MOORE V. TEXAS: THE CONTINUED QUEST FOR A NATIONAL STANDARD

ABSTRACT

The Supreme Court has long held that certain types of sentences violate the Eighth Amendment's proscription against cruel and unusual punishment. Throughout the Court's Eighth Amendment jurisprudence, it has reiterated that excessive-punishment claims are informed by evolving standards of decency. When the Court assesses a form of punishment under the Eighth Amendment, it utilizes a two-part proportionality review. This test requires the Court to first assess whether a national consensus has formed against a particular type of punishment through an examination of state legislation. If a national consensus exists, then the Court subjectively contemplates whether it has reason to disagree with the legislative trend. Consequently, a particular punishment violates the Eighth Amendment if the Court agrees with the national consensus.

In 2002, for the first time, the Supreme Court held that using capital punishment on intellectually disabled offenders constitutes cruel and unusual punishment under the Eighth Amendment. In its decision, the Court provided little guidance and left to the states the autonomy to develop standards for assessing intellectual disability in such cases. However, this task proved problematic, demonstrated by the Court granting certiorari twice in the past fifteen years to determine whether state standards adhere to its 2002 holding.

In *Moore v. Texas*, the Supreme Court struck down Texas's procedural standards for assessing intellectual disability in capital cases. Specifically, it held that Texas's use of seven evidentiary questions based upon lay perceptions was unconstitutional because a national consensus had formed against utilizing this type of subjective indicia to determine intellectual disability. This Case Comment analyzes the Court's reasoning behind its invalidation of Texas's standards, as well as the differences in state procedures for determining intellectual disability. These variations in state standards indicate that intellectually disabled offenders may be subject to the death penalty in some states but not in others depending on where they are tried and sentenced. Finally, through the lens of the incorporation and equal protection doctrines, this Comment argues that the Court should cease its search for national consensus when contemplating the constitutionality of different state procedures and instead provide a uniform test for determining intellectual disability in capital cases.

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INTRODUCTION

The Eighth Amendment of the United States Constitution prohibits the government from inflicting cruel and unusual punishment on its people.[1] The Supreme Court of the United States began to place categorical bans on certain types of punishment in the early twentieth century.[2] These prohibitions covered a wide array of sentences, such as the denaturalization of natural-born citizens and the use of capital punishment for underage offenders.[3] And while the types of punishments the Court has assessed vary greatly, the underlying rationale of its analysis has remained steadfast: ensuring the government affords every individual the dignity that the

1. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII; *see* Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1815 (2012).

2. *See* Atkins v. Virginia, 536 U.S. 304, 311–13 (2002) (providing a broad overview of the Court's Eighth Amendment jurisprudence); Pressly Millen, Note, *Interpretation of the Eighth Amendment*—Rummel, Solem, *and the Venerable Case of* Weems v. United States, 1984 DUKE L.J. 789, 798–99 (1984) (explaining that the Court first provided an in-depth discussion of the Eighth Amendment in Weems v. United States, 217 U.S. 349, 368–80 (1910)).

3. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 572–73 (2005) (discussing the prohibition of capital punishment for underage offenders); Trop v. Dulles, 356 U.S. 86, 92–93 (1958) (plurality opinion) (explaining that denaturalization of natural-born citizens is not an appropriate punishment).

human race deserves.[4] As Justice Stewart opined in *Robinson v. California*,[5] "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[6]

In the 1980s, the Court first addressed whether the Eighth Amendment's proscription against cruel and unusual punishment prohibits the execution of intellectually disabled offenders.[7] While the *Atkins v. Virginia*[8] Court determined that this class of individuals are inherently less culpable than those of average intelligence and therefore protected by the Eighth Amendment, the Court provided each state with the autonomy to create its own standards for enforcement.[9] However, the Court has had to address various states' chosen methodologies to ensure that they are not executing the class of individuals the Court intended to protect.[10] In *Moore v. Texas*,[11] the Court held that the Texas courts utilized an unconstitutional test for determining intellectual disability in capital cases, effectively narrowing a state's independence in creating its own *Atkins* standard.[12] This Case Comment first provides an overview of the Court's Eighth Amendment jurisprudence, with a particular focus on the use of capital punishment for intellectually disabled offenders. Next, it provides a synopsis of the Court's opinion in *Moore*. Finally, this Comment proposes that the Court should cease its search for a national consensus on the procedural standards of an *Atkins* claim and instead implement a national standard for assessing intellectual disability in death penalty cases.

I. BACKGROUND

Over the past century, the Supreme Court's interpretation of the Eighth Amendment's proscription against excessive punishment has evolved to reflect societal "standards of decency."[13] The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[14] However, as Justice Stevens noted in *Atkins*, the Court does not review claims of excessive punishment "by the standards that prevailed in 1685 . . . or when

4. *Atkins*, 536 U.S. at 311–12 (quoting *Trop*, 356 U.S. at 100–01).
5. 370 U.S. 660 (1962).
6. *Id.* at 667.
7. *See* Penry v. Lynaugh, 492 U.S. 302, 313 (1989), *abrogated by Atkins*, 536 U.S. 304.
8. 536 U.S. 304.
9. *See id.* at 317, 321; Natalie A. Pifer, *The Scientific and the Social in Implementing* Atkins v. Virginia, 41 L. & SOC. INQUIRY 1036, 1039 (2016).
10. *See, e.g.*, Moore v. Texas, 137 S. Ct. 1039, 1048 (2017); Hall v. Florida, 134 S. Ct. 1986, 1993 (2014); *see also* Pifer, *supra* note 9, at 1036–37.
11. 137 S. Ct. 1039.
12. *See id.* at 1052–53.
13. *Hall*, 134 S. Ct. at 1992 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).
14. U.S. CONST. amend. VIII; *see* Justin F. Marceau, *Un-incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1287–88 (2008) (explaining that the Court first incorporated the Eighth Amendment against the states in Robinson v. California, 370 U.S. 660, 666–67 (1962)).

the Bill of Rights was adopted."[15] Instead, it judges Eighth Amendment claims through the lens of current societal standards of moral decency.[16]

In the early 1900s, the Court declared "that it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."[17] Utilizing a proportionality review in *Weems v. United States*,[18] the Court held that being jailed in irons and forced to perform hard labor was an excessive punishment for falsifying records.[19] In *Weems*, the Court explained that the meaning of the Eighth Amendment continuously evolves "as public opinion becomes enlightened by a humane justice."[20] The Court has continued to "appl[y] this proportionality precept" in its subsequent Eighth Amendment jurisprudence.[21]

In *Trop v. Dulles*,[22] Chief Justice Warren explained that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man" and that it "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."[23] After *Trop*, the Court fully articulated its two-part proportionality test for excessive-punishment claims.[24] First, it looks to state legislation to assess whether a consensus has formed in terms of societal values.[25] The Court found that the use of legislative judgment is necessary because "in 'a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'"[26] If the Court determines that a societal consensus exists, it then subjectively contemplates "whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[27]

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15. Atkins v. Virginia, 536 U.S. 304, 311 (2002).

16. *Id.* at 311–12.

17. *Id.* at 311 (alteration in original) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)); *see* Susan Raeker-Jordan, *Kennedy, Kennedy, and the Eighth Amendment: "Still in Search of a Unifying Principle"?*, 73 U. PITT. L. REV. 107, 119–20 (2011) (detailing the Court's reasoning in *Weems*).

18. 217 U.S. 349.

19. *Id.* at 357, 366, 382; *see* Raeker-Jordan, *supra* note 17, at 118–19; Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the next Frontier*, 50 B.C. L. REV. 785, 796 (2009).

20. *Weems*, 217 U.S. at 378; *see* Winick, *supra* note 19.

21. *Atkins*, 536 U.S. at 311.

22. 356 U.S. 86 (1958).

23. *Id.* at 100–01; Judith M. Barger, *Avoiding* Atkins v. Virginia*: How States Are Circumventing Both the Letter and the Spirit of the Court's Mandate*, 13 BERKELEY J. CRIM. L. 215, 219 (2008) (quoting *Trop*, 356 U.S. at 100–01); *see* Raeker-Jordan, *supra* note 17, at 122.

24. Barger, *supra* note 23; *see* Lyn Entzeroth, *Constitutional Prohibition on the Execution of the Mentally Retarded Criminal Defendant*, 38 TULSA L. REV. 299, 303–04 (2002) (detailing the Court's application of the two-part proportionality test to the facts of *Trop*).

25. *Atkins*, 536 U.S. at 312 (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

26. Moore v. Texas, 137 S. Ct. 1039, 1056–57 (2017) (quoting Gregg v. Georgia, 428 U.S. 153, 175 (1976)).

27. *Atkins*, 536 U.S. at 313.

