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What is Property?: A Libertarian Perspective of Name, Image, and Likeness

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Abstract

Intercollegiate college sports are rapidly changing, reflecting a new legal paradigm.[1] *Pursuant to this paradigm, college athletes are now allowed to monetize the commercial value of their names, images, and likenesses, commonly*

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[1] This Article is a companion to my articles that examine a person's rights to own and control the 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); Mitchell F. Crusto, *Game of Thrones: Liberty & Eminent Domain,* 76 U. Mia L. Rev. 653 (2022) (arguing that the prohibition of college athletes' capitalizing on their NIL is an unconstitutional taking); Mitchell F. Crusto, *Boycott the Games: Show Me the Money!,* 32 J. Legal Aspects Sport 153 (2022) (suggesting that the public should consider boycotting college sports to achieve the equitable treatment of college athletes); Mitchell F. Crusto, *Blackness as State Property: Valuing Critical Race Theory*, 57.2 Harv. C.R.-C.L. L. Rev. 578 (Fall 2022, officially published Feb. 1, 2023) (utilizing Critical Race Theory to explain how the American legal system has denied Black people, specifically young Black men, the right to acquire property). These articles are components of a broad project to critically analyze the constitutionality of the law's treatment of people and their attributes as property. *See generally* Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 Stan. J.C.R. & C.L. 51 (2005) (focusing on Black

referred to as NIL. Currently, the basis of NIL law is tort law, that is, the right of publicity. However, the right of publicity has limited transferability and severability which arguably impedes adding value of college athletes' NIL. Consequently, this article argues that NIL law would be better grounded in property law, which allows for alienation, severability, and licensing. Such a change would accelerate the paradigm shift by which college athletes share in the wealth of college sports. Notwithstanding, this article's importance goes beyond the rights of college athletes; the issue of whether NIL is property establishes a precedent for whether every person has a property interest in their NIL, capable of monetization and entitled to protection from exploitation.

This Article advances the thesis that NIL law should be based upon private property principles and features to maximize NIL benefits to college athletes. It develops that seminal, normative thesis through three tasks: (1) it analyzes and points out deficiencies in the current NIL law, (2) it proposes a model code solution that society, policymakers, and government should adopt to maximize college athletes' NIL benefits, and (3) it presents several justifications for why the model code is a great idea and defends against critics of the solution. Consequently, this Article concludes that all levels of government should adopt and enact legalization that establishes NIL as the private property of college athletes.

Introduction

> "*[E]very man has a 'property' in his own person: this no Body has any Right but to himself."*
>
> — *John Locke*[2]

> *"That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society."*
>
> — *Samuel D. Warren & Louis D. Brandeis*[3]

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women's struggle for property rights). Please note that some of the content of this Article has appeared in some of the companion articles.

[2] John Locke, Two Treatises of Government, 116 (Rod Hay ed., McMaster University 1823) (1690).

[3] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890).

Antitrust laws "should not be a cover for exploitation of the student athletes."

—Justice Brett Kavanaugh[4]

A. Players Can't Get Paid.

In 2019, Chase Young was the star football player for The Ohio State University Buckeyes.[5] During his junior season, Mr. Young broke the school's single-season sack record,[6] earned a unanimous First-Team All-American nomination,[7] and received yet another Defensive Player of the Year award.[8] However, in November 2019, Mr. Young was suspended from play "due to a possible NCAA[9] issue that the Department of Athletics [was] looking

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[4] Adam Liptak, *Supreme Court Seems Ready to Back Payments to Student-Athletes*, N.Y. Times (Apr. 4, 2021), https://www.nytimes.com/2021/03/31/us/supreme-court-ncaa.html [https://perma.cc/MJQ9-B66E].

[5] *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://perma.cc/V4GM-U52H] (last visited Feb. 24, 2022) (reporting several awful stories of the National Collegiate Athletic Association's ("NCAA") mistreatment of Black athletes, including Chase Young). Some of this section appears in my companion articles.

[6] Tom VanHaaren, *Chase Young Sets Buckeyes' Single-Season Sacks Record*, ESPN (Nov. 23, 2019), https://www.espn.com/college-football/story/_/id/28147511/chase-young-sets-buckeyes-single-season-sacks-record [https://perma.cc/7DXD-L64E].

[7] Wyatt Crosher, *Ohio State's Chase Young and Jeff Okudah Are Unanimous First-Team All-Americans*, Buckeye Sports Bull. (Dec. 19, 2019), https://www.buckeyesports.com/ohio-states-chase-young-and-jeff-okudah-are-unanimous-first-team-all-americans [https://perma.cc/K2ZS-CTS8].

[8] Among his many awards, Mr. Young was a finalist for the Heisman Trophy. *See, e.g.*, Teddy Greenstein, *Chase Young Is the 2019 Chicago Tribune Silver Football Winner*, Chi. Trib. (Dec. 6, 2019), https://www.chicagotribune.com/sports/college/ct-chase-young-ohio-state-silver-football-20191206-imh2o6cs45cpdbj5e7b7sla4zu-story.html [https://perma.cc/U5BN-P4D5].

[9] *See* National Collegiate Athletic Association, Encyc. Britannica (Nov. 15, 2024), https://www.britannica.com/topic/National-Collegiate-Athletic-Association [https://perma.cc/8LF4-GUZQ] (noting that the NCAA is an organization formed in 1906 that regulates college athletics of its member schools); *see also What Is the NCAA?*, NCAA, https://www.ncaa.org/sports/2021/2/16/overview.aspx [https://perma.cc/K7TL-YCDT] (last visited June 20, 2024) (reporting that the NCAA was composed of "[m]ore than 500,000 college athletes across all three divisions" who "compete for about 1,100 member schools in all 50 states, the District of Columbia, Puerto Rico and even Canada . . . student-athletes strive to end each season at one of the NCAA's 90 championships in 24 sports").

into."[10] It was later reported that in 2018, Mr. Young had borrowed money from a family friend to purchase an airline ticket for his girlfriend to attend the prestigious Rose Bowl in Pasadena, California.[11] By the time Mr. Young was suspended in November 2019, he had already repaid the loan.[12] Despite this, the NCAA claimed that by taking the loan, Mr. Young had violated the NCAA amateurism rules[13] (hereinafter "rules") and ultimately suspended him for two games, which likely caused him to lose his bid for the highly-coveted Heisman trophy.[14] Mr. Young's misfortune illustrates how many college athletes were negatively impacted by the NCAA's extreme enforcement of its amateurism rules. Another notable, related travesty involved the USC star running back Reggie Bush, who, in 2010, was stripped of his 2005 Heisman Trophy following allegations that his family had accepted cash and living arrangements from a sports agent.[15] On April 24, 2024, following years of legal actions by Bush to clear his name, the Heisman Trust reinstated Reggie Bush's 2005 Heisman Trophy.[16]

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[10] Diamaris Martino, *Ohio State's Star Football Player Suspended for Accepting Loan*, CNBC (Nov. 8, 2019), https://www.cnbc.com/2019/11/08/ohiostates-star-football-player-suspended-for-accepting-loan.html [https://perma.cc/G5JE-HY2C] (reporting on a statement made by Ohio State's Associate Athletics Director).

[11] 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 [https://perma.cc/P6R3-7GWV].

[12] *Id.*

[13] "Amateurism rules" or "eligibility rules" herein refers to the body of NCAA rules under which, *inter alia*, its college athletes were prohibited from receiving funds of any kind related to their play other than scholarships that cover the costs of attending school.

[14] *See* Bruce Hooley, *Ohio State's Justin Fields, Chase Young 3-4 in Heisman Voting*, Sports Illustrated (Dec. 14, 2019), https://www.si.com/college/ohiostate/football/ohio-states-chase-young-justin-fields-watch-burrow-win-heisman [https://perma.cc/EG6N-PYKW] (reporting that Young lost the Heisman bid to Joe Burrow).

[15] *See* Shehan Jeyarajah, *How Did Reggie Bush Lose his Heisman Trophy? Answering Key Questions with Ex-USC Star Back Among Award Winners*, CBS Sports (Apr. 24, 2024), https://www.cbssports.com/college-football/news/how-did-reggie-bush-lose-his-heisman-trophy-answering-key-questions-with-ex-usc-star-back-among-award-winners/ [https://perma.cc/LFF6-H4K9].

[16] *See* David Cobb, *Reggie Bush's 2005 Heisman Trophy Reinstated as Former USC Trojans Star Wins Long Battle*, CBS Sports (Apr. 24, 2024), https://www.cbssports.com/college-football/news/reggie-bushs-2005-heisman-trophy-reinstated-as-former-usc-trojans-star-wins-long-battle/ [https://perma.cc/TK89-JBF6].

It is essential to place Mr. Young's narrative within the context of the NCAA's amateurism rules.[17] At the time of Mr. Young's alleged violation, under the relevant rules,[18] the NCAA and particularly its member schools, including The Ohio State University, prohibited athletes like Mr. Young from capitalizing on their name, image, and likeness, commonly referred to as NIL.[19] Furthermore, to maintain their amateur status, a student athlete was strictly forbidden from receiving funds or support from sources outside of NCAA member schools. By limiting student compensation and restricting their rights to their NIL, the NCAA and its member schools profit substantially from the billions of dollars from their sports programs, mainly in the form of advertising and television media.[20] Notwithstanding the NCAA's prohibition against NIL deals, Mr. Young, an award-winning player, would

[17] *See infra* note 89.

[18] *See* NCAA Division I Manual 64–77 (NCAA, 1998) (setting forth the amateurism and athletics eligibility requirements including: (1) Athletes will lose their amateur status and become ineligible for NCAA play if he or she is compensated for his or her athletic skills in that sport; (2) an NCAA member institution or affiliate is permitted to use the physical appearance, name, and pictures of a student-athlete for both charitable and educational purposes; (3) *a student-athlete will lose his or her ability to participate in NCAA sporting events if he or she either accepts or received payment through commercial advertisement, promotion, or endorsement*)(emphasis added).

[19] "Name, image, and likeness or NIL" herein is defined as laws and regulations relating to college athletes' right to benefit financially from the use of their name. *See generally*, Greg Daugherty, *What is NIL? Understanding Name, Image, and Likeness Rules*, Investopedia (May 29, 2024), https://www.investopedia.com/name-image-likeness-8558991 [https://perma.cc/TWY8-Q3MZ] ("What, exactly, did the NCAA mean by 'name, image, and likeness'? While the use of an athlete's name would seem straightforward, the distinction between 'image' and 'likeness' is less obvious. To help differentiate it from 'image'—as in a photograph or recognizable drawing of a particular athlete—USA Volleyball, that sport's governing body, describes 'likeness' as 'your 'semblance.' It elaborates: 'Think the outline of Michael Jordan on the Jordan brand. Arnold Palmer's signature on Arizona Iced Tea. Think EA Sports' popular and profitable video games that depicted former NCAA athletes by using their height, body type, number, and playing style—but never their name or exact image.'" (quoting Michelle Meyer, *An Overview of Name, Image, and Likeness in College Sports*, USA Volleyball, https://usavolleyball.org/resource/an-overview-of-name-image-and-likeness-in-college-sports/ [https://perma.cc/3N7K-8YC3])); Cole Claybourn, *Name, Image, Likeness: What College Athletes Should Know About NCAA Rules*, US World & News (Feb. 8, 2024), https://www.usnews.com/education/best-colleges/articles/name-image-likeness-what-college-athletes-should-know-about-ncaa-rules [https://perma.cc/N7CC-AHP4].

[20] *See* NCAA v. Alston, 141 S. Ct. 2141, 2150 (2021) (noting how college sports has become a huge economic enterprise).

have likely earned millions of dollars per year in advertising and promotional deals, more than enough to purchase tickets for his friends or family to see him play at the Rose Bowl.

In addition to being denied their NIL rights, the NCAA prohibited its member schools from compensating their athletes for their play, restricting benefits to scholarships. These restrictions meant that athletes, particularly those from economically disadvantaged backgrounds, lacked financial resources to meet their basic needs and faced food insecurity when school cafeterias closed.[21] In fact, tuition shortfalls amount to thousands of dollars per year with eighty-six percent of NCAA college athletes living below the poverty line. They are usually required to live on campus, attend offseason workouts, and travel to games all over the country.[22] These financial pressures, in addition to having to meet both academic as well as athletic challenges, place a tremendous emotional and psychological strain on college athletes,[23] especially African-American young men with disadvantaged backgrounds.[24] The NCAA and its member schools have received substantial financial

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[21] Armstrong Williams, *Time to Pay College Athletes*, NEWSMAX (Apr. 9, 2014), https://www.newsmax.com/ArmstrongWilliams/NCAA-college-athletes-nlrb/2014/04/09/id/564508/ [https://perma.cc/VY9E-XWND].

[22] *See Paying College Athletes—Top 3 Pros and Cons*, PROCON (Jan. 21, 2022), https://www.procon.org/headlines/paying-college-athletes-top-3-pros-and-cons/ [https://perma.cc/RH8C-YLXR] ("Erin McGeoy, a former water polo athlete at George Washington University, explained, 'a common occurrence was that we would run out of meal money halfway through the semester and that's when I started to run into troubles of food insecurity.'").

[23] "College athletes" herein refers to student athletes who participate in intercollegiate competitions. This term includes both NCAA players as well as players who are not governed by the NCAA. Further, this term includes high school athletes as many of them operate pursuant to State NIL law and NCAA rules. Often, States have established separate, similar NIL laws pertaining to high school athletes' NIL rights. *See* Greg Daugherty, *What is NIL? Understanding Name, Image, and Likeness Rules*, Investopedia (May 29, 2024), https://www.investopedia.com/name-image-likeness-8558991 [https://perma.cc/LA6V-VJRU] (noting that "as of October 2023, at least 30 states and the District of Columbia had such laws on the books" (citing *Tracker: High School NIL*, Bus. of Coll. Sports, https://businessofcollegesports.com/high-school-nil/ [https://perma.cc/69WC-FY29])).

[24] *See generally*, *State Property*, *supra* note 1. Some commentators have likened the NCAA's exploitation of its players to the enslavement of Black people or of Black labor during the era of Jim Crow. *See, e.g.,* Brandi Collins-Dexter, *NCAA's Amateurism Rule Exploits Black Athletes as Slave Labor*, ANDSCAPE (Mar. 27, 2018), https://andscape.com/features/ncaas-amateurism-rule-exploits-black-athletes-as-slave-labor/ [https://perma.cc/7YDV-6KSC]; Brando Simeo Starkey, *College Sports Aren't like Slavery. They're like Jim Crow*, THE NEW REPUBLIC (Oct. 31, 2014), https://

benefits from prohibiting their players from being compensated.[25] In fact, one study shows that NCAA college football stars could earn as much as $2.4 million per year if they were paid equitably for the financial benefits that they bring to the NCAA and its member colleges.[26]

Fortunately, following several landmark cases, state law amendments, and the NCAA's reformation of its rules,[27] college athletes are now entitled to benefit from their NIL. These changes in college athletes' right to benefit from their NIL are revolutionary. However, the NIL law presents a quintessential jurisprudential question: Does existing NIL law optimize the monetization of college athletes' NIL? This Article tackles that question by analyzing how the current NIL law, which is based on the tort of the right of publicity,[28] is a

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newrepublic.com/article/120071/ncaa-college-sports-arent-slavery-theyre-jim-crow [https://perma.cc/V9N7-647T].

[25] *See* Eliott C. McLaughlin, *California Wants its College Athletes to Get Paid, but the NCAA Is Likely to Put Up Hurdles*, CNN (Oct. 2, 2019), https://edition.cnn.com/2019/10/01/us/california-sb206-ncaa-fair-pay-to-play-act/index.html [https://perma.cc/8HAY-3RCY] ("With the signing of California's Fair Pay to Play Act, Gov. Gavin Newsom … says the law is about rebalancing a power structure in which NCAA universities receive more than $14 billion annually and the nonprofit NCAA receives more than $1 billion, 'while the actual product, the folks that are putting their lives on the line, putting everyone on the line, are getting nothing.'").

[26] *See* Tom Huddleston Jr., *College Football Stars Could Be Earning as Much as $2.4 Million Per Year, Based on NCAA Revenues: Study*, CNBC (Sept. 2, 2020), https://www.cnbc.com/2020/09/02/howmuch-college-athletes-could-be-earning-study.html [https://perma.cc/EHD6-XYLZ]; Tommy Beer, *NCAA Athletes Could Make $2 Million a Year if Paid Equitably, Study Suggests*, FORBES (Sep. 1, 2020), https://www.forbes.com/sites/tommybeer/2020/09/01/ncaa-athletes-could-make-2-million-a-year-if-paid-equitably-study-suggests/ [https://perma.cc/85UX-QLZT]; AJ Maestas & Jason Belzer, *How Much Is NIL Worth to Student Athletes?*, Athletic Director U, https://athleticdirectoru.com/articles/how-much-is-nil-really-worth-to-student-athletes/ [https://perma.cc/4CDA-PA6U] (last visited Feb. 26, 2022) ("[F]rom a licensing standpoint, the annual NIL value per student-athlete could range from $1,000–$10,000, whereas professional athletes garner between $50,000–$400,000 for the same group usage licenses . . . . When applied to Instagram followers for college athletes from the 2019-2020 school year, annual endorsement revenue estimates would be $700,000 for LSU's Joe Burrow, $440,000 for Alabama's Tua Tagovailoa, $390,000 for Oklahoma's Jalen Hurts, and in the $5–30K range for less popular athletes.").

[27] *See College Athlete Name, Image, and Likeness Rights Under the Law: 50-State Survey*, Justia (Oct. 2022), https://www.justia.com/sports-law/college-athlete-name-image-and-likeness-rights-50-state-survey/ [https://perma.cc/GDT4-JVVA].

[28] "Right of publicity" herein refers to a right of that prevents the unauthorized commercial use of an individual's name, likeness, or other recognizable aspects of one's persona. *See infra* Part I; Legal Information Institute, *Publicity*, Cornell L.

flawed approach to facilitating benefits for college athletes. Notwithstanding, this Article's importance goes beyond the rights of college athletes. It raises the possibility that every person, not just college athletes, has a property interest in their NIL.

B. Conundrum

Bronny James, Caitlin Clark, Arch Manning, Livvy Dunne, and many other well-known[29] and lesser-known college athletes are now benefitting from a paradigm shift in the continued struggle for the rights of college athletes.[30] That paradigm shift results from the combination of a series of major court decisions,[31] changes in various state laws,[32] and reformation of the NCAA rules.[33] Today, college athletes are permitted to monetize the use of

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Sch., https://www.law.cornell.edu/wex/publicity [https://perma.cc/F88X-U5UC] ("The state common and statutory law generally protects the right to publicity in the United States. However, not all states recognize the right to publicity. Only about 50% of all states recognize the distinct right to publicity. For the other half of the states, the majority of them recognize the right to publicity under the right of privacy."); *see generally* J. Thomas McCarthy, The Rights of Publicity and Privacy (2005). The Restatement Second of Torts recognizes four types of invasions of privacy: intrusion, appropriation of name or likeness, unreasonable publicity, and false light. *See* Restatement (Second) of Torts §§ 652A –652I (Am. L. Inst. 1977). Under the Restatement's formulation, the invasion of the right of publicity is most like the unauthorized appropriation of one's name or likeness. *See* Restatement (Second) of Torts § 652C cmts. a, b, illus. 1, 2 (Am. L. Inst. 1977).

[29] Sean Labar, *Top 10 NIL Earners Include Bryce Young, Olivia Dunne and Three High School Ballers Making Absurd Money*, OutKick (Jan. 5, 2023), https://www.outkick.com/10-most-valuable-nil-athletes-bryce-young-livvy-dunne-bronny-james/ [https://perma.cc/SC2M-HXV7]; *NIL Valuations & Rankings*, On3, https://www.on3.com/nil/rankings/ [https://perma.cc/FV65-P7YD] (last visited Jun. 20, 2024).

[30] *See* Derek Silva, Nathan Kalman-Lamb, & Johanna Mellis, *Beyond NIL: 5 Areas Where the Fight for College Athletes' Rights Continues,* Global Sports Matters (Dec. 14, 2021), https://globalsportmatters.com/culture/2021/12/14/beyond-nil-five-areas-fight-college-athletes-rights/ [https://perma.cc/H5K9-G24R].

[31] *See* NCAA v. Alston, 141 S. Ct. 2141 (2021) (holding that the NCAA benefits were too restrictive and that the NCAA is not entitled to protection against antitrust laws); O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied,* 137 S. Ct. 277 (2016) (class action against the NCAA's restrictions on past and present players' compensation including the use of their NIL).

[32] *See infra* note 136.

[33] Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA Media Center (Jun. 30, 2021); https://www.ncaa.org/news/2021/6/30/

their NIL.[34] Further, in May of 2024, in the antitrust class action *House v. NCAA*, the NCAA agreed to nearly $2.8 billion to current and former college athletes to compensate them for alleged price fixing of the athletes' NIL.[35]

The legal battle over NIL rights is principally being fought on the battlefield of college campuses, with college athletes on the frontlines.[36] However, the legal nature of NIL is of timely concern for many reasons beyond

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ncaa-adopts-interim-name-image-and-likeness-policy.aspx [https://perma.cc/KKV2-QJBV]; *Name, Image and Likeness Policy Question and Answer*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/July2022NIL_DIInterimPolicy.pdf [https://perma.cc/3LDH-VJDT]. In May 2022, the NCAA released guidance regarding collectives, which are separate third-party businesses typically formed by boosters or fans of a specific school to create and support NIL opportunities for the school's athletes, such as public appearances, autograph signings and brand deals, stating that they would be considered "boosters" and are not permitted to be involved in recruiting college athletes. Claybourn, *supra* note 19. On June 27, 2023, the NCAA published an NIL Update Memo providing answers to frequently asked questions when applicable state NIL laws conflict. E-mail from NCAA to NCAA Division I athletics directors, conference commissioners, presidents and chancellors, and administrators, available online at https://mc97gsxn49y6wmpf4p2n764zq7z1.pub.sfmc-content.com/2ezhy1105pc [https://perma.cc/YYQ8-YBSS] (last visited Nov. 16, 2024); *see* Erin Walsh, *NCAA Says Schools Must Adhere to NIL Rules Regardless of Conflict with State Laws*, Bleacher Report (Jun. 27, 2023), https://bleacherreport.com/articles/10080849-ncaa-says-schools-must-adhere-to-nil-rules-regardless-of-conflict-with-state-laws [https://perma.cc/3YRY-9NQ4]; *Name, Image, Likeness*, NCSA Sports, https://www.ncsasports.org/name-image-likeness [https://perma.cc/SUS2-JMEJ] (last visited June 11, 2024). The NCAA does not permit schools to offer student athletes signing bonuses, ongoing compensation, or other financial incentives to attend, nor does it allow students to get paid to play in any capacity.

[34] *See infra* note 136138.

[35] House v. NCAA, 545 F. Supp. 3d 804 (2021) (*In re* College Athlete NIL Litigation). The Plaintiffs alleged that the NCAA and conferences engaged in an "overarching conspiracy" to (a) "fix the amount that student-athletes may be paid for licensing, use, and sale of their names, images, and likeness—at zero; and (b) foreclose student-athletes from the market for licensing, use, and sale of their names, images, and likenesses entirely." Complaint at 7, Class Action Complaint, House v. NCAA, No. 4:20-cv-03919 (N.D. Cal. Jun. 15, 2020), ECF No. 1 available at https://www.courtlistener.com/docket/17248915/1/in-re-college-athlete-nil-litigation/ [https://perma.cc/J7DB-2S2V]; *see* Steve Berkowitz, *NCAA Lawsuit Settlement Agreement Allowing Revenue Sharing with Athletes Faces Unresolved Questions*, Usa Today (May 25, 2024), https://www.usatoday.com/story/sports/college/2024/05/25/ncaa-lawsuit-settlement-revenue-sharing-legal-questions/73843373007/ [https://perma.cc/RS77-CJDJ].

[36] *See* NCAA v. Alston, 141 S. Ct. 2141 (2021).

the debate over the rights and compensation of college athletes.[37] NIL law, or the lack thereof, involves the proliferation of social media platforms,[38] as well as the expansion of artificial intelligence ("AI")[39] and the development of the metaverse.[40] Consequently, NIL law should be in everyone's interest, particularly social influencers and celebrities, as NIL rights arguably belong to everyone, not just college athletes.[41]

Despite societal developments that require the protection of NIL and the opportunity to increase personal wealth and the wealth of the nation, NIL law is in its infancy. First and foremost, no federal or state law provides that every person has the legally-protected right to monetize their NIL and to protect it from exploitation.[42] Second, in states that have enacted NIL laws, they have been mainly limited to college athletes.[43] Third, where NIL

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[37] *See infra* note 97.

[38] *See* Nelson Granados, *The Sports Agent of the NIL Era: A Social Media Savvy Life Coach*, Forbes (May 23, 2023), https://www.forbes.com/sites/nelsongranados/2023/05/23/the-sports-agent-of-the-nil-era-a-social-media-savvy-life-coach/amp/ [https://perma.cc/9FCV-55H3]; *NIL x Social Media*, Student-Athlete Insights (Oct. 9, 2022), https://studentathleteinsights.com/blog/name-image-likeness-nil-insider-14 [https://perma.cc/DS77-CJ7U] ("Although brands are continuing to expand how they are activating student-athletes, social media remains the main tactic in nearly 80% of NIL partnerships.").

[39] *See* Sharoni S. Finkelstein & Alexandra L. Kolsky, *Artificial Intelligence Wants Your Name, Image, and Likeness—Especially if You're a Celebrity*, Venable LLC (May 17, 2023), https://www.venable.com/insights/publications/2023/05/artificial-intelligence-wants-your-name-image [https://perma.cc/YE4F-Y49M].

[40] "Metaverse" herein refers to persistent virtual worlds as well as augmented reality that combines aspects of the digital and physical world. *See* Eric Ravenscraft, *What Is the Metaverse, Exactly?*, Wired (Jun. 15, 2023), https://www.wired.com/story/what-is-the-metaverse/ [perma.cc/9VJW-FLD4].

[41] Crusto, *Right of Self*, *supra* note 1. These unexplored attributes of persona have legal aspects that have been widely undeveloped by our legal system. *See, e.g.,* Shaw Fam. Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 314 (S.D.N.Y. 2007) (stating that neither New York nor California recognized a right of publicity applicable to a decedent); Michael Decker, *Goodbye, Norma Jean: Marilyn Monroe and the Right of Publicity's Transformation at Death*, 27 Cardozo Arts & Ent. L. J. 243, 252 n.69, 253–54 n.77 (2009) (noting that many states now have common law and/or statutory rights of publicity that apply postmortem).

