

# Blackness as State Property: Valuing Critical Race Theory

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## ABSTRACT

*Employing the lens of Critical Race Theory, this Article posits that the Supreme Court’s unanimous decision in National College Athletics Association (“NCAA”) v. Alston is unconsciously racist and supports systemic racism. While Justice Kavanaugh’s concurring opinion expressly elaborates on the blatant inequities in compensation between the NCAA, college coaches, and college executive compared to that of the athletes, it fails to identify and protect the labor and property rights of student athletes, in particular, of young Black men who are disproportionately harmed. Consequently, white male supremacy over young Black men remains deeply embedded in our society, our economy, and in our legal system and continues to deny young Black men, even those who are gifted athletes, the power to acquire wealth.*

*This Article explores how the American legal system has denied Black people, specifically young Black men, the right to acquire property and thereby accumulate wealth. First, it describes how the white supremacists’ American Dream of domination over Black people supported a false narrative of white male superiority through robbing Black people of their labor and denying them property rights. Furthermore, it explores the modern enactment of white supremacy by studying how the NCAA and its member schools exploit the labor and property rights of young Black male athletes. Additionally, this Article illustrates, through the lens of Critical Race Theory, how the Court in Alston unconsciously adopts a centuries’ old legal principle of treating Blackness as state property.*

*This Article concludes that the legal system, especially the Supreme Court, should use Critical Race Theory when deliberating its decisions and should readdress systemic racism by prohibiting governmental sponsored exploitation of young Black men.*

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## INTRODUCTION\*\*

Chase Young was a star football player for the Ohio State University Buckeyes,<sup>1</sup> a finalist for the Heisman Trophy,<sup>2</sup> and a favorite for the National Football League’s (“NFL”) number one draft pick for 2020.<sup>3</sup> Yet in November 2019, Mr. Young was suspended from playing and was investigated for violating National Collegiate Athletic Association’s (“NCAA”) eligibility rules.<sup>4</sup> The NCAA claimed that Mr. Young had violated his status as an

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\*\* This Article is one in 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). 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*].

<sup>1</sup> 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](https://act.colorofchange.org/sign/congress_fairpay?source=coc_main_website), archived at <https://perma.cc/98RX-R2XW> (reporting on several stories of the NCAA’s mistreatment of Black athletes, including that of Chase Young).

<sup>2</sup> 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>, archived at <https://perma.cc/3YD2-UXHP>.

<sup>3</sup> Tyler Kepner, *Who is Chase Young? A Defensive Star and Student of the Game*, N.Y. TIMES (Apr. 21, 2020), <https://www.nytimes.com/article/chase-young.html>, archived at <https://perma.cc/WX5N-LHC8>.

<sup>4</sup> 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>, archived at <https://perma.cc/L7W4-8SMJ> (reporting on a Tweet from Ohio State’s Associate Athletics Director); BRITANNICA, THE EDITORS OF ENCYCLOPAEDIA, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <https://www.britannica.com/topic/National-Collegiate-Athletic-Association>, archived at <https://perma.cc/W2WC-BVQS> (noting that the NCAA is a nonprofit organization formed in 1906 that regulates college athletics, including game rules, athlete eligibility, and college tournaments); *What is the NCAA?*, NCAA, <https://www.ncaa.org/sports/2021/2/10/about-resources-media-center-ncaa-101-what-ncaa.aspx>, archived at <https://perma.cc/9ZLZ-D8B8> (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

amateur by borrowing money to purchase an airline ticket for his girlfriend to attend the prestigious Rose Bowl.<sup>5</sup> As a likely result of the investigation, Mr. Young failed to win the highly coveted Heisman Trophy.<sup>6</sup> While Mr. Young was being punished for an eligibility rule infraction, his school was being financially enriched by his performance on the gridiron,<sup>7</sup> bringing in a record high of over \$228 million in revenue.<sup>8</sup> Young Black male athletes are living below the poverty level, experience food insecurity, and some homelessness,<sup>9</sup> as their white male coaches are receiving millions of dollars in annual compensation.<sup>10</sup>

In 2021, in *NCAA v. Alston*,<sup>11</sup> the United States Supreme Court, in a unanimous decision, documented the gross inequity in the NCAA's compensation system, relative to "Fair Pay to Play."<sup>12</sup> In concurrence, Justice Kavanaugh highlighted the experiences of Black players, noting that the NCAA treats the players as unpaid amateurs while compensating the coaches, the University leadership, and the NCAA executives as highly-paid professionals.<sup>13</sup> Consequently, the *Alston* decision has been celebrated as a victory for

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NCAA's 90 championships in 24 sports across 3 divisions." The "NCAA 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. Moreover, under its amateurism rule, the NCAA, prohibits college athletes from contracting for the use of their name, image, and likeness. See *NCAA Guide for the College-Bound Student-Athlete 2021-2022*, NCAA, at 29, [http://fs.ncaa.org/Docs/eligibility\\_center/Student\\_Resources/CBSA.pdf](http://fs.ncaa.org/Docs/eligibility_center/Student_Resources/CBSA.pdf), archived at <https://perma.cc/UPV4-8PRR>.

<sup>5</sup> 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/arx41omz2l47191iwyw5ju398>, archived at <https://perma.cc/HS9C-7BLU>.

<sup>6</sup> See Hooley, *supra* note 2.

<sup>7</sup> See Press Release, Ohio State University, Ohio State Athletics Notches Record Revenue, Spends Less than Last Year (Feb. 4, 2021), <https://news.osu.edu/ohio-state-athletics-notches-record-revenue-spends-less-than-last-year/#:~:text=the%20department%20brought%20in%20%24233%2C871%2C740,each%20year%20with%20the%20NCAA>, archived at <https://perma.cc/7TVJ-NPT4>.

<sup>8</sup> See Nathan Baird, *Record Year for Ohio State Athletics Revenue Preceded Coronavirus Budget Crunch*, CLEVELAND.COM (Oct. 1, 2020), <https://www.cleveland.com/osu/2020/10/record-year-for-ohio-state-athletics-revenue-preceded-coronavirus-budget-crunch.html>, archived at <https://perma.cc/JJZ2-UKNW>.

<sup>9</sup> See *Paying College Athletes—Top 3 Pros and Cons*, PROCON.ORG, <https://www.procon.org/headlines/paying-college-athletes-top-3-pros-and-cons/>, archived at <https://perma.cc/VNN4-546P> (reporting that 85% of players live below the poverty line, that about 25% of Division I athletes reported food poverty in the past year, and almost 14% reported being homeless in the past year) [hereinafter PROCON].

<sup>10</sup> See *2021 NCAAF Coaches Salaries—Updated as of Nov. 17, 2021*, USA TODAY, <https://sports.usatoday.com/ncaa/salaries>, archived at <https://perma.cc/FYJ3-JXRY>.

<sup>11</sup> 141 S. Ct. 2141, 2144–46 (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).

<sup>12</sup> "Fair Pay to Play," for purposes of this Article, refers to college athletes' legal claims to compensation for their play and to capitalize on their name, image, and likeness while maintaining their amateur status with the NCAA. See *infra* Part III.

<sup>13</sup> See *Alston*, 141 S. Ct. at 2167–69 (Kavanaugh, J., concurring) (noting "there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary

the rights of college athletes because it held that the NCAA cannot stand by antitrust law to protect in its unfair compensation of the players.<sup>14</sup> Subsequent to *Alston*, several states enacted laws that permit NCAA athletes to capitalize on their name, image and likeness (“NIL”), without losing their NCAA amateur status.<sup>15</sup> This Article takes a contrary view of *Alston*, one that sees the players’ victory as Pyrrhic and the Court’s decision as racist.

This Article posits that, through the lens of Critical Race Theory (“CRT”), the Supreme Court’s decision in *Alston* is unconsciously racist and supports systemic racism. It argues that the *Alston* Court failed to identify and protect the property rights of student athletes, in particular, of young Black men who are disproportionately harmed. Furthermore, it concludes that the Court supports the continuation of a master-enforced relationship between the NCAA and the players. Consequently, following *Alston*, white male supremacy over young Black men remains deeply embedded in our society, our economy, and in our legal system, denying young Black men, even those most gifted, property rights and the power to acquire wealth. As the NCAA and its members are arguably governmental or government-sponsored, this aspect of systemic racism by which governmental enterprises deny young Black men of their property rights is called “Blackness as state property” throughout this Article.

A few questions are fundamental to this Article: (1) why should we care about the property rights of several thousand Black college male athletes?; (2) what role does the government play in the NCAA-player controversy?; and (3) how does the current controversy relate to the legal history of the property rights of Black people? First, there are several reasons why society should care about the property rights of Black male athletes in the NCAA. Broadly, how we treat the most disadvantaged in our society negatively impacts the rights of everyone. That is, if we allow the powerful to exploit the most vulnerable, we allow everyone to be abused. As it relates to Black players, if the law allows them to be exploited, it provides a precedent for everyone to be equally mistreated. More specific to race, we aspire, and are constitutionally bound, to be a society where a person is legally treated fairly and equally, regardless of race. To treat Black players unfairly would be constitutionally suspect. From a jurisprudential perspective, we should be concerned when the government is able to exploit a person’s labor and their NIL, without due process or just compensation. Furthermore, from an economic perspective, most of the Black players come from economically-dis-

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rule of reason scrutiny” and stating: “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.”)

<sup>14</sup> *Id.*

<sup>15</sup> See *Tracker: Name, Image and Likeness Legislation by State*, BUSINESS COLLEGE SPORTS, <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/>, archived at <https://perma.cc/ESH8-SKQT> (reporting that a minority number of states have enacted pro-NIL laws) [hereinafter *Tracker*].

advantaged communities with high unemployment, for whom sports is one of the few ways to take themselves and their families out of poverty.<sup>16</sup>

That leads to the second question of how the NCAA-player controversy equates the relationship between the government and its citizens. While not immediately obvious, the NCAA and its members are a partnership of government-owned members and government-sponsored support. This fact compels us to examine the limitations of eminent domain as it relates to the governmental exploitation of individual private property rights, including their labor and their NIL. 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.<sup>17</sup> 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.<sup>18</sup> Furthermore, all levels of government directly and indirectly support college sports, including by permitting them to pay in government-owned stadiums and not taxing them for their sports facilities.<sup>19</sup> By limiting student compensation and restricting their rights to their labor and their NIL, the NCAA and its member schools, which include “public” schools that are owned by States, receive billions of dollars from their sports programs, mainly in the form of advertising and television media.<sup>20</sup> The NCAA, its member schools, and its member State governments, greatly benefit financially from their taking of the private property of its student athletes.<sup>21</sup> Hence, the fact that the NCAA and its members are governmental and government-sponsored enterprises compels us to question

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<sup>16</sup> See generally BILLY HAWKINS, *THE NEW PLANTATION: THE INTERNAL COLONIZATION OF BLACK STUDENT-ATHLETES* (2001) (examining the controversial relationship between predominantly White NCAA Division I Institutions (PWI s) and black athletes, utilizing an internal colonial model); 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>, archived at <https://perma.cc/68SY-Y4C2> (arguing that Black players should benefit from the wealth derived from collegiate sports).

<sup>17</sup> See PROCON, *supra* note 9.

<sup>18</sup> See Andrew Syrios, *The NCAA Racket: \$10 Billion “Non-Profit” Organization*, *VALUEWALK* (Sept. 16, 2014, 7:38 pm), <https://www.valuewalk.com/2014/09/ncaa-business..>, archived at <https://perma.cc/XED4-MKGE>.

<sup>19</sup> 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>, archived at <https://perma.cc/5HPF-GGHF> (listing the twenty-five biggest Football Championship Subdivision (“FCS”) football stadiums in the country, most of which are owned by public schools).

<sup>20</sup> 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/>, archived at <https://perma.cc/FP8U-D562> (quoting California Governor Gavin Newsom’s statement that 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.”).

<sup>21</sup> See *infra* Part III.

whether the NCAA rules wrongfully expropriate the private property of their student athletes, contrary to foundational libertarian principles.<sup>22</sup>

The contemporary issue of player compensation also relates to the legal history of the property rights of enslaved Black people, particularly the biracial sons of wealthy white men. Here, there is important parallelism by which we can assess whether we as a nation have progressed from our enslavement heritage. How does a study of the property rights of biracial sons of wealthy white men relate to the rights of Black NCAA college athletes? Both are and were the most privileged of young Black males in their timeframe. If any young Black man might enjoy the benefits of white privilege, they would. If, on the other hand, they are denied the right of property, that would evidence some deeply rooted legal and cultural racial animus against their property rights. Furthermore, there is another important phenomenon worth investigating. That is the government's role in regulating the transfer of wealth from a white person to a young Black man, albeit from a white father to his biracial son or from a prestigious university to a star athlete. It is important to note that enslavement was government-sanctioned and only existed because of the empowerment granted by and guaranteed by the government at the federal, state, and local levels.<sup>23</sup> This raises the pressing question: did the law prohibit or restrict a white father's right to transfer, by gift, will, or inheritance, his wealth to his biracial son? And if so, why and does that same rationale continue today to restrict or prohibit white society from transferring wealth to young Black men?