In *Furman v. Georgia*,[28] the Court further narrowed the use of capital punishment.[29] The Court invalidated "the then-existing death penalty statutes in effect around the country" because it found that these statutes violated the Eighth Amendment's ban on cruel and unusual punishment.[30] In deciding the case, the Court took issue with Texas's discretionary capital sentencing system, which provided jurors with "unrestricted discretion to choose between a death sentence and alternative periods of confinement for convicted capital offenders."[31] This forced the Texas legislature to reassess its capital punishment statute, and in 1973, it enacted new provisions to help guide jurors in capital cases.[32] These new procedures mandated separate sentencing hearings where state courts provide the jury with specific questions to help focus its decision.[33]

Just three years later in *Jurek v. Texas*,[34] the Court upheld Texas's post-*Furman* capital sentencing procedure.[35] It explained that states must allow jurors to perform a particularized assessment of both the crime committed and the individual defendant.[36] Furthermore, the Court noted that "a capital [punishment] sentencing system must allow the sentencer to consider [both] mitigating as well as aggravating circumstances" to ensure appropriately individualized sentencing.[37] Because the Texas court allowed juries to consider a wide array of factors when assessing a defendant's potential for future violence, the Court held that the state's capital sentencing procedures were constitutional.[38]

In 1986, the Court first declared a categorical ban against executing certain individuals based on "class-wide characteristics."[39] In *Ford v. Wainwright*,[40] Justice Marshall examined the history of capital punishment for "insane" offenders, noting that "[t]oday, no State in the Union permits the execution of the insane."[41] He further observed that the Court "seriously question[s] the retributive value of executing a person who has no

28. 408 U.S. 238 (1972) (per curiam).
29. *Id.* at 239–40; *see* Peggy M. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-*Atkins *Claims of Mental Retardation*, 39 HASTINGS CONST. L.Q. 1, 6–7 (2011).
30. Entzeroth, *supra* note 24, at 304; *see* Tobolowsky, *supra* note 29.
31. Tobolowsky, *supra* note 29.
32. *Id.* at 7.
33. *Id.*
34. 428 U.S. 262 (1976).
35. *Id.* at 276; Tobolowsky, *supra* note 29, at 9–10.
36. Tobolowsky, *supra* note 29, at 9.
37. *Id.*
38. *Id.* at 9–10.
39. Jonathan Greenberg, *For Every Action There Is a Reaction: The Procedural Pushback Against* Panetti v. Quarterman, 49 AM. CRIM. L. REV. 227, 229, 229 n.16 (2012) (providing an overview of the Court's subsequent bans based on class-wide characteristics); *see* Ford v. Wainwright, 477 U.S. 399, 410 (1986).
40. 477 U.S. 399.
41. *Id.* at 408–09.

comprehension of why he has been singled out and stripped of his fundamental right to life."[42] Thus, the Court held that executing a mentally insane individual violated the Eighth Amendment's proscription against cruel and unusual punishment.[43]

Three years after declaring that the Eighth Amendment prohibited the execution of insane offenders, the Court addressed the issue of executing intellectually disabled criminals for the first time.[44] In *Penry v. Lynaugh*,[45] a jury found the defendant guilty of capital murder and sentenced him to death.[46] The Supreme Court granted certiorari on two issues: (1) whether the jury had the opportunity to adequately consider the defendant's intellectual capabilities and (2) whether executing an intellectually disabled offender violated the Eighth Amendment.[47] The Court overturned the defendant's death sentence because the jury instructions did not clearly convey that the jury could consider the defendant's intellectual disability as a mitigating factor.[48] However, the Court ultimately declined to extend an Eighth Amendment's categorical ban on capital punishment of those offenders with "mild" or "moderate" intellectual disability.[49]

Before the Court first addressed the appropriateness of capital punishment for intellectually disabled offenders in *Penry*, Georgia's execution of Jerome Bowden garnered a great deal of public outcry.[50] A jury sentenced Bowden to death after he murdered a woman during a robbery.[51] The state scheduled his execution for June 18, 1986, but a Georgia court granted a stay to assess his mental competency.[52] After Bowden underwent testing, a state-hired psychologist concluded that Bowden's intelligence quotient (IQ) was 65.[53] And while the state psychologist's findings clearly showed that Bowden suffered from intellectual disability, the Georgia Board of Pardon and Paroles nevertheless lifted the stay the very same day

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42. *Id.* at 409.

43. *Id.* at 409–10; *see* Greenberg, *supra* note 39, at 229.

44. *See* Tobolowsky, *supra* note 29, at 3, 13.

45. 492 U.S. 302 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

46. *Id.* at 310; Tobolowsky, *supra* note 29, at 11; *see* Mark Alan Ozimek, *The Case for a More Workable Standard in Death Penalty Jurisprudence:* Atkins v. Virginia *and Categorical Exemptions Under the Imprudent "Evolving Standards of Decency" Doctrine*, 34 U. TOL. L. REV. 651, 665–66 (2003).

47. *Penry*, 492 U.S. at 310; Tobolowsky, *supra* note 29, at 11–13; *see* Ozimek, *supra* note 46, at 666.

48. Tobolowsky, *supra* note 29, at 12; *see* Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After* Penry v. Johnson, 35 AKRON L. REV. 327, 347–48 (2002).

49. Tobolowsky, *supra* note 29, at 14; *see* Pifer, *supra* note 9, at 1038.

50. Timothy R. Saviello, *The Appropriate Standard of Proof for Determining Intellectual Disability in Capital Cases: How High Is Too High?*, 20 BERKELEY J. CRIM. L. 163, 168–69 (2015); *see, e.g.*, Associated Press, *Retarded Man, 33, Electrocuted as Plea to High Court Is Rejected*, N.Y. TIMES, June 25, 1986, at A16; United Press International, *Killer Executed in Georgia; He Had an IQ of 65*, L.A. TIMES (June 24, 1986), http://articles.latimes.com/1986-06-24/news/mn-21196_1_iq-test.

51. Saviello, *supra* note 50, at 165–66.

52. *Id.* at 165.

53. *Id.*

the psychologist performed the test.[54] The state executed Bowden less than twenty-four hours later.[55] In 1988, Georgia became the first state to ban the use of capital punishment against intellectually disabled offenders, in part because of the extreme public reaction against Bowden's execution.[56] Seventeen states followed in Georgia's footsteps over the span of less than fourteen years, illustrating that a national consensus had formed against the practice.[57]

A mere thirteen years after *Penry*, the Supreme Court revisited the issue of executing intellectually disabled individuals in *Atkins*.[58] In *Atkins*, a Virginia state court convicted the defendant of abduction, robbery, and capital murder.[59] He was subsequently sentenced to death, despite the evidence establishing that he had an IQ of 59.[60] In reversing the Virginia Supreme Court's decision, the Court effectively abrogated its decision in *Penry*.[61] In reaching this conclusion, Justice Stevens first assessed the trend in state legislation and found that eighteen states had enacted statutes banning the execution of intellectually disabled individuals within fourteen years.[62] However, Justice Stevens noted that the number of states was not as important as "the consistency of the direction of [the] change."[63] In weighing the proportionality of the defendant's sentence, the Court found that executing intellectually disabled offenders does not further the penological aims of capital punishment.[64] Because this class of individuals possess "diminished capacities to understand and process information," the Court reasoned that these offenders are less morally culpable than those with average intelligence.[65] Additionally, the Court reasoned that intellectually disabled offenders have a higher risk of wrongful execution because of the "possibility of false confessions" and a "lesser ability . . . to make a persuasive showing of mitigation."[66]

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54. *Id.*; *see also* Brooke Amos, Atkins v. Virginia*: Analyzing the Correct Standard and Examination Practices to Use when Determining Mental Retardation*, 14 J. GENDER RACE & JUST. 469, 470 (explaining that the psychologist who administered Bowden's IQ test determined that Bowden "was not mentally retarded enough to deserve clemency" because he had scored six points higher than his originally measured IQ).

55. Saviello, *supra* note 50, at 165.

56. *Id.* at 168.

57. *Id.* at 169.

58. Hensleigh Crowell, *The Writing Is on the Wall: How the* Briseno *Factors Create an Unacceptable Risk of Executing Persons with Intellectual Disability*, 94 TEX. L. REV. 743, 743–44 (2016).

59. Atkins v. Virginia, 536 U.S. 304, 307 (2002); *see* Ozimek, *supra* note 46, at 668–70 (providing an in-depth discussion of the facts of *Atkins*).

60. *Atkins*, 536 U.S. at 309; *see* Ozimek, *supra* note 46, at 670.

61. *See Atkins*, 536 U.S. at 321.

62. *Id.* at 314–15; *see* Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811, 812 (2007).

63. *Atkins*, 536 U.S. at 315; *see* Crowell, *supra* note 58, at 745.

64. *Atkins*, 536 U.S. at 319 (noting that the penological goals of the death penalty include retribution and deterrence for potential offenders).

65. *Id.* at 318–19.

