleace, and Douglas Schuler (Eds.), *CYBERCULTURE, THE KEY CONCEPTS* (2004).

³¹ The nature of and 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 such as an avatar in a fantasy football league which, in 2019, was a part of the American and Canadian fantasy sports/gaming industry was estimated at more than \$7 billion. *See* Tatiana Koffman, *How Blockchain Brings a New Era of Innovation to Fantasy Sports*, *FORBES.COM* (Sept. 19, 2021), <https://www.forbes.com/sites/tatianakoffman/2021/09/19/how-blockchain-brings-a-new-era-of-innovation-to-fantasy-sports/?sh=539df1af16f4> (reporting that “[o]ver the last two decades, Fantasy Sports has become one of the most rapidly growing and lucrative online industries, with a current market size of US\$18.6 billion and an expected growth of \$48.6 billion by 2027.”).

³² Jade Scipioni, *Here’s How Many Social Media Followers You Need to Make \$100,000*, *CNBC* (published April 30, 2021; updated May 20, 2021), <https://www.cnbc.com/2021/04/30/how-much-money-you-can-make-off-social-media-following-calculator.html> (discussing how 19-year-old influencer Josh Richards makes nearly a thousand dollars a minute as a TikTok star); Raktim Sharma, *How Do Influencers Make Money on Instagram?*, *YAHOO! FINANCE* (March 31, 2021), <https://in-finance.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).

³³ 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 his likeness. *See Likeness in Computer Games: Real-Life People*, *NEWTECH.LAW* (April 8, 2021), <https://newtech.law/en/likenesses-in-computer-games-real-life-people/>.

³⁴ *Id.* (the game developers used people’s likeness in their video game without their permission).



sanctioned and benefitted financially from the commercialization of your image. Moreover, persona should be of general public concern because of the need to address wealth inequity³⁵ within the intersection of age, race, gender, and class.³⁶ The abuse of persona is an unconscious cause of systemic racism,³⁷ by which the property rights of economically disadvantaged youth, particularly those of color, are transferred to upper-class, white seniors. I refer to this phenomena as “intergenerational wealth displacement,”³⁸ where young people³⁹ are exploited, robbed of the value of their nonvirtual and virtual selves. One example of *nonvirtual* inequitable transfer of wealth is the high debt load that many students, particularly those of color, pay to attend college, graduate, and professional schools and the negative impact this has on their quality of life.⁴⁰

Second, while not immediately obvious, the NCAA and its members are a partnership of government-owned members and government-sponsored support,

³⁵ 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> (reporting that 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%; that increases another 1,000% for the top 1%, hence the term “wealth gap”).

³⁶ See, e.g., Vanessa Williamson, *Closing the Racial Wealth Gap Requires Heavy, Progressive Taxation of Wealth*, BROOKINGS, (Dec. 9, 2020), <https://www.brookings.edu/research/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/> (reporting that “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.”).

³⁷ “Systemic racism,” aka “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: POLITICS OF LIBERATION 4* (1992 ed.) (noting that institutional racism “originates in the operation of established and respected forces in the society, and thus receives far less public condemnation than [individual racism].”).

³⁸ “Intergenerational wealth displacement,” for purposes of this article, is defined as legal and illegal, conscious and unconscious transfer of wealth from legal minors, particularly those from disadvantaged communities, to adults, particularly wealth, senior, white males, as one dynamic that resulted in an aged-related wealth gap. Households 65 years or older are 47 times wealthier than households where the median age is 35 years or younger. See Annalyn Censky, *Older Americans Are 47 Times Richer than Young*, CNN MONEY (Nov. 28, 2011), https://money.cnn.com/2011/11/07/news/economy/wealth_gap_age/index.htm.

³⁹ See Christopher Ingraham, *The Staggering Millennial Wealth Deficit, in One Chart*, WASH POST, (Dec. 3, 2019), <https://www.washingtonpost.com/business/2019/12/03/precariousness-modern-young-adulthood-one-chart/> (reporting “Millennials ... their 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.”).

⁴⁰ See Censky, *supra* note 38 (“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.”).



which compels us to examine the limitations of eminent domain as it relates to the governmental taking of persona. I posit that the NCAA and its members are governmental for several reasons. A large number of NCAA members are state-owned and operated colleges and universities, such as The Ohio State University.⁴¹ Moreover, the federal and state governments are subsidizing the NCAA by providing it with preferential tax benefits in their treatment of the NCAA as a tax-exempt, nonprofit entity.⁴² Furthermore, all levels of government directly and indirectly support college sports, including permitting them to pay in government-owned stadiums and not taxing them for their sports facilities.⁴³ The fact that the NCAA and its members are a governmental and/or government-sponsored enterprise compels us to question whether the NCAA rules wrongfully expropriate the private property of their student-athletes, contrary to foundational libertarian principles.⁴⁴

