How Hall v. Florida Transforms the Supreme Court’s Eighth Amendment Evolving Standards of Decency Analysis

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ABSTRACT

The U.S. Supreme Court’s recent decision in Hall v. Florida may prod states to more meaningfully enforce the protection of individuals with intellectual disabilities that the Court originally set forth in Atkins v. Virginia. But the majority opinion’s reliance on the views and practices of medical experts and psychiatric professionals has overshadowed critical Eighth Amendment doctrinal developments. This Essay argues that Hall v. Florida has quietly but fundamentally transformed the understanding of when it is appropriate for the U.S. Supreme Court to search for a national consensus on an issue under the Eighth Amendment and how the Court determines whether a consensus exists. This Essay represents an early attempt to identify and explore these developments and predicts that Hall’s long-term significance will reach far beyond its narrow yet important holding.

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INTRODUCTION

Contrary to what many commentators have suggested about *Hall v. Florida,*¹ the case’s constitutional legacy will not be its modest step to protect criminal defendants with intellectual disabilities. Rather, what will stand out years from now is how *Hall* quietly but fundamentally transformed both the understanding of when it is appropriate for the U.S. Supreme Court to search for a national consensus on an issue under the Eighth Amendment and how the Court determines whether a consensus exists.

The Court’s recent decision in *Hall* will help ensure that states meaningfully enforce² the protection the Court originally set forth in *Atkins v. Virginia,*³ which held that individuals with intellectual disabilities cannot be executed. The immediate responses to the *Hall* decision characterized it primarily as a “small but meaningful step”⁴ to “chip away at the death penalty.”⁵ But the majority opinion’s reliance on the views and practices of medical experts and psychiatric professionals has overshadowed other important doctrinal developments.⁶ This Essay represents an early effort to identify those developments and explore their implications.

This Essay contains three Parts. After describing the Court’s narrow holding briefly in Part I, this Essay explores *Hall*’s two most remarkable aspects. Part

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2. *Id.* at 1999 (recognizing that “[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court’s decision in *Atkins* could become a nullity, and the Eighth Amendment’s protection of human dignity would not become a reality”).
6. See, e.g., Robert Barnes & Matt Zapotosky, *Supreme Court Strikes Down Florida Law on Intellectually Disabled Death Row Inmates,* WASH. POST (May 27, 2014), http://www.washingtonpost.com/politics/supreme-court-strikes-florida-law-on-intellecutally-disabled-death-row-inmates/2014/05/27/45cda4f4-e5ab-11e3-8f90-73d071f3d637_story.html (noting that “Justice Samuel A. Alito Jr., writing for the dissenters, said [Justice] Kennedy’s reliance on the medical community’s view on how to consider the IQ tests rather than leaving it to states was a ‘sea change’ in the court’s approach”); Andrew Cohen, *The Court’s Emphatic Ban on Executing the Intellectually Disabled,* THE ATLANTIC (May 27, 2014, 5:40 PM), http://www.theatlantic.com/politics/archive/2014/05/hall-v-florida/371662 (focusing on the different approaches to professional opinion taken by the majority and dissent and concluding that Justice “Kennedy and his colleagues [in the majority] have filled the void left by *Atkins* with the information and evidence and knowledge and even perhaps the wisdom the nation’s best medical minds can bear upon the topic”).
II explicates how the Supreme Court’s decision to answer the question *Hall* presented by engaging in the Eighth Amendment national consensus analysis is doctrinally surprising and significant. Part III examines how the Court’s approach to conducting that consensus analysis deepens the Court’s commitment to an increasingly sophisticated method. This Essay takes the position that the Court’s deployment of its consensus-detecting apparatus is not only unexpected in the *Hall* context but is also striking because it could implicate a broad range of issues related to constitutional claims against harsh punishments like the death penalty. And this Essay further observes that the manner in which the *Hall* Court determined that a national consensus existed reflects an evolving and more nuanced Eighth Amendment approach that the Court continues to refine. Ultimately, this Essay predicts that *Hall*’s long-term significance will reach far beyond its narrow yet important holding.