66. *Id.* at 320.

While the Court's decision in *Atkins* established a categorical ban, it left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction."[67] This task proved problematic, and the Court was faced with addressing Florida's standards for intellectual disability twelve years after it decided *Atkins*. In *Hall v. Florida*,[68] the defendant was convicted of first-degree murder and sentenced to death.[69] Although the defendant presented evidence of adaptive deficits and had an IQ of 71, the Florida Supreme Court upheld the defendant's sentence.[70]

Florida's statutory definition of intellectual disability in capital cases set a bright-line IQ cutoff of 70, which means that no defendant with an IQ below 70 was eligible for the death penalty.[71] Justice Kennedy rejected Florida's standard, explaining that it did not adequately account for the "inherent imprecision of the [IQ] test itself."[72] The Court held that states must account for the clinically accepted standard error of measurement (SEM) when considering an offender's IQ.[73] Although the Court reiterated that states may implement their own definitions of intellectual disability, it concluded that those definitions must be "informed by the views of medical experts."[74] A mere three years later in *Moore*, the Court attempted to provide states with further guidance in crafting their own definitions of intellectual disability.

II. *MOORE V. TEXAS*

A. Facts

On April 25, 1980, Bobby James Moore and two friends decided to rob a supermarket.[75] The group, carrying two of Moore's firearms, entered the Birdsall Super Market in Houston, Texas.[76] They immediately proceeded to the courtesy booth where two clerks, James McCarble and Edna Scott, were stationed.[77] The men approached the clerks and Moore shot McCarble in the head, killing him instantly.[78] Moore fled the scene and police arrested him ten days later in Louisiana.[79] After Moore provided

67. *Id.* at 317 (alteration in original) (quoting Ford v. Wainwright, 477 U.S. 399, 416 (1986)).
68. 134 S. Ct. 1986 (2014).
69. *Id.* at 1990; Ashley Sachiko Wong, *Aligning the Criminal Justice System with the Mental Health Profession in Response to* Hall v. Florida, 94 OR. L. REV. 425, 430–31 (2016).
70. *Hall*, 134 S. Ct. at 1992; *see* Crowell, *supra* note 58, at 757.
71. *Hall*, 134 S. Ct. at 1994.
72. *Id.* at 1995.
73. *Id.*
74. *Id.* at 1998–2000; Crowell, *supra* note 58, at 757 (explaining that the Court held in *Hall* that "state policies that deviate from clinical definitions of intellectually disability create an unacceptable risk of executing intellectually disabled individuals and are therefore unconstitutional").
75. Moore v. Texas, 137 S. Ct. 1039, 1054 (2017) (Roberts, C.J., dissenting).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

police with a written statement admitting his involvement in the crime, the State charged Moore with capital murder.[80]

B. Procedural History

A jury convicted Moore of capital murder and sentenced him to death a mere two months after his arrest.[81] A federal habeas court vacated the sentence due to ineffective trial counsel and the Fifth Circuit affirmed.[82] In 2001, a second jury sentenced Moore to death, and the Texas Court of Criminal Appeals (CCA) affirmed the jury's decision.[83] Moore then challenged the sentence, seeking state habeas relief and claiming that his intellectual disability precluded him from capital punishment.[84]

In 2014, the Texas habeas court conducted an evidentiary hearing to determine whether Moore qualified as intellectually disabled.[85] Moore presented evidence indicating that he "had significant mental and social difficulties beginning at an early age."[86] The state habeas court ultimately determined that Moore possessed "subaverage intellectual functioning" based on the results of six IQ tests, the average of which produced a score of 70.66.[87] In addition, it concluded that Moore possessed serious adaptive deficits based on the testimony of several mental health professionals.[88] Using current clinical diagnostic standards, the habeas court determined that Moore qualified as intellectually disabled and therefore his sentence "violated the Eighth Amendment's proscription of 'cruel and unusual punishments.'"[89] The habeas court recommended that the CCA either change Moore's sentence to life in prison or allow for a new trial due to his intellectual disability.[90]

The CCA declined to adopt the recommendation of the state habeas court and again affirmed Moore's sentence after utilizing the clinical standards set forth in the 1992 edition of the American Association on Mental Retardation (AAMR) and the factors in *Ex parte Briseno*.[91] The CCA created the *Briseno* factors,[92] which includes seven questions to assess intellectual disability based on lay perceptions, to counteract what it

80. *Id.*
81. *Id.* at 1044 (majority opinion).
82. *Id.* at 1044–45.
83. *Id.* at 1045; *see also Court of Criminal Appeals*, TEX. JUD. BRANCH, http://www.txcourts.gov/cca (last visited May 16, 2018) (stating that the CCA is the highest court in Texas for criminal cases).
84. *Moore*, 137 S. Ct. at 1045.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 1046.
89. *Id.* at 1044 (quoting U.S. CONST. amend. VIII).
90. *Id.* at 1046.
91. *Id.* at 1044, 1046; *Ex parte* Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004), *abrogated by Moore*, 137 S. Ct. at 1039.
92. The *Briseno* factors include the following seven evidentiary questions:

deemed to be the "exceedingly subjective" nature of the adaptive deficit prong of clinical guidelines.[93] The Supreme Court of the United States granted certiorari to determine whether the CCA's methods for determining intellectual disability in capital cases adhered to the Eighth Amendment and the Court's precedents.[94]

C. Opinion of the Court

Justice Ginsburg authored the opinion of the Court.[95] Justices Kennedy, Breyer, Sotomayor, and Kagan joined her.[96] The Court vacated the CCA's ruling, holding that the *Briseno* factors violate the Eighth Amendment and deviate from the Court's holding in both *Atkins* and *Hall*.[97] Justice Ginsburg began by reviewing the Court's previous Eighth Amendment jurisprudence, emphasizing that the purpose of the Eighth Amendment "reaffirms the duty of the government to respect the dignity of all persons."[98] She further explained that, per *Atkins*, the Eighth Amendment prohibits states from taking the life of intellectually disabled offenders because the practice fails to further the penological aims of capital punishment.[99] Finally, the majority opinion noted that while "being informed by the medical community does not demand adherence" to the latest clinical diagnostic framework, the Court's precedent does not allow states to simply "disregard . . . current medical standards."[100]

Justice Ginsburg then examined the CCA's procedures for determining intellectual disability in capital cases.[101] First, she rejected the CCA's conclusion that two of Moore's IQ scores (74 and 78) proved that he is not intellectually disabled.[102] Justice Ginsburg detailed the Court's holding in *Hall*, which requires states to account for the SEM when assessing an IQ "close to, but above, 70."[103] She determined that the CCA failed to

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> (1) Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at the time, and, if so, act in accordance with that determination?; (2) Has the person formulated plans and carried them through or is his conduct impulsive?; (3) Does his conduct show leadership or does it show that he is led around by others?; (4) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?; (5) Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?; (6) Can the person hide facts or lie effectively in his own or others' interests?; and (7) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Briseno, 135 S.W.3d at 8–9.

93. *Id.* at 8.
94. *Moore*, 137 S. Ct. at 1048.
95. *Id.* at 1043.
96. *Id.*
97. *Id.* at 1053.
98. *Id.* at 1048 (quoting Hall v. Florida, 134 S. Ct. 1986, 1992 (2014)).
99. *Id.*
100. *Id.* at 1049.
101. *Id.*
102. *Id.* at 1047, 1049.
103. *Id.* at 1049.

properly consider Moore's intellectual functioning because, after the required SEM adjustment, his IQ of 74 produced a range of 69 to 79.[104] Furthermore, Justice Ginsburg dismissed the State's assertion that it may disregard part of Moore's IQ range because of his personal circumstances.[105] Ultimately, the Court held that a state may not cease its inquiry into an offender's intellectual disability merely because the offender's IQ score falls slightly above 70.[106]

The Court then considered whether the CCA utilized appropriate methods to determine Moore's adaptive deficits.[107] Justice Ginsburg noted that the CCA's assessment of Moore's adaptive functioning "deviated from prevailing clinical standards and from the older clinical standards the court claimed to apply."[108] For example, the CCA placed considerable emphasis on Moore's perceived adaptive strengths, such as playing pool for money.[109] However, clinical standards focus on adaptive deficits, not strengths, to determine an individual's overall adaptive functioning.[110] Accordingly, the Court held that the CCA's deviation from the current medical standards violated the protections afforded to intellectually disabled individuals.[111]

Finally, the Court examined the CCA's use of the *Briseno* evidentiary factors in assessing Moore's intellectual status.[112] Justice Ginsburg concluded that the *Briseno* factors merely perpetuate the lay stereotypes of intellectual disability that the medical community seeks to combat.[113] Additionally, the Court noted that no state legislatures had adopted anything remotely similar to the *Briseno* factors to determine an individual's intellectual ability.[114] The Court ultimately held that "[m]ild levels of intellectual disability, although they may fall outside Texas citizens' consensus, nevertheless remain intellectual disabilities."[115]

D. Dissenting Opinion

Chief Justice Roberts, joined by Justices Thomas and Alito, delivered a dissenting opinion.[116] Although the Chief Justice agreed that the *Briseno* evidentiary factors are inappropriate, he argued that the CCA's overall determination of Moore's intellectual disability did not violate the

104. *Id.*
105. *Id.*
106. *Id.* at 1050.
107. *Id.* at 1051.
108. *Id.* at 1050.
109. *Id.*
110. *Id.*
111. *Id.* at 1053.
112. *Id.* at 1051–52.
113. *Id.* at 1052.
114. *Id.* (noting that the Pennsylvania Supreme Court and the Tennessee Court of Criminal Appeals had adopted the use of the *Briseno* factors, but neither state legislature had codified the factors).
115. *Id.* at 1051.
116. *Id.* at 1053 (Roberts, C.J., dissenting).

