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Right of Self

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Right of Self

Mitchell F. Crusto*

Abstract

The exercise of free will against tyranny is the single principle that defines the American spirit, our history, and our culture. From the American Revolution through the Civil War, the two World Wars, the Civil Rights Movement, and up to today, Americans have embraced the fundamental rights of the individual against wrongful governmental intrusion. This is reflected in our foundational principles, including the Magna Carta, the Bill of Rights to the United States Constitution, the Reconstruction Amendments, the Nineteenth Amendment, and, more recently, in the Supreme Court's recognition of fundamental individual rights within the Constitution's penumbras. However, there is no unifying term or concept for this moving force that has guided our constitutional development.

This Article seeks to redefine our rights to individual liberties through a concept that I call "Right of Self." It introduces the concept of Right of Self as the legal recognition and protection of a person's attributes or identity, including one's labor; name, image, likeness (NIL); and other unequivocal identifiers. It is critical to clearly define this fundamental principle and embrace it as a protected right for several reasons, but mainly because modern technology has increased the number

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of ways in which the self is being expropriated, for example through the abuse of facial recognition technology. Without Right of Self, the powerful—often with the government’s tacit or direct support—can exploit people without restrictions or compensation. To illustrate this point, this Article analyzes a contemporary case of government-assisted, “private” taking of Right of Self that concerns a particular and vulnerable group of people: college student athletes.

This Article argues that Right of Self is an inherent, fundamental, and constitutionally based right of every person in America. It shows how the failure to embrace and protect that right has resulted in a particular form of inequity, which I call “intergenerational wealth displacement.” This inequity is rooted in race, gender, status, age, and class differences. To redress it, this Article proposes a model code that policymakers should adopt to recognize Right of Self as a fundamental right and to broadly apply it to protect people from the exploitation of their name, image, and likeness.

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INTRODUCTION¹

Let me share my journey. A few years ago, I became aware of how collegiate athletes were being exploited, both in the taking of their labor and the exploitation of their name, image, and likeness. This unfair treatment of young people compelled me to wonder: do people have an inherent right to the attributes of themselves, including their labor and the other attributes of

1. This Article is one in a trilogy that examines a person's rights to own and control the attributes of themselves. See Mitchell F. Crusto, *Blackness as State Property: Valuing Critical Race Theory*, HARV. C.R.-C.L. L. REV. (forthcoming 2022) [hereinafter Crusto, *Blackness as State Property*] (utilizing Critical Race Theory to explain how the American legal system has denied Black people, specifically young Black men, the right to acquire property); Mitchell F. Crusto, *Game of Thrones: Liberty & Eminent Domain*, U. MIA. L. REV. 653 (2022) [hereinafter Crusto, *Game of Thrones*] (presenting a Due Process rationale as a means to prohibit governmental exploitation of people's property rights). 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) [hereinafter Crusto, *Blackness as Property*] (focusing on Black women's struggle for property rights).

self, especially their virtual self. That is when I conceptualized “Right of Self,” and that is where this journey began.

I began with a Google search of essential terms. When I conducted a Google search for the phrase “Right of Self,” I was directed to links relating to self-determination,² but that was not the rabbit hole I wanted to venture down. Not to be deterred, I continued my search for what I believe is the most important, transformational concept in law and society. But I came up with nothing directly on point.

So, I thought, perhaps I would find some assistance if I broke the phrase down to its separate words, that is, “self” and “right,” and pulled out the dictionaries. The word “self,” I was happy to find, is defined as “the union of elements (such as body, emotions, thoughts, and sensations) that constitute the individuality and identity of a person.”³ At last, this was the definition I was looking for. For the word “right,” I cautiously settled on: “Legal rights are, clearly, rights which exist under the rules of legal systems or by virtue of decisions of suitably authoritative bodies within them.”⁴

Since I could not find a definition of the term “Right of Self,” I took the liberty of proposing my own definition. Before I define it, let me explain the three reasons why Right of Self is an important concept worthy of exploration: (1) it differentiates a privilege from a right; (2) it explores the dynamics of wealth

2. See, e.g., *Self-Determination*, UNDERREPRESENTED NATIONS & PEOPLES ORG. (Sept. 21, 2017), <https://perma.cc/8PWE-CS3S>; *Self Determination International Law*, CORNELL LEGAL INFO. INST., <https://perma.cc/7LTZ-BWF3>; Hurst Hannum, *Legal Aspects of Self-Determination*, ENCYC. PRINCETONIENSIS, <https://perma.cc/F3V3-TUJY>.

3. *Self*, MERRIAM-WEBSTER (2022), <https://perma.cc/APZ5-3SL9>. See generally 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).

4. *Legal Rights*, STAN. ENCYC. OF PHIL. (Dec. 20, 2001), <https://perma.cc/DUU5-LPA5> (last updated Nov. 4, 2017). However, I believe that Right of Self exists regardless of its formal recognition by the government—possessed by individuals as permissions and entitlements to do things or enjoy liberty and property free from infringement by other persons, governments, or other authorities. See 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).”).

inequity, and (3) it redresses the historical imbalance between the powerful and the powerless.

First, I have observed that, throughout the centuries, law has been a tool through which the powerful exploit the powerless, for example through social oppression.⁵ As a result, rights have been a “top-down” phenomenon, which I call the “privilege paradigm.”⁶ The problem I see in that paradigm is that the enjoyment of a privilege exists at the discretion of the powerful. I find this observation disturbing. Recognizing the need to free the powerless from this cycle of conscious and unconscious exploitation, I believe we need a different approach to the role of law, one which identifies and embraces the idea that people are entitled to control their own destiny through the ownership and control of their own selves and protected against infringements. I refer to that approach as the “rights paradigm.”⁷ Therefore, Right of Self requires a critical assessment of the power paradigm that distinguishes a privilege from a right. I contend that the law should recognize Right of Self as a fundamental right. Identifying certain rights as “fundamental” is not a novel idea. The United States Supreme Court has deemed certain rights to be fundamental⁸ and has

5. Law has been a tool of oppression, combined with force, claims of God-given rights, title, tradition, culture, religion, and government. See 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.”); LYNN WEBER, *UNDERSTANDING RACE, CLASS, GENDER, AND SEXUALITY: A CONCEPTUAL FRAMEWORK* (2d ed. 2010).

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

7. This rights-based approach to Right of Self reflects former Supreme Court Justice Sandra Day O’Connor’s vision of federalism as a means to protect individuals from undue governmental intrusion. See generally Bradley W. Joondeph, *The Deregulatory Valence of Justice O’Connor’s Federalism*, 44 HOUS. L. REV. 507 (2008).

8. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)

[I]n addition to the specific freedoms protected by the Bill of Rights, the “liberty” specially protected by the Due Process Clause includes the rights to marry; . . . to have children; . . . to direct the education and upbringing of one’s children; . . . to marital privacy; . . . to use

provided criteria for determining which rights are fundamental.⁹

The second reason for exploring the concept of Right of Self is its relationship between the privilege paradigm and wealth inequality in the United States,¹⁰ particularly as it relates to the intersection of class, race, gender, and age.¹¹ For example, I suspect that wealth inequality is one byproduct of systemic racism.¹² More broadly, I surmise that wealth inequality is a result of the dynamic through which the property or attributes

contraception; . . . to bodily integrity; . . . and to abortion. (citations omitted)

9. See *id.* at 720–21

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decisionmaking, that direct and restrain our exposition of the Due Process Clause. As we stated recently in *Flores*, the Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." (internal citations and quotations omitted)

10. 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 (June 13, 2019, 8:50 AM), <https://perma.cc/QD5D-FK22>. 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." *Id.*

11. See Vanessa Williamson, *Closing the Racial Wealth Gap Requires Heavy, Progressive Taxation of Wealth*, BROOKINGS (Dec. 9, 2020), <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").

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

of young people, are “transferred” to upper-class, white seniors—I refer to this process as “intergenerational wealth displacement.”¹³ One example of this phenomenon is the high price that students, particularly the economically-disadvantaged, pay to attend college and graduate and professional schools and the long-lasting impact this has on their quality of life.¹⁴ Therefore, I believe that analyzing Right of Self as a property right that is protected against exploitation can redress intergenerational wealth displacement and will ensure that young people of all backgrounds will have a greater opportunity to benefit economically from self.

The third reason for studying Right of Self is that the war over Right of Self is not new and, in fact, defines our constitutional history and culture.¹⁵ Throughout Anglo-American history, there have been notable breakthroughs in the privilege paradigm in which the powerless demanded and procured their rights against the powerful. One example of these rights-breakthroughs is the Magna Carta,

13. “Intergenerational wealth displacement,” for purposes of this Article, is defined as the legal and illegal, conscious and unconscious, transfer of wealth from legal minors, particularly those from disadvantages communities, to adults, particularly wealthy, senior, white males. This is one dynamic that resulted in an aged-related wealth gap. Consequently, households headed by persons aged sixty-five years or older are forty-seven times wealthier than households headed by persons aged thirty-five years or younger. Annalyn Censky, *Older Americans Are 47 Times Richer than Young*, CNN MONEY (Nov. 28, 2011, 3:09 PM), <https://perma.cc/2VNZ-S7YX>; see Christopher Ingraham, *The Staggering Millennial Wealth Deficit, in One Chart*, WASH. POST (Dec. 3, 2019), <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.”).

14. See Censky, *supra* note 13

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

15. See *infra* Part I. This observation does not ignore the ongoing political and constitutional law tensions that historically and currently surround issues relating to self. Examples of these tensions 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 *generally* RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES & MATERIALS* (2002).

adopted in 1215.¹⁶ Though the Magna Carta was concerned with the medieval relationship between the monarch (King John of England) and a group of rebel barons (the lowest rank in the Peerage of England), in the early seventeenth century, Sir Edward Coke adopted the Magna Carta to argue for Right of Self against the divine right of kings as a justification for absolute monarchies.¹⁷ Most importantly, in the eighteenth century, the Magna Carta's embellished principles greatly influenced the early American colonists and were foundational to the U.S. Constitution, especially the Bill of Rights.¹⁸ Since the establishment of the Republic, the U.S. Constitution has slowly but continuously moved toward the realization of Right of Self.¹⁹ Hence, Right of Self is a libertarian vision²⁰ through which the powerless are entitled to legal protections from exploitation. Most importantly, without Right of Self, the powerful will continue to use the legal system to exploit the powerless, widening the wealth gap and ultimately destroying the middle class.

For those reasons, I believe it is critical and timely for us to explore the rights we have to attributes of ourselves.

16. See generally J.C. HOLT, *MAGNA CARTA* (1992).

17. Michael Steenson, *Roots of Constitutional Government: Magna Carta at 800*, 72 *BENCH & BAR MINN.* 18, 19 (2015)

Magna Carta was used in the 17th century by Sir Edward Coke as a common law check on the power of the Stuart kings and later, in the mid-17th century, more broadly by the radical Levellers as a basis for arguing that certain fundamental rights should be beyond the reach of government.

18. *Id.* at 20 (citing A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* (1968)).

19. See *infra* Part I.

20. "Libertarian view," for purposes of this Article, means to strongly value individual freedom and civil liberties and to endorse a free-market economy based on private property and freedom of contract. See *Libertarianism*, *STAN. ENCYC. OF PHIL.* (Sept. 5, 2002), <https://perma.cc/82F4-69VN> (last updated Jan. 28, 2019); *Individual Rights*, *LIBERTARIANISM.ORG*, <https://perma.cc/S4QG-AY83>. 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." That right is a property in one's person, with possession and control over oneself akin to the exercise of control over one's possessions. See generally 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).

Consequently, I propose a definition of “Right of Self.” Right of Self is a natural property right²¹ in one’s “self”—encompassing a person’s attributes or identity, such as labor, name, image, likeness, and other unequivocal identifiers.²² With this right, a person is entitled to enjoy and control the attributes of themselves, protected from all exploitation, including private, governmental, and government-sponsored expropriation,²³ the last two raising issues of the scope of eminent domain.²⁴ I contend that Right of Self is based on jurisprudential, fundamental, and constitutional principles, including those

21. “Natural law” or “natural law theory of property,” for purposes of this Article, is defined as the jurisprudential theory in which there are “natural rights” (1) that are fundamental or natural, as derived from God or nature; (2) to which all people are equally entitled; (3) that are inalienable, meaning they cannot be bargained or legislated away from people; and (4) that apply to life, liberty, and property. *See generally The Natural Law Tradition in Ethics*, STAN. ENCYC. OF PHIL. (Sept. 23, 2002), <https://perma.cc/78ZW-W6GD> (last updated May 26, 2019); *Natural Law*, FREE DICTIONARY (2022), <https://perma.cc/YB9M-NU3A>.

22. “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, the right not to be enslaved, in all mediums such as print, online, fantasy, cyberspace, and the virtual universe.

23. The terms “government” or “governmental,” for purposes of this Article, refer to all levels and aspects of the federal, state, and local authorities, as well as “agents” of the government, including private individuals, organizations, and entities who receive government support or benefits including antitrust protection, non-profit status, and the like.

24. A natural consequence of an inherent right to oneself is protection from wrongful governmental takings. I explore this issue in-depth in a forthcoming article, Crusto, *Game of Thrones*, *supra* note 1. Moreover, though this Article focuses on the Right of Self of each resident of the United States, this right is a universal human right that belongs to every person. *See infra* Part III.

found in the Fourth,²⁵ Fifth,²⁶ Ninth,²⁷ Thirteenth,²⁸ and Fourteenth²⁹ Amendments, as well as in groundbreaking Supreme Court decisions.³⁰

The issue of who “controls” or “owns” self is as old as the founding of the Republic. Relative to the exploitation of labor, for over a century, there was a historic battle over who controls the self, particularly the self of enslaved people of African descent.³¹ Though the concept of liberty was a fundamental principle of the new Republic, it was not “universal.”³² It took a

25. U.S. CONST. amend. IV

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

26. *Id.* amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*” (emphasis added)).

27. *Id.* amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

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

29. *Id.* amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United 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.

30. See *infra* Part I. Parenthetically, this Article focuses on these Amendments’ *civil* rights protections, recognizing that they also protect against *criminal* infringements. This does not exclude the fundamental right of privacy. See *generally* *Publicity*, CORNELL LEGAL INFO. INST., <https://perma.cc/J24Y-VD9N>; *Statutes & Interactive Map*, RIGHT OF PUBLICITY, <https://perma.cc/H9UM-PFHX>.

31. See my forthcoming companion article, Crusto, *Blackness as State Property*, *supra* note 1, in which I view the expropriation of Right of Self as having its roots in Antebellum slavery practices, and how that exploitation and expropriation continue to manifest itself today.

32. See Elizabeth C. Tucker, Comment, *Has the Supreme Court Taken a Wrong Turn? An Analysis of the Supreme Court’s Decision in Atwater v. City of Lago Vista*, 107 DICK. L. REV. 675, 695 (2003) (“Racial concerns were not an

Civil War and the adoption of the Thirteenth Amendment to constitutionally guarantee Right of Self, relative to the expropriation of a person's liberty, labor, and property, under the term called "slavery."³³ Parenthetically, in an early case on a person's right to their name, image, and likeness, a judge analogized the "taking" of a person's image to the American enslavement of people of African descent.³⁴

While protection of self in the labor context is important, this Article instead focuses on certain "modern" developments relating to the exploitation of self³⁵ and argues for the necessity

issue at common law; thus, the Framers of the United State Constitution did not explicitly provide for protection of minorities in the Bill of Rights.").

33. The term "slavery" has been aptly replaced with the term "enslavement" to better describe the horrific abuses that the victims, or enslaved, had to endure from their enslavers, who were backed by the government. *See generally The 1619 Project*, N.Y. TIMES, <https://perma.cc/86KB-DBR5>. "The 1619 Project is an ongoing initiative from The New York Times Magazine that began in August 2019, the 400th anniversary of the beginning of American [enslavement]." *Id.* "It aims to reframe the country's history by placing the consequences of [enslavement] and the contributions of Black Americans at the very center of our national narrative." *Id.* Parenthetically, the government could abolish and provide reparations for the enslavement of people of African descent because the government originally legalized it and promoted it.

34. *See Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 80 (Ga. 1905)

The knowledge that one's features and form are being used for such a purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him; and, as long as the advertiser uses him for these purposes, *he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master*; and if a man of true instincts, or even of ordinary sensibilities, no one can be more conscious of his enthrallment than he is. (emphasis added)

35. Moreover, self 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 biopsy of cervical cancer taken from Henrietta Lacks, a thirty-one-year-old, working-class African-American woman and mother of five. *See generally 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.

of the legal protection of self, particularly a person's name, image, and likeness.³⁶ With the development of modern technology, including the expansion of the virtual or cyber universe,³⁷ these attributes of self are an invaluable source of wealth³⁸ and, therefore, subject to substantial exploitation.³⁹ Often, we see the public battles over Right of Self involving

936 (1991), a landmark case holding that the plaintiff had no property rights in his discarded cells or rights to any profits made from them. 793 P.2d at 488–93.

36. The legal aspects of these attributes of self are widely undeveloped by our legal system. *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); Michael Decker, Note, *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 n.77 (2009) (noting that many states now have common law or statutory rights of publicity that apply postmortem). From birth until death, and possibly beyond, every American possesses attributes of self.

37. "Cyberspace," for purposes of this Article, refers to the virtual environment of the Internet and anything associated with the Internet and Internet culture. *See generally* DAVID J. BELL ET AL., *CYBERCULTURE: THE KEY CONCEPTS* (2004).

38. The nature and ownership of self are still being developed. There is much at stake as technology continues to monetize the "virtual" essence of a person, such as an "avatar" in a fantasy football league that was part of the American and Canadian fantasy sports/gaming industry, which was valued at more than \$7 billion in 2017. Ashley Rodriguez, *How the \$7 Billion US Fantasy Football Industry Makes Its Money in 2017*, QUARTZ (Sept. 3, 2017), <https://perma.cc/GJ84-T69N>; *see* Dora Mekouar, *Why Millions of Americans Spend Billions on this Fantasy*, VOICE OF AM. (Sept. 3, 2019, 11:42 AM), <https://perma.cc/PPB3-UX2A>.

