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Equal Pay, Unequal Application: Equality Provisions in the ECJ and the Limitations of the Neo-Functionalist Model

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I. Introduction

Few political institutions have attracted as much scholarly attention as the European Community (EC). What was originally conceived as a limited organization serving the economic interests of Member States has become a "quasi-constitutional federal entity" with vast jurisdiction over financial, social, and legal matters throughout the European Union.[1] In this process of European integration, the European Court of Justice (ECJ) has emerged as one of the most important players. With increasingly specific case law, the ECJ has augmented its power over Member States' national courts, requiring federal law to be adjusted in line with European law. Given the rise of such "supranational governance," it is understandable that the neo-functionalist model of integration has gained traction in EU scholarship.[2] Describing integration as a progressive, barrier-dismantling process that ultimately seeks to shift rulemaking functions beyond the nation-state, the neo-functionalist model understands the ECJ today as a pseudo-federal structure akin to the United States Supreme Court.[3] In this view, rulemaking and governance happen largely at the supranational level, and Member State autonomy is restricted by these increasing regulations, to which national law must conform.

This paper will argue that despite its popularity in academic circles, the neo-functionalist model does not adequately explain the mechanism by which European integration has proceeded. In particular, I will argue that neo-functionalism ignores the structural limitations that Member States have used to effectively limit the ECJ's jurisdiction in practice, thereby stalling the consolidation of power at the supranational level. These

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1: Wayne Sandholtz & Alec Stone Sweet, *Neo-Functionalism and Supranational Governance*, in Erik Jones, Anand Menon, & Stephen Weatherill, eds., *Oxford Handbook on the European Union* 18 (2012).

2: *Id.* at 22-23.

3: See Ernst B. Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957* (2004).

limitations have prevented the full implementation of those individual rights preserved at the EC level. However, I do not wish to go as far as advocating intergovernmentalism—neo-functionalism's main opponent—in arguing that the ECJ, and EC-level institutions more broadly, are *always* restricted by the interests of Member States. Indeed, it is my belief that European integration *is* occurring, and often in a direction that shifts power from national to supranational institutions. My claim is rather more modest: this official shift in rulemaking is not always accompanied by the uniform application of supranational rules that neo-functionalism would suggest. This unofficial method of resistance has provided a means by which the Member States have often successfully preserved national legal traditions at the expense of promoting the "individual liberalism" advocated at the EC level.[4]

The implications of this argument are vast, particularly in the realm of human rights. More so than national courts, the ECJ has made the preservation of rights like gender equality and disability antidiscrimination one of its core missions. As such, this article takes the development of rights, and in particular the right to gender equality, in the EC as its central focus. My argument is that, while gender equality has been advanced by the ECJ on paper, Member States have mitigated these advances by, for example, failing to refer cases to the ECJ or interpreting ECJ directives too broadly once they are passed. Moreover, I will attempt to prove that individual social rights remain constricted by the EC's original goal of preserving Europe's *economic* unity. Where there are no economic benefits to be found, I note there are rarely any "human rights."

This article will proceed as follows. First, I will examine the neo-functionalist model as it pertains to women's rights and social rights more broadly, painting the traditional picture of European integration as a fluid and forward progress toward economic and political integration. By integrating a historical approach to the women's rights movement into a theoretical analysis of the European legal system, I will then locate the structural difficulties that have allowed Member States to retain some level of control over their national legal systems by excluding EU law. Next, I will examine a second field—disability antidiscrimination—in which EC-level rights have not been effectively integrated at the national level, despite their social importance. Taking the failures of both women's rights and disability antidiscrimination legislation, I will finally offer a revised view of European integration, zeroing in on how education and activism might be able to combat Member State resistance to EC rights provisions and promote the spread of individual rights

4: See Sean Pager, *Strictness vs. Discretion: The European Court of Justice's Variable Vision of Gender Equality*, 51 Am. J. Comp. L. 553 (2003).

across the Community.

