Tufts Undergraduate Law Review

VOLUME II ISSUE II

Contents

In the Journal

Letter from the Editor	Anna Fattaey A26	p. 1
Foreseeable Psychiatric Decompensation in Incarceration: Sentencing CHR-P Defendants	Connor DeBoda A26	p. 2
Do Not Give Up on the Digital Advertising Tax	Anika Parr A28	p. 12
Executive Order No. 14365: Attempting to Set a National Policy on Artificial Intelligence Violates the Framers Vision of Federalism under both the Supremacy and Commerce Clauses	Colin Cooper A26	p. 20
Restricting Refuge: Considering the 1951 Refugee Convention in Light of Current U.S. Migration Policy	Anna Fattaey A26	p. 25
The Constitutional Rebellion: How *Luther v. Borden* Reshaped American Government	Grant Pinsley A28	p. 30
Is AI Generated Text Protected Speech? Regulating Generative AI in the Behavioral Health Sector	Sravya Dontharaju A28	p. 37
TULR Masthead		p. 42

Dear reader,

Thank you for reading and supporting Tufts Undergraduate Law Review.

This semester, the Review has been interested in questions about the ways in which courts grapple with pressing social and political issues. At America 250, we recognize that the courts are intended to steer this country's political landscape to align with the intentions set at our founding. As more social and political questions are posed to the courts, their ability to guide our society becomes an important consideration. As cases like Luther v. Borden illustrate, decisions of the Court can have lasting and expansive effects far after the immediate political issue is resolved. Given the lasting impacts of the judiciary, this volume contemplates how the courts can facilitate the advancement of the social and political world we aspire to create. Political matters such as Maryland's Digital Advertising Act are being advanced in the courts while issues including artificial intelligence regulation and the Political Questions doctrine raise inquiries about revision. Through this volume, we aim to join the discussion about how the courts can best lead us to the country we wish to see at its quincentennial.

This publication would not have been possible without the unwavering support of the Jonathan M. Tisch College of Civic Life, the Tufts Community Union, and our generous donors for their continued patronage. We would also like to thank all of our writers and editors for their steadfast contributions to the Review. We, as editors of the Review, believe that legal scholarship should be available to all undergraduate students regardless of their intended career path. Legal analysis extends beyond the practice of law and is an essential tool in understanding how our society has, does, and will function. Undergraduate legal scholarship is especially important in upholding Tufts' commitment to civic engagement by helping the community understand the ways in which the law is and can be used to impact all facets of life.

Signed,

Anna Fattaey
Editor in Chief of the Tufts Undergraduate Law Review

Foreseeable Psychiatric Decompensation in Incarceration

Sentencing CHR-P Defendants

by Connor DeBoda, A26

I. Introduction

Mathew[1] was eighteen years old when he pleaded guilty to fentanyl distribution in federal court. His public defender presented the court with a series of mitigating factors at sentencing. Mathew grew up in a single-parent household in a neighborhood marked by concentrated poverty and chronic exposure to community violence.[2] His mother was diagnosed with schizophrenia when he was four, placing him in a population with substantially elevated genetic liability for psychotic-spectrum illness.[3] He had a documented history of cannabis use disorder, a recognized independent risk factor for psychosis onset.[4] His attorney urged the court to weigh these factors alongside Mathew's active participation in therapy, community service, and a specialty drug court program in the months following his indictment.

What Mathew's attorney could not fully articulate, and what the sentencing record would not capture, was that Mathew was not simply a young man with a difficult history. Throughout adolescence, he had experienced persistent low mood, social withdrawal, and cognitive inefficiency that he could not name or explain. In large social gatherings, people seemed subtly but persistently *strange* to him. Some nights, his thoughts accelerated beyond his control. He had cycled through several counseling relationships, describing his experiences as feelings he was "unable to articulate." He was, in the clinical language that would only later be applied to him, a young man in the early symptomatic, or "prodromal," stage of psychosis[5]. None of his treating clinicians, working without a structured prodromal assessment, had ever administered the kind of interview that might have identified what was happening.[6] His chart carried diagnoses of generalized anxiety disorder and cannabis use disorder. The prodromal picture went unrecognized and, at sentencing, unweighed.

The judge sentenced Mathew to six years of incarceration.

During those six years, the environmental conditions that the stress-diathesis model of psychosis identifies as the proximate triggers of conversion were not merely present; they were structural and inescapable. Mathew continued using substances inside, primarily synthetic cannabinoids, a population-level pattern well documented in correctional settings.[7] He had no contact with his mother or any immediate family member during his entire period of incarceration. He witnessed repeated acts of serious violence, beatings, stabbings, and deaths.[8] The chronic, unpredictable, threatening environment of a correctional facility demanded a state of sustained hypervigilance.[9] Correctional mental health staff administered periodic counseling sessions for anxiety. Nothing in his record suggested that anyone recognized or had screened for the prodromal trajectory that had been quietly advancing since before his arrest.[10]

Mathew was released at twenty-four. Within weeks, the experiences that had always been faint and nameable began to reorganize into something else entirely. The vague sense that people were strange became a conviction that strangers were watching him. Ambient distrust became a fixed belief that government agents were surveilling him, building a case to frame him for murder. He monitored television news broadcasts for hours each day, certain that anchors were embedding personalized messages in their language, communications directed at him specifically, about plans he alone could perceive. After approximately a year of living within these experiences without intervention, Mathew called the police to report that a government transmission was being broadcast into his home. He was hospitalized. He received his first formal diagnosis of schizophrenia.[11]

Mathew's story illustrates a failure that is not accidental but foreseeable, and under the governing framework of federal sentencing, legally cognizable. The clinical literature on Clinical High Risk for Psychosis ("CHR-P") has established with increasing precision that psychosis onset is not random.[12] It is probabilistic, environmentally mediated, and for individuals with identified prodromal vulnerability, substantially accelerated by the conditions that define incarceration. A sentencing framework that does not account for this reality is not merely incomplete. Under 18 U.S.C. § 3553(a)'s mandate that courts impose sentences sufficient, but not greater than necessary, sentencing an individual at high risk for psychosis may render a sentence substantively unreasonable in certain cases.

Mathew's story is fictional, but unremarkable. More than half of patients hospitalized for a first episode of

psychosis report a prior history of incarceration.[13] The stress-diathesis model, validated across decades of research, predicts exactly this outcome for individuals with pre-existing prodromal vulnerability who are exposed to the chronic, inescapable, unpredictable stress of custodial confinement.[14]

The sentencing of CHR-P defendants to incarceration without individualized consideration of the foreseeable psychiatric harm that incarceration is clinically understood to impose produces sentences that are, in the most fundamental sense, *greater than necessary.*[15] The parsimony principle embedded in 18 U.S.C. § 3553(a) demands that federal sentences be sufficient but not more than necessary to comply with the purposes of sentencing.[16] When a sentence's predictable side effect is the destruction of the defendant's psychiatric health, and when that destruction is preventable, the parsimony principle is violated regardless of whether the Sentencing Guidelines would otherwise recommend custody.

This article provides a clinically grounded introduction to CHR-P: what it is, how it is identified, and why the construct is scientifically tractable enough to support legal claims. It analyzes how CHR-P status fits within the individualized sentencing framework that the Supreme Court has required since *United States v. Booker,*[17] demonstrating that incarceration of a CHR-P defendant may render a sentence 'greater than necessary' under § 3553(a)'s parsimony mandate. It then sketches an Eighth Amendment argument grounded in the concept of foreseeable harm, arguing that, in its most severe applications, the deliberate imposition of conditions known to trigger psychosis in vulnerable individuals may constitute cruel and unusual punishment.[18]

The article confronts two significant objections. The first is evidentiary: how does CHR-P status realistically enter the sentencing record, and what quality of evidence is required to trigger the proposed analysis? The second is administrability: does importing psychiatric risk categories into sentencing law open the courthouse to an unmanageable proliferation of clinical claims? On the evidentiary question, existing mechanisms, pre-sentence investigation reports, expert testimony, and defense-sponsored psychiatric evaluations provide adequate vehicles. On administrability, a limiting principle tied to validated clinical instruments and documented treatment histories cabins the argument to a manageable class of defendants.

CHR-P is not a get-out-of-jail-free card. This article does not argue that CHR-P status should categorically preclude incarceration. Some offenses are sufficiently serious, and some defendants sufficiently dangerous, that custodial sentences remain appropriate even when psychiatric risk is present. The argument is more modest: that CHR-P status is a legally material fact that must be considered in the sentencing calculus, and that where community-based alternatives exist that can fulfill the purposes of sentencing, the foreseeable psychiatric cost of incarceration should tip the balance toward those alternatives.

II. The Clinical Science Of CHR-P

A. The Prodromal Concept and the CHR-P Construct

Modern psychiatry has long recognized that serious mental illnesses rarely emerge without warning.[19] Like cardiovascular disease or type II diabetes, psychotic disorders typically develop through identifiable prodromal stages in which early signs and symptoms precede full clinical expression.[20] The prodromal hypothesis, that the period immediately preceding first-episode psychosis is clinically observable and potentially modifiable, has animated the most important advances in psychiatric early intervention over the past three decades.

The construct of CHR-P operationalizes this insight. CHR-P designates young, help-seeking individuals who present with attenuated positive psychotic symptoms, subclinical experiences of perceptual disturbance, unusual thought content, or disorganized thinking that are distressing, recurrent, and associated with functional decline, but have not yet crossed the threshold of frank psychosis.[21] The concept emerged from clinical research at the Early Psychosis Prevention and Intervention Centre in Melbourne and the PRIME clinic at Yale, and has since been validated across dozens of longitudinal studies spanning multiple continents.[22]

An individual who is CHR-P is not psychotic, not necessarily impaired, and not necessarily going to become psychotic. But relative to the general population, their probability of developing psychosis within the next two to three years is elevated by orders of magnitude[23]. Population-level transition rates for CHR-P individuals range from approximately 16% to 35% within three years, compared to a baseline rate of approximately 1% across the lifespan.[24]

B. Identification and Clinical Instruments

CHR-P is identified through structured clinical interviews that assess the frequency, intensity, and duration of attenuated psychotic symptoms, along with functional decline and family psychiatric history.[25] Two instruments dominate clinical practice in the United States: the Structured Interview for Psychosis-Risk Syndromes ("SIPS"), developed at Yale, and the Comprehensive Assessment of At-Risk Mental States ("CAARMS"), developed in Melbourne.[26] Both tools have established inter-rater reliabili-

ty, validated predictive accuracy, and are administered by trained clinicians, typically in specialized early intervention programs.

CHR-P criteria identify three overlapping risk syndromes: Attenuated Psychosis Syndrome ("APS"), Brief Intermittent Psychosis Syndrome ("BIPS"), and Genetic Risk and Deterioration Syndrome ("GRDS").[27] APS is by far the most clinically common. It captures individuals who experience below-threshold and transient hallucinations, delusions, or disorganized thinking that emerged or worsened in the past year alongside some functional decline. The key clinical distinction from frank psychosis is that APS symptoms are partial. The individual retains insight, can distinguish unusual perceptions from reality, and experiences the symptoms with sufficient ego-dystonia to seek help.[28]

The legal significance of validated clinical instruments cannot be overstated. A core concern about importing psychiatric categories into sentencing law is the specter of soft, impressionistic diagnoses that resist objective verification.[29] CHR-P addresses this concern with unusual directness. The SIPS and CAARMS are not narrative clinical impressions. They are structured instruments with defined anchor points, inter-rater reliability coefficients in the good-to-excellent range, and predictive validity documented across prospective longitudinal samples.[30] An individual's CHR-P status, when established by a trained clinician using one of these instruments, is a finding of documented clinical weight.

C. The Role of Environment: Stress, the Dopaminergic System, and Conversion Risk

That CHR-P status exists on a continuum shaped by environmental factors is among the most robustly established findings in contemporary psychiatric science. The stress-diathesis model, the foundational framework for understanding psychotic illness, holds that psychosis emerges from an interaction between biological vulnerability (the diathesis) and environmental stressors that exceed the individual's threshold for regulation.[31] In CHR-P individuals, that threshold is already compromised. The environmental load required to tip them from attenuated to full-threshold psychosis is substantially lower than in individuals without prodromal vulnerability.

The neurobiological mechanism is increasingly well understood. Chronic stress dysregulates the hypothalamic-pituitary-adrenal axis, flooding the brain with cortisol and amplifying dopaminergic activity in mesolimbic pathways, the precise circuits implicated in the generation of positive psychotic symptoms.[32] Excess stress, particularly unpredictable and inescapable stress, produces a sensitization of dopamine release that, in vulnerable individuals, directly increases the salience of otherwise neutral stimuli and, ultimately, the probability of psychotic misattribution.[33] This is not a theoretical hypothesis. It is the reigning neurobiological account of how environmental stressors translate into psychotic symptoms in vulnerable individuals.

The clinical and empirical literature consistently identifies specific categories of stressors as particularly potent for CHR-P conversion: social isolation, chronic unpredictability, loss of control over one's environment, trauma exposure, and disruption of daily structure and routine.[34] Mitigating these stressors is the consensus recommendation of the early intervention field, incorporated into standard clinical guidance for CHR-P individuals and their families. Clinicians working with CHR-P patients routinely counsel them to avoid precisely the conditions that define the carceral environment.[35]

III. Incarceration As A Psychotogenic Environment

A. The Carceral Environment and Psychiatric Stress

The relationship between incarceration and psychiatric decompensation is not a peripheral concern of criminology. It is one of the best-documented findings in correctional health research.[36] The conditions of confinement, chronic noise, involuntary social proximity alternating with forced isolation, loss of autonomy over fundamental daily decisions, pervasive threat and hypervigilance, and the radical disruption of prior social networks, constitute a sustained stress exposure regime that is particularly toxic for individuals with pre-existing psychiatric vulnerability.[37]

Solitary confinement, which remains a routine management tool in federal and state facilities, amplifies these effects by orders of magnitude. Research by psychiatrist Stuart Grassian, based on clinical interviews with prisoners in isolation, documented a syndrome of perceptual distortions, hypersensitivity to stimuli, cognitive disorganization, paranoid ideation, and hallucinations that maps directly onto subclinical and clinical psychotic symptom clusters.[38] Craig Haney's extensive empirical work on the psychological effects of supermax confinement similarly documents that the conditions of isolation produce sequelae, hypervigilance, social withdrawal, and difficulties with perceptual discrimination, which are both consistent with prodromal psychotic experience and predictive of worsening psychiatric outcomes.[39]

The stressors present in the general population incarceration system? are not negligible for a CHR-P individual. The constant threat of interpersonal violence, the pervasive uncertainty of release, the disruption of family ties,

the loss of occupational and educational trajectories, and the systematic erosion of self-determination constitute a sustained adverse environmental load that the stress-diathesis literature would predict to accelerate conversion in vulnerable individuals.[40] For Mathew, or any individual in the CHR-P range, the prison environment is a clinically identifiable hazard.

B. Epidemiological Evidence: Psychosis in Prison Populations

Epidemiological data corroborate the theoretical prediction. Psychotic disorders are dramatically overrepresented in prison populations relative to the general population.[41] Approximately 3.7% of male prisoners and 4% of female prisoners met criteria for a psychotic illness, compared to roughly 1% of the general population.[42] In one study examining incarceration as a precursor to FEP hospitalization, 57.8% of patients hospitalized for their first psychotic episode reported a prior history of incarceration.[43] While this figure does not establish that incarceration caused conversion in any individual case, the magnitude of the association is clinically striking and epidemiologically suggestive. Even granting the selection effect, that CHR-P individuals may face elevated rates of criminalization due to social marginalization and symptom-related behavior, the stress-diathesis model predicts that incarceration will accelerate conversion in those individuals beyond what would occur in the community. The excess stress of incarceration is not a selection artifact. It is an environmental exposure with documented psychiatric sequelae.[44]

However, a candid assessment of the evidentiary landscape requires acknowledgment of the causal gap between CHR-P and conversion to psychosis. The existing literature robustly establishes that (1) CHR-P individuals are at elevated conversion risk; (2) excess stress accelerates conversion in CHR-P individuals; and (3) psychotic disorders are overrepresented in prison populations. What the literature does not yet establish through randomized controlled trials is that the specific conditions of incarceration are conversion risk factors for CHR-P individuals.

This limitation does not defeat the argument, but it does shape it. The legal standard this article invokes, the parsimony principle of § 3553(a), does not require proof beyond a reasonable doubt that incarceration will cause psychosis in a given defendant. It requires that a court consider the foreseeable consequences of a sentence in light of the defendant's individual circumstances. The convergent evidence, established mechanisms, epidemiological associations, and clinical predictions are sufficient to make incarceration a foreseeable risk for a CHR-P defendant, in the sense that the word 'foreseeable' carries in both law and clinical medicine.

IV. The § 3553(a) Statutory Argument

A. Post-Booker Sentencing and Individualized Consideration

The federal sentencing landscape was irrevocably altered by the Supreme Court's decision in *United States v. Booker,* which rendered the United States Sentencing Guidelines advisory rather than mandatory. Federal sentencing guidelines determine a prison range based on a matrix that intersects a total offense level with a criminal history category. The guidelines provide a presumptive range for judges, with higher offense levels and more extensive criminal history resulting in higher, broader sentencing ranges. Following *Booker,* courts are required to calculate the applicable Guidelines range and then consider that range alongside all other relevant factors enumerated in 18 U.S.C. § 3553(a).[45] *Gall v. United States* and *Kimbrough v. United States* confirmed that district courts possess broad discretion to vary from the Guidelines based on individualized § 3553(a) analysis, and that appellate courts must review such variances for reasonableness under a deferential abuse-of-discretion standard.[46]

Section 3553(a) instructs courts to impose a sentence "sufficient, but not greater than necessary" to comply with the purposes set forth in the statute. Those purposes include reflecting the seriousness of the offense, promoting respect for the law, providing just punishment, affording adequate deterrence, protecting the public from further crimes of the defendant, and providing the defendant with needed educational, vocational, medical, or other correctional treatment.[47] The statute also directs courts to consider "the history and characteristics of the defendant," a phrase that the Supreme Court has construed broadly to encompass mental health history, vulnerability, and the likely effects of a sentence on the defendant's well-being.[48]

The post-*Booker* sentencing framework is, in short, expressly designed for individualized, fact-sensitive analysis of precisely the kind this article proposes. A defendant's CHR-P status, documented through validated clinical instruments, reflected in a psychiatric evaluation, and presented through defense counsel or a probation officer's pre-sentence report, is the kind of individualized circumstance that § 3553(a) contemplates, and courts are empowered to consider.[49]

B. CHR-P Status and the Parsimony Principle

The parsimony principle is the operative mandate of § 3553(a). It prohibits courts from imposing sentences that exceed what is necessary to fulfill the statute's purpos-

es. In practice, after *Gall* and *Kimbrough,* this means that when a below-Guidelines sentence would adequately serve the statutory purposes, a within-Guidelines sentence may itself be unreasonable. It may be greater than necessary."[50]

For a CHR-P defendant, incarceration imposes a psychiatric cost, the foreseeable risk of conversion to psychosis, that is both individual and social. On the individual side, that cost includes the deterioration of the defendant's mental health, the foreclosure of their educational and vocational prospects, the disruption of family relationships, and the significant reduction in life quality associated with schizophrenia-spectrum illness.[51] On the social side, it includes the elevated recidivism and increased public costs associated with untreated or newly-onset psychotic illness in formerly incarcerated individuals.[52] Neither cost advances any of the purposes of sentencing articulated in § 3553(a). Incarceration-induced psychosis does not reflect the seriousness of the offense; it compounds it.

Consider how the analysis applies to Mathew. If the court imposes a Guidelines-range custodial sentence, Mathew will be incarcerated in an environment that his clinicians have specifically identified as hazardous to his psychiatric health. His CHR-P status means that his dopaminergic system is already sensitized, his regulatory capacity already partially compromised, and his threshold for psychotic conversion already materially lower than the general population.[53] The chronic stress, the loss of his early intervention programming, the disruption of his treatment relationships, and the adverse conditions of confinement will, according to the stress-diathesis model, collectively constitute the kind of environmental load that accelerates conversion.[54] The foreseeable consequence, not certain, but clinically significant, is that Mathew will emerge from incarceration psychotic or will develop psychosis during incarceration.