Eighth Amendment or the Court's precedent.[117] Chief Justice Roberts began by expressing his concern with the majority opinion's emphasis on the use of prevailing clinical standards.[118] Reiterating the Court's holding in *Atkins*, the Chief Justice argued that Texas courts appropriately considered medical standards when creating the state's definition of intellectual disability.[119] Furthermore, he asserted that it was within the CCA's discretion to dismiss the lower end of Moore's IQ range due to mitigating factors.[120] Because Moore's IQ did not fall below 70 after the CCA rejected his lower range of scores, Chief Justice Roberts argued that the state court could not find Moore intellectually disabled because he failed "one part of the CCA's three-part test."[121]

Next, the dissent objected to the majority opinion's departure from its Eighth Amendment precedent, which Chief Justice Roberts described as a prohibition of "sentences that our society deems repugnant."[122] He argued that the majority based its decision solely on clinical standards instead of focusing on any sort of societal moral consensus.[123] Additionally, the Chief Justice criticized the majority opinion's ambiguity in addressing the need to adhere to clinical standards.[124] He pointed out that the majority opinion provided no guidance when it declared that states have "'some flexibility' but cannot 'disregard' medical standards."[125] Lastly, Chief Justice Roberts noted that Moore presented no evidence of a national legislative consensus and that, more importantly, the majority deviated from its Eighth Amendment precedent when it failed to address any sort of prevalent legislative trend.[126]

III. ANALYSIS

Moore aptly illustrates the difficulties that states encounter when creating and implementing a standard for intellectual disability in capital cases. While the Supreme Court reached the correct decision in *Moore*, it failed to provide states with adequate guidance to enforce its ruling in *Atkins*. Because of the Court's ambiguity regarding state reliance on medical standards, *Moore* will likely lead to additional confusion about the appropriate definition of intellectual disability for the purposes of capital punishment. First, this Case Comment argues that states risk violating the Eighth Amendment through the doctrine of incorporation and equal protection under the Fourteenth Amendment if they continue to employ differing standards for determining intellectual disability. Next, it asserts that

117. *Id.*
118. *Id.* at 1053–54.
119. *Id.* at 1054.
120. *Id.* at 1055.
121. *Id.* at 1055–56.
122. *Id.* at 1058.
123. *Id.*
124. *Id.*
125. *Id.* (quoting *id.* at 1049, 1052 (majority opinion)).
126. *See id.* at 1061.

while the Court appropriately found a national consensus in *Atkins*, it should stop assessing states' procedural processes through such a lens. Finally, it advocates for a national standard to assess intellectual disability partially based on widely accepted clinical definitions to avoid these constitutional concerns.

A. Constitutional Considerations for a Uniform Standard of Intellectual Disability in Capital Cases

The risk that states will unconstitutionally execute intellectually disabled defendants continues with the Court's decision in *Moore*. The most apparent risk is that states will violate the Eighth Amendment by utilizing varying standards for assessing intellectual disability in capital cases. Indeed, when the Court declares a punishment "cruel and unusual," a state violates the Eighth Amendment if it practices such punishment.[127] Consequently, beginning when the Court deemed the practice of executing intellectually disabled offenders to be "cruel and unusual" in *Atkins*, any state that executes an individual who falls within this classification fails to adhere to the Eighth Amendment.[128] This is not the only constitutional consideration that arises from varying standards of intellectual disability in capital cases. The Court's failure to provide a uniform standard also increases the risk of states violating the Eighth Amendment through undermining the doctrine of selective incorporation and possibly equal protection under the Fourteenth Amendment. As demonstrated below, the Court must provide a standard that, at the very least, serves as a floor to ensure state adherence to *Atkins*.

1. Incorporation Considerations

Through the first clause of the Fourteenth Amendment,[129] the Supreme Court began to selectively incorporate the fundamental guarantees enumerated in the Bill of Rights to the states in the 1960s.[130] Although the

127. *See* Marceau, *supra* note 14.

128. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

129. Section One of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

130. *See* Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 290–91 (1982) (providing a detailed history of the selective incorporation doctrine).

incorporation doctrine remains a hotly contested concept among scholars,[131] the doctrine unequivocally provides that the "incorporate[d]" guarantees apply equally to both the states and the federal government.[132] Indeed, once the Court determines that a right is incorporated, a state may not provide "only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'"[133]

While not all of the guarantees enumerated in the Bill of Rights have been applied to the states, the Court has incorporated many of the criminal justice provisions.[134] For instance, in *Gideon v. Wainwright*,[135] the Court held that the Sixth Amendment's right to counsel in criminal prosecutions applied to the states through Section One of the Fourteenth Amendment.[136] When the Court decided *Gideon*, thirty-seven states already had provisions guaranteeing this right.[137] Although eight of the thirteen states without the statutory right to assistance of counsel had developed the right "without [the] benefit of any statute or rule of [the] court,"[138] the Court's ruling in *Gideon* made it unconstitutional for these states not to provide counsel to indigent criminal offenders facing felony charges.[139] And while many

131. *See, e.g.*, Kenneth Katkin, *"Incorporation" of the Criminal Procedure Amendments: The View from the States*, 84 NEB. L. REV. 397, 398 (2005); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1067–78 (2000).

132. Israel, *supra* note 130, at 291; Marceau, *supra* note 14, at 1242.

133. Malloy v. Hogan, 378 U.S. 1, 10–11 (1964) (quoting Ohio *ex rel.* Easton v. Price, 364 U.S. 263, 275 (1960) (per curiam)) (holding that the Fifth Amendment protection against self-incrimination applies to the states); Israel, *supra* note 130, at 295.

134. Israel, *supra* note 130, at 253, 253 n.2 (providing a list of the thirteen Bill of Rights guarantees that pertain to the "criminal justice process," which include: (1) search and seizure under the Fourth Amendment; (2) grand jury indictment under the Fifth Amendment; (3) double jeopardy under the Fifth Amendment; (4) Fifth Amendment right to due process; (5) self-incrimination under the Fifth Amendment; (6) Sixth Amendment right to a public and speedy trial; (7) Sixth Amendment right to an impartial jury; (8) notice under the Sixth Amendment; (9) right to confront opposing witnesses under the Sixth Amendment; (10) right to assistance of counsel under the Sixth Amendment; (11) Sixth Amendment right to compulsory process; (12) Eighth Amendment proscription against excessive fines; and (13) Eighth Amendment proscription against cruel and unusual punishment).

135. 372 U.S. 335 (1963).

136. *Id.* at 342, 344.

137. Katkin, *supra* note 131, at 462 (citing Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 17 (1962)).

138. *Id.* at 464.

139. *Gideon*, 372 U.S. at 344.

scholars have criticized *Gideon* for a myriad of reasons,[140] the Court's decision provided a bright-line rule: states must provide counsel to those indigent defendants facing felony charges.[141]

Despite the fact that the Court first began interpreting the Eighth Amendment during the nineteenth century,[142] it did not incorporate the Eighth Amendment's proscription against cruel and unusual punishment until 1962 with its decision in *Robinson*.[143] After the Court's decision in *Robinson*, its categorical bans against capital punishment in certain situations or with regard to particular offenders were to apply with equal force to both states and the federal government.[144] For instance, in *Roper v. Simmons*,[145] the Court held that both the Eighth and Fourteenth Amendments "forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."[146] Through the doctrine of incorporation, this categorical ban against executing juvenile offenders equally extends to the federal government and those states that continue to utilize capital punishment.[147] Thus, the Court must provide a uniform definition of intellectual disability as it did with juvenile offenders in *Roper* to ensure the categorical ban announced in *Atkins* does not lend itself to violations of the Eighth Amendment.