II. The Neo-Functionalist Narrative

Alec Stone Sweet and Wayne Sandholtz, the preeminent neo-functionalist scholars writing today, claim that neo-functionalism answers the question, "How—and through what processes—did an intergovernmental organization with a limited authority develop into a quasi-federal polity with the capacity to establish binding rules in an expanding array of policy domains?"[5] They further argue that the theory "accounts for the migration of rule-making authority from national governments to the European Union"—i.e., the increasing institutionalization of policy at the EU level.[6] In this way, the neo-functionalist story is one of "leveling up" rulemaking authority.

At first glance, the case study of women's rights seems to be the perfect example of such expanding supranational governance. Although a number of legal protections exist for women in the EC today, "women's rights were not on the agenda" in 1958, when the European Economic Community (EEC)—the EU's predecessor—was forming.[7] Instead, the then-EEC was conceived as loose confederation with predominantly economic objectives. As Daniel Keleman explains in his book *Eurolegalism*, the EEC's formation was driven by economic actors, who wanted greater freedom to conduct business across national lines but were held back by national trade barriers like tariffs.[8] These economic actors supported negative integration, or deregulation, so that they could participate in "previously sheltered domestic markets."[9] The corollary of this deregulation was *reregulation* to monitor this new economic zone, which came in the form of positive rights at the supranational level.[10] Rights then spilled over into noneconomic spheres as well, including gender equality. For example, the Treaty of Rome, the EEC's founding document, included an antidiscrimination clause that precluded differential pay schemes for men and women performing the same work.[11] Though its original purpose

5: Sandholtz & Stone Sweet, *Neo-Functionalism and Supranational Governance* at 19-20 (cited in note 1).

6: *Id.* at 19.

7: Rachel Cichowski, *Women's Rights, the European Court, and Supranational Constitutionalism,* 38 Law & Soc'y Rev. 489, 493 (2004).

8: See Daniel Keleman, *Eurolegalism* (2011).

9: *Id.* at 22-23.

10: *Id.*

11: Article 119 of the Treaty of Rome reads: "Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."

was to level the economic playing field between those Member States with wage equality and those without,[12] today Article 119's negative duty not to distort competition has become a positive, judicially enforceable right that individuals can claim against private employers at the level of the ECJ.[13] This, in short, is the central claim of the neo-functionalist model: supranational governance has progressively subverted power from the national governments by increasing the number of laws enforceable at the supranational level. This section will focus upon how the neo-functionalists understand the process by which this shift of power occurs.

IIa. *Defrenne*: a Case Study

The neo-functionalist evolution of women's rights can be described using the case of *Defrenne v Sabena*. In 1976, a young stewardess named Gabrielle Defrenne brought a gender discrimination case against her employer, the airline Sabena, to the Belgian Tribunal du Travail. Defrenne argued that she was entitled to compensation for her inadequate salary, which was lower than that of Sabena's male stewardesses despite having performed the same work. The case made its way to the Belgian Court of Appeals before ultimately being referred to the European Court of Justice, the highest legal arena in

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Treaty of Rome, art. 119 (now incorporated at Treaty of Lisbon, art. 141). See Alec Stone Sweet & Rachel Cichowski, *Sex Equality,* in Alec Stone Sweet, *The Judicial Construction of Europe* 150 (2004): "For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which workers receive, directly or indirectly, in respect of their employment from their employer. Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement and (b) that pay for work at time rates shall be the same for the same job."

12: Cichowski argues that it was primarily the French who led this charge, and that other countries agreed only to placate France. Denmark, with a 40% disparity between wages for male and female labor, was unsurprisingly very much opposed to the idea. Rachel Cichowski, *Judicial Rulemaking and the Institutionalization of European Union Sex Equality Policy,* in Alec Stone Sweet, Wayne Sandholtz, & Neil Filgstein, eds., *The Institutionalization of Europe* 129-30 (2001).

13: See Cichowski, 38 Law & Soc'y Rev. at 493 (cited in note 7). The right of individuals to bring claims against corporations or other individuals is known as a horizontal direct effect. It can be contrasted with a vertical direct effect, or the right to bring a claim against the state.

what would later become the European Union.[14] In a landmark decision, the European Court ruled that Defrenne was indeed entitled to backpay under Article 119 and ordered Sabena to compensate Defrenne from the date of the Treaty's ratification, January 1, 1962.[15] The ruling spurred a flood of similar cases from women who successfully used *Defrenne* as a precedent to expand the EU-level right to equal pay into increasingly specific arenas, from pensions to part-time compensation to maternity leave.