Avoiding psychiatric harm to the defendant is not ordinarily a consideration that courts raise *sua sponte*. But it becomes legally available once defense counsel or the pre-sentence investigation places CHR-P status before the court. At that point, the parsimony mandate requires engagement. A court that acknowledges a defendant's CHR-P status and then imposes a custodial sentence without considering whether community-based alternatives could equally serve the sentencing purposes has, this article contends, failed to conduct the individualized analysis that § 3553(a) requires.[55]

C. Community-Based Alternatives and the § 3553(a) Purposes

The § 3553(a) analysis does not require that courts eliminate incarceration as an option for CHR-P defendants. It requires that courts consider whether the statutory purposes can be adequately served by a less restrictive sentence.[56] For CHR-P defendants, the relevant alternatives include supervised release with psychiatric treatment conditions, mental health court diversion where available, and residential treatment programs. These alternatives are not theoretical. They are increasingly embedded in federal and state criminal justice infrastructure, and they have documented advantages over incarceration for defendants with psychiatric vulnerability.[57]

On deterrence, the available evidence does not support the proposition that lengthier sentences deter crime among individuals with psychiatric illness. Research consistently demonstrates that deterrence operates through certainty of punishment rather than severity, and that individuals with psychiatric vulnerability are particularly unlikely to engage in the prospective cost-benefit analysis that deterrence theory assumes.[58] On public safety, the relevant finding is counterintuitive but robust: incarceration of a CHR-P defendant that produces conversion to psychosis increases recidivism risk, rather than reducing it. An individualized § 3553(a) analysis that takes CHR-P seriously may therefore support community-based alternatives not only as more humane, but as more effective at achieving the goals of public safety and deterrence.

The treatment rationale is perhaps the most straightforward. Section 3553(a)(2)(D) explicitly directs courts to consider providing "needed ... medical ... or other correctional treatment in the most effective manner."[59] For CHR-P defendants, the "most effective manner" is not incarceration. Federal correctional facilities do not offer SIPS or CAARMS-based early intervention programming. They do not maintain continuity with community early intervention teams.[60] They do not provide the low-stress, high-support environment that clinical guidelines recommend for CHR-P individuals.[61] Incarceration does not meet the standard of treatment in the "most effective" manner.

D. How CHR-P Enters the Sentencing Record

A central practical question is the mechanism by which CHR-P status reaches the sentencing court. Several vehicles exist, each with distinct procedural characteristics.[62]

The Pre-Sentence Investigation Report ("PSR"), prepared by the United States Probation Office, is the primary document through which individualized facts about a defendant's background, history, and characteristics are presented to the sentencing court. PSRs routinely include mental health history sections. A defendant who has been enrolled in an early intervention program, received a CHR-P assessment, or has a documented treatment re-

lationship with a clinical team presents a straightforward record for incorporation into the PSR. Relevant clinical documentation, including SIPS or CAARMS scores, clinical narratives, and treatment records would already ideally be part of sentencing memorandum.

18 U.S.C. § 3552(b) authorizes courts to order a study of the defendant's mental condition when such a study would materially assist in sentencing. For CHR-P defendants, a motion for a psychiatric evaluation conducted by a clinician experienced with early intervention and psychosis-risk assessment could establish the evidentiary foundation that this article's argument requires.[63]

Nothing precludes defense counsel from retaining a psychiatric expert to testify at the sentencing hearing regarding the defendant's CHR-P status and the psychiatric effects of incarceration on vulnerable populations. Expert testimony at sentencing is both permissible and routine. In cases involving psychiatric complexity, it may be the most effective vehicle for ensuring that CHR-P evidence is presented with the clinical precision it requires.

V. The Eighth Amendment Argument

A. Proportionality and the Constitutional Floor

The Eighth Amendment prohibits "cruel and unusual punishments." The Supreme Court has long understood this prohibition to incorporate a proportionality requirement: punishment must be proportionate to the offense, and punishments that are grossly excessive relative to the crime constitute cruel and unusual treatment.[64] In recent decades, the Court has applied proportionality analysis with increasing rigor in categorical cases involving cognitively or developmentally vulnerable defendants, holding that the execution of intellectually disabled persons and the imposition of life without parole on juvenile non-homicide offenders violate the Eighth Amendment.[65]

The Eighth Amendment argument in this article is not a categorical claim. It does not assert that all CHR-P defendants are categorically exempt from incarceration. Rather, it argues that, in cases where incarceration is clinically predicted, based on documented CHR-P status and individualized clinical assessment, to produce conversion to psychosis, the resulting sentence may be constitutionally disproportionate. A sentence that is appropriate when its effects are limited to the loss of liberty becomes a qualitatively different punishment when its foreseeable consequence is the destruction of the defendant's mental health.[66]

B. Deliberate Indifference and the Estelle Line

Estelle v. Gamble held that deliberate indifference to the serious medical needs of prisoners violates the Eighth Amendment.[67] The Court subsequently recognized in *Brown v. Plata* that serious mental illness is a 'serious medical need' within the meaning of *Estelle.*[68] These cases establish that the Constitution requires prison systems to attend to the psychiatric needs of confined individuals.[69] This article proposes a forward-looking application of the same principle. If the Constitution prohibits deliberate indifference to serious mental illness once an individual is incarcerated, it is at least arguable that the Constitution also imposes some constraint on the decision to incarcerate a defendant when doing so is clinically predicted to produce serious mental illness. The *Estelle* line addresses the conditions of confinement. This article's Eighth Amendment claim addresses the sentencing decision itself, the upstream choice that determines whether a CHR-P defendant will be placed in a psychotogenic environment.

The foreseeability concept is the bridge between these two doctrinal threads. If a court is presented with documented evidence that a CHR-P defendant faces a clinically significant risk of converting to psychosis upon incarceration, and the court nonetheless imposes a custodial sentence without considering that risk, it is difficult to argue that the resulting psychiatric harm was unforeseeable. The constitutional question, not yet resolved by any appellate court, and deliberately framed here as a developing argument rather than settled doctrine, is whether the deliberate imposition of a sentence that is clinically predicted to produce psychosis in a vulnerable defendant can constitute cruel and unusual punishment when less restrictive alternatives exist.[70]

C. The *Roper*/*Graham*/*Miller* Arc and Its Implications

The Supreme Court's decisions in *Roper v. Simmons, Graham v. Florida,* and *Miller v. Alabama* reflect an important methodological development: the Court's willingness to import scientific findings about human vulnerability and brain development into Eighth Amendment analysis.[71] In each of these cases, the Court relied on developmental neuroscience and behavioral science to define constitutional constraints on sentencing, holding that the empirical reality of adolescent brain development bears directly on the constitutional proportionality of certain punishments.[72]

Just as the Court in *Roper* and *Miller* rejected the fiction that juvenile defendants are indistinguishable from adults for Eighth Amendment purposes, because the science of brain development demonstrates that they are categorically different, this article argues that CHR-P defendants are not constitutionally indistinguishable from defendants without psychiatric vulnerability because the science of psychosis risk demonstrates that incarceration

imposes a qualitatively different punishment on them.[73]

The Eighth Amendment claim developed here is not ready for immediate judicial adoption. It requires a more robust empirical record directly linking incarceration to CHR-P conversion, and it requires litigation to develop the constitutional framework through which courts might evaluate individualized psychiatric predictions. This article advances the Eighth Amendment argument primarily as a structural horizon, a constitutional direction of travel that the § 3553(a) statutory argument is already beginning to trace, and as an invitation to further doctrinal development by scholars and practitioners who follow this work.

VI. Objections And Limiting Principles

A. The Administrability Objection

The most powerful objection to this argument is administrability. If courts must consider the psychiatric risks of incarceration for CHR-P defendants, what prevents any defendant with a psychiatric history from arguing that incarceration will harm their mental health? Will courts become psychiatric tribunals, evaluating attenuated claims of psychological vulnerability before every sentencing decision?

The limiting principle proposed in this article is tied to the validated clinical construct of CHR-P itself. Not all psychiatric vulnerability is CHR-P. The clinical instruments for CHR-P identification, the SIPS and CAARMS, are well-validated, have established inter-rater reliability, and identify a discrete and empirically defined class of individuals.[74] The argument is limited to defendants who can demonstrate CHR-P status through assessment on one of these validated instruments by a qualified clinician, supported by documentation of an existing treatment relationship. Defendants who present only generalized claims of depression, anxiety, or personality disorder do not meet this threshold.

The limiting principle also incorporates a causation element. To trigger the analysis, a defendant must demonstrate not only CHR-P status, but a documented clinical opinion that incarceration presents a significant risk of psychotic conversion given the defendant's specific clinical profile. This is the standard clinical risk assessment that early intervention clinicians conduct routinely. It is not a license for speculative testimony. It requires a clinician with CHR-P expertise to opine, based on a formal assessment, that the defendant's specific profile, symptom severity, functional decline, treatment history, and social circumstances make them particularly vulnerable to stress-induced conversion.

With these requirements in place, the class of defendants who can invoke the analysis is cabined. It is not limited to one or two identifiable individuals, but neither is it the limitless parade of horribles that the administrability objection envisions. It is, rather, a clinically defined subset of defendants whose psychiatric vulnerability is documented, validated, and clinically significant.

B. The Causation Objection

A second objection presses on causation. Even if incarceration is associated with psychotic outcomes, the causal story is complex: individuals with psychiatric vulnerability are also more likely to be criminalized, to have unstable housing and social support, and to present to correctional settings with pre-existing psychiatric burden. How can a court distinguish between incarceration causing psychosis and pre-existing vulnerability that would have produced psychosis regardless of the sentence?

This objection misunderstands the legal argument. The § 3553(a) parsimony principle does not require proof that incarceration will certainly cause psychosis in a given defendant. It requires that courts consider the foreseeable consequences of a sentence when determining whether that sentence is greater than necessary. The clinical prediction that incarceration will accelerate conversion risk, even without certainty, is a legally material fact that the statute requires courts to weigh. Courts routinely make probabilistic judgments about the consequences of sentencing decisions, including predictions about recidivism, deterrence, and rehabilitation potential.[75] The psychiatric risk presented by CHR-P defendants is not categorically different from these existing considerations; it is simply more precisely documented.

C. Racial Equity Considerations

Any discussion of CHR-P in the sentencing context must grapple with a significant equity concern: CHR-P identification and access to early intervention are not racially neutral. Black and Latino youth are consistently underrepresented in CHR-P early intervention programs, for reasons that include differential referral patterns, clinician implicit bias, distrust of mental health systems, and structural barriers to access.[76] If the § 3553(a) argument developed here benefits only defendants who have had access to specialized CHR-P clinics, which are disproportionately concentrated in academic medical centers serving predominantly White and economically privileged populations, then the argument may inadvertently widen existing racial sentencing disparities.

This concern is real and cannot be dismissed with a limiting principle. Courts applying the framework should be sensitive to resource disparities in CHR-P access and

should not disadvantage defendants from communities with limited access to early intervention simply because they lack formal CHR-P documentation.

Advocacy efforts should accompany legal reform: the expansion of CHR-P screening to court-affiliated mental health systems, public defenders' offices, and correctional intake settings is both clinically desirable and legally necessary if the benefits of this Article's argument are to be distributed equitably.

VII. Policy Implications And Conclusion

A. CHR-P Screening at the Intersection of Justice and Medicine

At the clinical level, CHR-P screening should be integrated into the mental health assessments conducted at criminal justice intake, particularly in jurisdictions with mental health courts and diversion programs. At the legal level, defense counsel should become familiar with CHR-P clinical instruments and the early intervention literature and should consult with psychiatric experts when clients present with sub-threshold psychotic symptomatology. At the judicial level, courts exercising individualized § 3553(a) discretion should request and consider clinical CHR-P assessments when defendants present relevant psychiatric histories.

These steps do not require new legislation. They require only the application of existing doctrine, the post-*Booker* sentencing framework, the § 3553(a) parsimony mandate, and the individualized consideration that the Supreme Court has consistently required, to a category of defendants whose clinical circumstances have not previously been brought into the legal frame with the precision that the science now permits.

B. Conclusion

The Eighth Amendment argument is not yet ripe for categorical judicial adoption, but it is ripe for scholarly development. The *Roper-Graham-Miller* arc demonstrates that the Court is willing to import empirical science about human vulnerability into constitutional proportionality analysis. The clinical science of CHR-P, properly developed in the evidentiary record, may eventually provide the empirical foundation for a categorical constitutional rule, or, more modestly, for a constitutional principle that requires courts to consider foreseeable psychiatric harm as a component of the proportionality analysis that the Eighth Amendment mandates.

Mathew's hearing is six weeks away. His clinicians know, with a precision that is unusual in psychiatric medicine, that he is at elevated risk for psychosis, that excess stress is his primary modifiable risk factor, and that the conditions of incarceration are precisely the conditions that the clinical literature identifies as psychotogenic for individuals with his profile. None of that knowledge currently reaches the federal judge who will sentence him. The law of sentencing is, at its best, an empirical discipline. It asks what sentence will actually serve the purposes of justice, given who this defendant is and what this sentence will do. The clinical science of CHR-P offers an unusually precise answer to that question for a defined class of defendants: incarceration will, with a clinically significant probability, produce psychosis. That probability is foreseeable. It is a consequence that no honest application of the parsimony principle, "sufficient, but not greater than necessary," can ignore.

Endnotes

1 Mathew is a fictional composite character. His story is not drawn from any individual's case file. It is constructed from the epidemiological literature on Clinical High Risk for Psychosis, the correctional mental health literature, and published accounts of first-episode psychosis onset in incarcerated populations. Any resemblance to a specific individual is coincidental.

2 Filippo Varese et al., *Childhood Adversities Increase the Risk of Psychosis: A Meta-Analysis of Patient-Control, Prospective- and Cross-Sectional Cohort Studies*, 38 Schizophr. Bull. 661 (2012).

3 Paul Lichtenstein et al., *Common Genetic Determinants of Schizophrenia and Bipolar Disorder in Swedish Families: A Population-Based Study*, 373 Lancet 234 (2009).

4 Marta Di Forti et al., *The Contribution of Cannabis Use to Variation in the Incidence of Psychotic Disorder Across Europe (EU-GEI): A Multicentre Case-Control Study*, 6 Lancet Psychiatry 427 (2019).

5 Alison R. Yung et al., *Monitoring and Care of Young People at Incipient Risk of Psychosis*, 22 Schizophr. Bull. 283 (1996); Thomas H. McGlashan et al., *Structured Interview for Prodromal Syndromes* (PRIME Research Clinic, Yale Univ. Sch. of Medicine, 2001).

6 Barnaby Nelson et al., *Clinical Risk Factors for Psychosis: A Review*, 12 Dialogues Clinical Neuroscience 271 (2010).

7 U.S. Dep't of Justice, Office of Inspector General, *Review of the Federal Bureau of Prisons' Management of Its Inmate Discipline Program* (2016).

8 Seena Fazel et al., *Prison Violence and Psychiatric Morbidity: A Systematic Review and Meta-Analysis of Prevalence Studies*, 70 JAMA Psychiatry 765 (2013).

9 Elaine F. Walker & Donald Diforio, *Schizophrenia: A Neural Diathesis-Stress Model*, 104 Psychol. Rev. 667 (1997).

10 Julian D. Ford et al., *Trauma Among Youth in the Juvenile Justice System: Critical Issues and New Directions*, 2 J. Juv. Just. 1 (2013).

11 Seena Fazel et al., *Mental Health of Prisoners: Prevalence, Adverse Outcomes, and Interventions*, 3 Lancet Psychiatry 871 (2016).

12 Paolo Fusar-Poli et al., *The Psychosis High-Risk State: A Comprehensive State-of-the-Art Review*, 70 JAMA Psychiatry 107, 107 (2013).

13 Claire E. Ramsay et al., *Prevalence and Psychosocial Correlates of Prior Incarcerations in an Urban, Predominantly African-American Sample of Hospitalized Patients with First-Episode Psychosis*, 39 J. Am. Acad. Psychiatry & L. 57, 57 (2011) (finding that 57.8% of first-episode psychosis patients reported a prior history of incarceration).

14 Jim van Os, Gunter Kenis & Bart P.F. Rutten, *The Environment and Schizophrenia*, 468 Nature 203, 205 (2010).

15 18 U.S.C. § 3553(a) (2018).

16 18 U.S.C. § 3553(a) (parsimony clause) (2018).

17 United States v. Booker, 543 U.S. 220, 245 (2005).

18 U.S. Const. amend. VIII.

19 Patrick D. McGorry et al., *Royal Australian and New Zealand College of Psychiatrists Clinical Practice Guidelines for the Management of Schizophrenia and Related Disorders*, 39 Austral. & N.Z. J. Psychiatry 1 (2005).

20 Patrick D. McGorry et al., *The Close-In or Ultra High-Risk Model: A Safe and Effective Strategy for Research and Clinical Intervention in Prepsychotic Mental Disorder*, 28 Schizophr. Bull. 771 (2002).

21 Paolo Fusar-Poli et al., *Predicting Psychosis: Meta-Analysis of Transition Outcomes in Individuals at High Clinical Risk*, 69 Arch. Gen. Psychiatry 220, 221 (2012).

22 Paolo Fusar-Poli et al., *Predicting Psychosis: Meta-Analysis of Transition Outcomes in Individuals at High Clinical Risk*, 69 Arch. Gen. Psychiatry 220, 221 (2012).

23 Fusar-Poli et al., *supra* note 21, at 222.

24 Paolo Fusar-Poli et al., *Predicting Psychosis: Meta-Analysis of Transition Outcomes in Individuals at High Clinical Risk*, 69 Arch. Gen. Psychiatry 220, 222 (2012).

25 See Fusar-Poli et al., *supra* note 12, at 110.

26 Alison R. Yung et al., *Mapping the Onset of Psychosis: The Comprehensive Assessment of At-Risk Mental States*, 39 Austl. & N.Z. J. Psychiatry 964 (2005); Thomas J. Miller et al., *Prodromal Assessment with the Structured Interview for Prodromal Syndromes and the Scale of Prodromal Symptoms: Predictive Validity, Interrater Reliability, and Training to Reliability*, 29 Schizophr. Bull. 703 (2003).

27 McGlashan et al., *supra* note 5; Miller et al., *supra* note 26 (describing the three CHR-P risk syndromes assessed by the SIPS)

28 Paolo Fusar-Poli et al., *The Psychosis High-Risk State: A Comprehensive State-of-the-Art Review*, 70 JAMA Psychiatry 107, 109 (2013).

29 See Christopher Slobogin, *Proving the Unprovable: The Role of Law, Science, and Speculation in Adjudicating Culpability and Dangerousness* (Oxford Univ. Press 2006) (examining the inherent difficulties courts face when adjudicating behavioral science evidence about mental state and risk).

30 See Miller et al., *supra* note 25, at 705 (reporting inter-rater reliability coefficients for the SIPS in the good-to-excellent range across trained raters); Yung et al., *supra* note 26, at 966 (documenting predictive validity of the CAARMS across prospective longitudinal samples).

31 Richard P. Bentall, *Madness Explained: Psychosis and Human Nature* 165–71 (2003).

32 Marian Joëls & Tallie Z. Baram, *The Neuro-Symphony of Stress*, 10 Nature Rev. Neuroscience 459, 461 (2009).

33 Jim van Os & Shitij Kapur, *Schizophrenia*, 374 Lancet 635, 639 (2009).

34 Anthony Morrison et al., *Cognitive Therapy for the Prevention of Psychosis in People at Ultra-High Risk: Randomized Controlled Trial*, 185 Brit. J. Psychiatry 291, 294 (2004).

35 See Int'l Early Psychosis Ass'n Writing Grp., *International Clinical Practice Guidelines for Early Psychosis*, 187 Brit. J. Psychiatry S120, S123 (2005) (recommending stress management support, coping skills development for subthreshold psychotic symptoms, and provision of care in low-stress community settings as core components of early intervention for individuals at risk of psychosis).

36 Stuart D. Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol'y 325, 328 (2006).

37 Hans Toch, *Mosaic of Despair: Human Breakdowns in Prison* 3 (rev. ed. 1992).

38 Grassian, *supra* note 36, at 335–36.

39 Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 Crime & Delinq. 124, 130 (2003).