Therefore, this article first describes how the United States Supreme Court in *NCAA v. Alston*,⁴⁵ relative to “Fair Pay to Play”,⁴⁶ recently documented the gross inequity in the NCAA compensation system,⁴⁷ which treats the players as amateurs while compensating the coaches, the university leadership, and the NCAA executives as professionals.⁴⁸ Next, it argues that libertarian principles should apply to absolutely prohibit the government’s exercise of its eminent domain⁴⁹ powers, when applied to the private property attributes of a person’s self. Lastly, it recommends a frontend, transformative solution to the unjust treatment of college student-athletes: a boycott of NCAA sports to force it to compensate

⁴¹ See *supra* note 10.

⁴² See Andrew Syrios, *The NCAA Racket: \$10 Billion “Non-Profit” Organization*, VALUEWALK (Sept 16, 2014), <https://www.valuewalk.com/2014/09/ncaa-business/#:~:text=The%20NCAA%20is%20a%20tax-exempt%2C%20non-profit%20association%20that,substantially%20funded%20and%20strictly%20regulated%20by%20the%20government>.

⁴³ See, e.g., Anthony Chiusano, *The 25 Biggest FCS Football Stadiums in the Country*, NCAA.COM (Feb. 4, 2022), <https://www.ncaa.com/news/football/article/2021-07-20/25-biggest-fcs-football-stadiums-country> (listing the 25 biggest FCS football stadiums in the country, most of which are owned by public schools).

⁴⁴ See *infra* Part II.

⁴⁵ 141 S. Ct. 2141 (2021) (holding that while the NCAA could regulate its players compensation, restrictions on that compensation would be subjected to antitrust scrutiny under a “rule of reason” analysis and the ordinary rule of reason’s fact-specific assessment of their effect on competition).

⁴⁶ “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.

⁴⁷ See *NCAA v. Alston*, 141 S. Ct. 2141, at 2149–50, <https://casetext.com/case/natl-collegiate-athletic-assn-v-alston>

⁴⁸ See *infra* Part I.

⁴⁹ See *supra* note 25



the students as professionals, permit them to freely and without restrictions capitalize on their NIL, provide them with adequate health and safety provisions, and redress the past and present pay inequities.⁵⁰

I. NCAA Rules as Governmental⁵¹ Exploitation

The NCAA, through its rules, exemplifies how wealth is transferred from the youth of our country to the wealthy. Furthermore, as many NCAA athletes are young Black men from impoverished communities, the NCAA's rules are an example of how consciously or unconsciously society continued its dark, centuries-old history of denying Black people, in particular young Black men, the ability to acquire wealth.⁵² The players' battle over their rights to fair compensation and control over their NIL illustrates the dire need for the law to prohibit governmental exploitation of persona.

A brief backgrounder on the history of the issue of player compensation is appropriate. At first glance, it appears that the NCAA provides substantial benefits to its athletes.⁵³ However, the players have argued and have litigated that the compensation is inadequate, unfair, and subjects them to unequal treatment under the law. Consequently, in 2014, in a landmark class-action lawsuit *O'Bannon v. NCAA*,⁵⁴ former 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.⁵⁵ The district court ruled for the plaintiffs, and the NCAA agreed to allow student-athletes to receive full scholarships for the cost of attendance in light of the use of the students' names and likenesses.⁵⁶

⁵⁰ See *infra* Part I.

⁵¹ See *supra* Introduction, which explains the proposition that the NCAA and its members are governmental.

⁵² See Mitchell F. Crusto, *Blackness as State Property: Valuing Critical Race Theory*, HARV. C.R.-C.L. L. REV. (forthcoming 2022).

⁵³ See *supra* note 47.

⁵⁴ No. C 09-03329 CW, 2014 WL 3899815 (N.D. Cal. Aug. 8, 2014).

⁵⁵ The Sherman Antitrust Act of 1890 (26 Stat. 209, 15 U.S.C. §§ 1–7) is a United States antitrust law that prescribes the rule of free competition among those engaged in commerce. See *generally Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (Report), U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION (April 2007), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf>. Further, the court ruled that colleges be permitted to place as much as \$5,000 into a trust for each athlete per year of eligibility. Moreover, the court ordered the NCAA to pay the plaintiffs \$42.2 million in fees and costs. *O'Bannon v. NCAA*, 739 F. App'x 890 (9th Cir. 2018), <https://cdn.ca9.uscourts.gov/datastore/memoranda/2018/06/29/16-15803.pdf>.