I. *Hall v. Florida*: The Holding

In *Hall*, an inmate challenged his death sentence on the grounds that he had an intellectual disability and was therefore exempt from capital punishment under *Atkins*. The inmate, Mr. Hall, was tried and sentenced to death before the U.S. Supreme Court decided *Atkins*.

He had nevertheless presented evidence of his intellectual disability, and the trial court that sentenced him had “found that there was ‘substantial evidence in the record’ to support the finding that ‘Freddie Lee Hall ha[d] been mentally retarded his entire life.’” After the Supreme Court decided *Atkins*, Mr. Hall relied on that substantial evidence and the trial court’s remarkable finding to argue that he should not be executed. But the Florida Supreme Court rejected Mr. Hall’s argument because he had not provided admissible evidence to demonstrate that he had an IQ of seventy or below. The State successfully argued “Florida law requires that, as a threshold matter, Hall show an IQ test score of 70 or below before presenting any additional evidence of his intellectual disability.”

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8. As the Court explained in *Hall*, “Previous opinions of this Court have employed the term ‘mental retardation.’ This opinion uses the term ‘intellectual disability’ to describe the identical phenomenon.” *Hall* v. Florida, 134 S. Ct. 1986, 1990 (2014).
11. See id. at 710.
The Florida Supreme Court's ruling relied on two ambiguities embedded in *Atkins*: first, that it “did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation” qualifies for the Eighth Amendment protection; and second, that it “le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction.” *Atkins* did not set out a clear definition of intellectual disability to which the states would be held accountable, and it granted the states significant leeway in devising mechanisms to enforce the Court’s holding.

Because one criterion of intellectual disability is “significantly subaverage intellectual functioning,” an individual’s performance on an IQ test constitutes critical evidence. Under the relevant Florida statute (and general professional practice), an IQ score of approximately seventy or below would meet this particular criterion. But the Florida Supreme Court’s decision to make this score of seventy a “mandatory cutoff” was problematic for two key reasons: first, it disregarded the standard error of measurement that experts in the field universally recognize; and second, it precluded the consideration of evidence related to other criteria—specifically “evidence . . . [of] the defendant’s failure or inability to adapt to his social and cultural environment”—that professionals rely on to diagnose intellectual disability even in some cases when an individual scores higher than seventy on an IQ test.

Confronted with these concerns about Florida’s restrictive approach to recognizing an individual’s intellectual disability when seeking execution, the U.S. Supreme Court struck down Florida’s rule. According to the Court, “Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.” Put simply, “when a defendant’s IQ falls within the margin of error for intellectual disability, he or she must be able to present other evidence about problems adapting.”

Although an undeniably important opinion, *Hall*’s immediate reach remains unknown. One commentator observed: “While it is too soon to know how

14. *Id.* at 831 (quoting *Atkins* v. Virginia, 536 U.S. 304, 317 (2002)).
16. *Id.* at 1994.
17. *See id.* at 1995 (noting that the Florida Supreme Court’s interpretation of intellectual disability “relies on a purportedly scientific measurement of the defendant’s abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise”).
18. *Id.* at 1994.
19. *Id.* at 2001.
broad Hall’s practical effect will be . . . [the early] estimates suggest that only a ti-
ny fraction of America’s approximately 3,000 death row inmates are likely to be
exempted from the death penalty because of Hall.”

Whatever one makes of the Court’s holding in Hall, it is critical to step back
to look at how the Court reached its conclusion to understand the decision’s po-
tential jurisprudential ramifications.