Reflecting specifically on the property rights of young Black men in American society, this Article provides a legal history pertaining to the intersection of sex, race, age, socio-economic status, and wealth in the American enslavement society.<sup>24</sup> More specifically, this Article explores how these factors affected the acquisition, development, and retention of wealth owned by Black people.<sup>25</sup> It analyzes legal principles that historically forbade the

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<sup>22</sup> "Libertarian principles," for purposes of this Article, means to strongly value individual freedom and civil liberties and endorse a free-market economy based on private property and freedom of contract. See generally ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (the most sophisticated philosophical treatment of libertarian theory and themes, which espouses a form of minimal-state libertarianism).

<sup>23</sup> See, e.g., *Scott v. Sandford*, 60 U.S. 393, 395 (1857) ("The Constitution of the United States recognizes slaves as property, and pledges the Federal Government to protect it").

<sup>24</sup> This Article uses "wealth" as synonymous with the full rights of U.S. citizenship and capital accumulation, especially all rights of private property ownership, and wealth creation and transference, including that of intellectual or intangible property and government "entitlements." See OXFORD DICTIONARY, VOL. XX 42. (2d ed. 1989). The author recognizes that "wealth," in this context, is synonymous with "greed," the root of all evil, including the root of the American enslavement system. This Article adopts Professor Adrienne Davis's terms "enslavement" and "enslaved," rather than "slavery" and "slave" to describe the political-economic-sexual economy in which Black people were legally and often physically held in bondage. See Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 223 n. 4 (1999).

<sup>25</sup> See generally Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473 (2003) (presenting society's attempts to divide the world strictly into Black

ownership of property by Black people, examining, in particular, how the law blocked wealth transfer to young Black males and consolidated wealth in the hands of privileged white men.<sup>26</sup> An analysis of the legal status of young Black men in the antebellum South provides great insight into the very nature of the regulation of wealth transference and property rights, including a better understanding of contemporary constitutional issues involving race and gender.<sup>27</sup> In particular, it analyzes an apparent “exception” to the exclusionary practice of denying property rights young Black men—that is, the case of the “biracial bastard.”<sup>28</sup> These were the most privileged of young Black men who were fathered by wealthy white men, a few of whom obtained exceptional wealth, including plantations and enslaved people.<sup>29</sup>

This Article’s focus on the law’s reaction to wealthy white men who attempted to transfer their wealth to their biracial sons represents an unusual and exciting interdisciplinary approach to the contemporary debate on society’s obligations to Black people. This Article also shows how Critical Race Theory is an invaluable tool to properly redress past and present racial and

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and white, and to erase racially-mixed people from legal classification); *See generally* RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003) (examining how prejudices and biases still fuel fears and inform our sexual, marital, and family choices, including the presence of sex in racial politics, the historic role of legal institutions in policing racial boundaries, and the real and imagined pleasures that have attended interracial intimacy).

<sup>26</sup> This Article defines “privileged white men” as those whom white history deems as “masters” or “planters.” In the antebellum South, “privilege” was viewed by the number of Black people that a white person enslaved. *See* KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 30–31 (1956) (“The planter aristocracy was limited to some ten thousand families who lived off the labor of gangs of more than fifty slaves. The extremely wealthy families who owned more than a hundred slaves numbered less than three thousand, a tiny fraction of the southern population.”); *see generally* WILLIAM KAUFFMAN SCARBOROUGH, *MASTERS OF THE BIG HOUSE: ELITE SLAVEHOLDERS OF THE MID-NINETEENTH-CENTURY SOUTH* (2003) (presenting a comprehensive analysis of the demographics, backgrounds, and thinking of this elite super-class).

<sup>27</sup> This Article defines “young Black men” as Black men who are legally “minors”—that is, have not reached the age of legal “majority,” in a given State jurisdiction, generally reaching the age of twenty-one years old. This Article will focus on the rare instances in which a white male enslaver embraced his biracial son as a true heir and blood relative and sought to transfer wealth to him. The antebellum period is from 1830–1860. *See* STAMPP, *supra* note 26, at 28.

<sup>28</sup> This Article defines “biracial” as the offspring of a white man and a Black woman. It defines the term “bastard” in its technical legal term to mean a child born out of wedlock or “illegitimate,” for Black people and white people were not allowed to intermarry. “Mulatto” was the antebellum term for biracial people. If the offspring were of an enslaved Black woman, that child was legally deemed to be an enslaved person. Because a biracial person was legally considered Black, I will use the terms biracial and Black interchangeably.

<sup>29</sup> There were a small minority of “free Black men” who exercised nearly the same rights and privileges of property ownership as their white counterparts, resulting in their ownerships of large plantations and large number of enslaved Blacks. *See generally* David O. Whitten, Andrew Durnford: A Black Sugar Planter in the Antebellum South (1981) (documenting the life of a wealthy and privileged “free man of color,” the child of an English father and a free woman of color, who owned a sugar plantation and eighty enslaved people); *see infra* Part III.

other injustices.<sup>30</sup> This Article's approach serves to open the door to an increased use of Critical Race Theory to solve contemporary legal problems.

Hence, this Article posits that the *Alston* Court has its roots in Southern antebellum laws regulating and negotiating the gender-racial economies of property acquisition and transfers from white men to young Black men. This includes testamentary transfers and intestate succession, which served to reinforce a greater social and economic order of white supremacy. This Article argues that the *Alston* decision is unconsciously racist because it supports white supremacy and the concept of "Blackness as state property" in several ways. First, *Alston* is a case about wealth transference.<sup>31</sup> Second, *Alston* is about "property,"<sup>32</sup> in that young Black men who play sports for elite, predominately white universities are judicially reduced to "white property," or "diversity commodity."<sup>33</sup> As clearly stated in Justice Gorsuch's opinion for the Court, the NCAA still has dominion over the players, maintaining a master-enforced paradigm.<sup>34</sup> Third, the *Alston* case is about white male supremacy and white men's continued domination over the property rights and labor of a highly talented group of young Black men college.<sup>35</sup> Protect-

<sup>30</sup> See generally DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIAL AND PROBLEMS (2003) (utilizing Critical Race Theory in developing a black letter law case book).

<sup>31</sup> This Article defines "wealth transference" as the transfer of wealth or assets to by gift, during a person's lifetime, or by inheritance or will, to beneficiaries upon the death of the owner. See generally Dionissi Aliprantis, Daniel R. Carroll, & Eric R. Young, *The Dynamics of the Racial Wealth Gap*, Federal Reserve Bank of Cleveland, Working Paper no. 19-18. <https://doi.org/10.26509/frbc-wp-201918>, archived at <https://perma.cc/4YAB-XMMM> (reporting the important role that intergenerational transfers, including inheritances, plays in explaining the persistent, some scholars say, growing, racial wealth gap in this country).

<sup>32</sup> This Article defines "property" as legally enforceable interests over wealth including tangibles, such as land, and intangibles such as NIL and labor; see generally JUDGE A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 15 (1978) (explaining "how the American legal process was able to set its conscience aside and, by pragmatic toadying to economic 'needs,' rationalize a regression of human rights for blacks").

<sup>33</sup> The author coins this phrase to refer to Black students on white college campuses, who, in the eyes of many, are not academically entitled as tax-paying citizens to seek a quality education at their state's "flagship" universities and professional schools. See, e.g., *Blackness as Property*, *supra* note \*\* (examining the Supreme Court's affirmative action decisions relating to college admissions from the perspective of the historic treatment of Black people as property of white people).

<sup>34</sup> *NCAA v. Alston*, 141 S. Ct. 2141, 2165 (2021) ("Under the current decree, the NCAA is free to forbid in-kind benefits unrelated to a student's actual education. . .").

<sup>35</sup> See Curtis Bunn, *Black Coaches and Ex-athletes Say NCAA Changes Are Long Overdue*, NBC NEWS (July 6, 2021), <https://www.nbcnews.com/news/nbcblk/black-coaches-ex-athletes-say-ncaa-changes-are-long-overdue-n1273121>, archived at <https://perma.cc/H5Q8-C9EL> (discussing the impacts that the interim NCAA rule changes will have for Black student athletes and other athletes of color); Patrick Hruby, *Four Years A Student Athlete: The Racial Injustice of Big-Time College Sports*, VICE (Apr. 4, 2016), <https://www.vice.com/en/article/ezejxp/four-years-a-student-athlete-the-racial-injustice-of-big-time-college-sports>, archived at <https://perma.cc/M9LB-LG87> (calling attention to the known racial injustice of the NCAA amateurism rules and the false narrative that the impact of amateurism is colorblind). Studies around the wealth gap continue to show white males disproportionately possess wealth in the United States. See Emily Badger, Claire Cain Miller, Adam Pearce, & Kevin Quealy, *Extensive Data Shows Punishing Reach of Racism for Black Boys*, N.Y. TIMES, (Mar. 19, 2018),



ing the status quo protects the wealth of white men, including college coaches; in 2020, 82% of Division I head football coaches were white, while 48% of the players were Black.<sup>36</sup> These white coaches receive multi-million salaries, a range of enforcement, consulting contracts, and marketing opportunities, and positions as directors on corporate boards.<sup>37</sup> The various benefits coaches receive come close to or exceed their contracts with their schools.<sup>38</sup> Additionally, the status quo protects the substantial compensation of senior university administration, which is composed of over 80% white administrators.<sup>39</sup>

Furthermore, across these educational institutions, leadership both on and off the field remains predominantly white, despite the majority of players—those exerting the labor and generating the revenue—being Black men. Overall, the *Alston* decision fails to respect young Black men’s rights of self-determination, thereby negating the players’ free will and thereby robbing them of their true earning capability.<sup>40</sup> Moreover, the *Alston* decision continues to empower white America to judge whether Black college athletes are worthy recipients of white generosity. As summarized by California Governor Gavin Newsom, in supporting college athletes’ rights, changing the law 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.”<sup>41</sup> The *Alston* Court reinforces the power relationship between the NCAA as “master” and Black athletes as unpaid, “enslaved labor.”

The legal system must immediately adopt a transformative approach to addressing Blackness as state property, thereby assuring young Black men

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<https://www.nytimes.com/interactive/2018/03/19/upshot/race-class-white-and-black-men.html>, archived at <https://perma.cc/B9LK-EKTD> (“White boys who grow up rich are likely to remain that way. Black boys raised at the top, however, are more likely to become poor than to stay wealthy in their own adult households”).

<sup>36</sup> See Ryan McFadden, *There Are Few Black Coaches in College Football and the NFL Maryland’s Mike Locksley Has Formed a Coalition to Change That*, THE BALTIMORE SUN (Apr. 17, 2021), <https://www.baltimoresun.com/sports/terps/bs-sp-mike-locksley-20210817-37fyejrsozdwtfofgz6t6r62ve-story.html>, archived at <https://perma.cc/2NGD-GPDU>.

<sup>37</sup> 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>, archived at <https://perma.cc/2AYT-DUVY> (reporting that Nick Saban, head football coach at the University of Alabama, 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).

<sup>38</sup> See, e.g., *id.*

<sup>39</sup> See Emma Whitford, *College Presidents’ Cabinets Still Far from Gender Parity*, INSIDE HIGHER ED. (Apr. 15, 2020), <https://www.insidehighered.com/news/2020/04/15/pay-and-seniority-gaps-persist-women-and-minority-administrators-higher-education>, archived at <https://perma.cc/L62G-N63W>.

<sup>40</sup> NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

<sup>41</sup> McLaughlin, *supra* note 20.

equal protection in the right to acquire property and wealth. Part I explores the American Dream of white male supremacy over people of color and especially the legal principle of treating Blackness as property. Part II describes and analyzes how, in the antebellum American South, the law prohibited the transfer of wealth from white men to their biracial sons, who along with their enslaved counterparts were denied the right to own property. Part III analyzes the NCAA rules and *Alston* decision to determine whether they continue to support the concept of Blackness as state property.

This Article concludes that the legal treatments of young Black men's property rights are the roots to the Court's underlying rationale in *Alston*. The law regulating and negotiating the racial economies of property acquisition and transfers, including testamentary transfers and intestate succession between white men and their illegitimate Black sons, served to reinforce a greater social and economic order in the antebellum South—the domination, supremacy, and privilege of wealthy white males—and that same ideology is reflected in the contemporary practice of the NCAA and in the *Alston* decision.

## I. WHITE MALE SUPREMACY

Historical paradigms cemented the false narrative of Black people as white property, with repercussions and consequences still being exemplified today. The three separate paradigms surrounding the American Dream of white men are: (1) native land, (2) enslaved labor, and (3) the myth of white male superiority. Taken together, these three paradigms created an environment that demanded that the labor and property rights of Black people be relegated to white interests. Most significant is the role the government played in securing the dream of white male supremacy.