[42] *See* Drew Butler, *Comparing State NIL Laws and Proposed Legislation*, Icon Source (July 2022), https://iconsource.com/blog/nil-laws-comparison/ [https://perma.cc/J9KV-AEVX].

[43] *Id.* In fact, many States have enacted neither a right of publicity law nor a NIL law, including laws that specifically benefit college athletes. Mark Farbman, *States That Do Not Have Right of Publicity Statute NIL nor State Common Law Right*, LinkedIn (Jan. 20, 2024), https://www.linkedin.com/pulse/

laws have been enacted, they are founded on the right of publicity and equal protection.[44]

This Article seeks to establish a strong jurisprudential foundation for the development of NIL law. It does so by critiquing the deficiencies of the tortious right of publicity and positing that property law[45] offers a better jurisprudential basis for NIL law.[46] To assess the best basis for NIL law, I believe that NIL should achieve two related societal and economic goals: (1) maximizing the value of NIL and the wealth of the person who is entitled to NIL rights and (2) protecting NIL from exploitation. I coin these as the "NIL value proposition" ("NVP").[47] These two societal goals of maximizing

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states-do-have-right-publicity-statute-nil-nor-state-farbman-phd--hfige/ [https://perma.cc/J8JU-PA2W].

[44] *See* Jacob P. East, *What is NIL?: Right of Publicity Law in NCAA Sports*, Darkhorse (Feb. 1, 2023), https://darkhorse.law/what-is-nil-right-of-publicity-law-in-ncaa-sports/ [https://perma.cc/UB9N-XT5Q].

[45] "Property" herein refers to "natural law theory of property" which is the jurisprudential theory by which there are "natural rights" (1) that are fundamental or natural, as derived from God or nature, (2) to which all people are equally entitled, (3) that are inalienable, meaning they cannot be bargained or legislated away from people, and (4) that apply to life, liberty, and property. *See The Natural Law Tradition in Ethics*, Stan. Encyc. of Phil. (May 26, 2019), https://plato.stanford.edu/entries/natural-law-ethics/ [https://perma.cc/NM4J-G3YR]; *see generally* Jeremy Waldron, The Right to Private Property (1988); Stephen Munzer, A Theory of Property 1 (1990); Margaret Jane, Reinterpreting Property (1993); Will Kenton, *What Are Property Rights and Why Do They Matter?*, Investopedia (May 10, 2024), https://www.investopedia.com/terms/p/property_rights.asp [https://perma.cc/PZD7-E45J].

[46] This Article focuses on the college athletes' rights to monetize their NIL, comparing the current law based on the tort of the right of publicity versus a suggested law based on property law. The author is keenly aware of the fact that contract law plays a vital role in the exercise of an athlete's NIL rights. *See e.g.*, Nil Contract Template, US Legal, https://www.uslegalforms.com/forms/us-1341022bg/college-athlete-nil-endorsement-agreement?msclkid=d2b54dbdab581b266c492b3252ca050b&utm_source=bing&utm_medium=cpc&utm_campaign=USLF_Branding%20-%20Dynamic&utm_term=uslegalforms&utm_content=USLF_Branding_All_DSA [https://perma.cc/HU6M-XNMM] (last visited July 11, 2024). Further, many other areas of law are vital to the NIL deal, including agency law (the role of sports agents), tax law (the tax liability for NIL income), and estate planning and family law (NIL as marital property, hereditability). *See generally* Darren A. Heitner, How to Play the Game: What Every Sports Attorney Needs to Know (2021) (the go-to source for anyone interested in getting into the field of sports law). Notwithstanding, these important, albeit ancillary matters are not the subject of this Article.

[47] "NIL value proposition" herein refers to the author's conceptualization of how NIL might achieve the societal and economic goals increasing the wealth of the person and of the nation and promoting order by discouraging exploitation.

wealth and guarding against exploitation are fundamental to an orderly, lawful society. In order to achieve NVP, I posit that NIL law needs to have several property law features, including (1) alienation or marketability, (2) severability or divisibility, (3) heritability or descendibility, (4) protectability, and (5) justiciability. This Article assesses whether the current NIL law achieves NVP and posits that classifying NIL as a "property" right of the person who is entitled to the NIL rights would facilitate the value proposition that we seek.[48]

C. Roadmap

This Article advances the thesis that NIL law should be based upon and capture private property features to maximize NIL benefits to college athletes. It takes a seminal, normative view of the jurisprudential basis of NIL law relating to college athletes through three tasks: (1) it analyzes and points out the current NIL landscape which is based on the right of publicity; (2) it proposes a model code solution that society, policymakers, and government should adopt to maximize college athletes' NIL benefits; and (3) it presents several justifications for why the model code is a great idea and defends against critics of the solution. Consequently, this Article concludes that all levels of government should adopt and enact legislation that implements the model, a property-based NIL statute.

In summary, this Article utilizes a libertarian lens[49] to support the proposition that NIL law relative to college athletes should be grounded on private property principles rather than tort law. Part I next presents an analysis of the current State-based NIL laws and points out the deficiencies in the jurisprudential basis of the NIL law.

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[48] *See infra* Part II.

[49] "Libertarian lens" herein means to value individual freedom and civil liberties, endorse a free-market economy based on private property, and promote freedom of contract. *See* Libertarianism, Stan. Encyc. of Phil. (Jan. 28, 2019), https://plato.stanford.edu/entries/libertarianism/ [https://perma.cc/ML7E-2NUL]; *Individual Rights*, Libertarianism (last visited Mar. 23, 2022), https://www.libertarianism.org/topics/individual-rights [https://perma.cc/Q9V2-5ZNF] ("[L]ibertarian doctrines of individual rights are often cast in terms of a fundamental right of self-ownership."). This Article reflects libertarianism based on deontological ethics—the theory that all individuals possess certain natural or moral rights, mainly the right of "individual sovereignty" or "self-ownership," which is a property in one's person, with possession and control over oneself, as they exercise over the possessions they own. *See infra* Part III; *see generally* Robert Nozick, Anarchy, State, and Utopia 42–43 (2013 ed. 1974) (defending a political theory entrenched in the rights of individuals); David Boaz, The Libertarian Mind 27 (2015); G.A. Cohen, Self-Ownership, Freedom, and Equality 15 (1995).

Before getting into the weeds of legal analysis of NIL law, it is helpful to provide a brief explanation of how a college athlete NIL deal works.[50] Essentially, such a deal is a contract between a player and often a group or "collective" of college donors who agree to compensate a player for their services. These NIL deals typically consist of an endorsement of a service provider, such as a car dealership, or a product, such as a brand of pizza.[51] A high-profile player is typically represented by a seasoned sports agent accompanied by a team of lawyers, accountants, tax professionals, and social media experts.[52] The amount of money involved in a NIL deal depends on the value a player can bring to influence markets, such as a decision to purchase a certain brand of athletic equipment.[53] However, the NCAA rules prohibit a player from receiving any compensation, including from a NIL deal, to play a sport.[54] Further, the NCAA prohibits the use of a NIL deal to recruit or induce a player to enroll at and play for a given college, although this rule remains controversial.[55]

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[50] *See generally* Paul Rudder, *Who is the Highest Paid College Athlete*? *NIL Endorsement Deal Money in NCAA Sports*, AS (Mar. 25, 2024), https://en.as.com/ncaa/who-is-the-highest-paid-college-athlete-nil-endorsement-deal-money-in-ncaa-sports-n/ [https://perma.cc/K5NM-G684].

[51] *Id.* (reporting that the most common ways in which athletes can earn NIL contracts are for direct payments for promotional activities, free or sponsored products in exchange for promotion, free or sponsored services in exchange for promotion, earning affiliate money from social media promotion, becoming an ambassador for a brand or business, or appearing in commercials, ads, and digital content).

[52] *Id.*

[53] College athlete NIL deals greatly vary. Many college athletes do not have an NIL deal because they have no notoriety of value in the marketplace. However, there are nearly half a million college athletes who have NIL deals which average between $1,000 and $10,000. On the other end of the spectrum are the high-profile players who are commanding megabucks in NIL money in the millions of dollars. A selective few have national brand endorsement deals such as Bronny James who inked a lucrative contract with Nike while he was a high school student. The highest paid NIL players are high-profile, star football- or basketball-playing young men. Notwithstanding, one major exception is LSU gymnast Livvy Dunne who proves that having a significant social media following can garner substantial NIL deals, with over 11.3 million followers. *Id.*

[54] However, this past prohibition will likely be superseded by a historic settlement of a class action lawsuit which will effectively permit colleges to pay college athletes to play their sports. *See* Berkowitz, *supra* 35.

[55] *See* Stewart Mandel, *NCAA Recruiting Pay-for-Play is Here, and the Only Surprise is How Fast it Happened*, N.Y. Times (Feb. 23, 2024), https://www.nytimes.com/athletic/5296175/2024/02/23/ncaa-nil-paying-recruits-tennessee-injunction/ [https://perma.cc/FL4E-8VQX] (reporting that a federal judge in Tennessee "granted a preliminary injunction that prohibits the NCAA from enforcing its own rules against pay-for-play in recruiting. Effective immediately, name, image and likeness collectives can negotiate deals with recruits without fear of NCAA sanctions.").

While this Article presents a seminal, normative view of NIL through a libertarian lens, it has greatly benefited from the works of others directly or indirectly related to the issue. A brief mention of some representative scholarship on various, albeit non-exhaustive, related topics include the problem of social cost;[56] jurisprudential theories of property;[57] natural rights to property;[58] foundational principles of property in American history;[59] constitutional basis of property principles;[60] principles of equal protection,[61] the expansive scope

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[56] Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960); Margaret Jane Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987).

[57] *See generally* Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897); Robert Nozick, Anarchy, State, and Utopia (1974); David Boaz, The Libertarian Mind: A Manifesto for Freedom (2015); G.A. Cohen, Self-Ownership, Freedom, and Equality (1995); Waldron, The Right to Private Property (1988); S. Munzer, A Theory of Property (1990); Margaret Jane Radin, Reinterpreting Property (1993).

[58] *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959); *The Natural Law Tradition in Ethics*, Stan. Encyc. of Phil. (May 26, 2019), https://plato.stanford.edu/entries/natural-law-ethics/ [https://perma.cc/78ZW-W6GD]; *Natural Law*, The Free Dictionary (2022), https://www.thefreedictionary.com/natural+law [https://perma.cc/YB9M-NU3A].

[59] *See generally* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980); A.E. Dick Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America (1968); David J. Hoeveler, Creating the American Mind: Intellect and Politics in the Colonial Colleges (2007); Neil C. Olsen, Pursuing Happiness: The Organizational Culture of the Continental Congress (2013); James Walsh, Education of the Founding Fathers of the Republic: Scholasticism in the Colonial Colleges 35 (1925); Bernard Bailyn, The Ideological Origins of the American Revolution (1967) (concluding that the major themes of eighteenth-century libertarianism were realized in written constitutions, bills of rights, and limits on executive and legislative powers, and arguing that the revolutionary rhetoric of liberty and freedom was not simply propagandistic but rather central to how the revolutionaries understood their situation). These ideas and beliefs inspired both the American Revolution and the French Revolution. *Id.* at 200.

[60] *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972); Norman Redlich, John Attanasio, Joel K, Goldstein, Understanding Constitutional Law 403–91 (2005) (noting that the Supreme Court has extended fundamental rights to include the right to interstate travel, the right to parent one's children, protection on the high seas from pirates, the right to privacy, and the right to marriage); David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 Harv. J. L. & Pub. Pol'y 795, 806–16 (1996); Jack P. Greene, The Constitutional Origins of the American Revolution 79 (2011).

[61] *See generally* Gerald Gunther, *The Supreme Court, 1971 Term Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

of property;[62] individual rights and federalism;[63] property rights and takings,[64] the role of morality in the law;[65] the right of self;[66] the constitutional history of protecting intellectual property;[67] the right of privacy;[68] the right of publicity;[69]

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[62] See *generally* Charles A. Reich, *The New Property*, 73 Yale L. J. 733 (1964).

[63] *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection* of the National Government, 54 Colum. L. Rev. 543 (1954); Mitchell F. Crusto, *The Supreme Court's "New" Federalism: An Anti-Rights Agenda?,* 16 Ga. St. U. L. Rev. 517 (2000).

[64] *See generally* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967); Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964); Crusto, *Game of Thrones*, *supra* note 1.

[65] *See generally* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958).

[66] *See generally* Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982); Crusto, *Right of Self*, *supra* note 1; Ayn Rand, *Collectivized "Rights"*, in The Virtue of Selfishness 135, 140 (4th ed. 1964) ("Individual rights are not subject to a public vote; a majority has no right to vote away the rights of a minority; the political function of rights is precisely to protect minorities from oppression by majorities (and the smallest minority on earth is the individual)."); Patricia Kitcher, The Self: A History (Patricia Kitcher ed., 2021) (exploring the ways in which the concept of an "I" or a "self" has been developed and deployed at different times in the history of Western philosophy); Daniel C. Russell, *Self-Ownership as a Form of Ownership*, in The Oxford Handbook of Freedom 21, 21–39 (D. Schmidtz & Carmen E. Pavel eds., 2018).

[67] *See generally* Wendy J. Gordon, *A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L. J. 1533 (1993); *Origins and Scope of the Power*, Justia, https://law.justia.com/constitution/us/article-1/50-copyrights-and-patents.html#:~:text=As%20to%20patents%2C%20modern%20legislation%20harks%20back%20to,intellectual%20property%20through%20the%20Copyright%20and%20Patent%20Clause [https://perma.cc/3DK8-89KA] (last visited Nov. 9, 2024).

[68] *See generally* Warren & Brandeis, *supra* note 3, at 193; William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960); Richard C. Turkington & Anita L. Allen, Privacy Law: Cases & Materials (2002). This list does not ignore the ongoing political and constitutional law tensions that include "body autonomy" or "body integrity," as it relates to a woman's freedom of choice; a person's right to deny medical treatment, such as vaccination against COVID-19; and the right of privacy, to name a few. *See also* Rebecca Skloot, The Immortal Life of Henrietta Lacks (2010). Also relevant is Moore v. Regents, 793 P.2d 479 (Cal. 1990), *cert. denied,* 499 U.S. 544 (1991), a landmark case holding that the plaintiff had no property rights in his discarded cells or rights to any profits made from them. *Id.* at 488–93.

[69] *See generally* Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark's Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 Harv. L. Rev. 1271 (2022).

the inheritance rights in celebrities' likeness;[70] the history of the NCAA's amateurism rules; the legal battle over college athletes' rights;[71] the application of antitrust laws to college sports;[72] the particular negative effect of racism on NIL rights;[73] the wealth gap relative to race,[74] gender,[75] age,[76] and class;[77] the legal

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[70] *See, e.g.*, Shaw Fam. Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 319 (S.D.N.Y. 2007) (holding that the right of publicity cannot be created and transferred post-mortem where that right did not exist at the time of the testator's death); Decker, *supra* note 41, at 252 n.69, 253 n.77 (noting that many states now have common law or statutory rights of publicity that apply postmortem).

[71] *See generally* Claybourn, *supra* note 19.

[72] *See generally* Case Comment, *Sherman Act—Antitrust Law—College Athletics*—NCAA v. Alston, 135 Harv L. Rev. 471 (2021), https://harvardlawreview.org/wp-content/uploads/2021/11/135-Harv.-L.-Rev.-471.pdf [https://perma.cc/LYK5-M69D].

[73] *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987); Crusto, *Blackness as State Property*, *supra* note 1.

[74] *See* Vanessa Williamson, *Closing the Racial Wealth Gap Requires Heavy, Progressive Taxation of Wealth*, Brookings (Dec. 9, 2020), https://www.brookings.edu/articles/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/ [https://perma.cc/B25Y-JASG] (reporting that "the median white household has a net worth 10 times that of the median Black household," such that "[t]he total racial wealth gap . . . is $10.14 trillion"). *See also* Crusto, *Blackness as State Property*, *supra* note 1.

[75] *See generally* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991); Crusto, *Blackness as Property*, *supra* note 1; Elanor Taylor, *Groups and Oppression*, 31 Hypatia 520, 520–21 (2016) ("Oppression is a form of injustice that occurs when one social group is subordinated while another is privileged, and oppression is maintained by a variety of different mechanisms including social norms, stereotypes and institutional rules."); LynnWeber, Understanding Race, Class, Gender, and Sexuality: A Conceptual Framework (2d ed. 2010).

[76] *See, e.g.*, Annalyn Censky, *Older Americans Are 47 Times Richer than Young*, CNN Money (Nov. 28, 2011), https://money.cnn.com/2011/11/07/news/economy/wealth_gap_age/index.htm [https://perma.cc/2VNZ-S7YX]; Christopher Ingraham, *The Staggering Millennial Wealth Deficit, in One Chart*, Wash. Post (Dec. 3, 2019), https://www.washingtonpost.com/business/2019/12/03/precariousness-modern-young-adulthood-one-chart/ [https://perma.cc/55FW-6WP3] ("Millennials[‘] . . . financial situation is relatively dire. They own just 3.2 percent of the nation's wealth. To catch up to Gen Xers, they'd need to triple their wealth in just four years. To reach boomers, their net worth would need a sevenfold jump.").

[77] *See generally* Frank I. Michelman, *The Supreme Court, 1968 Term-Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969); Mitchell F. Crusto, *Unconscious Classism: Entity Equality for Sole Proprietors*, 11 U. PA.

treatment of virtual assets, cyberspace, and gaming;[78] the development and nature of college athletes' NIL rights;[79] taxation of NIL;[80] the future of college

J. Const. L. 215 (2009); Mitchell F. Crusto, *Obama's Moral Capitalism: Resuscitating The American Dream*, 63 U. Miami L. Rev. 1011 (2009). Federal Reserve data indicates that, from 1989 to 2019, wealth became increasingly concentrated in the top 1 percent of the country's wealthiest individuals. Matthew Yglesias, *New Federal Reserve Data Shows How the Rich Have Gotten Richer*, Vox (Jun. 13, 2019), https://www.vox.com/policy-and-politics/2019/6/13/18661837/inequality-wealth-federal-reserve-distributional-financial-accounts ["https://perma.cc/QD5D-FK22] (reporting that the gap between the wealth of the top 10 percent and that of the middle class is over 1,000 percent; that increases another 1,000 percent for the top 1 percent, hence the term "wealth gap."); Craig Garthwaite, Jordan Keener, Matthew J. Notowidigdo, & Nicole F. Ozminkowski, *Who Profits from Amateurism? Rent-Sharing in Modern College Sports* 1–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27734, 2020), https://www.nber.org/papers/w27734 [https://perma.cc/Y8WY-EYQT] (demonstrating that revenue generated from collegiate men's football and basketball programs is largely re-invested in the university's athletic department, with less than 7 percent being distributed to athletes given strict limits on academic scholarships and stipends for living expenses).

[78] *See generally* David R. Johnson & David Post, *Law and Border: The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996); David J. Bell, Brian D. Loader, Nicholas Pleace, & Doughlas Schuler, Cyberculture: The Key Concepts (2004). There is much at stake as technology continues to monetize the "virtual" essence of a person, such as an "avatar" in a fantasy football league that was part of the American and Canadian fantasy sports/gaming industry, which was valued at more than $7 billion in 2017. *See* Ashley Rodriguez, *How the $7 Billion US Fantasy Football Industry Makes Its Money in 2017*, Quartz (Sept. 3, 2017), https://qz.com/1068534/how-the-7-billion-us-fantasy-football-industry-makes-its-money-in-2017 [https://perma.cc/GJ84-T69N]; Dora Mekouar, Why Millions of Americans Spend Billions on this Fantasy, Voice of Am. (Sept. 3, 2019), https://www.voanews.com/a/usa_all-about-america_why-millions-americans-spend-billions-fantasy/6175070.html [https://perma.cc/PPB3-UX2A]; *see also* Monika A. Górska & Lena Marcinoska-Boulangé, *Likeness in Computer Games: Real-Life People*, Newtech.Law (Apr. 8, 2021), https://newtech.law/en/likenesses-in-computer-games-real-life-people [https://perma.cc/N2LF-W2KT] (reporting on lawsuits wherein famous people sued gaming enterprises for the unauthorized use their avatars, including Juventus footballer Edgar Davids, Gwen Stefani, Lindsay Lohan, Lacy Jonas, and Kierin Kirby).

[79] *See generally* Heitner, *supra* note 46.

[80] *See* Rebecca Lake, *NIL Deals and Tax Implications: A Guide for College Athletes*, Investopedia (May 30, 2024), https://www.investopedia.com/nil-deals-tax-implications-8599929 [https://perma.cc/ET7H-U9WA]; *Student-Athletes Involved in Name Image Likeness (NIL) Agreements Should Be Aware of Their Tax Obligations*, Taxpayer Advocate Service, https://www.taxpayeradvocate.irs.gov/news/nta-blog/nta-blog-student-athletes-involved-in-nil-agreements-should-be-aware-of-their-tax-obligations/2023/12/ [https://perma.cc/3JSP-HPDF] (last updated Feb. 9, 2024).

sports;[81] and the relationship between college education and intercollegiate sports.[82] I apologize in advance to the many brilliant scholars, be they alive, dead, or fictitious, whose works I have inadvertently failed to recognized here.

I. Conundrum

A. History of NIL Law[83]

Part I will focus on the problem of relying on the tortious right of publicity as the foundation for NIL law. To provide context to this part, as noted above, most states that have enacted NIL laws have done so in response to the need to protect college athletes from the overreaching of the NCAA's amateurism rules relating to player compensation.[84] Further, many of those states have stated the basis of the law is "equal protection," that is that college student athletes should have the same right to the right of publicity as college students who are not athletes. With those goals in mind, this part will look at the epicenter of the battle over NIL rights, namely that of college athletes over the NCAA's regulation of the athletes' benefit from their NIL. Consistent with societal goals, the claim of college athletes is that they should personally benefit from the commercial use of their NIL and that they should be protected from exploitation of their NIL.[85]

Consequently, Part I describes how and why various states have enacted laws to provide college athletes the right to capitalize on their NIL.[86] To be clear, these laws are narrowly focused on college athletes in response to the

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[81] David Hale, *What is the Future of College Football? Over 200 Coaches, Players and Administrators Respond*, ESPN (Aug. 1, 2022), https://www.espn.com/college-football/story/_/id/34307234/what-future-college-football-200-coaches-players-administrators-respond [https://perma.cc/57YF-DJRK].

[82] Gabe Feldman, *Reimagining The Role of Intercollegiate Sports in Higher Education*, Arnold Ventures, https://athleticdirectoru.com/articles/reimagining-the-role-of-intercollegiate-sports-in-higher-education/ [https://perma.cc/L8T3-VXRN] (last visited Jul. 17, 2024).

[83] *See infra* Part III.C.1.

[84] *See supra* Introduction.

[85] *See* David Savage, *Supreme Court Justices See "Exploitation" of College Athletes in NCAA Case*, L.A. Times (Mar. 31, 2021), https://www.latimes.com/politics/story/2021-03-31/supreme-court-ncaa-case [https://perma.cc/SLG3-H4WQ].

[86] *See infra* Part I; Ezzat Nsouli & Andrew King, *How US Federal and State Legislatures Have Addressed NIL*, Squire Patton Boggs (Jul. 13, 2022), https://www.sports.legal/2022/07/how-us-federal-and-state-legislatures-have-addressed-nil/ [https://perma.cc/9E5Z-445H].

NCAA's rules that prohibited such benefits to its players.[87] Caveat: There is no evidence that these targeted laws are meant to apply broadly to establish NIL law for everyone. Notwithstanding, I will analyze the deficiencies of these state NIL statutes to suggest how to fashion a model NIL law that would apply universally, not just to college athletes. This analysis will focus on the NIL law of one state, which is representative of the statutes of the various states that have enacted NIL laws.

As mentioned, the current legal development of NIL law is focused on the rights of college athletes. To understand those laws, one needs a brief history of how and why these laws were enacted, relating to the Fair Pay to Play issue. That requires a further discussion of the NCAA's amateurism rules and its past restraints on players' benefiting from their NIL.[88]

On June 21, 2021, in *NCAA v. Alston*,[89] the U.S. Supreme Court chipped away at the strict limitations on the NCAA's amateurism rules for college athletes' eligibility to play for member teams.[90] Specifically, the Court upheld a ruling by the U.S. Court of Appeals for the Ninth Circuit that struck down NCAA caps on student-athlete academic benefits (i.e. reimbursements and pay for academic-related expenses) on antitrust grounds, as those caps violated Section 1 of the Sherman Act.[91] The Sherman Act prohibits activities that restrict interstate commerce and competition for services or products in the marketplace.[92] Consequently, various states recognized college athletes' right to capitalize on their NIL[93] which has created a national marketplace for NIL deals.[94] In response to these developments, the NCAA adopted new rules that permit college athletes to be compensated for the use of their NIL.[95] It has been suggested that the future viability of college athletics, particularly

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[87] *See Amateurism*, NCAA, https://www.ncaa.org/sports/2014/10/6/amateurism.aspx [https://perma.cc/FM75-72RA] (last visited Nov. 16, 2024).

[88] *See supra* Introduction.

[89] 141 S. Ct. 2141 (2021).

[90] Amateurism, *supra* note 87.

[91] *See generally* Case Comment, supra note 72.

[92] The Sherman Antitrust Act, 15 U.S.C. §§ 1–7, is a United States antitrust law that prescribes the rules of free competition for those engaged in interstate commerce. *See* Legal Information Institute, *Sherman Antitrust Act*, Cornell L. Sch., https://www.law.cornell.edu/wex/sherman_antitrust_act [https://perma.cc/79ZY-XQS6] (last visited Apr. 1, 2022).

[93] *See infra* note 153.

[94] *See Tracker: NIL Marketplaces for Student Athletes*, Bus. of Coll. Sports, https://businessofcollegesports.com/tracker-nil-marketplaces-for-student-athletes/ [https://perma.cc/B44U-V3L9] (last updated Feb. 26, 2024).

[95] *See* NCAA, *supra* note 33.

football, as well as the financial health of many major colleges will depend on the way that players' NIL deals are regulated.[96]

Currently, the development of NIL law is state-statutorily-based and is narrowly focused on highlighting that college athletes should not be restricted by NCAA rules relative to the players' rights to benefit from their NIL. As the NCAA's continuing regulation and ongoing litigation show, the jury is still out on the final regulation of college athletes' NIL. Notwithstanding the context of the development of college athletes' NIL rights, the fact is those laws are on the books in many states, are being evaluated by other states, and are the source of serious debate over the need for federal law.[97] What is needed is a critical assessment of the current NIL law, which will be done in the next section.