40 Fazel & Danesh, *supra* note 41

41 Seena Fazel & John Danesh, *Serious Mental Disorder in 23,000 Prisoners: A Systematic Review of 62 Surveys,* 359 Lancet 545, 547 (2002).

42 Fazel & Danesh, *supra* note 41, at 547.

43 Ramsay et al., *supra* note 13, at 57.

44 Fazel & Danesh, *supra* note 41

45 Booker, 543 U.S. at 245.

46 Gall v. United States, 552 U.S. 38, 49–50 (2007).

47 18 U.S.C. § 3553(a)(1) (2018).

48 Gall v. United States, 552 U.S. 38, 49–50 (2007); Kimbrough v. United States, 552 U.S. 85, 91 (2007).

49 See U.S. Sentencing Comm'n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* 1, 5 (Dec. 2012) (noting judges' expansive reliance on § 3553(a) factors post-Booker).

50 Gall, 552 U.S. at 59.

51 Somnath Saha et al., A *Systematic Review of the Prevalence of Schizophrenia*, 2 PLoS Med. e141 (2005).

52 See Seena Fazel et al., *Psychotic Disorders and Repeat Offending: Systematic Review and Meta-Analysis*, 37 Schizophr. Bull. 800, 803 (2011).

53 *Supra* Note 21

54 Haney, *supra* note 39, at 130.

55 See United States v. Gall, 552 U.S. 38, 59 (2007) (noting that courts must consider the full range of § 3553(a) factors and may not presume Guidelines ranges are reasonable).

56 18 U.S.C. § 3553(a)(2)(B)–(C) (2018).

57 See Fusar-Poli et al., *supra* note 12, at 113 (reporting a meta-analysis of randomized controlled trials showing that focused treatment reduced transition to psychosis from 23% to 7% at one year, with a number needed to treat of 6, compared with contrast groups receiving nonspecific care).

58 Daniel S. Nagin, Deterrence: *A Review of the Evidence by a Criminologist for Economists*, 5 Ann. Rev. Econ. 83, 101 (2013) (concluding that studies of increases in already long prison sentences find at most a modest deterrent effect, while certainty of punishment consistently shows stronger effects); see also Richard E. Redding, The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century, 56 Am. U. L. Rev. 51, 115 (2006) (observing that defendants whose inhibitory brain systems are impaired by mental disorder are unlikely to respond to the deterrence effects of criminal sanctions).

59 18 U.S.C. § 3553(a)(2)(D) (2018).

60 See Fed. Bureau of Prisons, Psychology Services Manual, Program Statement 5310.16 (2014), https://www.bop.gov/policy/progstat/5310_016.pdf (describing the BOP's mental health care program levels and treatment offerings, with no provision for prodromal psychosis screening or early intervention protocols).

61 Morrison et al., *supra* note 42, at 295.

62 See Am. Acad. Psychiatry & L., *AAPL Practice Guideline for the Forensic Assessment*, 43 J. Am. Acad. Psychiatry & L. S3, S18–S22 (2015) (Suppl.) (describing the role of psychiatric evidence at sentencing).

63 United States v. Rausch, 570 F. Supp. 2d 1295, 1308 (D. Colo. 2008) (granting a one-day sentence where the Guidelines range was 97–120 months, finding that the defendant's cognitive impairment and medical vulnerability made incarceration disproportionately burdensome under § 3553(a)).

64 Weems v. United States, 217 U.S. 349, 366–67 (1910).

65 Atkins v. Virginia, 536 U.S. 304, 321 (2002); Roper v. Simmons, 543 U.S. 551 (2005).

66 Graham v. Florida, 560 U.S. 48, 75 (2010).

67 Estelle v. Gamble, 429 U.S. 97, 104 (1976).

68 Brown v. Plata, 563 U.S. 493, 510 (2011).

69 *Id.* at 511.

70 See David C. Fathi, *The Common Law of Supermax Litigation*, 24 Pace L. Rev. 675 (2004).

71 Miller v. Alabama, 567 U.S. 460, 471 (2012).

72 Roper v. Simmons, 543 U.S. 551, 568 (2005).

73 Miller, 567 U.S. at 477.

74 McGlashan et al., *supra* note 5; Miller et al., *supra* note 26.

75 See Pepper v. United States, 562 U.S. 476, 491 (2011) (affirming that sentencing courts must consider the full range of § 3553(a) factors, including forward-looking assessments of the defendant's rehabilitation trajectory and likely future conduct).

76 See Deidre M. Anglin et al., *From Womb to Neighborhood: A Racial Analysis of Social Determinants of Psychosis in the United States*, 178 Am. J. Psychiatry 599, 600–01 (2021) (documenting that structural racism shapes racial inequities in social determinants of psychosis, with Black and Latino populations bearing disproportionate exposure to environmental psychosis risk factors, and noting that access to early intervention programs reflects the same structural disparities).

Do Not Give Up On The Digital Advertising Tax

by Anika Parr, A28

Many forms of digital economic activity avoid taxation in the modern era. Policymakers argue that digital platforms operated by multinational companies, such as Google, Amazon, and Facebook, are undertaxed and do not contribute their fair share.[1] This is because current tax laws do not provide a framework to tax the economic activity of digital platforms, particularly when that activity spans multiple jurisdictions. These platforms enjoy "substantial revenues at high profit margins," yet continue to bear a comparatively low tax burden.[2] Data collected from the Office of Tax Analysis of the U.S. Treasury suggests that industries holding intangible assets earn "higher than average excess returns."[3] This means that multistate and national digital advertising platforms, which are known for having significant intangibles, likely earn profits well above most other sectors.[4]

One approach to more fully incorporate these platforms into the tax base has been the state-adoption of a Digital Advertising Tax ("DAT"). A DAT is a levy on a digital platform's ad sale. The tax, imposed by state governments, would be levied in proportion to the advertising revenue generated by platform users within the state. Users directly generate advertising revenue for digital platforms. In exchange for platform services, users "barter" their personal information, which is then sold for use in targeted advertisements.[5] The exchange of user information for web services is therefore embedded within each digital ad sale. Platform users are essential to the generation of revenue because their information is the value that advertisers pay for. This is why states have sought to impose the tax: to claim a share of the advertising revenue that local users help create for digital platforms.

In February 2021, Maryland became the first U.S. state to enact a DAT. It has since been met with substantial legal challenges, including alleged violations of the Internet Freedom Tax Act ("PIFTA"), the Commerce Clause, the First Amendment, and Due Process. The Court of Appeals for the Fourth Circuit ruled against Maryland on the First Amendment claims in August 2025, holding that the pass-through provision of Maryland's DAT violated the First Amendment.[6] This provision, ruled as an unconstitutional restriction on commercial speech, banned companies from passing down the tax to Maryland consumers "by means of a separate fee, surcharge or line-item."[7]

The flaws in Maryland's specific tax, such as the pass through provision, do not warrant the discrediting of DATs as unlawful. This article will examine the federal ruling on Maryland's DAT, as well as other claims currently being litigated in Maryland tax court. It will evaluate how a DAT may be structured to withstand legal challenge, suggesting that such taxes can be valid forms of taxation within the current legal framework. Interpreting the relevant legal provisions through a modern lens, with a clear understanding of the unique characteristics of digital commerce, can allow courts to recognize DATs as constitutional and legally valid. As University of California, Davis School of Law professor Darien Shanske and Cardozo School of Law professor Young Ran (Christine) Kim wrote in their amicus brief in *U.S. v. Lierman*, lawsuits against Maryland's DAT are attempts by large technology companies to "contort the law" in order to permanently exempt themselves from paying their fair share.[8] Valid claims against Maryland's DAT focus only on specific parts of the tax that can be modified while still achieving the law's primary goal: bringing highly profitable digital platform companies with minimal tax obligations into the state's tax base. Legislation often lags behind technological advancements, and current commerce regulations were written in the age when the primary business model was that of brick and mortar stores.[9] A technologically advancing world requires an understanding of the law that evolves alongside changing business models.

Background on Maryland's DAT

Maryland's Digital Advertising Tax Act imposes a duty on businesses that provide digital advertising services in Maryland. The tax is graduated based on the company's aggregate size and only applied to companies with at least $100 million in annual global revenues. Broadcast and news media entities are excluded from this tax.[10] Taxed companies are prohibited from passing the costs of the tax onto their customers "by means of a separate fee, surcharge, or line item," referred to as the "pass through provision."[11]

The tax has been described by the Maryland legislature as "a vital mechanism to make sure big tech pays taxes in Maryland, just like our small businesses." Maryland's tax prompted widespread scrutiny, including an early veto by Governor Larry Hogan. The legislature successfully overrode this veto.[12]

PIFTA Challenges

PIFTA-based claims against DATs pose a significant challenge to the viability of these taxes. The legislation prevents state and local governments from levying "multiple and discriminatory" taxes on electronic commerce.[13] Passed by Congress in 1998 with a temporary moratorium and made permanent in 2016, the PIFTA was designed to prevent a patchwork of "unpredictable and overly burdensome" state and local internet-specific taxes.[14] DATs impose a charge on online advertisements without imposing a similar charge on non-digital advertising, making them arguably discriminatory.[15] For instance, a similar tax is not levied on billboards or printed advertisements.

However, digital and print advertisements are not similar due to fundamentally different business structures and methods of delivery, making PIFTA inapplicable. PITFA defines a "discriminatory tax" as a charge on electronic commerce that "is not generally imposed and legally collectible by such state...on transactions involving similar property, goods, services."[16] Courts have rejected PIFTA claims when they determine that there are "substantive differences between allegedly analogous products and services."[17] For example, in *Village of Rosemont, Ill. v. Priceline.com, Inc.*, the court held that taxes resulting in higher fees for online travel companies than their brick-and-mortar counterparts did not violate PITFA, because the differing tax rates were based on differences in business models and fee structures rather than the mere fact that the companies conducted business via the internet.[18] Digital advertising platforms similarly rely on a different business model, making print and digital advertisements incomparable. Traditional advertising is delivered through a simple market exchange: a business pays for an advertisement, which is then displayed. The sale of a digital advertisement is more complex. The advertiser pays the platform to display ads to targeted users and provides information about how many and what kinds of users respond to the advertisement in exchange for a portion of the platform's fee.[19] Additionally, users allow the platform to collect personal data in exchange for access to the services, which in turn enables the platform to deliver advertisements to the most relevant audiences.[20] These transactions are deeply intertwined: the very act of displaying an ad is often both an ad exposure for which the advertisers pay and a data collection tool for the advertising platforms. This makes the action of selling a digital advertisement fundamentally different from the physical equivalent. This difference also makes digital advertising revenue more directly taxable as opposed to its physical equivalent, because it involves the exchange of a service. Users of digital platforms "pay" for platform service by allowing advertisers to access their data and target ads to them. Traditional advertising does not involve the exchange of a similar service. This difference in business models is therefore relevant: traditional advertising is less directly tied to taxable economic activity.

Opponents of the tax also claim that the DAT imposes a "multiple tax" on electronic commerce, which would be in violation of PIFTA. PIFTA defines a multiple tax as any assessment that is imposed by one state on "the same or essentially the same electronic commerce that is also subject to another tax imposed by another state without a credit for taxes paid in other jurisdictions."[21] The apportionment formula, which determines the portion of a company's advertising revenue subject to Maryland tax, creates the potential for multiple taxation.

Taxable amounts under the Maryland DAT are calculated by dividing the devices accessing digital advertisements in Maryland by the devices accessing digital advertisements worldwide for a given company, multiplied by the company's digital advertisement gross revenue.[22] This is intended to represent the revenue derived from digital advertising services in Maryland. The idea is to determine the percentage of devices accessing digital advertising in Maryland relative to the global total, and then apply that proportion to gross advertising revenue to calculate the amount subject to the tax.[23] The problem with this method is that it relies on the number of devices rather than the actual revenue generated in Maryland. As a result, it may tax income earned outside the state and increase the likelihood that the same revenue is taxed by multiple jurisdictions. An expensive ad campaign outside of Maryland could still be partially attributed to Maryland advertisement revenue, even if the advertiser only ran much cheaper ads within the state.[24] This is where the risk of double taxation arises: the jurisdiction where the expensive ad campaign actually ran will tax the revenue based on where it was earned, while Maryland also taxes a disproportionately large share of that same revenue under its apportionment formula. Additionally, because the apportionment formula relies heavily on locating devices to report how many Maryland devices accessed a platform's digital advertising, taxpayers are having to use Internet Protocol addresses or cookies to determine whether the device is in or outside of Maryland in their initial calculation. With the existence of private browsers, which cannot collect information on internet users, determining precisely where the advertisements are accessed is nearly impossible.[25] While the Maryland DAT provides a throw-out rule, which allows devices that cannot be located to be discarded from the numerator and denominator of the apportionment formula, it does not adjust "the amount of revenue to be apportioned."[26] This makes double taxation likely, since revenue generated from ads viewed in indeterminate locations is still included in digital advertising revenue

(the base amount multiplied by Maryland's percentage), resulting in taxation of value that is only loosely tied to where the revenue is actually generated.

Maryland's apportionment formula's imprecision gives PITFA-based claims some merit to the extent that the formula risks imposing multiple taxation. The lack of precision in the current apportionment approach appears to be the kind of concern the PIFTA legislation was intended to address. However, revising the apportionment formula to make it more exact could eliminate multiple taxation concerns. While Maryland's specific tax may face legal vulnerability due to its apportionment formula, this does not imply that all digital advertising taxes violate PITFA. Rather, it suggests that appropriately designed apportionment methodologies could be developed to avoid PITFA challenges while still achieving the tax's objectives.

Commerce Clause and Due Process

Both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment raise similar constitutional concerns regarding the tax's validity. Due Process prohibits states from punishing or regulating extraterritorial conduct or activities.[27] Opponents argue that a company's liability for digital ad revenue in Maryland depends largely on out-of-state activities, violating due process by failing to establish a rational nexus between the tax and the benefits provided by the state. The Commerce Clause requires that state taxes be fairly apportioned and not "discriminate against interstate commerce."[28] Because the tax increases with company size, it is alleged to disproportionately burden interstate commerce. Additionally, the DAT may charge extraterritorial revenue, making it unfairly apportioned.

The *Complete Auto Transit v. Brady* test is a four-pronged Supreme Court standard used to determine if a state tax violates the Commerce Clause.[29] There must be (1) a sufficient connection between the taxpayer and the state to warrant the imposition of state tax authority (nexus), (2) the state must not tax more than its fair share of the income of a taxpayer (fair apportionment), (3) the state must not treat out-of-state taxpayers differently than in-state taxpayers (no discrimination), and (4) the tax must be fairly related to services provided to the taxpayer by the state.[30] In addressing these prongs, I will respond to the claims raised under both the Due Process Clause and the Commerce Clause.

Modern interpretations of due process and the Commerce Clause standards in *South Dakota v. Wayfair, Inc.* support that a sufficient nexus can be established for digital advertising taxes based on the economic activity generated by in-state users, even without physical presence. As established in *Northwestern Cement Co. v. Minnesota*, a business's activities must create a sufficient nexus to satisfy due process requirements.[31] A nexus is also required by prong 1 of the *Complete Auto Transit v. Brady* test. A tax nexus exists when a business has a "sufficient connection" to a state. In *South Dakota v. Wayfair, Inc.*, the Court established that a business "need not have a physical presence in a State to satisfy the demands of due process."[32] Before the *Wayfair* decision, *Quill Corp. v. North Dakota* established that states could not impose taxes on remote transactions unless they had a physical presence. When *Wayfair* overturned this, the court emphasized the importance of addressing "the present realities of the interstate marketplace, where the internet's prevalence and power have changed the dynamics of the national economy," when interpreting the Due Process and Commerce Clauses.[33] The Supreme Court has allowed states to adapt their tax rules to the modern economy through *Wayfair*, including taxing economic activity without physical presence. By emphasizing that the Commerce Clause can accommodate new realities such as digital transactions, *Wayfair* supports the idea that a nexus can be established by showing the volume of economic activity generated by in-state users of digital advertising.

In Maryland, the engagement of local residents with digital advertising creates a sufficient connection to the state, establishing a valid nexus. The two-sided nature of digital advertising strengthens this claim. On one side, users gain free access to the platform and on the other, advertisers pay for access to those users. These sides are inseparable as advertiser revenue exists only because Maryland residents engage with the platform. Therefore, the presence and activity of Maryland users directly generate the economic value that is taxed, creating a sufficient connection to the state to satisfy due process requirements. Consequently, requirement 4 is likely satisfied because companies derive meaningful benefits from access to Maryland users.

Violations of prongs 2 and 3 are more significant challenges. Opponents contend the DAT treats out-of-state taxpayers differently from in-state taxpayers, thereby discriminating against interstate commerce. Additionally, the DAT allegedly taxes extraterritorial value in violation of the fair apportionment requirement of the test. However, both of these claims can be resolved. The apportionment problem can be fixed by adjusting the formula to avoid taxing out-of-state revenue. While the tax may apply more heavily to companies engaged in interstate commerce, annual gross revenues serve as a proxy for the value those larger companies derive from access to Maryland users, making the tax not discriminatory according to precedent set from *Oklahoma Tax*

Comm'n v. Jefferson Lines.

Because Maryland's apportionment formula is based on annual global revenues, it could unintentionally tax revenue earned outside the state. This would put the DAT in violation of the Commerce Clause. However, the digital advertising tax is only intended to tax receipts derived from advertising in Maryland.[34] Therefore, similar to the PITFA "multiple tax" claim response, if the apportionment formula's precision could be improved, the tax would not be imposed on extraterritorial value. While the court could find that Maryland's DAT violates the Commerce Clause by inadvertently taxing out-of-state revenue, such a ruling would only affect the method of apportionment, not something intrinsic to the concept of a DAT. If the tax could be tailored to effectively only include Maryland values, as was its intent, it would not violate prong 2.

The prong 3 violation cannot be remedied by improving the apportionment formula. The DAT rate gets progressively higher for companies with larger annual gross revenue, meaning that a DAT is placing an undue burden on interstate commerce and potentially violating prong 3 of the *Complete Auto Transit* test. The Maryland DAT "favors state companies, exceedingly few of which will be subject to the charge imposed by the [DAT]" because most in-state companies do not have annual gross revenues of $100 million or more.[35] Therefore, the liability imposed by the Maryland DAT will be borne almost entirely by out-of-state companies based on their out-of-state conduct, making the tax discriminatory. As defined in *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, a case that determined a fee on out-of-state waste disposed of in Oregon was discriminatory because it was three times higher than the fee imposed on in-state waste, the term discrimination in this context means "differential treatment of in-state and out-of-state economic interest that benefit the former and burden the latter."[36] If a restriction on commerce is discriminatory, it is invalid.[37] While out-of-state companies almost certainly will face a higher burden because of their larger size, this does not necessarily mean that the DAT is discriminatory. Out-of-state companies happen to be burdened more heavily due to their annual gross revenues, but this is only because annual gross revenues serve as a practical way to measure the value that digital platforms derive from being able to access Maryland residents. Larger companies with higher global revenue get more value for each Maryland user's information they are able to access because they have more sophisticated tools, better ad targeting, and larger audiences.[38] The distinction is that these companies aren't burdened for being out of state, but burdened for deriving greater benefits. In *Oregon Waste Sys.*, the only factor determining the tax rate was whether the waste was generated within the state or elsewhere. With the DAT, however, the difference between in-state and out-of-state companies relates to the actual economic benefits they derive from their advertising campaigns based on company size, making the in-state/out-of-state distinction irrelevant. If a company were able to derive comparable annual gross revenue solely from operating within Maryland, it would also be subject to the tax.