II. WHY DID THE COURT CONDUCT AN EIGHTH AMENDMENT
CONSENSUS ANALYSIS?

A. Background on the Court’s Eighth Amendment Consensus Analysis

In reaching the conclusion that Florida’s rule was unconstitutional, the Su-
preme Court in Hall relied on a two-part Eighth Amendment analysis, which
entails both a search for a national consensus against a punishment and the
Court’s application of its independent judgment. To explore why this was a
surprising move by the Court, a brief overview of that analysis will set a helpful
backdrop.  

The Court has long held that “[t]he [Eighth] Amendment must draw its
meaning from the evolving standards of decency that mark the progress of a ma-
turing society.” To determine the substance of those standards of decency:

[T]he Court’s Eighth Amendment framework centers on the use of
objective factors that assist the Court in detecting modern norms. . . .
The Court’s task would be impossible if the Justices did not look out
into the world for data that meaningfully informed their determina-
tion. . . . [T]he Court has developed and applied an increasingly so-
phisticated form of the objective indicia analysis. It considers a
number of factors . . . : the number of states that authorize the pun-
ishment; legislative direction of change; the number of sentences im-

22. See, e.g., Graham v. Florida, 560 U.S. 48, 61 (2010) (“In the cases adopting categorical rules the
Court has taken the following approach. The Court first considers ‘objective indicia of society’s
standards’ . . . to determine whether there is a national consensus against the sentencing practice at
issue. Next . . . the Court must determine in the exercise of its own independent judgment whether
the punishment in question violates the Constitution.” (quoting Roper v. Simmons, 543 U.S. 551, 552 (2005))).
posed; in the death penalty context, the number of executions carried out; and the degree of geographic isolation.  

Courts employ this Eighth Amendment approach when evaluating a statutory punishment’s constitutionality as applied either to a particular criminal offense or a particular class of offenders. When the Court has found that the challenged punishments are unconstitutional, it has imposed a “categorical bar” that exempts individuals convicted of certain crimes or belonging to a particular class of offenders from execution. The objective indicia analysis reflects that the Court is evaluating the punishment itself—several of the objective factors gauge on the ground sentencing outcomes and the punishment’s legal and practical availability. Hall, however, did not fall within the traditional ambit of this approach. Hall did not present a question about the constitutionality of a statutorily authorized punishment. Instead, it asked the Court to determine whether a state’s method of enforcing the mandate in Atkins violated the U.S. Constitution. This enforcement issue—the process by which the state sought to protect a class of offenders already granted Eighth Amendment protection—is distinct from all the seminal consensus cases.

B. What the Court Did in Hall

Early in the opinion, the Court explained how it would answer the question Hall presented. According to the Court:

The question this case presents is how intellectual disability must be defined in order to implement these principles and the holding of Atkins. To determine if Florida’s cutoff rule is valid,

28. E.g., Atkins v. Virginia, 536 U.S. 304 (2002) (determining whether the death penalty was a constitutional punishment for the class of offenders convicted of murder who are intellectually disabled); Roper v. Simmons, 543 U.S. 551 (2005) (determining whether the death penalty was a constitutional punishment for the class of offenders convicted of murder who were juveniles at the time of the homicide).
it is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores to determine how the scores relate to the holding of Atkins. This in turn leads to a better understanding of how the legislative policies of various States, and the holdings of state courts, implement the Atkins rule. That understanding informs our determination whether there is a consensus that instructs how to decide the specific issue presented here. And, in conclusion, this Court must express its own independent determination reached in light of the instruction found in those sources and authorities.30

After exploring how medical professionals define and diagnose intellectual disability, the Court assessed how the states had implemented Atkins. It conducted a headcounting analysis (similar but different in important respects to consensus analyses done in other cases)31 and determined that “at most nine States mandate a strict IQ score cutoff at 70.”32 The Court contrasted this number with the forty-one states where a defendant in Mr. Hall’s position “would not be deemed automatically eligible for the death penalty.”33 Drawing on this number of states that had not adopted Florida’s IQ cutoff and the growing recognition that IQ tests entail a standard error of measurement, the Court concluded that there was a consensus against a strict IQ cutoff of seventy. The Court then exercised its independent judgment and found that the Florida rule was unconstitutional.34