B. NIL Law Based on a Right of Publicity

As previously mentioned, the source of NIL law is essentially state statutes. Presently, two separate groups of state statutes impact college athletes' rights to their NIL. Several states have enacted NIL laws specifically focused only on the rights of college athletes, seeking to protect college athletes from the overreaching of NCAA amateurism rules. Some of these same states and other states have developed statutory or common right of publicity laws that tangentially protect NIL.[98] In the states that enacted pro-NIL college athlete laws, they rely on a confluence of a tortious,[99] right

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[96] The University of Arizona, *AZDC Presents: The Future of College Athletics* (Washington, D.C., Jun. 7–8, 2023), https://azdc-futureofcollegeathletics.com/ [https://perma.cc/2RKQ-RMY6]; Hale, *supra* note 81.

[97] Alcino Donadel, *Minus Federal Oversight, States are Passing their Own Laws on NIL Deals for Student-Athletes*, University Bus. (Aug. 23, 2023), https://universitybusiness.com/minus-federal-oversight-states-are-passing-their-own-laws-on-nil-deals-for-student-athletes/ [https://perma.cc/3D6S-AT2M] ("The College Athletes Protection & Compensation Act, for example, would establish the College Athletics Corporation (CAC), which would bring oversight to the NIL space and help develop, administer and enforce its uniform guidelines on NIL deals.").

[98] *See Tracker: Name, Image and Likeness Legislation by State*, Bus. of Coll. Sports, https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/ [https://perma.cc/G9LU-MSQ8] ("In 2023, states began amending their existing NIL laws to allow for more involvement by institutions and prohibit the NCAA from enforcing penalties for protected NIL activities." However, Alabama repealed their pro-athlete NIL law.) (last updated Jul. 28, 2023).

[99] *See supra* note 28. The Restatement Second of Torts recognizes four types of invasions of privacy: intrusion, appropriation of name or likeness, unreasonable

of publicity,[100] and equal protection[101] rationales.[102] Comparing these state pro-NIL statutes, there is a lack of uniformity, which has resulted in a call for a preemptive federal statute.[103]

On the federal front, there is a void in the law relative to NIL. Federal statutes have long protected certain aspects of intellectual or virtual property. For example, creative literary works such as novels are protected by

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publicity, and false light. *See* Restatement (Second) of Torts §§ 652A–652I (Am. L. Inst. 1977). Under the Restatement's formulation, the invasion of the right of publicity is most similar to the unauthorized appropriation of one's name or likeness. *See id.* at § 652C cmts. a, b, illus. 1, 2; Legal Information Institute, *Publicity: An Overview*, Cornell L. Sch., https://www.law.cornell.edu/wex/publicity [https://perma.cc/6RY9-BPUC].

[100] *See supra* note 28. Right of publicity gives an individual the exclusive right to license the use of their identity for commercial promotion. In the United States, the right of publicity is largely protected by state common or statutory law. Only about half the states have distinctly recognized a right of publicity. Of these, many do not recognize a right by that name but protect it as part of the Right of Privacy. In other states, the right of publicity is protected through the law of unfair competition. Legal Information Institute, supra note 99; *see also* Statutes & Interactive Map, Right Of Publicity, https://rightofpublicity.com/statutes [https://perma.cc/JL6K-PG4M] (last visited Mar. 1, 2022) (indicating that "a statute is not a prerequisite for the Right of Publicity to be enforceable" as a number of states have an enforceable Right of Publicity by way of common law). *Cf.* Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) ("This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures. We think the New York decisions recognize such a right.").

[101] *See* Gunther, *supra* note 61.

[102] However, the State of Illinois comes close to anticipating this Article's thesis that NIL should be grounded on property law, by assigning property features to the right of publicity. *See* 765 Ill. Comp. Stat. Ann. 1075.

[103] *See* Mark Roesler and Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law* (Sept. 16, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/ [https://perma.cc/3RRC-B2CH]. Inconsistency in right of publicity laws can result in unexpected consequences; *see, e.g.,* Eriq Gardner, *Appeals Court Rules Marilyn Monroe's Persona Belongs to Public, Not Her Estate* (Aug. 31, 2012), https://www.hollywoodreporter.com/business/business-news/appeals-court-rules-marilyn-monroes-image-public-estate-367160/ [https://perma.cc/AM86-BB96] (the 9th Circuit ruling that "at the time of her death, the famous actress was domiciled in New York, not California, and as a result, her estate can't use California's publicity rights law to object to a photo licensor and others").

federal copyright laws.[104] Additionally, creative ideas such as inventions are protected by federal patent laws.[105] However, there is no federal statutory law that expressly provides that people possess a property right in their NIL, and that protects NIL from exploitation.[106] Instead, the protection of a person's NIL must rely on the common law tort of the right of publicity[107] or the constitutional right to privacy.[108] Unfortunately, the right to one's privacy has recently been undermined by the Supreme Court.[109] That leaves us to focus on the tortious right of publicity as the most prominent foundation for the current NIL law.

As previously noted, state pro-NIL law is expressly grounded in the right of publicity, which is based on the right to privacy. Recognizing this fact, before moving forward, we need to briefly summarize the laws protecting a person's privacy rights and how they relate to NIL law. Unfortunately, the law uses the term "right of privacy" in two different, distinct contexts. First, there is the *general* "right to privacy."[110] The "right to privacy" is often traced to an 1890 Harvard Law Review article authored by Samuel D. Warren and Louis D. Brandeis.[111] There, Warren and Brandeis recognized the right to privacy as "'a right to be let alone.'"[112] In addition, past Supreme Court cases have found the right to privacy to be fundamental. For example, in *Griswold*

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[104] *See* 17 U.S.C. § 102.

[105] *See* 35 U.S.C. § 101.

[106] *See id.*

[107] *See supra* note 28.

[108] *See generally* Legal Information Institute, *supra* note 99 (providing a summary of U.S. Supreme Court decisions recognizing a right to privacy).

[109] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022) (overturning Roe v. Wade, 410 U.S. 113 (1973)). In overturning Roe v. Wade, the right to abortion no longer falls under the broader right to privacy.

[110] The Supreme Court has recognized the rights to privacy. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (concluding rights guaranteed by the First, Third, Fourth, Fifth, and Ninth Amendments create "zones of privacy").

[111] *See* Warren & Brandeis, *supra* note 3, at 193 ("That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.").

[112] *Id.* at 195 ("Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual . . . the right 'to be let alone.'" (quoting Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract 29 (2d ed. 1879))).

v. Connecticut,[113] the Court held that this right prevents states from enacting laws that make it illegal for married couples to use contraception.[114] One commentator has identified eight broad categories of constitutional analyses where the Supreme Court has invoked the concept of human dignity rather consistently.[115] However, while the right to privacy was the rationale for *Roe v. Wade*,[116] the Court has retreated from treating the right as fundamental when applied to access to abortion, when it overturned *Roe* in *Dobbs v. Jackson Women's Health Organization*.[117]

By comparison, there is what I refer to as the *specific* right of privacy, that is how it applies to the right to sue a person for infringing on unwarranted publicity. As to the basis of private tort action, the right to privacy includes: (1) the right of persons to be free from unwarranted publicity, (2) the right to be free from the unwarranted appropriation of one's personality, (3) the right to publicize one's private affairs without a legitimate public concern, and (4) the right to be free from the wrongful intrusion into one's private activities.[118] For example, in 2018, California enacted the California Consumer Privacy Act ("CCPA"), which protects the residents of California and their personal identifying information.[119] Further, some state constitutions afford greater privacy protections than does the federal Constitution.[120]

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[113] *Griswold*, 381 U.S. at 485–85.

[114] *Id.*

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

[116] *See* Roe v. Wade, 410 U.S. 113, 154 (1973).

[117] *See* 597 U.S. 215, 302 (2022).

[118] Restatement (Second) of Torts § 652 (Am. L. Inst. 1977).

[119] S.B. 1121, 2018 Legis. Serv., Ch. 735 (Cal. 2018).

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

Parallel to the law on privacy rights, the law has developed a private right of action based on the protection of one's "personality rights."[121] Personality rights consist of two types of rights: the right to privacy and the right of publicity.[122] The right to privacy, which includes protection against misappropriation, is designed to guard individuals' personal rights against emotional distress.[123] By comparison, the right of publicity is a right to legal action designed to protect the names and likenesses of celebrities against unauthorized exploitation for commercial purposes.[124] Critics of the right of publicity argue that the concept has been unevenly applied.[125] Alex Wyman argues that variations in state laws and the wide variation in their application and interpretation call for a common national standard.[126] On the other hand, Eric E. Johnson argues that the current doctrine actually embraces at least three different concepts: "the endorsement right, the merchandizing entitlement, and the right against virtual impressment."[127]

In the United States, the right of publicity is based on state law rather than federal law.[128] As such, recognition of the right varies from state to state.[129] The rationale underlying the right of publicity in the United States is rooted in a concern for both privacy and economic exploitation.[130]

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[121] *See generally Right of Publicity*, Int'l Trademark Ass'n, https://www.inta.org/topics/right-of-publicity/ [https://perma.cc/4P8N-D8WB] (discussing the right against misappropriation of a person's name and likeness).

[122] Federal appeals court Judge Jerome N. Frank coined the term "the right of publicity" in the case of Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953), which recognized a baseball player's interest in his photograph on a baseball card. *Id.* at 868–69. To date, the right of publicity has been recognized either in state common (judge-made) law or in state statutes, with more than half the states recognizing the right in one form or another.

[123] *See supra* note 28.

[124] John Vile, *Right of Publicity*, The First Amendment Encyclopedia, (July 2, 2024), https://www.mtsu.edu/first-amendment/article/1011/right-of-publicity [https://perma.cc/Z4AJ-FETF].

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Right of Publicity Statutes & Interactive Map*, Right of Publicity, http://rightofpublicity.com/statutes [https://perma.cc/LCP5-M99P] (last visited Feb. 9, 2022). Indiana has one of the strongest right of publicity statutes in the United States, providing recognition of the right for 100 years after death, and protecting not only a person's "name, image and likeness," but also signatures, photographs, gestures, distinctive appearances, and mannerisms. *See id.*

[130] *See* Savage, *supra* note 85.

A commonly-cited justification for this doctrine from a policy standpoint is the notion of natural rights and the idea that every individual should have a right to control how their right of publicity is commercialized by a third party.[131] The right of publicity is defined as the right of all individuals to control commercial use of their NIL or other identifying aspects of their identities.[132] In certain contexts, the right of publicity is limited by the First Amendment.[133] The right of publicity can be referred to as publicity rights or even personality rights.[134]

Consequently, as of 2023, several, although not all, states have enacted NIL laws that empower college athletes to benefit from the use of their NIL.[135] While they vary somewhat, they are similar in their limited scope and purpose.[136] Most states base college athletes' rights to monetize their NIL upon the right of publicity.[137] However, very few states expressly define or have enacted a statutory right of publicity.[138] This leads to uncertainty

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[131] Often, although certainly not always, the motivation to engage in such commercialization is to help propel sales or visibility for a product or service, which usually amounts to some form of commercial speech, which in turn receives the lowest level of judicial scrutiny. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578–79 (1977) (holding that the First and Fourteenth Amendments do not immunize the news media from civil liability when they broadcast a performer's entire act without his consent, and the Constitution does not prevent a state from requiring broadcasters to compensate performers).

[132] Roesler & Hutchinson, *supra* note 103.

[133] *See* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 Yale L. J. 86, 86 (Oct. 2020), https://www.yalelawjournal.org/article/the-first-amendment-and-the-rights-of-publicity [https://perma.cc/5JDD-NSFQ] ("The right of publicity protects persons against unauthorized uses of their identity, most typically their names, images, or voices. The right is in obvious tension with freedom of speech. Yet courts seeking to reconcile the right with the First Amendment have to date produced only a notoriously confused muddle of inconsistent constitutional doctrine. . . . We argue that in any given case the right of publicity is characteristically invoked to protect (one or more) of these four interests: the value of a plaintiff's performance, the commercial value of a plaintiff's identity, the dignity of a plaintiff, or the autonomous personality of a plaintiff.").

[134] *See generally* Melville B. Nimmer, *The Right of Publicity*, 19 Law & Contemp. Probs. 203 (1954).

[135] *See Tracker: Name, Image and Likeness Legislation by State, supra* note 98.

[136] *See* Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, Opendorse (May 23, 2023), https://biz.opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/ [https://perma.cc/V8YC-8J9T].

[137] *Id.*

[138] *See Publicity*, *supra* note 28 ("However, not all states recognize the right to publicity. Only about 50% of all states recognize the distinct right to publicity. For the

in exacting how it applied to ensure the NIL rights of college athletes. To critically analyze this approach, this section will assess one state's NIL law, that of the State of Louisiana, to identify its strengths and weaknesses. To be clear, none of these statutes expressly state that they seek to achieve the goal for NIL law that this Article has established as a critical analytical tool.

C. Louisiana's Representative Statute

Following the lead of other States, on July 1, 2021, Louisiana Governor John Bel Edwards signed into law Act No. 479.[139] The Act empowers Louisiana's intercollegiate athletes[140] ("athlete(s)") to capitalize[141] on the use of their own name, image, or likeness ("NIL").[142] It achieves this by prohibiting any rule "that prevents or unduly restricts" any athlete from benefitting from their NIL.[143] The stated rationale for the new law is equal protection—so that an athlete can enjoy the same NIL rights as any other college (non-athlete) student.[144] In signing the bill into law, Governor Edwards stated, "It is only

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other half of the states, the majority of them recognize the right to publicity under the right of privacy.").

[139] *See* 2021 La. Act 1305-07 (codified as La. Stat. Ann. §§ 17:3701-3703) (enacting Chapter 30 of Title 17 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 17:3701 through 3703) (enacted pursuant to Senate Bill 60 which was proposed by State Senator Patrick Connick and was passed with a bipartisan majority), https://legis.la.gov/legis/ViewDocument.aspx?d=1236588 [https://perma.cc/FQZ5-PBKE]

[140] La. Stat. Ann. § 17:3702 (2021) "Intercollegiate athlete," as defined in the Act means "a student enrolled in a postsecondary education institution who participates in an athletic program." For example, the State of Louisiana has thirteen NCAA member schools, with an estimated 4,200 NCAA athletes. *See Louisiana NIL Law for NCAA*, Spry (Aug. 22, 2022), https://spry.so/nil-state-guide/louisiana-nil-law-for-ncaa/ [https://perma.cc/3MHA-R3EC].

[141] *See §§ 17:3701, 3703*. While the Act does not provide for the nature of the capitalization, it does provide that "[c]ompensation must be commensurate with the market value of the authorized use of the athlete's name, image, or likeness. *Id.* at 2.

[142] *See id.* The Act does not expressly define the terms "name, image, or likeness." *See generally* Louisiana Revised Statutes, https://www.legis.la.gov/legis/LawSearch.aspx [https://perma.cc/YH62-CZ7N] (a search of the Louisiana statutes did not locate the definition of those terms in any other section of the Louisiana Revised Statutes).

[143] § 17:3703B.

[144] § 17:2701 ("An intercollegiate athlete must have an equal opportunity to control and profit from the commercial use of the athlete's name, image, or likeness, and be protected from unauthorized appropriation and commercial exploitation of the athlete's right to publicity, including the athlete's name, image, or likeness.").

fitting that college athletes be able to benefit financially from their hard work and to have more control over their personal NIL, which many organizations and entities have already done for years."[145] Hence, the Act is clearly meant to negate or limit the NCAA and its member schools' amateurism rules, which prohibits a player from benefitting from their NIL,[146] empowering players to capitalize on their NIL and not lose their amateur status.

Notwithstanding leveling the playing field for athletes, there is a practical, business aspect of the Act. College sports is a trillion-dollar industry in the United States,[147] of which the State of Louisiana receives millions every year, both directly and indirectly.[148] Those business benefits do not exist without the labor of student players.[149] As other states such as California and Texas have enacted similar laws, Louisiana cannot afford to sit idle and likely lose its players to other states that aggressively entitle athletes to NIL benefits. Hence, Act 479 has a second, unstated goal, which is to ensure that Louisiana-based colleges and universities remain competitive in the recruitment and retention of players.[150]

Consequently, this Part next seeks to answer two questions: (1) Does Act 479 achieve its stated purpose, which is to ensure that collegiate athletes in the State enjoy the same ability to capitalize on their NIL as do college students who are not athletes? (2) Does Act 479 make Louisiana colleges and universities competitive when it comes to recruiting and retaining athletic talent?

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[145] *See* Office of the Governor, *Gov. Edwards Signs Name, Image, and Likeness Bill Allowing College Athletes to Earn Money off of Their Own Name, Image, or Likeness*, L'Observateur (Jul. 1, 2021), https://www.lobservateur.com/2021/07/01/gov-edwards-signs-name-image-and-likeness-bill-allowing-college-athletes-to-earn-money-off-of-their-own-name-image-or-likeness [https://perma.cc/5C35-NDUG].

[146] *See* NCAA, *supra* note 33.

[147] *See* Sara Germano, *Payday for US College Athletes Rattles $14bn Industry*, Financial Times (Oct. 2, 2021), https://www.ft.com/content/447c3300-2fd2-4d70-829a-18b3715be498 [https://perma.cc/UV9J-44K2] ("For nearly a century, as US college sports ballooned into a more than $14bn industry.").

[148] *See* Victor Skinner, *Louisiana Audits Find Three State University Athletics Programs Are Losing Money*, Lafourche Gazette (Feb. 4, 2023), https://www.lafourchegazette.com/local_news/state/louisiana-audits-find-three-state-university-athletics-programs-are-losing-money/article_84755ed0-a498-11ed-bcc0-9fe1a8de3d92.html [https://perma.cc/LQC8-6FDW].

[149] *See* Dave Wischnowsky, *Wisch: What if College Athletes Went on 'Strike?'* (June 6, 2011), https://www.cbsnews.com/chicago/news/wisch-what-if-college-athletes-went-on-strike/ [https://perma.cc/5XYX-ME2V].

[150] *See* S.B. 60, 2021 Leg., Reg. Sess. (La. 2021). The Act's legislative history unveils two goals: equal treatment of athletes and ensuring competitiveness in attracting players.

In answering those two questions, this apart: (1) analyzes the legal context of the enactment of Act 479, (2) describes its pertinent provisions, and (3) outlines some of the legal issues it leaves unanswered. Ultimately, it raises the question: Is Act 479 a touchdown or a fumble when it comes to athletes' NIL?

1. Why Louisiana and Why Now?

Louisiana's athlete NIL law is consistent with a national trend,[151] following judicial and legislative developments, which is already having profound and perhaps unexpected consequences.[152] With the enactment of Act 479, Louisiana was at the forefront of states that granted intercollegiate athletes the power to capitalize on their NIL.[153] Louisiana's athletic programs, particularly LSU, illustrate much of the concerns expressed by the U.S. Supreme Court in *Alston*, particularly Justice Kavanaugh's concurring opinion.[154] As the school brings in huge revenue, especially from football media coverage,[155] the concern is over disparate compensation, where players are treated as

[151] *See* Kristi Dosh, *Trends in Name, Image, and Likeness in the First Few Months*, Bus. of College Sports (Oct. 20, 2021), https://businessofcollegesports.com/name-image-likeness/trends-in-name-image-and-likeness-in-the-first-few-months/ [https://perma.cc/F772-XCWB].

[152] *See, e.g.*, Nathaniel Meyersohn, "*Adidas' Plan to Take over College Sports: Sign Endorsement Deals with up to 50,000 Student Athletes*, CNN Bus. (Mar. 23, 2022), https://www.cnn.com/2022/03/23/business/adidas-endorsements-ncaa-athletes-nil/index.html [https://perma.cc/L3ZL-A4P6].

[153] An intercollegiate athlete at a postsecondary education institution may earn compensation for the use of the athlete's name, image, or likeness. *See* 2021 La. Act 1305-07 (codified as La. Stat. Ann. §§ 17:3701-3703) (enacting Chapter 30 of Title 17).

[154] *See Alston*, 141 S. Ct. at 2166 (Kavanaugh, J., concurring).

[155] *See #3 LSU, $58 million, Top 20 Most Profitable College Football Programs*, Athletics scholarships, https://www.athleticscholarships.net/profitable-college-football-programs.htm [https://perma.cc/4MUG-HJSP]. *See also LSU Athletics Loses over $10.5M in 2021 despite football program generating over $37M*, wbrz (Jan. 26, 2022), https://www.wbrz.com/news/lsu-athletics-loses-over-10-5m-in-2021-despite-football-program-generating-over-37m/ [https://perma.cc/95M7-4FQT].

amateurs while coaches[156] and athletic directors[157] are being paid as professionals. With the change in the NIL laws, many players are expected to rise from poverty to potentially becoming instant millionaires.[158]

Hence, Louisiana enacted Act 479 to be competitive with other states in the recruitment and retention of outstanding athletic talent who might be inclined to play for teams where the players could capitalize on their NIL. We highlight the Louisiana statute because it was at the forefront of granting athletes the power to capitalize on their NIL and it was representative of how other states are protecting athletes' NIL rights.

2. Louisiana's Statutory Provisions

Act No. 479 enacts Chapter 30 of Title 17 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 1:3701 through 3703. Section 3701 is labeled "Legislative intent," and states, "participation in intercollegiate athletics should not infringe upon an intercollegiate athlete's ability to earn compensation for the athlete's name, image, or likeness."[159] This is followed by the rationale for the new law—"An intercollegiate athlete must have an equal opportunity to control and profit from the commercial use of the athlete's name, image, or likeness, and be protected from unauthorized appropriation and commercial exploitation of the athlete's right to publicity,

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[156] *See* Jordan Cohn, *New LSU Coach Brian Kelly's Contract Worth $95 million over 10 years*, The Bet Washington (Nov. 30, 2021), https://www.audacy.com/thebetwashington/sports/lsus-brian-kellys-contract-worth-usd95-million-over-10-years [https://perma.cc/C7CS-3735]. *See also* Michael Bonnette, *Brian Kelly Named 34th LSU Football Head Coach*, LSUSports (Nov. 30, 2021), https://lsusports.net/news/2021/11/30/brian-kelly-named-34th-lsu-football-head-coach/ [https://perma.cc/L9WN-JTJR].

[157] *See* David Jacobs, *LSU Athletic Director's Salary Fourth Highest among Public SEC Schools*, Bus. Report (Sept. 16, 2021), https://www.businessreport.com/business/report-lsu-athletic-directors-salary-fourth-highest-among-public-sec-schools [https://perma.cc/5XP5-5VEF].

[158] *See LSU Athletes Begin Announcing Endorsement Deals as Louisiana is Set to Sign NIL Policy from quarterback Myles Brennan to cornerback Derek Stingley, a look at announced endorsements*, Sports Illustrated (July 1, 2021), https://www.si.com/college/lsu/football/lsu-athletes-announce-nil-endorsements-football [https://perma.cc/5UH9-B2ED]

[159] La. Stat. Ann. § 17:3701 (2021). Compensation must be commensurate with the market value of the authorized use of the athlete's name, image, or likeness. S.B. 60, 2021 Leg., Reg. Sess. (La. 2021) (enacting Chapter La. Rev. Stat. Ann. § 17:3701-03). However, the legislation does not define market value, and it is difficult to market value a collegiate athlete's NIL.

including the athlete's name, image, or likeness."[160] Section 3702 provides definitions specific to the Act.[161]

Section 3703 is the heart of the Act and has several component parts. Subsection A(1) states that "[a]n intercollegiate athlete…may earn compensation for the use of the athlete's name, image, or likeness…commensurate with the market value of the authorized use…."[162] Subsection A(2) prohibits a postsecondary education institution or its related parties from providing a current or prospective athlete with compensation for the use of the athlete's NIL.[163] Subsection B states that "[a] postsecondary education institution shall not adopt or maintain a contract, rule, regulation, standard, or other requirement that prevents or unduly restricts an intercollegiate athlete from earning compensation for the use of the athlete's NIL."[164]

3. Unresolved Issues: The Need for a Uniform, Model Act

Act 479 is a great first step forward to enhancing collegiate athletes' compensation and recognizing their inherent right to their NIL. However, the new law creates some issues. Notwithstanding the fact that the Act provides collegiate athletes a source of financial benefit for their NIL, it does not address the broader issue of Pay to Play[165]—whether the athletes should be compensated for their play as professionals[166] on the same lucrative basis as their coaches are compensated.[167] To be clear, the following analysis is focused on Act 479 and how Louisiana could develop a model law that would lead the national development of this important area of law.

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[160] La. Stat. Ann. § 17:3701 (2021).
[161] La. Stat. Ann. § 17:3702 (2021).
[162] La. Stat. Ann. § 17:3703 (2021).
[163] *Id.*
[164] *Id.*
[165] *See* Mandel, *supra* note 55.
[166] *See* Brennan Thomas, *Pay for Play: Should College Athletes Be Compensated?*, Bleacher Report (Apr. 4, 2011), https://bleacherreport.com/articles/654808-pay-for-play-should-college-athletes-be-compensated [https://perma.cc/QW2W-BT3V].
[167] *See* Tom Schad & Steve Berkowitz, *Why College Football is King in Coaching Pay–Even at Blue Blood Basketball Schools*, USA Today (Oct. 3, 2023), https://www.usatoday.com/story/sports/ncaaf/2023/10/03/college-football-coach-pay-is-soaring-even-at-basketball-schools/70924373007 [https://perma.cc/VDX2-5RZF].

i. "Internal" Issues Created by the Act's Provisions

(1) What Constitutes "Unauthorized Appropriation/Exploitation.

In its "Legislative intent" section, the goal of the Act appears straightforward, that is, to ensure that athletes' participation in college sports does not infringe on an athlete's ability to earn compensation for their NIL.[168] However, the next sentence contains some modifiers that can be interpreted as meaning that the athlete's ability to earn such compensation is not absolute. Specifically, the Act states that athletes "must have an *equal opportunity* to control and profit from the commercial use of the athlete's name, image, or likeness, and *be protected* from *unauthorized appropriation and commercial exploitation* of the athlete's *right to publicity*, including the athlete's name, image, or likeness."[169] This language can reasonably be read to mean that when it comes to an athlete's actual right to control and profit from their NIL, protection is only from **unauthorized** appropriation and commercial exploitation. Does the Act protect an athlete's NIL from **authorized** use, such as under the NCAA contract and rules for playing for an NCAA member team? To my knowledge, to date, there are no state NIL laws that require an athlete's college to pay an athlete for the use of their NIL, such as in the marketing and sales of a college jersey that features a player's name. However, many colleges, including LSU, Oklahoma, and Penn State are reportedly sharing the proceeds of jersey sales with their athletes.[170] Furthermore, that sentence ends with a reference to an "athlete's **right to publicity**." This is also problematic in that the right of publicity is a private tort action to address the unauthorized appropriation and commercialization of a person's NIL. It is based upon privacy law and arguably does not apply in the case of the NCAA and its member school's use of its athletes' NIL, which they do with the express or tacit permission of the athletes themselves.