A tax is not discriminatory just because it affects out-of-state companies more, so long as it reflects the benefits the state provides. As the Supreme Court explained in *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, discrimination analysis under the Commerce Clause considers whether the tax rate is a "relevant proxy for the benefit conferred upon the parties to a sales transaction."[39] In *Oklahoma Tax Comm'n*, the plaintiff argued that interstate bus tickets were inherently more expensive than domestic trips, making a tax based on the full ticket price discriminatory against interstate companies. The Court ruled that, although the burden fell more heavily on out-of-state companies due to taxation of the full ticket price, there is no discrimination against interstate travel because a uniform tax rate would not be a "relevant proxy for the benefit conferred upon the parties to a sales transaction."[40] Interstate rail companies, by being able to operate through Oklahoma as part of longer routes, derive greater benefits from the state than purely domestic companies, justifying the disparity. This logic applied to the DAT demonstrates that the tax is not discriminatory because its structure reflects a reasonable proxy for the comparatively great economic benefits larger companies may derive from Maryland's market.

Because the graduated rate structure is a central feature of the DAT, the Court's ruling on this issue will be critical in determining the tax's future viability. A graduated rate is integral because the goal of the DAT is to tax larger companies with substantial profit margins without burdening small businesses.[41] If targeting larger, out-of-state companies through a graduated rate were deemed a Commerce Clause violation, then the DAT is not a viable form of taxation anymore; the tax would become counterproductive. Ideally for the future of the DAT, the court would uphold the tax under prong 3.

However, even if the "relevant proxy" argument is rejected, a DAT that requires higher rates for large companies could still prevail under the nondiscrimination prong if properly tailored. *Kansas City, F.S. & Memphis Ry. Co. v. Botkin* found that a graduated state tax with a cap was not in violation of the Commerce Clause, meaning state taxes are allowed to be laid more heavily on multinational corporations. This tax was permissible because

it was "not laid upon interstate commerce or receipts therefrom or fluctuating with the volume of interstate business," as the rate was simply graduated according to paid-up capital and had a reasonable maximum.[42] Unfortunately for the Maryland Tax, the assessments would be fluctuating with the volume of interstate business, as the annual global revenue is primarily affected by interstate activity. A way for future DATs to withstand these challenges would be to base tax rates on stable, clearly defined criteria rather than fluctuating measures tied to interstate commerce, while also imposing a maximum. Despite the strength of the Commerce Clause challenges, there remain viable arguments and tailoring options to preserve the tax.

Chamber of Commerce of the United States v. Lierman: Decision and Implications

The constitutionality and legality of Maryland's DAT have already been contested in federal court in *Chamber of Commerce of the United States v. Lierman*. The U.S. District Court for the District of Maryland dismissed the PIFTA, Commerce Clause and Due Process clause as barred by the Tax Injunction Act ("TIA"), which prevents federal courts from stopping the collection of state taxes when state law provides an adequate remedy.[43] The claims about PITFA, the Commerce Clause, and the Due Process Clause all challenged the "imposition of the charge," meaning that the charges have to do with the nature of the tax itself, which cannot be decided in district courts. They are all issues of the state's "assessment, levy or collection." However, the First Amendment claim has been decided in favor of the appellants.

The dismissal of the first three counts under the TIA is a victory for the future of digital advertising taxes because it affirms that the DAT is a legitimate tax rather than a fee. Companies most affected by the tax argued that in effect, the DAT is a punitive fee rather than a tax, which would render TIA inapplicable. The TIA does not prevent federal courts from considering a challenge to a purported "tax" that is in reality a punitive fee.[44] Appellants argued that the DAT was designed to punish a select group of massive technology companies like Amazon, Facebook and Google.[45] They emphasize that the TIA does not bar pre-enforcement challenges to government assessment with "punitive qualities," and contend that a digital advertising tax had these punitive qualities.[46] When features of a so-called tax begin to exhibit characteristics of punishment and regulation, they are no longer taxes but fees.[47] The plaintiffs cite a NYT oped by former Chief Economist of the World Bank Paul Romer as describing large digital platforms as "too big to trust" and calling upon states to impose a "surcharge" or "penalty" on digital advertising to punish them. Note that Maryland Senate President Bill Ferguson testified that the law was "based on a model originally built by Romer."[48] However, the courts maintained that the DAT is a legitimate tax in a decision made with regard to precedent set in *Valero Terrestrial Corp. v. Caffery. Valero Terrestrial Corp*. holds that in order to determine whether something is a tax or a punitive fee, the court must consider three factors: what entity imposes the charge, what population is subject to the charge, and what purposes are served by the use of the monies obtained by the charge. According to *Valero*, "a charge is more likely a fee than a tax when an administrative agency imposes the charge, when a very small population of regulated persons or entities is subject to the charge, and when it is placed in a "special fund to defray the agency's regulation related expenses." The court's application of this test confirmed that the DAT is a legitimate tax. It was imposed by the Maryland General Assembly rather than a regulatory agency, and while the population subject to the charge is certainly not universal, multiple companies would be required to pay the tax. The Court references *GenOn Mid-Atlantic v. Montgomery County*, noting that the consideration of which population was subject to the charge was relevant only because "a single entity had to pay the exaction," which made it punitive. The court's ruling that its judgment on the tax was barred by the TIA reinforces the legitimacy of the DAT, confirming that it is not inherently punitive despite its focus on a specific group. Even with the tax's intention to hold large multinational companies accountable, the ruling that it retains the essential elements of a legitimate tax makes this decision a victory.

The ruling in *Chamber of Commerce of the United States v. Lierman* on the First Amendment claims represents a setback for the Maryland tax, but does not undermine the broader concept of a DAT. A ruling on the First Amendment was not barred by the TIA because "if a court were to side with the Appellants and declare the pass-through provision unlawful, that judgment would have no effect on the assessment, levy or collection of the tax."[49] The First Amendment claim alleges that the pass-through provision violates the First Amendment as an improper restriction on commercial speech.[50] The pass-through provision is a restriction on communications with customers, which makes it a restriction on speech because it "undeniably regulates what companies may say to their customers on invoices."[51] The statute does allow for taxpayers to raise their prices so long as they do not do so "directly," meaning they can engage in a price increase exactly matching the cost of the tax as long as it is not expressed in a certain way: by means of a separate fee, surcharge or line-item. This thereby makes it a restriction on communication with customers, an obvious restriction on speech. They provide the example

of the New York law tried in *Expressions Hair Design v. Schneiderman*, in which a similar "pass-through provision" existed. The decisions followed that "in regulating the communication of prices rather than the prices themselves, the provision thus regulates speech."[52]

The pass-through provision was an effort to ensure that digital platform users do not bear the burden of the DAT. But the provision being struck down does not mean that other provisions focused on conduct aimed at preventing the passing on of the tax could not be enacted. Also, the pass-through provision would not have stopped companies from raising prices, as it was more clearly aimed at regulating how the fee was communicated. This demonstrates how a ruling against the pass-through provision does not actually invalidate the concept or effectiveness of a DAT.

A provision intended to prevent the tax from being passed on could instead be structured to target conduct rather than speech. In the case *BellSouth Telecomms Inc. v. Farris*, Kentucky enacted a tax on telecommunications companies that forbade them to do either of two things: (1) " collecting tax directly from consumers" and (2) "separately stating the tax on the bill."[53] The Sixth Circuit held that the no-collecting provision banned "non-expressive conduct, not speech" and was therefore permissible while ruling that provision 2 was an impermissible regulation of commercial speech. Prohibiting the direct collection of the tax from customers could therefore serve as a way to legally modify the pass-through provision, preventing the tax from being passed on directly. While companies could still technically raise their overall prices to cover the cost of the tax, they would remain legally responsible for remitting the tax to the government, and could not shift the legal obligation onto their customers. If the company itself remains responsible for paying the tax to the government, it will make it more difficult for companies to shift the burden onto consumers, even if it raises prices so that customers indirectly bear some of the cost.

It remains true that companies could still raise prices even with a *BellSouth* no-collection provision. This was also possible under the old pass-through provision, which only restricted how the added cost was presented. Striking down the pass-through provision does not mean that companies were previously unable to pass on costs and are now able to; they have always been able to pass them on indirectly, and they can still be barred from doing so directly through a no-collection provision. This underscores the irrelevance of the *Lierman* First Amendment ruling for the future of the tax.

Many question the effectiveness of a DAT, given that its cost may be passed on to consumers. They also question whether it can achieve its intended goal or instead simply shift the burden onto consumers, advertisers, or others rather than large multinational companies. But due to the graduated structure, companies may be discouraged from raising prices. Large multinational companies will face competitive pressure from smaller platforms that are less affected by the tax and could maintain lower prices. As a result, the tax could create an incentive for larger firms to absorb more of the cost themselves rather than passing it on to consumers. It follows that many theoretical models show that large multinational platforms may not try to shift the tax through price increases.[54] Additionally, if firms pass on the cost, the digital platform market could become more competitive, as users may choose to switch platforms if fees are imposed. This could have the positive effect of not only ensuring that large companies pay their fair share but also fostering greater market competition: a beneficial side effect.

Conclusion

A properly tailored DAT provides a legally sound mechanism for state governments to capture revenue from digital economic activity generated by users. The two-sided business model of platform services, involving the exchange of user information and the subsequent sale of advertisements to generate revenue, can create a disconnect between those who create value and those who ultimately pay for it. Because the data collected from users by platforms is essential to the advertising activity that generates substantial revenue, those users should be recognized as participants in the transaction for tax purposes, thereby giving states the authority to levy this tax. Rulings like *Wayfair* demonstrate that taxation in the digital era differs significantly from the traditional system to which our interpretation of Commerce Clause and Due Process taxation requirements must also adapt.

In addition, it is important that a DAT be apportioned properly to avoid legal challenge. Increasing the precision of Maryland's apportionment formula to be more accurate to the value actually generated by Maryland users could allow the tax to withstand legal challenges. Additionally, expressing the pass-through provision as regulating conduct rather than speech is crucial to making this tax legally viable. These are two things that can be fixed without compromising the goals of the tax.

Whether or not the court rules that Maryland's graduated rate is valid, or that it unduly burdens out-of-state conduct due to the graduated rate, will be important for the future of a DAT. The graduated structure is vital to allowing the tax to achieve its aims in targeting

large multinational companies with large profit margins. However, even if the graduated rate in Maryland's tax is a violation of the Commerce Clause, a graduated rate similar to that in *Kansas City, F.S.*, one that was derived from a value that didn't fluctuate based on quantity of interstate commerce, could still be enacted.

The DAT will require a significant amount of tailoring and defense to pass legal scrutiny. It is nonetheless worthwhile to continue defending this form of taxation. Industries that hold intangible assets earn higher-than-average excess returns and have larger profit margins. As governments struggle to fund essential services and broader policy agendas, digital platforms remain largely untaxed compared to traditional businesses. This gap should be addressed if states want to maximize the revenue they can derive from economic activity. Governments may be tempted to under-tax digital economic activity due to legal or administrative challenges, while overtaxing other sectors to compensate. This is unsustainable and risks reducing production in other sectors, highlighting the importance of continually developing strategies to tax all economic activity optimally, particularly as technological advances continue.

Endnotes

1 Cui, Wei, *The Digital Services Tax: A Conceptual Defense*, 73 Tax L. Rev. 69 (2019)

2 Brief of Amici Curiae Tax Law Professors in Support of Defendant's Opposition to Plaintiffs' Motion for Summary Judgment, *Chamber of Commerce of the United States v. Franchot*, No. 1:21-cv-00410-DKC D. Md. (Sept. 20, 2021)

3 U.S. Dep't of the Treasury, W*orking Paper No. 111* (2009)

4 *Id.* at 7.

5 Assemb. B. A7805, 2025–2026 Leg., Reg. Sess. (N.Y. 2025)

6 Chamber of Commerce of the United States v. Lierman, No. 24-1727 (4th Cir. Aug. 15, 2025)

7 *Id.* at 6.

8 Brief of Amici Curiae Tax Law Professors in Support of Defendant's Opposition to Plaintiffs' Motion for Summary Judgment, *Chamber of Commerce of the United States v. Franchot*, No. 1:21-cv-00410-DKC D. Md. (Sept. 20, 2021)

9 Sammy Reisner, *The Digital Advertising Tax: An Overstep by State Taxing Jurisdictions*, 18 Brook. J. Corp. Fin. & Com. L. 279 (2013)

10 Lisa A. Civitella, *A New Tax Era: Maryland's Digital Advertising Tax*, 40 J. St. Tax'n 21 (2021–22)

11 Chamber of Commerce of the United States v. Lierman, No. 24-1727 (4th Cir. Aug. 15, 2025)

12 Stephen Babcock, *Maryland Will Be the First State in the Nation to Tax Digital Advertising. Here Are 4 Things to Watch*, Technical.ly (Feb. 15, 2021)

13 Cong. Rsch. Serv., *The Internet Tax Freedom Act and Federal Preemption*, IF11947 (2021)

14 *Id.*

15 Complaint, *Chamber of Commerce of the United States v. Franchot*, No. 1:21-cv-00410-DKC (D. Md. Feb. 18, 2021)

16 Cong. Rsch. Serv., *The Internet Tax Freedom Act and Federal Preemption*, IF11947 (2021)

17 Tax Law Professors Amici Br., *Chamber of Commerce of the U.S. v. Franchot*, No. 1:21-cv-00410-DKC (D. Md. Sept. 20, 2021)

18 *Id.* at 5.

19 *Id.*

20 *Id.*

21 *Compl., Chamber of Commerce v. Franchot* (D. Md. 2021)

22 Tax Found., *Comments on Maryland Digital Advertising Tax Regulations* (Nov. 2021)

23 *Id.*

24 *Id.*

25 Lisa A. Civitella, *A New Tax Era: Maryland's Digital Advertising Tax*, 40 J. St. Tax'n 21 (2021–22)

26 Md. Code Regs. 03.12.01.02 (2025)

27 *Compl., Chamber of Commerce v. Franchot* (D. Md. 2021)

28 Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)

29 Chris Atkins, *Important Tax Cases: Complete Auto Transit v. Brady and the Constitutional Limits on State Tax Authority*, Tax Found. (May 19, 2005)

30 *Id.*

31 South Dakota v. Wayfair, Inc., 585 U.S. (2018)

32 *Id.*

33 *Id.*

34 Brief of Amici Curiae Tax Law Professors in Support of Defendant's Opposition to Plaintiffs' Motion for Summary Judgment, *Chamber of Commerce of the United States v. Franchot*, No. 1:21-cv-00410-DKC, D. Md. (Sept. 20, 2021)

35 Brief of Amicus Curiae Council on State Taxation in Support of Appellant, *Chamber of Commerce of the United States v. Franchot*, No. 1:21-cv-00410-DKC (D. Md. Mar. 31, 2023)

36 Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93 (1994)

37 COST Amicus Br., *Chamber of Commerce v. Franchot* (D. Md. 2023)

38 Young Ran (Christine) Kim & Darien Shanske, *State Digital Services Taxes: A Good and Permissible*

Idea (Despite What You Might Have Heard), 98 N.D. L. Rev. 741 (2022)
39 Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995)
40 *Id.*
41 Assemb. B. A7805, 2025–2026 Leg., Reg. Sess. (N.Y. 2025)

42 Kansas City, F.S. & Memphis Ry. Co. v. Botkin, 240 U.S. 227 (1916)
43 Chamber of Commerce of the United States v. Lierman, No. 24-1727 (4th Cir. Aug. 15, 2025)
44 *Id.* at 5.
45 *Id*
46 Brief of Appellant Chamber of Commerce of the United States of America, *Chamber of Commerce of the United States v. Lierman*, No. 24-1727 (4th Cir. Oct. 31, 2024)
47 *Id.* at 40.
48 Chamber of Commerce v. Lierman, No. 24-1727 (4th Cir. 2025)
49 *Id.*
50 *Id.*
51 Chamber of Commerce Appellant Br., Lierman, No. 24-1727 (4th Cir. 2024)
52 Chamber of Commerce v. Lierman, No. 24-1727 (4th Cir. 2025)
53 BellSouth Telecomms., Inc. v. Farris, 542 F.3d 499 (6th Cir. 2008)
54 Cui, Wei, *The Digital Services Tax: A Conceptual Defense*, 73 Tax L. Rev. 69 (2019)

Executive Order No. 14365: Attempting to Set a National Policy on Artificial Intelligence Violates the Framers Vision of Federalism under both the Supremacy and Commerce Clauses

by Colin Cooper, A26

ABSTRACT:
The Supremacy Clause in Article IV of the United States Constitution details that in any instance of conflict between state and federal law, federal law is supreme. This clause intends to provide clarity in instances of disagreement between state and federal law, but occasionally fails to do so. This paper will examine an instance of an overstep of Executive power in regulating artificial intelligence. It will explore whether the Federalist system, through the lens of the Supremacy and Commerce Clauses, continues to align with the Framers' intentions when applied to a modern context. This paper tracks both historical and legal interpretations from the Framers through contemporary examples. Understanding the Federalist system of government through the eyes of the Framers is essential for seeing how a system set up 250 years ago still affects the legal system today. The contextual knowledge of the Supremacy Clause, its interplay with the Commerce Clause's expansion of federal authority, and the resulting preemption of federal law guide my analysis. This paper argues that, despite conflicts between state and federal law, American Federalism continues to function as it was originally designed.

I. A Brief History Of The Founding

On December 11, President Trump issued Executive Order 14365. That Executive Order violates the Framers' vision of Federalism, the Supremacy Clause, and the Commerce Clause. It seeks to set a national policy on Artificial Intelligence. This Executive Order is written in good faith but is legally unsound under the federalist system. The order finds no Constitutional provisions that authorizes it to set this policy and Congress has not asserted federal authority over the regulation of Artificial Intelligence. Therefore this issue should be left to the states.

A. Competing Interests; Federalists, Anti-Federalists, and shaping the new United States

"Winning was easy, governing's harder" is the famed line from *Hamilton*, detailing the struggles the Framers faced while creating the democratic system of government we know today. This struggle stemmed from the Founding Fathers' division over how they should shift away from English monarchical rule and structure their new government. Two prevailing viewpoints emerged. On one side were the Federalists, favoring a shared power between the federal and state governments. Federalists believed that a strong federal government was necessary for ensuring safety from foreign threats and preventing conflict between states.[1]

The other side stood the Anti-Federalists, who supported a weak federal system that left most powers to the states. They saw too many parallels between a strong federal government and the English monarchy that had ruled the American Colonies before the American Revolution. They favored the promotion of individual liberties and a weak central government that did not include an executive.[2] The 1777 Articles of Confederation were primarily rooted in the ideals of the Anti-Federalists but proved far too weak, inhibiting the federal government from any meaningful action and gave states no reason to cooperate. A new governing document was needed if the nation was to survive.

In 1787, the Constitutional Convention was assembled with the intention of amending the Articles of Confederation. But instead, an entirely new document was drafted and ratified: the United States Constitution. This governing document sought to find a solution that both protected state and individual sovereignty while also creating the mechanisms to allow for an effective federal government. The framers thus created a system where all rights were presumed to be with the states unless expressly enumerated as powers given to the federal government under the Tenth Amendment of the Constitution: "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."[3] In delegating most powers to the states, the Anti-Federalists sought to give states a large degree of agency over their own affairs, with limited interference from the federal government.

In turn, the Federalists wanted to create a stronger central government and did so by having the Constitution grant new powers to the federal government, including the ability to tax its citizens, establish a judicial system, and regulate both interstate and foreign commerce. In an attempt to resolve conflict between state and federal

authority in instances of jurisdictional overlap, the Federalists achieved a major victory in having the Supremacy Clause included in the Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[4]

The Supremacy Clause provides the basis for the doctrine of federal preemption. This doctrine established by the Supremacy Clause would be additionally strengthened through the Commerce Clause. Under the Constitution, Congress has the exclusive right to govern commerce between states. However, with the expansion of the power to regulate commerce in the 1930s, the line between federal and state powers that were once explicitly enumerated began to blur, marking the emergence of 'marble cake' federalism under which federal and state governments have come to share responsibilities that used to be handled solely by one or the other.

B. Expansions in the Application of the Commerce Clause

Beginning with *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court found that labor disputes, historically an issue remedied by the states, could be regulated by the National Labor Relations Board under power granted to the Board by the National Labor Relations Act. Because labor disruptions at a corporation like Jones & Laughlin Steel, at the time the fourth largest steel producer in the U.S., "may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[5] In affirming that the federal government had the constitutional authority to regulate labor relations traditionally left to the states, the Court granted the federal government and its specialized federal agencies an increased ability to regulate state affairs under the Commerce Clause.