⁵⁶ *Id.*



Then, in 2019, several former and then current NCAA players filed several lawsuits in federal court, which were consolidated under *Alston v. NCAA*,⁵⁷ challenging the NCAA restrictions on educational compensation for athletes.⁵⁸ 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.⁵⁹ The court required the NCAA to allow for certain types of academic benefits beyond the previously established full scholarships from *O’Bannon*.⁶⁰ The court based the decision on the large compensation discrepancy among the NCAA and the student-athletes.⁶¹ The NCAA appealed to the U.S. Ninth Circuit, which in May of 2020, upheld the district court’s decisions.⁶² However, 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.”⁶³ Yet, the Court agreed with the district court that the NCAA practices relative to some specific restrictions violated antitrust law,⁶⁴ with at least one appellate judge likening the NCAA to a cartel.⁶⁵ In response, the NCAA appealed to the U.S. Supreme Court and, on Dec. 16, 2020, in *NCAA v. Alston*,⁶⁶ the Supreme Court scheduled an oral argument on the issue of compensation for college athletes.⁶⁷ The centerpiece of this case was the antitrust protection under

⁵⁷ 375 F. Supp. 3d 1058 (N.D. Cal. 2019).

⁵⁸ *Id.* at 1062.

⁵⁹ *Id.* at 1110.

⁶⁰ *Id.* at 1088 (such as for computers, science equipment, musical instruments, and other tangible items not included in the cost of attendance calculation but nonetheless related to the pursuit of academic studies and barred the NCAA from preventing athletes from receiving other benefits).

⁶¹ *Id.* at 1089.

⁶² 958 F.3d 1239 (9th Cir. 2020).

⁶³ Wolters Kluwer trade report (Trade Reg. Rep. P 81227 (C.C.H.), 2020 WL 3549287).

⁶⁴ *Id.*

⁶⁵ 958 F.3d 1239, at 1267 (Judge Milan Smith wrote “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.”).

⁶⁶ 141 S.Ct. 2141.

⁶⁷ This case is an appeal of the Ninth Circuit’s ruling that affirmed a district court’s March 2019 decision against the NCAA, holding that its restrictions on non-cash education-related benefits violated antitrust law under the Sherman Act and required the NCAA to allow for certain types of academic benefits beyond the previously established full scholarships. In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019), affirmed in 958 F.3d 1239 (9th Cir. 2020). The NCAA’s petition for certiorari was joined by the American Athletic Conference.



NCAA v. Board of Regents,⁶⁸ as it relates to the NCAA's eligibility standards and compensation.⁶⁹

In 2021, the Supreme Court in *Alston* both in its decision and its dicta made some damning observations relative to the inequities that exist in college athletics, relative to players' compensation. Two major observations are of particular note: (1) college athletics is a huge economic enterprise not protected by federal antitrust laws and (2) the NCAA and its members reap outrageous financial benefits from exploiting the labor and NIL of the players. Hence, the Court makes clear that reform is long overdue.

II. A Huge Enterprise Not Protected by Antitrust Laws

In *Alston*, the plaintiffs claimed the NCAA's rules violate the Sherman Act, which prohibits contracts, combinations, or conspiracies "in restraint of trade or commerce."⁷⁰ In response, the NCAA argued 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.⁷¹ On this, the Court disagreed, stating that college sports is a trade and, therefore, cannot unduly restrain athletes from the marketplace.⁷² Specifically, Justice Neil Gorsuch, writing for a unanimous Court, upheld the NCAA's power over the eligibility of its players.⁷³ However, the Court agreed with the district court's enjoining of certain NCAA rules limiting the

⁶⁸ 468 U.S. 85 (1984) (struck down the NCAA's television plan as violating antitrust law, but in so doing held that the rules regarding eligibility standards for college athletes are subject to a different and less stringent analysis than other types of antitrust cases. Because of this lower standard, the NCAA has long argued that antitrust law permits it to restrict athlete compensation to promote competitive equity and to distinguish college athletics from professional sports).

⁶⁹ 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.

⁷⁰ 141 S. Ct. 2141. Courts have interpreted the Sherman Act's prohibition on restraints of trade to prohibit only restraints that are "undue," which are generally decided by a "rule of reason" and require a fact-finding of market power and structure so as to decide what a restraint's actual effect is on competition.

⁷¹ *Id.* at 2144. The Sherman Antitrust Act of 1890 (26 Stat. 209, 15 U.S.C. §§ 1–7) is antitrust law that prescribes the rule of free competition among those engaged in commerce. See generally *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (Report), U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION (April 2007), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf>.

⁷² *Id.* at 2148.