(2) Who Benefits from the Act, Its Scope.

Section 3702 provides definitions specific to the Act. Of particular concern is to whom the Act applies. The definition of "intercollegiate athlete" is a

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[168] *See* La. Stat. Ann. § 17:3701 (2021).

[169] *Id.* (emphasis added).

[170] Shehan Jeyarajah, *LSU, Oklahoma Among Schools to Offer Customizable Jerseys with Players Receiving Compensation, Merchandise Sales Have Long Been a Spot of Controversy in the Pre-NIL World*, CBS Sports (Feb. 4, 2022), https://www.cbssports.com/college-football/news/lsu-oklahoma-among-schools-to-offer-customizable-jerseys-with-players-receiving-compensation/ [https://perma.cc/YMF3-MMRP].

student enrolled in a postsecondary education institution.[171] Does that mean that a high school student is not protected by the Act, even one who intends to be enrolled in a postsecondary education institution? Then, there is the definition of "postsecondary education institution," which includes "a Louisiana public postsecondary education institution or nonpublic postsecondary institution that receives or disburses any form of student financial assistance, including scholarships or grants."[172] Does that mean a collegiate athlete who is from Louisiana but plays for a postsecondary school located *outside* the State is not protected by the Act?[173] Additionally, does it mean that a student who is enrolled in a postsecondary institution located outside the State is not protected while playing within the State? Further, is the Act constitutional as it applies to private and particular religious/faith-based schools?

(3) "Unduly Restricts."

The Act prohibits any contract, rule, regulation, standard, or other requirement that "prevents or *unduly restricts*" any athlete from benefitting from their NIL.[174] This provision directly challenges the NCAA's amateurism rules.[175] Upon close examination, this language does not provide an athlete an absolute right to capitalize on their NIL. Furthermore, the Act does not define what rule constitutes one that *unduly restricts* a player's NIL rights. This equivocal language arguably contradicts the goal of the Act, which is equality with non-athlete students. Non-athlete students enjoy NIL rights without such limitations.

(4) Supersedes the NCAA Rules.

The Act's intention to provide Louisiana collegiate athletes their NIL rights does not guarantee that it supersedes the authority of the NCAA over its members and its players. However, there is no reason to believe that the State of Louisiana has legal authority over the NCAA. This raises a question of preemption, that is, does the state law preempt the NCAA's jurisdiction over its members and players? While it appears clear that state law such as Louisiana's NIL statute would supersede NCAA rules and regulations, the

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[171] La. Stat. Ann. § 17:3702 (2021).

[172] *Id*.

[173] The author is aware of how this question leads to other issues: Whether it be desirable to enact a law with this scope? Might this run into problems with the dormant commerce clause? Thanks to the Harvard editors for pointing this out. However, by intention, this Article does not analyze those tangential issues.

[174] La. Stat. Ann. § 17:3703 (2021).

[175] *See* Amateurism, *supra* note 87.

NCAA has stated its position to the contrary.[176] The issue of preemption is intentionally beyond the scope of this Article.

In fact, in *NCAA v. Alston*, Justice Gorsuch, writing for a unanimous Supreme Court, expressly reiterated the authority of the NCAA to regulate its members and players.[177] That is despite the somewhat scathing concurring opinion of Justice Kavanaugh in which he emphasized that "[t]he NCAA is not above the law."[178] A prime example of the NCAA's continued supremacy over the state is in the NCAA's recent regulation stating that its member schools and players cannot use NIL deals as a means to recruit a player and that to do so is a violation of its rules.[179] This virtually destroys the effectiveness of the Act. Moreover, it raises a curious question: Will the State of Louisiana litigate this matter against the NCAA to protect the rights of the players?

(5) Class Legislation Violates the U.S. Constitution.

The Act bestows a benefit on intercollegiate athletes which could be read as "class legislation," which is legislation that arbitrarily favors or disfavors particular factions.[180] As such, it raises issues of whether it violates the U.S. Constitution's Equal Protection Clause and jurisprudence prohibiting class

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[176] Christina Stylianou & Gregg E. Clifton, *NCAA's Regulations Attempt To Restrict State Law: The New NIL Battleground, Blog*, Lewis Brisbois (June 29, 2023), https://lewisbrisbois.com/blog/category/sports-law/ncaas-regulations-attempt-to-restrict-state-law-the-new-nil-battleground [https://perma.cc/5SV9-FFKK] (pointing to an official NCAA statement, "The [NCAA] has been clear and maintains that schools must adhere to NCAA legislation (or policy) when it conflicts with permissive state laws. In other words, if a state law permits certain institutional action and NCAA legislation prohibits the same action, institutions must follow NCAA legislation.").

[177] *See* NCAA v. Alston, 141 S. Ct. 2141, 2154 (2021).

[178] *Id.* at 2169.

[179] *See generally* William J. Brennan, Jr*., State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977); Herbert Wechsler*, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,* 54 Colum. L. Rev. 543 (1954)*;* Mitchell F. Crusto*, The Supreme Court's "New" Federalism: An Anti-Rights Agenda?* 16 GA. St. U. L. Rev. 517 (2000).

[180] Class Legislation Law and Legal Definition, USLegal, https://definitions.uslegal.com/c/class-legislation/ [https://perma.cc/YN7U-ZAA2] ("Class legislation violates equal protection guaranteed through the fourteenth amendment of the U.S. Constitution. An Act enacted in the form of private act for the benefit of certain individual is an example of class legislation.").

legislation.[181] This is ironic because the Louisiana NIL law's justification is to level the playing field. However, it assumes that everyone has a right to capitalize on their NIL, although that right is rarely provided by way of Louisiana's college athlete NIL statute. Fortunately, class legislation analysis is not actively being used by the current Court.[182]

(6) When and How Does the Law Become Operational?[183]

Further, if the Act seeks to create a level playing field for collegiate athletes compared to other college students, the Act requires its implementation to be conditioned on the development of schools' policies.[184] This means that the players are *not* free to enjoy the benefits without further regulation. College students who are not athletes do not have this obstacle when they enjoy NIL opportunities. Further, the NCAA is still in charge of those regulations, which means that its athletes are still encumbered. Therefore, the Act arguably fails to provide athletes the same equal access to this opportunity as non-athletes.

ii. Broader Issues Not Addressed in the Act

In addition to the issues internal to the Act itself, there are several additional, important questions on which the Act is silent: (1) Does the new law apply retroactively to redress past takings of the players' NIL? (2) Will the new law facilitate the players' right to be directly compensated for playing their sports? (3) How does the law apply interstate; that is, will it be

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[181] *See generally* David Eliot Bernstein, *Class Legislation, Fundamental Rights, and the Origins of Lochner and Liberty of Contract*, 26 George Mason L. Rev. 1023 (2020).

[182] *Id.*

[183] *See* La. Stat. Ann. § 17:3703 (2021). The law became effective on July 1, 2021, however, the Act specifically states that "[e]ach postsecondary education management board shall adopt policies to implement the provisions of this Chapter. No postsecondary education institution shall implement the provisions of this Chapter until such time as the appropriate management board adopts the required policies. Each management board has discretion as to when it adopts policies to implement the provisions of this Chapter." Does that provision mean that an athlete cannot sign a NIL contract until after their school has established such policies?

[184] *See* Cody Worsham, *LSU's All-In NIL Event More than 500 Business Leaders Joined LSU's Head Coaches and Administrators for an Unprecedented Night of Education, Collaboration, and Navigation through NIL's Uncharted Waters*, Inside Geaux Time (Feb. 6, 2022), https://lsusports.net/news/2022/02/06/inside-geaux-time-lsus-all-in-nil-event/ [https://perma.cc/ND4H-3ESA].

recognized in states that have not enacted similar legislation? Does the law apply to Louisiana residents who receive NIL compensation in states that have not enacted such laws? (4) Does the Louisiana law take precedence over NCAA rules; that is, does it apply within or outside of the NCAA rules? (5) Are the athletes' NIL rights heritable, subject to the state's succession laws? (6) Can such NIL compensation impact a student's eligibility for Pell grants or government subsidies based on financial need?[185] (7) How does the Act regulate "corruption"?[186] (8) Does the Act mandate that colleges pay college athletes for the use of their NIL when the colleges financially benefit from the use of the players' NIL, outside their athletic activity, such as in college marketing and recruitment? (9) Does the Act set a ceiling for players' rights or it is the floor; that is, can the courts expand the players' rights to include direct compensation from their schools and/or the NCAA for its participation in college sports? (10) Does the Act serve as an unintended obstacle to litigation against the NCAA for its use of players' NIL? (11) In future litigation by players against the NCAA, could courts determine that the players' NIL rights are being respected when, in fact, they continue to be exploited? (12) Is the Act's protection of collegiate athletes' rights to capitalize on their NIL, a property right that is inherent to all Louisiana residents, protected by the Louisiana Constitution, or it is a mere privilege the State is granting to collegiate athletes? (13) Does the Act's recognition of collegiate athletes' NIL rights support an argument that violations of those rights, as well as players' claims for compensation for their labor, constitute governmental takings, subject to just compensation, under the Fifth and Fourteenth Amendments to the U.S. Constitution? (14) Should the Act address the need to protect college athletes from NIL deal exploitation by unscrupulous contracts? (15) Can a college athlete choose the state of choice of their NIL contract or is it tied to the athlete's residency? These unanswered questions evidence the inadequacy of the current NIL laws, which are limited in scope and grounded

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[185] Charles R. Johnson, Richard Pianoforte, *What Student Athletes Need to Know About Their NIL Income*, KIPLINGER (Dec. 13, 2023), https://www.kiplinger.com/personal-finance/nil-income-what-student-athletes-need-to-know [https://perma.cc/45B4-TGPT] ("If a student athlete's taxable income is considered high, they could receive less aid than they request. ("Income from NIL opportunities must be included in taxable income reported by students on their Free Application for Federal Student Aid (FAFSA) application forms. If a student athlete's taxable income is considered high, they could receive less aid than they request.").

[186] *See* Ray Waliewski, *NIL, bad for NCAA*, LIONNEWSPAPER (Sept. 27, 2024), https://www.lionnewspaper.com/opinions/2024/09/27/nil-bad-for-ncaa/ [https://perma.cc/245H-CAYA].

on equal protection in applying the right of publicity. Further, these unanswered questions are not unique to the Louisiana statute; they apply to the NIL law generally. Many of these questions can be addressed by amending NIL laws to recognize the deficiency of grounding NIL law on the tortious right of publicity. That shortcoming will be analyzed next, followed by a statutory proposal that bases NIL law on the law of property.

4. General Conclusion

In conclusion, intercollegiate sports, particularly football, are a significant industry in Louisiana.[187] With the national legal movement to grant collegiate athletes the control and use of their NIL, Louisiana's Act 479 seeks to give athletes that same rights as non-athlete students and seeks to ensure that Louisiana colleges and universities remain competitive in a changing market for sports talent. Louisiana's enactment of Act 479 is in lockstep with the national movement to recognize that collegiate athletes should have the legal right to profit from their NIL. That national movement will likely facilitate a revolution in collegiate athletics, one in which the athletes will be treated, compensated, and recruited as professionals rather than as amateurs. The new law is a positive step in providing those athletes with additional compensation from "new money" sources, that is from endorsements, appearances, and the like. Most importantly, Act 479 has a positive socio-economic impact on Louisiana, by helping to lift players and their families, particularly those from disadvantaged communities, out of poverty. It does so without reducing the profitability of existing revenue that the State and its athletic program are currently receiving.

However, these statutes that support the development of NIL rights fail to address the players' rightful demand to be justly compensated for their labor in playing and preparing to pay for the sports. Nor does it address the prior, arguably wrongful taking of the players' NIL.[188] From the perspective of the players, justice would require that (1) the state quickly facilitate the

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[187] LSU Athletics alone has reportedly a $500 million impact on the Louisiana economy. *LSU Athletics Has $500 Million Impact on Louisiana Economy, Study Says*, LSU Sports (Mar. 13, 2023) https://lsusports.net/news/2023/03/13/lsu-athletics-has-500-million-impact-on-louisiana-economy-study-says/ [https://perma.cc/F422-GMYB] (noting further that "LSU Athletics remains one of the few self-sufficient athletics departments in the country, receiving neither state funding nor student fees").

[188] *See* Crusto, *Game of Thrones*, *supra* note 1 (analyzing NCAA's restrictions on athletes' NIL as a taking).

stated goal of Act 479, (2) compensate the players for the past takings of their NIL, and (3) pay the players as professionals for their participation in the state's intercollegiate athletic programs, especially those that are operated by the state. Hence, when it comes to just compensation for collegiate athletes, more is not enough.

Louisiana's Act 479 is expected to be a touchdown; however, it appears to be a fumble. In addition to failing to address player demands, there are two reasons it fails to reach the NVP. First, due to the red tape needed to facilitate a college player's ability to capitalize on their NIL, the Act fails to achieve its stated goal, which is to put those players on a level playing field equal to non-athlete college students. Second, compared to the laws enacted by other states, such as Texas, which has expedited a player's signing NIL deals and receiving NIL funds, Louisiana is not competitive and is likely losing out on the recruitment and retention of talent. Perhaps, the state needs to return to the drawing board and consider another playbook to achieve its stated goals. This moment in time presents a special opportunity for the state to take a leadership role by drafting and enacting a model statute that grants and recognizes the inherent property and personal right of *all residents of Louisiana*, including collegiate athletes, to capitalize on their name, image, or likeness, including and beyond a right of publicity. Such a model statute should be adopted as a needed uniform code to protect that right for everyone from exploitation.

D. Right of Publicity is Deficient

As previously noted, NIL law as represented by the Louisiana statute rests on two legal bases: (1) the existence of a right of publicity and (2) equal treatment under the law. That is, in a nutshell, that college athletes have an equal right to the right of publicity as college students who are not athletes. As noted above, I believe that basing college athlete NIL law on the tort of a right of publicity has a major deficiency. Essentially, the tort of a right of publicity is not readily transferable by the athlete to other third parties, which makes it less suitable for NIL deals. After reviewing many NIL deals and studying the literature on NIL, my learned opinion is that there are seven reasons why those deals are hampered by the current NIL law. (1) As the right of publicity is based upon the right of privacy, such right is not assignable to third parties and, therefore, does not support the sale or license of

NIL deals.[189] (2) As the right of publicity is actionable only when there is an *unauthorized* use, it does not envision the "trading" of the use of a person's NIL for pay for an authorized use.[190] (3) As the right of publicity is based on an invasion of a person's privacy, it is unlikely that that right would be descendible to that person's estate upon their death.[191] (4) NIL based upon the right of publicity is not severable or divisible which makes licensing of NIL less feasible.[192] (5) The right of publicity is a common law tort and does not exist in every State's statute which may require litigation to determine its applicability to NIL deals.[193] (6) Based on tort law, NIL has limited remedies to redress violations. And (7) NIL is based on various state right of privacy laws, and current NIL does not facilitate the monetarization of NIL in countries outside the United States in jurisdictions that do not recognize the right of publicity.[194]

These deficiencies in the Louisiana NIL law are representative of the states that have enacted pro-college athlete NIL law and compel us to seek a paradigm shift, one that is a more favorable legal classification for NIL law, one that would facilitate the efficient monetization of NIL. A more favorable approach to the development of NIL law will be presented next.

II. "Name, Image, and Likeness as Property" Act

As previously presented, we are witnessing a paradigm shift in how college athletes are regulated, which is allowing them to financially benefit from their NIL. As described in Part I, this shift represents a revolutionary break from the NCAA amateurism rules that strictly prohibited players from receiving any type of compensation related to their player status. How we treated college athletes is symptomatic of a fundamental flaw in our jurisprudence, in that college athletes were denied the same NIL rights that were available to non-athletes, such as art or music students. The changes to the rights of college athletes are greatly welcome and long overdue. However, as presented in Part I, new state laws favoring NIL rights for college athletes, which are grounded in the tort of the right of publicity, are ill-equipped to support

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[189] Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, Communications Lawyer (American Bar Association), Aug. 2011.
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*

the legal needs and financial goals of NIL deals. The solution to the growing need to protect NIL from exploitation and to increase the value of NIL and thereby enrich the persons who possess the NIL is to categorize NIL as "property"[195] and to codify that in federal or state law. The following provides the essential provisions of such a law and lays out three tenets of a proposed "Name, Image, and Likeness as Property Act" or NAPA for short.

There are three major tenets of the NAPA, which are laid out in its preamble:

> Preamble: Everyone, particularly college athletes, enjoy their name, image, and likeness as attributes of their "self"[196] and should be tradable by that person to monetize its value, protected against unauthorized use or intrusion, and should be descendible as a part of their estate when that person dies. These desired outcomes require that we deem or characterize a person's NIL as their property.
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> First, whereas, the law has long protected a person's personal and real property, whereas, federal copyright and patent laws protect the creative property of a person, there is no federal law that protects a person's NIL; and, whereas, a person seeking protection must rely on the common law tort of a right of publicity.
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> Second, whereas, with the proliferation of social media, the rise of AI, and the development of the metaverse, a person's NIL has become a valuable, vulnerable asset that can be monetized and can increase a person's wealth but, if left unprotected, would become the wealth of a person who exploits another person's NIL.
>
> Third, whereas, several states have enacted laws that seek to recognize the right of college athletes to capitalize on their NIL and not lose their eligibility to play NCAA college sports, although those laws are particular

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[195] "Property" herein refers to "natural law theory of property" which is the jurisprudential theory by which there are "natural rights" (1) that are fundamental or natural, as derived from God or nature, (2) to which all people are equally entitled, (3) that are inalienable, meaning they cannot be bargained or legislated away from people, and (4) that apply to life, liberty, and property.

[196] "Self" herein refers to a person's attributes or identities, such as the fruits of labor, name, image, likeness, their brand, any other quality or feature regarded as a characteristic or inherent part of someone (both tangible and intangible), and other unequivocal identifiers. Rights that protect the attributes of a person should not be limited to the right of privacy, the right of publicity, and the right to not be enslaved. These rights extend to all mediums such as print, online, cyberspace, and the virtual universe. *See* Crusto, *Right of Self, supra* note 1 (presenting the seminal thesis that everyone is legally entitled to own attributes of their "self" which is coined as "persona").

> to college athletes and are based on the right of publicity; and whereas, property law possesses unique beneficial features that would enhance a person's wealth and protect their NIL from exploitation as well as provides timeworn, proven remedies against abuse. Therefore, we hereby proclaim every person owns a natural property right to their NIL, is entitled to all the attributes of property including alienation, severability, descendability, and is protected by all legal and equitable remedies that inure to property.

This Article is aware of the call for a national, uniform approach to achieving this goal via a federal statute.[197] However, the creation of a federal statute and the issue of federal preemption is beyond the scope of this Article. Further, this Article acknowledges that some critics believe that NIL laws will result in the death of college sports.[198] Consequently, a detailed model "Name, Image, and Likeness as Property Act" follows the main text of this Article. I have drafted the model act with the hopes that government officials and policymakers will adopt it as a standard for reform in this area of law. The justifications for NAPA and responses to its critics are presented next.

III. Justification

We start with a brief overview of where we are and where we are going next. Part I of this Article presented the conundrum of grounding NIL law in the tortious right of publicity and identified the legal issue of how current pro-NIL state law fails to facilitate the maximization of the monetization of NIL's rights. Part II presented NAPA as a statutory solution to this problem, proposing that NIL be viewed as property, particularly the personal property of college athletes, and lays out the tenets of a model statute. Next, this Part III supports the thesis of NIL as property and NAPA by presenting three justifications, that it (1) is based in foundational and constitutional principles, particularly intellectual property; (2) facilities the aspirations of NIL laws which are to maximize the players' wealth and to protect them from exploitation; and (3) promotes public policy. This discussion concludes with a

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[197] *See* Kristi Dosh, *4 New Federal NIL Bills Have Been Introduced In Congress*, Forbes (July 29, 2023), https://www.forbes.com/sites/kristidosh/2023/07/29/4-new-federal-nil-bills-that-have-been-introduced-in-congress/ [https://perma.cc/5H6T-DDFN].

[198] *See* Manu Raju, Clare Foran & Morgan Rimmer, *NCAA leaders warn college sports at risk of 'permanent damage' without action from Congress*, CNN (Dec. 3, 2023), https://www.cnn.com/2023/12/03/politics/ncaa-college-sports-at-risk-nil/index.html [https://perma.cc/KT92-RVN7].

defense against critiques of NIL as property. We begin with the foundational and constitutional argument in support of NIL as property.

A. Foundational and Constitutional Principles

Treating NIL as property is baked into our Nation's DNA. It is baked into our foundational and constitutional principles, as will be presented next. In this first argument, I plan to support the proposition that NIL is property by focusing on the foundational and constitutional provisions that promote and protect the private ownership of property. This justification will be in three parts: (1) the right to private property as foundational, (2) the right to private property as constitutional, and (3) the constitutional right to promote and protect intellectual property.

1. Foundational Principles

It is indisputable that the right to private property is a foundational principle that defines the American spirit, our history, and our culture.[199] The American Revolution was fought to defend our belief in the universal and natural right to private property.[200] Most importantly, for purposes of this Article, as a corollary to that right, is the position that NIL is both universal and natural and therefore automatically belongs to everyone, including college athletes. As I argue in a companion piece,[201] the "Right of Self" includes a natural property right[202] in one's "self" or "persona," encompassing a person's attributes or identities, such as labor, name, image, likeness, and other

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[199] *See* companion articles, *supra* note 1.

[200] Edmund S. Morgan, The Challenge of the American Revolution 54–55 (1976) ("Anyone who studies the Revolution must notice at once the attachment of all articulate Americans to property. 'Liberty and Property' was their cry, not "Liberty and Democracy.'").

[201] *See* Crusto, *Right of Self*, *supra* note 1.

[202] "Natural property right" herein refers to the jurisprudential theory by which there are "natural rights" (1) that are fundamental or natural, as derived from God or nature, (2) to which all people are equally entitled, (3) that are inalienable, meaning they cannot be bargained or legislated away from people, and (4) that apply to life, liberty, and property. *See, e.g.*, *The Natural Law Tradition in Ethics*, Stan. Encyc. of Phil. (May 26, 2019), https://plato.stanford.edu/entries/natural-law-ethics/ [https://perma.cc/23YV-9W4K]; *Natural Law*, West's Encyclopedia of American Law (2008), https://legal-dictionary.thefreedictionary.com/natural+law [https://perma.cc/VZJ6-DXMB].

unequivocal identifiers.[203] The issue of who "controls" or "owns" one's property is as old as the founding of the Republic. Relative to the exploitation of labor, there was a historic battle over who controlled the property in oneself, particularly the self of enslaved people of African descent.[204]

A brief legal history of the American Revolution and the establishment of the Republic evidences that private property is a foundational, fundamental right. Following the philosophy of John Locke,[205] the Founders clearly adopted the libertarian principles of self-autonomy or the sovereignty of the individual as right-holders, including the right in themselves and a right in their property.[206] In 1689, Locke argued in his Two Treatises of Government that political society existed for the sake of protecting "property," which he defined as a person's "life, liberty, and estate…."[207] His words then must have rung in the ears of the Founders: "[E]very man has… 'property' in his own 'person.' This nobody has any right to but himself."[208] In "A Letter Concerning Toleration," Locke elaborated on the relationship between libertarianism and the limitations of government when he wrote that the magistrate's power was limited to preserving a person's "civil interest," which he described as

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[203] "Attributes" of a person include their labor, their brand, and a quality or feature regarded as a characteristic or inherent part of someone or something, both tangible and intangible, but not limited to the right of privacy, the right of publicity, or the right not to be enslaved, in all mediums such as print, online, cyberspace, and the virtual universe.

[204] *See* Crusto, *Blackness as Property*, *supra* note 1.

[205] *See* Locke, *supra* note 2.

[206] *See Individual Rights*, *supra* note 49 (noting the idea of "self-ownership" is the focus of most libertarians). *See also Libertarianism*, *supra* note 49 (discussing Robert Nozick's theory of self-ownership and its relation to libertarianism in Robert Nozick's 1974 book Anarchy, State, and Utopia: "[T]he key libertarian starting point is that individuals have a very stringent (perhaps the most stringent possible) set of rights over their persons, giving them the kind of control over themselves that one has over possessions one holds as private property. This includes (1) control rights over the use of the entity: both a liberty-right to use it and a claim-right that others not use it without one's consent, (2) rights to transfer these rights to others (by sale, rental, gift, or loan), (3) immunities to the non-consensual loss of these rights, (4) rights to compensation if someone uses the entity without one's permission, and (5) enforcement rights (including rights of prior restraint if someone is about to violate these rights).").

[207] Locke, *supra* note 2, at 141 ("[N]o political society can be, nor subsist, without having… the power to preserve the property…").

[208] *See id.* at 116.

"life, liberty, health, and indolency of body; and the possession of outward things…."[209]

Additional to Locke's writings, the Founders were guided by the libertarian principles found in the English common law which identified a right to the natural attributes of self as an inherent natural right, entitled to protection from wrongful governmental infringement—as digested in Blackstone's Commentaries.[210] Blackstone noted that the "right of personal security" included "enjoyment of life" and that "[l]ife is an immediate gift of God, a right inherent by nature in every individual."[211] He also emphasized that the government could not take a person's life, liberty, or property arbitrarily or without the express warrant of law.[212]

The Founders' adoption of their belief in the enjoyment of life, liberty, and the pursuit of happiness as a property right echoes Locke's view of the universality of natural law and its relationship to property rights. For example, Samuel Adams stated that "[a]mong the Natural Rights of the Colonists [were]… a right to life… liberty… [and] property…."[213] Most significantly, the Founders' belief in the right to privately own property is reflected in the immortal word of the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain *unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness*."[214] On July 4, 1776, the Declaration was unanimously

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[209] John Locke, A Letter Concerning Toleration 6–7 (1689) ("It is the Duty of the Civil Magistrate, by the impartial Execution of equal Laws, to secure unto all the People … the just Possession of these things belonging to this Life.").

[210] *See* William Blackstone, Commentaries on the Laws of England 118–20 (1765–1769) ("[T]he rights of persons that are commanded to be observed by the municipal law… are due from every citizen … and … belong to him…").

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

[212] *Id*. at 129–30 ("[I]t is enacted by the statute 5 Edw. III. c. 9. that no man shall be forejudged of life or limb, contrary to the great charter and the law of the land: and again, by statute 28 Ed. III. c. 3. that no man shall be put to death, without being brought to answer by due process of law.").

[213] Samuel Adams, The Rights of the Colonists, The Report of the Committee of Correspondence to the Boston Town Meeting (1772), *reprinted in* 7 Old S. Leaflets no. 173, 417 (1906), https://history.hanover.edu/texts/adamss.html [https://perma.cc/T6S9-KEQR].