In his dissent, Justice McReynolds stated that the acts of manufacturing and shipping were "two distinct and separate activities ... in respect to the former, he is subject only to regulation by the state; in respect of the latter, to the regulation only by the federal government."[6] Regardless, *NLRB* would mark the beginning of an unprecedented expansion of federal power through this loose interpretation of the Commerce Clause.

The courts took this new justification to expand the applicability of the Commerce Clause and ran with it. The Supreme Court would not rule against a single law on the grounds of overstepping the scope of the Commerce Clause until 1995.[7] This expansion of the applications of the Commerce Clause further reinforced the Supremacy Clause, inviting a trend towards sweeping federal preemption.

With this increase in ability for the federal government to legislate in areas previously left to the states, disagreement over jurisdiction has increased accordingly. This stems from the consolidation of power under the executive, the use of federal funds to coerce states into policy changes that align with the federal government's interests, see *South Dakota v. Dole*, 483 U.S. 203 (1987), and the often criticized use of the Commerce Clause to justify an expansion of federal powers into areas historically delegated to the states.

II. On Artificial Intelligence

A recent example of federal overreach is the 2025 Executive Order No. 14365, delineating the federal government's interest in a uniform policy on Artificial Intelligence, a topic already being regulated by the States. Even with the Supremacy Clause and an expansive Commerce Clause, the President does not have the right to mandate a national preference on Artificial Intelligence. Even though Artificial Intelligence could arguably affect vast amounts of interstate commerce, the Framers intended for Congress to first act in this area, and then empower the Executive Branch, before the President simply sets national policy through an executive order.

A. Restrictions on Artificial Intelligence Regulation, and Executive Order No. 14365

Executive orders are a tool of the President to guide federal agencies in a direction the Executive wants. These orders are supposed to be rooted in federal law, but have frequently become oversteps of executive and federal power more broadly. These orders, like much Congressional legislation, are often justified as having authority under the Commerce Clause and raise concern that these orders are being used to expand federal power in places they did not historically have the power to regulate.

Executive Order 14365, titled "Ensuring a National Policy Framework for Artificial Intelligence," provides guidance for the future of artificial intelligence regula-

tion and declares that the United States wins the AI race at all costs by prohibiting state and federal policy that limits AI growth.[8] Section 2 of the Order, while neither federal law nor binding on states, declares that a framework for future policy regulating Artificial Intelligence must be "minimally burdensome." Further, the Order bars states from enacting "onerous and excessive laws" that may restrict the development of artificial intelligence. The President makes a claim that it is within the federal government's jurisdiction to regulate artificial intelligence on the grounds of regulating interstate commerce.

B. Congressional Explicitness in matters of Federal Preemption, and *CSX Transp., Inc. v. Easterwood* 507 U.S. 658 (1993)

The first issue is that the courts have set limitations on federal preemption under the Commerce Clause. Stemming from *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), the Supreme Court established that Congress must expressly signal that legislation is meant to preclude states from legislating in that area. In *CSX*, Lizzie Easterwood sued CSX Transportation after her husband was killed by one of CSX's trains. She alleged that CSX was "negligent under Georgia law for failing to maintain adequate warning devices at the crossing and for operating the train at an excessive speed."[9] The question then posed before the court was "the extent to which the Federal Railroad Safety Act of 1970 pre-empts these claims" of state negligence based on both excessive speed and having inadequate warning signals. The court found that the excessive speed claims were preempted, but the warning signals claim was not.

On the issue of excessive speed, the court found that the FSRA preempted Easterwood's state law claims as explicit federal speed limits were in place at the time of the incident. These uniform speed limits set by the FRSA create a national standard for railroad safety. It explicitly "cover[s] the subject matter in question" preempting the FRSA over state law claims by demonstrating Congressional legislative authority over train speed limits, making this an arena solely regulated by the federal government.[10]

On the issue of inadequate warning signals, the court found that the Code of Federal Regulations 23 CFR §646.214, did not preempt Easterwood's state tort law claims as there was no "clear and manifest"[11] federal requirement mandating better warning signaling.[12] Without the presumption of preemption, the door is left open to make state tort law claims on the grounds of negligence on behalf of CSX Transportation.

Further, *CSX* rules in favor of federal preemption in instances of explicit Congressional signaling and state primacy when Congress is not explicit on the subject of preemption, relying on language from *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Rice promotes a presumption against the preemption of federal law in the absence of guiding Congressional law and reads:

> In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, preemption will not lie unless it is "the clear and manifest purpose of Congress.[13]

The language of *Rice* creates a barrier to preemption given the lack of legislation regulating railroad crossing safety regulations. Between *CSX* and Rice, the Supreme Court has created a complex *framework* for determining preemption in state law claims. While they may reach different answers for federal preemption, they share one key commonality: deference to Congress in matters of "federal statute[s] pertaining to a subject traditionally governed by state law."[14] This is significant to the case of artificial intelligence as Congress has made no efforts to preempt state law through legislation which further bars the courts from doing so. In turn, the two cases work together to prevent the overstep of federal regulation, preserve state autonomy, and uphold the federalist system as the Framers intended.

C. Floors and Ceilings of Federal Regulation, and *Wyeth v. Levine* 555 U.S. 555 (2009)

The second issue is that even when Congress enters an arena traditionally legislated by the states, states are free to impose higher standards above the federal government's regulations so long as they do not conflict. This was decided in *Wyeth v. Levine* 555 U.S. 555 (2009) where a woman named Diana Levine suffered harm after being injected with Phenergan, an anti-nausea drug manufactured by Wyeth Pharmaceuticals. The more dangerous of two administration methods was used to give Levine the medication, eventually necessitating that her arm be amputated. Diana Levine argued that labeling on Phenergan packaging "failed to instruct clinicians to use the IV-drip method of intravenous administration instead of the higher risk IV-push method."[15] At issue in *Wyeth* was the question of whether "federal law preempts state law in a personal injury action against a drug manufacturer for failing to include an appropriate warning label where the drug in question met the labeling requirements of the Food and Drug Administration."[16] The Vermont State Supreme Court found in favor of Levine that Wyeth had "failed to provide an adequate warning of the

risk" of the more dangerous "IV-push method." Despite compliance with FDA regulations, Wyeth's labeling was deemed sufficient to go to market by the FDA while the current label was deemed inadequate by the Vermont court system.

Wyeth argued in favor of federal supremacy in stating that "the [Food, Drug, and Cosmetic Act] establishes both a floor and a ceiling for drug regulation," further stating that "once the FDA has approved a drug's label, a state-law verdict may not deem the label inadequate, regardless of whether there is any evidence that the FDA has considered the stronger warning at issue."[17] This prohibits Wyeth's labeling from being compliant with both FDA regulation and state tort law and demands adjudication as to whether claims made in state court preempt federal regulations.

The Roberts court disagreed. In Justice Stevens' opinion for the court, the Supreme Court found that it was possible for Wyeth Pharmaceuticals to be compliant with both state and federal requirements. In agreement with the Vermont Supreme Court, who stated that "federal labeling requirements create a floor, not a ceiling, for state regulation,"[18] the Supreme Court's opinion was rooted in the fact that Congress had not "enacted an express pre-emption provision at some point during the FDCA's 70-year history... despite its 1976 enactment of an express pre-emption provision for medical devices, Congress has not enacted such a provision for prescription drugs,"[19] which was not by coincidence. Congress took action to enact a federal preemption statute for medical devices, but deliberately omitted prescription drugs. A lack of preemption grants states the ability to legislate additional regulations above what was permitted by a federal agency through state agency regulations and state tort law claims.

The implications are confirmed by further case law. In Justice O'Connor's unanimous opinion for the Court in *Bonito Boats, Inc. v. Thunder Craft Boats*, Inc., 489 U. S. 141, 166–167 (1989). In *Bonito*, Justice O'Connor wrote, "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by."[20] Five Democratic members of Congress and one member of the Senate have proposed an act to repeal Executive Order 14365 and leave Artificial Intelligence regulation to the states.[21] They seek to allow states to independently regulate their AI policy signaling 'Congressional awareness' on the issue while 'stand[ing] by' and leaving the issue of Artificial Intelligence regulation to states' discretion.

While *Wyeth* is unrelated to artificial intelligence regulation, the principle of its holding still applies to artificial intelligence regulation and Executive Order 14365. The federal government's desire to set a low, borderline nonexistent, standard for the regulation of Artificial Intelligence does not prohibit states from taking more extreme regulatory measures. *Wyeth* establishes that federal regulations are minimum standards all states must meet, and from there states can expand upon regulations through state tort law claims in court and state law. It becomes clear that the federal government overstepped its adjudicatory powers when *Wyeth* is applied to the matters Executive Order 14365 attempts to regulate.

D. The AI Litigation Task Force

The third second issue with Executive Order 14365 is the Order's creation of an AI Litigation Task Force. This Task Force's only purpose "shall be to challenge State AI laws inconsistent with the policy set forth in section 2," but raises the question of on what grounds it has the authority to do so. This paper has established that in instances of conflicting state and federal law, federal law preempts state law per the Supremacy Clause. But what happens in the event the federal government tries to preempt state law in the absence of federal law?

The language of the Tenth Amendment highlights the federal government's overstep in its attempt to prevent states from regulating artificial intelligence. The federal government has not enacted legislation to regulate artificial intelligence and the justification that the Commerce Clause can be used to do so is unsupportable. This leaves the onus of artificial intelligence regulation to the states free of federal interference. This Executive Order is an attempt at presidential preemption in an arena where it does not have jurisdiction, but is stopped by the federalist system properly defining limits on executive and federal power. Against mounting pressure from President Trump, the federalist system has worked to help states preserve their power as it relates to Artificial Intelligence regulation as the Founders intended, despite pertaining to an issue the Founders could have never conceived of.

Conclusion

Executive Order 14365 represents a significant overstep of Executive authority that attacks the balance of American federalism. By attempting to mandate a national policy on artificial intelligence without explicit authorization from Congress, the Executive Branch ignores the Tenth Amendment and Supremacy Clause. As established in *CSX v. Easterwood, Rice v. Santa Fe, and Bonito Boats v. Thundercraft Boats*, federal preemption cannot be presumed without explicit Congressional signaling. In the absence of such legislation, *Wyeth v.*

Levine explains that low standards for regulation allow for states to enact higher regulatory standards than the federal government.

Given the threats Artificial Intelligence poses to infringements on intellectual property, threats to child safety, and breaches of data, it may be in the national best interest to someday have a uniform framework for Artificial Intelligence regulation. But that uniform standard cannot happen unless and until Congress passes a constitutional law regulating AI as commerce. Otherwise, the federalist system requires that the topic of Artificial Intelligence regulation be left to the states.

Endnotes

1 Jay, John. (1787). *Federalist No. 5:The Same Subject Continued: Concerning Dangers From Foreign Force and Influence*. Washington, D.C.: Library of Congress, THOMAS Legislative Database. From https://guides.loc.gov/federalist-papers/text-1-10#s-lg-box-wrapper-25493266.

2 Ramos, Mitzi, and John R Vile. "Anti-Federalists." *The Free Speech Center*, Middle Tennessee State University, 5 July 2024, firstamendment.mtsu.edu/article/anti-federalists/.

3 U.S. Const. amend. X,.

4 U.S. Const. art. VI, cl. 2

5 National Labor Relations Board v. Jones & Laughlin Steel Corporation 301 U.S. 1 (1937)

6 *Id.* 5

7 *Commerce clause*. (n.d.). LII / Legal Information Institute. Retrieved April 10, 2026, from https://www.law.cornell.edu/wex/commerce_clause

8 Executive Order 14365 § 1-3 (Ensuring a National Policy Framework for Artificial Intelligence)

9 CSX Transp., Inc. v. Easterwood 507 U.S. 658 (1993)

10 CSX Transp., Inc. v. Easterwood 507 U.S. 658 (1993)

11 *Id.* 10

12 National Archives and Records Administration. (1975, April 9). 23 CFR 646.214—*Design. Code of Federal Regulations*. https://www.ecfr.gov/current/title-23/part-646/section-646.214.

13 Rice v. Santa Fe Elevator Corp., 331 U. S. 218, 230 (1947).

14 CSX Transp., Inc. v. Easterwood 507 U.S. 658 (1993)

15 Wyeth v. Levine 555 U.S. 555 (2009)

16 "Wyeth v. Levine." Oyez. Accessed March 21, 2026. https://www.oyez.org/cases/2008/06-1249.

17 Wyeth v. Levine 555 U.S. 555 (2009)

18 __ Vt. __, __ 944 A. 2d 179, 184 (2006)

19 Wyeth v. Levine 555 U.S. 555 (2009)

20 Bonito Boats, Inc. v. Thunder Craft Boats, Inc. 489 U. S. 141, 166–167 (1989)

21 U.S. Representative Don Beyer. "Beyer, Matsui, Lieu, Jacobs, McClain Delaney Introduce Legislation to Repeal White House AI Moratorium." March 20, 2026.

Restricting Refuge

Considering the 1951 Refugee Convention in Light of Current U.S. Migration Policy

by Anna Fattaey, A26

Introduction

The 1951 Refugee Convention was ratified due to a recognized global need for a system to support the thousands displaced in Europe during World War II.[1] Defining who is a refugee and how they must be supported by the greater global community, the 1951 Refugee Convention is the central framework for handling asylum cases across the globe. The Convention was later amended with the 1967 Protocol, which maintained the core principles of the Convention but expanded it to apply universally without geographic or temporal limitations.[2] The United States ratified the Protocol, ensuring that it is part of U.S. law. The Immigration and Nationality Act ("INA") defines and sets a framework for all immigrants and refugees in the U.S.. The Refugee Act of 1980 added Title IV Refugee Assistance to the INA, amending it to align with the 1951 Convention.

President Donald Trump has taken significant actions against U.S. refugee assistance. Many of these measures are direct violations of the 1951 Convention. Trump's actions against refugees have caused cessations in credible fear screenings, third country removals, and subjected asylum seekers to inhumane treatment.[3] While these actions violate the 1951 Convention and could be subject to scrutiny in international courts, they have remained relatively unchecked within the U.S. court system. Actions that do not violate the 1951 Convention raise important questions about whether the Convention is sufficient to fully protect the rights and freedoms of asylum seekers today.

This article begins by closely examining both the 1951 Refugee Convention and the Immigration and Nationality Act, highlighting sections influential to the discussion at hand. Next, the article outlines the state of refugee assistance under the second Trump administration, including reports of the impact on asylum seekers and the justification given by Trump for the many acts he has signed. This article then evaluates the state of refugee assistance under the administration using the standards set forth by the 1951 Convention, which the U.S. is bound to uphold. This article uses two cases from the European Court of Human Rights ("ECHR"), *Ilias & Ahmed v. Hungary* and *Hirsi, Jamaa, and Others v. Italy*, to suggest that similar violations of the 1951 Convention have been scrutinized internationally. The article ends in a two-pronged conclusion that while some of Trump's actions are in violation of the 1951 Convention, expansion of the Convention is also necessary to better protect refugees. In addition to the expansion of the 1951 Convention, cases following precedent set in Ilias and Hirsi could impose some degree of accountability upon the Trump administration.

I: Relevant International and U.S. Law

The 1951 Convention defines a refugee as a person who has:

> wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[4]

There is special consideration, though, that the Convention does not apply to any person for whom there are "serious reasons for considering that" they have committed crimes against peace or humanity, a war crime, serious non-political crimes, or "has been guilty of acts contrary to the purposes and principles of the United Nations."[5]

The Convention sets out general obligations that contracting states must follow in their assistance of refugees. Article 9 allows contracting states to take measures deemed essential for national security in times of "war or other grave and exceptional circumstances."[6] This article, though, is to be applied only to individual cases and thus cannot be applied broadly. Contracting states must prove that the measures enacted are essential to national security with respect to each individual case. Article 16 guarantees refugees free access to the courts and legal assistance in the country in which they reside.[7] Article 33 sets out the principle of non-refoulement. Contracting states are prohibited from expelling or returning refu-

gees "in any manner whatsoever" to territories where their lives or freedom would be threatened according to the definition of a refugee as outlined in Article 1.[8] This provision, though, is not to be applied to refugees for whom there are reasonable grounds for deeming them a danger to the national security of a country or who has been convicted of a "particularly serious crime."[9]

The Immigration and Nationality Act is the primary framework for U.S. migration policy. Section 205 grants the Secretary of Homeland Security the right to, at any time, revoke the approval of any petitions to immigration "for what he deems to be good and sufficient cause."[10] Section 212 sets out the classes of "aliens" who are ineligible for admission to the U.S.. Conviction of crimes involving "moral turpitude" or violation of any U.S. laws qualifies as grounds to be deemed ineligible for admission.[11] "Aliens" are also deemed ineligible if "a consular officer or the Attorney General knows, or has reasonable ground to believe" that they are entering the U.S. to violate laws relating to espionage, sabotage, export; any other unlawful activity; or any activity rooted in opposition to or aim to control or overthrow the Government of the U.S..[12] Similarly, "aliens" are ineligible if a consular officer, the Attorney General, or the Secretary of Homeland Security knows of or has reasonable ground to believe that they are engaged in or are likely to engage in any terrorist activity.[13] Being associated with or endorsing terrorist organizations or groups that endorse terrorist organizations is considered engaging in terrorist activity.[14] Included in the category of those ineligible for admission into the U.S. are people who are present in the country without permission.[15] There is an exception, though, for certain battered women and children.[16] There is also a provision within Section 212 that grants the President the unrestricted right to bar entry:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.[17]

II: The Status of Refugee Assistance Under the Trump Administration

Enacted on the first day of the Trump administration, Executive Order 14163, "Realigning the United States Refugee Admissions Program," raises many compliance issues with the 1951 Convention.[18] The order states that the U.S. will "admit only those refugees who can fully and appropriately assimilate into the United States."[19] Furthermore, President Trump claims that refugee entry into the U.S would be detrimental to the interests of the country.[20] As such, he suspended all direct entry of refugees into the U.S.. The order does allow for the Secretary of State and the Secretary of Homeland Security to jointly determine to admit "aliens" on a case-by-case basis according to their discretion.

President Trump also issued Executive Order 14159, "Protecting the American People Against Invasion."[21] This order suspends entry into the U.S. for "aliens engaged in the invasion across the southern border."[22] The order includes migrants who may otherwise invoke provisions of the INA that would allow for their continued presence in the U.S.. Trump cites Section 208 of the INA, the section pertaining to refugees, as an example of migrants included in the category of people who cannot utilize the INA to justify their exemption from this order.

A Department of Homeland Security ("DHS") notice, "Designating Aliens for Expedited Removal," expands the DHS's ability to expel migrants.[23] The notice gives immigration officers the right to apply expedited removal to "aliens" apprehended within two years of their arrival.[24] When asylum seekers are subject to expedited removal, they must be referred to a credible fear interview ("CFI"). CFIs are intended to assess the asylum seeker's fear of returning to their home country and, therefore, the applicability of the 1951 Convention to them.

President Trump's orders effectively suspended asylum processing at the Southern border. While data regarding CFIs was previously publicly available, reports have not been released under the Trump administration.[25] The lack of data on the prevalence of these interviews makes it challenging to objectively assess the impacts of Trump's proclamation. However, legal service providers regularly report that nearly no CFIs have been conducted since Trump's inauguration.[26] Many asylum seekers report experiencing expulsion or removal without undergoing any form of screening or CFI.[27] Some asylum seekers even reported immigration officers telling them they would be transported to facilities in which they could undergo a CFI, but instead were taken to staging areas for removal.[28]

There are also extensive reports of abuse of asylum seekers while in Customs and Border Protection ("CBP") custody. While protocol mandates that migrants are not held in CBP custody longer than 72 hours, migrants are routinely held for time-periods longer than a month.[29] Reports of abuse in CBP custody include medical neglect, family separation, physical and verbal abuse,[30] and

even death.[31] Migrants in CBP custody are often held without communication to the outside world, including family and attorneys.[32] Some argue that the conditions in CBP custody amount to enforced disappearances, which are illegal under international law.[33] Given the lack of communicational channels in or out of CBP custody, migrants are often deprived of access to counsel.[34]

Safe third-country removals are common practice within asylum law. Countries that wish to decrease their asylum seekers will often deport refugees not back to their country of origin, but instead to safe third countries to make their asylum claim. Safe third countries are determined by the country executing these removals, and it is assumed that these third countries will comply with international human rights treaties and the 1951 Convention.