⁷³ *Id.* (however, he expressly constrained his opinion to the specific issue on appeal).



education-related benefits schools may make available to student-athletes.⁷⁴ Most importantly, the Court, while recognizing the benefits that the NCAA and its members bestow on its athletes, noted that the NCAA has become a “sprawling enterprise” and “a massive business.”⁷⁵ The Court then advised the NCAA that it could *not* use the federal antitrust laws as a justification for its rules regulating players’ compensation.⁷⁶ Specifically, the Court affirmed the district court’s decision finding that the NCAA’s restrictions on “non-cash education-related benefits” violated antitrust law under the Sherman Act.⁷⁷

III. The NCAA Exploits Its Players

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*.⁷⁸ Equally important is the Court’s dicta on the issue of “pay to play.” There, the Court emphasized the inequity in the players’ compensation. 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.⁷⁹ 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.⁸⁰ 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 student-athletes below what a competitive market would yield.⁸¹

Less subdued than Justice Gorsuch’s majority opinion,⁸² Justice Brett Kavanaugh’s concurring opinion pointed out that, at first glance, it appears that the NCAA provides substantial benefits to its players or member athletes.⁸³ However, he noted the compensation gap between what the NCAA leadership, school leadership, and coaches are paid compared to what the players receive,

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 2149.

⁸⁰ *Id.* at 2144.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 2166-2169.



is “astronomical”.⁸⁴ He went beyond highlighting the compensation inequity to identifying the source of that inequity, which is the NCAA’s exploitation of both the labor and NIL of its players.⁸⁵ He likened the NCAA athletes to underpaid employees and issued a stark warning:

[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.⁸⁶

Furthermore, Justice Kavanaugh noted that, contrary to the billions the NCAA generates each year, the “athletes who generate the revenue, many of whom are African American and from lower-income backgrounds, end up with little to nothing”.⁸⁷ Hence, the NCAA’s noble goal of keeping commercialization out of college sports only applies to the athletes themselves and not to the executives, college coaches, and member schools.

What follows is a summary of the current financial inequities in the “pay-to-play” issue. It compares what some college athletes receive for playing against what compensation the NCAA, the member schools, and some of the college coaches receive. In its fiscal year that ended August 31, 2019, the NCAA, a private, nonprofit enterprise, reported gross revenues of more than \$1.1 billion dollars, with a positive increase in net assets (profits) of \$70 million, and net assets of just under a half of a billion dollars.⁸⁸ It proudly reported that about 60% 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.⁸⁹ At the same time, more than \$200 million, or about 25% of its annual revenue, went to “association-wide programs” (nearly \$150

⁸⁴ *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.”).

⁸⁵ *Id.*

⁸⁶ *Id.* at 2169.

⁸⁷ *Id.* at 2168 (citing the Brief for African American Antitrust Lawyers as *Amici Curiae* 13–17). NCAA athletes’ compensation is usually limited to the cost of tuition, room, board, and fees.

⁸⁸ NCAA Consolidated Statement of Activities, August 31, 2020 and 2019, https://ncaaorg.s3.amazonaws.com/ncaa/finance/2019-20NCAAFIN_FinancialStatement.pdf.

⁸⁹ *Ibid.*



million), “management and general” (\$45 million), and (\$67.7 million).⁹⁰ NCAA President Mark Emmert’s base salary for calendar year 2019 was \$2.5 million and his total compensation was \$2.9 million, according to the association’s latest federal tax return.⁹¹

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 each and every year from the NCAA, through its state-owned member colleges.⁹² California 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, putting everything on the line, are getting nothing.”⁹³

Then there are the incredible salaries⁹⁴ some NCAA coaches of state-owned schools⁹⁵ are being paid, which rival the highest paid salaries of professional coaches. The 2020 NCAA men’s football coach salaries for state schools is represented by Nick Saban of the University of Alabama, who earns up to \$10 million

⁹⁰ *Id.*

⁹¹ See Steve Berkowitz, *NCAA President Mark Emmert Credited with \$2.9 Million in Total Pay for 2019 Calendar Year*, USA TODAY (Jul 19, 2021), <https://www.usatoday.com/story/sports/college/2021/07/19/ncaa-mark-emmert-total-pay-2019/8015855002/>.

⁹² 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.

⁹³ See Elliott C. McLaughlin, *California Wants its College Athletes to Get Paid, But the NCAA Is Likely to Put Up Hurdles*, CNN (Updated Oct. 2, 2019), <https://www.cnn.com/2019/10/01/us/california-sb206-ncaa-fair-pay-to-play-act/index.html/>.

⁹⁴ 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 boards, 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., Anthony Riccobono, *Nick Saban Net Worth: Salary, Contract Extension Put Alabama HC Among Highest-Paid Coaches*, INTERNATIONAL BUSINESS TIMES (June 7, 2021), <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 more than \$10 million in a season last year).

⁹⁵ 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. *2021 NCAA Basketball Coach Pay* (updated as of Mar. 9, 2021), USA TODAY, <https://sports.usatoday.com/ncaa/salaries/mens-basketball/coach>.



per year.⁹⁶ Moreover, the 2020 NCAA men's basketball coach salaries for state schools in the top 10 are equally shocking as represented by John Calipari of the University of Kentucky with an \$8 million per year compensation.⁹⁷ With these astronomical salaries, it is hard to argue that college sports have not become highly commercialized and extremely profitable for some.