2. Equal Protection Considerations

Not only do differing standards for determining intellectual disability risk undermining selective incorporation but they also perhaps violate the equal protection clause. The Fourteenth Amendment guarantees that "[n]o

140. *See, e.g.*, Carol S. Steiker, Gideon *at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2698 (2013) (criticizing the Court for "remain[ing] crucially silent on the quality and scope of services that constitutionally sufficient counsel must provide or on the appropriate mechanisms for the funding, appointment, training, or supervision of such counsel"); Kim Taylor-Thompson, *Tuning Up* Gideon*'s Trumpet*, 71 FORDHAM L. REV. 1461, 1462 (2003) (noting that the Court's decision in *Gideon* "left open the critical question of how states might develop a coherent system of representation for indigent individuals charged with crimes").

141. Timothy P. O'Neill, *"Stop Me Before I Get Reversed Again": The Failure of Illinois Appellate Courts to Protect Their Criminal Decisions from United States Supreme Court Review*, 36 LOY. U. CHI. L.J. 893, 894 n.13 (2005).

142. Erin E. Braatz, *The Eighth Amendment's Milieu: Penal Reform in the Late Eighteenth Century*, 106 J. CRIM. L. & CRIMINOLOGY 405, 414–16 (2016).

143. Robinson v. Wainwright, 370 U.S. 660, 667 (1962); Marceau, *supra* note 14, at 1287..

144. *See* Marceau, *supra* note 14, at 1287 (explaining that the Court's decision in *Robinson* incorporated the Eighth Amendment's prohibition against cruel and unusual punishment).

145. 543 U.S. 551 (2005).

146. *Id.* at 578.

147. *See id.* at 560 (stating that the Eighth Amendment is applicable to the states through the Fourteenth Amendment, meaning that the Court's ruling applies to both the federal government and the states); *see also* Catherine B. Pober, *The Eighth Amendment's Proscription Against Cruel and Unusual Punishments Requires a Categorical Rejection of the Death Penalty as Imposed on Juvenile Offenders Under the Age of Eighteen:* Roper v. Simmons, 44 DUQ. L. REV. 121, 124 n.31 (2005).

State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[148] Each state's standards for determining intellectual disability for the purpose of capital punishment also should be assessed through an equal protection lens to ensure adherence to *Atkins*.

The crux of an equal protection analysis lies in the level of scrutiny applied by the Court based on the class of individuals a law purportedly discriminates against.[149] If an equal protection claim involves a "suspect class," meaning a law that discriminates on the basis of national origin or race,[150] the Court applies a "strict scrutiny" standard of review where the government must show its classification is "narrowly tailored to achieve a compelling governmental interest."[151] However, short of a government action involving a suspect classification, the Court applies more lenient standards of review.[152]

If a governmental action purportedly discriminates against a "quasi-suspect" classification, the Court uses heightened scrutiny, a standard which is more deferential to the government's interest than strict scrutiny.[153] The Court utilizes several factors to determine if a classification is quasi-suspect and thus entitled to some form of heightened scrutiny, which include: a history of pervasive discrimination against the group, the group's immutable characteristics, the group's "ability to contribute to society," the classification reflecting "deep-seated prejudice," and the group's general political powerlessness.[154] However, if a court determines the group is not a suspect or quasi-suspect class, it applies the extremely deferential "rational-basis review" where the law will be upheld if the government can show a "rational relationship" to a "legitimate government purpose."[155]

For an *Atkins* claim, the analysis hinges on the rights of intellectually disabled offenders to be free from state infliction of capital punishment.

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148. U.S. CONST. amend. XIV, § 1.

149. David J. Shannon, *"No Pass, No Play": Equal Protection Analysis Under the Federal and State Constitutions*, 63 IND. L.J. 161, 163 (1987).

150. Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2772 (2005).

151. *See, e.g.*, Abrams v. Johnson, 521 U.S. 74, 82 (1997); *see also* Smith, *supra* note 150; Stacey L. Sobel, *When* Windsor *Isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J.L. & PUB. POL'Y 493, 500 (2015).

152. Smith, *supra* note 150, at 2772–73.

153. *Id.* at 2773.

154. Sobel, *supra* note 151, at 501 (citing United States v. Virginia, 518 U.S. 515, 531 (1996) (acknowledging a pervasive history of sex discrimination)); *see* Lyng v. Castillo, 477 U.S. 635, 638 (1986) (noting close relatives do not share immutable characteristics "that define them as a discrete group"); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–41, 445 (1985) (discussing the ability of those with intellectual disabilities to contribute to society and their political power); Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (discussing the deep-seated prejudice against illegal aliens).

155. Heller v. Doe, 509 U.S. 312, 319–20 (1993).

However, the Court has refused to recognize those with intellectual disabilities as a suspect, or even quasi-suspect, class.[156] Despite finding that intellectual disability is an immutable characteristic and that those individuals with intellectual disability have a history of experiencing discrimination, in *City of Cleburne v. Cleburne Living Center*,[157] the Court found that intellectually disabled individuals are not a suspect class because they are not politically powerless.[158] Consequently, the Court only afforded the class rational basis review to assess the zoning ordinance at issue in *Cleburne*.[159] However, unlike most of the laws that have overcome rational basis review in an equal protection analysis, the Court held that the city's interests for the zoning ordinance were not legitimate.[160] In reaching its conclusion, the Court reasoned that the government's stated interest of preventing the negative attitudes of neighbors was not a legitimate reason for denying the permit and that the government did not properly justify its position that the living center would be overcrowded.[161] Although the Court purported to use rational basis, many scholars have argued that the outcome of *Cleburne* denoted a slightly higher standard than traditional rational basis review.[162] What is more, the dissent noted that the "ordinance surely would be valid under the traditional rational-basis test."[163]

Differing state standards of assessing intellectual disability for capital punishment alone will not trigger an equal protection violation. However, the clinical childhood-onset requirement that many states employ which requires individuals to show their below average IQ and adaptive deficits were present before the age of eighteen could be considered unconstitutional.[164] As Professor Steven Mulroy has explained, the childhood-onset

156. *Cleburne*, 473 U.S. at 442; *see Heller*, 509 U.S. at 321; *see also* Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1071 (2004) (providing an in-depth analysis of *Cleburne*).

157. 473 U.S. 432.

158. *Id.* at 443–45 (finding that the state and federal legislative responses to protecting intellectually disabled individuals illustrate that the class is not politically powerless); *see* Steven J. Mulroy, *Execution by Accident: Evidentiary and Constitutional Problems with the "Childhood Onset" Requirement in* Atkins *Claims*, 37 VT. L. REV. 591, 631 (2013).

159. *Cleburne*, 473 U.S. at 446.

160. *Id.* at 448; *see* Mulroy, *supra* note 158, at 631–32 (explaining the Court's rejection of the city's various justifications for the ordinance).

161. Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 794 (1987).

162. *See, e.g.*, Mulroy, *supra* note 158, at 632; Pettinga, *supra* note 161 (observing that the Court's "ensuing review [in *Cleburne*] was more exacting than the traditional rational basis test").

163. *Cleburne*, 473 U.S. at 456 (Marshall, J., concurring in part and dissenting in part); Pettinga, *supra* note 161.

164. *See, e.g.*, FLA. STAT. § 921.137(1) (2017); TENN. CODE ANN. § 39-13-203(a)(3) (2017); VA. CODE ANN. § 19.2-264.3:1.1(A) (2017); *see also* AM. ASS'N OF INTELLECTUAL & DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (11th ed. 2010) [hereinafter AAIDD, INTELLECTUAL DISABILITY]; AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013) [hereinafter DSM-5].

prong of an intellectual disability determination could plausibly fail a traditional rational basis analysis.[165] He argues that this prong likely fails because a state's justification for using the age requirement to assess intellectual disability in capital cases does not rationally relate to any sort of penological purpose.[166] Indeed, individuals who experience some form of trauma after their eighteenth birthday that results in intellectual and adaptive deficits similar to those of someone who has been medically diagnosed as intellectually disabled will still be eligible for the death penalty in a state that requires a showing of childhood onset.[167] Consequently, states that employ the clinical childhood-onset requirement arguably risk violating the equal protection clause under a traditional rational basis analysis because those individuals who are similarly situated will be treated differently merely because the trauma occurred after a certain age.[168] The Court should provide states with a uniform standard for assessing intellectual disability in capital cases because the variations in state procedures for an *Atkins* claim may violate the equal protection clause if some states continue to utilize a childhood-onset requirement.

B. The Difficulty of Finding a National Consensus in the Procedures for Determining Intellectual Disability

The proscription against executing intellectually disabled offenders was realized through a national consensus that formed against the practice.[169] If the Court continues to consider the national moral consensus when providing procedural guidelines, it risks nullifying the original ban it announced in *Atkins*. Thus, the Court should instead provide the states with a standard for determining intellectual disability in capital cases to serve, at the very least, as a floor to avoid the potential constitutional problems discussed above.