Defrenne was a serious affront to the autonomy of the Member States' national courts, which had successfully ignored Article 119 in the fourteen years since the Treaty of Rome's ratification by instead adhering to their own less rigorous national equality initiatives.[16] Under this explicit precedent, individuals were granted the enforceable social right to equality at the EU level thereby extending the EU's reach into Member State jurisdiction, as national law had to be revised to adhere to the Treaty of Rome. But the revisions did not end with *Defrenne*. After *Defrenne*, the ECJ saw a series of women's rights cases using *Defrenne* as precedent. Among these were cases that argued against "indirect discrimination"—that is, discrimination against groups of workers constituted primarily by women. For example, in *Jenkins v. Kingsgate Ltd.* the Court held that it was illegal to pay part-time workers lower hourly wages than fulltime workers for performing the same work, given that the majority of the part-time workforce was female.[17] Five years later, in *Bilka v. Weber von Hartz*, a German woman named Karin Weber von Hartz argued that denying pensions to part-time workers unfairly discriminated against women for the same reason.[18]

Stone Sweet and Cichowski argue that this progressive broadening of Article 119's scope was a result of the Article's initial "ambiguities," which

14: From 1953 to 1993, the EU existed under the name of the European Economic Community. It was not until 1993, under the Treaty of Maastricht, that the European Union as such came into existence.

15: *Defrenne v. Sabena,* [1976] ECR 455 (E.C.J.).

16: For example, see the Equal Pay Directive of 1975, which defined "equal work" more narrowly than Article 119, and the Member State resolution ratified on December 31, 1961—one day before the Treaty was to take effect. These policies are discussed in Stone Sweet & Cichowski, *Sex Equality* at 157-70 (cited in note 11).

17: *J.P. Jenkins v. Kingsgate (Clothing Productions) Ltd.,* [1981] IRLR 388 (E.C.J.).

18: *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz,* [1986] IRLR 317 (E.C.J.). Also see Ingeborg Heide, *Sex Equality and Social Security: Selected rulings of the European Court of Justice*, 143 Int'l. Lab. Rev. 299 (2004).

could be exploited by the plaintiff.[19] One such ambiguity was that the equal pay provision applied not only to wages, as was commonly thought, but also "to any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer."[20] Precedent then incrementally clarified that the Article's jurisdiction extended into indirect discrimination and pensions as well, encouraging still more individuals, certain now that they had a case, to come forward with workplace gender discrimination claims. As Keleman describes the process, "To encourage enforcement litigation, laws need to establish detailed substantive and procedural requirements, the violation of which can serve as the basis for legal claims."[21] In other words, as the equal pay provision became more detailed and specific in its reach, the more clearly individuals could identify a violation of the provision. Consequently, individuals became more likely to take equality violations to court. As Lisa Conant writes, "Explicit articulations of rights and obligations, by providing some hope of successful claims, encourage potential litigants to sue."[22]

Clarified case law also created more access points for litigation from interest groups. Civil society groups like women's rights organizations were thus able to circumvent their national courts when they faced opposition there.[23] This had the effect of giving power to the lower courts, whose rulings were previously permanently silenced when a higher court made a contradictory ruling.[24] In Great Britain, for example, most of the women's rights cases originated from Britain's lowest courts, the tribunals.[25] Additionally, Cichowski notes that almost half of all preliminary reference referrals to the Court came from

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19: Stone Sweet & Cichowski, *Sex Equality* at 149-51 (cited in note 11).

20: *Id.* at 150.

21: Keleman, *Eurolegalism at* 41 (cited in note 8).

22: Lisa Conant, *Individuals, Courts, and the Development of European Social Rights*, 39 Comp. Pol. Stud. 76, 79 (2006).

23: See Karen Alter, *Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy,* 33 Comp. Pol. Stud. 452 (2001); Keleman, *Eurolegalism* at 38-93 (cited in note 8).

24: Though lower courts could bring claims against higher courts to a national court of appeals, I am here considering these courts of appeals as higher courts themselves, as they too represented the "end of the line" for the lower court's case within individual nations. See Heide, 143 Int'l. Lab. Rev. at 299 (cited in note 18).