39. College athletes must cover the difference between scholarships and their cost of living, amounting to thousands of dollars annually. *Paying College Athletes—Top 3 Pros and Cons*, PROCON.ORG, <https://perma.cc/AE43-AAAC> (last updated Jan. 21, 2021). This leaves about 85 percent of players below the poverty line, with about 25 percent of Division I athletes reporting food poverty and almost 14 percent reporting homelessness in 2020. *Id.* "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.'" *Id.*; *see also* Craig Garthwaite et al., *Who Profits from Amateurism? Rent-Sharing in Modern College Sports* 1–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27734, 2020), <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).

wealthy people, like celebrities, such as the legal battle over control of famed singer Britney Spears's self via a conservatorship.⁴⁰ However, the need for protection is universal, not exclusive to individuals of certain socioeconomic classes. For example, with the proliferation of social media, many individuals currently depend on the fruits of their virtual selves.⁴¹ Failing to protect a person's Right of Self negatively impacts disadvantaged minors, in a disproportionate manner.⁴²

Moreover, Right of Self is personal and private. Imagine one morning you receive a text message from your best friend. She tells you a new "character," who looks and talks just like you, has been added to a popular video game.⁴³ Upon investigation, you discover that someone stole your image and licensed it to a

40. See *What We Know About Britney Spears's Conservatorship Hearing*, N.Y. TIMES (June 23, 2021), <https://perma.cc/6MG3-6ZEX> (last updated Sept. 13, 2021). A Los Angeles judge terminated the court-ordered arrangement at the request of the popstar and her legal team, ending her years-long battle. Sarah Whitten, *Britney Spears Freed from Conservatorship After 13 Years*, CNBC (Nov. 12, 2021, 5:18 PM), <https://perma.cc/B7EV-XMKX> (last updated Nov. 12, 2021).

41. See Jade Scipioni, *Here's How Many Social Media Followers You Need to Make \$100,000*, CNBC (Apr. 30, 2021, 11:48 AM), <https://perma.cc/TLR7-CSLN> (last updated May 20, 2021) (discussing how nineteen-year-old influencer Josh Richards makes nearly \$1,000-a-minute as a TikTok star); Raktim Sharma, *How Do Influencers Make Money on Instagram?*, YAHOO FIN. (Mar. 31, 2021), <https://perma.cc/YVF9-FA5B> (discussing how influencers use their personas as branding to influence marketing, promotional, and affiliate deals).

42. See Garthwaite et al., *supra* note 39, at 36 ("The player-level analysis reveals that the existing limits on player compensation effectively transfers resources away from students who are more likely to be [B]lack and more likely to come from poor neighborhoods towards students who are more likely to be white and come from higher-income neighborhoods.").

43. Juventus footballer Edgar Davids brought a lawsuit against Riot Games Europe Holdings Ltd., stating that a player named Lucian in their League of Legends game infringed Davids's likeness. See Monika A. Górska & Lena Marcinoska-Boulangé, *Likeness in Computer Games: Real-Life People*, NEWTECH.LAW (Apr. 8, 2021), <https://perma.cc/N2LF-W2KT>. Similarly, Gwen Stefani sued Activation Publishing Co. when she saw that her avatar, which she believed would only be used to perform No Doubt songs, also performed other songs in the game Band Hero. *Id.* Additionally, Lindsay Lohan filed a lawsuit against Rockstar Games in connection with the character Lacy Jonas in Grand Theft Auto V, claiming that the avatar infringed her likeness. *Id.* In a lawsuit brought by Kierin Kirby against Sega, Kirby claimed that the avatar Ulala from the video game Space Channel 5 infringed her likeness. *Id.*

game developer.⁴⁴ Is that legal? Constitutional? Ethical? This issue is particularly important relative to the need to redress intergenerational wealth displacement,⁴⁵ by which young people or minors are robbed of the value of their virtual selves.⁴⁶

The ambition of this Article, then, is to consider two questions. (1) What are the jurisprudential, fundamental, and constitutional bases of Right of Self? (2) How would Right of Self apply to the ownership and commercial use of a person's name, image, and likeness (NIL), so as to redress the contemporary challenge of wealth inequity between young people and adults in our society? Consequently, this Article proposes the seminal thesis that every person in the United States is entitled to Right of Self. Part I of this Article posits that Right of Self embodies jurisprudential, fundamental, and constitutional principles. Part II proposes a model statute that seeks to codify Right of Self as an inherent, universal right that belongs to every person in the United States. Part III presents a case study of how Right of Self might apply to a contemporary issue of wealth inequity—college student-athletes' struggle for the right to their NIL in light of the National Collegiate Athletic Association's (NCAA)⁴⁷ amateurism rules⁴⁸ or eligibility rules, following the

44. In each of the cases discussed in the previous footnote, except for the case concerning Gwen Stefani, the game developers used the person's likeness in their video game without their permission. *Id.*

45. See *supra* note 13.

46. 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 General Data Protection Regulation, Council Regulation 2016/679, 2016 O.J. (L 119) 1, 1–3 (EU) (protecting data rights for individuals, strengthening mandated data protection requirements, and imposing significant legal responsibilities on entities handling personal data). No similar protections exist in U.S. law, except in California under the California Consumer Privacy Act (CCPA). CAL. CIV. CODE §§ 1798.100–199.100 (West 2021).

47. See *National Collegiate Athletic Association*, ENCYC. BRITANNICA, <https://perma.cc/2PWL-X8JT> (noting that the NCAA is a nonprofit organization established in 1906 that regulates college athletics, including game rules, athlete eligibility, and college tournaments); *What Is the NCAA?*, NCAA, <https://perma.cc/3YAM-9Q79> (reporting that, as of March 2021, the NCAA was composed of "[n]early half a million college athletes [who] make up the 19,886 teams that send more than 57,661 participants to compete each year in the NCAA's 90 championships in 24 sports across 3 divisions").

48. "Amateurism rules," for purposes of this Article, refers to the body of NCAA rules, under which college teams are only allowed to compensate their

Supreme Court's decision in *NCAA v. Alston*⁴⁹ relating to "Fair Pay to Play"⁵⁰ and subsequent state laws granting players some benefits to capitalize on their NIL.⁵¹

athletes with scholarships and other academic benefits. Before *Alston*, these rules prohibited players from being compensated for their play or from capitalizing on their NIL. See NCAA, NCAA DIVISION I MANUAL, § 12.1.2 (2021) [hereinafter NCAA MANUAL], <https://perma.cc/K22L-9RRG> ("An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual . . . [u]ses athletics skill (directly or indirectly) for pay in any form in that sport . . ."); *id.* § 12.5.2.1

After becoming a student-athlete, a student-athlete shall not be eligible for participation in intercollegiate athletics if the student-athlete: (a) Accepts any remuneration for or permits the use of the student-athlete's name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or (b) Receives remuneration for endorsing a commercial product or service through the student-athlete's use of such product or service.

Clearly, these rules do not reflect changes due to the impact of the *Alston* decision. See generally Anastasios Kaburakis et al., *Is It Still "In the Game", or Has Amateurism Left the Building? NCAA Student-Athletes' Perceptions of Commercial Activity and Sports Video Games*, 26 J. SPORT MGMT. 295 (2012).

49. 141 S. Ct. 2141 (2021). *Alston* affirmed the district court's decisions (1) not to disturb NCAA rules limiting athletic scholarships and other compensation related to athletic performance, (2) to find unlawful and enjoin certain NCAA rules limiting the education-related benefits schools may make available to student-athletes, and (3) as consistent with established antitrust principles when subjecting the NCAA's compensation restrictions to antitrust scrutiny under a "rule of reason" analysis. *Id.* at 2160–66. Tangentially, this case shows that, contrary to Alexander Hamilton's belief that the Supreme Court is the "weakest" branch of government, the Court's established power of "judicial review" has produced profound social, economic, and political outcomes. See THE FEDERALIST NO. 78 (Alexander Hamilton); *infra* Part I.C.

50. "Fair Pay to Play," for purposes of this Article, refers to the legal issue of the right of college athletes to profit from their name, image, and likeness while maintaining their amateur status with the NCAA. It is often referred to simply as "Pay to Play," although that phrase also refers to various situations in which persons exchange money for services or the privilege to engage in certain activities, particularly in reference to political corruption. See generally *supra* note 39 and accompanying text; *infra* Part III.

51. See Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, OPENDORSE (Apr. 15, 2022), <https://perma.cc/D9YJ-2Z2T> (compiling all states' NIL legislative actions). In the last few years, this NCAA rule has been under attack from various sources and the NCAA itself is planning to reform it. For example, in October 2019, California passed the Fair Pay to Play Act, CAL. EDUC. CODE § 67456 (West 2021), which, when enforceable, will allow students to have more control of their names and likenesses for sponsorships and endorsements beyond the NCAA's control. See Lucy Callard, *Fair Pay to Play Act: California Legislation Threatens NCAA*

In summary, this Article visualizes a libertarian view of Right of Self as an inherent entitlement of every person in America and shows how such a right could redress wealth inequality. It both (1) lends evidence to the thought that a rights paradigm, rather than a privilege paradigm, provides policymakers with an important transformational approach to progressive, real change; and (2) is a seminal argument for the recognition and protection of an inherent Right of Self, free from exploitation.⁵² As presented in the next Part, I provide my argument for Right of Self is a quintessential right based upon our history, our culture, and fundamental principles..

I. RIGHT OF SELF

*Every man has Property in his own Person.
This no Body has any Right but to himself.*

John Locke⁵³

Right of Self is a fundamentally, constitutionally, and jurisprudentially based natural property right that every person in the United States is entitled to enjoy. As this Part will discuss, this thesis is vitally important, and not self-evident, for two reasons. First, to date, the Supreme Court has not expressly stated that there is a fundamental right to Right of Self that broadly applies across the constitutional spectrum. Further, the

Amateurism Rules, JURIS (Oct. 25, 2019), <https://perma.cc/263Q-CW3N> (reporting on the new Fair Pay to Play Act); Greta Anderson, *Court Panel Rules Against NCAA Restrictions on Athlete Pay*, INSIDE HIGHER ED (May 19, 2020), <https://perma.cc/9YE3-TQFG> (reporting on the NCAA's process of reviewing its policies related to how to compensate players for names and likenesses); *infra* Part III.

52. This Article has a forthcoming companion piece in which I analyze Right of Self relative to the constitutionality of governmental taking of the NIL of student athletes. See Crusto, *Game of Thrones*, *supra* note 1.

53. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 18 (C.B. MacPherson ed., Univ. of Toronto Press 1978) (1690) [hereinafter LOCKE, TWO TREATISES OF GOVERNMENT] (“For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is one joynd to, at least where there is enough and as good left in common for others.”); cf. JEREMY BENTHAM, THEORY OF LEGISLATION 111 (Richard Hildreth trans., 1840) (1802) (providing the most influential utilitarian justification for private property: “Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it”).

Court has not expressly stated that Right of Self is a property right that is protected against private and public exploitation. Second, because the Supreme Court has determined that privacy is a fundamental right,⁵⁴ Right of Self might be viewed as a corollary to the right of privacy. However, as the Court has yet to expressly determine that Right of Self is a fundamental right, the Court's jurisprudence unintentionally diminishes the value of an individual's rights, which results in the unregulated taking of the attributes of self, often without consent of the people.

Despite the lack of an express provision in the Constitution stating that Right of Self exists, textual and non-textual historical evidence and several Supreme Court holdings exist that support the premise that the Constitution protects Right of Self as a fundamental right. The following sources of "authority" present both textual and non-textual support for the thesis that Right of Self is fundamental:⁵⁵ (1) historical sources that form the philosophical, legal, and moral underpinnings of the Constitution (hereinafter referred to as "founding principles"); (2) express provisions in the Constitution, particularly the Bill of Rights and Reconstruction Amendments; and (3) Supreme Court decisions relating to fundamental rights and Right of Self.⁵⁶ Hence, this Article's thesis proceeds in three parts: that

54. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

55. See Antonin Scalia, *Is There an Unwritten Constitution?*, 12 HARV. J.L. & PUB. POL'Y 1, 2 (1989) (discussing three alternative sources for non-textual constitutional rights: history, natural rights, and the evolving consensus of society); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" (citations omitted)); NORMAN REDLICH ET AL., 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).

56. The concept of Right of Self as a fundamental right is also evidenced in international human rights principles and treaties adopted and ratified by the United States. See generally G.A. Res. 22000A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966); G.A. Res. 2106 (XX),

Right of Self is (1) a libertarian principle that was a personal belief of the Founders of the Republic; (2) embodied in the Declaration of Independence, the Bill of Rights, and in the Reconstruction Amendments; and (3) a corollary to Supreme Court decisions that recognize certain penumbral and fundamental rights.

A. *Libertarian Belief*

A brief legal history of the American Revolution, the establishment of the Republic, and development of the U.S. Constitution and the Bill of Rights shows that the Founders believed in what I refer to as Right of Self. Because the term “Right of Self” is a novel, modern, libertarian concept, we need to establish the elements or components of libertarianism from a historical perspective to see how the Founders knew and embraced the concept.⁵⁷

Libertarian theory embodies the classical liberal tradition of John Locke,⁵⁸ David Hume,⁵⁹ Adam Smith,⁶⁰ and Immanuel Kant.⁶¹ The hallmark of libertarianism is self-autonomy or the

International Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965).

57. See generally 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).

58. See generally LOCKE, *TWO TREATISES OF GOVERNMENT*, *supra* note 53.

59. See generally DAVID HUME, *A TREATISE OF HUMAN NATURE* (1739–1740).

60. *Adam Smith’s Moral and Political Philosophy*, STAN. ENCYC. OF PHIL., <https://perma.cc/7W7U-GZ55> (last updated Nov. 11, 2020).

61. See *Libertarianism*, STAN. ENCYC. OF PHIL., *supra* note 20 (“[L]ibertarian theory is closely related to . . . [the philosophy of] Immanuel Kant.”). Right of Self captures the key feature of libertarianism: the idea of self-ownership. Robert Nozick argued that people have a very stringent set of rights over their persons, giving them the kind of control over themselves that one might have over possessions they own, including:

- (1) [R]ights to control the use of the entity: including a liberty-right to use it as well as a claim-right that others not use it without one’s consent, (2) rights to transfer these rights to others (by sale, rental, gift, or loan), (3) immunities to the non-consensual loss of these rights, (4) compensation rights in case others use the entity without

sovereignty of individuals as right-holders, including the right in themselves and a right in their property.⁶² Establishing the central role of “natural,” or God-given, individual rights, liberalism (which encompasses libertarianism) challenged the traditional sources of control over individual rights: monarchic government in an overbearing and overtaxing King George III; a state-established religion in the Church of England; and government-sponsored monopolies such as the East Indian Tea Company.⁶³ These individual rights include “the rights to life, liberty, private property, freedom of speech and association, freedom of worship, government by consent, equality under the law, and moral autonomy.”⁶⁴

The Founders embraced John Locke’s theories of natural rights, including the right to private property and to government by consent.⁶⁵ According to libertarian principles, the quintessential role of the government is to protect the rights of the individual.⁶⁶ Consequently, liberal philosophy advocates limiting government power “to that which is necessary to accomplish this task. Libertarians are classical liberals who strongly emphasize the individual right to liberty.”⁶⁷ Further, libertarians “contend that the scope and powers of government should be constrained so as to allow each individual as much freedom of action as is consistent with a like freedom for

one’s consent, and (5) enforcement rights (e.g. rights to restrain persons about to violate these rights).

Libertarianism, STAN. ENCYC. OF PHIL., *supra* note 20; see NOZICK, *supra* note 20, at 268; see also 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).

62. See *Libertarianism*, STAN. ENCYC. OF PHIL., *supra* note 20.

63. *Libertarianism*, ENCYC. BRITANNICA, <https://perma.cc/W8NE-34CM> (last updated Oct. 22, 2021).

64. *Id.* The first well-developed statement of libertarianism, AN AGREEMENT OF THE PEOPLE (1647), was produced by the radical republican Leveller movement during the English Civil Wars (1642–1651) and presented to Parliament in 1649. *Libertarianism*, ENCYC. BRITANNICA, *supra* note 63. This statement included the ideas of self-ownership, private property, legal equality, religious toleration, and limited, representative government. *Id.*

65. *Libertarianism*, ENCYC. BRITANNICA, *supra* note 63.

66. *Id.*

67. See *id.* (“[A]ll libertarians agree that individual rights are imprescriptible—i.e., that they are not granted (and thus cannot be legitimately taken away) by governments or by any other human agency.”).

everyone else.”⁶⁸ As such, “they believe that individuals should be free to behave and to dispose of their property as they see fit, provided that their actions do not infringe on the equal freedom of others.”⁶⁹

The Founders also adopted Adam Smith’s analysis of the economic effects of free markets.⁷⁰ Smith propelled the liberal theory of “spontaneous order,” by which some forms of order in society arise naturally and spontaneously, without central direction, from the independent activities of large numbers of individuals.⁷¹ In 1776, the American revolutionary Thomas Paine combined the theory of spontaneous order with a theory of justice based on natural rights to justify the call for independence from England.⁷²

One might argue that when tensions mounted between the American colonists and George III, libertarianism dictated that the colonists become revolutionaries. The colonists followed the seventeenth-century Lords who had challenged the absolute rule of the King, arguing that reason and principles of liberty and equality should guide human affairs, and that governments exist to serve the needs of the people.⁷³

The Founders, including George Mason, who wrote the Virginia Declaration of Rights, and Thomas Jefferson, who was the primary author of the Declaration of Independence, were clearly influenced by the philosophies of John Locke.⁷⁴ In 1689,

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*; see ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 175 (1759); ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 405 (1776).

72. See THOMAS PAINE, *THE RIGHTS OF MAN* 157 (1776) (maintaining that the “great part of that order which reigns among mankind is not the effect of government”).

73. See JEFFREY KOPSTEIN ET AL., *COMPARATIVE POLITICS: INTERESTS, IDENTITIES, AND INSTITUTIONS IN A CHANGING GLOBAL ORDER* 61 (2014) (examining British nobles’ desires to recognize individual rights and affirm the concept of limited government using documents like the Magna Carta); Robert Blackburn, *Britain’s Unwritten Constitution*, BRIT. LIBR. (Mar. 13, 2015), <https://perma.cc/R586-TF3P> (same).