[214] The Declaration of Independence para. 2 (U.S. 1776) (emphasis added).

adopted by all thirteen colonies.[215] A movement subsequently developed for constitutional reform, culminating in the Philadelphia Convention of 1787, which adopted the fundamental conception of property as a private right and reached its fruition through the Constitution of 1787.[216] Both the Constitution of 1787 and Alexander Hamilton's The Federalist No. 78 "provided the basis for an inviolable right of property."[217]

Hence, the natural right to private property in oneself is a guiding, foundational principle that continues as a major tenet of our belief system. As it reflects the attributes of a person, NIL is uniquely "natural property," which does not require legislation to exist and be universal. Therefore, our Nation's foundational principles support NAPA's recognition of college athletes' right to their ownership and monetization of their NIL and protection against exploitation.

2. Constitutional Protection of Private Property

In addition to the Founders' belief in the private ownership of the attributes of oneself, the Founders expressly provide for protection of private property in the Bill of Rights' Amendments to the Constitution. In further evidence of the Founders' incorporation of pro-private property principles in the Constitution, the Founders borrowed from various previously established state constitutions that expressly provided for the right to private property.[218] The Founders deemed this right so fundamental that they thought it unnecessary to repeat it in the U.S. Constitution itself; nonetheless, the Anti-Federalists insisted on the protection of self, leading to the adoption of the Bill of Rights.[219] While the Constitution did not expressly provide for a *right* of private property, the Fifth Amendment's Due Process Clauses comes

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[215] *See Continental Congress*, History (Sept. 25, 2024), https://www.history.com/topics/american-revolution/the-continental-congress [https://perma.cc/F5D4-6NH4]. *See generally* Garry Willis, Inventing America: Jefferson's Declaration of Independence 207–17 (1978).

[216] Alan Freeman & Elizabeth Mensch, *Property*, *in* A Companion to the American Revolution 642 (Jack P. Greene & J.R. Pole eds., 2000).

[217] *Id.* at 642–43.

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

[219] U.S. Const. amends. I–X.

close by stating that "[n]o person shall . . . be deprived of life, liberty, or property . . . nor shall private property be taken for public use, without just compensation."[220] Further, enacted during Reconstruction, the Fourteenth Amendment expressly provides that States cannot deprive a person of "life, liberty, or property . . . nor deny any person . . . the equal protection of the laws."[221] Moreover, many state constitutions have such a provision today.[222]

Taken together, these Due Process Clauses provide two different types of protection of property against actions by the state and federal governments: (1) procedural due process, which requires that before depriving a person of life, liberty, or property, the government must follow certain procedures;[223] and (2) substantive due process, which requires that if depriving a person of life, liberty, or property, the government must have sufficient justification.[224] I argue that the "enjoyment of life, liberty, and the pursuit of happiness" should include the enjoyment of financial benefits one can generate using their attributes, including one's NIL.

While the Bill of Rights focuses primarily on rights that protect individual liberties during criminal investigations and prosecutions, its underlying principles also protect against the government's abuse of a person's civil rights or liberties, which I also believe includes protection of a person's NIL. Most importantly, the Ninth Amendment expressly provides that the enumeration of any rights in the Constitution does not deny or negate other rights reserved by the people.[225] In conjunction, the Tenth Amendment reserves any powers

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[220] U.S. Const. amend. V.

[221] U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

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

[223] *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972). *See generally* Robert L. Glicksman & Robert L. Levy, Administrative Law: Agency Action in Legal Context (2010).

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

[225] U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). James Madison proposed the Ninth Amendment to ensure that the enumerated rights in the Bill of Rights would not be read to preclude the existence of other

not delegated to the United States by the Constitution, as reserved to the states, or respectively to the people.[226] Moreover, over the years, the Supreme Court has found that there are some fundamental, "unenumerated" rights, some of them within the penumbras of the Constitution, as implied by the Ninth Amendment.[227] Hence, the Ninth and Tenth Amendments, combined with Supreme Court precedents, support the proposition that the Founders believed in three principles of constitutional power: (1) that all rights not transferred to the government, including the right of self, continue to reside with the people; (2) that additional fundamental rights exist outside of the Constitution; and (3) that the rights enumerated in the Constitution are not an exhaustive list of individual rights.

The Constitution's support for a person's right to own and control the attributes of themselves is evidenced in the Thirteenth and Fourteen Amendments. Specifically, the Thirteenth Amendment[228] protects a person's right to self by expressly prohibiting enslavement, by which a person's self was the property of another person.[229] Additionally, the Fourteenth Amendment[230] secured citizenship rights of every person who was born in the United States or is a naturalized citizen. What is interesting about those Amendments to the Constitution is the increased scope of protection they provide against abuse of individual rights. While the Bill of Rights pertains to the protection of rights against abuse by the federal government, the Thirteenth and Fourteenth Amendments protect individual rights from abuse by state government and by private actors. That is, the Constitution protects a person whose self is violated by another person who seeks to enslave them.

Therefore, the Constitution recognizes a right to private property and provides protections against governmental and private abuses of that right. This provides constitutional support for the proposition that NIL is private

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rights reserved to the people of the United States. Historical Background on Ninth Amendment, Legal Info. Inst. at Cornell L. Sch., https://www.law.cornell.edu/constitution/ninth_amendment [https://perma.cc/TF3A-LW2C].

[226] U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

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

[228] U.S. Const. amend. XIII.

[229] *See* Crusto, *Blackness as Property*, *supra* note 1.

[230] U.S. Const. amend. XIV.

property. Relative to NIL, if NIL were based on property law, every person's NIL would arguably be protected from both wrongful private and governmental exploitation. Furthermore, the current NIL law based on the right to privacy is in constitutional decline following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.[231] That decision overturned *Roe v. Wade*,[232] which was grounded on the right to privacy based on the Due Process Clause of the Fourteenth Amendment.[233] That leads to the discussion of the nation's constitutional recognition of the need to promote and protect intangible forms of property.

3. Constitutional Protection of Intellectual Property[234]

Today, a major economic and national security concern is the theft of the nation's intellectual property including identify theft and data exfiltration. On a personal level, imagine the horror if someone were to steal your NIL and then use it for evil, unlawful, or exploitative purposes, including extortion.[235] In this next discussion, I plan to support the proposition that

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[231] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022). On the issue of a broad application of Dobbs, Justice Alito's majority opinion (6-3) recognized that the Court's overturning Roe might be read broadly, to apply to other areas beyond abortions, and cautioned that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Id.* at 221. However, Justice Thomas in his concurring opinion stated that the legal rationale for Dobbs could be applied to overturn other major cases, including those that legalized gay marriage, barred the criminalization of consensual homosexual conduct, and protected the rights of married people to have access to contraception. *Id.* at 331–36.

[232] Roe v. Wade, 410 U.S. 113 (1973).

[233] *Id.* at 113, 129.

[234] *See generally* Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 Harv. L. Rev. 813 (1927); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281 (1970); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325 (1989); Jessica Litman, *The Public Domain*, 39 Emory L.J. 965 (1990); Wendy J. Gordon, *A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533 (1993). This discussion was inspired by Loyola Professor Paul S. "Ford" Miller. Thank you for your contribution.

[235] *See, e.g.,* Tim Fang, *San Francisco City Attorney Sues Websites Creating AI-Generated Deepfake Pornography,* CBS (Aug. 15, 2024), https://www.cbsnews.com/sanfrancisco/news/sf-city-attorney-sues-websites-creating-ai-generated-deepfake-pornography/ [https://perma.cc/ZEX6-G8E7] (highlighting the private and public concern over AI-generated deepfake pornographic images of adults and children).

NIL is property by focusing on the Constitution's provisions to protect and promote the private ownership of intellectual property.

While the Founders established private ownership of property as a fundamental principle worthy of governmental protection, they didn't define the word "property." However, I suggest that evidence shows that the Founders adopted an expansive view of private property as the ownership of a person's labor, a thing or idea, or an abstraction of the thing or idea.[236] When considering private property, its ownership, and its governmental protection, I believe that they had three types of property in mind. These were (1) the land and natural resources that they claimed by way of European discovery of native lands and conquest against the Native or European nations,[237] (2) the ownership and domination of all attributes and labor of enslaved people,[238] and (3) the ideas and inventions that are intangible, intellectual property.[239] Here, we are focused on the Founders' constitutional commitment to the ownership, growth, and governmental protection of intellectual property. I believe that such attention to intellectual property supports the constitutional commitment to the concept of NIL as the private property of the person to be promoted and entitled to governmental protection.

Several of our Founders were learned people of science including Benjamin Franklin, one of our greatest inventors.[240] They recognized the need to provide national encouragement of and protection for copyrights and patents as the private property of their creator-inventors.[241] Their concerns are evidenced in the Intellectual Property ("IP") Clause found in Article I of the Constitution.[242] Pursuant to that clause in the Constitution, in 1790 the first

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[236] *See, e.g.*, Jeremy Bentham, Theory Of Legislation 112–13 (R. Hildreth trans., 6th ed. 1890).

[237] *See, e.g.*, Johnson v. McIntosh, 21 U.S. 543 (1823).

[238] *See* Crusto, *Blackness as Property*, *supra* note 1.

[239] *See The Framing and Ratification of the Intellectual Property Clause*, Legal Info. Inst. at Cornell L. Sch., https://www.law.cornell.edu/constitution-conan/article-1/section-8/clause-8/the-framing-and-ratification-of-the-intellectual-property-clause [https://perma.cc/NR22-SKM9].

[240] *See generally* Walter Isaacson, Benjamin Franklin: An American Life (2003).

[241] *See* Kristi Dosh, *4 New Federal NIL Bills Have Been Introduced In Congress*, Forbes (July 29, 2023), https://www.forbes.com/sites/kristidosh/2023/07/29/4-new-federal-nil-bills-that-have-been-introduced-in-congress/ [https://perma.cc/5H6T-DDFN].

[242] Article I, Section 8, Clause 8 of the Constitution, also known as the "Patent and Copyright Clause," grants Congress the enumerated power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and

Congress enacted national copyright and patent laws.[243] Since that initial statute, the scope of copyright and patent protection has expanded substantially to include technological developments.[244] Further, in support of the proposition that NIL should be the private property of the person at least for and beyond the person's lifetime, the Copyright Extension Act of 1998 expanded an author's copyright to the life of the author plus 70 years, far longer than the 14 years prescribed by the First Copyright Act.[245]

This argument supports the proposition that NIL is property. However, whether or not it falls under the protection of intellectual property law is beyond the scope of this Article. Notwithstanding, in *Vidal v. Elster*,[246] the Supreme Court opined on whether a person could legally register the phrase "Trump too small" as a trademark.[247] There, the Court upheld the U.S. Patent and Trade Office's denial of such an unauthorized use of another person's name.[248] The Supreme Court held that the "names clause"[249] of the Lanham Act trademark law[250] did not violate the Free Speech Clause of the First Amendment.[251] In writing the majority opinion, Justice Thomas noted that "[o]ur country has recognized trademark rights since the founding."[252] However, he pointed out that "[r]estrictions on trademarking names have

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Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I., § 8, cl. 8.

[243] *See* Edmund S. Morgan, The Challenge of the American Revolution 54–55 (1976) ("Anyone who studies the Revolution must notice at once the attachment of all articulate Americans to property. 'Liberty and Property' was their cry, not 'Liberty and Democracy.'").

[244] *See id.*

[245] *See id.*

[246] Vidal v. Elster, 602 U.S. 286 (2024). This case was brought to my attention by Felicia Caponigri, Visiting Scholar, Chicago-Kent College of Law. Thank you for your contribution.

[247] *Id.*

[248] *Id.*

[249] The "names clause," in the Lanham Act prohibits the registration of a trademark that "[c]onsists of or comprises a name . . . identifying a particular living individual except by his written consent," 15 U.S.C. § 1052(c).

[250] The Lanham (Trademark) Act, Pub. L. 79–489, 60 Stat. 427 (1946) (codified at 15 U.S.C. § 1051) is the primary federal trademark statute in the United States.

[251] U.S. Const., amend. I ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

[252] *Vidal,* 602 U.S. at 296 (citing Beverly W. Pattishall, *The Constitutional Foundations of American Trademark Law*, 78 Trademark Rep. 456, 457–59 (1988)).

a long history."[253] Most important to the proposition that a college athlete's NIL is property is Justice Thomas's dicta which explains why the law does and should restrict trademarking another person's name without that person's permission:

> Such restrictions have historically been grounded in the notion that a person hasownership over his own name, and that he may not be excluded from using that name by another's trademark. As the Court has explained, "[a] man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property." *Brown Cite Chemical Co. v. Meyer*, 139 U. S. 540, 544 (1891). It is therefore "an elementary principle that every man is entitled to the use of his own name in his own business." F. Treadway, Personal Trade-Names, 6 Yale L. J. 141, 143–144 (1897) (Treadway); see also A. Greeley, Foreign Patent and Trademark Laws §138, p. 135 (1899) ("The right of any one to place his own name on goods sold by him is recognized as a natural right and cannot be interfered with"). "The notion that people should be able to use their own name to identify their goods or business is deeply rooted in American mores." B. Pattishall, D. Hilliard, & J. Welch, Trademarks and Unfair Competition §2.06 (2001).[254]

The *Vidal* rationale support the supposition that a college athlete's name, and perhaps image and likeness, should be treated as the natural property of the athlete, entitled to constitutional protections.

In summary, the Founders provided constitutional, federal protections for the forms of intellectual property known at the time, which were copyrights and patents. In the process, they recognized intellectual creation as the property of their creators. The Founders' protection of early forms of intellectual property should be extended to new forms of intellectual property that have resulted from the internet and social media, namely NIL. Therefore, NIL as property is an extension of the Founders' recognition of the importance of promoting and protecting the intellectual, albeit intangible, wealth of the nation.

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Hence, both our nation's foundational and constitutional principles recognize a right to private property and the protection thereof. They clearly support a proposition that NIL is property. That leads this discussion to the

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[253] *Id.* at 288 (citing J. McCarthy, Trademarks and Unfair Competition §13:5 (5th ed. 2023)).

[254] *Id.* at 301–02.

second justification which is that NIL as property facilitates the aspirational goals of NIL law.

B. Facilitates the Aspirations of NIL Law

I believe that in addition to college athletes, everyone has a right to own and monetize the use of their NIL. As such, NIL is a source of wealth as well as a matter of privacy. As to the privacy side, imagine one morning you receive a text message from your best friend. She tells you a new "character," who looks and talks just like you, has been added to a popular video game or worse yet, to a pornographic online site.[255] Upon investigation, you discover that someone has taken your image and likeness without your permission and has licensed it to a game developer.[256] As to the wealth side, imagine you are a leading college athlete and someone is using your NIL without your permission and is collecting millions in royalties which legally belong to you. This leads to a discussion as to what are the expectations of a person, particularly a college athlete, when it comes to NIL law.

This section will argue that when one considers the purpose of NIL law, one would agree that treating NIL as property is the best legal vehicle to achieve that purpose. In my opinion, NIL law should achieve two important societal and economic goals, which I believe coincide with the expectations of a person whose NIL is being used. Those goals are: (1) maximizing the value of NIL and the wealth of the person whose NIL is at hand and (2) protecting NIL from exploitation.[257] I coin these as the "NIL value proposition"

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[255] Juventus footballer Edgar Davids brought a lawsuit against Riot Games Europe Holdings Ltd., stating that a character named Lucian in their League of Legends game infringed Davids's likeness. Monika A. Górska & Lena Marcinoska-Boulangé, *Likeness in Computer Games: Real-Life People*, Newtech.Law (Apr. 8, 2021), https://newtech.law/en/articles/likenesses-in-computer-games-real-life-people/ [https://perma.cc/RS3X-BMKP]. Similarly, Booker T. Huffman sued Activision, claiming that the Call of Duty character David "Prophet" Wilkes is based upon a character he appeared as in the early days of his wrestling career named G.I. Bro. Andy Chalk. *Activision Smacks down Pro Wrestler Booker T. in Call of Duty Copyright Lawsuit,* PC Gamer (June 25, 2021), https://www.pcgamer.com/activision-beats-pro-wrestler-booker-t-in-call-of-duty-copyright-lawsuit/#:~:text=in%20Call%20of%20Duty%20copyright%20lawsuit,-News&text=June%2025%2C%202021-,Booker%20T.,on%20his%20GI%20Bro%20personal [https://perma.cc/ZW8Q-AWTX].

[256] In each of the cases referenced in the above footnote, the game developers used the person's likeness in their video game without their permission.

[257] These two societal goals of maximizing wealth and guarding against exploitation are fundamental to an orderly, lawful society.

("NVP").[258] In addition to college athletes, classifying NIL as property will benefit a wide range of people, including actors and entertainers, internet influencers, and every person who wishes to protect their NIL from its unauthorized use and to benefit from its authorized use.

Three relatively recent developments compel us to address the legal nature of a person's interest in their NIL. One such development is the increasing market value of NIL due to the proliferation of social media.[259] Another development is a greater recognition of how AI poses a growing threat to a person's NIL.[260] A third development is the rising demand by college athletes,[261] actors,[262] and entertainers[263] for the right to benefit from the use of their NIL and to protect it from exploitation.[264] Notwithstanding the societal and economic significance of NIL, there is little current legal analysis of NIL broadly; most discussion of NIL is focused on a singular question: Do college athletes have a right to capitalize on the use of their NIL?[265] Most

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[258] "NIL value proposition" herein refers to the author's conceptualization of how NIL reflects the expectations of the holders of NIL rights and how NIL might achieve the societal and economic goals increasing the wealth of the person and of the nation and promoting order by discouraging exploitation.

[259] *See* Dan Whateley & Ashley Rodriquez, *How NIL Deals and Brand Sponsorships Are Helping College Athletes Make Money*, Bus. Insider (Sept. 19, 2023), https://www.businessinsider.com/how-college-athletes-are-getting-paid-from-nil-endorsement-deals [https://perma.cc/U2D5-C4V6]

[260] *See generally* Sharoni S. Finkelstein & Alexandra L. Kolsky, *Artificial Intelligence Wants Your Name, Image and Likeness–Especially if You're a Celebrity*, Venable LLP (May 17, 2023), https://www.venable.com/insights/publications/2023/05/artificial-intelligence-wants-your-name-image [https://perma.cc/U7KM-S53A].

[261] *See* Claybourn, *supra* note 19.

[262] Actors worry that AI could be able to create digital replicas of their likenesses or that their performances could be digitally altered without payment or approval. *See* Sophie Lloyd, *SAG-AFTRA Strike Update: Actors Union Ready to Negotiate After Writers Deal*, Newsweek (Sept. 25, 2023), https://www.newsweek.com/sag-aftra-strike-update-1829456 [https://perma.cc/6MPZ-F865]; *cf.* Leah Asmelash, *These Books are Being Used to Train AI. No One Told the Authors*, CNN Style (Oct. 8, 2023), https://www.cnn.com/2023/10/08/style/ai-books3-authors-nora-roberts-cec [https://perma.cc/MKE8-42Y3].

[263] *See* Ashley Cullins, *Michael Jackson's Likeness Valued at $4.1 Million in Big Tax Court Win for Estate*, Hollywood Rep. (May 3, 2021), https://www.hollywoodreporter.com/news/general-news/michael-jacksons-likeness-valued-4-1-million-tax-court-4177594/ [https://perma.cc/G6B3-6VJW].

[264] *See supra* note 47.

[265] *See* Alan Blinder, *College Athletes May Earn Money From Their Fame, N.C.A.A. Rules*, N.Y. Times (June 30, 2021), https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html [https://perma.cc/49WH-D5PX].

importantly, the answer to that question will establish the legal basis for everyone who wishes to benefit from the use of their NIL and to protect their NIL from abuse.

This leads to the second point which is to argue that adopting property law as the legal basis of NIL provides an effective means to achieve the goals of NIL law. This is especially true compared to the right of publicity which is based in tort law and the right of privacy. The following are my arguments for each justification for NIL as property. Essentially, property law has time-honored, well-defined, and certain features that severally and combined make it the most powerful tool to achieve NVP. Those features and how they promote the NVP will be presented next. In addition to the foundation and constitutional provisions to protect property, which is discussed above, property has the following attributes that will be briefly discussed below in addition to how property relates to NIL: (1) ownership/title; (2) possession; (3) alienable and transferable by sale, license, contract, or gift; (4) assignable, leasable, and licensable; (5) divisible and subdividable; (6) heritable and descendible by inheritance or will; (7) concurrently-owned; (8) collateral for loans; (9) exclusivity; (10) time-honored, clear, and certain rules; (11) divisible into present and future interests; (12) protected by legal and equitable remedies, (13) can be held in trust; (14) income-generating; (15) insurable; (16) taxable; (17) protected against wrongful, governmental taking, and (18) internationally respected.[266] Few of these attributes of NIL as a property right are features of the current law, which treats NIL as a right of publicity. What the reader will discover from the discussion below is that we currently behave as if NIL is property, notwithstanding the fact that the state-statutory NIL deemed it to be grounded in the right of publicity tort. Many of the property features of NIL are essential for effective estate planning and intergenerational wealth transference.

[266] *See generally* Restatement (Third) of Prop. (Am. L. Inst. 2011). These are often referred to as a "bundle of rights" which is a metaphor for the legal components of property; Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. Cin. L. Rev. (2014), https://scholarship.law.uc.edu/uclr/vol82/iss1/2 [https://perma.cc/H26V-KZZH].

1. Ownership and Title

Ownership or title is one of the key aspects of property law.[267] Most property ownership is evidenced by a document such as a deed (real property), a registration (car), a certificate (stock), or a passbook or statement (bank account). The intangibility of intellectual property might be evidenced by a copyright or patent document. NIL is different in that there is no government-issued documentation of ownership or title. Like other virtual assets, NIL is the new property. NIL should be seen as one of the many types of digital or virtual assets, a new class of property, that include cryptocurrencies, non-fungible tokens (NFTs), game tokens, and governance tokens.[268] "Digital" or "virtual" assets are non-physical and can generate value for the owner. They should be able to transfer ownership through purchase, gifting, or other means of giving the rights to someone else, along with the value the item can bring; and must be discoverable or stored somewhere that it can be found.[269] With the development of modern technology, including the expansion of the virtual world or metaverse,[270] property interests in attributes of one's self, such as NIL, have increased in value. One example of the value of NIL is that of the world-famous soccer star Cristiano Ronaldo who has reportedly 545 million

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[267] *Ownership and Titles: Chain of Title in Property Law,* Univ. of Pittsburgh Sch. of L. Online Blog (Apr. 18, 2024), https://online.law.pitt.edu/blog/understanding-ownership-and-title-in-property-law [https://perma.cc/B844-E9UJ], ("Title is everything in property law. If you hold title to property, you own it. . . . Ownership signifies the legal right to possess and use property.").

[268] *See* The *Digital Asset: Meaning, Types, and Importance,* Investopedia (May 17, 2024), https://www.investopedia.com/terms/d/digital-asset-framework.asp [https://perma.cc/LBU9-3BB7].

[269] *Id.* (explaining that examples of virtual assets include photos, documents, videos, books, audio/music, animations, illustrations, manuscripts, emails and email accounts, logos, metadata, content, social media accounts, gaming accounts, nonfungible tokens, cryptocurrency, tokens, crypto assets, tokenized assets, security tokens, and central bank digital currencies).

[270] *See generally* Deborah Lovich, *What Is the Metaverse and Why Should You Care?,* Forbes (May 11, 2022), https://www.forbes.com/sites/deborahlovich/2022/05/11/what-is-the-metaverse-and-why-should-you-care/ [https://perma.cc/SU38-NGCT] ("The current increase in attention to the Metaverse is partly driven by the very recent ability to fully 'own' virtual objects, experiences, or land . . . . There are entire metaverse worlds based on this new economy . . . . Republic Realm, a company that develops land in the Metaverse, recently paid $4.3 million for a piece of virtual land in the metaverse-world Sandbox.").

Instagram followers and commands nearly $4 million per post![271] That does not include the millions of dollars he receives from the sale of t-shirts, trading cards, and other NIL revenue.[272] Further, consider the financial value of an avatar in a fantasy football league.[273]

Some critics might argue that NIL is not property because it is not recognized by the government as property. My response is that a person's ownership of their NIL exists pursuant to natural law. Further, there are many types of virtual property that are not issued by states or governments. This relatively new asset class has experienced exponential growth: "In November 2021, non-state-issued digital assets reached a combined market capitalization of $3 trillion, up from approximately $14 billion in early November 2016."[274] Hence, relative to college athletes' NIL, I believe that each player has a natural property right to own and, therefore, have title to their NIL. By comparison, a college athlete can be said to "own" a cause of action under the right of publicity; however, First Amendment considerations restrict the ability to win a claim for a violation of the right of publicity.

2. Possession

It has been said that "possession is nine-tenths of the law" of property.[275] However, possession alone is insufficient to entitle a person to ownership.[276] Notwithstanding, one feature of property ownership is a right to possess the property.[277] Possession of intangible property is a challenging concept,

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[271] *See* Chris De Silva, *Sport's Highest Earners Per Instagram Post*, Wide World of Sports, https://wwos.nine.com.au/news/highest-earning-sports-stars-on-instagram-lionel-messi-cristiano-ronaldo-virat-kohli/ab1bcaaf-0c00-4779-8c67-227a4079aa7f#22 [https://perma.cc/36BN-FZYT].

[272] Riccardo Zazzini, *Cashing in on the Beautiful Game: Ronaldo's Net Worth Breaks the Bank*, Highsnobiety (Oct. 8, 2023), https://www.highsnobiety.com/p/cristiano-ronaldo-net-worth/ [https://perma.cc/B8SR-YPCZ] ("As of 2023, Forbes estimates [Ronaldo's] net worth at a cool $500 million, making him one of the wealthiest athletes in the world.").

[273] Mekouar, *supra* note 78, reporting that, in 2019, the fantasy sports industry was worth over $7 billion).

[274] Exec. Order No. 14067, 87 Fed. Reg. 14143 (Mar. 9, 2022).

[275] *Possession is Nine Points of the Law and Legal Definition*, US Legal, https://definitions.uslegal.com/p/possession-is-nine-points-of-the-law/ [https://perma.cc/B2XZ-674K].

[276] *See supra* note 195.

[277] *See* Thomas W. Merrill, *Ownership and Possession*, *in* Law and Economics of Possession 9, 18–19 (Yun-chien Chang, ed., 2015) ("I would go further, and

although one would presume that the owner of intangible or virtual assets such as NIL would belong to the person whose NIL is at issue. Hence, a college athlete arguably has both ownership (or title), to their NIL, as well as the right to possess their NIL. By comparison, a college athlete may "possess" a cause of action under the right of publicity; however, possession is personal to the player whose NIL seeks protection. The law of finders does not apply to the right of publicity. Hence, college athlete NIL law has nothing that provides anyone a right of possession in the right of publicity.