C. Why the Court’s Analysis is Surprising

The Eighth Amendment approach that the Court employed in deciding Hall was not the obvious analytical framework. Had it been, one or both of the parties might have meaningfully utilized it. But neither party’s petition stage briefs contained a consensus claim, and the State’s brief on the merits pointed out that Petitioner Hall did not argue that a consensus against IQ score cutoffs exists.35 Indeed, in his Reply Brief on the merits, Mr. Hall argued, “[W]hile Flori-
da is in a distinct and small minority . . . the precise number of States that share Florida’s approach is immaterial. *Atkins* recognized the relevant national consensus, and the question here is only whether Florida’s rule complies with *Atkins*. It does not.36 The dissenting opinion in *Hall* picked up on this, remarking “[i]t is telling that Hall himself does not rely on a consensus among States.”37

The parties did not contemplate this case to present a traditional consensus question, demonstrating that the Court’s analysis was unexpected. The amici did not meaningfully fill the void left by the parties’ briefs either. Although seven amicus briefs were filed,38 only one set forth a consensus analysis.39 While that lone brief may have assisted the Court’s framing of the issue, it did not persuade the Court on the consensus analysis’s substance because the amicus argued that there was no consensus against the Florida rule. Of course, the Court’s majority found the contrary.

What makes the Court’s approach even more surprising is that despite the parties’ decision not to present the Eighth Amendment consensus concern, not a single justice took the position that a consensus analysis was unnecessary or inappropriate. The four dissenting justices disagreed with the way in which the majority conducted its consensus analysis, but they did not argue that the consensus framework itself was the wrong one for deciding the question.40 Thus, all nine Supreme Court justices endorsed the view that the *Hall* litigation required a

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40. See *Hall*, 134 S. Ct. at 2002 (Alito, J., dissenting) (noting that “[i]n these prior [consensus] cases, when the Court referred to the evolving standards of a maturing ‘society,’ the Court meant the standards of *American society as a whole* rather than the views of *professional societies*” (emphasis added)).
search for “methodological consensus.” In this way, Hall marks a potentially significant expansion of the Eighth Amendment’s reach. Now, not only will the Court look to states’ legislative determinations about what punishments are available for particular crimes and the actual sentencing practices but it may also consider the method by which the jurisdictions impose those punishments to see if there are consensuses around those procedural practices.

D. **Why the Court’s Analysis is Critical: the Implications**

The Court’s Eighth Amendment approach in Hall allows litigants to present new constitutional challenges to outdated or outlier methodologies that states utilize to implement harsh punishments like the death penalty. As a starting point, it is easy to envision a few examples (like Hall) that raise issues with the way in which states have implemented Atkins. In one high-profile Atkins case, a defendant named Warren Hill repeatedly challenged the state of Georgia’s statutory allocation of the burden of proof for those claiming that their intellectual disability prohibits their execution. Georgia requires defendants to prove their intellectual disability to the fact finder beyond a reasonable doubt in order to prevail on an Atkins claim. Eleventh Circuit Judge Barkett notes “Georgia is the only state to require proof of mental retardation beyond a reasonable doubt.”

Like Florida’s IQ cutoff, Georgia’s method of enforcing Atkins appears out of step with the rest of the nation. A consensus-based challenge, seemingly tenuous from a doctrinal perspective before Hall, may now be a potent approach to striking down this draconian statute. Given that states have found a variety of ways to water down Atkins, a number of similar challenges grounded in consensus may be ripe.