### A. *Native Land*

During the colonial and antebellum period, the government expropriated the lands for Native Peoples, either by conquest or by purchase, and granted that land to predominately wealthy white men.<sup>42</sup> This resulted in land being cheaply available to wealthy white men. The availability of large amounts of land created an environment where private property ownership was viewed as a necessity towards achieving the American Dream. Understanding the context in which wealthy white slaveholding men, or “mas-

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<sup>42</sup> See, e.g., *Johnson v. M'Intosh*, 21 U.S. 543, 604 (1834) (the landmark U.S. Supreme Court decision holding that private citizens could not purchase lands from Native Americans); see generally History.Com Editors, *Native American History Timeline*, <https://www.history.com/topics/native-american-history/native-american-timeline>, archived at <https://perma.cc/7XKY-PPVP> (reporting that on May 28, 1830, President Andrew Jackson signed the Indian Removal Act, which gave plots of land west of the Mississippi River to Native American tribes in exchange for land that was taken from them).

ters,” interacted with Black men in the antebellum South requires an understanding of the legal world that masters constructed in pursuit of American Dream. Laws in the antebellum South served the interests of those in power, meaning that it was constructed by, and for those white men. What did powerful white men in the antebellum South want? Property rights, specifically the ownership, use and fruits of property, particularly, and at least initially, cheap land.<sup>43</sup>

The common law system revolved around private land ownership.<sup>44</sup> However, American common law principles deviated from those in the English common law to better serve the needs of white American masters, or slaveowners.<sup>45</sup> The settlement and development of American title to land was fundamental in shaping American law principles.<sup>46</sup> American law developed early on the paradigm of land as a private commodity that could be freely bought, sold, exploited, and freely willed.<sup>47</sup> Taken together, these private property principles make up the American private property paradigm. Three aspects of private property are particularly important. First, the abolishment of the law of primogeniture allowed the private owners of land to disinherit blood relations as “heirs” and to will their property freely.<sup>48</sup> Hence, the Americanization of English common law treated land as more

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<sup>43</sup> See generally FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* (1920) (presenting an illuminating view of the role of the proverbial “frontier” on the American psyche).

<sup>44</sup> See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 202 (1973); EDWARD E. CHASE, *PROPERTY LAW, CASES MATERIAL AND QUESTIONS* 3 n.7 (2002) (“A.M. Honore likewise distinguished between the rights of exclusion and of use and enjoyment, listing the incidents of ownership.”); Restatement of Property 1–10 (1936) (analyzing property based upon four basic legal relations—“right-duty,” “privilege-absence of right,” “power-liability,” and “immunity disability”—derived from W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 23–123 (1923)).

<sup>45</sup> Compare the issue of right of or delivery of possession leasehold law. *Hannan v. Dusch*, 153 S.E. 824, 830 (Va. 1930) (stating that under the American rule, the lessee has a right to possession, but absent an explicit covenant, the lessor has no duty to deliver possession.).

<sup>46</sup> *M’Intosh*, 21 U.S. at 604 (discussing that private citizens could not purchase lands from Native Americans because they could not legally hold title); but see *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2452 (2020) (“Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not ruled otherwise, we hold the government to its word.”).

<sup>47</sup> See FRIEDMAN, *supra* note 44, at 206–15 (analyzing the transformation of land as a commodity, including changes in common tenancy presumption, the simplification of a conveyancing, and efficiencies of land remedies and noting that in 1798, Jesse Root wrote, “The title of our lands is free, clear, and absolute, and every proprietor of land is a prince in his own domains and lord paramount of the fee”).

<sup>48</sup> Primogeniture is a system of inheritance in which a person’s property passes to their firstborn legitimate child upon their death. The term comes from the Latin: “primo,” which means first, and “genitura,” which relates to a person’s birth. Historically, primogeniture favored male heirs, also called male-preference primogeniture. It was also a common method of determining succession in hereditary monarchies throughout the world. See *Primogeniture*, CORNELL LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/primogeniture>, archived at <https://perma.cc/7MHE-HHSU>. See FRIEDMAN, *supra* note 44, at 205–07 (“Land-law reform was well under way even before the Revolution. After the Revolution, legislatures carried on the work of dismantling the feudal past. . . . Primogeniture, dead in most of New England, vanished from the South by 1800.”).

alienable and more as a commodity rather than following the traditional primogeniture structure.

Second, American common law abolished the English common law rule prohibiting foreigners from owning land.<sup>49</sup> Such a limitation would have stifled the mingling of the white ethnic groups that were a part of antebellum America.<sup>50</sup> The American rule took the position that prohibiting foreign land ownership “‘originated in ages of barbarism, out of the hatred and jealousy with which foreigners were regarded. . . . [To] those [aliens] who are actually amongst us the best policy’ would be ‘to encourage their industry by giving them all reasonable facilities in the acquisition of property.’”<sup>51</sup> Of course, these rules allowing foreigners to own land did not apply to enslaved people of African descent.<sup>52</sup>

Third, the tightening of the law surrounding perpetuities by the abolition of the fee tail and the invalidation of future interests that “unduly suspended the power of alienation” resulted in the development of the Rule Against Perpetuities.<sup>53</sup> Taken together, these created the American private property doctrine that private property should be easily alienable, free of land monopolies and land dynasties—at least as far as it pertained to white men. The regime maximized land utilization by promoting land as a commodity and allowed “foreigners” to own land, provided they fit the appropriate constraints of a “desirable” foreigner. It also supported the purportedly more egalitarian view that land should be free for the living and unburdened by familial control in death. Based on these principles, landowners had a vested interest in the availability of cheap land, laws promoting free alienation of land, and free control over the use and disposal of private property.

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<sup>49</sup> Between 1765–1770, English jurist and politician William Blackstone published *Commentaries on the Laws of England*. This treatise on common law defined “aliens”—derived from the Latin term *alienus*, meaning “foreigner” or “outsider”—as people born outside of the king’s “dominions” or territory over which the monarch rules. Given the loaded and overwhelmingly negative connotation that identifier carries today, this author refers to “aliens” or foreign-born residents as “foreigners.” See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765), Book I at 158 (“[N]o alien born out of the dominions of the crown of Great Britain. . .”).

<sup>50</sup> For a nuanced look at the different ethnic white sub-groups that made up antebellum Charleston, South Carolina, see, e.g., JEFF STRICKLAND, UNEQUAL FREEDOMS: ETHNICITY, RACE AND WHITE SUPREMACY IN CIVIL WAR-ERA CHARLESTON 14 (2015) (“The pace of northern and western European immigration to the United States accelerated in the second quarter of the nineteenth century, and Germans and Irish arrived in record numbers, some of them selecting Charleston as their home.”).

<sup>51</sup> See FRIEDMAN, *supra* note 44, at 209 (quoting 1 AM. JURIST 87–88 (1829)).

<sup>52</sup> Perhaps allowing white foreigners to own land in the United States was meant to accommodate the integration of the Louisiana Purchase into the United States, as many of the people residing there were not of British descent. See generally GEORGE DARGO, JEFFERSON’S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS (1975).

<sup>53</sup> See FRIEDMAN, *supra* note 44, at 210–11.

### B. *Enslaved Labor*

Cheap land on its own was not enough to meet the needs of the American Dream. Consistent with the private property paradigm surrounding the availability of cheap land, these men also needed cheap labor to develop and cultivate that land so that white men could reap the profit at minimal labor and cost. While an influx of Irish and other European immigrant labor provided cheap labor for industry in the North, the South's cheap labor primarily came in the form of enslaved people of African descent.<sup>54</sup> From this enslavement dynamic, the white "master" was born.

The development of the American private property law regime was contemporaneous with the American enslavement system. Beginning early in colonial American history, Black people as labor were intrinsically tied to the land. For example, in 1705, Virginia state law stated that enslaved Black people were legally to be classified as "real estate," and governed by the same laws as land, houses, and trees.<sup>55</sup> Other states, including Kentucky in 1789 and the Louisiana territory in 1806, adopted similar laws.<sup>56</sup> Enslaved Black people were classified legally as either real estate and "immovable,"<sup>57</sup> or chattel and "movable."<sup>58</sup> As property, Black people were bought or sold, "gifted" through will or *inter vivos* donation, attachable to the debts of their "owners,"<sup>59</sup> insurable, and subject to taxation by the State.<sup>60</sup> Treating people as property was contradictory to the reality that Black people were, in fact, people.<sup>61</sup>

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<sup>54</sup> See generally LESLIE HOWARD OWENS, *THIS SPECIES OF PROPERTY: SLAVE LIFE AND CULTURE IN THE OLD SOUTH* (1976); see also THADIOUS M. DAVIS, *GAMES OF PROPERTY, LAW, RACE, GENDER AND FAULKNER'S GO DOWN*, MOSES (2003) (a thorough and thought-provoking analysis of the relationship between race, property, agency, game theory, critical legal studies, feminist critique and literature).

<sup>55</sup> See FRIEDMAN, *supra* note 44, at 74 ("This law was meant to insure that uniform rules of inheritance, and liability for debt, would govern the law of an estate—the land and its slaves."). Friedman notes that in 1792, Virginia repealed this law and in 1794 passed a law prohibiting the sale of enslaved Blacks to satisfy a master's debts unless all other personal property had been exhausted. *Id.* at 197–98; see also LOUISIANA'S BLACK CODE, §10 (1806) ("Slaves shall be considered as real estate, and shall be subject to mortgage, seizure, and sale, as real estate."); A. Leon Higginbotham Jr. & Barbara K. Kopytoff, *Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia's Civil Law*, 50 OHIO ST. L.J. 511, 517 (1989).

<sup>56</sup> See FRIEDMAN, *supra* note 44, at 197 n. 54 (citing HENRY W. FARNAM, *CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860*, at 183 (1938)).

<sup>57</sup> See generally THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW (1619-1860)* 64 (1996). In some circumstances, enslaved people were referred to as "chattel or movables." This distinction was of special importance under Louisiana law.

<sup>58</sup> *Id.* at 74–75.

<sup>59</sup> This Article uses "owners" as the legal term used at the time of enslavement to denote those people who exercised legal dominion over enslaved people. White history has also called these people "masters" or "planters."

<sup>60</sup> See FRIEDMAN, *supra* note 44, at 74.

<sup>61</sup> See generally Paul Finkelman, *Slavery in the United States, Persons or Property?, in THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY*

In the antebellum, enslavement economy rules were as follows. First, enslaved Black people were considered “property” under antebellum law.<sup>62</sup> White men could freely rape enslaved Black women without punishment or legal consequence,<sup>63</sup> and interracial marriage was strictly prohibited.<sup>64</sup> Both scenarios resulted in bastards, or children born out of wedlock. In addition, the legal status of any children of an enslaved mother would also be enslaved, regardless of whether their father was a white man.<sup>65</sup> Enslaved Black people lacked any ability to own property, as they themselves were deemed property and therefore legally belonged to their master.<sup>66</sup>

One of the most important tenets of the enslavement system was that an enslaved Black person was totally reliant upon their master for any financial support, for the black codes generally forbade enslaved Black people from owning property.<sup>67</sup> Ownership of property by enslaved Black people was directly contradictory to the enslavement economy and the ideology that enslaved peoples themselves were property. Both their bodies, and any fruits of their labor, legally belonged to their masters.<sup>68</sup> This separation of enslaved Black people from any legal property rights mattered, for it gave white mas-

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105–34 (Jean Allain ed., 2012) (providing a detailed discussion on the legal history of enslaved persons as both property and persons).

<sup>62</sup> *Id.* at 128. (discussing *Dred Scott v. Sandford*, 60 U.S. 393 (1856) and Chief Justice Taney’s decision: “First, Taney found that slaves were a form of private property explicitly recognized and protected by the Constitution and federal law. His analysis precluded seeing slaves as persons.”); see also *Conditions of Antebellum Slavery 1830-1860*, PBS, <https://www.pbs.org/wgbh/aia/part4/4p2956.html>, archived at <https://perma.cc/6EMD-PM2P> (“Slaves were considered property, and they were property because they were black. Their status as property was enforced by violence—actual or threatened.”).

<sup>63</sup> See Morris, *supra* note 57, at 305 (“Race, age and status were all elements in the law of rape in the South. Every state that adopted statutes to deal expressly with rapes committed by slaves (and in some cases free people of color added that the victim had to be a white female. . . . [N]o white could ever rape an enslaved woman.”).

<sup>64</sup> See ROBERT B. SHAW, *A LEGAL HISTORY OF SLAVERY IN THE UNITED STATES* 44 (1991) (“One such crime was an illegal marriage; a Maryland law of 1715 prohibited any white person from marrying any negro or mulatto slave.”).

<sup>65</sup> See ULRICH B. PHILLIPS, *AMERICAN NEGRO SLAVERY: A SURVEY OF THE SUPPLY EMPLOYMENT AND CONTROL OF NEGRO LABOR AS DETERMINED BY THE PLANTATION REGIME* 77 (2d. ed. 1969) (“Then in 1662 it was enacted that ‘whereas some doubts have arisen whether children by any Englishman upon a negro woman shall be bond or free. . . all children born in this colony shall be bond or free only according to the condition of the mother.’”).

<sup>66</sup> STAMPP, *supra* note 26, at 197 (“Legally a bondsman was unable to acquire title to property by purchase, gift, or devise; he could not be a party to a contract.”); see also PHILLIPS, *supra* note 65, at 500 (“Any property they might acquire was considered as belonging to the master.”).