3. Alienable and Transferable, by Sale, License, Contract, or Gift

Property is alienable which means it can be freely transferred to others.[278] All private property is presumed to be alienable as it may be conveyed by one party to another.[279] Such a transfer can be gratuitous such as by gift or will,[280] or can be for consideration such as by sale, license, or contract.[281] The fact that

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contend that modern legal systems also protect possession, at least in some circumstances, without regard to ownership or perhaps even in opposition to ownership . . . . The law of finders provides a particularly striking illustration. . . . The finder is not regarded as the owner. Nevertheless, the law regards the finder-as-possessor as having significant rights independent of the owner. . . . The finder, for example, is protected by both criminal law and tort law against unwanted takings of the object by a third party (Armory v. Delamirie [1722] 1 Stra. 505). This is a clear instance of the law protecting possession independently of ownership.").

[278] *See Alienable,* Legal Info. Inst., at Cornell L. Sch., https://www.law.cornell.edu/wex/alienable#:~:text=Alienable%20means%20transferable.%20An%20interest%20in%20property%20is,law%2C%20or%20statutory%20restriction%20on%20it%20states%20otherwise [https://perma.cc/6SF2-4SFL].

[279] *Id.* ("[U]nless some contractual, common law, or statutory restriction on it states otherwise.").

[280] Stephen R. Munzer, *Gratuitous Transfers, in* A Theory of Property 380, 380-418 (1990), https://www.cambridge.org/core/books/abs/theory-of-property/gratuitous-transfers/AE0BB654213165CC5A3A2AF075413E1C# [https://perma.cc/8U9P-XYFJ] ("Gratuitous transfers fall into two groups: transfers from a living person and transfers from the estate of a person who has died. The former group (*inter vivos* transfers) consists mainly of gifts. The latter group (transfers at death) divides. If the deceased person made a valid will, the transfers are called devises in the case of real property and bequests in the case of personal property. If that person has no valid will, the transfers occur by intestate succession. In all cases of the latter group, the things received may be called inheritances. For simplicity's sake, the term 'bequests' will be used for all transfers by will.").

[281] *See* James Chen, *Conveyance: Property Transfer Examples and FAQs*, Investopedia (Nov. 6, 2022), https://www.investopedia.com/terms/c/conveyance.asp [https://

property is alienable and can be licensed from the owner to one, or many, third parties is an invaluable feature of property law.[282] It allows the property owner to transfer all or some of their property interest to third parties, usually in consideration of revenue for the use of the property.[283] These transfers can be severable or divided into lesser property units.[284] They can be extended for different lengths of time such as a short period or a longer period.[285] They can be irrevocable or revocable.[286] As a result, NIL as property allows a person to license their NIL to as many persons as there is a market. By comparison, a college athlete can be said to "license" the right of publicity; however, the right is personal to the player and may not be enforceable by a third-party licensee without the player's participation in the claim of misappropriation.

4. Assignable, Leasable, and Licensable

As noted above, property is assignable, which means it can be leased or licensed to others.[287] One example of an assignment is the leasing of the remaining three months of a one-year lease, which is like a sublease. Most NIL deals involve the licensing of a college athlete's NIL, to endorse a product or service in return for monetary compensation. This permits the athlete to monetize their NIL. For example, Bronny James might license the limited use of his image to promote Nike shoes. The license might be exclusive to Nike or may be non-exclusive. Hence, NIL as property, which can be licensed, is a great vehicle for achieving the NVP.

By comparison, as previously presented, the current NIL law relative to college athletes rests on a right of publicity, which gives a person a legal claim against a person who wrongfully expropriates a person's NIL in violation of their right to privacy. Tort law places many limitations on the right

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perma.cc/9BEK-9RNT] ("The term conveyance refers to the act of transferring property from one party to another. The term is commonly used in real estate transactions when buyers and sellers transfer ownership of land, building, or home. This is done using an instrument of conveyance—a legal document such as a contract, lease, title, or deed.").

[282] Andrew Bloomenthal, *Licensing Agreement: Definition, Example, Types, and Benefits*, Investopedia (Mar. 21, 2024), https://www.investopedia.com/terms/l/licensing-agreement.asp [https://perma.cc/PZ63-4JJG].

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] *See Alienable*, supra note 278.

of publicity. One limitation on the right of publicity is that it is not generally alienable from the person whose privacy a third person expropriates.[288] Tort actions are generally personal and non-assignable.[289] That means that one cannot purchase a right of publicity. This has two negative effects on the value of NIL. First, it devalues NIL. Second, it makes NIL non-transferable. Of course, one might question, if NIL is based in tort law, which is non-transferable, how can college athletes negotiate NIL deals? The answer is that despite the statutory tort basis for NIL rights, NIL is a natural property right, which automatically belongs to all people, including college athletes.[290] Hence, there is nothing in the college athlete NIL law that provides for the ability to lease a players' NIL.

5. Divisible and Subdividable

As property is divisible, one can sub-divide or license it to many users.[291] College athletes can divide their NIL into sublease or sub-licenses to permit a third party the right to create and possibly sell copies of the players' image on products, such as t-shirts for profit, for which an athlete might receive a royalty payment.[292] This property feature can increase the value of a college athlete's NIL by permitting non-exclusivity arrangements with third parties such as brand endorsements with shoe manufacturers, food producers, and car dealerships. By comparison, there is nothing in the college athlete NIL law that provides for the ability to divide or subdivide the right of publicity.

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[288] *See* Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979).

[289] *See* Murphy v. Allstate Ins. Co., 553 P.2d 584, 587 (Cal. 1976).

[290] *See* Crusto, *Right of Self*, *supra* note at 604.

[291] Divisibility of intellectual property such as NIL has not been formally recognized in the law. Divisibility and assignability of easements in gross was the subject of *Miller v. Lutheran Conf. & Camp Ass'n*, 200 A. 646 (Pa. 1938) (holding that easements in gross could be divided but must be controlled by consensus of all owners).

[292] *See* Mark Seavy, *The New Challenges for NIL*, Licensing International (Mar. 11, 2024), https://licensinginternational.org/news/the-new-obstacles-for-nil/ [https://perma.cc/X5W9-B9C8] ("With the transient nature of the transfer portal and how quickly athletes turn over, NIL does not have great selling power as a standalone. The licensing should focus on co-branded products for the market.").

6. Heritable and Descendible, by Inheritance or Will

Property generally survives its owner and transfers to the owner's estate at death.[293] This means that a person's property, which is deemed as their estate, can be transferred to other living people or organizations after the property owner dies.[294] This is achieved by will or via the law of inheritance.[295] Currently, it is unclear whether a college athlete's NIL is descendible to their heirs or named beneficiaries in their will.[296] That is because, as was previously noted, the NIL law is silent on the matter.[297] When one examines related case law that deals with the descendibility of the likeness of celebrities, commentators have noted the deficiency that exists in viewing the right of publicity as a privacy right rather than as a property right.[298] By comparison, a college athlete operating under NIL laws, which expressly provide for their protection,

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[293] *See* Ward Williams, *Inheritance Laws by State*, Investopedia (Dec. 28, 2023), https://www.investopedia.com/inheritance-laws-by-state-5113616 [https://perma.cc/VBA7-S37P]; Julia Kagan, *Last Will and Testament: Definition, Types, and How to Write One*, Investopedia (June 12, 2024), https://www.investopedia.com/terms/l/last-will-and-testament.asp [https://perma.cc/RWC9-ERFF]; *cf*., David Horton, *Indescendibility*, 102 Calif. L. Rev. 543, 543 (Dec. 22, 2013).

[294] See Williams, *supra* note 293.

[295] *Id.*

[296] *See supra* Part I.

[297] *Id.*

[298] *See generally* Joshua L. Simmons & Miranda D. Means, *Split Personality: Constructing a Coherent Right of Publicity Statute*, 10 Landslide, no. 5, May/June 2018, https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2017-18/may-june/split-personality/?login [https://perma.cc/8YCV-9D43] ("Over the past few years, a number of states have considered new or revised statutes that would protect the right of publicity. For example, last year the New York State legislature considered Assembly Bill A08155, which would, at least nominally, transform New York's right of publicity from a privacy right, codified in Civil Rights Law article 5, to a property right. By transitioning from an inalienable personal right to an alienable property right, New York would make the right of publicity transferable and descendible."); Eric E. Johnson, *Disentangling the Right of Publicity*, 111 Nw. U. L. Rev. 891, 908 (2017) ("Beyond the inefficiency, however, there is a larger and more important problem with the negative way in which right-of-publicity doctrine is structured: it leads to bad law."); Susan G. Bluer, *California Extends the Rights of Publicity to Heirs: A Shift from Privacy to Property and Copyright Principles*, 7 Hastings Comm. & Ent. L.J. 575 (1985), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1171&context=hastings_comm_ent_law_journal [https://perma.cc/JU2A-VEYC]; Vicky Gerl Neumeyer, *The Right of Publicity and its Descendibility*, 7 U. Mia. Ent. & Sports L. Rev. 287 (1990), http://repository.law.miami.edu/umeslr/vol7/iss2/5 [https://perma.cc/45LE-KGFL].

does not provide for descendibility. Some states, such as Texas, have a general NIL law that expressly provides for descendibility under the right of publicity;[299] however, not all states do so.

7. Concurrently Owned

Property can be concurrently owned, which means two or more persons can enjoy the benefits and share the burdens of ownership at the same time.[300] This feature of property law, usually as tenants in common or joint tenants, is invaluable for family-oriented wealth sharing and estate planning.[301] It would be equally valuable for college athletes to have the power to title their NIL deals with others, such as their parents or a spouse, as tenants in common or joint tenants with right of survivorship. There are related issues as to whether NIL deals (or income, royalties, etc. from NIL) are marital property or community property, which might require some advance planning such as a pre-nuptial agreement.[302] Caveat: Should a player choose to share their NIL rights with another person, perhaps as marital property if the player gets married or as a gift to a parent, that player is agreeing to share control over their NIL.[303] For example, if Olivia Dunne were to get married in Louisiana, which is a community property state, the income from an NIL deal inked after the marriage would be shared with her new spouse, unless they sign a pre-nuptial agreement to opt out of the community property regime.[304] Whenever

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[299] Callie Baker, *Misappropriation and Right of Publicity*, Texas Music Office (Sept. 2011) (citing Tex. Prop. Code Ann. § 26.013 (Vernon 1987)), https://gov.texas.gov/music/page/misappropriation_and_right_of_publicity [https://perma.cc/2SGW-FTQE] ("A person who illegally uses the deceased individual's name, voice, signature, or likeness is liable to the person who owns the property right for the amount of damages that result of the unauthorized use or $2,500, whichever is greater; the amount of any profits from the unauthorized use that are attributable to that use; punitive damages; and reasonable attorney's fees and court costs.").

[300] *See* James Chen, *Tenancy In Common (TIC): How It Works and Other Forms of Joint Tenancy*, Investopedia, https://www.investopedia.com/terms/t/tenancy_in_common.asp [https://perma.cc/J4QP-R3KJ].

[301] *See id.*

[302] *See generally* MP McQueen, *What Is Marital Property (Common Law vs. Community States)?* Investopedia, https://www.investopedia.com/terms/m/maritalproperty.asp [https://perma.cc/6P7L-BAN8].

[303] *See* James Chen, *What Is Joint Tenancy in Property Ownership?*, Investopedia, https://www.investopedia.com/terms/j/joint-tenancy.asp [https://perma.cc/ZTK6-VZYF].

[304] *Louisiana's Community Property Law*, Louisiana Office of the Attorney General (citing La. Civ. Code art. 2334), https://www.ag.state.la.us/Files/Shared/

a person voluntarily grants another person a share of their property rights, that action opens the door to increased exploitation of college athletes/social media influencers/celebrities. That is, there is a danger in spouses and parents owning the right to a player's NIL. Consequently, if a player anticipates sharing their NIL rights with another person, they should seek legal counsel before doing so. By comparison, a college athlete operating under NIL laws grounded in the right of publicity is not generally permitted to co-own a tortious cause of action, so there is nothing in the college athlete NIL law that provides for the ability to co-own NIL.

8. Collateral for Loans

Property can be used as collateral for securing a loan.[305] The most common example of this is a mortgage with a loan that is secured both by a personal obligation to pay and a lien on real property as collateral.[306] In addition to mortgages against real property, other forms of property including securities, such as stocks and bonds, can be used as collateral to secure loans.[307] Viewing NIL as property would facilitate a college athlete's ability to borrow money from lenders using their NIL deal(s) as collateral. This feature would be beneficial to a college athlete as it allows for liquidity and immediate cash while the athlete awaits royalties or payments on their NIL deal. By comparison, there is nothing in the college athlete NIL law that provides for the ability to use NIL as collateral.

9. Exclusivity

Property law provides an owner the right to exclude unauthorized or unlawful use, or occupancy by others.[308] For example, a person might

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Documents/MatrimonialRegimesandCovenantMarriageBooklet.pdf [https://perma.cc/9P9R-53T2].

[305] Kiah Treece, *What Is a Collateral Loan and How Can I Get One?*, Forbes (July 18, 2023), https://www.forbes.com/advisor/personal-loans/loans-with-collateral/ [https://perma.cc/9DTL-WAPB].

[306] *See id.*

[307] *See id.*

[308] *See generally* James Y. Stern, *The Essential Structure of Property Law*, 115 Mich. L. Rev. 1167 (2017), https://repository.law.umich.edu/mlr/vol115/iss7/2 [https://perma.cc/QGU4-2CY8].

misappropriate a player's image and use it in a video game.[309] While an innocent third-party user might not be liable for the misuse, the thief might be liable to the extent of the harm to the player.[310] That right of exclusivity is protected by both civil and criminal laws.[311] Adding exclusivity to NIL is essential to protect it from unauthorized use or exploitation. This feature of property law would also protect third parties who contract with college athletes to endorse their brands. Without selective exclusivity, NIL would have diminished value. By comparison, there is nothing in the college athlete NIL law that provides for exclusivity.

10. Time-Honored, Clear, and Certain Rules

Further, property law rules are well-established, crystal clear, and universal.[312] By comparison, a right of publicity is relatively new, not universally enacted in state law, and not expressly provided in federal statutes.[313] As a new form of property, NIL joins other virtual assets in increasing the wealth of the nation and of its people individual. Viewing NIL as property would add to the stability and certainty of this new form of wealth for college athletes. By comparison, right of publicity statutes provide for specific, limited remedies, including statutory monetary damages or actual damages; injunctive relief; an award of the profits the infringer received from the use; or (in some states) punitive damages for willful violations that they have sustained actual losses to recover damages.[314]

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[309] *See, e.g.*, Keller v. Elec. Arts Inc. (*In re* Nat'l Collegiate Athletics Ass'n Student-Athlete Name & Likeness Licensing Litig.), 724 F.3d 1268 (9th Cir. 2013) (Keller was the starting quarterback for Arizona State University before transferring to the University of Nebraska. He filed a class action suit alleging a violation of his right of publicity under California law against Electronic Arts, a video game developer who created an NCAA football game that included a player with similar characteristics to Keller.).

[310] *See id.*

[311] *See* John G. Sprankling, *The Right to Exclude*, The International Law of Property (2014).

[312] *See id.*

[313] *See* John R. Vile, *Right of Publicity*, Free Speech Ctr. (Aug. 11, 2023), https://firstamendment.mtsu.edu/article/right-of-publicity/ [https://perma.cc/59ZN-F5Q2].

[314] *See, e.g.*, Ohio Rev. Code § 2741.07, Damages in civil action to enforce publicity right, https://casetext.com/statute/ohio-revised-code/title-27-courts-general-provisions-special-remedies/chapter-2741-right-of-publicity-in-individuals-persona/section-274107-damages-in-civil-action-to-enforce-publicity-right [https://perma.cc/XMH2-ZC9A]. *See generally Publicity Rights Under State Laws, Remedies for*

11. Divisible into Present and Future Interests

Tort actions are limited in application by both the statutes of limitations and, arguably, the death of the NIL owner.[315] This feature of property law facilitates estate planning by allowing a property owner to effectively plan on the transfer of the future interest in their property.[316] In viewing NIL as property, a college athlete can transfer to others or retain now or in the future a life estate or a future interest in their NIL. By comparison, there is nothing in the college athlete NIL law that provides for the divisibility into present and future interests.

12. Protected by Legal and Equitable Remedies

Property has well-established and universally followed legal and equitable remedies that protect its owners.[317] Unlike tort law, property law has over the centuries developed unique legal and equitable remedies that provide NIL property owners very comprehensive, effective protection of their rights.[318] Those remedies include declaratory judgement; compensatory, punitive, and liquidated damages; temporary restraining orders and injunctions; and constructive trusts.[319] To treat NIL as property would facilitate the application of property-law remedies to protect college athletes from exploitation. By comparison, there is nothing in the college athlete NIL law that provides for any remedies, although the state's right of publicity law likely provides for legal and equitable remedies.

Misappropriation of Publicity Rights, Justia, https://www.justia.com/entertainment-law/publicity-rights/ [https://perma.cc/K4TY-EV7D]; Neal H. Klausner & Sara L. Edelman, *Expert Q&A on Right of Publicity Claims*, Prac. L., J., https://www.dglaw.com/wp-content/uploads/2021/09/Klausner_Edelman_Expert_QnA_Right_of_Publicity.pdf [https://perma.cc/2UN8-AAU3].

[315] *See generally* Legal Info. Inst., *Future Interest*, Cornell L. Sch., https://www.law.cornell.edu/wex/future_interest [https://perma.cc/V9TW-5SMC].

[316] *Id.*

[317] *See generally* F.H. Lawson, Remedies of English Law (1972).

[318] *Id.*

[319] *Id.*

13. Can be Held in Trust

Property can be held in a trust.[320] Trust law provides an invaluable tool particularly for estate planning.[321] One aspect of a trust relative to NIL deals is for a college athlete to transfer title/ownership of an asset such as an NIL contract while granting a life estate interest in some or all of the income from an NIL deal to the player for life (or to someone else, such as the player's mother), while providing for the ownership in the future interest in the income to other beneficiaries. By comparison, there is nothing in the college athlete NIL law that provides for the ability to hold a players' NIL in a trust.

14. Income-Generating

Property can generate income.[322] College athletes have several ways to capture NIL income, including a range of endorsement deals from appearing in advertisements to creating online content like YouTube videos, TikToks, podcasts, or other outlets.[323] NIL deals can also involve autograph signings; public appearances and speaking engagements; hosting sports camps and training clinics for aspiring athletes; and partnering with local businesses for promotions, appearances, endorsements or joint marketing initiatives.[324] By comparison, there is nothing in the college athlete NIL law that provides for the ability to monetize a players' NIL.

15. Insurable

Property can be insured against loss.[325] Real estate insurance is commonly used to guard against various types of risks including hazard, flood,

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[320] *See generally* Legal Info. Inst., *Trust,* Cornell L. Sch., https://www.law.cornell.edu/wex/trust [https://perma.cc/6B2W-ZC37].

[321] *Id.*

[322] *See generally* Julia Kagan, *Income Property: What it is, How it Works, Pros and Cons*, Investopedia, (May 22, 2022), https://www.investopedia.com/terms/i/income_property.asp [https://perma.cc/QDS9-W7PJ].

[323] Richard Pianoforte*, For Student Athletes, NIL Means Visibility, Income–and Taxes*, Fiduciary Tr. int'l (Aug. 2, 2024), https://www.fiduciarytrust.com/insights/article-detail/for-student-athletes-nil-means-visibility-income---and-taxes [https://perma.cc/2QFH-PSHU].

[324] *Id.*

[325] *See, e.g.*, Alexandra Twin, *Property Insurance: Definition and How Coverage Works*, Investopedia (July 18, 2024), https://www.investopedia.com/terms/p/property-insurance.asp [https://perma.cc/CRE2-JF72].

liability, and title.[326] Similarly, viewing NIL as property, there are many types of risk in NIL deals that should be insured.[327] For example, as NIL deals are often contingent on the personal performance of a college athlete, life insurance would be an important means of hedging against the risk of a player's premature death.[328] By comparison, there is nothing in the college athlete NIL law that provides for the insurability of a players' NIL.

16. Taxable

Property is taxable in several ways, including the income it produces, its ownership (such as real property which is often taxed annually by local governments), and its capital appreciation (upon sale).[329] Relative to taxing NIL, any money, goods, property, or services that a student receives (both monetary and non-monetary) from NIL-related activities must be reported on their federal, state, and local tax returns and is taxed as ordinary income.[330]

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[326] *Id.*

[327] *See generally The Risks of NIL: What Student-Athletes Need to Watch Out For*, Couro (July 14, 2024), https://www.couro.io/insights/the-risks-of-nil-what-student-athletes-need-to-watch-out-for [https://perma.cc/877A-8FR5].

[328] *See generally* Amy Fontinelle, *Life Insurance: What it is, How it Works, and How to Buy a Policy*, Investopedia (Sept. 17, 2024), https://www.investopedia.com/terms/l/lifeinsurance.asp [https://perma.cc/3X6U-JF7K].

[329] *See generally* Julia Kagan, *Property Tax: Definition, What it's Used for, and How it's Calculated*, Investopedia (June 25, 2024), https://www.investopedia.com/terms/p/propertytax.asp [https://perma.cc/29AS-M6NY]; Carlos J. Hornbrook, *Student Athletes Need to Know the Potential Tax Implications of the Name, Image, Likeness Rules in College Football*, 42 ABA Tax Times 11 (June 11, 2023), https://www.americanbar.org/groups/taxation/resources/tax-times/archive/student-athletes-potential-tax-implications-name-image-likeness-rules/ [https://perma.cc/96ZQ-AZT9].

[330] *See* 26 U.S.C.S. § 64; Rebecca Lake, *NIL Deals and Tax Implications: A Guide for College Athletes*, Investopedia (May 30, 2024) https://www.investopedia.com/nil-deals-tax-implications-8599929 [https://perma.cc/CB7X-6CJH]; *Student-Athletes Involved in Name Image Likeness (NIL) Agreements Should Be Aware of Their Tax Obligations*, Taxpayer Advoc. Serv. (Dec. 7, 2023), https://www.taxpayeradvocate.irs.gov/news/nta-blog/nta-blog-student-athletes-involved-in-nil-agreements-should-be-aware-of-their-tax-obligations/2023/12/ [https://perma.cc/8FAQ-ZZ9Z] (Explaining that such reportable "income" include free products or services that an athlete receives in exchange for endorsing a brand or business; fees earned through student-focused activities, such as signing autographs or making promotional appearances; compensation from brand ambassadorship or sponsorship deals, including brand marketing conducted on social media channels; fees paid for public speaking engagements; money earned from appearances in televised advertisements; ad revenue generated through a YouTube channel, blog, or podcast that the student

This taxation of NIL income likely applies at the state and local levels as well.[331] Furthermore, it is possible for the IRS to view NIL as property for which there could be taxation for capital gains for its appreciated value.[332] Additionally, if NIL is a part of a player's estate when they die, the value of the NIL could be subject to federal and state estate taxes.[333] There are many nuances to the taxation and financial impacts of college athletes' NIL deals, including "the jock tax," self-employment taxes, in-kind compensation, deductions and expenses, estimated tax payments, impact on financial aid, and working with NIL collectives.[334] There are other related tax issues, such as dependency status for a minor athlete's parents' tax returns and the need to file in various states when sponsorship deals involve working in multiple states.[335] Consequently, the tax burden on players' NIL is a huge consideration when deciding whether treating NIL in this way enriches college athletes. Of course, even after paying the taxes owed on their NIL deals, players will still net a financial benefit over what they were allowed to make before the change in the law. Prior to the change, they were not allowed to accept any money for their NIL.

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owns; royalties or fees earned through a licensing or merchandising agreement; and licensing via non-fungible tokens (NFTs)).

[331] *See How Do State and Local Individual Income Taxes Work?,* Tax Pol'y Ctr., https://www.taxpolicycenter.org/briefing-book/how-do-state-and-local-individual-income-taxes-work [https://perma.cc/TA7F-WLYY].

[332] *See generally* The Investopedia Team, *Can You Realize Capital Gains on Intangible Property?*, Investopedia (Aug. 23, 2022), https://www.investopedia.com/ask/answers/032715/can-you-realize-capital-gains-intangible-property.asp [https://perma.cc/A3QK-YYBD].

[333] *See generally* Raquel Sportel, *Intellectual Property Assets in Estate Planning*, porterwright (July 7, 2022), https://www.porterwright.com/media/intellectual-property-assets-in-estate-planning/ [https://perma.cc/T7DM-DDQC].

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

[335] *Name, Image, Likeness and the Tax Implications of Paying College Athletes*, H&R Block, https://www.hrblock.com/tax-center/income/nil-student-athletes/ [perma.cc/V956-VA2W]; *See* Katharina Reekmans, *A Parent's Guide to NIL: Navigating Your College Athlete's Taxes*, INTUITTURBOTAX (Jun. 13, 2024) https://blog.turbotax.intuit.com/self-employed/a-parents-guide-to-nil-navigating-your-college-athletes-taxes-53889/ [https://perma.cc/BN3R-XRTL].

There is another interesting aspect of the revolution which allows players to monetize their NIL. NIL provides a new source of tax revenue.[336] In the past, NIL collectives have applied for and received tax-exempt status from the IRS.[337] A collective is usually a group of boosters who organize to provide NIL deals to highly sought-after players to encourage them to play for a particular college.[338] However, in June 2023, the IRS Office of Chief Counsel explained that many organizations that develop paid NIL opportunities for student-athletes are *not* eligible for tax-exempt status under IRC § 501(c)(3) "because the private benefits they provide to student-athletes are not incidental both qualitatively and quantitatively to any exempt purpose furthered by that activity."[339] This will likely change how NIL agreements are structured and the status or type of institutions they contract with going forward.[340] That means that some of the revenue that would have gone to the NCAA and its school members — all of whom are tax exempt, non-profit entities — would now become taxable. Hence, whereas boosters/collectives who contributed directly to a college or university's athletic program would have received a tax deduction as a charitable donation, those same boosters who form cooperatives to help recruit players via NIL deals have been instructed by the IRS that those NIL funds are not tax deductible.[341]

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[336] *See* Memorandum from the Off. of Chief Couns. of the Internal Revenue Serv. to the Dir. of EO Rulings & Agreements (May 23, 2023), https://www.irs.gov/pub/lanoa/am-2023-004-508v.pdf [perma.cc/W62U-4EDS].

[337] *Name, Image, and Likeness (NIL) Collectives*, Taxpayer Advocate Service (Mar. 7, 2023), https://www.taxpayeradvocate.irs.gov/get-help/general/nil/nil-collectives/ [perma.cc/HC5J-S37M].