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41. Id. at 2005 (Alito, J., dissenting).
43. See GA. CODE ANN. § 17-7-131(c)(3) (2013).
44. Hill v. Humphrey, 662 F.3d 1335, 1365 n.1 (11th Cir. 2011) (Barkett, J., dissenting).
47. See Carol S. Steiker & Jordan M. Steiker, Lessons for Law Reform from the American Experiment with Capital Punishment, 87 S. CAL. L. REV. 733, 764–65 (2014), for an example of Texas’s use of
But there is no doctrinal reason the Hall approach should be cabined to intellectual disability claims. Other outlier practices surrounding the death penalty may be challenged as well. While nearly all states that administer the death penalty require jurors to decide whether a guilty inmate will receive a life sentence or the death penalty, three states permit trial court judges to override jurors’ sentencing determinations: Delaware, Florida, and Alabama.\(^{48}\) Last year, attorneys for an Alabama death row inmate filed a petition for certiorari to the U.S. Supreme Court asking if the “increasingly rare and geographically isolated practice of imposing the death penalty through override violate[s] the nation’s evolving standards of decency and the Eighth Amendment?”\(^{49}\) The Supreme Court denied the petition, but Justice Sotomayor wrote a dissent from the denial of certiorari in *Woodward v. Alabama*.\(^{50}\) Part II of her dissent looks like a consensus analysis. She observed that only three states authorize judicial override and emphasized the infrequency of the life to death overrides in Florida and Delaware before concluding “Alabama has become a clear outlier.”\(^{51}\) Interestingly, Justice Sotomayor found that the practice may contravene Eighth Amendment principles, but she did not cite to the consensus cases. In light of Hall, those cases take on renewed relevance, and the question originally presented in *Woodward* seems ripe for review.

Countless other issues can be viewed and litigated through the consensus framework if the Court adheres consistently to the principle that evolving standards of decency govern not only what punishments are constitutionally prohibited but also the procedures by which those punishments are imposed.\(^{52}\) Assuming this consistent application, some challenges to the way in which jurisdictions impose the death penalty could find fertile ground in Hall.\(^{53}\) One question is what

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the *Briseno* factors. “In Texas, for example, the highest state criminal court has openly doubted whether all offenders who meet professional standards for mental retardation are sufficiently less culpable to deserve exemption from the death penalty. Accordingly, that court has created its own, nonscientific, test for mental retardation that defeats the Court’s categorical ban . . . .” Id.


51. Id. at 408 (Sotomayor, J., dissenting from denial of certiorari).

52. These issues may include challenges to outlier jury instructions (or failures to instruct), the availability of certain mental state defenses, weighing or nonweighing capital sentencing schemes, and burdens of proof imposed on defendants to establish mitigating circumstances.

53. While Hall represents an Eighth Amendment approach that ensures greater uniformity in states’ capital sentencing schemes, the Court will likely devise a means to balance these consensus based pressures with its longstanding deference to state level decisionmaking about capital punishment.
other punishments, aside from capital punishment, will also be susceptible to Hall-style litigation. Although the Court has not often utilized a consensus analysis outside the death penalty context, it recently found a consensus against life without parole sentences for juvenile offenders convicted of nonhomicide crimes. The Court’s involvement in policing the harshest punishments available to certain classes of offenders suggests that juveniles facing life or life equivalent sentences may successfully persuade the Court to strike outlier policies and practices governing their punishments. Whether the Court will evaluate other punishments or the practices implicating them is an open question.

III. HOW THE COURT CONDUCTED ITS EIGHTH AMENDMENT CONSENSUS ANALYSIS

Hall not only extends the consensus analysis’s reach, but also has a tangible impact on how the Court conducts that analysis. The how question has engendered much debate within the Court. While those debates partly continued in Hall, the majority’s opinion confirms that the Court’s approach is more nuanced.