On the other end of the spectrum, NCAA athletes are severely limited to what they are compensated, usually limited to the cost of tuition, room, board, and fees.⁹⁸ One scholarly analysis found that while some players are valued or worth millions to these universities and the NCAA, 86% of college athletes live below the poverty line, with many qualifying and receiving government Pell grants.⁹⁹ 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, which are potentially worth hundreds of millions of dollars.¹⁰⁰ The Court's observation is true: the NCAA and its member schools are rich and becoming richer off the past and present labor and NIL of its players.

Hence, the *Alston* decision reflects the growing popular view that the NCAA was exploiting its players.¹⁰¹ While the *Alston* decision is herein regarded as a landmark decision that supports right 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 privilege. Subsequent to *Alston*, several states, albeit not universally

⁹⁶ 2021 NCAAF Coaches Salaries (updated as of Nov. 17, 2021), USA TODAY, <https://sports.usatoday.com/ncaa/salaries>.

⁹⁷ 2021 NCAA Basketball Coach Pay (updated as of Mar. 9, 2021), USA TODAY, <https://sports.usatoday.com/ncaa/salaries/mens-basketball/coach>.

⁹⁸ Sarah Lytal, *Ending the Amateurism Façade: Pay College Athletes*, HOUSTON L. R. (Apr. 18, 2019), <https://houstonlawreview.org/article/7835-ending-the-amateurism-facade-pay-college-athletes>.

⁹⁹ See Armstrong Williams, *Time to Pay College Athletes*, NEWSMAX (Apr. 9, 2014), <https://www.newsmax.com/ArmstrongWilliams/NCAA-college-athletes-nlr/2014/04/09/id/564508/>.

¹⁰⁰ The NCAA total control over players' NIL depressed the value of their NIL, where the NCAA is a monopsonist, the sole procurer of players' NIL.

¹⁰¹ Daniel Roberts, *Poll: 60% of Americans Support College Athletes Getting Paid Endorsements*, YAHOO! FINANCE (Oct. 8, 2019), <https://finance.yahoo.com/news/poll-60-of-americans-support-college-athletes-getting-paid-endorsements-122801067.html> (reporting that a 2019 Seton Hall Sports Poll found that 60% of those surveyed agreed that college athletes should be allowed compensation for their name, image, and/or likeness, while 32% disagreed, and 8% were unsure, a change from polling conducted in 2017, when 60% believed college scholarships were enough compensation for college athletes).



enacted in every state,¹⁰² enacted laws that permit NCAA athletes to receive pay for their NIL and maintain their amateur status.¹⁰³ These developments have prompting changes in the NCAA rules to comply with the individual state laws.¹⁰⁴

Unfortunately, the *Alston* Court and the state laws favoring players' ownership of their NIL raise more questions about the existence of a property right (persona) that players have and its protection against wrongful governmental takings than they answered. At first glance, these developments appear to be a win for the players. However, I believe they are a pyrrhic victory. Both the Court and the state legislation have failed to address the issue of the limits on the government's exploitation of people's NIL. To the contrary, Justice Gorsuch apparently accepted the NCAA's power over the eligibility of its players.¹⁰⁵ From a critical perspective, this means that any benefits that the players derived from the NCAA would be in the form of a gift or a privilege, rather in recognition of a right the players are entitled to enjoy. Thus, *Alston* does little to establish the limits on the government's eminent domain powers over persona rights. This requires us to consider a theoretical solution to people's persona rights and the limits on eminent domain.

IV. Liberty and Limits of Eminent Domain

The Constitution expressly safeguards the rights of the individual against wrongful governmental infringements,¹⁰⁶ with particular attention to criminal

¹⁰² See *Tracker: Name, Image and Likeness Legislation by State*, BUSINESS COLLEGE SPORTS (last updated Aug. 3, 2021), <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> (last visited Aug. 5, 2021) (reporting that 15 states' pro-NIL laws are now in effect, including Alabama, Arizona, Colorado, Florida, Georgia, Illinois, Kentucky, Mississippi, Nebraska, New Mexico, Oklahoma, Ohio, Oregon, Pennsylvania, and Texas, with many others to be effective later in 2021. Just to be clear, the new state laws do not use the term persona, nor do they provide a rationale for the new laws).

¹⁰³ *Id.*

¹⁰⁴ See Greta Anderson, *Court Panel Rules Against NCAA Restrictions on Athlete Pay*, INSIDE HIGHER EDUCATION (May 19, 2020) (reporting on the NCAA's process of reviewing its policies related to how to compensate players for names and likenesses).