<sup>67</sup> The “Black Codes” were state laws throughout the country that enforced racial segregation and disenfranchised Black people, particularly in Southern states. See, e.g., MORRIS, *supra* note 57, at 1 (citing the Code of Alabama (1852): “the state or condition of negro or African slavery is established by law in this State; conferring on the master property in and the right to the time, labor, and services of the slave, and to enforce obedience on the part of the slave to all his lawful command.”). See SHAW, *supra* note 64, at 167 (“Almost as an invariable rule, the slave had no right to contract with any party, or at least, no means of enforcing such a contract.”).

<sup>68</sup> KENNEDY, *supra* note 25, at 42-34 (Stating that enslaved men and women were “one doomed in his own person, and his posterity, to live without . . . the capacity to make anything his own, and to toil that another may reap the fruits.”).

ters a readily available cheap labor source for purchase. Rather than having to hire a white labor force, maintain ongoing payment and other legal labor protections, they could instead cheaply purchase human beings to perform this labor.

On a national level, the ability of cheap slave labor helped the United States transform from a “colonial economy to the second biggest industrial power in the world.”<sup>69</sup> From 1801 to 1862, the amount of cotton picked daily by an enslaved person increased 400%, and the ownership of enslaved people increased wealth for Southern planters so much that by the eve of the Civil War, the Mississippi River Valley had more millionaires per capita than any other region in the burgeoning United States.<sup>70</sup> White masters required cheap labor in order to capitalize on the rapid growth and scale of cotton growing; larger demand equated larger output and larger labor capacity.<sup>71</sup> Without cheap labor in the form of enslaved human beings, the white landowning masters would never be able to reach the labor capacity needed to grow and acquire wealth.

The enslavement and private property paradigms were directly complementary. Enslaved Black people were treated as a commodity; they could be easily alienated and treated as the subject of inheritance or *inter vivos* gift, and they could be used to maximize profits. Enslavement served to further the White man’s dream of private property proliferation. As white masters acquired more free land, they needed to procure more enslaved labor.

### C. Myth of White Male Superiority<sup>72</sup>

The final paradigm in understanding the American Dream, which is built around the concept of Black people as property, is the myth of white male superiority. In order for both the private property and enslavement regimes to function as cruelly as they did, there needed to be an ethos, a justification, built around the concept that white men are superior to all Black people. White male superiority was used as a justification for private property ownership within the colonies and the violent taking of land in the Western and Southern states. The concept of manifest destiny was similarly structured around the philosophy that white men were entitled to settle, con-

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<sup>69</sup> P.R. Lockart, *How Slavery Became America’s First Big Business*, Vox (Aug. 16, 2019), <https://www.vox.com/identities/2019/8/16/20806069/slavery-economy-capitalism-violence-cotton-edward-baptist>, archived at <https://perma.cc/37C9-JK6U>.

<sup>70</sup> *Id.*

<sup>71</sup> Matthew Desmond, *In Order to Understand the Brutality of American Capitalism, You Have to Start on the Plantation*, N.Y. TIMES MAGAZINE (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html>, archived at <https://perma.cc/JY3R-FFNZ>.

<sup>72</sup> See generally JEOMA OLOU, *MEDIOCRE: THE DANGEROUS LEGACY OF WHITE MALE AMERICA* (2020) (chronicling how white men, through use of genocide and enslavement, have structurally built a system that allows them to live in prosperity and ease, built on the labor of Indigenous and Black people, and used this structure to reinforce their own ideas of white male superiority).

quer, and prosper from the land.<sup>73</sup> Seizure of land was justified by the alleged moral superiority of the white race.

The illusion of white male superiority provides the foundation for both private property and enslavement paradigms. Surely, white men were doing the Native People a favor by seizing and taking land that otherwise would remain “wild,” and acting as the patriarch over an “inferior race” through the process of the enslavement of Black people. In order for white men to realize their American Dream, they needed to believe that domination was their birthright, so they created the constructs that allowed this to be a reality.

This illusion of superiority did more than just condone the frenzy around the property “land grab” and the enslavement of Black people; it made those actions a moral imperative. For example, some Christian theologians went so far as to argue that the enslavement of human beings was justifiable from a biblical point of view. In a famous 1861 sermon, James Henley Thornwell expounded that “[a]s long as that [African] race, in its comparative degradation, co-exists side by side with the white, bondage is its normal condition. . . . The relation of master and slave stands on the same foot with the other relations of life. . . . In itself, it is not inconsistent with the will of God. It is not sinful. The Christian Scriptures . . . distinctly sanction slavery as any other social condition of man.”<sup>74</sup>

In the first half of the nineteenth century, theorists in the United States and Britain began to envision a world dominated by white men.<sup>75</sup> American experience with Black and Native Peoples reinforced, in the minds of powerful white men, “scientific” ideas on the existence of inferior and superior races, including scientists who measured skulls and heads in an attempt to confirm social theories claiming inherent differences among the races.<sup>76</sup> Southerners, eager to find rationale for the continuance of the enslavement of Black people, embraced the new ethnology of polygenesis enthusiastically.<sup>77</sup> In 1851, noted physician Samuel A. Cartwright reported to the medical association of Louisiana that “Negroes, with their smaller brains and blood vessels, and their tendency toward indolence and barbarism, have only to be kept benevolently in the state of submission, awe and reverence that God has ordained.”<sup>78</sup> Cartwright was only one powerful white man in a long

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<sup>73</sup> *Id.*

<sup>74</sup> See Tom Gjelten, *White Supremacy Ideas Have Historical Roots In U.S. Christianity*, NPR (July 1, 2020), <https://www.npr.org/2020/07/01/883115867/white-supremacist-ideas-have-historical-roots-in-u-s-christianity>, archived at <https://perma.cc/4CXN-T4FX>.

<sup>75</sup> See REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* 116-138 (1981) (providing a history on the “scientific” movement supporting the ideology behind “superior” and “inferior” races).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Michael E. Ruane, *A Brief History of the Enduring Phony Science that Perpetuates White Supremacy*, WASH. POST (Apr. 30, 2019), <https://www.washingtonpost.com/local/a-brief-history-of-the-enduring-phony-science-that-perpetuates-white-supremacy/2019/04/29/>



history of those who used spurious and nefarious “science” as a way of justifying the false narrative of Black inferiority.<sup>79</sup>

It is important to note that the same wealthy white men who enslaved Black people were also the legislators who wrote the laws of enslavement. In 1860, about three-quarters of deep-South legislators and two-thirds of upper-South legislators were enslavers and at the gubernatorial level, enslavers were virtually universal—Southern politics revolved around the defense of enslavement, which was cast as defense of the South itself.<sup>80</sup> Consequently, Black men were not permitted to own property, except in highly limited circumstances which, not unsurprisingly occurred, if and when those interests aligned with the interests of wealthy white men.

In summary, the white male supremacy myth promoted white men’s exploitation of native land and of human beings. This myth permeated social norms including the legal system.<sup>81</sup> Essential to the realization of the myth were the enactment and enforcement of strict enslavement laws with one fundamental rule—keep property and wealth in the hands of white men and disenfranchise Black people, especially Black men.

## II. PROHIBITING BLACK PROPERTY RIGHTS

Part II describes how the legal system in the antebellum South prohibited the transfer of wealth from white people to Black people. It documents the reality that enslaved Black people lacked property rights, and, worse, were themselves legally deemed the property of white owners. This legal regime of enslavement was sanctioned and promoted by all levels of governments.

The biracial sons of wealthy white men were arguably the most privileged of all Black men in the antebellum South. They provide insight into how the government regulated the transfer of wealth from a white person to a Black person, albeit a white father to his Black son. Enslavement was government sanctioned, only existing with the empowerment granted by and guaranteed by the government, both federal, state, and local.<sup>82</sup> This is a study of the rare instances of white men transferring wealth to their Black son. Not all white men who fathered Black children were interested in transferring

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<sup>79</sup> *Id.*

<sup>80</sup> See PETER KOLCHIN, *AMERICAN SLAVERY, 1619–1877*, at 183–84 (1993).

<sup>81</sup> See Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1709, 1719 (1993) (examining how whiteness, initially constructed as a form of racial identity, evolved into a form of property, historically and presently acknowledged and protected in American law, noting that “the interaction between concepts of race and property, played a critical role in establishing and maintaining racial and economic subordination.”).

<sup>82</sup> See generally JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, VOLS. 1-V (Helen Tunnicliff Catterall, ed., 1968) (1926) (composing a definitive enslavement, most annotated compilation of enslavement cases).

wealth to their Black children.<sup>83</sup> Furthermore, not all biracial children of white men resulted from a consensual relationship between a white man and a Black woman; often these children resulted from white men who raped Black women.<sup>84</sup> The rare attempt of white men transferring property to young Black men raises a probing question: did the law prohibit or restrict a white father's private property right to transfer his wealth to his biracial son, by gift, will, or inheritance?

### A. *Blackness as White Property*

The plight of the biracial sons of white men in the antebellum South is best understood within the context of the property rights of Black people in general. As mentioned above, enslaved Black people were legally classified as "white property,"<sup>85</sup> a designation necessary for an American Dream of white male supremacy and dominion over land and labor. This legal treatment of all Black people as white property was not universal. During the Colonial period, white America was conflicted about the role and place of Black people in society.<sup>86</sup> Then and later in many "free" states in the North, many white people accepted Black people as equals, or at the very least as human beings.<sup>87</sup> In the South, many white people denied Black people as equals and relegated them to being legally classified as property because they directly participated in or indirectly benefited from the enslavement socio-economic order.<sup>88</sup>

Unfortunately, those in favor of viewing and treating Black people as the property of white people won.<sup>89</sup> By the start of the antebellum period in

<sup>83</sup> See, e.g., "Ex-Slave Story 11-A," Interview with Mary Harris and her son, by Posey, WPA Writers Project (10-28-1940), copy in author's possession, from Louisiana Department, Louisiana State Library, Baton Rouge ("Because the man who owned and sold my mother was her father. But that's not all. That man I hate with every fibre [sic] of my body and why? A brute like that who could sell his own child into unprincipled hands is a beast. The power, just because he had the power, and the thirst for money.").

<sup>84</sup> See PHILLIPS, *supra* note 65, at 500 ("[A]lthough the willful killing of slaves was generally held to be murder, the violation of their women was without criminal penalty.").

<sup>85</sup> This Article defines "white property" as the legal, social, and economic order or system which relegated Black people as the legal property of white people who were permitted by the government to buy, sell, lease, use, mortgage and inherit people as if they were a parcel of land or an animal.

<sup>86</sup> PHILLIPS, *supra* note 65, at 75-76 ("Thus for two generations the negroes were few, they were employed alongside the white servants, and in many cases were members of their masters' households. . . . Until after the middle of the [17th] century the laws did not discriminate in any way between the races.").

<sup>87</sup> MORRIS, *supra* note 57, at 62. ("This claim of property in slaves, both in theory and in practice, as defined by legislation and jurisprudence, as defended by theologians and as sanctioned by ecclesiastical bodies, as carried out into every-day practice by the pious and the profane, is manifestly and notoriously a claim, not only to the bodies and physical energies of the slave, but also to his immortal soul, his human intelligence, his moral powers and his Christian graces and virtues.")

<sup>88</sup> *Id.* at 61-80 (discussing how the law of slavery regarded enslaved people as an article of property, chattel)

<sup>89</sup> See FRIEDMAN, *supra* note 44, at 196-201.

1830, it was accepted law and practice that enslaved Black people were legally property, relegated to serving the needs and desires of white people.<sup>90</sup> This classification of humanity as property ensured that Black people were denied the citizenship rights held by white people, including the right to vote, the right to make contracts, the right to self-defense when attacked, and the right to travel.<sup>91</sup> Under limited circumstances, enslaved Black men could have possession of property, albeit not legal ownership, with permission of their white owners.<sup>92</sup> In these exceptional instances, Black men were permitted to possess property because their white owners believed that granting them this “possessory privilege” would ensure compliance with their owners’ commands.<sup>93</sup> For example, one historical narrative details Alexander Steele, an enslaved Black carpenter in Georgia who allegedly owned four horses, a mule and two cows, as well as large quantities of fodder, corn, and hay.<sup>94</sup> However, the law was clear, the “property” of an enslaved person was, in actuality, the property of the owner of that enslaved person.<sup>95</sup> Hence, Mr. Steele’s possessory privilege was just that—a privilege, granted through the permission of white masters, that aligned with their interests, and that failed to give an actual legal right.

In summary, most Black people in the antebellum South were enslaved and denied the right to own property. Moreover, as enslaved people, they themselves were legally deemed to be and were treated as the property of their white owners. In limited circumstances, a few Black people were allowed to possess chattel property, such as livestock, but only with permission of their owners. Hence, in the antebellum South, as a general rule, Black people had no property rights.

There was an instructive exception to the nearly total prohibition of Black men owning property in the antebellum South: when a white man fathered a Black son. A young Black man who was a biracial son of a white man and a Black woman had a chance to receive property from his father. That young Black man was legally impaired in several ways, reflecting the plight of nearly all enslaved Black people in the antebellum South. He was (1) classified as Black (“mulatto”), not as white, regardless of appearance which could include light complexion and European facial features;<sup>96</sup> (2)

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<sup>90</sup> *Id.*

<sup>91</sup> *Id. See, e.g.,* Mitchell F. Crusto, *Enslaved Constitution: Obstructing the Freedom to Travel*, 70 U. PITT. L. REV. 233–75 (2008) (providing a legal history of how the U.S. Constitution was and remains conflicted over the right to travel, particularly intra-state travel).