74. See generally 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

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.”⁷⁵ In *A Letter Concerning Toleration*, Locke elaborated on the relationship between libertarianism and the limitations of government when he wrote that the magistrate’s power was limited to preserving a person’s “civil interest,” which he described as “life, liberty, health, and indolency of body; and the possession of outward things.”⁷⁶ Hence, the Founders’ adoption of a belief in the enjoyment of life and liberty as a property right evidences that the most influential Founders embraced Locke’s view of the universality of natural law⁷⁷ and its relationship to property⁷⁸ rights.⁷⁹

To be clear, there were real-life, pragmatic, not purely philosophical, reasons why the American colonists revolted from English rule. For example, “[n]o taxation without representation” was a rallying cry for the colonists who believed they should not be taxed since they did not vote for members of

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.

75. LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 53, at 48.

76. JOHN LOCKE, A LETTER CONCERNING TOLERATION 17 (1692).

77. *Supra* note 30 (defining “natural law”).

78. “Property,” for purposes of this Article, recognizes the ambiguous and sometimes contradictory theories of private property. *See generally* J. WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988); S. MUNZER, A THEORY OF PROPERTY (1990); M.J. RADIN, REINTERPRETING PROPERTY (1993).

79. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness . . .”); Joshua Getzler, *Theories of Property and Economic Development*, 26 J. INTERDISC. HIST. 639, 641 (1996)

There is a notion of property as presocial, a natural right expressing the rights of persons which are prior to the state and law, this being the view of Hugo Grotius, Samuel von Pufendorf, John Locke, Immanuel Kant, and Georg W.F. Hegel; and there is a notion of property as social, a positive right created instrumentally by community, state, or law to secure other goals—the theory of Thomas Hobbes, David Hume, Adam Smith, Jeremy Bentham, Emile Durkheim, and Max Weber.

Parliament in England.⁸⁰ Those practical reasons notwithstanding, the theory of natural law and governance provided the American Revolutionaries with a philosophical justification for challenging the British rule under King George III.⁸¹ Moreover, the Founders' adoption of natural law, libertarian principles remains a guiding, foundational template that continues to serve as a major tenet of our belief system.⁸² This distinction, between a "natural property right" and a "positive"⁸³ or "man-made"⁸⁴ property right (in which utilitarians like Jeremy Bentham believe)⁸⁵ is critical to appreciating the essential nature of an individual's Right of Self. Consequently, Right of Self is a type of "natural property" that is not "property" in a traditional sense. Understanding that distinction, Right of Self is *not* the kind of property that the Founders envisioned when they adopted the doctrine of eminent domain.⁸⁶ Instead, it is the kind of property that the Founders declared in the Declaration as being "truths," "self-evident," "endowed by their Creator," and "unalienable" rights.

That Right of Self was a personal belief of the Founders is evidenced by the documents that inspired the Revolution and is embodied in the Declaration of Independence—the most sacred

80. JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* 79 (2011).

81. See BAILYN, *supra* note 74, at 27 ("[T]he great *virtuosi* of the American Enlightenment—Franklin, Adams, Jefferson—cited the classic Enlightenment texts and fought for the legal recognition of natural rights . . .").

82. This is evidenced in Supreme Court Justice Field's 1888 dissenting opinion in which he recognized the importance of natural law's influence in early U.S. law, stating that the "right to pursue . . . happiness is placed by the declaration of independence among the inalienable rights of man . . . not by the grace of emperors or kings, or by force of legislative or constitutional enactments, but by their Creator." *Powell v. Pennsylvania*, 127 U.S. 678, 692 (1888) (Field, J., dissenting).

83. In general, the term "positive law" connotes statutory law that has been enacted by a duly authorized legislature. *Positive Law*, BLACK'S LAW DICTIONARY (8th ed. 2004).

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

85. See BENTHAM, *supra* note 53, at 111.

86. Unlike Bentham's utilitarian justification for property, self is protected by natural law rights. *See id.*

declaration of individual rights in U.S. history and indisputably the cornerstone of our culture and values.⁸⁷ On September 5, 1774, the First Continental Congress denounced taxation without representation and Britain's maintenance of an army in the colonies without the Congress's consent.⁸⁸ The Congress then issued a declaration of the rights due every citizen, among them life, liberty, property, assembly, and trial by jury.⁸⁹ On October 14, 1774, the First Continental Congress declared that citizens were "entitled to life."⁹⁰

On July 4, 1776, the Continental Congress voted to adopt the Declaration of Independence.⁹¹ The Declaration, adopted unanimously, proclaimed that *life, liberty, and the pursuit of happiness* are fundamental rights: self-evident, inalienable, and endowed by the Creator.⁹² While this alone could serve as conclusive evidence of the Founders' belief in what I refer to as Right of Self, there is even more evidence that the Founders embraced Right-of-Self: reflective principles that they drafted into the Constitution.

The Constitution took effect in 1789, and with it the Continental Congress was replaced by the U.S. Congress.⁹³ Shortly after, the states ratified the Bill of Rights, which guaranteed the fundamental rights the breach of which

87. See generally GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION: HOW A REVOLUTION TRANSFORMED A MONARCHICAL SOCIETY INTO A DEMOCRATIC ONE UNLIKE ANY THAT HAD EVER EXISTED* (1992); *A COMPANION TO THE AMERICAN REVOLUTION* (Jack P. Greene & J.R. Pole ed., Blackwell Publishers 2004); GORDON S. WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* (2007); GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* (1978).

88. 1 JOURNALS OF CONGRESS: CONTAINING THE PROCEEDINGS FROM SEPT. 5, 1774, TO JAN. 1, 1776, at 1–10 (1776).

89. *Declaration and Resolves of the First Continental Congress*, AVALON PROJECT (2008), <https://perma.cc/AY76-JBC6>.

90. *Id.* ("Resolved, N. C. D. 1. That they are entitled to life, liberty, and property, and they have never ceded to any sovereign power whatever a right to dispose of either without their consent.").

91. 2 JOURNALS OF CONGRESS: CONTAINING THE PROCEEDINGS FROM JAN. 1, 1776, TO JAN. 1, 1777, at 240–48 (1777).

92. THE DECLARATION OF INDEPENDENCE, *supra* note 79.

93. THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE FOR RATIFICATION, PART ONE 1098–1101 (Bernard Bailyn ed., 1993).

compelled the Revolution.⁹⁴ In drafting the Declaration and the Constitution, the Founders were undoubtedly aware that the English common law—as digested in Blackstone’s Commentaries—identified the right to the natural attributes of self as an inherent natural right that is entitled to protection from wrongful governmental infringement.⁹⁵ Blackstone noted that the “right of personal security” was composed of “enjoyment of life” and that “[l]ife is an immediate gift of God, a right inherent by nature in every individual.”⁹⁶ He also emphasized that the government could not take a person’s life, liberty, or property arbitrarily or without the express warrant of law.⁹⁷ Then, and more evident today, the “enjoyment of life” includes all attributes of self, including enjoying the financial benefits of one’s labor, NIL, and other real and virtual features of self.

When drafting the Constitution, the Founders borrowed from various previously established state constitutions that expressly provided that the right to or enjoyment of attributes of self was a fundamental right.⁹⁸ For example, in 1779, Founder

94. *Id.* at 1100–05.

95. See 1 WILLIAM BLACKSTONE, COMMENTARIES *54 (“Those rights then which God and nature have established, and are therefore called natural rights . . .”).

96. *Id.* at *125

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. 1. 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, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority . . .

97. *Id.* at *129

The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity: and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law . . . And it 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.

98. *Id.* Many state constitutions have such a provision today. See, e.g., VA. CONST. art. I, § 1 (“[A]ll men . . . have certain inherent rights . . . namely, the

and eventual President John Adams reported in the Massachusetts Constitution that “all men have certain natural, essential, and unalienable rights, among which may be reckoned the right of enjoying and defending their lives.”⁹⁹ Echoing Massachusetts’s language almost verbatim, the Pennsylvania Declaration of Rights proclaimed “[t]hat all men . . . have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty.”¹⁰⁰ That was deemed so fundamental a principle that the Founders did not believe it necessary to repeat it verbatim in the U.S. Constitution itself, although the Anti-Federalists insisted on the expressed protection of self, which led to the adoption of the Bill of Rights.¹⁰¹

The words of the Bill of Rights were not superfluous words on paper, but rather reflected the Founders’ personal beliefs that the right to the enjoyment of attributes of self was fundamental. For example, Samuel Adams stated, “Among the Natural Rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property.”¹⁰² George Mason also expressed his belief in libertarianism: “all men . . . when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life.”¹⁰³

Hence, the Founders believed and adopted the principle that every person is endowed with a natural right to enjoy Right of Self as a property right, which in modern terms means that Right of Self is fundamental and reflects the foundational principles of our Constitution. This brief history of our Nation’s

enjoyment of life . . .”); *id.* § 11 (“That no person shall be deprived of his life, liberty, or property without due process of law . . .”).

99. MASS. CONST. art. I, *amended by* MASS. CONST. amend. art. CVI (“All men are born free and equal, and have certain natural, essential, and unalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting their property; in fine, that of seeking and obtaining their safety and happiness.”).

100. PA. CONST. art. I (enacted Sept. 28, 1776).

101. See generally *The Bill of Rights: A Brief History*, ACLU, <https://perma.cc/46J3-6KFW>.

102. Samuel Adams, *The Rights of the Colonists*, REVOLUTIONARY WAR & BEYOND (Nov. 20, 1772), <https://perma.cc/987K-93SU>.

103. THE VIRGINIA DECLARATION OF RIGHTS § 1 (Va. 1776).

founding principles provides the first justification for Right of Self—its historical and philosophical roots are synonymous with enjoyment of life, liberty, and the pursuit of happiness, which is the bedrock of natural law and liberal democracies.

B. *Foundational Principle*

The second justification for Right of Self is its embodiment in the express provisions of the original, foundational documents of the democracy—the Declaration of Independence and the Bill of Rights—and as *the* guiding principle in the Reconstruction Amendments.

As previously discussed, the Declaration of Independence was the foundational document in which the Founders asserted their belief in Right of Self. Building off that cornerstone of our democracy, our constitutional history evidences that the principle of Right of Self was reiterated in both the Bill of Rights and in the Reconstruction Amendments.¹⁰⁴

1. The Bill of Rights

Right of Self, expressed as the enjoyment of life, liberty, and the pursuit of happiness, was so basic, so obvious a natural right, that the Founders did not expressly restate it in the Preamble to the U.S. Constitution.¹⁰⁵ However, textual evidence of the Founders' belief that Right of Self was a fundamental right is found in the constitutional safeguards intended to protect self against governmental infringement, particularly in the context of overreaching criminal laws. To be specific, the Constitution itself expressly protects Right of Self from governmental deprivation, particularly in the context of abusive criminal laws and procedures.¹⁰⁶ To that point, Article I, Section 9 prohibits the federal and state governments from passing bills of attainder.¹⁰⁷ Further, Article I, Section 10 prohibits the

104. *See supra* Part I.A.

105. *See* U.S. CONST. (excluding any mention of life, liberty, and property).

106. *See* Paul Paulker, *The Constitution, Deprivation of Life, and Personhood*, AM. THINKER (May 12, 2012), <https://perma.cc/NN7Z-LR7B> (describing the Due Process Clauses and Equal Protection Clause as safeguards against state power).

107. U.S. CONST. art. I, § 9, cl. 2.

federal and state governments from passing ex post facto laws.¹⁰⁸

In addition to Article I, the provisions of the Bill of Rights provide the best evidence of the Founders' commitment to Right of Self and its constitutional protection against governmental abuse. Shortly after the Constitution was adopted and in response to the Constitution's failure to expressly recognize civil liberties, the Founders passed the first ten amendments to the Constitution, in the aptly named "Bill of Rights."¹⁰⁹ These amendments codified Right of Self against governmental infringement, following the model of the Virginia Declaration of Rights¹¹⁰ and the Northwest Ordinance.¹¹¹ As a staunch defender of individual liberties, James Madison drafted the Bill of Rights in response to the Anti-Federalists' demands that Right of Self be expressly recognized and protected in the Constitution. The Congress approved the draft amendments to the Constitution on September 25, 1789,¹¹² and the states ratified it on December 15, 1791.¹¹³

While each of the Bill of Rights Amendments reflects the thesis that Right of Self was fundamental to the Founders' constitutional mindset, the Fifth Amendment commands the federal government to recognize and protect Right of Self: "No person shall . . . be deprived of life, liberty, or property . . . nor shall private property be taken for public use, without just compensation."¹¹⁴ This libertarian principle was echoed and expanded to expressly apply to state governments in the Fourteenth Amendment, which expressly provides,

108. *Id.* art. I, § 10.

109. *See The Bill of Rights: A Brief History, supra* note 101.

110. THE VIRGINIA DECLARATION OF RIGHTS, *supra* note 103, § 1.

111. The Northwest Ordinance of 1787; *see* David G. Chardavoyne, *The Northwest Ordinance and Michigan's Territorial Heritage*, in *THE HISTORY OF MICHIGAN LAW* 13, 13 (Paul Finkleman & Martin Herschok eds., 2006) ("[The Northwest Ordinance's] provisions established a structure of government that encouraged settlement of that vast region and provided those settlers a startling set of civil rights that presaged the U.S. Constitution's Bill of Rights.").

112. *See The Bill of Rights: A Brief History, supra* note 101.

113. The Bill of Rights ensured that the well-found civil liberties would be recognized by, protected from, and not trampled by the newly-formed federal government. *See id.* (establishing ten amendments to the Constitution).

114. U.S. CONST. amend. V.

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.¹¹⁵

Together, the Fifth and the Fourteenth Amendments' due process clauses, which apply to the federal and state governments, respectively, each provides two types of protection: (1) procedural due process, which requires the government to follow certain procedures before depriving a person of life, liberty, or property; and (2) substantive due process, which requires the government to have sufficient justification when seeking to deprive a person of life, liberty, or property.¹¹⁶

In addition to the Fifth Amendment, the enactment of other Bill of Rights Amendments shows the Founders' conviction to the protection of Right of Self. (1) The First Amendment prohibits the creation of an established religion and protects against restraints on the free exercise of religion, abridgment of the freedom of speech, infringement on the freedom of the press, and interference with the rights to peaceably assemble and petition for governmental redress of grievances.¹¹⁷ (2) The Second Amendment provides citizens the right to personally protect their Right of Self, through their right to bear arms.¹¹⁸ (3) The Fourth Amendment guards people's privacy against wrongful governmental infringement.¹¹⁹ (4) As already mentioned, the Fifth Amendment's Due Process Clause, coupled

115. *Id.* amend. XIV, § 1.

116. REDLICH ET AL., *supra* note 55, at 275–76.

117. *See* 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.”).

118. *See id.* amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

119. *Id.* amend. IV

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

with the Takings Clause,¹²⁰ are definitive statements of libertarian principles. (5) And the Ninth Amendment and the Tenth Amendment reserve to each person their Right of Self, commanding that all rights not transferred to the government by the Constitution reside in the people; that there are additional fundamental rights that exist outside the Constitution; and that the rights enumerated in the Constitution are not an explicit and exhaustive list of individual rights.¹²¹ Subsequently, the protection of civil liberties, which is foundational to our federalist Constitution, was reinforced and expanded in the Reconstruction Amendments, which protect Right of Self from both federal and state government infringements.

2. The Reconstruction Amendments

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

President Abraham Lincoln¹²²

Throughout United States history, we have grappled with when to apply positive law property rules to natural rights.

120. See *id.* amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

121. See *id.* amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *id.* 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.”).

122. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

From 1619, before the formal creation of the United States,¹²³ until post-Civil-War Reconstruction,¹²⁴ the law wrongfully applied property law to human beings based on skin color, as if people were land or chattel.¹²⁵

From the Republic's inception, the Founders recognized the inherent contradiction between their belief in libertarianism and their ownership and enslavement of people of African descent as property.¹²⁶ Rather than extend Right of Self to Black people, the Founders choose to use the Constitution to support the enslavement of Black people.¹²⁷ That choice, paired with the

123. See generally *The 1619 Project*, *supra* note 33; Meilan Solly, *58 Resources to Understand Racism in America*, SMITHSONIANMAG.COM (June 4, 2020), <https://perma.cc/J58Q>.

124. See Paul Finkelman, *Slavery in the United States: Persons or Property?*, in *THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY* 105, 125–30 (Jean Allain ed., 2012) (characterizing the Court's conclusion in *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), as concluding “that masters could seize their slaves wherever they found them, without the use of any law or legal process, as long as it was done without breach of the peace”). See generally F. MICHAEL HIGGINBOTHAM, *RACE LAW: CASES, COMMENTARY, AND QUESTIONS* (4th ed. 2015); KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* (1956).

125. See Finkelman, *supra* note 124, at 105–34 (discussing enslavement in early America and the tensions between different racial groups regarding the concept of African enslaved persons as property who could be transferred or owned by white individuals). See generally Crusto, *Blackness as Property*, *supra* note 1.

126. See Solly, *supra* note 123.

127. Before the Civil War, the Constitution protected the institution of enslavement and did not consider Black people as U.S. citizens. Article I, Section 2, Clause 3, the Enumeration Clause or Three-Fifths Compromise, provided:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, *three fifths of all other Persons*.