25: Karen Alter & Vargas Jeannette, *Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy*, 33 Comp. Pol. Stud 452 (2000).

Member States' lower courts, as opposed to the higher and middle courts.[26] Lower courts had incentives to refer cases to the ECJ because when the Court sided with the lower courts' ruling over that of the higher court, it "len[t] legal credibility to a lower court and thus bolster[ed] the influence of the lower court within the national legal system."[27] With this shift in power caused by the rise of the ECJ, civil society groups like women's rights organizations gained more opportunities to make successful rights-based claims.

IIb. Increasing Institutionalization: Legitimacy and the Positive Feedback Loop

In accordance with the neo-functionalist model, as precedent built, the ECJ became less likely to bend to political pressure from Member States when making decisions, as it was less likely to face backlash when rules were clearly articulated. Because states knew that private litigants would challenge national policy when it clearly violated EC law, Member States also became more likely to adhere to EU law when its scope was made clear.[28] By crafting highly detailed directives in their legal decisions, the Court thus limited the possibility of Member State discretion in implementation.[29] In line with the Stone Sweet and Sandholtz analysis, these decisions were uniquely insulted by Member State reversal. As such, the Court's power, and more broadly, integration, proceeded in a forward direction. In the neo-functionalist view, there was no returning of authority back to the national level once a case had been decided. Via this positive feedback loop, the ECJ came to consolidate power and establish its supremacy over national law.

The ECJ's neo-functionalist rise to prominence was further legitimated by the "era of rights" that characterized EC policy in general during the 1970 and 80s. After the triumvirate of cases including *Stauder*, *Internationale Handelsgesellscaft*, and *Nold*, the ECJ established that human rights were

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26: Cichowski's study finds that 140 cases were referred by lower courts, compared to 167 by higher and middle courts. In her view, this is a somewhat surprising finding if we assume that lower courts have been uniquely empowered by the E.C.J.'s rise; after all, most cases are not referred by the lower courts. But the numbers nevertheless suggest a real opportunity for action at the level of the lower courts, which had previously been silenced by the rulings of higher courts. See Rachel Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (2007).

27: Karen Alter, *Establishing the Supremacy of European Law* 49 (2001).

28: *Id.*

29: See Keleman, *Eurolegalism* (cited in note 8), and Fabio Franchino, *The Powers of the Union: Delegation in the E.U.* (2007).

to be a part of the Community's principles, and that "the Court would henceforth entertain claims that such rights had been adversely affected by Community acts and policies."[30] Human rights were further codified in the Maastricht Treaty in 1992. Deriving these rights from both the common law constitutional traditions of the Member States and from international rights treaties, the Community "established compliance with human rights as a condition of EU membership and set up an ex-post membership mechanism for suspension of the rights of a Member State which was found to be violating such rights in a serious and persistent way."[31] This shift to a social framework for EU membership facilitated integration at a deeper level than the purely economic. It suggested to Member States that, as members of a community concerned with human rights, they were bound not only by a shared currency but also by shared values. This language of rights further justified the expansion of ECJ power vis-à-vis Member States, as it made the issue seem more human than political, and so validated the existence of rights beyond the national scope.[32]

IIc. The Supremacy Doctrine

The ECJ thus made clear that being a part of the EC meant adhering to the value system of European law, often at the expense of national law. The representative case in this regard is *Stork v. High Authority.*[33] In *Stork*, the Court ruled that the High Authority of the European Steel and Coal Community, a transnational economic actor based in Germany, was not required to consider whether its actions violated German constitutional law but only whether they violated EC law. The supremacy doctrine, or the notion that EC law is prior to—and therefore should negate conflicting–national policy, further cemented this idea when it was introduced in the 1964 case of *Costa v. ENEL.*[34] A similar decision was reached in *Internationale Handelsgellschaft*, which ruled that:

> "Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the community would have an adverse effect

30: Grainne de Burca, *The Evolution of E.U. Law* 478 (2d ed., 2011).
31: *Id.* at 481.
32: See Keleman, *Eurolegalism* (cited in note 8).
33: *Friedrich Stork & Cie v. High Authority of the European Coal and Steel Community*, [1959] E.C.J. 1.
34: *Flaminio Costa v. E.N.E.L.,* [1964] E.C.J. 6.