See Gregg v. Georgia, 428 U.S. 153, 195 (1976) (plurality opinion) (stating that “each distinct system must be examined on an individual basis”). Perhaps the most plausible way the Court will balance these countervailing issues is to prudently use its power to deny and grant certiorari. See Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill, 100 COLUM. L. REV. 1643, 1730–31 (2000) (“The power to refuse to hear cases enables the Court to bide its time and . . . intervene selectively, without committing itself to policing a new area it brings under its supervision. As a result, then, the procedural license given by certiorari has had a profound role in shaping our substantive constitutional law.”). Alternatively, the Court may rely on the “independent judgment” prong of its Eighth Amendment analysis to protect outlier practices that do not necessarily strike the justices as unfair or detrimental. See Meghan J. Ryan, Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?, 87 WASH. U.L. REV. 567, 590 (2010) (“The Court has called on its independent judgment without question as a check on the conclusion it had reached based on the objective indicia of contemporary values.”).  

55. For example, practices involving the transfer of juveniles to adult criminal court may be susceptible to consensus based scrutiny. See Janet C. Hoeffel, The Jurisprudence of Death and Youth: Now the Twain Should Meet, 46 TEX. TECH L. REV. 29, 39 (2013) (evaluating the status of juvenile transfer eligibility).  
than a simple tally of legislative decisions for and against a particular punishment or practice.

A. Background on Ongoing Debates Around Consensus Analysis

In *The Way the Court Gauges Consensus (and How To Do It Better)*, my co-authors and I explain how the Court conducts its consensus analysis and identify some of the debates surrounding that ever evolving approach. We explain that the Court “considers a number of factors . . . : the number of states that authorize the punishment; legislative direction of change; the number of sentences imposed; in the death penalty context, the number of executions carried out; and the degree of geographic isolation.” While the justices who have dissented from the rulings in *Atkins*, *Simmons*, *Kennedy*, and *Graham* have taken issue with various particular aspects of the majorities’ analyses, the fundamental debate centers on whether the Court should rely more on states’ statutes or their actual sentencing practices when deciding if a national consensus exists. We describe how the Court’s analysis has become more sophisticated, posit that “punishment usage is a more important indicator of societal mores than whether the punishment is legislatively authorized,” and propose that “[t]he Court should count functionally abolitionist states [based on usage] as abolitionist states. To do so . . . we suggest that the Court incorporate usage indicators before it categorizes states into abolitionist and retentionist columns.” The majority opinion in *Hall* confirms our observations about the Court’s increased focus on actual usage and largely ratifies the modification to the consensus analysis we proposed.

B. Critical Aspects of the *Hall* Consensus Determination

There are at least five critical aspects to the *Hall* opinion’s method of detecting a national consensus.

First, the Court noted that the direction in which legislatures have moved on an issue and the consistency in that direction is a relevant part of the consensus analysis. While this factor appeared prominently in *Atkins* and arose again in *Simmons*, it “was deemphasized in subsequent opinions . . . to the point that it disappeared entirely in recent cases like *Graham.*” The Court in *Hall* evaluated the trend, counting five states that had legislatively abolished the death penalty

57. See Smith et al., supra note 7.
58. *Id.* at 2406.
59. *Id.* at 2423, 2433.
60. Menschel, supra note 21.
since Atkins, one state whose statute was struck down by its highest court, and five others that had passed laws allowing defendants claiming intellectual disability to present evidence to support their claim even if they scored higher than seventy on an IQ test. Thus, “The trend inquiry is revived in Hall...”

Second, the Court definitively included states whose high courts have struck down their capital sentencing schemes in its count of jurisdictions that have abolished the death penalty. In Kennedy v. Louisiana, the majority opinion hinted that the Florida law authorizing the challenged punishment did not render Florida a retentionist state because the Florida Supreme Court had struck down that statute as unconstitutional. Based on that opinion, we wrote that “binding opinions requiring either legislative or administrative responses to constitutionalize a punishment may remove the state from the pro-punishment side of the ledger.” In Hall, the Court made explicit what was implicit about how it views these judicial determinations that state legislation is unconstitutional. It counted New York in the same camp as the five states that had legislatively abolished the death penalty since Atkins, stating that “the New York Court of Appeals invalidated New York’s death penalty under the State Constitution in 2004... and legislation has not been passed to reinstate it.”