U.S. CONST. art. I, § 2, cl. 3, *amended by id.* amend. XIV (emphasis added). “[O]ther Persons” meant enslaved persons, mainly of African descent. Article I, Section 9 provided:

The Migration and Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Nation's economic reliance on the labor of enslaved people, forced the Nation to grapple with applying positive law property rules to natural rights.¹²⁸ Hence, for decades, the government scornfully treated people as property based on skin color.¹²⁹

However, the Right of Self was so strong and fundamental to the fabric of the Nation's ethos that it ultimately won out over the enslavement of people of African descent, following a bloody Civil War. Consequently, the clearest constitutional provisions relative to Right of Self, protecting a person's self against private and state deprivation, are found in the Thirteenth and Fourteenth Amendments. To understand these Amendments' historic purposes, we need a brief foundational understanding of the legal history of the enslavement of people of African descent in the United States. Before the Civil War, the Constitution protected the institution of enslavement.¹³⁰ Black people were deemed to be property of white enslavers, and Black people were not considered United States citizens.¹³¹ Following a bloody contest over the rights of enslaved people, the Thirteenth Amendment sought to abolish enslavement, which had been sanctioned by many states and by the federal government up to that time.¹³² In 1865, the Thirteenth Amendment corrected this misapplication of property law when

Id. art. I, § 9. This referred to the importation of enslaved persons of African descent. Article IV, Section 2, Clause 3, the Fugitive Slave Clause, required:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom Service or Labour may be due.

Id. art IV, § 2, cl. 3, *superseded by id.* amend. XIII.

128. See *supra* note 124 and accompanying text.

129. See Finkelman, *supra* note 124, at 119. See generally Crusto, *Blackness as Property*, *supra* note 1.

130. See *supra* note 127 and accompanying text.

131. See *Dred Scott v. Sandford*, 60 U.S. 393, 403, 454 (1857) (enslaved party) (holding that "a negro, whose ancestors were imported into [the United States], and sold as slaves," whether enslaved or free, was not and could not be a U.S. citizen).

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

it abolished the de jure institution of the enslavement of people.¹³³

Unfortunately, the Thirteenth Amendment did not make Black people citizens of the United States, nor did it protect them from harm. As the Confederate leadership regained power in the South, southern legislatures enacted “black codes,” state-sanctioned, racially-based controls on the lives, liberty, and property rights of Black people.¹³⁴ In direct response to the black codes, the Nation adopted two additional constitutional amendments to protect the citizenship rights of newly freed Black people.¹³⁵ Those were the Fourteenth Amendment¹³⁶ and the Fifteenth Amendment,¹³⁷ which sought to protect the legal status of Blacks, guaranteeing them citizenship and granting Black males the right to vote. However, the Federal Government’s protection of Blacks was short lived.¹³⁸

After Reconstruction and the restoration of southern white supremacy,¹³⁹ the Supreme Court in the *Slaughter-House Cases*¹⁴⁰ destroyed the protective impact of the Fourteenth Amendment, again exposing Black lives to exploitation, oppression, and abuses. The Court achieved that outcome by effectively limiting the application of the Fourteenth Amendment to federal rights, such as the right to interstate travel, excluding “state rights,” such as the right to intrastate

133. U.S. CONST. amend. XIII.

134. See generally *id.*

135. The Thirteenth Amendment was ratified on December 6, 1865. *The Constitution: Amendments 11–27*, NAT’L ARCHIVES, <https://perma.cc/L84M-YSFU>. The Fourteenth Amendment was adopted on July 9, 1868. *Id.* The Fifteenth Amendment, ratified on February 3, 1870, attempted to give all citizens, particularly Black freedmen (not including women or other disenfranchised groups of people) the right to vote. *Id.*

136. See U.S. CONST. amend. XIV. The Fourteenth Amendment echoes the Fifth Amendment’s protection of the sanctity of life. Compare *id.* amend. XIV, § 1 (No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”), with *id.* amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law.”).

137. See *id.* amend. XV.

138. See generally JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS, 1954–1965* (1987).

139. See generally *id.*

140. 83 U.S. 36 (1872).

travel.¹⁴¹ Subsequently, beginning in the 1920s, several Supreme Court decisions interpreted the Fourteenth Amendment as “incorporating” portions of the Bill of Rights, which made these portions enforceable against state governments.¹⁴² In the 1940s and 1960s, the Supreme Court issued a series of decisions incorporating several of the specific rights from the Bill of Rights and making those rights binding to the states.¹⁴³

In 1954, the Court issued the landmark decision of *Brown v. Board of Education*,¹⁴⁴ which held that racially segregated public schools were unconstitutional.¹⁴⁵ The case restored Black people’s hope that the Federal Government and the courts would once again be allies in their struggle for equal justice.¹⁴⁶ In the 1960s, Black people pressed for their constitutional rights through peaceful civil rights protests, marches, and sit-ins,¹⁴⁷ resulting in President Lyndon B. Johnson signing the Civil Rights Act of 1964¹⁴⁸ into law.¹⁴⁹ Today, the federal government arguably has both a constitutional and a statutory duty to protect Black people’s Right of Self from expropriation. Federal

141. *See id.* at 57.

142. *See, e.g.*, *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (binding the states to protect freedom of speech). Under Selective Incorporation, the Court used the Fourteenth Amendment’s Due Process and Equal Protection Clauses to “incorporate” individual elements of the Bill of Rights against the states. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 961–64 (3d ed. 2000).

143. TRIBE, *supra* note 142, at 961–64. At the time, federal rights of citizenship were few, so the cases effectively limited protection to a small minority of rights. *Id.* Two years later, in *United States v. Cruikshank*, the Supreme Court ruled that the First and Second Amendments do not apply to state governments, further restricting the reach of the Fourteenth Amendment. 92 U.S. 542, 559 (1875).

144. 347 U.S. 483 (1954). The Court ruled that state laws establishing racial segregation in public schools were unconstitutional, even if the segregated schools were otherwise equal in quality. *Id.* at 495. This was followed by a decade-long battle over the desegregation of public schools, including universities. *See generally* JACK BASS, *UNLIKELY HEROES* (1990).

145. *Brown*, 347 U.S. at 495.

146. *See generally* CHARLES J. OGLETREE, *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* (2004).

147. *Civil Rights Act of 1964*, HISTORY (Jan. 4, 2010), <https://perma.cc/TMT4-2T47> (last updated Jan. 20, 2022).

148. Pub. L. No. 88-352, 78 Stat. 241 (1964).

149. *See id.*

civil rights laws provide federal courts with the jurisdiction to protect Black lives, recognizing that, throughout our history, Black people have been particularly vulnerable to both governmental and societal abuse and should be afforded special, federal protection.¹⁵⁰ Even today, no federal statute expressly prohibits the expropriation of Right of Self, not even as applied to the most vulnerable in our society. Further, due to the criminal due process loophole in the Thirteenth Amendment¹⁵¹ and the Nation's addiction to the free labor of Black people, Jim Crow laws and incarceration have served as an effective, unfortunate tool to further "enslave" Black people long after enslavement was formally abolished.¹⁵² Consequently, some private players and government enterprises continue to treat some Black people as their property.¹⁵³

Because the Fourteenth Amendment expressly grants Congress the authority to guarantee the effectiveness of that Amendment, Congress is authorized to enact the protection of Right of Self statutorily.¹⁵⁴ Enacting such a solution would protect Right of Self as a fundamental right, and, with that, it would gain the protections of strict scrutiny judicial analysis.

Today, civil liberties that are protected against both federal and state governments' infringements are now analyzed under the auspices of "fundamentality."¹⁵⁵ For example, in 2010, the Supreme Court incorporated the Second Amendment's right to bear arms into the protection against state action.¹⁵⁶ Moreover, if a right is deemed fundamental, any law, policy, practice, or

150. See *supra* note 144.

151. U.S. CONST. amend. XIII (stating that enslavement and involuntary servitude are prohibited "except as a punishment for crime whereof the party shall have been duly convicted").

152. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); *13TH* (Netflix 2016).

153. See, e.g., Crusto, *Blackness as State Property*, *supra* note 1.

154. See U.S. CONST. amend. XIV, § 5.

155. See *Lutz v. City of York*, 899 F.2d 255, 267 (3d Cir. 1990) ("The test usually articulated for determining fundamentality under the Due Process Clause is that the putative right must be 'implicit in the concept of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'" (citations omitted)).

156. See *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (holding that the right to bear arms is a fundamental and individual right, subject to strict scrutiny by the courts).

action that abridges that right is assessed by the courts under the more exacting standard of strict scrutiny, instead of the less demanding rational basis test.¹⁵⁷ Because Right of Self is fundamental, it would be subject to the same strict scrutiny analysis.¹⁵⁸

C. *Fundamental Right*

Right of Self posits that the “enjoyment of life, liberty, and happiness” is a property right—recognizing that the enjoyment of self and protection of property are fundamental. The relationship between the enjoyment of life as a property right and Right of Self requires some explanation. When we think of the constitutional issues relative to life and liberty, we might think about those involving a woman’s right to privacy or a person’s right not to be killed by a police officer. However, the enjoyment of life and liberty includes a person’s attributes of life and liberty, which I coin as “self.” For example, while the Bill of Rights focuses primarily on individual rights against the government’s use of *criminal* laws to take a person’s liberties, its underlying principles also apply to protect people from the government’s abuse of a person’s *civil rights or liberties*. This is evidenced by the Takings Clause of the Fifth Amendment, which protects a person’s property from wrongful governmental takings, and is reinforced by the Thirteenth Amendment’s prohibition on taking a person’s liberty and labor by enslavement and by the Fourteenth Amendment’s protection of citizenship rights against all wrongful governmental infringements.¹⁵⁹ While the protection of the enjoyment-of-self principle might appear to be self-evident, again there is scarce Supreme Court case law to support it. Notwithstanding, there are Supreme Court cases finding the right of privacy as

157. See *Reno v. Flores*, 507 U.S. 292, 302 (1993) (reaffirming that due process “forbids the government to infringe certain ‘fundamental’ liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest”).

158. For example, the Civil Rights Act of 1964 established that U.S. federal anti-discrimination law protects groups of people with a common characteristic, including race, color, religion, national origin, and other such categories, from discrimination on the basis of that characteristic. Pub. L. No. 88-352, 78 Stat. 241 (1964).

159. U.S. CONST. amends. V, XIII, XIV.

fundamental, and Right of Self is a corollary of the right of privacy.¹⁶⁰ Further, there are Supreme Court decisions that establish the criteria by which a right might be deemed to be fundamental; and I believe that Right of Self meets those criteria.¹⁶¹

1. Right of Self Meets Criteria for Fundamentality

The Supreme Court's expansion of the rights it deems fundamental further supports the proposition that Right of Self is fundamental. Since 1925, the Court has expanded its list of unenumerated or fundamental rights—civil liberties that are protected against both federal and state infringement.¹⁶² To establish when a right is fundamental, the Court looks to “history, legal traditions, and practices [to] provide the crucial ‘guideposts for responsible decisionmaking.’”¹⁶³

For example, in 2015, the Supreme Court formulated a test for whether a right is fundamental in the landmark case of *Obergefell v. Hodges*.¹⁶⁴ In that case, the Court identified “four

160. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

161. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

162. See generally Erwin Chemerinsky, *50th Annual William H. Leary Lecture—Fifty Years of Constitutional Law: What's Changed?*, 2016 UTAH L. REV. 689 (2016).

163. *Glucksberg*, 521 U.S. at 720 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)); see *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (“Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution’s text involves much more than the imposition of the Justices’ own choice of values . . . the Court has sought to identify the nature of the rights qualifying for heightened judicial protection.”); see also *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (“Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights.” (emphasis added)). See generally Mitchell F. Crusto, *Black Lives Matter: Banning Police Lynchings*, 48 HASTINGS CONST. L.Q. 3 (2020).

164. 576 U.S. 644 (2015); see *id.* at 663–64

Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.” The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. The identification and protection of fundamental rights is an enduring part of the judicial

principles and traditions [that] demonstrate that the reasons that marriage is fundamental under the Constitution and should apply with equal force to same-sex couples.”¹⁶⁵ While two of these principles are specific to marriage, two are not. Those two that apply here provide a test to determine whether Right of Self is a fundamental right: (1) is Right of Self inherent in the concept of individual autonomy; and (2) is the Right of Self a keystone of our social order?¹⁶⁶ The answer to both questions is yes.

As evidenced above, Right of Self is *the* cornerstone of our social order, inherent to our concept of individual autonomy, and basic to our culture and traditions. In addition to the express provisions in the Constitution protecting Right of Self, the Supreme Court has recognized one aspect of Right of Self, the protection of life, in several key cases. For example, in *Ford v. Wainwright*,¹⁶⁷ in which the Court held that the Constitution forbids the execution of the insane, the Court also expressly recognized the fundamental Right of Self: “For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.”¹⁶⁸

As presented above, protecting Right of Self from governmental infringement meets the Supreme Court’s recent criteria for what constitutes a fundamental right, as spelled out in *Obergefell* and other key fundamental rights decisions. There is a clear constitutional basis for holding that there is a fundamental right to the enjoyment of life, liberty, and property

duty to interpret the Constitution. That responsibility, however, “has not been reduced to any formula.” Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present. (internal citations omitted)

165. *Id.* at 665.

166. *See id.* at 665, 669.

167. 477 U.S. 399 (1986).

168. *Id.* at 409.

that is protected against wrongful governmental infringement. In *County of Sacramento v. Lewis*,¹⁶⁹ the Court reiterated a substantive due process aspect of Right of Self inherent in the Fourteenth Amendment.¹⁷⁰ The Court explained that its prior cases have held the amendment to guarantee “more than fair process,” which includes a “substantive sphere” that bars “certain government actions regardless of the fairness of the procedures used to implement them.”¹⁷¹

However, in recent years, the Supreme Court has shied away from the Fourteenth Amendment’s protection of Right of Self.¹⁷² For example, the Supreme Court has failed to use Fourteenth Amendment jurisprudence to assess the legality of police use of lethal force as an impermissible seizure, but rather has relied on the Fourth Amendment.¹⁷³ This brings the discussion to the next type of evidence in support of Right of Self, that is, Right of Self as a corollary to the Supreme Court’s jurisprudence that has held that there is a fundamental right of privacy.

2. Right of Self as Corollary to Privacy

While the Court has not expressly recognized a general Right of Self, there are several constitutional rights that the Court has found within the penumbras of the Constitution that support its existence. Relative to Right of Self, the Constitution safeguards the right of privacy and personal autonomy. The Supreme Court has interpreted the Constitution to protect these

169. 523 U.S. 833 (1998).

170. *See id.* at 840.

171. *Id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

172. For example, relative to the state’s lawful infringement on life, the Eighth Amendment has been used to challenge the death penalty as “cruel and unusual” punishment. Most attempts have been unsuccessful, but the Court had held that executing certain classes of persons is unconstitutional. *See Roper v. Simmons*, 543 U.S. 551, 575 (2005) (minors); *Atkins v. Virginia*, 536 U.S. 304, 318, 320 (2002) (mentally incompetent persons); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (mentally insane persons).

173. *See Mitchell F. Crusto, Right to Life: Interest-Convergence Policing*, 71 RUTGERS L. REV. 63, 119, 125 (2018) (arguing an Eighth Amendment, “capital punishment” jurisprudence rationale for prohibiting police use of lethal force).

rights, specifically in the areas of (1) marriage,¹⁷⁴ (2) procreation,¹⁷⁵ (3) abortion,¹⁷⁶ (4) private consensual homosexual activity,¹⁷⁷ and (5) medical treatment.¹⁷⁸ Further, the right to privacy serves as the justification for decisions involving a wide range of civil liberties cases, including those relating to compulsory public education.¹⁷⁹

174. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (finding a right to privacy in the marital relationship, noting that a line of U.S. Supreme Court cases suggested that specific guarantees in the Bill of Rights had penumbras, which covered the marital relationship).

175. *Eisenstadt v. Baird*, 405 U.S. 438, 477 (1972) (expanding the scope of sexual privacy rights by invalidating a law that banned the sale of contraceptives to unmarried couples).

176. *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that the Fourteenth Amendment's due process clause includes a fundamental right of privacy that protects women seeking to terminate their pregnancies before a fetus is viable outside the womb).

177. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down laws that criminalize homosexual sodomy and holding that substantive due process under the Fourteenth Amendment protects the right of adults to be free to engage in consensual sexual acts); see LiJia Gong & Rachel Shapiro, *Sexual Privacy After Lawrence v. Texas*, 13 *GEO. J. GENDER & L.* 487, 500 (2012) (noting *Lawrence's* nationwide impact).

178. *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 286 (1990) (guaranteeing adults' right to personal autonomy in matters relating to their medical care). Additionally, in the area of pornography, the Court has granted some privacy rights. See *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (relying on the First and Fourteenth Amendments to invalidate all state laws that prohibited private possession of obscene materials depicting adults over the age of eighteen).

179. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925). See generally Neil M. Richard & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 *CALIF. L. REV.* 1887 (2010). State constitutions afford greater privacy protections than does the Federal Constitution. Ten states have explicit privacy clauses in their constitutions: ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; ILL. CONST. art. I, § 12; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7. Courts in these and other states have held that their state constitutions protect liberties, including reproductive choice, to a greater extent than the federal constitution. See, e.g., *State v. Planned Parenthood of Alaska, Inc.*, 38 P.3d 904 (Alaska 2001) (pertaining to a privacy dispute regarding reproductive rights, for which the state constitution set a higher standard than the federal baseline); *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28 (Ariz. 2002) (same); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (same); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612 (Fla. 2003) (same); *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003) (same); *Planned Parenthood League of Mass., Inc. v. Att'y Gen.*, 677 N.E.2d

The Supreme Court consistently recognizes that there are fundamental rights that are “deeply rooted in this Nation’s history and tradition.”¹⁸⁰ Specifically, although the Court has not yet recognized Right of Self, in the context of name, image, and likeness, it is arguably encapsulated in previously recognized rights to personal autonomy,¹⁸¹ privacy,¹⁸² and informational privacy.¹⁸³ Support for this proposition can be found in a few landmark cases. For example, *Meyer v. Nebraska*¹⁸⁴ recognizes marriage as a fundamental right and the liberty interest under the right to privacy and autonomy.¹⁸⁵ There the Court stated that the term “liberty” denotes not only

101 (Mass. 1997) (same); *Women of Minn. v. Gomez*, 542 N.W.2d 17 (Minn. 1995) (same); *New Jersey v. Farmer*, 762 A.2d 620 (N.J. 2000) (same); *New Mexico Right to Choose v. Johnson*, 975 P.2d 841 (N.M. 1998) (same); *Planned Parenthood Ass’n v. Dep’t of Hum. Res.*, 663 P.2d 1247 (Or. Ct. App. 1983), *aff’d on other grounds*, 687 P.2d 785 (Or. 1984) (same); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000) (same); *Women’s Health Ctr. v. Panepinto*, 446 S.E.2d 658 (W. Va. 1993) (same).

180. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). There are many other theories for deciding what is a fundamental right. Some argue that the Court’s preeminent role is perfecting the processes of government and that the Court should only recognize non-textual rights that concern ensuring adequate representation and the effective operation of the political process. *See, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). Others argue that the Court should use natural law principles in deciding what rights to protect as fundamental. *See, e.g.*, HARRY V. JAFFA, *ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION* (1994). Still others maintain that the Court should recognize non-textual fundamental rights that are supported by a deeply embedded moral consensus that exists in society. *See, e.g.*, Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *YALE L.J.* 221, 284 (1973).

181. *See Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (describing due process liberty guarantees in terms of personal autonomy, which includes the right “to b[e] free in the enjoyment of all his faculties; to be free to use them in all lawful ways”).

182. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (concluding that the First, Third, Fourth, Fifth, and Ninth Amendments, as interpreted by the Court in decisions over the years and read together, create “zones of privacy”).

183. *See Whalen v. Roe*, 429 U.S. 589, 603–04 (1977) (noting the right to informational privacy within the Fourteenth Amendment but finding no violation in the instant case).

184. 262 U.S. 390 (1923).

185. *See id.* at 399 (“While this court has not attempted to define with exactness the liberty . . . it denotes not merely freedom from bodily restraint but also the right . . . to marry . . .”).

freedom from bodily restraint, but also the rights to contract, to employment, to marry and raise a family, to be assured freedom in one's religious practices, "and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."¹⁸⁶ Further, the Court articulated a two-step test in *Washington v. Glucksberg*,¹⁸⁷ "emphasizing that 1) the Due Process Clause 'specially' protects rights and liberties deeply rooted in tradition and implicit in the concept of ordered liberty; and 2) a 'careful description' of the asserted fundamental liberty interest is required."¹⁸⁸ The *Glucksberg* Court also acknowledged a line of cases that applied heightened scrutiny while invoking either fundamental rights or liberty interests.¹⁸⁹ Additionally, one commentator has identified eight broad categories of constitutional analyses where the Supreme Court has invoked dignity in more than just a random fashion.¹⁹⁰

186. Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 373 (2006) (quoting *Meyer*, 262 U.S. at 399).

187. 521 U.S. 702 (1997).

188. Marcus, *supra* note 186, at 385 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

189. See *Glucksberg*, 521 U.S. at 720 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)); *Eisenstadt v. Bard*, 405 U.S. 438 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

190. Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 86 n.107 (2011)

These eight categories are: Fourteenth Amendment substantive due process claims; Fourteenth Amendment equal protection claims; Fifth Amendment self-incrimination claims; Fourth Amendment search and seizure claims; Eighth Amendment cruel and unusual punishment claims; Fourteenth Amendment right to die claims; Fourteenth Amendment procedural due process claims; and First Amendment freedom of expression claims.

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

3. Right of Privacy Relating to Personality Rights

Relative to Right of Self and the right of privacy, personality rights are recognized both in federal and in state laws. “Personality rights” consist of two types of rights: (1) the right of publicity, which is the right to protect one’s image and likeness from commercial exploitation without permission or contractual compensation; and (2) the right to privacy, which is the right to be left alone and not have one’s personality represented publicly without permission.¹⁹¹

Scholars trace the “right to privacy” to an 1890 article in the Harvard Law Review authored by Samuel D. Warren and Louis D. Brandeis.¹⁹² The right to privacy includes protection against misappropriation and is designed to protect individuals’ personal rights against emotional distress.¹⁹³

By comparison, the “right of publicity”¹⁹⁴ is a tort action that protects celebrities from the unauthorized exploitation of their NIL for commercial purposes.¹⁹⁵ One scholar has argued that the current doctrine actually embraces at least three different concepts—“the endorsement right, the merchandizing entitlement, and the right against virtual impressment.”¹⁹⁶ Because the right of publicity exists only as a state law-based right, application of the right can vary from state to state.¹⁹⁷ In

191. See Michael Mullins, *New Fame in a New Ballgame: Right of Publicity in the Era of Instant Celebrity*, 45 IND. L. REV. 869, 876 (2012).

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

193. See *id.* at 195 (“Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection . . .”).

194. Judge Jerome N. Frank of the Second Circuit minted the term in *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. See *id.* at 869. To date, more than half of states recognize the right of publicity in state common law or state statutes.

195. See *id.* (“[P]laintiff, in its capacity as exclusive grantee of player’s ‘right of publicity,’ has a valid claim against defendant if defendant used that player’s photograph during the term of plaintiff’s grant and with knowledge of it.”).

196. Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891, 910 (2017).

197. See *Statutes & Interactive Map*, RIGHT OF PUBLICITY, <https://perma.cc/75K8-SA29>.

response to the lack of uniformity, critics have called for a broad, national standard.¹⁹⁸ I argue that as the law is rooted in natural rights and the idea that every individual is entitled to control how, if at all, their right of publicity is commercialized by third parties, it would be appropriate for there to be federal legislation supporting such a right.¹⁹⁹

* * *

Therefore, Right of Self should be recognized as a fundamental, constitutionally based, universal right and should apply to virtual attributes that include a person's name, image, and likeness. Failing to recognize and protect this right leaves it ripe for continued exploitation.

There is clearly a void in the development of civil liberties that must be addressed to redress wealth inequities. Doing so requires a transformational development in our understanding of natural property and the importance of strong laws that protect such property of the individual. Such laws would both promote growth of new markets for intellectual property generated through the often-virtual world of cyberspace and allow individual citizens protection against exploitation. Many constitutional and policy reasons exist to support such a development as both desirable and timely. The solution to this shortcoming in the law is proposed in the next Part.

II. RIGHT OF SELF ACT²⁰⁰

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

198. See Alex Wyman, *Defining the Modern Right of Publicity*, 15 TEX. REV. ENT. & SPORTS L. 167, 167 (2014) (arguing that the “framework for litigating” the right of publicity is “impossibly muddled” because it may be “litigated in fifty different ways depending on which state’s law is applied”).

199. See Johnson, *supra* note 196, at 897 (“[I]n its early days the right of publicity was reserved for celebrities—that is, those few people who had a present pecuniary value attached to their fame—but it has, over the decades, been increasingly recognized as a right belonging to the everyday person.”).

200. This Act benefited from the Senate bill, College Athletes Bill of Rights, and a proposal published by the ABA. See generally Booker, *Senators Announce College Athletes Bill of Rights*, COREY BOOKER (Aug. 13, 2020), <https://perma.cc/M2XM-SREN>; Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMM’NS L. 14 (2011).

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. Brandeis²⁰¹

The “Right of Self Act” (ROSA) is the proposed code that would guide society, industry, government, and policymakers in identifying and enforcing Right of Self, particularly as applied to virtual aspects of self—including NIL. It reflects the normative claim that every person in this country has a fundamental and constitutionally based right to possess and control the use of their self. Additionally, ROSA provides legal and equitable remedies for the wrongful exploitation of a person’s Right of Self.²⁰² The ROSA’s specific provisions follow the main text of this Article as an Addendum. Here, I provide the three tenets that the provisions of ROSA reflect:

Tenet #1: ROSA recognizes the natural rights theory of property, as embodied in the Declaration of Independence and the U.S. Constitution, and embraces the fundamental principle that we are all endowed with certain natural, or God-given, rights that are inalienable. These rights include the possession and control of the virtual attributes of self, including one’s name, image, and likeness, thus ending the question whether a universal Right of Self in such attributes of self exists.

Tenet #2: ROSA seeks to protect people, specifically the most vulnerable in our society and particularly minors of color from disadvantaged communities, from all exploitation of their virtual selves, by granting legal and equitable remedies to victims of such exploitation. These remedies include the use of injunctive relief and constructive trusts, as well as compensatory and punitive damages, including private, governmental, and governmental-spoused expropriation.²⁰³

201. Warren & Brandeis, *supra* note 192, at 193.

202. Because both the Fifth Amendment and the Fourteenth Amendment expressly grant Congress the authority to guarantee their effectiveness, Congress is authorized to enact the ROSA. *See* U.S. CONST. amend. V, § 2; *id.* amend. XIV, § 5.

203. *See generally* *Dombrowski v. Pfister*, 227 F. Supp. 556, 558 (E.D. La. 1964) (involving a civil rights criminal prosecution regarding segregation

Tenet #3: ROSA seeks to remedy past, present, and future expropriation of Right of Self by providing remedial solutions to the past exploitation and expropriation of the virtual aspects of self. These remedial solutions involve intentionally providing compensation and reparations for past and present exploitation, such as that of NCAA athletes.

In conclusion, ROSA (1) recognizes Right of Self, (2) codifies it as a fundamental principle of law, and (3) prohibits both private and public exploitation of the virtual aspects of a person's self without their full knowledge and express consent. It is a win-win because it protects the privacy of people while providing clear guidance and uniformity to society, industry, and government to avoid needless litigation. This change will deliver both justice and peace of mind for those who wish or need to protect their self.

III. INTERGENERATIONAL WEALTH DISPLACEMENT

This Part presents a case study of a battle over Right of Self through the lens of the NCAA and its student-players' struggles over the students' right to capitalize on their NIL. This Part highlights the problems with the current law relative to a particular aspect of Right of Self and illustrates the need for a transformative solution. It unfolds in three sections. The first section provides background on the players' struggle to benefit from their NIL. The second section analyzes the Supreme Court's decision in *NCAA v. Alston*, relating to the NCAA and players' compensation. The third section analyzes various state laws that seek to allow NCAA players to benefit from their NIL and presents the shortcomings in those laws and the unanswered questions that they raise.

activities). Dissenting in *Dombroski*, Judge John Minor Wisdom argued, "the crowning glory of American federalism . . . is the protection the United States Constitution gives to the private citizen against all wrongful governmental invasion of fundamental rights and freedoms . . . it makes federalism workable." *Id.* at 570–71 (Wisdom, J., dissenting) (footnotes and emphasis omitted). Libertarian principles intersect with federalism, and libertarianism and federalism are in constant tension with one another. See Ilya Somin, *Libertarianism and Federalism*, 751 CATO INST. POL'Y ANALYSIS 1, 12 (2014) ("Federalism is often a valuable tool for protecting freedom, but can also be a menace.").

At this point, it is appropriate to explain how the battle over college students' rights to control the use of their self demonstrates the transformational value of Right of Self. First, sports are an invaluable insight into our culture and values.²⁰⁴ Second, Justices and other constitutional scholars have analogized the judicial function in sports terms.²⁰⁵ And third, Right of Self as applied to college students is an important example of intergenerational wealth displacement, a system of government-sponsored wealth and age exploitation. However, NCAA athletes are not the only people who should be interested in the issue of who can capitalize from their NIL; everyone should demand the same right.

A. *Battle*

In 2019, Chase Young was the star football player for the Ohio State University Buckeyes.²⁰⁶ During his junior season, Mr. Young broke the school's single season sack record, was unanimously named an All-American, and received several defensive player of the year awards.²⁰⁷ However, in November

204. See Kenneth J. Macri, *Not Just a Game: Sport and Society in the United States*, INQUIRIES J. (2012), <https://perma.cc/QZ62-763W> (“Sport coincides with community values and political agencies, as it attempts to define the morals and ethics attributed not only to athletes, but the totality of society as a whole.”).

205. See Megan E. Boyd, *Riding the Bench—A Look at Sports Metaphors in Judicial Opinions*, 5 HARV. J. SPORTS & ENT. L. 245, 248 (2014) (quoting Chief Justice John Roberts, who once stated, “Judges are like umpires. Umpires don’t make the rules; they apply them . . . I will remember that it’s my job to call balls and strikes and not to pitch or bat”). Justice Stevens expressed his frustration on a decision by stating that the majority “punted” on an issue of importance in *Morse v. Frederick*, 551 U.S. 393 (2007). Boyd, *supra*, at 251.

206. See *Demand That the U.S. Congress Guarantee Fair Pay for College Athletes in Every State*, COLOR OF CHANGE, <https://perma.cc/6YWM-C9QP> (last visited Aug. 5, 2021) (reporting on several awful stories of the NCAA’s mistreatment of Black athletes, including that of Chase Young).

207. His awards include the Bronko Nagurski Trophy, Chuck Bednarik Award, Ted Hendricks Award, Chicago Tribune Silver Award, Nagurski-Woodson Defensive Player of the Year Award, and the Smith-Brown Defensive Lineman of the Year. Mr. Young was also named the Big Ten Athlete of the Year and was a finalist for the Heisman Trophy. See *Ohio State’s Chase Young Wins Nagurski Award*, ESPN (Dec. 9, 2019), <https://perma.cc/WGB6-7H2Q>; *Chase Young Wins Chuck Bednarik Award*, OHIO ST. UNIV. (Dec. 12, 2019), <https://perma.cc/5PQT-Y6WZ>; Jarrod Clay,

2019, Mr. Young was suspended from play due to a “possible NCAA issue from 2018 that the Department of Athletics [was] looking into.”²⁰⁸ 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.²⁰⁹ By the time Mr. Young was suspended in November 2019, he had repaid the loan.²¹⁰ Despite this, the NCAA claimed that, by taking the loan, Mr. Young violated the NCAA’s amateurism rules.²¹¹ The NCAA ultimately suspended him for two games,²¹² which likely caused him to lose his bid for the highly coveted Heisman Trophy.²¹³

This story begs the question: had Mr. Young had been permitted to capitalize on this Right of Self—primarily, his name, image, and likeness—would he have needed the loan that caused the “violation” at issue?²¹⁴ Through its rules, the NCAA

Chase Young Wins 2019 Ted Hendricks Award, ABC 6 (Dec. 11, 2019), <https://perma.cc/HG7G-4DEL>; Teddy Greenstein, *Chase Young Is the 2019 Chicago Tribune Silver Football Winner*, CHI. TRIB. (Dec. 6, 2019), <https://perma.cc/XSL7-5XH9>.

208. Díamaris Martino, *Ohio State’s Star Football Player Suspended for Accepting Loan*, CNBC (Nov. 8, 2019, 4:06 PM), <https://perma.cc/MG3Q-CYNY> (last updated Nov. 8, 2019, 5:25 PM).

209. 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://perma.cc/MF8U-TB9X>.

210. *Id.*

211. Gregory A. Cranmer et al., *Everyone Hates the NCAA: The Role of Identity in the Evaluations of Amateurism Transgressions: A Case Study of the Chase Young’s Loan Scandal*, COMMC’N & SPORT, 2021, at 1, 3–5.

212. *Id.*

213. See Bruce Hooley, *Ohio State’s Justin Fields, Chase Young 3–4 in Heisman Voting*, SPORTS ILLUSTRATED (Dec. 14, 2019), <https://perma.cc/FYU3-3AAN> (discussing the outcome of the Heisman award and Fields’ and Young’s accolades); Josh Planos, *Ohio State’s Chase Young Is Playing like a Heisman Contender*, FIVETHIRTYEIGHT (Oct. 29, 2019), <https://perma.cc/9RUN-ZLTR> (analyzing Young’s skills and statistics that made him a serious Heisman contender).

214. As an award-winning player on a top college football team, Mr. Young would have had the funds available via advertising and promotional deals to purchase a ticket for his friends or family to see him play in the big game. One study shows that NCAA college football stars could be earning as much as \$2.4 million per year. See Tom Huddleston Jr., *College Football Stars Could Be Earning as Much as \$2.4 Million Per Year, Based on NCAA Revenues: Study*, CNBC (Sept. 2, 2020), <https://perma.cc/KM9X-NRRR>; Tommy Beer, *NCAA Athletes Could Make \$2 Million a Year If Paid Equitably, Study Suggests*, FORBES, <https://perma.cc/UFR3-7FGN> (last updated Sept. 1, 2020, 1:03 PM).

denied Mr. Young the fruits of his Right of Self,²¹⁵ cutting him off from an economic opportunity that may have mitigated any need to borrow money for the airline ticket. Instead of Mr. Young, the NCAA and its member school, Ohio State University, financially benefitted from the use of Mr. Young's NIL in the form of media coverage of his performance.

Mr. Young's story is a pointed example of the importance of the law's recognition of Right of Self. A brief overview of the current battle over NCAA athletes' rights to their virtual selves contextualizes this case study. Prior to recent changes in the law, players were restricted to school-granted benefits, such as scholarships, under the NCAA rules.²¹⁶ These benefits are often insufficient to meet a student's basic needs.²¹⁷ Further, to

215. In addition to his NIL rights, Mr. Young was entitled to just compensation for the value of his labor as a player, which is beyond the scope of this Article. Some critics have likened the NCAA's exploitation of its players to the enslavement of Black people or of Black labor during Jim Crow. While this is a powerful analysis due to the number of Black male athletes who are negatively impacted by NCAA amateurism rules, that is not the focus of this Article. See Brandi Collins-Dexter, *NCAA's Amateurism Rule Exploits Black Athletes as Slave Labor*, UNDEFEATED (Mar. 27, 2018), <https://perma.cc/9WSV-PBL9>; Jay Connor, *The NCAA Is Big Business for Everybody but Black Players*, ROOT (Nov. 15, 2019, 12:30 PM), <https://perma.cc/JS6S-ZKPJ>; Brando Simeo Starkey, *College Sports Aren't like Slavery. They're like Jim Crow*, NEW REPUBLIC (Oct. 31, 2014), <https://perma.cc/FVP9-Y7VK>. Moreover, college sports, particularly football, can be especially dangerous to students' physical and emotional health and wellbeing. Numerous players have sued the NCAA for its handling of concussions. See *Former College Football Player Sues NCAA in Federal Court over Concussions*, USA TODAY (Sept. 4, 2013, 12:10 PM), <https://perma.cc/VB6U-59DE> (reporting on a class action complaint filed by three former NCAA football players alleging the NCAA neglected former players); see also Edward M. Wojtys, Editorial, *The Dark Side of College Football*, 10 SPORTS HEALTH 489, 489–90 (2018) (reporting that thirty-four NCAA football players have died during football activities in the past eighteen years; twenty-seven nontraumatic deaths were reported in 2017, while six players died from trauma to the head or neck over the same time period).