> on the uniformity and efficacy of community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called in question. Therefore the validity of a community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of the state or the principles of a national constitutional structure."[35]

Later, *Von Colson* articulated this point more clearly by institutionalizing the doctrine of indirect effect, which forced national judges to interpret national law in conformity with EC law.[36] The obligations imposed by indirect effect were further clarified in *Marleasing*, which explicitly stated that national judges must "rewrite national legislation—in processes of 'principle construction'—in order to render EC law applicable in the absence of implementing measures."[37] The product of these cases was a siphoning of power from the national legal systems and a transfer to the ECJ and EC law.

In this way, the women's rights movement fought in the ECJ mirrored the larger neo-functionalist story of European integration. *Defrenne* took advantage of existing EU law and used it to advance the rights of an individual actor when the national legal system failed. This precedent created "access points for litigation" that future actors could then use to argue for the same right in different spheres.[38] Over time, these accumulated rights became progressively more detailed, and hence required Member States to make more changes to national law in order to comply. "[F]raming legal norms as rights" further encouraged centralization and integration by legitimizing the expansion of the Court's jurisdiction.[39] By increasing its jurisdiction and

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35: *Internationale Handelsgesellschaft mbH v Einfuhr,* [1970] E.C.J. 11.

36: *Sabine von Colson and Elizabeth Kamann v. Land Nordrhein-Westfalen* [1983] E.C.J. 14.

37: *Marleasing S.A. v. La Comercial Internacional de Alimentacion S.A.,* [1989] E.C.J. 106. Also see Alec Stone Sweet & Thomas Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 Amer. Pol. Sc. Rev. 63, 66 (1998).

38: de Burca, *The Evolution of E.U. Law* at 25 (cited in note 30). Also see Cichowski, 38 Law & Soc'y Rev. at 489 (cited in note 7).

39: Keleman *Eurolegalism* at 51 (cited in note 8).

encouraging individuals to bring forth enforcement litigation, the European Court of Justice thus evolved into a pseudo-federal institution with much more power and oversight than it was originally intended to have.

III. Structural Limitations on Integration: Member State Resistance

The neo-functionalist portrait painted in Section II provides an optimistic view of European integration from the perspective of individual rights, but it largely ignores the structural limitations that still prevent European law from fully subsuming national law in practice. The first and most obvious limitation is simply that Member States are self-interested: they want to avoid being dominated. The ECJ, by contrast, has an interest in dominating—that is, in making EC provisions enforceable at the national level. This conflict of interests is described by economics' principal-agent problem, which states that rational principals (the ECJ) will delegate responsibilities to agents (Member States) to minimize transaction costs, but the principal then transfers some amount of control over the implementation of those responsibilities to the agent.[40] This section will examine the ways in which the Member States, as agents entrusted with implementing the political desires of the EC, continue to resist ECJ influence.

IIIa. The Referral Process and the Subsidiarity Principle

Perhaps the most obvious limitation of neo-functionalism is procedural: cases must be referred to the ECJ by national courts. This means that even though European law is "prior" to national law in an abstract legal sense, national law is *procedurally* prior to European law. National courts thus wield the exclusive power to decide which cases make it to the level of the ECJ. And because national courts have an interest in preserving their own judicial primacy, there is little political reason for them to refer cases to the ECJ.

One reason the national courts are unwilling to refer cases is that the ECJ has not been not shy about making adverse rulings, or claims that national law conflicts with EC law and needs to be altered as per the requirements of indirect effect. For example, Cichowski found that in over half of all preliminary rulings between 1971 and 1993, the court made adverse rulings.[41]

40: See Imelda Mahler Stijn Billiet and Dermot Hodson, *The Principal-Agent Approach to E.U. Studies: Apply Liberally but Handle with Care*, 7 Comp. Euro. Pol. 409 (2009).

41: Cichowski, *European Court and Civil Society* (cited in note 26).