1. The Substantive Ban Against Executing Intellectually Disabled Offenders

In *Atkins*, the Court conducted an Eighth Amendment proportionality analysis to assess whether a national consensus had formed regarding the lesser moral culpability of intellectually disabled offenders.[170] Ultimately,

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165. Mulroy, *supra* note 158, at 644–45.

166. *Id.* at 651. The use of the age of onset requirement for intellectual disability in capital cases is analogous to the policy of executing sixteen- and seventeen-year-old adolescents, but not fifteen-year-old adolescents, because of the penological interests involved. *See* Michael J. Spillane, *The Execution of Juvenile Offenders: Constitutional and International Law Objections*, 60 UMKC L. REV. 113, 124–25 (1991) (explaining that Justice Scalia, writing for a plurality in *Stanford v. Kentucky*, noted that "if the fact that death penalty for juvenile offenders truly serves no legitimate penological function is proven scientifically, then the juvenile death penalty should be invalidated under the Equal Protection Clause as irrational").

167. Mulroy, *supra* note 158, at 595.

168. *Id.* at 628–29.

169. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

170. *Id.*

it determined that "our society views mentally retarded offenders as categorically less culpable than the average criminal" based on the trend in state legislation banning the practice of executing intellectually disabled offenders.[171] Indeed, the Court noted that in the fourteen years between *Penry* and *Atkins*, eighteen states and the federal government enacted statutes banning the practice.[172] While the number of states with such a ban bolstered the notion of a national consensus, the Court recognized that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."[173] What is more, no states passed legislation reinstating the practice of executing intellectually disabled offenders during that period.[174]

While the Court found that a national consensus had formed against the practice, it noted that the states still disagreed about what occurs when "determining which offenders are in fact retarded."[175] Despite acknowledging the likelihood of conflicting interpretations, the Court nevertheless provided states with the autonomy to develop their own standards for determining intellectual disability in capital cases.[176] The only guidance it provided was that the standards states employ must protect individuals whose intellectual disability places them within the group of those offenders that society has "deemed to have lesser culpability and a greater risk of wrongful [capital] conviction and/or execution."[177] Allowing this amount of discretion will likely lead to variations in state procedures and thus lend itself to the very thing that the Court prohibited in *Atkins*: the execution of intellectually disabled defendants.

2. The Court Should Cease Searching for a National Consensus to Determine the Adequacy of State Procedures

Although the Court determined that a national consensus had formed against the practice of executing intellectually disabled individuals, it continues to search for national consensus in the state procedures used to assess an *Atkins* claim.[178] In the first case that it assessed after *Atkins*, the Court invalidated Florida's bright-line IQ cutoff of 70 after finding that many states do not employ such a standard.[179] In reaching its determination, the Court stated that "[a] significant majority of States implement the protections of *Atkins* by taking the SEM into account."[180] The Court then

171. *Id.* at 314–16; *see* Crowell, *supra* note 58, at 745.
172. *Atkins*, 536 U.S. at 314–15.
173. *Id.* at 315.
174. *Id.* at 315–16.
175. *Id.* at 317.
176. *Id.*
177. Barger, *supra* note 23, at 226.
178. *See* Moore v. Texas, 137 S. Ct. 1039, 1052–53 (2017); Hall v. Florida, 134 S. Ct. 1986, 1996–97 (2014).
179. *Hall*, 134 S. Ct. at 1998.
180. *Id.* at 1996.

went on to detail the practices of each state, concluding that "[t]he rejection of the strict 70 cutoff in the vast majority of States and the 'consistency in the trend' toward recognizing the SEM provide strong evidence of [a] consensus."[181]

In *Moore*, the Court utilized the national consensus framework when determining whether Texas's use of the *Briseno* factors to assess intellectual disability in capital cases violated *Atkins*.[182] While the Court rejected the CCA's dismissal of an offender's various IQ scores and its assessment of adaptive functioning, it purported to do so because the procedures did not adhere to generally accepted clinical standards, not under the pretext of a lack of national consensus.[183] However, the Court's decision arguably implicitly relied on its interpretation of national consensus in its evaluation of the CCA's IQ determination because it cited to *Hall* when it rejected the CCA's conclusion that Moore's IQ scores showed he was not intellectually disabled.[184] While Justice Ginsburg made no mention of consensus in this portion of the opinion, her reliance on *Hall* seemingly incorporates a search for a national consensus because the Court's holding in *Hall* was based on the finding of such a consensus.[185]

The Court may have shied away from outwardly relying on the national consensus analysis in its evaluation of the CCA's IQ and adaptive function standards, but it did explicitly employ the analysis when it concluded that the *Briseno* factors violate the Eighth Amendment.[186] It reasoned that Texas's use of the *Briseno* factors "[is] an outlier, in comparison . . . to other States' handling of intellectual-disability."[187] The Court found that "[n]o state legislature has approved the use of the *Briseno* factors or anything similar."[188] But the Court did not need to employ such an analysis in determining whether the *Briseno* factors risked executing those offenders whose intellectual disability renders them categorically less culpable than the average criminal. Instead, Justice Ginsburg should have utilized the same analysis as with her evaluation of the CCA's IQ determination and its assessment of adaptive functioning.

Indeed, such an analysis would have allowed the Court to quickly dismiss the *Briseno* factors due to their lack of clinical basis. The Court recognized that the *Briseno* factors are not rooted in "any authority, medical or judicial."[189] The lack of clinical reliability in these factors is bol-

181. *Id.* at 1998 (quoting Roper v. Simmons, 543 U.S. 551, 567 (2005)).
182. *Moore*, 137 S. Ct. at 1052.
183. *Id.* at 1049–50.
184. *Id.* at 1049.
185. *Hall*, 134 S. Ct. at 1998.
186. *Moore*, 137 S. Ct. at 1052–53.
187. *Id.* at 1052.
188. *Id.*
189. *Id.* at 1046.

stered by the fact that the factors are based on a work of fiction—specifically the character Lennie in John Steinbeck's *Of Mice and Men*—a point that the opinion wholly fails to recognize.[190] What is more, the *Briseno* court provided no reason as to why Lennie's adaptive functioning was an appropriate measure for intellectual disability, besides stating that Lennie has a "lack of reasoning ability and adaptive skills."[191] Further, it is unlikely that Lennie himself would have been spared from execution if a court weighed his crime against the *Briseno* factors.[192]

Not only are the *Briseno* factors based on a piece of fiction that is nearly a century old but they also readily lend themselves to the perpetuation of lay stereotypes concerning intellectual disability, such as the common misconception that all intellectually disabled people are essentially identical to one another.[193] While the Court ignored the roots of the *Briseno* factors, it did recognize that the factors perpetuate the very stereotypes that the medical community seeks to curtail.[194] Justice Ginsburg observed: "Those stereotypes, much more than medical and clinical appraisals, should spark skepticism [in the use of the factors]."[195] Instead of hinging its rejection of the factors on a lack of national consensus toward their use, the Court should have based its decision on the incredulity of determining whether an offender lives or dies based on nothing more than mere stereotypes and fiction.

The procedures employed by the CCA demonstrate that no true national consensus exists regarding which intellectually disabled offenders are "categorically less culpable than the average criminal."[196] As of 2016, the United States estimated its population to be around 300 million people.[197] Nineteen states have abolished the death penalty, and four additional states have fully suspended its use through gubernatorial moratoria.[198] Thus, these states, which comprise more than thirty seven percent

190. *See Moore*, 137 S. Ct. at 1046; *see also Ex parte* Briseno, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004), *abrogated by Moore*, 137 S. Ct. 1039.

191. *See Briseno*, 135 S.W.3d at 6; Hannah Brewer, *The* Briseno *Factors: How Literary Guidance Outsteps the Bounds of* Atkins *in the Post-*Hall *Landscape*, 69 BAYLOR L. REV. 240, 251 (2017).

192. Julia Barton, *Judging Steinbeck's Lennie*, LIFE L. (Sept. 3, 2013), http://www.lifeofthelaw.org/2013/09/judging-steinbeck-lennie (noting that Professor John Blume of Cornell Law opines that Lennie himself would have been executed under the *Briseno* factors, stating, "I mean, after he accidentally strangles the young woman, he tries to cover it up. That's one of the factors the *Briseno* opinion cites as evidence that somebody doesn't have mental retardation. They would look into the fact, 'well, he worked. He worked as a farm hand. He was gainfully employed.'").

193. Brief of Amici Curiae, The American Association on Intellectual and Developmental Disabilities (AAIDD), and The Arc of the United States as Amici Curiae, in Support of Petitioner at 9, *Moore*, 137 S. Ct. 1039 (No. 15-797), 2016 WL 4151447, at *9.

194. *Moore*, 137 S. Ct. at 1051–52.

195. *Id.* at 1052.

196. Atkins v. Virginia, 536 U.S. 304, 316 (2002).

197. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, http://www.census.gov/popclock (last visited Mar. 26, 2017).