216. See NCAA MANUAL, *supra* note 48, art. 12 (placing numerous limits on what "benefits" student-athletes can receive).

217. In fact, 86 percent of NCAA college athletes live below the poverty line, with many qualifying for and receiving government Pell Grants. Armstrong Williams, *Time to Pay College Athletes*, NEWSMAX (Apr. 9, 2014, 7:47 AM), <https://perma.cc/9RRW-8W3Y>. These students are usually required to live on campus, attend summer workout camp, and travel to games. *Id.* They often require additional financial support not allowed by NCAA rules. *Id.* For example, how are they supposed to eat after the school cafeterias are closed when their only meal ticket applies to onsite school-sponsored meals? *Id.* In addition to the lack of general financial support, there are the dangers of

maintain their amateur status, student athletes were strictly forbidden from receiving funds or support from sources outside of NCAA member schools.²¹⁸ Yet the NCAA and its member schools, including state-owned “public” schools, have received and continue to receive billions of dollars from their sports programs, mainly in the form of advertising, television media, and the grossly discounted labor of the players.²¹⁹ In comparison, the “benefits” these NCAA student athletes receive are grossly inadequate, especially when compared to the benefits professional athletes receive.²²⁰

After several years of player protests and litigation, often referred to as “Fair Pay to Play,”²²¹ the players scored two major victories over the NCAA’s restrictions on player compensation in *O’Bannon v. NCAA*²²² and the Supreme Court case of *NCAA v. Alston*.²²³ Subsequently, following the State of California’s

getting injured. *Id.* All these factors place an emotional and psychological strain on these players of color.

218. NCAA MANUAL, *supra* note 48, art. 12.

219. California’s Governor Gavin Newsom, in supporting college athletes’ rights, noted that the Fair Pay to Play Act would rebalance a power structure in which NCAA universities receive more than \$14 billion annually and the nonprofit NCAA receives more than \$1 billion, “while the actual product, the folks that are putting their lives on the line, putting everything on the line, are getting nothing.” Elliott C. McLaughlin, *California Wants Its College Athletes to Get Paid, but the NCAA Is Likely to Put Up Hurdles*, CNN (Oct. 2, 2019, 9:00 AM), <https://perma.cc/N3AG-KMVY>; see Dan Murphy, *California Defies NCAA as Gov. Gavin Newsom Signs into Law Fair Pay to Play Act*, ESPN (Sept. 30, 2019), <https://perma.cc/3JFB-JPN7>; Tom Goldman, *College Athletes in California Can Now Be Paid Under Fair Pay to Play Act*, NPR (Sept. 30, 2019, 5:23 PM), <https://perma.cc/N4ZW-C8JG>.

220. See Tommy Beer, *NCAA Athletes Could Make \$2 Million a Year If Paid Equitably, Study Suggests*, FORBES (Sept. 1, 2020, 1:03 PM), <https://perma.cc/UFR3-7FGN> (highlighting that in the NFL and NBA, athletes receive approximately 50 percent of revenue compared to the 7 percent that NCAA athletes do); *Paying College Athletes—Top 3 Pros and Cons*, *supra* note 39 (“If college players earned 50% of their team’s revenues like the NFL and NBA players do, the average football player’s yearly salary would be \$360,000 and the average basketball player’s yearly salary would be \$500,000.”).

221. See *supra* note 50 and accompanying text.

222. 7 F. Supp. 3d 955 (N.D. Cal. 2014); *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015); *O’Bannon v. NCAA*, 137 S. Ct. 277 (2016) (denying certiorari); see *O’Bannon*, 7 F. Supp. 3d at 1007 (holding that the NCAA’s rules and bylaws violate antitrust law by unreasonably restraining trade).

223. See *NCAA v. Alston*, 141 S. Ct. 2141, 2155 (2021) (deciding that though the NCAA can regulate its player’s compensation, restrictions on that

pre-*Alston* lead,²²⁴ several states enacted laws recognizing the right of NCAA athletes to capitalize on the commercial use of their NIL.²²⁵ After years of deliberation,²²⁶ the NCAA provided interim rules to permit its players to benefit from the use of their NIL and still maintain their eligibility as amateurs.²²⁷ These developments represent a major financial opportunity for NCAA

compensation are subject to antitrust scrutiny under a “rule of reason” analysis and the ordinary rule of reason’s fact-specific assessment of their effect on competition).

224. In October 2019, California passed the Fair Pay to Play Act, which gives students more control over their names and likenesses by allowing sponsorships and endorsements beyond the NCAA’s control. Jack Kelly, *Newly Passed California Fair Pay to Play Act Will Allow Student Athletes to Receive Compensation*, FORBES (Oct. 1, 2019, 12:36 PM), <https://perma.cc/V8AB-YT6G>.

225. Twenty-five states—Arizona, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia—have pro-NIL laws that are now in effect, with three others to be effective by July 2023 and one more effective by August 2025. See *Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLL. SPORTS, <https://perma.cc/L3ZP-2KSZ> (last updated Apr. 13, 2022); Keller, *supra* note 51. However, the new state laws do not use the term *persona*, nor do they provide a rationale for the new laws.

226. In the last couple of years, the NCAA eligibility rules have been under attack from various sources, and the NCAA itself has been planning a reform after the enactment of the California Pay to Play Act and the federal district court and Ninth Circuit decisions in *Alston*. See Greta Anderson, *Court Panel Rules Against NCAA Restrictions on Athlete Pay*, INSIDE HIGHER ED (May 19, 2020), <https://perma.cc/GTV6-ER79>.

227. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://perma.cc/F7S4-7RQ9>. The NCAA adopted the interim rules on June 30. *Id.* The rules provide four points of guidance: (1) athletes can engage in NIL deals that comport with state law and colleges and universities can provide information on “state law questions”; (2) college athletes in states without NIL laws can monetize their NIL rights without violating NCAA rules; (3) athletes can hire a professional services provider to advise on NIL activities; and (4) athletes should report NIL activities in accordance with state law or school and conference rules. *Id.* The NCAA’s interim rules do not expressly prohibit gambling businesses or other vice industries. *Id.* Moreover, (1) deals cannot serve as recruiting inducements; (2) athletes cannot receive benefits without services given; (3) agents or representation are allowed for NIL benefits; (4) schools cannot be involved in creating opportunities for their athletes; and (5) players cannot promote alcohol, legal drugs like cannabis, tobacco products, adult entertainment, or gambling. See *id.*; Barry Benjamin, *NCAA Interim NIL Policy: Sponsoring College Athletes—What You Need to Know About NIL Regulations*, JD SUPRA (Aug. 17, 2021), <https://perma.cc/5KE5-XTPB>.

athletes, allowing them to enjoy what other students, including non-athletes and some athletes who play for other non-NCAA leagues already enjoy—benefitting from their NIL. While state laws permitting NCAA players to capitalize on their NIL are vitally important, this development raises a broader societal issue and quintessential jurisprudential question worthy of exploration: Should every American be innately entitled to enjoy Right of Self?

1. Inequitable Distribution of Wealth

Clearly, the NCAA and its member school financially exploit the labor and NIL of their players. Each year, the NCAA and its member schools receive billions of dollars from their sports programs, mainly in the form of advertising and television media. In 2019, the NCAA reported gross revenues of over \$1.1 billion dollars,²²⁸ with most of its annual revenue coming from two sources: television and marketing rights for the Division I Men's Basketball Championship and ticket sales for all championships, particularly men's football.²²⁹ Additionally, NCAA President Mark Emmert's base salary for calendar year 2019 was \$2.5 million and his total compensation was \$2.9 million according to the association's latest federal tax return.²³⁰

By comparison, student players are not permitted to share in these revenues, lest they lose their amateur status.²³¹ Over the years, the NCAA rules regarding student-athlete compensation have gradually evolved to provide minimal increased benefits to students.²³² Notwithstanding, they are

228. See NCAA, CONSOLIDATED FINANCIAL STATEMENTS: AUGUST 31, 2020 AND 2019, at 5 (2020), <https://perma.cc/F7SQ-NDAV> (PDF). From 2019 to 2020, the NCAA saw a positive increase in net assets (profits) of over \$70 million, and net assets of just under \$500 million. *Id.* About 25 percent of its annual revenue went to “association-wide programs” (nearly \$150 million) and to “management and general” (\$45 million). *Id.* The NCAA spent \$67.7 million on outside legal fees. Steve Berkowitz, *NCAA President Mark Emmert Credited with \$2.9 Million in Total Pay for 2019 Calendar Year*, USA TODAY (July 19, 2021, 4:25 PM), <https://perma.cc/2597-VJH9>.

229. NCAA, *Finances*, <https://perma.cc/N8GF-BVUY>.

230. Berkowitz, *supra* note 228.

231. See NCAA MANUAL, *supra* note 48, art. 12.

232. These include: room, board, books, fees, and “cash for incidental expenses such as laundry” (1956); “paid professionals in one sport to compete on an amateur basis in another sport” (1974); authorizing “member schools to

severely limited in their compensation, which is usually limited to the cost of tuition, room, board, and fees.²³³

In addition to the NCAA devaluing their labor, players have claimed they were negatively impacted by the NCAA's former prohibition on receipt of funds from their name, image, and likeness.²³⁴ These claims were advanced in litigation in which the players sought to enhance compensation for their play by demanding that they be permitted to benefit financially from their NIL.²³⁵

The NCAA's explanation of its restrictions on players' compensation, especially from outside sources, are twofold: (1) a history of teachers' complaints that student athletes made more money than they did; and (2) to weed out corruption in college sports.²³⁶ However, neither of these explanations hold up

increase scholarships up to the full cost of attendance" (1974); the "Student Assistance Fund" and the "Academic Enhancement Fund" to "assist student-athletes in meeting financial needs, improve their welfare or academic support, or recognize academic achievement"; allowing payments "incidental to athletics participation," including awards for "participation or achievement in athletics" (like "qualifying for a bowl game") and permitting certain "payments from outside entities" (such as for "performance in the Olympics"); authorizing "member schools to award up to (but no more than) two annual 'Senior Scholar Awards' of \$10,000 for students to attend graduate school after their athletic eligibility expires"; and finally, allowing schools to fund travel for student-athletes' family members to attend "certain events." NCAA v. Alston, 141 S. Ct. 2141, 2150 (2021).

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

234. See Joel Mitnick & Ngoc Pham Hulbig, *Supreme Court to Weigh in College Sports: The Intersection of Antitrust and "Amateurism"*, NAT'L L. REV. (Dec. 18, 2020), <https://perma.cc/H4AA-WJYY>.

235. In the recent *Alston* case, these former college athletes argued that their compensation was grossly unfair, and that the NCAA is a monopoly with unfair competitive advantage. See *id.*

[The] players argue that the top athletic teams are operating a system that acts as a classic restraint of trade in violation of Section 1 of the Sherman Act. Without those restraints, they argue that student-athletes would be compensated at a level more commensurate with their value to their universities, conferences, and the NCAA.

236. See *Alston*, 141 S. Ct. at 2149

In 1948, the NCAA sought to do more than admonish. It adopted the "Sanity Code." The code reiterated the NCAA's opposition to "promised pay in any form." But for the first time the code also authorized colleges and universities to pay athletes' tuition. And it

against the level of compensation that the NCAA allows coaches to receive. For example, in 2021, the reported salary²³⁷ of the top ten *state-owned*²³⁸ men's football coaches ranged from \$9.7 million (Nick Saban of the University of Alabama) to \$5.6 million (Chip Kelly of UCLA).²³⁹ Moreover, the 2021 NCAA men's *basketball* coach salary range of *state* schools in the top ten are equally shocking, with a high of \$8 million (John Calipari of the University of Kentucky) and three coaches exceeding \$4 million each (Chris Beard of Texas Tech, Rick Barnes of Tennessee, and Roy Williams of North Carolina).²⁴⁰ These salaries emphasize that college sports are already highly commercialized and extremely profitable to most of the actors, including the colleges, their administrations, and the NCAA—with one notable exception, the student athletes themselves.

created a new enforcement mechanism—providing for the “suspension or expulsion” of “proven offenders.” (citations omitted)

237. Salaries are only one form of financial benefit that these coaches receive. For instance, they have major endorsement contracts, consulting contracts, shoe contracts, and directorships on corporate boards, the earnings from which come close to or exceed their contracts with their schools. As a result, many of the top coaches have tremendous net worth. *See, e.g., Nick Saban Net Worth*, CELEBRITY NET WORTH, <https://perma.cc/REV7-3JD3> (reporting that Saban has a net worth of \$60 million); Anthony Riccobono, *Nick Saban Net Worth: Salary, Contract Extension Put Alabama HC Among Highest-Paid Coaches*, INT'L BUS. TIMES (June 7, 2021, 3:58 PM), <https://perma.cc/7UFP-CKFC> (reporting that Saban signed an eight-year deal worth at least \$74.4 million in the summer of 2018 and that, with his \$9.1 million salary and \$950,000 in bonuses, Saban became the first college football coach to make over \$10 million in a season last year).

238. These salaries highlight that, in many instances, state-owned schools exploit players' Right of Self. Nevertheless, the coaches of the private school members of the NCAA make, comparably, incredibly high salaries. *See, e.g., Men's Basketball Head Coach Salaries*, USA TODAY, <https://perma.cc/FBW9-NJR6> (last updated Mar. 9, 2021, 3:21 PM) (reporting that Duke University's basketball coach, Mike Krzyzewski, received total annual pay of \$7,044,221). Texas Christian University's football coach Gary Patterson received total annual pay of \$6.1 million. *College Football Head Coach Salaries*, USA TODAY, <https://perma.cc/7RSK-2X5J> (last updated Oct. 14, 2021, 9:09 AM).

239. *College Football Head Coach Salaries*, *supra* note 238.

240. *Men's Basketball Head Coach Salaries*, *supra* note 238.

2. Players' NIL

In the last several years, players and others have attacked the NCAA compensation system, alleging that the NCAA exploits students. Some of these attacks have been adjudicated in federal court, challenging both the direct compensation the NCAA pays its players and the NCAA prohibition on players' rights to commercially benefit from the use of their NIL.

In 2014, in a landmark class-action lawsuit, *O'Bannon v. NCAA*, numerous college athletes claimed that the NCAA and its schools were reaping profits off these athletes' NIL in violation of the Sherman Act and antitrust law.²⁴¹ The district court ruled for the plaintiffs, and the NCAA agreed to allow the athletes to receive full scholarships for academics in light of the use of the students' NIL.²⁴² While the athletes received some benefits from the *O'Bannon* decision, the courts failed to recognize their Right of Self. This resulted in continued legal challenges to the fairness of the NCAA compensation of the players.²⁴³

Then, in 2019, several former NCAA players filed lawsuits in federal court, which were consolidated under *NCAA v. Alston*,²⁴⁴ challenging the NCAA restrictions on educational compensation for athletes.²⁴⁵ 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.²⁴⁶ The court required the NCAA to allow certain types of *academic* benefits beyond the full scholarships that

241. See *O'Bannon v. NCAA*, 802 F.3d 1049, 1052 (9th Cir. 2015). The Sherman Antitrust Act of 1890 is a United States antitrust law that enshrines the rule of free competition among parties engaged in commerce. 15 U.S.C. §§ 1–7. See generally DOJ & FTC, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007), <https://perma.cc/FDV9-CUUQ>.

242. See 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://perma.cc/6UNW-525H>.

243. See Mike DeCourcy, *If NCAA Had Never Taken On Ed O'Bannon, It Might Not Have Been Dunked On So Furiously by the Supreme Court*, SPORTING NEWS (June 21, 2021), <https://perma.cc/3FL3-FX7E> (explaining how *O'Bannon* opened doors for future challenges to NCAA policies).

244. 375 F. Supp. 3d 1058 (N.D. Cal. 2019).

245. *Id.* at 1061–62.

246. *Id.* at 1108–10.

O'Bannon established, such as for “computers, science equipment, musical instruments and other items not included in the cost of attendance calculation but nonetheless related to the pursuit of various academic studies.”²⁴⁷

However, the court held that the conferences within the NCAA may still limit cash or cash-equivalent awards for academic purposes.²⁴⁸ Despite these limitations, the court based its relaxation of the NCAA rules on the huge compensation discrepancy between the NCAA and the students.²⁴⁹ Subsequently, the NCAA appealed to the Ninth Circuit and reported that it was planning reforms.²⁵⁰

In May of 2020, the Ninth Circuit upheld the district court’s decisions in *Alston*.²⁵¹ However, the Ninth Circuit accepted the NCAA’s argument about “the importance to consumer demand of maintaining a distinction between college and professional sports.”²⁵² Facing a major challenge to its control over the players, the NCAA appealed to the Supreme Court, seeking antitrust protection under *NCAA v. Board of Regents*,²⁵³ as it

247. *Id.* at 1088, 1102. 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; expenses for pre- and post-eligibility tutoring; expenses related to studying abroad that are not covered by the cost of attendance; and paid post-eligibility internships.” *Id.* at 1088.

248. *Id.* at 1062.

249. *See id.* at 1070 (“Moreover, the compensation that class members receive under the challenged rules is not commensurate with the value that they create for Division I basketball and FBS football; this value is reflected in the extraordinary revenues that Defendants derive from these sports.”).

250. *See NCAA Files Appeal in Alston Case*, NCAA (Aug. 16, 2019), <https://perma.cc/8Z9G-2C2T>.

251. 958 F.3d 1239 (9th Cir. 2020). Judge Milan Smith wrote,

The treatment of Student-Athletes is not the result of free market competition. To the contrary, it is the result of a cartel of buyers acting in concert to artificially depress the price that sellers could otherwise receive for their services. Our antitrust laws were originally meant to prohibit exactly this sort of distortion.

Id. at 1267.

252. *Id.* at 1257 (quoting *Alston*, 375 F. Supp. 3d at 1082).