Third, Hall deepens the Court’s commitment to analyzing usage indicators to determine if a state’s legislative authorization of a punishment is a meaningful reflection of that state’s popular will. Based on some crucial language in Atkins, we observed that “a state’s failure to execute (or perhaps sentence to death) individuals for long periods of time could arguably be construed as evidence that a state is as good as abolitionist for national consensus purposes.” In Hall, the Court drew on this same language to describe the situation in Kansas:

Kansas has not had an execution in almost five decades, and so its laws and jurisprudence on this issue are unlikely to receive attention on this specific question. See Atkins, 536 U.S., at 316, 122 S. Ct. 2242 (“Even in those States that allow the execution of mentally retarded offenders, the practice is uncommon. Some States... continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue

63. See Smith et al., supra note 7, at 2409.
64. Id.
66. Smith et al., supra note 7, at 2408.
legislation barring the execution of the mentally retarded in those States”).

Thus, even though Kansas (like Florida) had an IQ cutoff, the Court did not treat it the same as a truly retentionist jurisdiction. In the Hall context, the Court did not go so far as to consider Kansas an abolitionist state, but it did view the extremely infrequent usage of its death penalty as a legitimate basis for diminishing the import and weight of Kansas’s punishment authorizing legislation.

Fourth, the Court counted Oregon as the equivalent of an abolitionist state because it “has suspended the death penalty and executed only two individuals in the past 40 years.” One commentator observed that “[i]t is not entirely clear whether [Justice] Kennedy’s characterization of Oregon is influenced more by the fact that Oregon has a gubernatorial moratorium in place, or because it has executed so few people over the past four decades, or some combination of the two. Nevertheless, Kennedy’s doctrinal move is terribly important . . . .” In The Way the Court Gauges Consensus (and How To Do It Better), we do not consider the effect that gubernatorial moratoria may have on the Court’s consensus analysis, and in this way, Hall may go even further in assessing evolving standards of decency than we predicted or proposed.

Fifth, the way the Court characterized Oregon also reveals the most interesting consensus development: Usage indicators can prompt the Court to move a jurisdiction from the retentionist camp to the abolitionist camp. Indeed, for the first time, the Court actually identified “the ledger” when it contrasted the few states with IQ cutoffs to “the 18 States that have abolished the death penalty, either in full or for new offenses, and Oregon . . . .” The Court’s willingness to engage in a careful analysis and move beyond a black-and-white legislation based headcounting regime stands out. The approach taken in Hall appears to work roughly along the lines of what my coauthors and I proposed: “[R]ather than simply tallying states that do—or do not—legislatively authorize the challenged punishment, the Court should integrate the usage indicators before sorting states into abolitionist or retentionist columns. In other words, the Court should create two categories: ‘functionally abolitionist’ and ‘retentionist.’”

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68. See id.
69. The Court also prioritized actual sentencing practices in Graham and “place[d] states that allow a punishment but practically speaking do not use it, at the center of [its] analysis.” Menschel, supra note 21.
70. Hall, 134 S. Ct. at 1997.
71. Menschel, supra note 21.
73. Smith et al., supra note 7, at 2435.
CONCLUSION

Despite the prevailing view that the case simply represents an “incremental limitation of the death penalty,” the *Hall* opinion may prove to be one of the most compelling and influential decisions of the term. Beyond its immediate holding, the Court’s (apparently noncontroversial) decision to utilize the consensus framework has major implications for individuals challenging not only harsh punishments but also state practices governing how those punishments are handed down. Additionally, the way in which the Court detected the national consensus in *Hall* definitively answers several key questions that have surrounded its approach. Those responses leave no doubt that the consensus jurisprudence turns in large part on actual sentencing practices and incorporates data about usage into its ledger style analysis. This nuanced approach to detecting consensus ensures that the Court will consider “evidence of declining use” and effectively strike down punishments that have “become obsolete.”


75. Smith et al., *supra* note 7, at 2451, 2438.