<sup>92</sup> For example, in some parts of the South enslaved Black men and women were allowed to grow and cultivate gardens of their own. *See* LOREN SCHWENINGER, *BLACK PROPERTY OWNERS IN THE SOUTH 1790–1915* at 31 (1990).

<sup>93</sup> *Id.* at 36.

<sup>94</sup> *Id.*

<sup>95</sup> *See* PHILLIPS, *supra* note 65, at 500 (“[A]ny property they might acquire was considered as belonging to the master.”).

<sup>96</sup> The term “mulatto” was used as an official census racial category in the United States, to acknowledge multiracial persons, until 1930, which adopted the southern states laws that “one-drop” of African blood resulted a person in being classified as Black. *See* Paul Schor,

classified as a “slave,” the property of his father, and as such could not own property;<sup>97</sup> (3) “illegitimate,” born out of wedlock, as Black and white people were not allowed to marry;<sup>98</sup> therefore lacking inheritance rights to his father’s estate; (4) a religious outcast, denied membership into the Christian religion; and (5) as a minor, lacked legal capacity to own property or to contract. These Black men, oftentimes educated, talented, and self-assured as the sons of wealthy, powerful white men, posed a threat to the overarching concept of white male superiority.

### B. “Free Blacks” Owned Property

Contrary to the condition of enslaved Black men, “free Black” men and women in the South were legally permitted to own property.<sup>99</sup> A few free Black men and Black women in antebellum Louisiana owned exceptional estates which included land, businesses, and even enslaved Black people.<sup>100</sup> How can one explain such an anomaly? In the case of Louisiana, the free Black ownership of property derived from Spanish colonization prior to the Louisiana Purchase.<sup>101</sup> The land was granted by the Spanish government to Black people in Louisiana in part to control land that was taken from native tribes.<sup>102</sup>

After the United States gained ownership and control of Louisiana, it became increasingly difficult for a Black person to become free and to own property.<sup>103</sup> With each decade that crept closer to the Civil War, the re-

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*The Disappearance of the ‘Mulatto’ as the End of Inquiry into the Composition of the Black Population of the United States*, in COUNTING AMERICANS: HOW THE US CENSUS CLASSIFIED THE NATION 155–68 (2017).

<sup>97</sup> See STAMPP *supra* note 26, at 197 (“Legally a bondsman was unable to acquire title to property by purchase, gift, or devise; he could not be a party to a contract.”); PHILLIPS, *supra* note 65, at 500 (“[A]ny property they might acquire was considered as belonging to the master.”).

<sup>98</sup> See *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (striking down, as unconstitutional, therefore criminal bans on interracial marriage in Virginia and in fifteen other states and the District of Columbia); see generally JOHN W. BLASSINGAME, BLACK NEW ORLEANS 1860-1880 (1973) (especially Chapter 7 on the nature of sex relations between Black people and white people in Reconstruction New Orleans).

<sup>99</sup> See SCHWENINGER *supra* note 92, at 64; see, e.g., H.E. STERKX, THE FREE NEGRO IN ANTE-BELLUM LOUISIANA 7-9 (1972) (“During the long period from 1724-1860 there were free [persons of color] in every walk of life. . . . Even with all the apparent advantages [of being a freed person of color vs. being enslaved] the knowledge they could not be equal to whites hovered over them.”).

<sup>100</sup> See *United States v. Louisiana*, 225 F. Supp. 353, 363 n.9, 1963 U. S. Dist., LEXIS 10307 (E.D. La. 1963) (“In 1860, Louisiana free blacks owned real property and slaves valued at \$50,000,000.”).

<sup>101</sup> See *Early Days: Colonial Louisiana, 1718-1803*, LSU LIBRARIES, <https://lib.lsu.edu/sites/all/files/sc/fpoc/history.html#historyearly>, archived at <https://perma.cc/N5DH-7SSP> (stating that during the antebellum period free people of color in Louisiana enjoyed a higher level of acceptance and prosperity as a legacy of the state’s French and Spanish founders when compared to other free people of color).

<sup>102</sup> See *Blackness as Property*, *supra* note \*\* (documenting the history of Spanish land grants in Louisiana).

<sup>103</sup> See SCHWENINGER *supra* note 92, at 64.

strictions became more and more stringent.<sup>104</sup> The enslavement paradigm meant that property belonged to white people and not to Black people, regardless of whether they were enslaved or free. Consequently, Southern states enacted laws to deny all Black property rights and to take property from free Black people. For example, Florida state law made it illegal to purchase anything from a free Black person without prior written permission from a governmental official.<sup>105</sup> In 1843, Louisiana authorized local New Orleans authorities to arrest any free Black people born outside of the state—even those who owned property within the state.<sup>106</sup> Mississippi went even further, banning all free Black people emancipated from outside of the state, and therefore lacking express written prior consent, from owning any property whatsoever.<sup>107</sup> During the late 1850s, Southern states enacted legislation that sought to drive free Black people out of those states and require them to find a suitable master and return to bondage.<sup>108</sup>

In the antebellum South, some free Black men enjoyed the privilege of owning property, which was seen as an affront to the white male supremacy paradigm. Black property ownership was viewed as a threat to a white supremacist American Dream and directly contradictory to the entrenched narrative of white male superiority. However, despite the nearly complete prohibition of Black people owning property, there was a unique challenge that arose when wealthy white men chose to transfer their personal property to their biracial sons.

### C. *Black Sons of White Men*

The law of enslavement relied on perpetuating a legal fiction of race and attempted to draw a strict “color” line between the “white” race and the “Negro” race.<sup>109</sup> Under this legal system, all the benefits of society, especially property and wealth, belonged to white people. The law also forbade interracial relationships, but allowed white men’s sexual abuse of Black woman.<sup>110</sup> This dichotomy is exemplified by the children of white men and enslaved Black women being legally classified as enslaved.<sup>111</sup>

The government played a defining role in enslavement, even controlling white men’s behavior. In particular, a white man could not marry a Black

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 64.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 63.

<sup>109</sup> See generally KENNEDY, *supra* note 25, at 41–59.

<sup>110</sup> *Id.*

<sup>111</sup> See JOHN H. RUSSELL, *THE FREE NEGRO IN VIRGINIA 1619–1865* 37 (1913) (citing 2 W. W. Hening, *STATUTES AT LARGE OF VIRGINIA* 170 (1823)) (“whereas some doubts have arisen (sic) whether children got by any Englishman upon a negro woman shall be bond or free, . . . all children born in this colony shall be bond or free only according to the condition of the mother.”). See also *Partus sequitur ventrem*, *BLACK’S LAW DICTIONARY* 1121 (6th ed. 1990) (“The offspring of a slave belongs to the mother, or follows the condition of the mother.”).

woman. Even though white men could and often did have sex with Black women, the law made it very difficult, but not impossible, for a white man to transfer property to a Black person.<sup>112</sup> While white men could formally acknowledge their biracial children under limited circumstances,<sup>113</sup> most biracial people in the antebellum South were legally classified as Black and thus enslaved, not free, had no property rights, and did not inherit property from their white fathers.<sup>114</sup>

Antebellum Louisiana provides a unique case study into the inheritance rights of biracial sons of wealthy white fathers. In Louisiana, the class of free Black people can be traced back to miscegenational relationships between white masters and their enslaved Black women during French and Spanish control of the occupied territory.<sup>115</sup> An early example occurred in 1764, between a white man, Luis Augustin Meullion, his Black enslaved woman, Maria Juana, and their son, Jean Baptiste Meullion.<sup>116</sup> In 1776, Luis agreed to emancipate Jean Baptiste and Maria Juana, on the condition that they serve him until his death.<sup>117</sup> After his father's death, Jean Baptiste moved to St. Landry Parish, and, in 1830, owned fifty enslaved Black people and a large acreage of land.<sup>118</sup>

While a white man was prohibited from marrying a Black woman, Louisiana law recognized a special interracial contracted relationship between a white man and a Black woman called a "plaçage."<sup>119</sup> These "arranged" relationships were often between a wealthy or influential white man and the "biracial" or "colored," here 50% white, daughter of a wealthy white man.<sup>120</sup> However, such an arrangement did not mean that their Black offspring would automatically inherit from their white father. In antebellum Louisiana, property could only legally pass to a biracial child if that child was born to a free Black woman or the child was manumitted from slavery.<sup>121</sup> In addition, white fathers had to follow a specific legal acknowledgment procedure.<sup>122</sup>

<sup>112</sup> See *Blackness as Property*, *supra* note \*\*, at 167–73 (discussing *McCarthy et al v. Mandeville*, 3 La. Ann. 239 (La. 1848) in which the white siblings of a white man, Eugene McCarthy, unsuccessfully claimed that the property titled in the name of his Black "concubine," Eulalie d'Mandeville, belonged to them).

<sup>113</sup> In most circumstances, the children were only legally acknowledged if they were born to a free Black woman or legally emancipated by their owner.

<sup>114</sup> See Crusto, *supra* note 47.

<sup>115</sup> STERKX *supra* note 99, at 18–20, 26–28, 59–67.

<sup>116</sup> *Id.* at 204.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> A "plaçage" is a recognized extralegal contract in French and Spanish colonies of North America, including the Caribbean, see STERKX, *supra* note 99, at 250, or civil union between a white man and a Black woman, that operated as a family unit.

<sup>120</sup> See *Blackness as Property*, *supra* note \*\*, at 164–67.

<sup>121</sup> See Loren Schweninger, *Property Owning Free African-American Women in the South, 1800-1870*, 1 J. OF WOMEN'S HIST. 13 (1990).

<sup>122</sup> See *Compton v. Prescott*, 12 Rob. (La.) 69, 71 (La. 1845) (citing La. Civ. Code Ann. art. 200 (1825) that illegitimate children are broken into two classes, "those born from two

As a result, antebellum Louisiana law made it nearly impossible for a biracial child to inherit from a white father, mainly because of its prohibition on interracial marriage. First, Article 200 provided for two classes of illegitimate children: “those born from two persons, who at the moment when such children were conceived might have legally contracted marriage with each other [white couples] and those who are born from persons to whose marriage there existed, at the time, some legal impediment [a miscegenational couple].”<sup>123</sup> Second, the Code established stringent rules for a white father to acknowledge a Black or mulatto child by providing that the sole means of acknowledging a “colored” child was for the acknowledging father to make a declaration before a notary public in the presence of two witnesses.<sup>124</sup> This more formal procedure differed from provisions for a white father acknowledging paternity of a white child or that of a Black father acknowledging paternity of a child of any race.<sup>125</sup>

Children born of miscegenational relationships were thus allowed a stringent, yet available, means of legitimization, and potentially wealth transfer to their biracial sons.<sup>126</sup> Therefore, most free Black people who reached the upper economic levels in antebellum Louisiana were biracial.<sup>127</sup> Despite the existence of this process, it was not something that the law easily condoned. For example, in the case of *Robinett v. Verdun’s Vendees*,<sup>128</sup> the decedent Alexander Verdun sold tracts of land to Jean Baptiste Gregoire and six or seven other “colored” persons. Verdun’s white heirs alleged that that these people were in actuality Verdun’s illegitimate children.<sup>129</sup> The court annulled the sale finding that the deceased Verdun had not properly acknowledged his illegitimate colored children.<sup>130</sup> Hence, white property remained with Verdun’s white heirs.

If a white father followed the stringent letter of the law, there might be a different outcome. In an exceptional case, *Compton v. Prescott*, Leonard B. Compton, a white man, died in the 1840s without leaving any ascendants or legitimate descents, with an estate worth \$184,640.<sup>131</sup> Since Compton fol-

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persons who, at the moment when the children were conveyed might have legally contracted marriage with each other; and those who are born from persons to whose marriage there existed, at the time, some legal impediment.” Those in the latter category fell into the classification of “adulterous and incestuous bastards.”

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> For a different case involving the illegitimate children of a free Black man and a free white woman, see Succession of Mélasie Hébert, 33 La. Ann. 1099, 1103–07 (La. 1881). Of note, this case occurred after the Civil War and after Reconstruction.

<sup>126</sup> See La. Civ. Code Ann. art. 221 (1825) (providing strict requirements for a white father to legally acknowledge a colored child as his offspring). Southern state legislatures made the process of manumission of enslaved persons a difficult process, often requiring that the freed enslaved person be sent out of state.

<sup>127</sup> See SCHWENINGER, *supra* note 121, at 99.

<sup>128</sup> 14 La. 542 (La. 1840).

<sup>129</sup> *Id.*; see SCHWENINGER, *supra* note 121, at 99.

<sup>130</sup> *Id.* at 4.