[338] *See generally* David Ubben & Tess DeMeyer, *What is NIL, How has it Changed College Sports and Why are Schools under Investigation?*, The Athletic (Feb. 2, 2024), https://www.nytimes.com/athletic/5245564/2024/02/02/nil-explained-ncaa-name-image-likeness-investigation/ [perma.cc/9V28-JLFE] ("Collectives are organizations that fundraise via large and small donors with the intent to direct that money to a school's athletes through NIL deals . . . . One of the NCAA's first pieces of official NIL guidance, sent to schools in May 2022, stated that collectives count as boosters and are subject to the same, long-applied recruiting rules. In short, collectives cannot be involved in recruiting, and they can't entice a recruit to sign with a particular school with the promise of payment.").

[339] Memorandum from the Off. Of Chief Couns., *supra* note 336.

[340] *See* Kristi Dosh*, 4 New Federal NIL Bills Have Been Introduced In Congress*, FORBES (July 29, 2023), https://www.forbes.com/sites/kristidosh/2023/07/29/4-new-federal-nil-bills-that-have-been-introduced-in-congress/ [https://perma.cc/5H6T-DDFN].

[341] *Id.*

This feature can provide important revenue to operate governmental functions. This includes taxation of the ownership (property tax), on the revenue (income tax), on the appreciation (capital gains), on the sale (capital gains), or on the death of the owner (estate tax). In the future, the government may tax other aspects of NIL, such as its appreciated value. State and local governments are challenged to determine how NIL, a new virtual asset, should be taxed.[342] Another interesting question is whether a person's interest in their NIL could be transferred to a tax-deferred retirement account such as a self-directed Individual Retirement Account.[343] Clearly, a college athlete who has a NIL deal(s) needs access to competent law advisors. By comparison, there is nothing in the college athlete NIL law that provides for how the government will or should tax a player's NIL.

17. Protected against Wrongful, Governmental Taking

As previously noted, the Fifth and Fourteenth Amendments protect property owners from wrongful governmental takings.[344] This applies to both tangible and intangible property.[345] I have argued in a separate article that the past NIL restrictions prohibiting college athletes from monetizing their NIL was a wrongful taking that requires just compensation.[346] By comparison, there is nothing in the college athlete NIL law that provides for the compensation for past, present, or future governmental taking of a player's NIL.

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[342] For example, relative to cryptocurrencies, such as Bitcoin, the IRS views them as property, which trigger tax events when used as payment or cashed in. "When you realize a gain—that is, sell, exchange, or use crypto that has increased in value—you owe taxes on that gain." Joe Liebkind, *Cryptocurrency Taxes: How They Work and What Gets Taxed*, Investopedia, https://www.investopedia.com/tech/taxes-and-crypto/ [https://perma.cc/BTX5-UNXK].

[343] *See* Hornbrook, *supra* note 329.

[344] *See* Crusto, *Game of Thrones*, *supra* note 1.

[345] *See* Hosick, *supra* note 33.

[346] *See* Crusto, *Game of Thrones*, *supra* note 1.

18. Respected Internationally[347]

Private property law is recognized in many, although not all, countries throughout the world, which makes NIL an international asset.[348] Both common law and civil law jurisdictions throughout the world speak the language of private property.[349] Many NIL contracts involve international business transactions, as many corporations are based overseas and not in the United States.[350] Further, many college athletes are international, that is, not U.S. citizens, which raises other issues of eligibility to participate in NIL deals.[351] Consequently, it is essential for NIL laws to be based on property law principles, rather than on the right of publicity. By comparison, there is nothing in the college athlete NIL law that provides for a state's NIL law to be allowable in other states or in other countries, making enforcement in other jurisdictions problematic.

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Hence, when it comes to facilitating the aspirational goals of NIL law–to promote and protect college athletes' wealth creation–viewing NIL as the personal property of the athletes is the best approach. This clearly provides support for the proposition that NIL is property, which leads to the third piece of support for the proposition that NIL is property: that it promotes public policy. This third leg of support is discussed next.

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[347] *See generally* Alix C. Heugas, *Protecting Image Rights in the Face of Digitalization: A United States and European Analysis*, J. World Intell. Prop. (2021), https://onlinelibrary.wiley.com/doi/full/10.1111/jwip.12194?msockid=1f662fa8658e6ce135a53fc6618e6af0 [perma.cc/TSV9-EFMY].

[348] *See* Ursula Kriebaum & August Reinisch, *Property, Right to, International Protection*, Max Planck Encyclopedias of International Law [MPIL], Oxford Public International law, https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Publikationen/Propertyright_int_protec.pdf [https://perma.cc/D3MG-8AM2].

[349] *Id.*

[350] *See generally* Daniel C.K. Chow & Thomas J. Schoenbaum, International Business Transactions: Problems, Cases, and Materials (6th ed. 2022).

[351] Madeline Myers, *How Can International Athletes Get NIL Deals? Here's How to Do It Safely*, Bus. Coll. Sports (Mar. 16, 2023), https://businessofcollegesports.com/name-image-likeness/how-can-international-athletes-get-nil-deals-heres-how-to-do-it-safely/ [perma.cc/N47C-NW6C].

C. Promotes Public Policy

In this third argument, I plan to support the proposition that NIL is property by focusing on how such a legal designation promotes public policy. Next, I argue that NIL as property promotes three public policies: (1) it reinvigorates antitrust principles that prohibit the unfair monopolization of goods or services, (2) it enriches college athletes and establishes a precedent for the proposition that every person should own and benefit from their NIL, which would increase the wealth of the nation, and (3) it remedies wealth inequities particularly between younger and older Americans. Let's first put this public policy discussion into context. As previously noted, college sports are experiencing a seismic transformation following the legal responses to historical inequities related to college athletes' NIL rights. This transformation involves numerous matters directly or indirectly related to NIL. These include the "fair pay to play,"[352] transfer portal,[353] collectives,[354] the conference realignment,[355]

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[352] *See* Mandel, *supra* note 55. This refers to the players' demand to be compensation by their college for their labor as players.

[353] "Transfer portal" herein refers to a NCAA-permitted process by which a college player can seek opportunities to play for a school other than the one they are attending. This is achieved when a student enters their name into a database that is available to other programs and coaches elsewhere. *See* Greg Johnson, *What the NCAA Transfer Portal Is . . . and What It Isn't*, NCAA (Oct. 8, 2019), https://www.ncaa.org/news/2023/2/8/media-center-what-the-ncaa-transfer-portal-is-and-what-it-isn-t [perma.cc/WD25-LJAE]; On3 Staff Report, *What is the NCAA Transfer Portal? Everything You Need to Know*, On3 (Nov. 9, 2023), https://www.on3.com/transfer-portal/news/ncaa-transfer-portal-everything-you-need-to-know/ [perma.cc/J3TK-N5QX].

[354] "Collectives" herein refers to groups of college supporters who pool funds from a wide range of donors to help facilitate NIL opportunities for student-athletes to monetize their brands. Pete Nakos, *What are NIL Collectives and How do they Operate?*, On3 (July 6, 2022), https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/ [https://perma.cc/V39N-EN4M].

[355] "Conference realignment" herein refers to the movement of college teams from one NCAA conference to another to obtain better TV deals. *See* Robert Read, *College Football Realignment: Explaining New-Look Conferences*, Newsweek (Sept. 1, 2023), https://www.newsweek.com/college-football-realignment-explaining-new-look-conferences-1824055 [perma.cc/YGZ7-63CF]; Pat Forde, *Everyone Is to Blame for Slowly Killing College Sports*, Sports Illustrated (Mar. 20, 2024), https://www.si.com/college/2024/03/20/everyone-is-to-blame-for-slowly-killing-college-sports [perma.cc/2R9X-97YR].

players as employees,[356] unionization of players,[357] federalization,[358] and corruption.[359] These matters, while vital to understanding the demands that college sports are facing today, are outside the scope of this article.

1. Reinvigorates Antitrust Principles Protecting Free Markets in Property

The first public policy argument in support of treating NIL as property is a judicial reawakening of protective, federal antitrust law principles, by holding the NCAA is not exempt from the federal antitrust laws that

[356] "Players as employees" herein refers to the legal movement to have college athletes be categorized as employees of their colleges entitling them to the benefits attended to that designation. *See* Memorandum from Jennifer Abruzzo, Nat'l Lab. Rels. Bd. Gen. Couns., on Employee Status of Players at Academic Institutions (Sept. 29, 2021), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of [https://perma.cc/AR88-YEAJ]; Ben Nuckols, *NCAA Head Warns that 95% of Student Athletes Face Extinction if Colleges Actually Have to Pay Them as Employees*, Fortune (Feb. 24, 2024), https://fortune.com/2024/02/24/ncaa-college-sports-employees-student-athletes-charlie-baker-interview/ [https://perma.cc/LQ6K-5JW9]. *See also* Maryclaire Dale, *US Appeals Court Says Some NCAA Athletes May Qualify as Employees under Federal Wage-and-Hour Laws*, Associated Press (July 11, 2024), https://apnews.com/article/ncaa-athletes-pay-employees-lawsuit-e8471184e47a9f806e480d7317ee4ed9?utm_source=Sailthru&utm_medium=email&utm_campaign=Issue:%202024-07-15%20Higher%20Ed%20Dive%20%5Bissue:63872%5D&utm_term=Higher%20Ed%20Dive [https://perma.cc/PZ6P-5MNR].

[357] "Unionization" herein refers to the movement to treat college athletes as employees of their colleges and to organize them pursuant to labor laws. Ross Dellenger, *The Next Frontier in College Sports: The Unionization of College Athletes*, Sports Illustrated (Sept. 29, 2021), https://www.si.com/college/2021/09/30/nlrb-advisory-opens-next-frontier-college-sports-unionization [https://perma.cc/T2KY-NQMR].

[358] "Federalization" herein refers to the NCAA and its members-led efforts to have Congress enact federal legislation that will preempt state NIL laws. *See* Steve Berkowitz, *Senators Hopeful of Passing Broad College Sports Legislation Addressing NCAA Issues this Year*, USA Today (June 14, 2024), https://www.usatoday.com/story/sports/college/2024/06/13/ncaa-legislation-college-sports-richard-blumenthal-cory-booker/74091381007/ [https://perma.cc/DJ7T-UKP4].

[359] "Corruption" herein refers to illegal activities that influence college athletes' decisions, such as to which college to attend. *See* Guy Lawson, *'The Death of College Sports Will Be Fast and Furious: The Scandal That Could Kill the NCAA*, Rolling Stone (Mar. 24, 2024), https://www.rollingstone.com/culture/culture-commentary/ncaa-college-sports-corruption-scandal-1234993227/ [https://perma.cc/4FDT-97UE]; Guy Lawson, Hot Dog Money: Inside the Biggest Scandal in the History of College Sports (2024).

prohibits unreasonable restrictions on interstate commerce and competition in the marketplace. As discussed next, in a series of groundbreaking decisions, the federal courts have applied federal antitrust laws to assess whether the NCAA has unduly restricted college athletes' right to compensation, including their NIL rights. While the court decisions do not expressly refer to the players' NIL rights, the plaintiffs' claims expressly sought remedies for the unlawful restraints of players' NIL rights. Hence, this first policy argument is that the court has inferred that NIL is the property of the players and is entitled to federal antitrust considerations.

The sea change in college sports is being fueled by three groundbreaking lawsuits that have successfully challenged the NCAA's claim of a broad exemption from antitrust laws as applied to its former prohibition on players' rights to their NIL. For newcomers to the issue of NIL and college sports, one might ask: What is its relationship to antitrust law? Oddly enough, the answer is: A huge relationship. However, we must digress to provide some context before moving forward.

What are these antitrust principles that are driving the changes in college sports? To effectively explore this reawakening phenomenon would take another law review article; so, I apologize in advance to those antitrust scholars who will find this analysis somewhat superficial. Here's the rub. The Sherman Act prohibits, *inter alia*, activities that restrict interstate commerce and competition in the marketplace.[360] The NCAA had taken the position that they were broadly exempted from the antitrust law. However, in three court rulings, *O'Bannon*,[361]

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[360] Sherman Antitrust Act, 15 U.S.C. §§ 1–7, is a United States antitrust law that prescribes the rules of free competition for those engaged in interstate commerce. *See* Legal Info. Inst., *Sherman Antitrust Act*, Cornell L. Sch. (Apr. 1, 2022), https://www.law.cornell.edu/wex/sherman_antitrust_act [https://perma.cc/2AUL-F5YM].

[361] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955 (N.D. Cal. 2014), aff'd in part, rev'd in part, vacated in part, 802 F.3d 1049 (9th Cir. 2015). *See also* Thaddeus Kennedy, *NCAA and an Antitrust Exemption: The Death of College Athletes' Rights*, Harv. J. of Sports & Ent. L. (Aug. 31, 2020) ("In *NCAA v. Board of Regents*, 468 U.S. 85 (1984), the Supreme Court established that even if the NCAA's amateurism rules are presumed to be competitive, they are not to be exempt from antitrust scrutiny. Justice Stevens wrote, 'While as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice.' *Id*. at 101 n.23. Even under the assumption that NCAA regulations are beneficial to student-athletes and are helpful in preserving the model of college sports, NCAA policies cannot be automatically deemed lawful. They must be proven to serve a legitimate procompetitive purpose. This sentiment has been long upheld by federal courts.").

Alston,[362] and *House*,[363] the courts have stripped the NCAA's broad antitrust protection relative to its amateurism rule that denied players the right to benefit from their NIL. As previously mentioned, the latest outcome is a nearly $2.8 billion settlement in which the NCAA and its member colleges have agreed to pay past and current athletes.[364] As previously discussed, these federal cases were accompanied by various state enactments of pro-NIL laws.[365] Let's review these pivotal cases.

In 2014, in a landmark class-action lawsuit *O'Bannon v. NCAA*,[366] numerous college athletes claimed that the NCAA and its colleges were reaping the profits off their names and likenesses, in violation of the Sherman Act and federal antitrust law.[367] As previously mentioned, the NCAA argued that it enjoys a broad exemption from the antitrust laws.[368] To the contrary, the district court ruled in part for the plaintiffs. Consequently, the NCAA agreed to allow student-athletes to receive full scholarships for academics considering the use of the students' names and likenesses.[369] While college athletes received some benefits from the *O'Bannon* decision, courts still failed to recognize the students' property rights in their NIL or their labor rights. As a result, players continued to challenge the fairness of the NCAA's compensation and amateurism rules.

Following the *O'Bannon* decision, in 2019, several former NCAA players filed several lawsuits in federal court, which were consolidated under *NCAA v. Alston*,[370] challenging the NCAA restrictions on educational compensation for athletes.[371] In March of 2019, a federal judge ruled that the NCAA restrictions on "non-cash education-related benefits" violated antitrust law under the Sherman Act.[372] The court required the NCAA to allow for certain types of academic benefits beyond the previously-established full

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[362] *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).
[363] *See* House v. Nat'l Collegiate Athletic Ass'n, 545 F. Supp. 3d 804 (2021).
[364] *Id*.
[365] *See* discussion *supra* Part I.
[366] *See O'Bannon,* 7 F. Supp. 3d at 955.
[367] *Id*. at 963.
[368] *See id*.
[369] *See* Hosick, *supra* note 33; Michael McCann, *Why the NCAA Lost its Latest Landmark Case in the Battle Over What Schools Can Offer Athletes*, Sports Illustrated (Mar. 8, 2019), https://www.si.com/college/2019/03/09/ncaa-antitrust-lawsuit-claudia-wilken-alston-jenkins [https://perma.cc/5FJH-RDKA].
[370] *See* In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1065 (N.D. Cal. 2019).
[371] *Id.* at 1062.
[372] *Id*. at 1110.

scholarships from *O'Bannon*, such as for "computers, science equipment, musical instruments, and other tangible items not included in the cost of attendance calculation but nonetheless related to the pursuit of academic studies."[373] Moreover, the district court in *Alston* barred the NCAA from preventing athletes from receiving "post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; tutoring; expenses related to studying abroad that are not included in the cost of attendance calculation; and paid post-eligibility internships."[374] However, the court held that the conferences within the NCAA may still limit cash or cash-equivalent awards for academic purposes.[375] The court based the decision on the large compensation discrepancy amongst the NCAA and the students.[376] The NCAA appealed to the U.S. Ninth Circuit.[377]

As previously discussed, in response to pending litigation and public opinion in favor of players having control over their NIL,[378] California passed the Fair Pay to Play Act (S.B. 206), which permits athletes to capitalize on their NIL for sponsorships and endorsements, free from the NCAA rules.[379] The new law also prohibits universities from implementing rules that prohibit

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[373] *Id*. at 1088.

[374] *Id*.

[375] *Id*.

[376] *Id*. at 1089.

[377] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955 (N.D. Cal. 2014), aff'd in part, rev'd in part, vacated in part, 802 F.3d 1049 (9th Cir. 2015).

[378] Michael T. Nietzel, *Americans Now Overwhelmingly Support College Athletes Earning Endorsement and Sponsorship Money*, Forbes (Feb. 11, 2020), https://www.forbes.com/sites/michaeltnietzel/2020/02/11/americans-now-overwhelmingly-support-college-athletes-earning-endorsement-and-sponsorship-money/ [https://perma.cc/E3SW-YUUY].

[379] S.B. 206, 2019 Cal. Legis. Serv. Ch. 383 ("[Under S.B. 206] an athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, shall not prevent a student of a postsecondary educational institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness."); *see also Governor Newsom Signs SB 206, Taking on Long-Standing Power Imbalance in College Sports*, Off. of Governor Gavin Newsom (Sept. 30, 2019), https://www.gov.ca.gov/2019/09/30/governor-newsom-signs-sb-206-taking-on-long-standing-power-imbalance-in-college-sports/ [https://perma.cc/P7R3-SFCX]; Gregg E. Clifton & Nicholas A. Plinio, *New Jersey Grants Name, Image, Likeness Rights to Collegiate Student Athletes*, JacksonLewis (Sept. 15, 2020), https://www.collegeandprosportslaw.com/uncategorized/new-jersey-grants-name-image-likeness-rights-to-collegiate-student-athletes/ [https://perma.cc/C39G-YVAP].

student-athletes from earning compensation or denying scholarships to athletes who choose to market their NIL.[380] S.B. 206 does not require universities to pay student-athletes themselves; as a result, the net cost to the NCAA and its collegiate members would be zero, since all compensation is paid for by third-party endorsers.[381] The law seems to be based on an equal protection argument that, relative to benefiting from their NIL, NCAA schools cannot treat athletes differently from other college students.[382] For example, a film major who doesn't play a varsity sport is permitted to generate income making YouTube videos, but a film major who is also an intercollegiate athlete may not.[383]

Returning to *Alston*, in May of 2020, the Ninth Circuit upheld the district court's decisions.[384] It noted that the NCAA had a necessary interest in "preserving amateurism and thus improving consumer choice by maintaining a distinction between college and professional sports."[385] Notwithstanding, the Ninth Circuit agreed with the district court's finding that the NCAA practices relative to some specific restrictions violated antitrust law.[386] Judge Smith penned a concurrence and noted that the NCAA's treatment of its players is "not the result of free market competition. To the contrary, it is the result of a cartel of buyers acting in concert to artificially depress the price that sellers could otherwise receive for their services. Our antitrust laws were originally meant to prohibit exactly this sort of distortion."[387] Subsequently, the NCAA started a review of its policies related to players' compensation for NIL,[388] while it appealed the case to the U.S. Supreme Court.

On March 31, 2021, the Supreme Court heard arguments in *NCAA v. Alston*.[389] The centerpiece of this case was the antitrust protection under

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[380] *See* S.B. 206, *supra* note 379.

[381] *Id.*

[382] *See* Billy Witz, *A State Skirmish Over N.C.A.A. Amateurism Rules Has Quickly Become a National Battle*, N.Y. Times (Dec. 28, 2020), https://www.nytimes.com/2020/12/28/sports/ncaa-amateurism-rules.html [https://perma.cc/PP74-83TF].

[383] *Id.*

[384] *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig., 958 F.3d 1239, 1244 (9th Cir. 2020).

[385] *See* NCAA v. Alston, 141 S. Ct. 2141 (2021).

[386] *Id.*

[387] *Id.* at 1267 (Smith, J., concurring).

[388] *See* Hosick, *supra* note 33.

[389] *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

NCAA v. Board of Regents,[390] as it relates to the NCAA's eligibility standards and compensation.[391] In *Alston*, the plaintiffs claimed the NCAA's rules violate the Sherman Act, which prohibits contracts, combinations, or conspiracies "in restraint of trade or commerce."[392] The Court noted that courts have interpreted the Sherman Act's prohibition on restraints of trade to prohibit only restraints that are "undue."[393] The Court further noted that courts assess whether a restraint is undue using the "rule of reason" standard,[394] which requires a fact-finding of market power and structure to decide what a restraint's actual effect is on competition.[395] In response to the plaintiff's antitrust allegations, the NCAA argued that its business should enjoy a special exception that excludes it from antitrust law or at least be given special leeway under antitrust law.[396] On this issue, the Court sided with the college athlete plaintiffs, stating that college sports is a trade and, therefore, cannot unduly restrain athletes from the marketplace.[397]

However, the Court relented in its attack of the NCAA. On the one hand, it 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, postgraduate scholarships, tutoring, or education abroad.[398] But, on the other hand, the Court failed to rule on certain other NCAA rules limiting players'

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

[391] *See generally* Robert Barnes & Rick Maese, *Supreme Court Will Hear NCAA Dispute Over Compensation for Student-Athletes*, Wash. Post (Dec. 16, 2020), https://www.washingtonpost.com/politics/courts_law/supreme-court-ncaa/2020/12/16/90f20dbc-3fa9-11eb-8db8-395dedaaa036_story.html [https://perma.cc/D9BC-AJH7] (reporting that the NCAA oversees rules related to student athletes that play in their athletics programs, which, inter alia, limit the type of compensation that the school could give to student athletes as to distinguish college athletics from professional sports, disallowing "non-cash education-related benefits" such as scholarships and internships so that there is no apparent "pay to play" aspects).

[392] *Alston*, 414 S. Ct at 2151 (quoting 15 U.S.C. § 1).

[393] *Id.* (quoting Ohio v. Am. Express Co., 585 U.S. 529, 539 (2018)).

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

[395] *Id.* (quoting Ohio v. Am. Express Co., 585 U.S. 529, 541 (2018)).

[396] *Id.* at 2159.

[397] *Id.*

[398] *Id.* at 2164.

education-related benefits.[399] 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,[400] leaving the restrictions on amateur status partially undisturbed. Hence, Justice Gorsuch, writing for a unanimous Court, affirmed the lower court's injunction against the NCAA's restrictions on players' compensation.[401] However, the Court explicitly stated that since the student athletes did not renew their "across-the board challenge to the NCAA's compensation restrictions,"[402] the Court's review was limited to "those restrictions now enjoined."[403]

The most significant take away from the *Alston* case is that the Court advised the NCAA that it could *not* use the federal antitrust laws as a justification for its rules regulating players' compensation.[404] In a concurring opinion, Justice Kavanaugh was more direct in attacking the NCAA's undue control over its players' rights, emphasizing that "the NCAA's current compensation regime raises serious questions under the antitrust laws."[405] While the *Alston* decision is regarded as a landmark decision that supports the right for student-athletes to profit from their NIL, the Court's *Alston* decision did *not* expressly answer the question of whether college athletes are legally entitled to their NIL, and, if so, its legal basis. Rather, the Court appeared to guide the NCAA's behavior letting them know that its prohibition of players' NIL would be difficult to defend against in the courts.

Continuing to test the boundaries of the NCAA's restrictions on its players' NIL rights, in 2020, in *House v. NCAA*,[406] some NCAA athletes filed a lawsuit against the NCAA.[407] They were seeking $1.4 billion in damages representing the NIL revenue they could have earned if it had been allowed during their enrollment.[408] In 2021, U.S. District Judge Claudia Wilken ruled that potentially thousands of NCAA athletes could be grouped into a class that may potentially have been harmed.[409] Under antitrust law, damages

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399 *Id.* at 2147.
400 *Id.* at 2165.
401 *Id.* at 2151.
402 *Id.* at 2151.
403 *Id.* at 2154, 2162–63 (holding that the district court's injunction did not invite future courts to "micromanage" the NCAA, but rather constituted a permissible antitrust remedy).
404 *Id.* at 2165.
405 *Id.* at 2168 (Kavanaugh, J., concurring).
406 *See* House v. Nat'l Collegiate Athletic Ass'n, 545 F. Supp. 3d 804 (2021).
407 *Id.*
408 *Id.*
409 *Id.*

would be tripled if the NCAA lost, resulting in a $4.2 billion dollar exposure.[410] As in the other two cases, the plaintiffs' claimed that the NCAA rules have constituted and continue to constitute an undue restraint on their ability to monetize their NIL.[411]

As is sometimes the case, a Supreme Court decision's impact goes beyond the specific holding of the case.[412] This is true about the Supreme Court's decision in *Alston*. Alexander Hamilton once stated that the Supreme Court is the "weakest" branch of government.[413] As detailed above, the Court has the power to change industries through judicial review. Relative to NIL, federal courts—particularly the Supreme Court—have reinvigorated federal antitrust law to facilitate college athletes to enjoy a legal right to monetize their NIL. The Court in the *O'Bannon* case ruled in favor of the plaintiff-athletes and found that the NCAA had violated antitrust law in its restraints on athletes' participation in the NIL market. Most importantly, the Supreme Court in *Alston* rejected the NCAA's claim of broad exemption from the federal antitrust laws. Consequently, the federal court in *Brown* approved a settlement against the NCAA for damages to the players resulting from alleged antitrust violations. However, the federal court decisions failed to provide direction as to the jurisprudential basis for players' NIL rights, whether based on tort law or on property law.

My read of these decisions supports the proposition that NIL is property. In assessing the antitrust aspect of NCAA regulations of college athletes, it appears the courts were treating the players' NIL as a property or a product that should be allowed to benefit from free market forces unrestrained by the NCAA's prohibition of the players' right, and against the substantial monopolistic largess of the NCAA and its member colleges. In each of the three cases cited, the plaintiffs sought to redress the NCAA's unreasonable restraints on players', both past and present, compensation. In particular, they pointed out how the NCAA's amateurism rules effectively monopolized the players' property interest in their NIL. They argued that such anticompetitive behavior violated the federal antitrust laws. As the Sherman Act protects interstate commerce of goods and services, it would apply to NIL as *property* goods. Specifically, one might ask how the NCAA's amateurism rules restrict the marketability of players' NIL. Perhaps, it is obvious. By prohibiting its

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[410] *Id.*

[411] *Id.*

[412] *See generally Supreme Court—Leading Cases: NCAA v. Alston*, 135 Harv. L. Rev. 471 (Nov. 10, 2021) (analyzing the antitrust aspects of the majority decision).