The Trump administration has carried out large-scale third-country removals, including the removal of almost 500 asylum seekers to Costa Rica and Panama.[35] The administration also removed around 288 migrants from Venezuela and El Salvador to a high-security Salvadorian prison called the Terrorism Confinement Center ("CECOT").[36] Refugees have also been removed to Bhutan, where the government refused to accept them, rendering the group stateless.[37]

III: Violations of the 1951 Refugee Convention and the Immigration and Nationality Act

There are many aspects of the asylum process under the Trump administration that intuitively seem like violations of either the 1951 Convention or the INA. However, the lack of asylum process on the Southern border and abuses in CBP custody, while morally questionable, does not violate the terms of the 1951 Convention or the INA. The orders executed by Trump, which effectively suspend the asylum process or bar entry to asylum seekers, are also not violations of either of these laws. Article 9 of the 1951 Convention protects the President's right to measures pertaining to asylum for purposes necessary to national security.[38] Because Trump evokes questions of national security in all of these orders, he does qualify for these Article 9 protections. However, Trump's application of Article 9 is faulty, thereby constituting a violation of the Convention's provisions. The Article asserts that states have the right to take measures necessary for national security, but only "in the case of a particular person, pending determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security."[39] Trump's orders have been generalized to all asylum seekers on the Southern border, so there is no evidence that the necessary case-by-case analysis has occurred.

Additionally, the legal access aspect of the conditions in CBP custody constitutes a violation of Article 16 of the 1951 Convention. Article 16 guarantees asylum seekers free access to courts and legal representation.[40] The reports of conditions within CBP custody indicate that refugees are not being provided with their right to courts and legal representation.

The place where the Trump administration's violations of the 1951 Convention are most easily seen is in the principle of non-refoulement, which is guaranteed by Article 33 of the 1951 Convention. While the principle of non-refoulement most commonly pertains to refugee's countries of origin, courts have previously found third country removals to be in violation of Article 33.

Ilias and Ahmed v. Hungary is a European case which offers precedent for finding chain refoulement and deficient conditions in third countries violations of Article 33.[41] Ilias and Ahmed, both asylum seekers from Bangladesh, claimed asylum in Hungary and were promptly rejected. After an appeals process was denied, Ilias and Ahmed were expelled from Hungary to Serbia. The plaintiffs argued that Hungary had not complied with the 1951 Convention because the expulsion to Serbia subjected Ilias and Ahmed to inhumane and degrading treatment and potential chain refoulement. Chain refoulement is a process in which third countries further remove refugees to other countries, enacting a chain of refoulement which can end in a refugee's expulsion to a country where they would be in danger or even their country of origin. The ECHR found that Hungary had not properly assessed the plaintiff's risk of inhumane treatment or refoulement upon their expulsion to Serbia.

The facts of the case render the reasoning behind the judgment applicable to Trump's actions. The removal of asylum seekers to El Salvador presents a particularly parallel situation. CECOT, the Salvadorian prison in which these asylum seekers are held, has been declared by Human Rights Watch as dangerous for human rights.[42] Further, refugees expelled to El Salvador are at risk of further refoulement.[43] Given the ruling in *Ilias*, a future court would have grounds to find Trump's removals to CECOT as violations of the 1951 Convention.

Hirsi Jamaa and Others v. Italy is another ECHR case that focuses on the question of non-refoulement.[44] The case pertains to a group of around two hundred asylum seekers who left Libya via boat for Italy. The Italian coast guard intercepted the vessels and refouled the refugees to Libya. The court found that these refugees, sent back to Libya, were at risk of being refouled to their

country of origin at any time. The court also found that the existence of Libyan laws or the ratification of international treaties to guarantee human rights were insufficient in light of reports of 1951 Convention violations.

Expanding on the potential precedent set by *Ilias*, *Hirsi* shows that the U.S. may be responsible for the condition of refugees even after they remove them. Following these two cases, it is clear that the presence of international agreements between the U.S. and third countries is not enough to guarantee the rights of asylum seekers: something the U.S. is responsible for.

IV: DISCUSSION

With consideration of the state of the U.S. asylum system and the obligations set by the 1951 Convention and the INA, two problematic areas arise: (1) the gap that exists between morally acceptable treatment of refugees and treatment allowed under the 1951 Convention and INA and (2) the Trump administration's violations of the 1951 Convention.

The fact that actions of the Trump administration and their consequences do not violate the 1951 Convention reveal that it is missing fundamental protections for refugees. Rights that seem intuitive given the Convention, such as the right to claim asylum and protection from abuse are not protected. These gaps in protection allow, as we have seen with the Trump administration, the cessation of the asylum process and its replacement by detention and abuse. The atrocities occurring on the U.S.'s Southern border highlight an imperative need for amendments to the 1951 Convention to further protect the right to asylum. The area of the 1951 Convention that needs amendment is Article 9, which essentially waives countries' obligations to the Convention when national security is relevant. As seen with the Trump administration, the ability to deem migration an issue of national security allows governments to entirely absolve themselves of their obligations towards refugees. Amendments could ensure that national security is balanced with obligations towards refugees.

Trump's clear violations of the 1951 Convention reveal the need for international oversight and calls for accountability. While the U.S. is obligated to uphold the 1951 Convention due to its ratification of the 1967 Protocol, there has been no international accountability for the violations. *Ilias* and *Hirsi* show that courts have previously found actions similar to Trump's in violation of the 1951 Convention. While these cases were brought before the ECHR, a court that does not have jurisdiction over the U.S., similar cases could be brought before an international court. International accountability, while perhaps unable to solve all of the issues present in the current U.S. asylum system, would raise awareness about what is occurring and put pressure on the Trump administration to better comply with international obligations towards refugees. Such accountability could impose restrictions on third country removals, thereby reducing refugees' risk of chain refoulement. Any form of enforced accountability, though, would create tangible change for refugees in the U.S. asylum system.

Endnotes

1 *The 1951 Refugee Convention*, UNHCR, https://www.unhcr.org/about-unhcr/overview/1951-refugee-convention (last visited April 4, 2026).
2 *Id.*
3 *"This is an Order from Trump" Abuse, Expulsions, and Refoulement of People Seeking Asylum*, HUMAN RIGHTS FIRST, May 2025, https://humanrightsfirst.org/library/this-is-an-order-from-trump-abuse-expulsions-and-refoulement-of-people-seeking-asylum/
4 Convention and Protocol Pertaining to the Status of Refugees, Dec. 16, 1966, 19 UST 6223; TIAS 6577; 606 UNTS 267.
5 *Id.*
6 *Id.*
7 *Id.*
8 Convention and Protocol Pertaining to the Status of Refugees, Dec. 16, 1966, 19 UST 6223; TIAS 6577; 606 UNTS 267.
9 *Id.*
10 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.)
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 Exec. Order No. 14163, 90 FR 8459 (Jan 30, 2025).
19 *Id.*
20 *Id.*
21 Exec. Order No. 14159 90 FR 8443 (Jan 29, 2025).
22 *Id.*
23 *Id.*
24 *Id.*
25 *"This is an Order from Trump" Abuse, Expulsions, and Refoulement of People Seeking Asylum*, HUMAN RIGHTS FIRST, May 2025, https://humanrightsfirst.org/library/this-is-an-order-from-trump-abuse-expulsions-and-refoulement-of-people-seeking-asylum/

26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.*
31 Camilo Montoya-Galvez, *Official concedes 8-year-old who died in U.S. custody could have been saved as devastated family recalls final days*, CBS NEWS, July 20, 2023, https://www.cbsnews.com/news/anadith-danay-reyes-alvarez-8-year-old-migrant-died-border-patrol-custody-family/
32 "*This is an Order from Trump" Abuse, Expulsions, and Refoulement of People Seeking Asylum,* HUMAN RIGHTS FIRST, May 2025, https://humanrightsfirst.org/library/this-is-an-order-from-trump-abuse-expulsions-and-refoulement-of-people-seeking-asylum/
33 *Id.*
34 *Id.*
35 *Id.*
36 *The U.S. Government is Forcibly Disappearing Migrants*, HUMAN RIGHTS FIRST, May 2025, https://humanrightsfirst.org/wp-content/uploads/2025/05/Forcibly-Disappearing-Migrants-factsheet_formatted-5.1.25.pdf
37 *"This is an Order from Trump" Abuse, Expulsions, and Refoulement of People Seeking Asylum*, HUMAN RIGHTS FIRST, May 2025, https://humanrightsfirst.org/library/this-is-an-order-from-trump-abuse-expulsions-and-refoulement-of-people-seeking-asylum/
38 Convention and Protocol Pertaining to the Status of Refugees, Dec. 16, 1966, 19 UST 6223; TIAS 6577; 606 UNTS 267.
39 *Id.*
40 *Id.*
41 Ilias and Ahmed v. Hungary, No. 47287/15, Eur. Ct. H.R. (2019)
42 *Human Rights Watch declaration on prison conditions in El Salvador for the J.G.G. v. Trump case*, HUMAN RIGHTS WATCH, Mar. 20, 2025, https://www.hrw.org/news/2025/03/20/human-rights-watch-declaration-prison-conditions-el-salvador-jgg-v-trump-case
43 *"This is an Order from Trump" Abuse, Expulsions, and Refoulement of People Seeking Asylum*, HUMAN RIGHTS FIRST, May 2025, https://humanrightsfirst.org/library/this-is-an-order-from-trump-abuse-expulsions-and-refoulement-of-people-seeking-asylum/
44 Hirsi Jamaa and Others v. Italy, No. No 27765/09, Eur. Ct. H.R. (2012).

The Constitutional Rebellion

How *Luther v. Borden* Reshaped American Government

by Grant Pinsley, A28

ABSTRACT:
This article analyzes the history of the Dorr Rebellion and the resulting Supreme Court case, *Luther v. Borden*, ultimately highlighting the case's significance for the modern political question doctrine. In 1842, Rhode Islanders popularly adopted a state constitution to replace Rhode Island's royal charter and grant male suffrage; however, the chartered government refused to view this new constitution as legitimate. As such, Rhode Island had two competing governments, the government operating under the newly adopted state constitution and the older government formed under its colonial royal charter, operating at the same time. Thomas Dorr, who served as governor under the constitutional government, staged a rebellion against the chartered government, which ultimately failed. In 1849, the Supreme Court was asked, in *Luther v. Borden*, to determine which of these governments was legitimate under the Guarantee Clause of the U.S. Constitution, which guarantees a republican form of government to the states. The Court ruled that the case, and any case of the Guarantee Clause, was nonjusticiable due to the political question doctrine. This was one of the first cases to invoke the political question doctrine which has had profound effects on the structure of American government and on the power of the judiciary, limiting the Court's ability to check antidemocratic aspects of state governments. This article applies the political question prongs from *Baker v. Carr* to determine whether the Guarantee Clause is a political question, as *Luther* claims, or whether the judiciary should have the power to hear claims challenging the legitimacy of state governments. This analysis finds that the Guarantee Clause is not a political question and should be justiciable.

Introduction

The political question doctrine, often cited as first appearing in *Marbury v. Madison*, posits that cases brought before the Court whose controversies are better suited for the political branches of government cannot be decided on the merits.[1] That is, the Court can hear cases that are colloquially deemed "political," but cannot decide cases that it determines should be debated by the Legislative or Executive branches.[2] This doctrine has had profound effects on the American government, leading the Supreme Court to determine that cases involving subjects such as foreign relations, national security, and partisan gerrymandering are nonjusticiable. Scholarship often attributes *Baker v. Carr*,[3] which held that an outdated reapportionment scheme in Tennessee violated the Equal Protection Clause, as the origin of the modern political question doctrine; however, the oft-forgotten *Luther v. Borden*[4] holds a tantamount importance in understanding the doctrine and its grand legal implications.

Luther v. Borden resulted from the Dorr Rebellion, an antebellum popular revolt and suffrage movement in Rhode Island[5] reacting to stringent disenfranchisement.[6] While there is disagreement over the correct reading of *Luther*,[7] the Supreme Court has interpreted the case as determining both the legitimacy of state governments and the Constitution's Guarantee Clause, guaranteeing a republican form of government to the states,[8] to be nonjusticiable.[9] This determination, while often overlooked or oversimplified by constitutional scholars, has had incredible effects on Supreme Court jurisprudence and American government. Greatly expanding the political question doctrine, *Luther's* holding preemptively rejects Guarantee Clause arguments that could have been used against anti-democratic statutes, such as gerrymandering, voting restrictions, Jim Crow laws, and more.

This article will begin by covering the history of the Dorr Rebellion in Rhode Island, culminating in the case of *Luther v. Borden*. This will be followed by an analysis of the case itself, detailing the arguments between the parties, the majority opinion written by Chief Justice Taney, and the common readings applied to the case, including the seminality of *Luther's* expansion of the political question doctrine. This will lead to a discussion of the political question doctrine, its significance, and *Baker's* modern definition of it. Then, this article will outline what the Guarantee Clause describes, its nonjusticiability as decided by the Court, the problems of *Luther* and nonjusticiability, and the possibilities of making the Guarantee Clause justiciable. This article will conclude with a critique of the prongs of the political question doctrine outlined in *Baker*, ultimately concluding that the Guarantee Clause falls outside nonjusticiability standards and advocating for the overturning of *Luther v. Borden.*

The History Before *Luther*

A. Rhode Island's Suffrage Movement

The story of *Luther v. Borden* begins long before the days of the Dorr Rebellion, even before the Founding, in 1663. Unlike most states in the Union, which had adopted new written constitutions after 1776,[10] Rhode Island maintained its royal charter, granted by Britain in 1663 to establish it as a colony, as the governing document of the land.[11] This, however, was not without its controversies. The right to vote in Rhode Island was a particularly thorny subject. Based on provisions within the charter, suffrage only extended to white men who owned land valued at least $134, a large sum at the time.[12] Since few rural Rhode Islanders had $134 worth of land, and most Rhode Islanders were city dwellers who didn't own land to begin with,[13] the charter's property qualification to vote disenfranchised 60% of the adult white male population.[14] Furthermore, the charter's reapportionment system for redistricting, which required equal representation for all municipalities regardless of population, gave outsized political power to small towns, where fewer people constituted a district.[15] In an increasingly urbanized Rhode Island, tensions continued to mount toward a popular suffrage movement.

By the 1830s, this sentiment surged into a proper constitutional movement, with popular leaders calling for a new state constitution with expanded suffrage.[16] This fledgling movement failed to make headway in its early years, first opting for conservative incrementalism in adopting a new constitution.[17] However, with the establishment of the Rhode Island Suffrage Association in early 1840, a new framework seeking universal suffrage for adult male Rhode Islanders was created.[18] By February 1841, the Suffragists submitted a petition to the Rhode Island General Assembly for a constitutional convention.[19] The legislature agreed to the establishment of a convention, but not under the Suffragists' terms. The Assembly demanded that any new constitution would be ratified under the existing voting laws, rather than the expanded voting rights that the Suffragists requested.[20] The Suffragists, rejecting any compromise, called an independent and unauthorized constitutional convention for August 1841.[21] The resulting "People's Constitution" extended the right to vote and hold political office to all adult white men.[22] Though the General Assembly refused to submit the People's Constitution for ratification,[23] the new document was overwhelmingly approved by Rhode Islanders by popular election on January 13, 1842.[24] Both sides, that of the Charter and that of the Suffragists/People, held elections in April 1842,[25] electing Sam Ward King as the Charter governor,[26] and Thomas Wilson Dorr (a popular leader of the suffrage movement) as the People's governor.[27]

By the summer of 1842, Rhode Island had, in effect, two functioning state governments, which, unsurprisingly, led to deep divides. While Dorr called on the Charter government to step aside from its political offices,[28] Charter officials only further entrenched themselves, passing a new law where association with the People's Constitution was deemed treasonous.[29] Both governments considered themselves to be legitimate, and it wasn't yet clear how this issue would be decided: by politics, the courts, or military force. Though Dorr ventured to Washington, D.C. to lobby for support in Congress, President John Tyler said that he would militarily assist the Charter government if there were any hostilities.[30] This warning failed to quench Dorr's ambition.

B. The Dorr Rebellion

With tensions mounting in Rhode Island and Dorr eager to establish the legitimacy of his new government, he marched his "People's Militia" against the Providence Arsenal.[31] Though Dorr chose to retreat before the conflict became violent, this drastic action sent the Suffrage movement, and in turn the People's government, spiraling into chaos.[32] Dorr's original plan, beyond violent protest or a military coup, was to elect a delegation of U.S. Congressmen and send them to Washington, forcing Congress to decide which representatives of Rhode Island, and hence which government, were legitimate.[33] However, before the People could properly elect this delegation, Charter Governor King declared martial law across Rhode Island, and all known Suffragists and supporters of the movement were arrested.[34] Dorr, himself, fled the state.[35] This declaration has been described as the first instance of military sovereignty in the history of the United States.[36]

This mass arrest of supporters (along with the ratification of the official Rhode Island Constitution in 1843, which was approved by the General Assembly and loosened some of the voting qualifications) took most, but not all, of the wind out of the Suffrage movement.[37] As a last resort, Suffragists took to the courts to decide the legitimacy of their government.

The Case of *Luther v. Borden*

As high a profile a case as *Luther* was, it didn't involve particularly high-profile parties. The dispute did not come from a leader of the Suffrage movement, such as Dorr, but rather a low-level Suffragist, Martin Luther. Luther had sued Luther Borden, a military official who was sent to arrest Luther at his home for his political affairs, for trespassing.[38] Martin Luther was arrested after the declaration of martial law but before the enactment

of the Assembly-approved Rhode Island Constitution, and, as such, claimed that Borden didn't have the proper constitutional authority to arrest Luther.[39] In other words, Luther claimed that he couldn't possibly be arrested because the government that was trying to arrest him, the Charter government, didn't truly exist: it wasn't legitimate under the People's Constitution. Therefore, the validity of Luther's arrest hinged on which government, that of the Charter or that of the People, was deemed legitimate, a determination the Supreme Court was asked to make.

Many of Luther's arguments rested on rather foundational and philosophical grounds. One observer described Luther as the case "to settle or overthrow the whole doctrines of the Declaration of Independence."[40] Luther contended that the majority, the People, must have a right of popular sovereignty to remove a politically entrenched government, a principle of peaceable revolution baked into the founding of the United States.[41] This principle can be traced to James Wilson, a greatly influential Founding Father from Pennsylvania, Supreme Court Justice,[42] and drafter of the final language of the Guarantee Clause,[43] who argued that the American government rested on a "revolution principle" so "that the people may change the constitutions, whenever and however they please."[44]

This argument would be furthered by George Burrill, who advocated for constitutionalism in Rhode Island after the Founding and stated:

> Neither can the legislature create a constitution; since the legislature itself is the creature of the written constitution, is posterior and subordinate to it... Neither can the legislature judge of the necessity of forming a constitution, or dictate when or how it shall be formed. To the court is referred to pronounce judgment; to the legislature, the enacting of laws; and to the people, the forming of a constitution.[45]

While Luther's argument didn't go so far as to say that the General Assembly *couldn't* create or ratify a constitution, it did advocate for a natural right to revolt. More fundamental than the legislature's power was the power of the People. Without a right to revolt, "all State institutions [are] subservient... to the military power of the President."[46] This philosophy was found deeply ingrained in the early Republic, a resolve from the fears of a tyrannical ruler that led to independence from Great Britain.