<sup>131</sup> *Compton v. Prescott*, 12 Rob. (La.) 67 (La. 1845).

lowed the appropriate procedures for “acknowledgement” of his illegitimate children, they were allowed to inherit a portion of the estate.<sup>132</sup> In his will, Compton requested that a sizable portion of his estate be transferred to his biracial son Scipo and daughter Loretta, stating “it being my intention to give them, and that they shall have one fourth in value of my estate.”<sup>133</sup> Compton had previously acknowledged Scipo and his sister Loretta as his natural children by regular notarial acts executed on May 14th, 1830 and December 27th, 1837.<sup>134</sup> The court found that Compton had complied with the statutory requirements for acknowledgement of illegitimate “colored” children under Article 221, and for bequeathing one quarter of his estate to his “natural” children pursuant to Article 1474 of the Louisiana Civil Code, then in effect.<sup>135</sup> Of note, Loretta and Scipo’s mother, Fanchon, was a “free woman of color,” a class of Black people allowed to own property in Louisiana.<sup>136</sup> The court noted that “Scipo and Loretta are named in the will as being the testator’s children; he always treated them as such. . . [and] caused one of them to be educated in Ohio at his own expense, and always showed them the affection of a father.”<sup>137</sup> Hence, Compton’s bequest that one quarter of his estate go to his miscegenational children, Loretta and Scipo, was honored by the court.

A few white men took extraordinary measures to protect their Black “wives” and biracial children, such as moving the family from the enslavement South to a “free” state or country.<sup>138</sup> Such a rare strategy was employed by a white Tennessee schoolteacher.<sup>139</sup> Showing his deep love for his enslaved Black wife and their children, he petitioned to the American Colonization Society, seeking permission to migrate to Liberia: “My wife is a Quadroon of New Orleans. . . . we have been married for five years and have two children, who being only 1/8 African, are blue-eyed, and flaxen hair; and nearly as ‘pale faced’ as myself. Still, they are coloured and that is a word of tremendous import in North America! . . . I will go anywhere . . . to avoid so hateful an alternative.”<sup>140</sup>

In the rare instance of a wealthy white man who fathered a child with a free Black woman, their Black son might have received the property of their white father. Andrew Durnford was the Black son of a white man, Thomas

<sup>132</sup> *Id.* at 71.

<sup>133</sup> *Id.* at 60.

<sup>134</sup> *Id.* at 68.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 67–68 (explaining via dicta, that a white man could acknowledge his natural child, passing limited inheritance rights in a will, to a free colored child of a miscegenational relationship between a white man and a free Black woman).

<sup>137</sup> *Id.* A close reading of the decision shows that Loretta and Scipo were likely born after their mother, Fancon, was emancipated. This would mean that they were free Black people, and not enslaved, for there is no mention that the will granted them freedom.

<sup>138</sup> IRA BERLIN, *SLAVES WITHOUT MASTERS, THE FREE NEGRO IN ANTEBELLUM SOUTH* 267 (1974).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*



Durnford, a wealthy white Englishman living in New Orleans, and Rosaline Mercier, a “free woman of color.”<sup>141</sup> Andrew inherited a sizeable estate from his white father.<sup>142</sup> By 1850, Andrew Durnford, a Black man, owned assets valued at \$80,000, including 1,200 acres of improved land, 1,460 acres of unimproved land, farm machinery valued at \$10,000, significant amounts of livestock, and seventy enslaved Black people.<sup>143</sup> This Black man was, indeed, a very rare exception to the general rule of law that Black men could not own property.

Antebellum Southern legal principles regulating the transfer and ownership of property by Black men test Derrick Bell’s “interest convergence” principle.<sup>144</sup> As indicated by antebellum practice, Black men’s property interests and security tended to rise and fall depending on how closely those interests aligned with wealthy white interests. Traditionally, this meant that on the rarest of occasions, the legal system permitted a Black man to own property, if it was the result of a miscegenational relationship through direct familial lines, oftentimes to further a white father’s “bidding.”

### III. BLACKNESS AS STATE PROPERTY

The historically-based legal principle of “Blackness as state property” continues today as a conscious or unconscious source of systemic racism. This Part demonstrates the contemporary relevance by (1) showing how the NCAA rules serve as a form of systemic racism that denies property rights to young Black players; (2) analyzing how the Supreme Court’s decision in *Alston* unconsciously perpetuates the principle; and (3) explaining how Critical Race Theory is an invaluable tool to identify constitutional rights of Black people relative to libertarian property rights.

#### A. Systemic Racism

Perhaps nowhere in higher education is the disenfranchisement of Black male students more insidious than in college athletics.<sup>145</sup> –Dr. Shaun R. Harper

A conversation on the exploitative nature of college athletics would not be possible without first examining the educational environment that allows this exploitative relationship to flourish. An examination of this dynamic will provide context as to why the NCAA and college sports have been al-

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See STERKX *supra* note 99, at 203.

<sup>144</sup> Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”).

<sup>145</sup> See SHAUN R. HARPER, BLACK MALE STUDENT-ATHLETES AND RACIAL INEQUITIES IN NCAA DIVISION I COLLEGE SPORTS: 2018 EDITION ii (2018).

lowed to traditionally prey on young Black men by positioning college sports as a “savior,” enabling university dreams.

The failed educational system creates an ideal environment for college sports to act as a “savior” for young Black men. The kindergarten-12th grade (K-12) educational system in the United States treats Black students, particularly Black young men, with a negative bias compared to their white counterparts.<sup>146</sup> Black children are disproportionately represented in certain special education categories, primarily emotional disturbance and intellectual disabilities, than their white peers.<sup>147</sup> Black students are nearly four times as likely as white students to be suspended.<sup>148</sup> In 2018, nearly one third (32%) of Black students in K-12 lived in poverty, compared with 10% of white students.<sup>149</sup> Of those students living in poverty, 64% of Black students had parents who had not completed high school.<sup>150</sup> In addition, a high percentage of Black students attended high poverty schools compared to their white counterparts, with 45% of Black students attending high poverty schools, compared with 8% of white students.<sup>151</sup> While attending high poverty schools does not necessarily mean that a student will have poor educational outcomes, there is less of an educational investment made in that student. For example, throughout the country, high poverty districts spend 15.6% less per student than wealthier districts, resulting in lower access to

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<sup>146</sup> See, e.g., Nick Morrison, *Black Students ‘Face Racial Bias’ in School Discipline*, FORBES (Apr. 5, 2019), <https://www.forbes.com/sites/nickmorrison/2019/04/05/black-students-face-racial-bias-in-school-discipline/?sh=315e358636d5>, archived at <https://perma.cc/4ZAF-HETF>; Francis Pearman, *Anti-Blackness and the Way Forward for K-12 Schooling*, BROOKINGS INSTITUTE (July 1, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/07/01/anti-blackness-and-the-way-forward-for-k-12-schooling/>, archived at <https://perma.cc/9VPB-4Z3R>. There are many ways in which systemic racism has impacted the educational outcomes for Black children. For example, the higher portion of Black students who receive individualized education programs, for Black children with IEPs and/or special needs are less likely to graduate. See, e.g., Emmanuel Felton, *Special Education’s Hidden Racial Gap Across the Country*, THE HECHINGER REPORT (Nov. 25, 2017), <https://hechingerreport.org/special-educations-hidden-racial-gap/>, archived at <https://perma.cc/6X2T-MTLM>. Further, Black children are overrepresented in the foster care system, and there is overlap between education in foster care and the school to prison pipeline.

<sup>147</sup> Hani Morgan, *Misunderstood and Mistreated: Students of Color in Special Education*, 3 VOICES OF REFORM: EDUC. RSCH. TO INFORM & REFORM 72, 72-81 (2020).

<sup>148</sup> Brett Andrews, *Black Kids More Likely to be Suspended than White Kids over Same Behavior*, NEW YORK POST (Oct. 6, 2019), <https://nypost.com/2019/10/16/black-kids-more-likely-to-be-suspended-than-white-kids-over-same-behavior/>, archived at <https://perma.cc/TYJ5-GS6J>.

<sup>149</sup> Jinghong Cai, *Black Students in the Condition of Education 2020*, NATIONAL SCHOOL BOARDS ASS’N (NSBA) (June 23, 2020), <https://www.nsba.org/Perspectives/2020/black-students-condition-education>, archived at <https://perma.cc/HTH8-GCKA>. It is unclear whether the COVID pandemic has further exacerbated these figures.

<sup>150</sup> *Id.*

<sup>151</sup> High-poverty schools are defined as public schools where more than 75% of the students are eligible for a free or reduced-price lunch. See Nat’l Ctr. for Educ. Stat, *Concentration of Public Students Eligible for Free or Reduced Price-Lunch*, CONDITION OF EDUC. 2020 (2020) (defining low-poverty, mid-low, mid-high and high poverty schools); Cai, *supra* note 149. In addition, only 7% of Black students attended low-poverty schools compared with 39% Asian and 31% white students. *Id.*

resources such as individual computers, guidance counselors, and teacher helpers.<sup>152</sup> In addition, while the school dropout rate has decreased nationwide, Black students still have a higher dropout rate than white students, with 6.4% dropping out prior to completing high school, in comparison to 4.2% of their white counterparts.<sup>153</sup> Twenty-two percent of Black students aged 18 to 24 were neither enrolled in school nor working, much higher than the 14% average for all U.S. 18 to 24 year old young adults.<sup>154</sup> Graduation rates remain lower for Black students than the nationwide average, at 79% vs. 85%.<sup>155</sup>

As a result of these disparities, Black college students are less likely to enroll in college immediately following high school than any of their racial counterparts.<sup>156</sup> Compounding this issue is the dramatic increase of the average cost of college tuition in the last twenty years.<sup>157</sup> In addition to high tuition prices, the costs for housing, food, transportation, books, and other school related expenses have also increased, putting an even greater financial burden on college students.<sup>158</sup> The average tuition and fees at private universities have jumped 144%, out of state tuition and fees at public universities have risen 171%, and most dramatically in-state tuition and fees at public universities have grown an astounding 211%.<sup>159</sup>

The lack of educational equity for Black students in K-12 education, coupled with the exorbitant costs and subsequent financial burden of college education, creates significant roadblocks for young Black students looking to access college. College athletics can be seen as an opportunity to access university education that otherwise seems unavailable.<sup>160</sup> However, the odds are against Black students. Only 7.5% of students who play high school football will play football at any level in college.<sup>161</sup> Only 2.9% of those will

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<sup>152</sup> Cai *supra* note 149.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> See V. IRWIN, J. ZHANG, X. WANG, S. HEIN, K. WANG, A. ROBERTS, C. YORK, A. BARMER, F. BULLOCK MANN, R. DILIG, & S. PARKER, REPORT ON THE CONDITION OF EDUCATION 2021, INSTITUTE OF EDUCATION SCIENCES 23 (2021). Only 60% of Black high school graduates, slightly less than 2019, enrolled in college immediately following high school, compared to approximately 70% of white high school graduates; 80% of Asian high school graduates and 65% of Latinx high school graduates. *Id.* This report does not include statistics on the enrollment rate of Native American or Indigenous students. *Id.*

<sup>157</sup> Briana Boyington, Emma Kerr, & Sarah Wood, *20 Years of Tuition Growth at National Universities*, U.S. NEWS (Sep. 17, 2021), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/2017-09-20/see-20-years-of-tuition-growth-at-national-universities>.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See generally Krystal K. Beamon, “Used Goods”: *Former African American College Student-Athletes’ Perception of Exploitation by Division I Universities*, 77J. NEGRO EDUC. 352 (2008) (examining how the emphasis on athletic performance of Black college students hamper their academic and occupational achievements).

<sup>161</sup> For example, out of 1,006,013 high school football players, only 73,712 will play football at the college level. NCAA Research, *Estimated Probability of Competing in College*

play for a Division I school.<sup>162</sup> Only 3.5% of students who play high school basketball will play basketball at any level in college.<sup>163</sup> Only 1.0% of those students will play for a Division I school.<sup>164</sup> According to data directly from the NCAA, only about 1% to 5% of high school athletes receive some form of a Division I athletic scholarship.<sup>165</sup> The rarity of these college sports scholarships, and the benefits they bestow, including access to free or discounted higher education due to athletic prowess, makes them highly competitive and can create an environment ripe for exploitation. Furthermore, it is important to note that fewer than 2% of NCAA student-athletes go on to become professional athletes.<sup>166</sup> As such, nearly all Black student athletes must depend on academics or capitalizing on their name, image, and likeness (NIL) to prepare them for life after college.

At best, college athletes of NCAA member colleges are severely limited to what they are compensated for, usually limited to the cost of tuition, room, board and fees.<sup>167</sup> Notwithstanding these benefits, most college athletes need additional financial support, which they are denied under the NCAA rules. Ultimately, the NCAA rules forbid student athletes from being compensated for their playing of sports and has historically denied that the right to capitalize on their NIL. This reality is particularly problematic for many Black athletes who come from under-privileged, impoverished families.

Traditionally, in order to play for an NCAA member school, a college athlete had to maintain their “amateur” status. According to the NCAA, an amateur is someone who “does not have a written or verbal agreement with an agent, has not profited above his/her actual and necessary expenses or gained a competitive advantage in his/her sport.”<sup>168</sup> Athletes who violate

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*Athletics* (Apr. 8, 2020), [https://ncaaorg.s3.amazonaws.com/research/pro\\_beyond/2020RES\\_ProbabilityBeyondHSFiguresMethod.pdf](https://ncaaorg.s3.amazonaws.com/research/pro_beyond/2020RES_ProbabilityBeyondHSFiguresMethod.pdf), archived at <https://perma.cc/LH83-Z3ST>.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* For example, out of 540,769 high school basketball players, only 18,816 will play basketball at the college level.