198. Wong, *supra* note 69, at 438; *see States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/states-and-without-death-penalty (last visited Mar.

of the entire U.S. population,[199] do not believe that the death penalty is an acceptable form of punishment, regardless of the crime committed. While Moore's intellectual disability would have been relevant for sentencing purposes in twenty-seven states, it would have been a null issue had he murdered McCarble in at least twenty-three different states.[200] Consequently, a mere change in venue could completely reshape the terms of Moore's punishment despite the details of Moore's crime and his intellectual ability remaining the same. This variation in what each state considers an "appropriate sentence" indicates the lack of national consensus on the morality of capital punishment.[201]

In addition to the differences between the states that continue to employ capital punishment and those that don't, significant variation remains in intellectual disability standards in those states that still use the death penalty.[202] In fact, the parameters for assessing intellectual disability in capital cases differ vastly among those twenty-seven states that continue to utilize capital punishment, creating a problematic tension between selective incorporation and states' rights.[203] Many of these states have adopted the same general three-part framework for determining intellectual disability recommended in the American Association on Intellectual and Developmental Disability (AAIDD) and the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (APA).[204] This definition includes three equally weighted components: subaverage intellectual functioning, limitations in adaptive functioning, and an "onset of [these] deficits" during adolescence.[205]

What is even more concerning is the large variation in how states interpret and assess each of these elements.[206] For instance, Texas uses the

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25, 2018) (stating as of November 9, 2016, the states without the death penalty include: Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. Those with gubernatorial moratoria include: Colorado, Oregon, Pennsylvania, and Washington).

199. U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2010 TO JULY 1, 2017 (2017), https://www.census.gov/data/tables/2017/demo/popest/nation-total.html (based on 2016 estimates of population of the following states: Alaska, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Oregon, Rhode Island, Pennsylvania, Vermont, Washington, West Virginia, and Wisconsin).

200. Moore's intellectual disability would not have been a factor for sentencing in those states that do not employ the death penalty. *See States With and Without the Death Penalty*, *supra* note 198.

201. *Atkins*, 536 U.S. at 305.

202. *See* Hall v. Florida, 134 S. Ct. 1986, 1996–98 (2014).

203. *See* Barger, *supra* note 23, at 227–29.

204. *Id.* at 226.

205. Saviello, *supra* note 50, at 181; *see* Moore v. Texas, 137 S. Ct. 1039, 1045 (2017) (quoting *Hall*, 134 S. Ct. at 1995) (explaining that subaverage intellectual functioning is generally "indicated by an IQ score 'approximately two standard deviations below the mean'—*i.e.*, a score of roughly 70"); *Hall*, 134 S. Ct. at 1994 (defining adaptive deficits as "the inability to learn basic skills and adjust behavior to changing circumstances"); AAIDD, INTELLECTUAL DISABILITY, *supra* note 164; DSM-5, *supra* note 164.

206. Barger, *supra* note 23, at 227–29.

clinical definition of intellectual disability found in the 1992 edition of the AAMR.[207] This version is similar to the AAIDD's three-part definition; however, individuals must also provide evidence that their adaptive deficits are *related* to subaverage intellectual functioning.[208] While the latest version of the APA definition also has a relatedness component, the current version of the AAIDD abandoned this requirement.[209]

Furthermore, Texas used the *Briseno* evidentiary factors to determine the relatedness of an offender's intellectual functioning and adaptive functioning, with a particular focus on the offender's adaptive strengths.[210] These factors, which were not attributed to clinical authority, required a jury to answer seven questions based upon lay perceptions of intellectual disability.[211] For example, juries in Texas were asked to consider whether those who knew the defendant during adolescence thought the defendant was "mentally retarded."[212] However, the Court noted in *Moore* that no other state legislatures have adopted the *Briseno* factors, or anything remotely similar, since its decision in *Atkins*.[213] Had Moore murdered McCarble in *any* other state, the jury would not have had to consider if the people that knew Moore personally believed he was intellectually disabled. Indeed, other states that continue to condone capital punishment do not seem to believe that purely subjective factors help a jury to determine the overall culpability of an intellectually disabled defendant.[214]

Additionally, a variation exists in the way states utilize an offender's IQ scores to determine intellectual disability in capital cases.[215] Before the *Hall* Court decreed that states must account for the SEM of an individual's IQ, nine states utilized standards that "could be interpreted to provide a bright-line cutoff" for intellectual functioning.[216] Of those nine states, Kentucky, Florida, and Virginia adopted legislation that explicitly mandated a "fixed score cutoff."[217] While the Court held that fixed score cut-

207. *Moore*, 137 S. Ct. at 1046.

208. *Id.*

209. *Id.* at 1055 (Roberts, C.J., dissenting).

210. *Id.* at 1052 n.9 (majority opinion).

211. *Id.* at 1051–53; Crowell, *supra* note 58, at 750.

212. *Moore*, 137 S. Ct. at 1051–53 (quoting *Ex parte* Briseno, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004)); Crowell, *supra* note 58, at 750.

213. *Moore*, 137 S. Ct. at 1052.

214. *Id.* (noting that no other state employs standards even remotely similar to the subjective *Briseno* factors).

215. Hall v. Florida, 134 S. Ct. 1986, 1996–97 (2014).

216. *Id.* (explaining that Arizona, Kansas, Washington, North Carolina, and Delaware have statutes in which courts may interpret the standards to require an IQ below a fixed point before assessing the defendant's adaptive deficits).

217. *Id.* at 1996; *see* FLA. STAT. § 921.137(1) (2017) (defining "significantly subaverage general intellectual functioning" as "performance [on an IQ test] that is two or more standard deviations from the mean score on a standardized intelligence test"); KY. REV. STAT. ANN. § 532.130(2) (West 2017) (defining "[s]ignificantly subaverage general intellectual functioning" as "an intelligence quotient (I.Q.) of seventy (70) or below"); VA. CODE ANN. § 19.2-264.3:1.1(A) (2017) (providing a nearly identical definition to Florida's statutory definition).

offs are unconstitutional pursuant to the Eighth Amendment, these particular state legislatures had previously determined that individuals with an IQ above a certain point were just as categorically culpable as the average criminal.[218] These differences in standards illustrate that states utilizing capital punishment have not reached a consensus on which offenders fall into this particular categorical ban.

Even more telling is that some states cannot reach a legislative consensus on an appropriate standard for intellectual disability. In 1989, the Texas legislature first considered banning the execution of such individuals.[219] While the legislature proposed multiple iterations of the ban between 1989 and 2000, none of these proposals ever came to fruition.[220] After twelve years, both houses of the Texas legislature finally approved procedures to determine if an individual qualifies as intellectually disabled, but the Governor subsequently vetoed the bill.[221] Even after the Court's decision in *Atkins*, Texas has been unable to reach a legislative consensus, instead relying on the courts to provide an appropriate interim standard.[222] Indeed, the Texas legislature has attempted to promulgate fourteen separate bills since the Court first decided *Atkins*.[223] While the Supreme Court's Eighth Amendment jurisprudence dictates that the most appropriate "objective evidence of contemporary values" is found in state legislators,[224] Texas cannot seem to reach a consensus regarding the moral compass of its own citizenry.

These differences among various states and even the lawmakers in a single state illustrate that a national consensus on the procedures for implementing *Atkins* is more of a myth than a reality. Such lack of uniformity reveals that Moore's crime would not have been treated equally in all states for the purposes of death penalty eligibility.[225] The Court is grasping to create a uniform picture of contemporary values that will never truly

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218. As the statutes in Kentucky, Florida, and Virginia illustrate, these particular states determined that an offender with an IQ above 70 remain eligible for the death penalty. *See* Noah Cyr Engelhart, *Matching the Trajectory of the Supreme Court on Intellectual Disability Defense: A Recommendation for the States*, 79 ALB. L. REV. 567, 576 (2015).

219. Tobolowsky, *supra* note 29, at 23–24 (detailing Texas's extensive legislative history in considering the implementation of such a ban).

220. *Id.*; *see* Sarah Gail Tuthill, *The Texas-Size Struggle to Implement* Atkins v. Virginia, 14 TEX. WESLEYAN L. REV. 145, 148 (2007).

221. Tobolowsky, *supra* note 29, at 32; Crowell, *supra* note 58, at 745.

222. Tobolowsky, *supra* note 29, at 32–35 (detailing the intellectual disability standards that the Texas legislature proposed at least four times since *Atkins*, all of which failed to pass both legislative houses); Crowell, *supra* note 58, at 745–46.

223. Tuthill, *supra* note 220.

224. Atkins v. Virginia, 536 U.S. 304, 312 (2002) (explaining the methods of determining if a national consensus has formed for the purposes of the Eighth Amendment).