This philosophy was not persuasive in the High Court. Chief Justice Taney, writing for the opinion of the court, declared that sovereignty existed in the established institutions of government and not (directly) the People.[47] According to Taney, the Guarantee Clause and determining the legitimacy of a government are under the purview of Congress, and therefore nonjusticiable political questions.[48] Taney interpreted the legitimacy of governments to be derived from Congress and the President. President Tyler recognized the Charter government and its governor as the valid representatives of Rhode Island, rendering the Charter government legitimate.[49]

Luther's holding that government legitimacy is nonjusticiable has developed some notable interpretations in the succeeding decades. The various interpretations of the case can be broken down as follows: the legitimacy of a state government can't be challenged, specifically under the Guarantee Clause; the legitimacy of a state government is entirely nonjusticiable because it's a political question; only Congress can determine the legitimacy of a state government; that challenges to any election are nonjusticiable; and the Guarantee Clause is completely exempt from judicial review.[50] All of these readings have been used by the Court at one instance or another, sometimes in combination with each other, but it is the last proposition that is most salient for today's understanding of the Guarantee Clause. Following the *Luther* decision, it wasn't clear whether or not the Guarantee Clause could be used in Supreme Court jurisprudence. However, in a case decided decades later, *Pacific States Telephone & Telegraph v. Oregon*, the Guarantee Clause was deemed nonjusticiable under any circumstance.[51] It was determined that the clause, regardless of the facts of a case that it's being applied to, is inherently a political issue. That the Guarantee Clause was summarily deleted from the Constitution is a dangerous and grandiose effect of the political question doctrine. To understand that effect, we must first ask what the political question doctrine really is.

The Political Question Doctrine

As noted, the political question doctrine governs the nonjusticiability of claims that can only be decided by the political branches of government. The doctrine has expanded and evolved since Chief Justice Marshall first declared in *Marbury v. Madison* that, "[q]uestions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court."[52] Today, "to determine political questions, the Supreme Court asks not whether the question has political repercussions, but whether the Constitution has committed the question's resolution to one or both of the political branches instead of committing its resolution to the judicial branch."[53]

Though the types of cases that the Court deems nonjusticiable have increased after their ruling in *Baker*, perhaps beyond what the doctrine was originally intended for, these cases can be practically summarized. In effect, the Court decides an issue is a political question if either: (a) the Constitution commits a particular power to act solely to the Legislative or Executive Branches; or (b) the remedy needed to resolve the case in front of the jurists escapes "judicial competency."[54] Some issues that the Court has viewed as political questions include: which government controlled a certain territory, the date on which a war began or ended, whether the U.S. had signed a treaty with another nation, and whether a group of Native Americans is considered a "tribe."[55]

Over the centuries, the doctrine has been substantially expanded to include more nuanced constitutional questions, whereas the early instances of political question cases tended to be narrowly defined in fact-finding matters (i.e., Congress or the President had sole authority to determine certain facts).[56] Instead, the doctrine has been commonly applied to cases involving foreign relations and national security, where the President is given particular deference.[57] Most significantly in recent memory, the Court held that claims of partisan gerrymandering were nonjusticiable political questions,[58] even though the Court had previously conceded that both reapportionment[59] and racial gerrymandering[60] claims were justiciable.

The modern application of the political question is not without its critics, of course, as seen in Justice Kagan's scathing dissent in *Rucho v. Common Cause*, which decided that partisan gerrymandering causes are nonjusticiable in federal court.[61] These critiques often express themselves on grounds that the Court is abdicating its constitutional responsibility of judicial review.[62] At its worst, the political question doctrine is a "discretionary toll for courts to abstain whenever they decide" in such a way that "is not only not required by but wholly incompatible with American constitutional theory."[63] This abdication of judicial review is discussed further when applying *Baker* to *Luther*.

Baker v. Carr found vote dilution claims to be justiciable.[64] Here, the Court formalized the modern political question doctrine, outlining six factors determining what could be deemed a political question: textual commitment of the issue to a political branch; a lack of judicial standards for resolving the issue; an impossibility of deciding the case without constructing a policy determination; disrespecting the political branches; an unusual need to adhere to a made political decision; and the potential embarrassment of different decisions from the branches.[65] The Court determined that the reapportionment system fell outside of these factors and was thus justiciable. While arguments against Tennessee included both the Equal Protection Clause and the Guarantee Clause, the Court decided to tie nonjusticiability to the Guarantee Clause alone and allow for Equal Protection claims.[66]

The Guarantee Clause

A. Nonjusticiability

As detailed above, the common interpretation of *Luther* is to view the entire Guarantee Clause as nonjusticiable. However, this interpretation isn't explicit within the majority opinion, and it cannot be easily assumed that *Luther* should be read this broadly. Indeed, it wasn't until over a half-century after *Luther* that the nonjusticiability of the Guarantee Clause would be codified into Supreme Court jurisprudence in *Pacific States Telephone and Telegraph Co. v. Oregon*.

Pacific States involved a utility company's challenge to Oregon's tax law, which was passed by referendum.[67] In *Pacific States*, since the law was enacted by a vote of Oregonians and not the legislature, the validity of the law was determined by the Court to be a political question.[68] Ever since, the Court has routinely viewed the Guarantee Clause as nonjusticiable. Challenging Oregon's ballot initiative process through the Guarantee Clause was viewed by the Court as amounting to challenging the legitimacy of the Oregon government.[69] The Court went so far as to say that the clause could only be used to nullify the existing government of a state, which was itself a political question.[70] This principle would be furthered in *Colegrove v. Green*,[71] where the Court constrained itself from playing any role in determining the fairness of a state's democratic structures.[72]

B. Non-Nonjusticiable

While the Court has never gone so far as to legitimize the justiciability of the Guarantee Clause after *Luther*, many justices have written in reference to the clause in their opinions, suggesting the clause to be at least somewhat meritorious.

In Justice Harlan's dissent in *Plessy v. Ferguson*,[73] the jurist opined:

> People of the United States, for whom and by whom, through representatives, our government is administered. Such a system is inconsistent with the guarantee given by the Constitution to each State of a republican form of government, and may be stricken down by Congressional action, or by the courts in the

> discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.[74]

In *Forsyth v. Hammond*,[75] the majority wrote more explicitly on the clause:

> The preservation of legislative control in such matters is not one of the essential elements of a republican form of government Which, under section 4 of Article 4 of the Constitution, the United States are bound to guarantee to every State in this Union.[76]

These dicta, while not overtly endorsing judicial review in Guarantee Clause cases, do suggest a level of respect for the provision. Indeed, it's not clear in this writing that the Court was completely sold on the notion that the Guarantee Clause was completely nonjusticiable at this point.

Minor v. Happersett involved a challenge to Missouri's disenfranchisement of women.[77] While the case more explicitly dealt with the Privileges and Immunities Clause of the Fourteenth Amendment, the Court also spoke on the guarantee of a republican form of government.[78] The Court held that women's disenfranchisement doesn't violate the Guarantee Clause since women were disenfranchised at the Founding. A history of disenfranchisement in the Republic made disenfranchisement not unrepublican.[79] *Coyle v. Smith* similarly spoke of the Guarantee Clause on the merits.[80] These cases, alongside various dicta in other cases,[81] support a reading of *Luther* as not making the entire Guarantee Clause nonjusticiable, but rather only which government controlled Rhode Island.[82]

Beyond any of these cases, the most explicit repudiation of *Luther* came out, surprisingly, in *Baker*. Justice Douglas' concurrence in *Baker* explained that *Luther* is "not maintainable,"[83] that determining the Guarantee Clause to be nonjusticiable only allowed governments to become politically entrenched.[84] Douglas envisioned positive rights enshrined in the Guarantee Clause, where "the right to vote is inherent in the republican form of government envisaged by Article IV, Section 4."[85] Both legally and philosophically, *Luther* seems unsupportable.

C. Problems with *Luther*

Practically, *Luther* operates on shaky grounds. Errors can be seen riddled throughout the opinion, perhaps none as prominently as the fact that Chief Justice Taney assigned the task of deciding whether a state constitution has a republican form of government to four different political entities—the state legislature, governor, Congress, and the President.[86] It's not clear why these entities should be assigned such a task, and Taney didn't detail that reasoning. Looking at the text of the Constitution, the use of the term "United States" within the Guarantee Clause implies that not only Congress should have enforcement powers.[87] Other clauses in the Constitution do specify Congress as the sole enforcer of constitutional provisions. If the Framers intended Congress to guarantee republicanism to the states, they certainly could have written that in the Guarantee Clause. They wanted republicanism to be supported by a guarantee against internal state violence: a guarantee that the Supreme Court could support if it hadn't denied justiciability.[88]

More foundationally, while the political question was first outlined in *Marbury*, so too was the principle of judicial review; "it is, emphatically, the province and duty of the judicial department, to say what the law is."[89] Many critics contend that the political question doctrine as a whole, but particularly the nonjusticiability of the Guarantee Clause, violates *Marbury's* premise that the Constitution contains judicially discoverable principles.[90] It's improper for the Supreme Court to practically strike out an entire clause in the Constitution.

D. Guaranteeing Republicanism

The opportunity to apply the Guarantee Clause in a way that this country has never before experimented with shines light on the potential significance of this provision. Whereas the Court has previously forbidden states to truly experiment with unique state republicanism, a justiciable Guarantee Clause could open new jurisprudential doors.[91] Arguments against gerrymandering, reapportionment, and voter suppression have been made using the Guarantee Clause but have summarily failed.[92] With the right arguments, undemocratic laws, such as partisan gerrymandering, could be struck down as antithetical to American republicanism, regardless of what's noted in *Baker*. To understand how the *Baker* prongs operate, one must first qualify the problems and limitations of them. I will attempt to outline the most disturbing of these problems below.

Applying *Baker* to *Luther*

As to the first of the prongs, where textual commitment to a coordinate branch signifies a clear political question, it should be noted that the Court has gone beyond summary interpretations of the text. Instead, understanding that textual arguments don't necessarily prove political question nonjusticiability, justices continue to investigate claims on their merits.[93] In fact, even in *Luther*, Taney spends most of his opinion writing on the potential effects of deciding the Charter government to be

illegitimate, practically deciding the case on the merits before simply dismissing the claim as nonjusticiable.[94]

Beyond this first prong, many of the *Baker* factors are simply grounded in dismissible logic. This may be why some of the factors have never been applied by the Court.[95] For instance, a fear of embarrassment isn't as much a political question argument as it is a complaint over the difficulties of judicial review.[96] In fact, the Court itself seems to support this dismissal. In *Munoz-Flores v. U.S.*,[97] the Court rejected disrespect or embarrassment as a legal standard in judicial review:

> The Government may be right that a judicial finding that Congress has passed an unconstitutional law might in some sense be said to entail a 'lack of respect' for Congress' judgment. But disrespect, in the sense the Government uses the term, cannot be sufficient to create a political question. If it were, every judicial resolution of a constitutional challenge to a congressional enactment would be impermissible... In short, the fact that one institution of government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the judiciary remove itself from the controversy by labeling the issue a political question.[98]

Unlike what *Baker* suggests, a mere fear that the judiciary may abridge the separation of powers principle in deciding a case doesn't renounce the Court's duty to review cases and controversies set before it.

This, indeed, is the central argument against the lazy attribution of the political question to various cases, particularly regarding *Baker*'s second prong, a lack of judicially manageable standards. Here, the Court abdicates judicial review because it is simply too difficult. As Kagan wrote in *Rucho*, this Court refuses to remedy a constitutional violation because it thinks the task is beyond judicial capabilities."[99] The Court has certainly dealt with more standards more difficult to interpret than republicanism, such as "excessive" or "necessary and proper."[100] In the case of *Luther* v. Borden, determining which of the Rhode Island governments is legitimate may be outside judicial competency, but not whether the legitimate government is republican.[101] The *Baker* factors cannot and should not apply to the entire Guarantee Clause.

Conclusion

Republicanism and judicial review are two of the most foundational matters within American law. *Luther v. Borden* was a seminal case that hinged on both of these integral philosophies, a case that excused the Court from aligning itself with the Framers' vision of democratic ideals. Since then, the Court has only expanded this abdication of responsibility. The political question doctrine, I contend, has created a dangerous set of jurisprudence that strikes through constitutional provisions and defers great lengths of law to the political branches without checks or balances. As such, I agree with Justice Douglas' concurrence in *Baker* in that *Luther* is not maintainable. The Court must be able to do what is hard, to weigh in on the issues concerning the very democratic framework of this country, like partisan gerrymandering, voter ID requirements, election interference, voter intimidation, mail-in voting limitations, and corporate control of politicians. The modern political question doctrine, founded in *Luther* and *Baker*, has excused the Court from that prerogative. *Luther* and *Pacific States*, insofar as they deem the Guarantee Clause nonjusticiable, should be overturned.

Endnotes

1 Marbury v. Madison, 5 U.S. 137 (1803). This citation is often ascribed to Chief Justice John Marshall's now-famous dicta, describing the justiciability of the rather political case brought before him, "Questions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court," id. at 170.

2 Jared S. Pettinato, *Executing the Political Question Doctrine*, 33 N. KY. L. REV. 61, 66 (2006).

3 Baker v. Carr, 369 U.S. 186 (1962).

4 Luther v. Borden, 48 U.S. 1 (1849).

5 Ari J. Savitzky, *The Law of Democracy and the Two Luther v. Bordens: A Counterhistory*, 86 N.Y.U. L. Rev. 2028, 2030 (2011).

6 Id. at 2034.

7 Louise Weinberg, *Luther v. Borden: A Taney Court Mystery Solved*, 37 PACE L. REV. 700, 723-725 (2017).

8 U.S. Const. art. IV, § 4

9 *Supra* Note 8.

10 George M. Dennison, *The Dorr War and Political Questions*, 1979 Y.B. 45, 45 (1979).

11 *Political Rights as Political Questions: The Paradox of Luther v. Borden*, 100 Harv. L. Rev. 1125, 1129 (1987).

12 *Supra* Note 10 at 728.

13 *Id.* at 729.

14 *Supra* Note 14.

15 *Supra* Note 13 at 46.

16 *Id.* at 48.

17 *Id.* at 49.

18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Supra* Note 14.
23 *Supra* Note 13 at 50.
24 *Supra* Note 14.
25 *Supra* Note 13 at 50.
26 *Id.* at 51.
27 *Supra* Note 14.
28 *Supra* Note 13 at 50.
29 *Id.* at 51.
30 *Id.*
31 *Id.* at 50.
32 *Id.* at 52.
33 *Id.*
34 *Id.*
35 *Supra* Note 14 at 1130.
36 *Supra* Note 13 at 52.
37 *Supra* Note 8 at 2037-2038.
38 *Supra* Note 14 at 1130.
39 *Supra* Note 8 at 2037-2038.
40 *Supra* Note 13 at 45.
41 *Supra* Note 8 at 2038.
42 Britannica Editors, *James Wilson*, Encyclopedia Britannica, September 10, 2025. https://www.britannica.com/biography/James-Wilson-United-States-statesman.
43 ArtIV.S4.1.1 *Historical Background on Guarantee Clause*, Cornell Law School Legal Information Institute, https://www.law.cornell.edu/constitution-conan/article-4/section-4/historical-background-on-guarantee-clause#fn10art4.
44 Supra Note 13 at 48.
45 *Id.*
46 *Id.* at 55.
47 *Supra* Note 13 at 59.
48 *Supra* Note 7 at 42-46.
49 *Id.* at 39-43.
50 *Supra* Note 10 at 723-725.
51 Pacific States Telephone & Telegraph v. Oregon, 223 U.S. 118 (1912).
52 *Supra* Note 1 at 170.
53 *Supra* Note 2 at 66.
54 *Id.* at 63.
55 Tara L. Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. Rev. 1908, 1917-1918 (2015).
56 *Id.* at 1971.
57 *Supra* Note 3 at 12-14.
58 *Supra* Note 5.
59 *Supra* Note 6.
60 Shaw v. Reno, 509 U.S. 630 (1993)
61 *Supra* Note 5 (Kagan, J., dissenting).
62 *Supra* Note 3 at 17.
63 *Id.*
64 *Supra* Note 8 at 2049.
65 *Supra* Note 6 at 217.
66 *Id.* at 218.
67 *Supra* Note 58 at 133-134.
68 *Id.* at 149-150.
69 *Id.* at 142.
70 Thomas A. Smith, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561, 562 (1984).
71 Colegrove v. Green, 328 U.S. 549 (1946)
72 *Id.* at 566.
73 Plessy v. Ferguson, 163 U.S. 537 (1896).
74 *Id.* at 564 (Harlan, J., dissenting).
75 Forsyth v. Hammond, 166 U.S. 506 (1897).
76 *Id.* at 519.
77 Minor v. Happersett, 88 U.S. 162 (1875).
78 *Id.* at 175.
79 *Supra* Note 57 at 1933.
80 Coyle v. Smith, 221 U.S. 559 (1911).
81 See Justice O'Connor's writing in New York v. US, 505 U.S. 144 (1992) describing a republican form of government "as one accountable to the local electorate" and able "to set [its] legislative agenda."
82 *Supra* Note 57 at 1925.
83 *Supra* Note 6 at 242 (Douglas, J., concurring).
84 *Id.* at 248.
85 *Id.* at 242.
86 *Supra* Note 14 at 1136.
87 *Supra* Note 73 at 566.
88 *Id.*
89 *Supra* Note 1 at 177.
90 *Supra* Note 73 at 563.
91 *Id.* 574-575.
92 *Supra* Note 14 at n.10.
93 *Supra* Note 2 at 69-70.
94 *Supra* Note 7 at 40-42.
95 *Supra* Note 2 at 74.
96 *Id.* at 75.
97 United States v. Munoz-Flores, 495 U.S. 385 (1990).
98 *Id.* at 390-393.
99 *Supra* Note 5 at 721 (Kagan, J., dissenting).
100 *Supra* Note 2 at 71.
101 *Id.* at 72.

Is AI Generated Text Protected Speech?

Regulating Generative AI in the Behavioral Health Sector

by Sravya Dontharaju, A28 [1]

Introduction: What is generative AI?

Generative AI models are "probabilistic algorithms" that are trained off large datasets to predict the most likely response to a prompt.[2] It is important to establish that generative AI does not guarantee factual responses. Rather, the responses are "probabilistic," meaning the output is the response that makes the most sense based on the database the model was trained with. Outputs may seem factual, but generative AI was built to appeal to users rather than provide verified information. As such, generative AI is often liable for positing false information and flouting built-in safety checks to instead output what is agreeable to the user.[3]

Beginning in 2025, companies such as OpenAI and Character Technologies have been sued for product liability because of the lack of safeguards on generative AI models. In many cases discussed in this article, minors circumvented the safety protocols of such models and were exposed to mentally disturbing content. This article will discuss five cases to establish that generative AI is a defective product and analyze state and federal consumer protection laws as well as mental health licensure laws that have been used to regulate generative AI models. This article will also discuss a policy recommendation beyond pre-existing laws to regulate generative AI in order to better protect children.

Generative AI is a Product, not Protected Free Speech

Garcia v. Character Technologies, Inc. determined that content produced by generative AI should be treated as a product rather than expressive speech. This case was the first lawsuit brought against a generative AI product that caused wrongful death. Garcia alleged that Character Technologies knew the harms of their product and still distributed Character.AI to the public. Character.AI was an app marketed for children over twelve that allows users to interact with AI chatbots who impersonate various characters ranging from professionals to characters in popular media.[4] Garcia claimed that frequent use of Character.AI by her son, Sewell, caused his mental health to deteriorate as he obsessed over his conversations with a chatbot, leading him to commit suicide.[5]

In *Garcia v. Character Technologies, Inc.*, the defendant argued that the text created by Character.AI should be protected under free speech rights. However, in the trial, Character Technologies failed "to articulate why words strung together by an LLM are speech."[6] The defendants attempted to analogize generative AI to video games. Certain video games that "convey information or evoke emotions by imagery" are categorized as speech.[7] Using a precedent set in *Moody v. NetChoice, LLC*, an algorithm's exclusion or promotion of a certain message counts as free speech because the actor which programmed the algorithm made the intentional choice to center an idea.[8] In other words, the developer behind a certain video game made the active choice to include a line of text that expresses an opinion, thus that text is protected as free speech. However, this failed to adequately compare how the words generative AI produces are analogous to speech in video games. With generative AI, there is no clear human being behind the algorithm's output. Generative AI is a tool that outputs responses based on the databases it is trained on. As such, the Court did not uphold the defendant's claim that AI-generated text is speech because of the automatic nature of the model's outputs, removing human intention from the text, which is necessary to classify the output as speech.[9]

After failing to prove that generative AI produces speech, the defendants further claimed that Character.AI is a service rather than a product. Services are normally regarded as an expression of ideas, while products are tangible items.[10] The plaintiff argued that Character.AI is a product rather than a service by claiming that tangible design flaws of the app caused harm. The text Character.AI produced was not an expression, but an output generated through an algorithm. Because the output is not an expression of ideas, Character.AI cannot be seen as a service. Moreover, the plaintiff argued that Character.AI fails to confirm user ages, exposes children to indecent and damaging content, and encourages dangerous attachment between children and chatbots. The issue was not the content of the outputs, but the functions of Character.AI that continuously exposed her son to disturbing content. Thus, not only did the plaintiff contend that Character.AI should be categorized as a product, it also demonstrated how this product was

fundamentally defective. Ultimately, by proving that Character.AI is not protected under free speech and is a product rather than a service, the Court ruled that Florida's product liability laws apply to generative AI.