<sup>164</sup> *Id.*

<sup>165</sup> See NCAA, *Scholarships*, NCAA, <https://www.ncaa.org/sports/2014/10/6/scholarships.aspx>.

<sup>166</sup> See *NCAA Recruiting Facts* (Aug. 2014), <https://www.nfhs.org/media/886012/recruiting-fact-sheet-web.pdf>, archived at <https://perma.cc/EPR9-N7H9>; see also *Probability of Competing Beyond High School*, NCAA, <https://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school>, archived at <https://perma.cc/78YG-WYWE>; Tony Manfred, *Here Are the Odds That Your Kid Becomes a Professional Athlete (Hint: They're Small)*, Business Insider (Feb. 10, 2012), <https://www.businessinsider.com/odds-college-athletes-become-professionals-2012-2>, archived at <https://perma.cc/954F-EEE9>.

<sup>167</sup> See generally David J. Berri, *Paying NCAA Athletes*, 26 MARQ. SPORTS L. REV. 479 (2016) (discussing the economics surrounding why schools decided to limit compensation for student athletes, how it impacts the competitiveness of college sports, and the estimated free market labor cost for student athletes); Sarah Lytal, Comment, *Ending the Amateurism Façade: Pay College Athletes*, HOUSTON L. REV. 158 (2019) (discussing the current litigation against the NCAA, as well as an examination of the employee treatment of athletes).

<sup>168</sup> *What is Amateurism? And why Does the NCAA Care About it?*, BREAKOUT SPORTS (Jan. 29, 2019), <https://breakoutsports.net/2019/01/29/what-is-amateurism-and-why-does-the-ncaa-care-about-it/>, archived at <https://perma.cc/M9Y4-RQHQ>.

their amateur status could be penalized by a fine, blocked from games, and denied NCAA eligibility. *Any* profit for their athletic talent or achievements, whether it is a high value promotional deal, or \$25 from a hometown basketball tournament, is seen as a violation of amateur status and subject to penalty.

College athletes who violate the antiquated NCAA amateurism rules regarding financial compensation face being slapped with egregious fines or punishments. Further, athletes who violate the amateurism rules on financial gain and profit are often forced to pay more money in fines based on the NCAA's discretion. Why such a punitive response to protect a rule that promotes amateurism in college sports while college coaches are being paid exorbitant professional level salaries? Why are the NCAA and its members so set on punishing college students when the infraction is so relatively insignificant? For example, in November 2019, freshman basketball player James Wiseman was forced to sit out twelve games and donate \$11,500 to a charity of his choice, based on recruiting inducements his family received before he enrolled at the University of Memphis and for competing in three games while he was ineligible.<sup>169</sup> The recruiting inducement at issue: Mr. Wiseman's mother accepted \$11,500 in moving expenses from Memphis coach Penny Hardaway. The interaction occurred in the summer of 2017, when Hardaway was a high school coach who wanted Wiseman's family to move from Nashville to Memphis so he could play for the team there.<sup>170</sup>

Despite the financial restrictions noted above, college athletes on scholarships need only retain amateur status when playing the sport for which they were recruited. For example, Kyle Parker, a white football player for Clemson University, was considered an amateur for football, which he received a scholarship for, but a "pro" for baseball, for which he received a \$1.4 million dollar signing bonus in 2010.<sup>171</sup> Additionally, the NCAA carved out an exception in its amateurism rules for Olympians, even if they were competing in the Olympics in the same sport for which they received a college scholarship. For example, the NCAA allowed a white swimmer, Joseph Schooling, to keep his scholarship and a \$740,000 bonus for winning a gold medal at the 2016 Olympics.<sup>172</sup> This lack of uniformity in what it truly means to be an "amateur" creates a patchwork system with rules that largely excludes college athletes from earning any sort of income from their image and labor.

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<sup>169</sup> Ben Pickmannov, *Memphis' James Wiseman Ruled Ineligible by NCAA, Plays Anyway After Court Order*, SI.COM, <https://www.si.com/college/2019/11/08/james-wiseman-memphis-ineligible-ncaa>, archived at <https://perma.cc/QT3L-PA55>.

<sup>170</sup> *Id.*

<sup>171</sup> Robert Litan, *What's in a Name?*, MILKEN INST. REV. (Oct. 28, 2019), <https://www.milkenreview.org/articles/the-ncaas-amateurism-rules>, archived at <https://perma.cc/9HZY-FH27>.

<sup>172</sup> *Id.*

As discussed earlier, the false narrative of Black people as property was built upon the historical complimentary paradigms of the American Dream of white men, namely the (1) private property paradigm; (2) the American enslavement paradigm; and the (3) white male superiority paradigm. These paradigms allowed for, and condoned, the narrative of Blackness as white property. How does this historical practice relate to the NCAA and their traditional treatment and practice towards college athletes today? While not a perfect paradigm match, the NCAA's practice towards college athletes, specifically towards young Black male athletes, mirror's the antebellum practice of Blackness as white property. Through the practice of complimentary paradigms, the NCAA is allowed to make significant amounts of money off the labor and the NIL of young college athletes—with a particularly exploitative lens to the property rights of young Black men. This is done by (1) creating a false narrative that playing NCAA-sponsored sports is a meaningful alternative to college life that is focused on personal, academic, and occupational development; (2) creating a power dynamic where these same athletes are then forced to relinquish their labor and NIL capital to the NCAA and its members' institutions; and (3) the largely white collegiate coaching team and university administration are allowed to reap the profit. Hence, the NCAA rules and inequitable treatment of young Black men is an obvious example of systemic racism.

### B. *Unconscious Racism*

The NCAA's enterprise was sharply criticized by the Supreme Court, which documented in *NCAA v. Alston* how the NCAA and its members are exploiting its players, particularly Black men.<sup>173</sup> While the Court did an outstanding job of detailing the nature of the exploitation, the Court fell short by not providing a sufficient remedy and by not identifying how the exploitation, which is arguably governmental, violates the constitutional rights of Black players. This section posits that in failing to do so, the Court is perpetuating the legally-sanctioned prohibition of Black men's property rights, which is a continuation of the Blackness as state property paradigm.

In *NCAA v. Alston*, the Court unanimously affirmed the Ninth Circuit decision finding that the NCAA's restrictions on "non-cash education-related benefits" violated antitrust law under the Sherman Act.<sup>174</sup> Perhaps more 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.<sup>175</sup> The Court highlighted that the profitability of this sports-driven enterprise relies on "amateur" student-athletes competing under rules that

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<sup>173</sup> *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

<sup>174</sup> *Id.* at 2154, 2166.

<sup>175</sup> *Id.* at 2144.

restrict how the schools may compensate them for their play.<sup>176</sup> This observation is consistent with the claims brought in this case by former student-athletes that the NCAA's amateurism rules depress compensation for at least some student athletes below what a competitive market would yield.<sup>177</sup>

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 be given special leeway under antitrust law.<sup>178</sup> On this, the Court disagreed, stating that college sports is a trade and, therefore, cannot unduly restrain athletes from the marketplace.<sup>179</sup> 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.<sup>180</sup> Unfortunately, and perhaps illogically, the Court failed to rule on the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance.<sup>181</sup> 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 or to create rules on their applicability, leaving the restrictions on amateur status partially disturbed.<sup>182</sup>

While recognizing the benefits that the NCAA and its members bestow on its athletes, the Court in *Alston* noted that the NCAA has become a "sprawling enterprise" and "a massive business."<sup>183</sup> The Court documented the obvious inequities in compensation between what the leadership of the NCAA receive, what some members schools receive, and what some coaches receive, as compared to what the athletes receive.<sup>184</sup> This includes the fact that the president of the NCAA earns nearly \$4 million per year, its 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.<sup>185</sup>

As a nonprofit organization, the NCAA is making a fortune. In its fiscal year that ended on August 31, 2019, the NCAA, a private, nonprofit enter-

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<sup>176</sup> *Id.* at 2150–51.

<sup>177</sup> *Id.* at 2154.

<sup>178</sup> *Id.* at 2164–65.

<sup>179</sup> *Id.* at 2158, 2160, 2166.

<sup>180</sup> *Id.* at 2153–66.

<sup>181</sup> *NCAA v. Alston*, 141 S. Ct. 2141, 2166 (2021) (J. Kavanaugh concurring). ("But this case involves only a narrow subset of the NCAA's compensation rules—namely the rules restricting the education-related benefits that student athletes may receive, such as post-eligibility scholarships at graduate or vocational schools. The rest of the NCAA's compensation rules are not at issue here and therefore remain on the books.")

<sup>182</sup> *Id.*

<sup>183</sup> *Alston*, 141 S. Ct. at 2150.

<sup>184</sup> *Id.* at 2151. *Alston*, 141 S. Ct. at 2167 (J. Kavanaugh concurring).

<sup>185</sup> *Id.* at 2151.

prise, reported gross revenues of over \$1.1 billion dollars, with positive increase in net assets (profits) of \$70 million, and net assets of just under a half of a billion dollars.<sup>186</sup> 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.<sup>187</sup> It proudly reported that about 60 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.<sup>188</sup> At the same time over \$200 million or about 25 percent of its annual revenue went to “association-wide programs” (nearly \$150 million), “management and general (\$45 million), and outside legal fees (\$67.7 million).<sup>189</sup> Furthermore, the NCAA pays its top executives an outrageous salary compared to what the student athletes receive. For example, 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.<sup>190</sup>

Moreover, the NCAA is not the other beneficiary of the inequity in college sports. States and their college level educational institutions reap substantial financial benefits from their membership in the NCAA. For example, a state like California receives millions each and every year from the NCAA through its state-owned member colleges, as criticized by California's Governor Gavin Newsom, in supporting college athletes' rights.<sup>191</sup> He 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.”<sup>192</sup>

On the other end of the spectrum, college athletes of NCAA member colleges are severely limited to what they are compensated for, usually limited to the cost of tuition, room, board, and fees.<sup>193</sup> In the recent *Alston*

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<sup>186</sup> NCAA Consolidated Statement of Activities, August 31, 2020 and 2019, at 4 (2020), [https://ncaaorg.s3.amazonaws.com/ncaa/finance/2019-20NCAAFIN\\_FinancialStatement.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/finance/2019-20NCAAFIN_FinancialStatement.pdf), archived at <https://perma.cc/P2FW-SVN6>.

<sup>187</sup> NCAA, Finances, <https://www.ncaa.org/finances>, archived at <https://perma.cc/QA2P-ETW2>.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> See Steve Berkowitz, *NCAA President Mark Emmert Credited with \$2.9 Million in Total Pay for 2019 Calendar Year*, USA TODAY (Jul. 19, 2021, 4:25 PM), <https://www.usatoday.com/story/sports/college/2021/07/19/ncaa-mark-emmert-total-pay-2019/8015855002/>.

<sup>191</sup> McLaughlin, *supra* note 20.

<sup>192</sup> *Id.*

<sup>193</sup> See generally David J. Berri, *Paying NCAA Athletes*, 26 MARQ. SPORTS L. REV. 479 (2016), <http://scholarship.law.marquette.edu/sportslaw/vol26/iss2/11>, archived at <https://perma.cc/4VFB-VMB4>; Sarah Lytal, *Ending the Amateurism Façade: Pay College Athletes*, HOUS. L. REV. (Apr. 18, 2019), <https://houstonlawreview.org/article/7835-ending-the-amateurism-facade-pay-college-athletes>, archived at <https://perma.cc/T5G6-32WK>.



case,<sup>194</sup> these former college athletes argued that their compensation was grossly unfair, and that the NCAA is a monopoly with unfair competitive advantage.<sup>195</sup> Specifically, the players 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. Without those restraints, they argued that student-athletes would be compensated at a level more commensurate with their value to their universities, conferences, and the NCAA. This observation was echoed in Justice Kavanaugh's concurring opinion in *Alston*:

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. See Brief for African American Antitrust Lawyers as *Amici Curiae* 13–17.<sup>196</sup>

One scholarly analysis found that players are valued or worth millions to schools and the NCAA generally, but 86% of college athletes live below the poverty line, with many qualifying and receiving government Pell Grants.<sup>197</sup> In addition to devaluing their labor, the players claimed they were negatively impacted by the NCAA's prohibition on student athletes receiving funds from their name, image, and likeness.<sup>198</sup>

Yet, while it seems on the surface that *Alston* should be the case that helps to "solve" the inequities allowing for the NCAA to exploit young college athletes, and in particular, young Black male athletes, it only muddies the waters relative to players compensation. Rather than create a universal rule of law that student athletes have complete control of their NIL rights and the ability to use their own bargaining power to determine the fair price of their image and labor, the Supreme Court, to borrow football jargon, punted that decision to NCAA member schools.

The Court ruled that the NCAA may place no limits on "education-related" benefits to student athletes. Does that mean that student athletes can

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<sup>194</sup> *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

<sup>195</sup> *Supreme Court to Weigh in College Sports: The Intersection of Antitrust and "Amateurism,"* THE NATIONAL L. REV. (Dec. 18, 2020), <https://www.natlawreview.com/article/supreme-court-to-weigh-college-sports-intersection-antitrust-and-amateurism>, archived at <https://perma.cc/JET3-BTSU>.