¹⁰⁵ See 141 S. Ct. 2141. (Further, he expressly constrained his opinion to the specific issue on appeal, and expressly stated that it is not an undue restraint for the NCAA, or conferences within it, to define what those educational benefits are, or for creating rules on their applicability, leaving the restrictions on amateur status partially disturbed. Thus, the Court's decision did not free NCAA member college athletes from their contractual relationship with their colleges and universities.)

¹⁰⁶ See U.S. CONST. amend. V; *id.* amend. XIV, § 1 ("No state shall ... deprive any person of life ... without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").



law and procedures.¹⁰⁷ However, when it comes to protecting people's private property rights against governmental infringements, the 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.¹⁰⁸ 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 Amendment.¹⁰⁹ This "private property conundrum" requires us to explore the limits of eminent domain relative to the right of private property, particularly as it relates to natural property rights in one's self (*persona*), particularly *NIL*.

I believe that the answer to the conundrum is found by viewing the unresolved question of the limits of eminent domain relative to *persona*, through the lens of a libertarian,¹¹⁰ "rights paradigm."¹¹¹ This approach is a counterbalance to law as a vehicle of social oppression¹¹² or "privilege paradigm".¹¹³ My argument

¹⁰⁷ See the Bill of Rights, U.S. CONST. amend. I-amend. X (1791), BILL OF RIGHTS INST., <https://www.billofrightsinstitute.org/primary-sources/bill-of-rights>.

¹⁰⁸ See generally Bernard Bailyn, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

¹⁰⁹ 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.)), which applies to the States through the passage 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 (2010), <https://scholarship.law.stjohns.edu/lawreview/vol84/iss1/3/> (critically viewing takings through a social justice lens).

¹¹⁰ See *supra* note 28. "Every man has Property in his own Person. This no Body has any Right but to himself." John Locke, *TWO TREATISES OF GOVERNMENT* (1690) Second Treatise of Government, Ch.5, para. 27 at p. 18, reprinted in C.B. Macpherson (Ed.), *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS* (1978). In 1689, Locke argued that political society existed for the sake of protecting "property," which he defined as a person's "life, liberty, and estate."

¹¹¹ "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 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 governmental intrusion. See generally Bradley W. Joondeph, *THE DEREGULATORY VALENCE OF JUSTICE O'CONNOR'S FEDERALISM*, 44 HOUS. L. REV. 507 (2008).

¹¹² Law has been a tool of oppression, combined with force, claims of God-given rights, title, tradition, culture, religion, and government. See generally Lynn Weber, *UNDERSTANDING RACE, CLASS, GENDER, AND SEXUALITY: A CONCEPTUAL FRAMEWORK* (2010).

¹¹³ "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.



goes like this: Libertarian, rights-paradigm is the cornerstone of the foundation of our fundamental, constitutional, and societal values.¹¹⁴ Consequently, the Constitution is generally silent on governmental protection against personal property rights because the protection of those rights were formally and previously declared and adopted by all 13 colonies on July 4, 1776, that “life, liberty, and the pursuit of happiness” were “self-evident, inalienable, and endowed by the Creator”.¹¹⁵ Further, specific provisions in the U.S. Constitution evidence the founders’ imperative to restrict the reach of government into the private lives of people, via the use of criminal law and the due process of law.¹¹⁶

While the Bill of Rights focuses primarily on the individual rights against the government’s use of the criminal laws to take a person’s liberties, its underlying principles also apply to protect people from the government’s abuse of a person’s civil rights or liberties. For example, the First Amendment¹¹⁷ prohibits the civil liberties from an established religion, and protect 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.¹¹⁸ The Second Amendment¹¹⁹ provides citizens the right to personally protect their private property rights. The Fourth Amendment¹²⁰ guards people’s privacy against

¹¹⁴ See Crusto, *Right of Self*, *supra* note 24.

¹¹⁵ Declaration of Independence para. 2 (Jul. 4, 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 ...”), http://www.archives.gov/exhibits/charters/declaration_transcript.html. See generally THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE FOR RATIFICATION (Bernard Bailyn, Ed., 1993).

¹¹⁶ See Paul Paulker, *The Constitution, Deprivation of Life, and Personhood* (May 12, 2012), http://www.americanthinker.com/articles/2012/05/the_constitution_deprivation_of_life_and_personhood.

¹¹⁷ “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.”

¹¹⁸ *Ibid.*

¹¹⁹ 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.”

¹²⁰ 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.”



wrongful governmental infringement. The Fifth Amendment¹²¹ has two strong protections of private property rights: the Due Process Clause and the Takings Clause, both were and are strong, definitive statements of libertarian principles. The Ninth Amendment¹²² and the Tenth Amendment¹²³ support the proposition that the founders believed that all rights, such as right of self, not transferred to the government continue to reside in the people, that there are additional fundamental rights that exist outside the Constitution, and that the rights enumerated in the Constitution are not an explicit and exhaustive list of individual rights. That principle was reiterated following the Civil War with passage of the 13th Amendment,¹²⁴ which abolished government-sponsored enslavement of people, and the 14th Amendment,¹²⁵ which provides due process and equal protection to our rights. Hence, the Constitution from its inception and throughout its history has embraced the right to private property against governmental infringement, erring in favor of private property and against governmental exploitation.