[413] *See* The Federalist No. 78 (Alexander Hamilton).

players from monetizing their NIL, the NCAA and its member schools have been and would be the sole source of access to the players' NIL. The NCAA's control over the labor pool of college athletes' compensation is a perfect example of a monopsony, which is a market condition in which there is only one buyer, the monopsonist.[414] As a result, the players are forced to play for what little they are granted in the form of scholarships. By comparison, one wonders whether the Sherman Act has or would apply to a cause of action in the form of a right of publicity. Hence, by agreeing that such anti-competitive behavior is subject to judicial scrutiny, the federal court effectively recognized the players' property rights to their NIL.

That takes us back to the argument in support of this article's statutory solution. That is these three groundbreaking decisions have resurrected somewhat dormant antitrust law to take down a major economic and political force in American life, the NCAA.[415] Such a reinvigoration of antitrust principles support the proposition that NIL is property that qualifies for antitrust protection. Federal protection of college athletes' NIL rights to access national markets takes us to the next public policy argument in support of NIL as property: That it enhances personal and national wealth.

2. Enhances Personal and National Wealth

The following presents the second argument that viewing NIL as property is good public policy, which is because such a designation enhances personal wealth of college athletes and other people and thereby increases the wealth of the nation. NIL should be seen as one of the many types of digital or virtual assets, a new class of property, that include cryptocurrencies, nonfungible tokens (NFTs), game tokens, and governance tokens.[416] "Digital" or "virtual" assets are non-physical, can generate value for the owner; should be able to transfer ownership through purchase, gifting, or other means of giving the rights to someone else, along with the value the item can bring; and must be discoverable or stored somewhere that it can be found.[417] This relatively

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[414] *See* Julie Young, *Monopsony: Definition, Causes, Objections, and Example*, Investopedia (May 1, 2024), https://www.investopedia.com/terms/m/monopsony.asp [https://perma.cc/LC73-UCS5].

[415] Related to this legal issue but separate and still in litigation is whether the NCAA and its members violated the labor rights of its players.

[416] *See supra* Part III.B; *supra* note 268.

[417] *Id.* (Noting that examples of virtual assets include photos, documents, videos, books, audio and music, animations, illustrations, manuscripts, emails and email accounts, logos, metadata, content, social media accounts, gaming accounts,

new asset class has experienced exponential growth: "In November 2021, non-state issued digital assets reached a combined market capitalization of $3 trillion, up from approximately $14 billion in early November 2016."[418]

As a new form of property, college athletes' NIL is a great potential and real source of wealth. As previously noted, one study shows that NCAA college football stars could earn as much as $2.4 million per year if they were paid equitably for the financial benefits that they bring to the NCAA and its member colleges.[419] The top fifteen NIL college athletes' deals range from $6.2 million for Bronny James, followed by Livvy Dunne at $3.3 million at the higher end to Quinn Ewers, Hansel Enmanuel, and Bryce James each tied at $1.2 million.[420] NIL deals are predicted to gross revenue of over $1 billion per year.[421] With the development of modern technology, including the expansion of the virtual or metaverse,[422] property interests in attributes of college athletes' NIL will likely continue to increase in value.[423] For example,

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nonfungible tokens, cryptocurrency, tokens, crypto assets, tokenized assets, security tokens, and central bank digital currencies).

[418] Exec. Order No. 14067, *supra* note 274.

[419] *See* ProCon.org, *supra* note 22.

[420] Ross Kelly, *Top 15 Student Athletes Who Make the Most NIL Money*, Stadium Talk (Apr. 24, 2024), https://www.stadiumtalk.com/s/student-athletes-nil-money-1bbab05a452c410d [https://perma.cc/74KJ-E79F].

[421] Kori Hale, *How NIL Diversity Is Driving The Market Up To $1.1 Billion*, Forbes (Mar. 10, 2023), https://www.forbes.com/sites/korihale/2023/03/10/how-nil-diversity-is-driving-the-market-up-to-11-billion/ [https://perma.cc/784N-H6NZ] (explaining that the top 100 college athletes are estimated to earn about $1 billion per year in NIL revenue).

[422] "Metaverse," herein, refers to the virtual environment of the internet and anything associated with the Internet and the diverse Internet culture. *See generally* David Bell et al., Cyberculture: The Key Concepts 41–43 (2004).

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

consider the financial value of an avatar in a fantasy football league.[424] Despite its financial worth as a virtual asset, NIL rights[425] have yet to be explored or truly valued or properly treated as property. Further, college athletes' NIL is on the forefront of a likely explosion in society's legal recognition of the value of the NIL of every person.[426] Hence, viewing NIL as property will enhance the personal wealth of college athletes, and every person, thereby greatly increasing the wealth of the nation. The newfound NIL wealth will enhance the personal wealth of the players, notwithstanding the tax burden as discussed previously. The NIL wealth increases the wealth of the nation directly in the form of increased taxes, as well as in the form of increased commerce that results from NIL endorsed products and services. That leads to the third argument in favor of viewing NIL as property: That it redresses wealth inequity.

3. Remedies Wealth Inequality

Third, viewing NIL as property addresses wealth inequity between the young and the old in this country.[427] Relative to such inequity, NIL is especially valuable to younger Americans, both college athletes and non-college athletes. This inequity results from a conscious and unconscious transfer of

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[424] The nature of property interests in one's persona are still being developed. There is much at stake as technology continues to monetize the "virtual" essence of a person. *See* Mekouar, *supra* note 78 (reporting that, in 2019, the fantasy sports industry was worth over $7 billion).

[425] These unexplored attributes of persona have legal aspects that have been widely undeveloped by our legal system. *See, e.g.*, Shaw Fam. Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 314 (S.D.N.Y. 2007) (holding that neither New York nor California has a right of publicity applicable to a decedent); Decker, *supra* note 41, at 252 n. 69, 253–54 n.77 (2009) (noting that many states now have common law and/or statutory rights of publicity that apply postmortem).

[426] *See* Crusto, *Right of Self*, *supra* note 1.

[427] *See* Matthew Yglesias, *New Federal Reserve Data Shows How the Rich Have Gotten Richer*, Vox (June 13, 2019), https://www.vox.com/policy-and-politics/2019/6/13/18661837/inequality-wealth-federal-reserve-distributional-financial-accounts [https://perma.cc/FY39-PMU5] ("[T]he rich have gotten richer and inequality has grown[.]" In fact, the Federal Reserve data indicates that from 1989 to 2019, wealth became increasingly concentrated in the top 1% and top 10% and that the gap between the wealth of the top 10% and that of the middle class is over 1,000%; and increases another 1,000% as compared to the top 1%, hence the term "wealth gap.").

wealth from young people,[428] of both their nonvirtual and virtual selves,[429] to upper-class, white adults.[430] I refer to this wealth transferal phenomenon as "intergenerational wealth displacement."[431] One example of a nonvirtual, inequitable transfer of wealth is the high debt load that many students pay for college, graduate, and professional schools and its subsequent negative impact on their quality of life.[432] As such, rights to one's NIL are of particular

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[428] *See* Christopher Ingraham, *The Staggering Millennial Wealth Deficit, in One Chart*, Wash. Post (Dec. 3, 2019), https://www.washingtonpost.com/business/2019/12/03/precariousness-modern-young-adulthood-one-chart/ [https://perma.cc/ZRF4-WVVP] ("[Millennials'] financial situation is relatively dire. They own just 3.2 percent of the nation's wealth. To catch up to Gen Xers, they'd need to triple their wealth in just four years. To reach boomers, their net worth would need a sevenfold jump.").

[429] This "exploitation" includes the lawful and unlawful commercial use of virtual or digital images, data, and information, referred to as "personally identifiable information," usually by big business or government. *See* Handbook on European Data Protection Law, E.U. Agency For Fundamental Rts., 29–31 (2018), https://fra.europa.eu/sites/default/files/frauploads/fra-coe-edps-2018-handbook-data-protection_en.pdf [https://perma.cc/S4AF-SAF7] (protecting data rights among EU Member States for individuals, strengthening mandated data protection requirements, and imposing significant legal responsibilities on entities handling personal data). No similar protections exist in U.S. law, except for the State of California's California Consumer Privacy Act (CCPA). *See* Office of the Attorney General, *California Consumer Privacy Act (CCPA) Fact Sheet*, Cal. Dep't of Just. (2019), https://www.oag.ca.gov/system/files/attachments/press_releases/CCPA%20Fact%20Sheet%20%2800000002%29.pdf [https://perma.cc/GLK6-BWWJ].

[430] Parenthetically, this article will also shine light on the unconscious cause of systemic racism. That focus is explored in *Blackness as State Property*. Crusto, *supra* note 1. "Systemic racism," or "institutional racism," for purposes of this Article, refers to the conscious and unconscious institutionalization of and the continuation of the oppression of Black people. *See* Stokely Carmichael & Charles V. Hamilton, Black Power: The Politics of Liberation in America 4 (1992 ed. 1967) ("[Institutional racism] originates in the operation of established and respected forces in the society, and thus receives far less public condemnation than [individual racism].").

[431] "Intergenerational wealth displacement" herein is defined as legal and illegal, conscious and unconscious, transfer of wealth from younger Americans, particularly those from disadvantaged communities, to adults, particularly wealthy, senior, white males, as one dynamic that resulted in an aged-related wealth gap. Households headed by people aged sixty-five or older are forty-seven times wealthier than households where the median age is thirty-five years or younger. *See* Annalyn Censky, *Older Americans Are 47 Times Richer than Young*, CNN Money (Nov. 28, 2011), https://money.cnn.com/2011/11/07/news/economy/wealth_gap_age/index.htm [https://perma.cc/F6YR-L577].

[432] *Id.* ("Some of those trends come hand in hand with more young people attending college, which can be a double-edged sword. While those college credentials

interest to millennials, Generation Z, and Generation Alpha who are currently living off the fruits of their persona, due to the proliferation of social media. For example, a nineteen-year-old influencer Josh Richards made nearly a thousand dollars a minute as a TikTok star.[433] As social influencers and brand ambassadors, NIL as property provides college athletes and other young people the opportunity to earn well-needed wealth. Consequently, the NCAA athletes' controversy should be public concern because it further highlights the need to address wealth inequity, particularly at the intersection of age, race, gender, and class.[434]

Hence, I believe that there is a void in the development of civil liberties that will redress wealth inequities. This requires a transformational development in our understanding of our rights. Such a development could promote the growth of new markets for virtual assets such as NIL generated through the often-virtual world of the metaverse.[435]

Therefore, for the three reasons presents, NIL is foundational, NIL is facilitated by property law principles and public policy, and NIL should be viewed as property. This leads to a brief discussion of critiques against the NAPA legislation which would view NIL as the property of college athletes, which will be discussed next.

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could lead to income gains for many young people down the road, surging tuition costs are also leaving them burdened by more student loans than prior generations.").

[433] *See* Jade Scipioni, *Here's How Many Social Media Followers You Need to Make $100,000*, CNBC (Apr. 30, 2021), https://www.cnbc.com/2021/04/30/how-much-money-you-can-make-off-social-media-following-calculator.html [https://perma.cc/CT9J-KHNK]; Raktim Sharma, *How Do Influencers Make Money on Instagram?*, Yahoo! Fin. (Mar. 31, 2021), https://ca.sports.yahoo.com/news/how-do-influencers-make-money-through-instagram-083707019.html [https://perma.cc/T6J7-52NQ] (discussing how influencers use their NIL as branding to influence marketing, promotional, and affiliate deals).

[434] *See, e.g.*, Vanessa Williamson, *Closing the Racial Wealth Gap Requires Heavy, Progressive Taxation of Wealth*, Brookings (Dec. 9, 2020), https://www.brookings.edu/research/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/ [https://perma.cc/UR4D-HDDC] ("The median white household has a net worth [ten] times that of the median Black household . . . . The total racial wealth gap, therefore, is $10.14 trillion.").

[435] *See* Timir Chheda, *Intellectual Property Implications in a Virtual Reality Environment*, 4 J. Marshall Rev. of Intell. Prop. L. 483, 483, 507 (2005) (predicting a future that we now live in and calling on lawmakers to adjust the laws with the changes in technology).

D. Response to Critics

Notwithstanding these strong arguments supporting the conception of NIL as property, I recognize there are critics of this perspective. Those critiques include (1) that NIL as property would open the floodgates of litigation and (2) that NIL as property would create a slippery slope with negative consequences, particularly the death of college sports. Next, I present two such critiques and briefly respond to each of them. I will show that those critiques are insufficient to overcome the benefits of viewing NIL as property.

1. Opens the Floodgates

Critics might argue that if NIL were property, it would open the floodgates to litigation against the NCAA and its member colleges. These critics have a valid point. The Supreme Court's decision in *Alston* has encouraged, rather than discouraged, more litigation against the NCAA and the apparent inequities in the application of some of its rules.[436] Having lost many battles in the federal courts, the NCAA has turned to Congress to seek control over the Association's players and to preempt state NIL laws.[437]

To these critics, I say that while NIL has not expressly been classified as property, it is *de facto* property. That is, each day, in commerce, we treat NIL as property. Clearly, college athletes are contracting NIL deals which are meant to function as the property of the athletes. Furthermore, NIL deals are not limited to college athletes. They are utilized by entertainers, social influencers, musicians, and professional athletes to name some of the most notable NIL dealers. Anyone of any stature in society can negotiate an NIL deal. When we do, we enjoy the benefits and are obligated to the burdens of

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[436] *See supra* Part I.

[437] *See, e.g.*, Manu Raju, Clare Foran, & Morgan Rimmer, *NCAA Leaders Warn College Sports at Risk of 'Permanent Damage' without Action from Congress*, CNN Politics (Dec. 3, 2023), https://www.cnn.com/2023/12/03/politics/ncaa-college-sports-at-risk-nil/index.html [https://perma.cc/2TJM-AK37]; Alex Anderson, *The Contest for Collegiate NIL Rights: How the Protect the Ball Act May Insulate the NCAA*, JD Supra (July 15, 2024), https://www.jdsupra.com/legalnews/the-contest-for-collegiate-nil-rights-9671614/ [https://perma.cc/8QNL-Q9FZ] ("Two-dozen federal bills concerning NIL and athletics governance have been introduced in recent years. Only one has made it out of committee—the Protecting Student Athletes' Economic Freedom Act. That bill would preclude student-athletes from being designated as employees. Even if the Act was passed by the House of Representatives, at this time, it lacks the necessary bipartisan support to clear the Senate and be signed into law.").

NIL being treated as property. Consequently, I would respond to the critics that as a matter of Equal Protection, college athletes should be entitled to enjoy the benefits of NIL as property as well as the legal protections afforded thereof. Hence, the fact that lawsuits are being filed to recognize and ensure the rights of college athletes is a poor excuse to negate those rights.

2. Slippery Slope

Somewhat related to the above-discussed floodgates critique, some critics might argue that treating NIL as property would create a slippery slope with negative consequences, particularly the death of college sports.[438] In response, I argue that some of these critics are being disingenuous here. I believe that they are not against the concept of NIL as property, rather, they are against who owns and controls the players' NIL. I believe that they would like to put the NIL genie back into the bottle which was owned and controlled by the NCAA, to the detriment of the players. Their view of a slippery slope is, in fact, a revolution on players' rights which I believe will enhance and grow college sports both financially and in popularity as the public's confidence in the fairness of those sports are restored.[439]

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Part III supports the normative claim that we should enact the NAPA to facilitate and accelerate the monetization of college athletes' names, images, and likenesses. It posits that such a legislative initiative should apply universally and particularly in states that have enacted NIL protections promotive of the NIL rights of college athletes. Further, such an initiative should be retroactive. Hence, for the reasons discussed above, I conclude that classifying NIL as property is highly justified by the unique features of property law that serve to achieve the legal and economic goals of NIL law. Relative to the NIL rights of college athletes, I believe that viewing college athletes' NIL rights as

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[438] *See id.*

[439] *See* Jay Bilas, *Why NIL Has Been Good for College Sports . . . and the Hurdles that Remain*, ESPN (June 29, 2022), https://www.espn.com/college-sports/story/_/id/34161311/why-nil-good-college-sports-hurdles-remain [https://perma.cc/VXP3-PW8A] (listing several "positives" that have resulted from NIL laws, including (1) "[a] wide swath of athletes are making money; (2) [w]omen's college athletes are benefiting; (3) [q]uestions about sources of money to athletes have mostly ended; (4) [m]ore athletes seem to be opting to stay in school; (5) [t]alent might be more spread out—not concentrated; and (5) NIL helps athletes with financial literacy.").

property provides the best means of protecting players from being unfairly exploited and enhancing their ability to acquire wealth. This is especially fair if one considers that despite pending litigation, college athletes are still not compensated for their play.[440]

Conclusion

When it comes to providing college athletes a right to monetize the use of their names, images, and likenesses, the current law is conflicted. On the one hand, many states and the NCAA have recognized the players' equal rights to legal protection from unauthorized use of their NIL. On the other hand, the current pro-NIL laws restrict the true benefits that should be available to college athletes by grounding those laws on a right of publicity which fails to achieve many of the attractive features of property law. This conundrum raises a quintessential jurisprudential flaw in our legal system: The right of publicity is tort law which by its nature has limited assignability and marketability. Whereas property law, by comparison, would provide NIL law proven benefits including assignability, licensing, alienation, divisibility, and heritability.

Consequently, this Article posits that classifying NIL as property is the best legal classification to achieve two important societal and economic goals: (1) NIL as property facilitates the monetization of NIL and enriches college athletes, and (2) NIL as property provides an established legal regime to protect NIL from exploitation. Adopting a property-law approach to NIL law would facilitate a true paradigm shift in the rights of college athletes, as well as that of non-college athletes including the everyday person who would also benefit from a pro-property view of NIL law.

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[440] *See* Sports Illustrated Editorial, *College Athletes Still Aren't Being Paid Salaries*, Sports Illustrated (Dec. 20, 2022), https://www.si.com/college/2022/12/20/stories-of-the-year-college-athletes-pay [https://perma.cc/2JPF-VQCA].

Appendix: The "Name, Image, and Likeness as Property" Act ("NAPA")[441]

As noted in Part II of this Article, the following is the proposed model Act that the government, courts, and policymakers should adopt to provide, promote, and protect the rights of intercollegiate college athletes to monetize their names, images, and likenesses by treating NIL as the personal property of the athletes.

A. Preamble

College athletes own, possess, enjoy, and control an inherent private property right in attributes of their "self"[442] which is referred to herein as "persona."[443] One aspect of persona is a person's name, image, and likeness (NIL). NIL should be tradable by the person of whom the NIL exists. The goal of NIL law should be to maximize the wealth of its owner, facilitate that person to monetize its value, and protect against unauthorized use or intrusion. As such, NIL should enjoy all the attributes and features of private property. These features include (1) ownership/title; (2) possession; (3) alienable/transferable, by sale, license, contract, or gift; (4) assignable/

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[441] This draft model statute benefits from the State of Illinois's NIL statute which assigns many property attributes to the right of publicity. *See* 765 ILCS 1075 (West 2024), https://law.justia.com/codes/illinois/chapter-765/act-765-ilcs-1075/ [https://perma.cc/8GPC-SLU2]. *See also* Ark. Code Ann. § 4-75-1104 (West 2024), https://casetext.com/statute/arkansas-code-of-1987/title-4-business-and-commercial-law/subtitle-6-business-practices/chapter-75-unfair-practices/subchapter-11-frank-broyles-publicity-rights-protection-act-of-2016/section-4-75-1104-property-right-in-use-of-name-voice-signature-photograph-or-likeness-prior-consent [https://perma.cc/AX87-SPRN] ("An individual has a property right in the commercial use by any medium in any manner without the individual's prior consent of: (1) The individual's name, voice, signature, photograph, or likeness; and (2) Any combination of the individual's name, voice, signature, photograph, or likeness[.] (b) The property right provided under subsection (a) of this section: (1) Is freely transferable, assignable, licensable, and descendible, in whole or in part, by contract or by a trust, testamentary disposition, or other instrument executed before or after August 22, 2016[.]"). This statute was brought to my attention by W. Taylor Farr, Attorney Advisor for the Clerk's Office of the United State Court of Appeals for the Eighth Circuit and Adjunct Professor at the University of Arkansas School of Law. Thank you for your contribution.

[442] *See* Crusto, *Right of Self*, *supra* note 1.

[443] *Id.*

lease/license; (5) divisible/subdivide; (6) heritable/descendible, by inheritance or will; (7) concurrently-owned; (8) collateral for loans; (9) exclusivity; (10) time-honored, clear, and certain rules; (11) divisible into present and future interests; (12) protected by legal and equitable remedies, (13) can be held in trust; (14) income-generating; (15) insurable; (16) taxable; (17) protected against wrongful, governmental taking, and (18) respected-internationally.[444]

The "Name, Image, and Likeness" Act ("NAPA") is the proposed code that would guide government and policymakers to recognize NIL as the personal property of college athletes, with all the features or attributes of natural property. Additionally, NAPA provides all the legal and equitable remedies for the wrongful exploitation of NIL rights. This Act recognizes that the right to private property is one of the cornerstones of our democracy. It is a fundamental belief of the Founders and is embodied in both the Declaration of Independence and the Bill of Rights. Additionally, this Act recognizes that the *natural* rights theory of property, as embodied in the Declaration of Independence and the U.S. Constitution, embraces the fundamental principle that we are all endowed with certain natural or God-given rights that are inalienable. Despite its abuse in the ownership of people of African descent, the fundamental right of private property was reiterated and expanded in the Reconstruction Amendments. In accordance with the Ninth Amendment to the U.S. Constitution, all rights not expressly superseded by the federal or state governments are reserved to the people. Furthermore, in the Fifth Amendment, the Founders indirectly recognized the importance of private property when they expressly prohibited its taking from the federal government (later applied to state governments via the Fourteenth Amendment) by limiting takings to limited public purpose and only with just compensation.

Tangentially, this Act seeks to protect college athletes, particularly those especially vulnerable such as African-Americans from disadvantaged communities, protect from exploitation of NIL by granting property-based legal and equitable remedies to victims of such exploitation. Those remedies shall include injunctive relief and constructive trusts, as well as compensatory and punitive damages, including private, governmental, and governmental-sponsored expropriation. Finally, this Act seeks to remedy past, present, and future expropriation of college athletes' NIL by providing remedial solutions to the past exploitation and expropriation of the virtual aspects of self, by intentionally providing compensation and reparations for past and current exploitation, such as that of NCAA college athletes, through the establishment of a Victims' Compensation Fund. It is expected that this Act will guide

[444] *See supra* Part III.B.

society, corporations, and government to avoid needless, costly litigation. This change will deliver both justice and peace of mind for college athletes who need to protect their NIL from past, present, and future wrongful expropriation and who are entitled to maximize the value of their NIL.

B. Provisions

Whereas, college athletes' right of ownership and right to control their NIL as their personal property is fundamental and should be constitutionally protected against direct and indirect private, industry, and governmental exploitation of self;

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

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

Whereas, the NCAA's amateurism rule has diminished the value of attributes of college athletes, by monopolizing its development in an anti-competitive environment;

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

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

Whereas, those pro-NIL State laws are grounded on the right of publicity and equal protection, which are inadequate to achieve the proper goals of NIL;

Whereas, the proper goals of NIL are to maximize the wealth of college athletes and to protect them from exploitation;

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

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

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

underprivileged communities, ownership of property rights and any meaningful remedies for their mistreatment and inferior status;

Whereas, those analytical lenses fail to create an effective, transformative narrative that would free college athletes, some of whom are legal minors, from economic exploitation and the lack of human dignity they suffer (and have suffered) by being treated as the property of the NCAA and its member schools.

Whereas, even in the face of reform, college athletes are left seeking a handout from their exploiters, rather than being empowered by a constitutional right to own and control their NIL;

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

Whereas, the law has long protected a person's personal and real property, whereas, federal copyright and patent laws protect the creative property of a person, there is no federal law that protects a person's NIL; and whereas a person seeking protection must rely on the common law tort of a right of publicity;

Whereas, with the proliferation of social media, the rise of AI, and the development of the metaverse, a person's NIL has become a valuable, vulnerable asset that can be monetized and can increase a person's wealth while, if left unprotected, would become the wealth of a person who exploits another person's NIL;

Whereas, several States have enacted laws that seek to recognize the right of college athletes to capitalize on their NIL and not lose their eligibility to play NCAA college sports, although those laws are particular to college athletes and as based on the right of publicity; and whereas, property law possesses unique beneficial features that would enhance a person's wealth and protect their NIL from exploitation as well as provides timeworn, proven remedies against abuse.

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

(1) NAPA recognizes that the natural rights theory of property, as embodied in the Declaration of Independence and in the Constitution, embraces the fundamental principle that college athletes are all endowed with certain natural or God-given rights to their NIL which is inalienable.

(2) NAPA's primary goals are to maximize the wealth of college athletes and to end private, industry, and governmental exploitation of the NIL property right of college athletes, by banning their authority to so, and by granting those being exploited with special legal and equitable remedies including the use of injunctive relief and constructive trusts, to protect the owners for the present and future wrongful taking of NIL.
(3) NAPA seeks to remedy past, present, and future expropriation of the NIL of college athletes by intentionally providing compensation and reparations of the past and current takings of college athletes' NIL rights.
(4) All levels and branches of government, to the highest extent of their powers and authorities, are hereby mandated to abolish all direct or indirect expropriation of college athletes' NIL. This mandate is self-evident and does not require supplemental action other than the immediate endeavors needed to facilitate these requisites.
(5) The Justice Department is hereby authorized to investigate alleged incidents of such expropriations.
(6) NAPA shall be subject to strict judicial scrutiny. The legal standard for assessing liability shall be whether the government or its agents are, or have taken, college athletes' NIL puts the burden on the government as a fiduciary of those property rights.
(7) Any such past expropriation, exploitation, use, and infringement on college athletes' NIL shall be enjoined from the adoption of this Act, and that such abuses be retroactively compensated to the full extent of the current market value of the abuse.[445]

Hence, the "Name, Image, and Likeness as Property" Act provides and hereby proclaims that college athletes own a natural property right to their NIL, is entitled to all the attributes of property including alienation, divisibility, descendability, and is protected by all legal and equitable remedies that inure to property, and directs that all federal, state, and local laws recognize and protect NIL as private property of college athletes.

[445] *See generally* House v. NCAA, 545 F. Supp. 3d 804 (2021) (grappling with how to apportion the collection from the NCAA and its members and the distribution of compensation for violating past and present players' NIL rights).