<sup>196</sup> *NCAA v. Alston*, 141 S. Ct. 2141, 2168 (2021).

<sup>197</sup> 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/>, archived at <https://perma.cc/F3UC-P9FQ>.

<sup>198</sup> *Id.*

get payments for academic achievement without limitation? Consumer products related to education? What qualifies as “education related” and where do universities draw the line? If schools with more money are able to offer more significant education related benefits, will those benefits be the tipping point that causes a student athlete to choose one university over another? If young Black college athletes come from a lower socio-economic background, will they know the right things to ask for to leverage this court decision, while at the same time skirting any potential rule violations of the NCAA? What about those student athletes who lack the “savviness” for this type of maneuvering? While *Alston* is inarguably one of the largest sports law decisions of this generation, it leaves more questions than it provides answers. In particular, it fails to provide sufficient answers to the paradigms around NCAA exploitation of young Black men that created the environment in which the NCAA was allowed to become more and more profitable, at the expense of their athletes.

### C. Valuing Critical Race Theory

Some might contend that in a post-*Alston* world, the exploitative nature of the NCAA’s practices has been remedied. There is some support for this viewpoint. The *Alston* decision explicitly ruled that the NCAA may place no limits on educational related benefits to student athletes.<sup>199</sup> Going further, the NCAA adopted an interim name, image, and likeness policy which stated that all NCAA college athletes will have the opportunity to benefit from their name, image and likeness moving forward,<sup>200</sup> pursuant to some post-*Alston* state laws.<sup>201</sup> However, by viewing the decision in *Alston* through both the historical paradigms of antebellum and current paradigms around Blackness as white property, as applied both to the antebellum enslaved practice and NCAA exploitation of young Black men, it becomes apparent that more work needs to be done.

First, the decision in *Alston* creates inconsistencies across state lines when it pertains to the ability of young Black college athletes to profit off their NIL rights. What if a student athlete agreed to play for a school in a state that is planning to pass legislation that blocks their ability to profit off their NIL? Since they were recruited to this school pre-*Alston*, should they be penalized for subsequent court decisions that have allowed for uneven compensation to be dangled as a carrot in current recruiting practices?

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<sup>199</sup> *NCAA v. Alston*, 141 S. Ct. 2141 (2021) (affirming District Court and Ninth Circuit decision that found unlawful certain NCAA rules limiting the education-related benefits schools may make available to student athletes.).

<sup>200</sup> Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy>, archived at <https://perma.cc/XQ9K-V2HP>.

<sup>201</sup> See *Tracker*, *supra* note 15.

Second, *Alston* does nothing to remedy the situation that, even if young Black college athletes are able to profit off their NIL, the coaching and administrations they serve remain primarily white. Realistically, if this practice begins to siphon funds away from the NCAA member institutions and their predominantly white coaching staff, how long will it take for the NCAA to create new barriers and loopholes barring Black student athletes from accessing wealth? A lack of representation off the field is reflected in policies and practices that unfairly impact Black students and other students of color.

Third, the decision in *Alston* may seem like a huge win for young Black male athletes. Justice Kavanaugh's concurrence language is especially compelling, stating that:

[t]he NCAA acknowledges that it controls the market for college athletes. The NCAA concedes that its compensation rules set the price labor at a below-market rate. And the NCAA recognizes that student athletes currently have no meaningful ability to negotiation with the NCAA over the compensation rules. . . . But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America. . . . 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. . . . 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.<sup>202</sup>

Is this language compelling? Yes. Does it seem to signify a huge step forward by the Supreme Court to recognize the exploitative nature of college sports, in specific how they apply to young Black men? Sure. However, the exploitative and unequal impact of the exclusionary ability to make money while still maintaining "amateur" status is nothing new, for the debate over NCAA amateur status and its disproportionate impact on Black athletes has been happening for decades.<sup>203</sup> So the question remains, why this case? Why now?

To answer those questions, we turn to Critical Race Theory (CRT). Rooted in Derrick Bell's 1973 critique of America's failing political liberalism,<sup>204</sup> CRT has developed into a robust legal discipline that provides a

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<sup>202</sup> See *Alston*, 141 S. Ct. at 2169 (J. Kavanaugh concurring).

<sup>203</sup> For a detailed examination of the fight for pay for student athletes over the last twenty years, see, e.g., Kristen R. Muenzen, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS. L. REV. 257 (2003); Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>, archived at <https://perma.cc/AAP5-WC4Q>; Audrey C. Sheez, *Student-Athletes v. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. (2016).

<sup>204</sup> See generally DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* (6th ed. 2008) (addressing the reasons why race remains a key to America's economic, political and

counter narrative to systemic racism in our legal system.<sup>205</sup> CRT examines how the intersection of law and race challenges mainstream American liberal approaches to racial justice.<sup>206</sup> It views race, especially “Blackness,” as a socially constructed category that is used to oppress and exploit people of color, especially Black people.<sup>207</sup> Moreover, it views law from the perspective of the disenfranchised, adopting a normative approach that challenges doctrinal norms that promote majoritarian interests. It has six “basic tenets,” including that (1) race is socially constructed; (2) racism in the United States is the common, ordinary experience of most people of color; (3) resulting from “interest convergence” or “material determinism,” legal advances, or setbacks, for people of color tend to serve the interests of dominant white groups; (4) members of minority groups periodically undergo “differential racialization,” or the attribution to them of varying sets of negative stereotypes, again depending on the needs or interests of whites; (5) pursuant to the thesis of “intersectionality” or “anti-essentialism,” no individual can be adequately identified by membership in a single group; and (6) the “voice of color” thesis holds that people of color are uniquely qualified to speak on behalf of other members of their group(s) regarding the forms and effects of racism.<sup>208</sup> Furthermore, the movement has led to the growth of the “legal story telling” movement, which argues that the self-expressed views of victims of racism and other forms of oppression provide essential insight into the nature of the legal system.<sup>209</sup>

Anyone who turned on the television or read a news article over the last year has likely been inundated with the ongoing debate about the propriety of teaching CRT.<sup>210</sup> A growing number of “red” states have prohibited the teaching of Critical Race Theory in their public schools.<sup>211</sup> This is an attempt

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social functioning); *see also*, Bell, *supra* note 128 (positing that alleged improvements or advantages to people of color tend to serve the interests of dominant white groups, in what Bell calls “interest convergence”).

<sup>205</sup> *See generally* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw et al., eds., 1995).

<sup>206</sup> *See generally* RICHARD DELGADO & JEAN STEFANIC, CRITICAL RACE THEORY: AN INTRODUCTION (3d ed., 2017).

<sup>207</sup> *See, e.g., Blackness, supra* note 47 (providing a CRT-inspired legal history of Blackness was used as a tool of white exploitation, to justify the enslavement of people of African descent).

<sup>208</sup> *See* Delgado *supra* note 206, at 6-9.

<sup>209</sup> *Id.*

<sup>210</sup> *See* Phil McCausland, *Teaching Critical Race Theory Isn't Happening in Classrooms, Teachers Say in Survey*, NBC NEWS (July 1, 2021), <https://www.nbcnews.com/news/us-news/teaching-critical-race-theory-isn-t-happening-classrooms-teachers-say-n1272945>, *archived at* <https://perma.cc/78BX-EZ5Y> (survey conducted by Association of American Educators, a nonpartisan group of educators, showed that out of 1100 teachers surveyed more than 96% said their schools did not require them to teach CRT).

<sup>211</sup> *See* Julia Carrie Wong, *The ACLU on Fighting Critical Race Theory Bans: “It’s about our Country Reckoning with Racism,”* THE GUARDIAN (July 1, 2021), <http://www.theguardian.com/us-news/2021/jul/01/aclu-fights-state-bans-teaching-critical-race-theory>, *archived at* <https://perma.cc/A55P-QYMV> (reporting that Arkansas, Idaho, Iowa, Oklahoma, Tennessee and Texas have passed anti-CRT laws; Florida, Georgia and Utah have

to whitewash away our Nation's racial sins by banning the truth.<sup>212</sup> History teaches that such bans on freedom of thought are dangerous precursors to more insidious, overt assaults. For example, the Nazis' public burning of "un-German" books was a precursor to the Holocaust, which killed nearly one-third of world Jewry and about two-thirds of European Jewry, based on a pre-war figure of 9.7 million Jews in Europe.<sup>213</sup> Moreover, such a ban on freedom of thought cautions us against the government's overreaching into our individual liberties.

Critical Race Theory is a lens for viewing historical and present policy decisions and is *not* an attack on white people as individuals.<sup>214</sup> Rather, CRT seeks to demonstrate how United States' laws, regulations, rules, and procedures often harm Black people.<sup>215</sup> Using CRT as a lens for critical legal analysis allows policymakers to view policy decisions critically, in a thoughtful and comprehensive way. Had the Court in *Alston* employed CRT, it might have fashioned a constitutionally based remedy to redress the inequity in college sports that it so well documented, instead of simply taking judicial notice of it. Using CRT allows us to dig deeper into the real meaning of the decision in *Alston*. When viewed from the labor and property rights of young Black men, *Alston* shows how much financial benefit NCAA member schools have reaped through their athletic programs, primarily basketball and football.<sup>216</sup> As noted above, those programs disproportionately consist of young Black men, while their coaching staff remains primarily white.<sup>217</sup> As a result, the white men who are coaches, college administrators, and executives at the NCAA benefit handsomely from the labor and promotion of young Black men, robbing them of their labor and their NIL.

Hence, employing CRT as a lens to look at historical practice and legal precedent, it becomes obvious that the NCAA's practice of recruiting young Black men for physical labor and as sources of income generation for universities, with inadequate, unjust compensation, did not develop in a vac-

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passed resolutions; and in 2021, twenty-two states have introduced bills seeking to limit the teaching of CRT).

<sup>212</sup> See generally Lauren Michele Jackson, *The Void That Critical Race Theory Was Created to Fill*, THE NEW YORKER (July 27, 2021), <https://www.newyorker.com/culture/cultural-comment/the-void-that-critical-race-theory-was-created-to-fill>, archived at <https://perma.cc/SN3B-TJFH> (providing a history of CRT and how and why white supremacists are attacking it).

<sup>213</sup> See JACK R. FISCHER, THE HOLOCAUST 87 (1998); Yehuda Bauer & Robert Rozett, *Appendix 6: Estimated Losses in the Holocaust*, in ENCYCLOPEDIA OF THE HOLOCAUST 1797–1802 (Israel Gutman ed. 1990); see generally WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH (1960).

<sup>214</sup> Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS INSTITUTE (July 2, 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/>, archived at <https://perma.cc/7VEJ-UKXS>.

<sup>215</sup> *Id.*  
<sup>216</sup> See *Where Does the Money Go?*, NCAA, <https://www.ncaa.org/about/where-does-money-go>, archived at <https://perma.cc/7GPV-MLXJ>.

<sup>217</sup> See generally THE INSTITUTE FOR DIVERSITY AND ETHICS IN SPORT, *The Racial and Gender Report Card (RGPC) 2020*, <https://www.tidesport.org/racial-gender-report-card>, archived at <https://perma.cc/5VC3-RXAX>.

uum. Rather, it is just the latest iteration of young Black men's bodies and physicality being exploited for the financial gain of others—influential white men. Under the guise of “amateurism,” college athletes are forced to forfeit their rights to their name, image, and likeness, while the coaches, university administrators, and NCAA executives cash in big from the unpaid labor of the players. Moreover, the NCAA rules and how it benefits its member schools, particularly those that are owned and operated by a State is a contemporary version of government-supported exploitation of Black labor, which results in the unfair treatment of all NCAA athletes, regardless of race or economic background. Therefore, using a CRT lens, the *Alston* decision is an example of unconscious racism in the Court that, despite some acknowledgement of injustice, continues the framework where the NCAA and its members expropriate the labor and property rights of young Black athletes.

### CONCLUSION

This Article adopts the Critical Race Theory “interest convergence” principle, which stipulates that Black people achieve civil rights victories only when white and Black interests converge.<sup>218</sup> Viewing the decision in *Alston* through this lens allows us to see how the Court failed to redress the NCAA's exploitation of college students' labor and property rights, because ultimately, the interest of the NCAA's Black players do not coincide with the interest of influential white people. Unfortunately, while Justice Kavanaugh expressly recognized how NCAA athletes, particularly its Black players, are grossly under-compensated, neither he nor his fellow Justices felt the need to fashion a remedy for the injustice. This Article raises the disturbing question: why do the NCAA and its members believe it is right and just to exploit its players, by not compensating them in a manner that at the minimum lifts the most vulnerable player out of poverty? Can it be that some powerful white men are so greedy or insensitive to the needs of its most valued athletes not to share in the vast bounty of their enterprise? Or is it something more insidious—that powerful white men have a white male superiority complex that compels them to treat young Black men as the Southern, Antebellum laws treated biracial bastards, that is to deny them the inherent rights to acquire property and wealth?

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<sup>218</sup> Derrick A. Bell Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1056 (2005).