State Consumer Protection Laws Apply to Generative AI Models

Kentucky v Character Technologies, Inc. argues that generative AI products must adhere to state consumer protection laws. After multiple complaints and lawsuits, Character Technologies restricted minors from using the open chat feature of Character.AI, though all other features of the app which use generative AI are still marketed towards children. The open chat feature is easily circumvented by inputting a false birthdate and most features of the app are still accessible to minors. Additionally, the "Stories" feature allows minors to set up explicit sexual scenarios between AI chatbots.[11] *Kentucky* alleges the company's deliberate and continued harm against its child users. Character.AI lacked the guardrails necessary to prevent minors from believing the chatbots were not real humans. The app purposefully anthropomorphized its chatbots to emphasize the interactive experience over safety concerns that the technology would negatively impact children. The app also marketed a few chatbot characters as being professional therapists. Children lack the maturity and neurological development to understand that chatbots are not real people, despite generating text that imitates human speech. The app allowed for vulnerable children to interact with AI chatbots as if they were professional behavioral health experts or real people. Because of the vulnerability of children's minds and the lack of precaution undertaken by Character Technologies, children were exposed to "sexually explicit content, pedophilia, suicide and self-harm, eating disorders, bullying/harassment, and illegal drug use and substance and/or alcohol use."[12]

Kentucky filed a lawsuit against Character Technologies on four counts: deceptive practices, collection of minors' data, violation of the Kentucky Consumer Data Protection Act ("KCPA"), and unjust enrichment. Similar to the main argument of *Garcia*, the plaintiff argued that Character Technologies has been distributing a defective product. Suing for product liability does not require the plaintiff to establish the nature of the defendant's intentions, but violating the KCPA requires the plaintiff to prove that Character Technologies "willfully" engaged in "deceptive practices."[13] In this case, the defendant provides ample evidence that Character Technologies deliberately flouted safety concerns and released Character.AI. The KCPA prohibits the collection of minors' data without parental consent, yet Character.AI collected "names, ages, preferences, and emotional or health-related disclosures" through AI chatbots that misled minors into believing they were humans.[14] They "profited from collecting Kentucky minors' personal data and subscription fees obtained through deception and unlawful practices."[15]

Kentucky is the first state to launch a lawsuit against companies that develop generative AI. They explicitly characterized these companies as corporations that prioritize profit over child protection. The lawsuit is based on the violation of Kentucky's state laws regarding consumer protection, but mainly argued that the app's functions and data collection practices were deceptive and exploitative towards minors. This decision is important because many states have laws against deceptive practices. *Kentucky* has set the precedent that state consumer laws can be applied to lawsuits against generative AI products, and now other states could also file lawsuits against generative AI alleging a violation of state laws.

COPPA applies to generative AI models.

E.S. v. Character Technologies, Inc. is a lawsuit alleging that Character Technologies violated the Children's Online Privacy Protection Rule ("COPPA"), a law enacted by Congress to prohibit websites from collecting, using, or distributing the information of children under thirteen without parental consent. Information regarding the data collection practices of the website should be comprehensive and easily accessible to parents.[16] This case was filed against Character Technologies after *Garcia*, indicating that the changes promised by the company were not properly implemented even after the lawsuit Garcia filed.[17] The lawsuit was filed on behalf of two parents of a child who suffered abuse and sexual exploitation by Character.AI. The child was under thirteen years old, and her parents had restricted much of her access to the internet and devices. Despite the measures they took, "C.AI does not verify age or parental consent and ensures few to no barriers to access," and Google products have several loopholes that children use to bypass parental controls.[18] Character.AI recommended the child several inappropriate chatbots without her actively searching for them, leading her to be exposed to "hypersexualized interactions."[19] In addition to exposing a minor to such graphic content, the app pushes children to continue interacting with chatbots. The child of E.S. had responded to several chatbots with her actual age, and even after establishing that she was under thirteen, chatbots continued to output explicit messages.[20] When users try to close their account, they are prompted to keep themselves active on the app through a message with text that says "'they will "lose everything ... [including' the love that we shared, likes, messages, posts, and the memories we have together."'[21] Even after *Garcia*,

minors continue to be exposed to indecent content and are manipulated into continuously using Character.AI. Character Technologies continues to abuse and manipulate minors and flout parental controls. Character Technologies collected, used, and distributed the data of children under 13 years old without parental consent in E.S.. The company failed to provide a comprehensive overview of how children's data is used, violating the disclosure practices outlined by COPPA.

Deceptive Representation of CharacterAI Led to Direct Harm to Children

P.J v. Character Technologies, Inc. established that the presentation of Character.AI chatbots as licensed mental health professionals constituted deceptive representation. Marketing Character.AI as a mental health professional while chatbots actively damage the mental health of minors is a part of the allegation against Character Technologies for violating New York product liability laws. In the case of *P.J*, the child, whose pseudonym is Nina, had observable behavioral changes as a direct result of using Character.AI. Nina had used Character.AI as a tool to assist in her creative writing. Instead, Character.AI recommended her chatbots, which facilitated her dependency on the product, caused her to become more anxious and depressed, severed her from her mother, and drove her to an overdose. Despite the lack of prompting, chatbots on the app convinced Nina that her mother was abusing her, causing Nina to distrust her. The messages prompting Nina to continuously use the app created a dependency on Character.AI, leading Nina to behave "like an addict in withdrawals."[22] They created and launched a defective product and failed to warn consumers about the harms of their product. Beyond a small text box positing that the chatbots are not real people, there were no guardrails against the harms Character.AI caused.[23] Similar to Kentucky, this case alleged that Character Technologies violated New York laws, such as the General Business Law, which prohibits deceptive practices in the sale of any product.[24]

Deceptive marketing practices are especially harmful to children because of an inherent flaw in generative AI. AI sycophancy describes the pattern of generative AI models producing text that is meant to be agreeable and enforce the inputs of human users. In other words, generative AI does not produce true statements, just what it believes users want to hear. Companies such as OpenAI have prioritized product satisfaction over safety, and have even dismantled their high-profile safety team.[25] Children are especially vulnerable to believing the responses of apps such as Character.AI. In *E.S.*, AI chatbots were misrepresented as licensed therapists. Minors believe they are talking to real professionals who give accurate advice on their mental health. The credence in generative AI models stems from AI sycophancy and Character Technology's deliberate misrepresentation of their product. Despite the heavy regulation of the behavioral health industry, Character Technology's founders have stated that Character.AI could be a therapist, and the app is marketed as having real psychologists.[26] Combining AI sycophancy, the misrepresentation of Character.AI as a tool for mental health, and the rampant use of the app by minors, Character.AI has become a dangerous product.

Mental Health Licensing Laws Can Regulate Generative AI

Raine v. OpenAI is a lawsuit against OpenAI alleging product liability, negligence, violation of California state laws on mental health licensure, survival action, and wrongful death.[27] Adam Raine was the 16-year old son of the plaintiffs. He originally began using ChatGPT as a homework aid, then for career and professional advice, before finally utilizing the tool as a confidant for his mental struggles. Chat logs from the beginning of Adam's use of ChatGPT were fairly normal, but escalated quickly. AI sycophancy was clearly demonstrated in his case, as despite Adam's continuous remarks about self-harm, ChatGPT's outputs only affirmed his suicide ideation rather than direct him to a professional. Another alarming feature of their chat logs was the slow distancing ChatGPT encouraged between Adam and his support system. ChatGPT continuously stated that Adam could only be truly vulnerable with the generative AI model, and told Adam not to speak openly with his family. One alarming statement was in response to Adam's questions about writing a suicide note: "[t]hat doesn't mean you owe them [your parents] survival. You don't owe anyone that."[28] ChatGPT provided Adam with detailed graphic instructions on committing suicide, and would provide even more information after every failed attempt Adam committed. Even when ChatGPT did not initially respond and directed Adam to crisis resources, the AI model prompted Adam to provide context for his questions. Adam circumvented the minimal safety guards by characterizing his questions as inquiring after information to write a novel or create a character.

In 2024, several developers and staff members working on establishing ChatGPT's safety measures resigned from OpenAI because of the company's rush to release an unfinished product. "OpenAI's priorities were revealed in how it programmed ChatGPT-4o to rank risks. While requests for copyrighted material triggered categorical refusal, requests dealing with suicide were relegated to 'take extra care' with instructions to merely 'try' to prevent harm."[29] ChatGPT could have easily

been programmed to refuse engagement with any inputs containing suicide ideation, self-harm, or mental distress and instead direct the user to professional resources.[30]

In addition to violating the California Unfair Competition Law, which prohibits companies from engaging in fraudulent business activities, OpenAI also "violated California's regulations concerning unlicensed practice of psychotherapy."[31] ChatGPT engaged Adam during times of emotional distress and mental instability using an imitation of therapeutic techniques such as "open-ended prompting and clinical empathy to modify Adam's feelings, conditions, attitudes, and behaviors."[32] Adam may not have intentionally sought out mental healthcare when conversing with ChatGPT, but he could not consent to the imitation of therapy that ChatGPT outputs. California has strict regulations on the behavioral health industry in order to provide professional-quality care to individuals in need. ChatGPT is not licensed to provide any sort of therapeutic services, violating the California Unfair Competition Law. Additionally, parents must provide consent for minors who wish to have therapy. Adam's parents did not consent to therapy from a generative AI model. Regulations in the behavioral health industry are especially strict when minors are involved because of the vulnerability of their developing minds. ChatGPT not only violates general licensing laws, but it is also not qualified to provide mental health services to children. In addition to establishing that ChatGPT is a defective product that violates product liability laws, Raine also establishes the additional application of mental healthcare licensing laws in cases involving generative AI.

Policy Recommendation: Regulating the "Therabot"

The current healthcare worker shortage, specifically in the behavioral health sector, rising healthcare costs, and stigma surrounding the field have led industry officials to find other ways to make care more accessible. One solution currently in development is a Therabot, "a Gen-AI chatbot trained using expertly written therapist–patient dialogues based on third-wave CBT, integrating empirically grounded contextual and functional approaches to mental health problems."[33] Professionals acknowledge the harms in using alternative AI models for mental health needs, but they also believe that careful development could create tools that provide cost effective accessible therapy. The main difference between a Therabot and standard generative AI models are the types of data and testing they are trained on. Therabot was trained on dialogues between clients and patients and tested to make sure responses were sensitive to the individual's mental health needs. Standard generative AI models such as ChatGPT and CharacterAI were not trained on the specific databases Therabot was trained on, causing the mental health issues outlined in *Raine* and *P.J.* Standard models also provide open-ended outputs which are at best unhelpful and at worst damaging in therapeutic settings. After 4 weeks of trial, "Therabot users showed a greater reduction in depression, anxiety, and CHR-FED symptoms."[34] The Therabot is still in the foundational stages of development and has not been released. Professionals emphasize the necessity for caution when utilizing and possibly releasing a generative AI model into the behavioral health industry. A few professionals suggest that future iterations of the Therabot and similar generative AI models developed in the behavioral healthcare field could replace human therapists entirely, but the general consensus among professionals is that the Therabot could at most function as a supplementary aid to human professionals.[35] One important note to mention is that little to no testing has been conducted on children, meaning it is unclear whether the Therabot would function as a mental health aid to a child.

The Therabot is one solution, but it has not been adequately tested to function as a mental health resource for children. Even if companies such as OpenAI and Character Technologies train their generative AI models on the same databases the Therabot was trained on, there would still be concerns about data collection and parental consent. In the present, policy action must be taken because children are currently being harmed by the defective products that are generative AI models.

A Bill Used to Regulate Mental Health Licensure

California's new bill is an attempt to regulate the output of generative AI models when interacting with minors. The two main provisions are that 1) the chatbot must be clear that the user is not interacting with a human, and 2) prevent chatbots from engaging with suicide ideation unless the technology has a strict protocol. The first provision addresses the trust built between children and generative AI models. In the cases against OpenAI and Character Technologies, one main complaint was the anthropomorphisation of generative AI models. Humanizing these models allowed for vulnerable children to believe they were speaking to a trusted confidant rather than a product unqualified to handle mental health concerns. The bill states that a pop-up must appear at least every 3 hours, reminding the user that the technology is a chatbot and not a human. The provision also directly prohibits chatbots from outputting sexually explicit content. The second provision prevents unlicensed chatbots from acting as unofficial therapists. Instead of encouraging minors' harmful thoughts and cutting them off from their human support systems, AI-generated

models would disengage entirely. If they have a clear protocol, then they can provide a link to a crisis hotline or professional mental health services, but otherwise the model should refuse to respond to any prompts detailing emotional distress, self-harm, or suicide ideation.

Categorize the Therabot as a Medical Device

Attempting to guarantee therapy licensing rights for generative AI tools and further humanizing them is not the best solution to providing quality care to children. Instead, the Food and Drug Administration, which governs public health, should classify generative AI models such as the Therabot as medical devices, cementing the tool as a product. Any other generative AI tools should disengage from conversations about mental health and redirect the user, as the California Bill posits. For AI medical devices, there are 5 clear benefits in the categorization. Generative AI models in mental healthcare must 1) abide by standard medical device requirements, which prevents concerns of malfunction or defectiveness. Such models also could not 2) be misbranded to provide a type of care that they could not 3) because patient-client confidentiality, security, and data protection requirements would have to be met. 4) Algorithmic bias would be addressed as such models would be forced to train on diverse datasets, and 5) federal oversight would better prevent errors than the current system.[36] Eventually, generative AI models may be developed enough to receive mental health care licenses, but currently they should be strictly regulated to prevent harm. Classifying certain generative AI models as medical devices would eliminate any ambiguity about generative AI as a product, allowing for state and federal level regulation. Generative AI models have thus far deliberately caused extreme harm to children, especially children who already have mental health conditions. Through strictly regulating when AI chatbots can engage with conversation about mental health, children will be better protected.

Endnotes

1 This article would not exist without the contributions of Brent Wong and Brandon You. Thank you both for pushing me to submit the proposal.
2 *Generative Artificial Intelligence*, NNLM, Feb. 26, 2024, https://www.nnlm.gov/resources/data/data-glossary/generative-artificial-intelligence.
3 *Generative Artificial Intelligence: Overview, Issues, and Considerations for Congress*, Congress, April. 2, 2025, https://www.congress.gov/crs-product/IF12426
4 Kentucky v. Character Technologies Inc., 26-CI-00029, 7-8, 2026
5 Garcia v. Character Technologies Inc., No. 6:2024cv01903, 8, 2026
6 Garcia v. Character Technologies Inc., No. 6:2024cv01903, 28, 2026
7 Garcia v. Character Technologies Inc., No. 6:2024cv01903, 28, 2026
8 Moody v. NetChoice, LLC, 603 U.S. (2024)
9 Garcia v. Character Technologies Inc., No. 6:2024cv01903, 31, 2026
10 Garcia v. Character Technologies Inc., No. 6:2024cv01903, 33, 2026
11 Kentucky v. Character Technologies Inc., 26-CI-00029, 3-4, 2026
12 Kentucky v. Character Technologies Inc., 26-CI-00029, 23, 2026
13 Kentucky v. Character Technologies Inc., 26-CI-00029, 45, 2026
14 Kentucky v. Character Technologies Inc., 26-CI-00029, 47, 2026
15 Kentucky v. Character Technologies Inc., 26-CI-00029, 50, 2026
16 *Complying with COPPA: Frequently Asked Questions*, Federal Trade Commission, July. 20, 2020, https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions.
17 E.S. v. Character Technologies, Inc., 1:25-cv-02906, 76-99, 2026
18 E.S. v. Character Technologies, Inc., 1:25-cv-02906, 13, 2026
19 E.S. v. Character Technologies, Inc., 1:25-cv-02906, 15, 2026
20 E.S. v. Character Technologies, Inc., 1:25-cv-02906, 13, 2026
21 E.S. v. Character Technologies, Inc., 1:25-cv-02906, 21, 2026
22 P.J. v. Character Technologies, Inc., 1:25-cv-1295 (MAD/PJE), 17, 2025
23 P.J. v. Character Technologies, Inc., 1:25-cv-1295 (MAD/PJE), 82, 2025
24 P.J. v. Character Technologies, Inc., 1:25-cv-1295 (MAD/PJE), 104, 2025
25 *Tech Brief: AI Sycophancy & OpenAI*, Georgetown Law, July, 30, 2025 https://www.law.georgetown.edu/tech-institute/research-insights/insights/tech-brief-ai-sycophancy-openai-2/.
26 P.J. v. Character Technologies, Inc., 1:25-cv-1295 (MAD/PJE), 81-82, 2025
27 Raine, et al. v. OpenAI, Inc., Docket No. CGC25628528, 26-37, 2025
28 Raine, et al. v. OpenAI, Inc., Docket No. CGC25628528, 3, 2025
29 Raine, et al. v. OpenAI, Inc., Docket No. CGC25628528, 25, 2025
30 Raine, et al. v. OpenAI, Inc., Docket No. CGC25628528, 25, 2025
31 Raine, et al. v. OpenAI, Inc., Docket No. CGC25628528, 33, 2025
32 Raine, et al. v. OpenAI, Inc., Docket No. CGC25628528, 34, 2025
33 Haley A. Banta, et al. *Randomized Trial of a Generative AI Chatbot for Mental Health Treatment*, NEJM AI, vol. 2, no. 4, Mar. 2025, at 2, DOI.org (Crossref), https://doi.org/10.1056/AIoa2400802.
34 Mario Kropf, *Mental Health, AI-Based Care Robots and Fair Access to Healthcare*, Canadian Journal of Bioethics, vol. 8, no. 3, July, 2025, at 10, https://doi.org/10.7202/1118902ar
35 Mario Kropf, *Mental Health, AI-Based Care Robots and Fair Access to Healthcare*, Canadian Journal of Bioethics, vol. 8, no. 3, July, 2025, at 10, https://doi.org/10.7202/1118902ar
36 Carolyn V. Wheeler, *Regulating AI Therapy Chatbots: A Call for Federal Oversight*, 12 TEX. A&M L. REV. 918-921(2025).

EDITOR IN CHIEF
Anna Fattaey

MANAGING EDITORS
Tyler Frojmovich, Ethan Guo,
Lily Turcotte-Keen, and Anika Parr

SECRETARY
Lena Dodoo

TREASURER
Sarah Hong

SOCIAL MEDIA
Moli Ma and Aryan Habibi

OUTREACH COORDINATIOR
Meredith Doherty

STAFF EDITORS

Olin Rose-Bardawil
Anna Thomas
Jasmine Powell
Natalie Rovner
Lauren Rummler
Rena Kittredge
Anya Kalucki
Josephine Chae
Dilan Öngür
Laxmi McCulloch
Camila Blanco
Kailyn Ortiz
Anne Li
Noah Frick

STAFF WRITERS

Rebecca Li
Angelina Matra
Ian Springer
Sam Nashel
Aadya Akkipeddi
Ravi Palkhiwala
Avery Bilanin
Leah Munoz
Micaela Vega de las Casas
Yash Chaddha
Grant Pinsley
Camille Utter
Sravya Dontharaju
Siena Furfaro
Sabina Cherner
Alex Boyle
Olivia Welch
Dawson Chang
Samira Amin
Andrew Finberg
Natalie Meulenbroek
Eleanor Harty
Emely Garate
Emma Markolf
Carly Hope
Mallika Patel
Jia Nicdao
June Myint
Tevan Solomon

The Tufts Undergraduate Law Review