225. Although criminal sentencing generally varies greatly from state to state, a variation in death penalty eligibility in the context of intellectually disabled offenders is problematic. This is primarily because when the Court held that executing intellectually disabled offenders violates the Constitution, the doctrine of selective incorporation mandates that those guarantees apply equally to both the states and the federal government. *See supra* Section III.A.1.

exist. Instead of attempting to cobble together a common standard of societal decency, the Court must use its own judgment to determine the appropriate procedures for assessing intellectual disability in capital cases or it risks violating the Eighth Amendment by undermining the doctrine of incorporation, and perhaps even violating equal protection.

C. Creating a Uniform Standard

Both *Moore* and *Hall* demonstrate the discrepancies in what states consider to be the "best" methods to assess intellectual disability in capital cases. The differences in state definitions, compounded by the Court's vagueness when addressing such standards, have left the states with little guidance in creating an appropriate test to satisfy the constitutional ban against executing intellectually disabled criminals. Over the past fifteen years, the Court has consistently held that states may create their own definitions of intellectual disability.[226] However, the Court continuously requires states to be informed by widely accepted medical standards when crafting these definitions.[227] Additionally, the Court attempted to narrow the scope of state discretion when it held that states must consider the SEM of an offender's IQ score.[228] Nevertheless, the Court's decision in *Moore* failed to provide states with additional guidance. Justice Ginsburg remained vague in the majority opinion, claiming that clinical guidelines need not fully dictate state standards, all the while focusing heavily on Texas's deviation from medical consensus.[229]

1. The Parallels to *Roper v. Simmons*

In *Roper*, the Court held that executing those offenders who committed a capital crime before the age of eighteen violates the Eighth Amendment.[230] The decision, which was announced only three years after *Atkins*, drew several parallels between defendants under the age of eighteen and intellectually disabled offenders.[231] As in *Atkins*, the *Roper* Court concluded that a national consensus had formed against the practice of executing juveniles, showing that individuals under the age of eighteen are "categorically less culpable than the average criminal."[232] However, distinct from the ban announced in *Atkins*, the *Roper* Court provided the states with a clear rule: no state nor the federal government may execute an offender under the age of eighteen.[233]

While one can categorize the Court's holding in *Roper* as a bright-line rule, it can likewise be described as providing the states with a floor.

226. *Id.* at 317.
227. *See* Hall v. Florida, 134 S. Ct. 1986, 2000 (2014).
228. *Id.* at 1995.
229. *See* Moore v. Texas, 137 S. Ct. 1039, 1044 (2017).
230. Roper v. Simmons, 543 U.S. 551, 578 (2005).
231. *Id.* at 570–72.
232. *Id.* at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).
233. *Id.* at 574.

In fact, the Court included several appendixes detailing states' definition of adulthood for various activities.[234] Most notable are some of the age-of-adulthood laws in Mississippi, which continues to employ the death penalty, where an individual must be twenty-one to qualify for jury service[235] but can marry before the age of eighteen.[236] However, Mississippi law continues to treat age as merely a mitigating factor that a jury may consider when determining capital sentencing (although it cannot execute anyone under the age of eighteen after the Court's decision in *Roper*).[237] Indeed, in many states juveniles, who likely do not enjoy the full rights of adulthood in other respects, may be charged as an adult far before their eighteenth birthday.[238] Consequently, one could plausibly argue that the Court's holding in *Roper* acts more as a floor than as a bright-line rule, permitting states to increase the age for death penalty eligibility or even abolish the practice altogether. This is to say that the similarities in the Court's assessment of the culpability of juveniles and of intellectually disabled offenders merely bolster the call for the Court to provide states with a uniform definition of intellectual disability. This would merely require states to abide by the Court's standard for determining death penalty eligibility for intellectually disabled defenders while still leaving them free to craft a more protective standard for defendants or to employ more lenient standards in other respects, such as length of sentencing.

2. Utilizing Widely Accepted Clinical Standards

To avoid Eighth Amendment and equal protection clause challenges, the Court should provide states with a legal definition of intellectual disability in capital cases. The Court's decision in *Moore* indicates that states may not consider factors that have no medical basis, like the *Briseno* evidentiary questions.[239] The Court's holding is appropriate because lay perceptions of intellectual disability may perpetuate the stereotypes that the medical community seeks to combat.[240] In fact, lay witnesses who provide testimony regarding a defendant's intellectual and adaptive functioning may be presenting their own biases or an inaccurate perception of the disability.[241] The use of this sort of testimony will likely increase the risk of

234. *Id.* at 579–87 (listing state statutes in Appendices A–D establishing the age of majority for the death penalty, voting, jury service, and marriage).

235. MISS. CODE ANN. § 13-5-1 (2018).

236. *Id.* § 93-1-5 (providing that males must be at least seventeen years of age to legally marry, whereas females must be at least fifteen years of age).

237. *Id.* § 99-19-101(6)(g).

238. *See, e.g.*, 705 ILL. COMP. STAT. 405/5-805(2)(a) (2017) (requiring mandatory transfer for certain crimes at the age of fifteen); MO. REV. STAT. § 211.071(1) (2017) (allowing for discretionary transfer at the age of twelve); OHIO REV. CODE ANN. § 2152.12(A)(1)(a)(i) (West 2017) (requiring mandatory transfer for certain crimes at the age of sixteen).

239. Moore v. Texas, 137 S. Ct. 1039, 1051–52 (2017).

240. *Id.* at 1052.

241. Tobolowsky, *supra* note 29, at 76.

a court inaccurately deciding whether a defendant is intellectually disabled.

For example, both Utah's and Kansas's tests for adaptive functioning should theoretically be invalidated by the Court's holding in *Moore* because they "have little or no relation to the clinically defined disability of mental retardation."[242] As Chief Justice Roberts opined in *Moore*, the majority bases its decision from a purely clinical point of view but assures the reader "that it is not requiring adherence 'to everything stated in the latest medical guide.'"[243] The Court's continuing ambiguity regarding medical standards leaves states with little direction when creating an appropriate test for intellectual disability.

The variances in state standards increase the risk that the Court's mandate will be violated. As Justice Ginsburg stated in *Moore*, "[s]tates may not execute anyone in 'the *entire category* of [intellectually disabled] offenders.'"[244] So long as states continue to employ different means of determining intellectual disability, the likelihood of executing an individual who falls within the categorical ban articulated in *Atkins* remains high. Thus, the Court should provide a conclusive definition, along with an appropriate test, to assess whether an individual accused of a capital crime qualifies as intellectually disabled.

This proposed national standard should be informed by clinical guidelines' first two prongs of intellectual disability. However, as noted by the majority opinion in *Hall*, clinical definitions may prove problematic at times.[245] These problems include the evolving nature of clinical definitions to reflect new medical breakthroughs and the potential imprecision of scientific measurement and analysis.[246] However, lay witnesses and perceptions are likely far more subjective than medical standards. Crafting a standard informed by clinical definitions of intellectual disability will allow individuals with disabilities who have been convicted of capital crimes to be assessed on a level playing field, regardless of the state where they stand trial.

And while bias and misunderstanding may understandably color jury perceptions, a clearly articulated standard informed by widely accepted clinical definitions will help combat the prejudices that often permit the execution of intellectually disabled defendants. Therefore, the Court

242. Barger, *supra* note 23, at 229 (explaining how the assessment of adaptive deficits allow states to consider both an offender's culpability and the "insufficient connection to the penological theories of deterrence and retribution").

243. *Moore*, 137 S. Ct. at 1058 (Roberts, C.J., dissenting) (quoting *id.* at 1049 (majority opinion)).

244. *Id.* at 1051 (majority opinion) (second alteration in original) (quoting Roper v. Simmons, 543 U.S. 551, 552 (2005)).

245. *See* Hall v. Florida, 134 S. Ct. 1986, 1995 (2014) (explaining that states must assess an IQ's SEM in part because of the "inherent imprecision of the [IQ] test itself").

246. *See* Saviello, *supra* note 50, at 182–92 (detailing the imprecision of the tests for both intellectual disability and adaptive deficits).

should provide a clear and concise definition to ensure that each state adheres to the categorical ban against executing intellectually disabled offenders as mandated in *Atkins*.

CONCLUSION

The Supreme Court's decision in *Moore* served as little more than a lackluster attempt to provide states with guidance in creating a standard for determining intellectual disability for the purposes of capital punishment. While the Court attempted to narrow the leniency it provided to states with its holdings in both *Moore* and *Hall*, it has likely done nothing more than cause confusion as states attempt to create legislation that adheres to the Court's mandates. The Court's refusal to provide states with a functional definition of intellectual disability in capital cases might seem merely frustrating at first glance, but it is also potentially unconstitutional—arguably violating both the Eighth Amendment and the equal protection clause. What is more, as each state creates its own test for determining intellectual disability, the states increase their risk of violating the Eighth Amendment's prohibition of cruel and unusual punishment. Thus, the Court should provide the states with a definition to avoid these pressing constitutional concerns.

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