Consistent with that conclusion, when the founders adopted the Takings Clause of the Fifth Amendment,¹²⁶ I believe that they did not mean to embrace

¹²¹ 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, *nor 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).

¹²² 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 not be read to preclude the existence of other rights reserved to the people of the United States. 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. *See Unenumerated Rights Ninth Amendment*, LEGAL INFORMATIONAL INSTITUTE, CORNELL LAW SCHOOL, <https://www.law.cornell.edu/constitution-conan/amendment-9>.

¹²³ 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.”

¹²⁴ U.S. CONST. amend. XIII (“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.”).

¹²⁵ 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.”).

¹²⁶ *See supra* note 121. *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 (2010), <https://scholarship.law.stjohns.edu/lawreview/vol84/iss1/3/> (critically viewing takings through a social justice lens).



the government's eminent domain powers as a principle that broadly superseded fundamental private property rights. This contention is evidenced by the specific restrictions that the Takings Clause expressly places on the government's exercise of eminent domain, namely (1) private property taken, (2) for public use, and (3) not without just compensation.¹²⁷ Constitutional restrictions on eminent domain are also arguably based on jurisprudential, fundamental, constitutional principles found in several amendments, as well as in groundbreaking Supreme Court decisions.¹²⁸

Furthermore, I believe that persona rights, in particular NIL, are peculiar and demand particular and absolute protection against governmental exploitation. While the founders placed strict limits on eminent domain, are persona rights outside of those limits? Historically, the Takings Clause was meant to apply to the government's taking of real property.¹²⁹ Subsequently, most of the takings cases involve the expropriation of the private ownership of real property for a public purpose.¹³⁰ Over the years, the Supreme Court has expanded taking jurisprudence to include some governmental regulations that negatively impacted private property rights as "takings."¹³¹ Some might argue that as persona is neither *real* property nor a regulatory taking of interest relating to real property, it should not be the subject of a taking.

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 that some forms of intellectual property—intangibles including franchises and contracts—can be the subject of a taking. For example, the City of Oakland notoriously tried to claim the Raiders of the National Football League team through eminent domain, a move blocked by the California Supreme Court in 1982.¹³² Additionally, in *Lynch v. United States*,¹³³ 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. Therefore, persona is not outside of the government's eminent domain powers simply because it is a form of intellectual property.

¹²⁷ See *supra* note 121.

¹²⁸ Parenthetically, this article focuses on the civil rights protections of these amendments, recognizing that they also protect liberty, in the form of rights against criminal infringements.

¹²⁹ See *supra* note 25

¹³⁰ *Id.*

¹³¹ See "Taking," CORNELL LAW SCHOOL, LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/takings>.

¹³² See *City of Oakland v. Oakland Raiders*, 32 Cal.3d 60 (1982).

¹³³ 292 U.S. 571 (1934).



If governmental restrictions on one's persona (think NCAA rules) and intellectual property are subject to the Takings Clause, can persona be an exception to eminent domain? Consistent with the foundational principles of our democracy, the strongest argument prohibiting the government from taking persona (NIL rights) rests on the fact that persona rights are a peculiar type of property. Unlike the property envisioned by the founders relative to the Takings Clause, persona rights are not real property but are intrinsically and by definition *attributes of a human being*. As previously discussed, the American Revolution, the Constitution, and the development of constitutional law evidence the primacy of the protection of human rights from governmental intrusion.¹³⁴ The founders and our jurisprudence also believed in the importance of natural law and the nature of natural property.

As persona rights reflect the attributes of a person, they are uniquely “natural property,”¹³⁵ which is not “property”¹³⁶ in a traditional sense.¹³⁷ Throughout the United States' history, natural law has continued to serve as a guiding, foundational principle that continues as a major tenet of its belief system.¹³⁸

¹³⁴ See generally David J. Hoeveler, *CREATING THE AMERICAN MIND: INTELLECT AND POLITICS IN THE COLONIAL COLLEGES* (2007).

¹³⁵ 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.”).

¹³⁶ “Property,” for purposes of this article, is defined as self-ownership that follows libertarian principles, including a 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 defined using the ambiguous and sometimes contradictory theories of private property. See “libertarianism,” *supra* note 28.

¹³⁷ 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).

¹³⁸ See *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (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”).