253. 468 U.S. 85 (1984). This decision struck down the NCAA’s television plan as violating antitrust law, but in so doing, held that the rules regarding eligibility standards for college athletes are subject to a different and less stringent analysis than other types of antitrust cases. *Id.* at 120. Because of this lower standard, the NCAA has long argued that antitrust law permits

relates to the NCAA's eligibility standards and compensation.²⁵⁴ Simultaneously, the NCAA announced that it would continue to review its policies related to players' compensation for NIL.²⁵⁵

On June 21, 2021, Justice Neil Gorsuch, writing for a unanimous Court, stated that it is *not* an undue restraint for the NCAA, or conferences within it, to define what those educational benefits are or to create rules for their applicability, leaving the restrictions on amateur status partially undisturbed.²⁵⁶ Yet the Court advised the NCAA that it could *not* use the federal antitrust laws to justify its rules regulating players' compensation.²⁵⁷ Specifically, the Court affirmed the district court's decision finding that the NCAA's restrictions on "non-cash education-related benefits" violated antitrust law under the Sherman Act.²⁵⁸ Further, the Court agreed with the

them to restrict athlete compensation to promote competitive equity and to distinguish college athletics from professional sports. *See NCAA Files Appeal in Alston Case*, *supra* note 250.

254. *See* NCAA v. Alston, 141 S. Ct. 2141, 2154 (2021); Robert Barnes & Rick Maese, *Supreme Court Will Hear NCAA Dispute over Compensation for Student-Athletes*, WASH. POST (Dec. 16, 2020), <https://perma.cc/R58F-9HTR> (reporting that the NCAA oversees rules for student-athletes, which limit the type of compensation that schools can give to student athletes, distinguishing college athletics from professional sports and disallowing "non-cash education-related benefits" such as scholarships and internships so that there is no apparent "pay to play" aspect).

255. *See* Stanton McManus, *Another NCAA Upset: Rethinking the Playbook for Compensating Student-Athletes*, MINN. L. REV. DE NOVO (Apr. 23, 2019), <https://perma.cc/3QTW-KV6W> (discussing possible changes to NCAA policies); Greta Anderson, *Court Panel Rules Against NCAA Restrictions on Athlete Pay*, INSIDE HIGHER ED (May 19, 2020), <https://perma.cc/4UTT-KYF8> (reporting on the NCAA's process of reviewing its policies related to how to compensate players for names and likenesses).

256. *Alston*, 141 S. Ct. at 2151.

257. *Id.* at 2158.

258. *Id.* at 2166. The plaintiffs claimed that the NCAA's rules violated the Sherman Act, which prohibits contracts, combinations, or conspiracies "in restraint of trade or commerce." *Id.* at 2151. Courts have interpreted the Sherman Act's prohibition on restraints of trade to prohibit only restraints that are "undue," which are generally decided by a "rule of reason" analysis and require a fact-finding of market power and structure to decide what a restraint's actual effect on competition is. *Id.* at 2151–52. The Court disagreed with the NCAA's arguments that its business should enjoy a special exception excluding it from antitrust law or that it should at least be given special leeway under antitrust law. *Id.* at 2162–63. Instead, the Court stated that college sports is a trade and, therefore, the NCAA cannot unduly restrain athletes from the marketplace. *Id.*

district court's injunction of certain NCAA rules limiting the education-related benefits schools may make available to student-athletes.²⁵⁹

The *Alston* Court's dicta on the issue of "pay to play" was equally damaging to the NCAA's position. In favor of the players, the Court noted that colleges have leveraged sports to raise revenues, attract attention, enhance enrollment, and fundraise from alumni.²⁶⁰ Justice Brett Kavanaugh, in a concurring opinion, viewed the NCAA athletes as underpaid employees²⁶¹ in a "massive money-raising enterprise"²⁶² in which NCAA leadership, school leadership, and coaches receive substantial financial benefits.²⁶³

While the *Alston* decision is indeed a landmark decision that supports student-athletes' entitlement to fair compensation, the Court's *Alston* decision failed to directly answer the question of whether NCAA players are legally entitled to their NIL.²⁶⁴ Some might argue that, following

259. *Id.* at 2166.

260. *Id.* at 2149. The Court highlighted that the profitability of this sports-driven enterprise relies on "amateur" student-athletes competing under rules that restrict how the schools may compensate them for their play. *Id.* This observation is consistent with the claims brought in this case by former student-athletes that the NCAA amateurism rules depress compensation for at least some student-athletes below what a competitive market would yield. *Id.* at 2147.

261. *See id.* at 2169 (Kavanaugh, J., concurring)

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

262. *Id.*

263. *See id.* at 2168 ("The bottom line is that the NCAA and its member colleges are suppressing the pay of student-athletes who collectively generate billions of dollars in revenue for colleges every year.").

264. *See id.* at 2147 (majority opinion) (restricting the decision's scope to the issues directly on appeal). While some laude *Alston* as a victory for college athletes, one spokesperson for the cause, Sedona Prince, views the efforts as minimal and promises to continue her lawsuit to recognize college athletes' constitutional rights to their "persona." *See Hearing on Compensating College Athletes Before the S. Comm. on Com., Sci., & Transp.*, 117th Cong. (June 17, 2021) (written testimony of Sedona Prince), <https://perma.cc/WS3X-2ZCQ>

O'Bannon and *Alston*, NCAA players are entitled to the *privilege* of receiving commercial compensation from their NIL and maintaining their amateur status, but only if expressly granted by state law.²⁶⁵

Most importantly, after *Alston*, and in response to public opinion in favor of players having control over their NIL,²⁶⁶ several states enacted laws permitting NCAA athletes to capitalize on their NIL and maintain their amateur status.²⁶⁷ That development is vitally important to college athletes, especially high-profile players.²⁶⁸ Moreover, as will be presented

I have personally worked very hard in the last few years to grow my following on social media but, because of NCAA rules, I cannot earn a cent on the platforms I have built. I can't get sponsored on Instagram, for example, despite the fact that I already have more than 240,000 followers. And I would lose my college eligibility if I accepted any of the money that my TikTok profile has generated through the TikTok Creator Fund—money that I have already earned. I know of many other student-athletes, including some of my own teammates, who have been forced to turn down similar opportunities that no one else would think twice about taking.

265. See Anderson, *supra* note 255 (explaining how the decisions interact with state NIL laws like California's Fair Play for Pay Act).

266. See Michael T. Nietzel, *Americans Now Overwhelmingly Support College Athletes Earning Endorsement and Sponsorship Money*, FORBES (Feb. 11, 2020, 8:43 AM), <https://perma.cc/4G32-SQYZ>.

267. See Keller, *supra* note 51 (tracking all states' NIL legislative actions).

268. See A.J. Maestas & Jason Belzer, *How Much Is NIL Worth to Student Athletes?*, ADU, <https://perma.cc/SE55-KER3>

Thus from 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 \$5K–\$30K range for less popular athletes. (emphasis added)

According to current estimates, this new market for college athletes is \$500 million in the first year and \$1 billion in the second year. Justin Birnbaum & Olivia Evans, *College Athletes Are Ready to Reap the Rewards of a Billion-Dollar NIL Market. Opendorse Is Here to Help*, FORBES (June 24, 2021, 8:00 AM), <https://perma.cc/37S9-DANG>; see Colin Dwyer, *NCAA Plans to Allow College Athletes to Get Paid for Use of Their Names, Images*, NPR (Oct. 29, 2019, 2:59 PM), <https://perma.cc/F3CC-DMTB> (reporting that the NCAA is making over \$1 billion on TV rights and marketing fees). This change in the rules does not mean an open market for the college athletes' NIL; there are some restrictions on the players' access to this opportunity and lots of

next, the states' passage of laws that benefit NCAA players raises a question beyond the college sport arena, namely, whether Right of Self exists as a universal right.

B. *Prelude to Right of Self*

Both *O'Bannon* and *Alston* dealt with the NCAA's power to restrict player compensation. *O'Bannon* expressly addressed compensation in the form of players being denied the benefits from their NIL,²⁶⁹ while *Alston* did not directly speak to that form of compensation.²⁷⁰ Both cases combined issued a blow to the NCAA's total control over players' compensation.²⁷¹ Moreover, in 2019, California passed the Fair Pay to Play Act,²⁷² which allows NCAA athletes to capitalize on their NIL, challenging the amateurism rules as applied to players' self.²⁷³

unanswered questions. Dan Murphy, *NCAA Name, Image and Likeness FAQ: What the Rule Changes Mean for the Athletes, Schools and More*, ESPN (June 30, 2021), <https://perma.cc/HC79-ESPZ>.

269. See *supra* Part I.A.

270. See *supra* Part I.A.

271. See Murphy, *supra* note 268 (addressing the NCAA's scope of power after the decisions).

272. CAL. EDUC. CODE § 67456 (West 2021). The Act provides:

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.

Id. § 67456(a)(2); see *Governor Newsome Signs SB 206, Taking on Long-Standing Power Imbalance in College Sports*, OFF. OF GOVERNOR GAVIN NEWSOME (Sept. 30, 2019) [hereinafter *Governor Newsome Signs SB 206*], <https://perma.cc/7F5G-SB5D>; see also Gregg E. Clifton & Nicholas A. Plinio, *New Jersey Grants Name, Image, Likeness Rights to Collegiate Student-Athletes*, JACKSON LEWIS: COLLEGIATE & PRO. SPORTS L. BLOG (Sept. 15, 2020), <https://perma.cc/RX2G-WY6E> (announcing a similar law in New Jersey).

273. See *Governor Newsome Signs SB 206*, *supra* note 272. The Fair Pay to Play Act also prohibits universities from implementing rules that prohibit student-athletes from earning compensation or denying scholarships to athletes who choose to market their persona. *Id.* However, it does not require universities to pay student-athletes themselves; as a result, the net cost to the NCAA and its collegiate members would be zero, as all compensation is paid for by third-party endorsements. See Allen Kim, *California Just Passed a Law*

Although the Act does not express provide its legal basis, it seems to be based on an equal protection argument—that NCAA schools cannot treat athletes differently from other college students.²⁷⁴ Hence, the *O'Bannon* and *Alston* decisions, combined with the California statute, compelled many other states to enact laws permitting NCAA athletes to capitalize on their NIL and not lose their amateur status with the NCAA.²⁷⁵

However, that is not the end of the matter as the *O'Bannon* and *Alston* decisions and the state laws relating to players' NIL raise more questions about the existence of a Right of Self, both for NCAA players and for the public in general. The following observations result from an analysis of a survey I conducted of the current state laws (collectively referred to as “Fair Play”) that grant NCAA athletes control over the commercial use of their NIL.

1. Limited Beneficiaries

Fair Play only applies to college athletes who play for the NCAA.²⁷⁶ That means that the new laws are not “universal”; that is, they do not grant everyone the fundamental right to enjoy Right of Self. Moreover, the laws do not address the interstate application of a state's law permitting a player in that state to enjoy Right of Self.²⁷⁷ For example, does the California Fair Play statute apply when a California-based athlete competes in a state that has not enacted a similar law? The new law does not apply broadly to other college students or to the public in general, creating further confusion and potential for misapplication and inequity.

that Allows College Athletes to Get Paid, CNN (Sept. 30, 2019), <https://perma.cc/9P7C-DLES>.

274. See Billy Wilz, *A State Skirmish over N.C.A.A. Amateurism Rules Has Quickly Become a National Battle*, N.Y. TIMES (Dec. 28, 2020), <https://perma.cc/ZK44-LZU3> (last updated June 21, 2021) (“For example, while a film major who doesn't play a varsity sport is permitted to generate income making YouTube videos, a film major who is also an athlete may not.”).

275. See Keller, *supra* note 51 (monitoring state NIL legislation).

276. Dan Murphy, *Everything You Need to Know About the NCAA's NIL Debate*, ESPN (Sept. 1, 2021), <https://perma.cc/ED4Z-X8Z5>.

277. See Keller, *supra* note 51 (highlighting the problems with “the unfavorable ‘patchwork’ of state laws”).

2. Privilege Versus Right

Fair Play can best be described as granting a “privilege” rather than a “right.” As such, state laws that grant players NIL rights constitute a vulnerable gift or privilege, rather than recognition of the players’ inherent right to their NIL. Reviewing the litigation in which college athletes challenged the NCAA’s amateurism rules, the courts have focused on antitrust law, fundamental injustice, equal protection, and popular opinion.²⁷⁸ These cases, including *Alston*, and the subsequent state laws on the matter, all lack an expressly stated jurisprudential rationale for the new laws. This is disturbing because the change relies on the granting of privilege, which reinforces the existing top-down power structure, rather than the establishment of Right of Self. Thus, the new law is a privilege and not a right, meaning there is no guarantee of its permanence.

3. Limited Benefits

Fair Play only applies to players’ NIL.²⁷⁹ But there are other important attributes of Right of Self that players, and everyone else, should be entitled to, such as one’s *labor*. One might argue that the Thirteenth Amendment prohibits the exploitation of this particular attribute of self; that is, it prohibits the taking of a person’s liberty, labor, and property, under the prohibition of enslavement. As previously noted, in one of the United States’ first publicity cases, a judge likened the “taking” of a person’s image to the American enslavement of people of African descent.²⁸⁰ Because the new law protects only one attribute of self, it provides the players limited benefits not including compensation for their labor.

278. See *infra* Part III.A.2; see also Daniel Roberts, *Poll: 60% of Americans Support College Athletes Getting Paid Endorsements*, YAHOO FIN. (Oct. 8, 2019), <https://perma.cc/Z4WC-XFXQ> (reporting that a 2019 Seton Hall Sports Poll found that 60 percent of those surveyed agreed that college athletes should be allowed compensation for their NIL, while 32 percent disagreed, and 8 percent were unsure, a change from 2017, when 60 percent believed college scholarships sufficiently compensated college athletes).

279. See Murphy, *supra* note 268.

280. See *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 80 (Ga. 1905).

4. Limited Application

Fair Play only applies to forbidding the NCAA from denying players' eligibility under the NCAA amateurism rules.²⁸¹ The new law is somewhat vague in how it applies to the NCAA's control of player compensation.²⁸² Can the NCAA use other means to punish a student for benefitting from their NIL, other than via eligibility? For example, can the NCAA require that a student who received NIL profits use that money to offset the cost of their education? The new law presumes the goodwill of the NCAA to embrace Right of Self as a fundamental right.

5. Silent on Retroactivity

Fair Play does not provide for retroactive application; in fact, a common theme is that the law takes effect as of a given date and going forward.²⁸³ This raises the obvious question of whether present and past NCAA players are entitled to retroactive compensation for the rights to the attributes of self that were previously denied to them. Making the new law retroactive would support past and present athletes who should be expressly allowed to seek damages and reimbursement for the past harms done by the old rules. Hence, the new law does not address the issue of retroactivity for the past takings of NCAA's athletes' NIL rights.

6. Silent on Descendibility

Fair Play does not provide for whether the players' control of the commercial use of their NIL extends to their estates when they die.²⁸⁴ Most people assume that when they die, their estate will continue to benefit from the use of Right of Self.²⁸⁵ Surprisingly, that is not the general rule. Under the general

281. Keller, *supra* note 51.

282. See *id.* (referencing that NIL laws typically ensure conferences "cannot limit a student-athlete's ability to be compensated" but not do restrict any other conference action).

283. See Danita Harris, *NIL Is History in the Making—Will It Consider the Warriors of the Past?*, SPORTS BUS. J. (Nov. 19, 2020), <https://perma.cc/2JGV-8VFZ> (identifying potential retroactivity concerns).

284. See Keller, *supra* note 51 (summarizing all state NIL legislation).

285. See Decker, *supra* note 36, at 252 n.69, 253 n.77.

common law in the United States, the right of NIL was not descendible.²⁸⁶ As a result, several states enacted laws expressly providing for the descendibility of some aspects of Right of Self,²⁸⁷ but not expressly for players' NIL. Consequently, the new law does not address whether college athletes' NIL apply postmortem, to the benefit of their estates and possibly their heirs.

7. Silent on Remedies

Fair Play laws do not provide remedies for noncompliance, including fines, a cause of action, damages, injunctions, or other legal and equitable remedies.²⁸⁸ Again, the law relies on the goodwill of the NCAA for compliance and for the details of implementation.²⁸⁹ By not adding a cause of action, penalties for noncompliance, and other remedies, the law lacks teeth, sending a signal to the world that state governments are not serious about protecting the players' rights. Hence, the new law fails to provide for adequate protection to the players' NIL right.

8. Race, Gender, Status, and Wealth Neutral

Fair Play does not take into account the intersectionality of race, gender, status, and wealth, as it relates to its actual impact on vulnerable, historically disadvantaged populations, such as African Americans.²⁹⁰ Several of the top NCAA athletes in the highest grossing sports of football and basketball are young Black men, many of whom are from disadvantaged families or communities.²⁹¹ The law fails to provide for those student-athletes who lack the basic financial essentials and

286. *See id.*

287. *See id.*

288. *See* Matt Brown, *Enforcing NIL Regulations*, FRONT OFF. SPORTS (July 14, 2021), <https://perma.cc/MX4D-4RQL> (“Conspicuously absent in almost all of these plans? Any punishments or enforcement mechanisms.”).

289. *See id.*

290. *See* Cat Ariail, *NIL Agreements Could Expose Enduring Racial, Sexual Inequities*, SBNATION (July 7, 2021), <https://perma.cc/W52J-F8XG> (“Yes, the new NIL policy opens up a free market of financial opportunity for college athletes. Yet, the infrastructure of this free market is not free of biases of race, gender and sexuality.”).

291. Garthwaite et al., *supra* note 39, at 5–6.

support to attend NCAA member schools and enjoy the lifestyle that most students have.²⁹² In this way, the new law is insensitive to the unique challenges that some students, particularly those from financially disadvantaged backgrounds, face and fails to tailor the law to address their unique needs.