This distinction, between a “natural property” right and a “positive”¹³⁹ or “manmade”¹⁴⁰ property right,¹⁴¹ is critical to appreciating the essential nature of a person’s rights to the attributes of themselves. In summary, adopting John Locke’s “natural law” approach¹⁴² over Jeremy Bentham’s utilitarian approach,¹⁴³ *persona* is *not* the kind of property that was envisioned by the founders when they adopted the doctrine of eminent domain.¹⁴⁴

Moreover, there is the matter of the public use or public purpose requirement of the Takings Clause. While not impossible to imagine, it is extremely unlikely that the government would have a public need to take a person’s name, image, and likeness, with or without just compensation. In addition to NIL, the case prohibiting the government’s taking of other attributes of a person, such as their labor, their brand, or someone personal identifier, becomes even more compelling.

Therefore, because *persona* is a natural attribute of a person, constitutional principles demand its total protection from governmental takings. More broadly, for purposes of this article, right of self includes a natural property right¹⁴⁵ in one’s “self”—encompassing a person’s attributes or identity, such as labor, name, image, likeness, and other unequivocal identifiers.¹⁴⁶

¹³⁹ In general, the term “positive law” connotes statutory law that has been enacted by a duly authorized legislature, BLACK LAW DICTIONARY 1200 (8th ed. 2004).

¹⁴⁰ “Manmade law” is law that is made by humans, usually considered in opposition to concepts like natural law or divine law.” See generally Akpotor Eboh, *Natural Law and Man-Made Laws: Criticizing the Latter by Appealing to the Former*, 4 INT’L J. OF INNOVATIVE HUMAN ECONOGY & NATURE STUDIES 13-19 (2019).

¹⁴¹ Jeremy Bentham, THEORY OF LEGISLATION (1802) 111 (Richard Hildreth, Ed., 1840) (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.”).

¹⁴² “[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).

¹⁴³ Unlike Bentham’s utilitarian justification for property, *persona* rights are protected by natural law rights.

¹⁴⁴ *Id.*

¹⁴⁵ “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 generally *The Natural Law Tradition in Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (first published Sept. 23, 2002; substantive revision May 26, 2019), <https://plato.stanford.edu/entries/natural-law-ethics/>.

¹⁴⁶ See *supra* note 23.



V. Boycotting the Games

The history of libertarian principle shows that private property rights are the cornerstone of our democracy. Unfortunately, the founders created a challenge to private property rights when, in the Fifth Amendment, it recognized the government's power to expropriate private property for a public purpose with just compensation. Today, we have new forms of property including virtual property in one's name, image, and likeness. These forms were not envisioned by the founders and should rarely, if ever, meet the requirements of a taking for a public purpose. Clearly, when it comes to the NCAA's regulation of its players' NIL rights, there is no argument to support that there is public purpose for doing so. Hence, NIL should be off limits to the powers of eminent domain.

The Supreme Court in the *Alston* case recognized that there are limits on the NCAA's right to control the compensation of its players. Meanwhile, following the lead of the State of California, many states have enacted legislation that permits college athletes to capitalize on their NIL and not lose their amateurism status with the NCAA. In the wake of these developments, NCAA players are beginning to receive compensation for the use of their NIL. However, the wheels of change are moving too slow, in my opinion, to justly compensate players for the past, present, and future exploitation of the attributes of their selves, including their labor and their NIL.

It is time for the consumer to take action, if we believe in the principles of our founders and the guiding principles of our democracy—that is, to protect the private property rights of our people. Ultimately, if the courts, the executives, and the legislature will not stand up to the NCAA and its members, it is incumbent on the consumers of NCAA athletics to boycott the games until the players are paid as the professionals that they are, for the revenue that they deliver to the NCAA and its member institutions.

Conclusion

As technology creates new forms of property, such as in a person's name, image, and likeness, the law needs to address the conflict between private property rights and the government's power of eminent domain. Clearly, the founders intended that the Constitution embrace libertarian principles to recognize and protect private property. NIL is a unique form of property, that is, natural property in attributes of a person or persona. Hence, it is logical and fundamental that NIL should be off limits to the government's power of eminent domain, which requires that the law should prohibit governmental exploitation of persona rights. That includes state governments and the NCAA's regulations of college athletes' right to capitalize their NIL.



Governmental exploitation of college students, under the guise of amateurism, compels an examination of the legality and the morality of the practice. It raises disturbing questions about racial animus, systemic racism, and institutional racism. This injustice raises the broader question: Under the United States Constitution, should NCAA student-athletes and indeed everyone who lives in the United States be protected from governmental exploitation of the virtual aspects of self?

Sport spectators and the general public have a moral duty to stop the madness. If we care about the governmental exploitation of students' property rights, we should boycott the games. In college stadiums, on public television networks, and via streaming services, let's vote *for* the rights of students and *against* governmental expropriation. Let's not show up until the NCAA pays up—Show the players the money!

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