9. Wrongful Takings

Fair Play does not address the issue of the protection of Right of Self against the government's exercise of eminent domain,²⁹³ particularly wrongful governmental²⁹⁴ takings.²⁹⁵ Historically, the State has the constitutional authority to take *real* property under the doctrine of eminent domain.²⁹⁶ The problem here is that Right of Self is not simply manmade, physical property—it is a privacy right, a form of natural law, in a human being! Since this is a natural right, the State has no inherent or fundamental constitutional right to natural property.²⁹⁷ Moreover, eminent domain only applies to the expropriation of property *for public use*, but the taking of

292. Keller, *supra* note 51.

293. The term “eminent domain,” for purposes of this Article, is defined as a governmental taking of property. Eminent domain actions typically apply to real property (real estate, including buildings and land), but any kind of property may be taken within the confines of the Fifth Amendment’s Takings Clause. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”). This includes tangible and intangible property, such as franchises and contracts. See 2 NICHOLS ON EMINENT DOMAIN § 5.03 (2021) (“The protections of eminent domain extend beyond tangible property and include protection of intangible types of property such as patents, mineral rights, and contract rights.” (quoting *Creegan v. State*, 391 P.3d 36, 47 (Kan. 2017)). For example, the City of Oakland unsuccessfully tried to take the Oakland Raiders football team through eminent domain, which the California Supreme Court rejected in 1982. See *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 844 (Cal. 1982) (acknowledging that intangible property can be subject to condemnation through the power of eminent domain and remanding to give the City the opportunity to “prove a valid public use for its proposed action”). See *generally History of the Federal Use of Eminent Domain*, DOJ, <https://perma.cc/6ZCH-EZTU> (last updated Jan. 21, 2022).

294. See *supra* note 23 (defining “governmental”).

295. “Taking(s),” for purposes of this Article, refers to instances in which the government takes private property for public use. See *Takings*, CORNELL LEGAL INFO. INST., <https://perma.cc/C6SN-6HFD>.

296. *History of the Federal Use of Eminent Domain*, *supra* note 293.

297. See *supra* Part I.

players' NIL serves no public purpose.²⁹⁸ Further, assuming that the government's taking of NIL is rightful, it is still subject to just compensation, pursuant to the Fifth Amendment's Takings Clause.²⁹⁹ Hence, the new law does not protect the players from wrongful governmental takings and does not mandate just compensation.

10. Overall Observations and Questions

What can we learn from the NCAA players' battle for their NIL rights relative to a universal Right of Self? The following observations show the complexity of the issue of whether there is a universal, inherent Right of Self.

(1) Without a rights-based analysis of relationships between parties, systemic classism is allowed to exploit the political and economic underdogs. The benefits that the underdogs receive are narrowly defined "privileges" granted to them by the powerful, and not "rights" guaranteed to them by the Constitution. As in the case of Fair Play, student athletes are the underdogs who currently must rely on the goodwill of the NCAA.

(2) State governments, particularly in states with NCAA members, have received and continue to receive huge direct and indirect revenue and other benefits from their wrongful taking of college athletes' Right of Self, both their NIL and their labor.

(3) The NCAA's amateurism rules diminish the value of college athletes' Right of Self, by monopolizing its development in an anticompetitive environment.

(4) Despite Fair Play, and the millions of dollars in potential compensation to a select few high-profile NCAA athletes, the NCAA and its members will continue to rake in and continue to keep billions of dollars from the attributes of self of its athletes.

(5) The current discussion about easing the restrictions on NCAA athletes' NIL is a ruse, as it focuses on the granting of a

298. *Cf.* CASTLE COALITION, CALIFORNIA SCHEMING: WHAT EVERY CALIFORNIAN SHOULD KNOW ABOUT EMINENT DOMAIN ABUSE 13 (2008), <https://perma.cc/RE6W-MRPJ> (PDF) (suggesting substantive reform of California eminent domain laws by, at least, "restrict[ing] eminent domain to traditional public uses such as schools, roads, utilities and government buildings").

299. U.S. CONST. amend. V.

privilege that narrowly applies to NCAA athletes, rather than ensuring federally protected property rights of those athletes.

(6) The legal analysis of the NCAA's amateurism rules that focuses on questions of antitrust rules, athlete compensation, and equal treatment compared to non-athlete college students fails to provide college athletes, many of whom are racial minorities from underprivileged communities, any meaningful remedies for their mistreatment and inferior status. Even in the face of reform, college athletes are left holding a hat in hand begging for a handout, rather than being empowered by a constitutional right to own and control their NIL and other attributes of self.

In summary, the case study of the players' apparent victory over the NCAA's control of their NIL demonstrates the need for a transformative change in the law relative to Right of Self and that the current privilege being granted to NCAA athletes should be a universal right that every American is entitled to enjoy.

C. *Solution Applied*

1. Applying a Federal Right of Self Act

Recognizing that Right of Self should be identified as a universal, constitutionally based property right, how would ROSA apply to the current debate over NCAA athletes' right to their NIL? When we seek to apply ROSA to the "pay-to-play" issue, several practical challenges further demonstrate the need for a federal law that embraces Right of Self. As discussed next, a federal ROSA would address the problems of a lack of uniformity, an unequal playing field, and the obstacles of developing a national media market for NIL.

First, a federal ROSA would add uniformity to the law on players' NIL rights. There is a lack of uniformity in the current laws as some, but not all, states have passed Fair-Pay-to-Play (Fair Play) laws.³⁰⁰ This raises two problems: one relates to how Fair Play laws compare to one another; and the other relates to how a state's Fair Play law applies in a state that has not yet enacted Fair Play laws. As to the first problem, varying state laws interpreted by their respective state courts will likely

300. See Keller, *supra* note 51.

produce differing rules, which might create inequities. The second problem, one of comity, raises difficulties when an athlete enrolled in a Fair Play school plays in a game hosted by and located in a non-Fair Play state. A federal ROSA would address these problems by providing a single, superseding body of rules that would make for a better, more predictable operation of college sports.

Second, a federal ROSA would level the playing field from state to state. Currently, many states have not enacted Fair Play laws.³⁰¹ This causes a problem of fair competition in recruiting players that gives Fair Play schools a competitive edge over non-Fair Play schools.³⁰² The most sought-after players would likely gravitate to NCAA schools in states like California that allow players to benefit from the compensation from their NIL.³⁰³ As a result, schools in Fair Play states would have a major competitive advantage over schools in non-Fair Play states.³⁰⁴ Not only would this create powerhouse teams, it would also weaken the attraction of college sports as the competition would become lopsided. Moreover, as successful college sports teams drive revenue in many forms, including media, advertising, ticket sales and increased student enrollment, Fair Play schools could receive increased financial benefits. The NCAA interim rules relating to NIL aggravate this problem by narrowly applying to students who play for a school located in a state that has enacted a Fair Play law.³⁰⁵

Third, a federal ROSA would facilitate and promote an orderly market for college athletes' NIL, as that market is a national one involving interstate commerce, which is under

301. *Id.*

302. See Tom Goldman, *A New Era Dawns in College Sports, as the NCAA Scrambles to Keep Up*, NPR (June 28, 2021, 5:01 AM), <https://perma.cc/59QG-7DQV> (“A state-by-state patchwork of NIL laws would create recruiting advantages—athletes choosing schools in states allowing NIL payments—and thus create competitive imbalance.”).

303. See *id.* (quoting USC quarterback Mo Hasan, “[I]f I’m a top quarterback and I can make over one hundred thousand dollars at the University of Florida and I can’t make that at the University of Arizona, then that’s an easy decision in a lot of cases”).

304. *Id.*

305. Hosick, *supra* note 227.

federal jurisdiction.³⁰⁶ As media is interstate and sports are played in various states and players are required to cross state boundaries, the federal government has jurisdiction over college sports.³⁰⁷ Moreover, as presented in Part III.A, NIL is a subset of Right of Self that is constitutionally protected against wrongful private or public nonconsensual exploitation.³⁰⁸ As such, it is incumbent on the federal government to protect and defend the NIL rights of college athletes. A federal ROSA would spell out this fact and clarify the regulation of issues including enforceability, fines and penalties for noncompliance, retroactivity, descendibility, and other such details.³⁰⁹ Most importantly, a federal ROSA would guarantee players their NIL as a matter of right rather than as a privilege granted by the NCAA and certain state governments, furthering the concept of Right of Self as a universal right protected against all wrongful exploitation.

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

306. U.S. CONST. art. I, § 8, cl. 3 (granting Congress power to regulate interstate commerce).

307. *See Sports Law*, CORNELL LEGAL INFO. INST., <https://perma.cc/6W58-FWN5> (noting that professional sports are governed federally through antitrust legislation, except for baseball which the Supreme Court has exempted).

308. *See supra* Part III.A.

309. *See infra* ADDENDUM I.

2. Responding to Critics of ROSA

Despite the overwhelming constitutional and policy bases for recognition of Right of Self as a universal right relative to virtual self, there are critics to such an approach. Next, this section briefly responds to several possible arguments against a federal ROSA relative to its application to the NCAA matter. Each critique is accompanied by a response, which explains how the benefits of the solution outweigh its possible shortcomings.

First, some critics of a federal ROSA might argue that it is fatally flawed because it is based on the premise that Right of Self is a right, and thus inalienable—that is, that it cannot be voluntarily contracted to another person, or have its use be waived, such as when college athletes agree to play for an NCAA team. In response to this critique, this Article posits that as a personal right,³¹⁰ Right of Self is alienable by its owner to another person or entity. Moreover, it concedes that a player has an apparent choice in playing for an NCAA team and derives a substantial increase in the value of their brand as a result of doing so.³¹¹ However, it contends that the NCAA rules are overbearing and do not allow for fair and open negotiation and competition for a player's talent and, therefore, are anti-competitive in violation of the Sherman Act.

Second, some critics might argue that a federal ROSA would destroy college athletics by turning it a highly competitive, uncongenial activity, unbecoming of college life. There is no reason to believe this would be the outcome of the abolition the amateurism rules. Evidence is the abandonment of a similar amateurism rule in the Olympic Games.³¹² Olympic athletes are reasonably competitive; however, they are still collegial.³¹³ Moreover, this critique is illogical in that the coaches

310. See *supra* Part I.

311. See Kennington Lloyd Smith III, *How Important Will College Brand Value Be to Athletes in Name, Image, and Likeness Era?*, USA TODAY (July 2, 2021, 4:01 PM), <https://perma.cc/XW76-KGDY> (noting that choosing which college athletic program to participate in has historically depended on the program's "overarching brand").

312. See Casey Faucon, *Assessing Amateurism in College Sports*, 79 WASH. & LEE L. REV. 3, 82–83 (2022) (undercutting arguments for amateurism in college sports by analogizing the successful abandonment of amateurism in the Olympics).

313. *Id.*

of NCAA member schools are already often highly compensated as professionals.³¹⁴ That has not resulted in unprofessional behavior. Further, following the enactment of a federal ROSA, college athletes would be permitted to hire professional agents, which would result in an increase in the financial worth of self for all athletes.

Third, some critics might argue that the government's eminent domain powers allow it to take private property, including intellectual property, for a public purpose and with just compensation. Moreover, in the case of the NCAA, were it determined to be a governmental entity, the players are justly compensated for waiving their NIL rights. This compensation comes in both direct and indirect forms and is invaluable. In addition to a free education, room and board, etc., the players receive the benefits of status of playing on an NCAA team, including media exposure and the like. In the case of the NCAA, a critic might argue that no taking has occurred because the players have consented by waiving their NIL rights. In response to the consent issue, it is clear that there are unequal bargaining positions between the NCAA and its players. In light of the enormous financial benefits the NCAA and its members receive, the compensation given to the players is anything but fair.

Therefore, a federal ROSA embodies both constitutional principles and good public policy. Contrary to critics' assertions, a federal ROSA will not result in a less collegial environment on college campuses. Ultimately, a federal ROSA does not mean that Right of Self is inalienable. Rather, it places its value in the hands of the person whose name, image, and likeness are being commercially used: the players themselves. None of those critiques negate the positive impact of a federal ROSA in recognizing and protecting all Americans' Right of Self. Further, Right of Self will likely promote a greater and richer marketplace for virtual assets, which will enhance the income and wealth of its owners, particularly young people who are socially and economically disadvantaged.

* * *

Returning to the libertarian thesis of this Article, the *Alston* case evidences that libertarianism—the recognition and

314. See *College Football Head Coach Salaries*, *supra* note 238; *Men's Basketball Head Coach Salaries*, *supra* note 238.

protection of Right of Self—is alive in the Supreme Court’s jurisprudence, but just barely. While Justice Gorsuch and Justice Kavanaugh are the most libertarian-leaning Justices on the Court today, they are far from embracing Right of Self in *Alston*. If those Justices were true libertarians, they would have recognized Right of Self as applied to student athletes’ ownership and control of their labor and NIL, protected that right against *present and future* private and governmental exploitation, and awarded the students remediation for the *past* takings of their property rights. Consequently, we need a robust conversation on the status of our fundamental rights and particularly the role of the federal courts in protecting those rights within our federalist system of government.

CONCLUSION

This is a time to envision transformational change in our social order, to redress the wealth inequality between various segments of our society, particularly college students from disadvantaged communities of color. To achieve such a change, we must develop and embrace a different approach to entitlements, one that identifies and protects inherent rights, rather than enacting them as mere privileges subject to legislative discretion. Right of Self is an invaluable concept to make that vision a reality.

Right of Self is a libertarian principle that identifies and protects people’s right to possess and control all attributes of their self. Further, it is a modern restatement of our foundational principles of civil liberties. When applied to a contemporary issue of wealth equity relative to the NIL rights of college athletes, Right of Self proves to be a powerful paradigm to redress economic inequities on college campuses. If we are serious when we say that rights matter, we should recognize and embrace Right of Self.

ADDENDUM I: RIGHT OF SELF ACT (ROSA)

Part II of this Article provided three tenets that are reflected in the provisions of ROSA. The following is a proposed code that society, industry, government, and policymakers should adopt, and courts should enforce, to recognize and protect everyone's Right of Self.

A. *Overview*

The "Right of Self Act" (ROSA) is the proposed code that would guide government and policymakers in identifying and enforcing Right of Self, particularly as applied to virtual aspects of self, including NIL. It reflects the normative claim that every person in this country has a fundamental and constitutionally based right to possess and control the use of their self. Additionally, ROSA provides legal and equitable remedies for the wrongful exploitation of a person's Right of Self.³¹⁵ The specific provisions of the ROSA are as follows:

Recognizing that the Founding Fathers believed in Right of Self; that their belief is embodied in both the Declaration of Independence and in the Bill of Rights; that, in addition to the Bill of Rights, the Reconstruction Amendments reiterated and expanded the libertarian vision of the Founders to include formerly enslaved people of African descent; that the United States Supreme Court has recognized certain rights as fundamental, including the right of privacy; and that, in accordance with the Ninth Amendment, all rights not expressly superseded by the federal or state governments are reserved to the people, there is an inherent Right of Self in which every American possesses and controls the attributes of self as a property right.

"Self" is defined for purposes of this code as the "natural property" rights endowed in each and every person, encompassing a person's attributes or identity, such as labor; name, image, and likeness (NIL); and other unequivocal identifiers. It is defined as the intersection of personal rights

315. Congress is authorized to enact the ROSA because both the Fifth Amendment and the Fourteenth Amendment expressly grant Congress the authority to guarantee their effectiveness. See U.S. CONST. amend. V, § 2; *id.* amend. XIV, § 5.

and property rights to which a person is fundamentally, constitutionally, statutorily, or otherwise entitled, including, but not limited to, the right of privacy, the right of publicity, and the right not to be enslaved. “Self” applies in all mediums such as print, online, fantasy, cyberspace, and the virtual universe. “Attributes” of a person includes their labor, their brand, and a quality or feature regarded as a characteristic or inherent part of someone or something. Moreover, Right of Self is guaranteed in substantive due process through the penumbra of the Fifth Amendment and relative to the right to the attributes of one’s person expressly provided for in the Thirteenth and Fourteenth Amendments.

To protect Right of Self, it is proposed that the Government, at all levels, including Congress, the federal judiciary, and the Executive branch, as well as state and local governments, expressly recognize that Right of Self exists and is a right belonging to everyone, to own and control the use of attributes of self, particularly those virtual attributes such as NIL.

This code recognizes that the natural rights theory of property, as embodied in the Declaration of Independence of 1776 and in the United States Constitution, embraces the fundamental principle that we are all endowed with certain natural, or God-given, rights that are inalienable, including the possession and control of the virtual attributes of self, including name, image, and likeness, ending the question of whether there is a universal right in such attributes of self.

This Code seeks to protect people, specifically the most vulnerable in our society and particularly minors of color from disadvantaged communities, from all exploitation of their virtual selves by granting legal and equitable remedies to victims of such exploitation, including the use of injunctive relief and constructive trusts, as well as compensatory and punitive damages, including private, governmental, and governmental-spoused expropriation.

Additionally, this Code seeks to remedy past, present, and future expropriation of Right of Self 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 and including the exploitation of National Collegiate Athletic Association (NCAA) athletes.

Therefore, this Code (1) recognizes Right of Self, (2) codifies it as a fundamental principle of law, and (3) prohibits both private and public exploitation of the virtual aspects of a person's self without their full knowledge and express consent. It constitutes a win-win, as it protects the privacy of people while providing clear guidance to society, industry, and government that would avoid needless litigation. This change will deliver both justice and peace of mind for those who wish or need to protect their self.

B. *The Provisions*

Whereas, Right of Self is fundamental and should be constitutionally protected against direct and indirect private, industry, and governmental exploitation of self;

Whereas, the federal government, through its antitrust laws and non-profit status granted to the NCAA, has taken and continues to expropriate the rights of college athletes without impunity and without just compensation;

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

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

Whereas, the United States Supreme Court, in a unanimous decision, signaled to the NCAA that the growing view that its amateurism rules are unfair would jeopardize its antitrust protections;

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

Whereas, while NIL rights represent millions of dollars in potential compensation to a selective few, high-profile NCAA athletes, the NCAA, and its members will continue to rake in and continue to keep 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 the NCAA misconstrues these rights as privileges under the control of the NCAA;

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

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

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

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

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

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

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

(4) All levels and branches of Government, to the highest extent of their powers and authorities, are hereby mandated to

abolish all direct or indirect taking of self. This mandate is self-evident and does not require supplemental action other than the immediate endeavors needed to facilitate these requisites.

(5) The Justice Department is hereby mandated to investigate each and every alleged incident of such takings.

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

(7) And, any past taking, exploitation, use, or infringement of attributes of self shall be enjoined by the adoption of this Code. Such abuses shall be retroactively compensated to the full extent of the current market value of the abuse.