In two countries, that number was 100%, and 67% of cases in three more, demonstrating that the ECJ is not afraid to counter national tradition and legal authority when given the chance.[42] This explains why British judges withheld references on sex equality cases from the ECJ to such an extent that the Employment Appeals Tribunal, or EAT, "only cited European law in 12 sex discrimination and equal pay cases prior to 1986."[43] On a larger scale, Damian Chalmers has found that from 1972-1998 only a quarter of cases involving EC law were referred to the ECJ.[44] Discretion over referrals has thus allowed judges to slow the process of integration by preventing the expansion of EC jurisdiction via the positive feedback loop explained in Section II.

National courts also retain a large amount of discretion in interpreting EC law, even after it has been passed. In *Defrenne*, for example, the Court held that Article 119 had direct effect only in situations in which "direct discrimination" could be identified *by a national judge.*[45] This left a huge amount of interpretative leeway, which the national courts had a tendency to abuse in the direction of preserving national power. Even when directives are intended to be interpreted narrowly, national courts often interpret them "more broadly than necessary" in order to preserve their own autonomy.[46] Resistance tends to be particularly high when a directive violates existing national norms and structures.

Member States, moreover, have not only sought to slow the process of integration through deliberately broad interpretations, but to *reverse* it by returning judicial power to the national level. To this end, in 1992, Member States introduced the subsidiarity principle in the Maastricht Treaty. The subsidiarity principle holds that:

> "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

42: *Id.*

43: Alter & Vargas, 33 Comp. Pol. Stud. at 460 (cited in note 25).

44: Alter, *Establishing the Supremacy of European Law* at 34 (citing Damian Chalmers, *The Positioning Of EU Judicial Politics within the United Kingdom*, 23 West. Euro. Pol. 169 (2000)) (cited in note 27).

45: Stone Sweet & Cichowski, *Sex Equality* at 154 (cited in note 11).

46: Alter, *Establishing the Supremacy of European Law* at 61 (cited in note 27).

> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."[47]

The Member States, tired of revising national principles in line with EC measures, spurred the introduction of subsidiarity. In regards to women's rights, the concept allowed for "national principles [to be] determinative in analyzing the principle of equal treatment."[48] Though national courts still had to adhere to Article 119—an EC law—they were then allowed more discretion to define exactly what constituted a discriminatory practice. As national courts were able to use their own standards to define discriminatory practices, subsidiarity had the effect of re-legitimating national social and legal tradition.

By limiting referrals, interpreting referrals in ways that favored national tradition, and introducing subsidiarity, the Member States thus effectively limited the encroachment of EC law into the national legal sphere. As a result, the ECJ has been forced to temper its aggressive pursuit of equality law and individual rights in favor of an approach that balances "enforcement of equality and respect for Member State discretion" and returns some amount of legal authority to the national courts.[49] Unlike the neo-functionalist model, this empirical understanding of ECJ authority recognizes the limitations of the Court as supranational entity—mainly, that per the principal-agent problem, its only enforcement mechanism is the national courts and that, as such, the ECJ is only as powerful as the national courts allow it to be.

IIIb. Economic Concerns

Much of neo-functionalism's integration theory relies on the notion of "spillover." Spillover "occurs when actors realize that the objectives of initial supranational policies cannot be achieved without extended supranational policy-making to additional, functionally related domains."[50] The most obvious example of this phenomenon is economic spillover, whereby the pursuit of economic goals results in the creation of other policies—equality provisions for women being this article's primary example. Neo-functionalism paints spillover as a process of expansion, but seems to ignore the possibility

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47: Treaty of Maastrict on European Union, art. 3b.

48: Ruth Harvey, *Equal Treatment of Men and Women in the Work Place: The Implentation of the European Community's Equal Treatment Legislation in the Federal Republic of Germany,* 38 Amer. J. Comp. L. 31, 60 (1990).

49: Pager, 51 Am. J. Comp. L. at 603 (cited in note 4).

50: Sandholtz & Stone Street, *Neo-Functionalism and Supranational Governance* at 20 (cited in note 1).

that "spillover rights" might conflict with the rights from which they initially sprang. For example, upholding social rights might require that a corporation make economic sacrifices. This section argues that "spillover rights" are only politically viable as long as the original right remains tenable. As a result, the neo-functionalist argument that rights are being "expanded" via the spillover effect is somewhat overstated.

At its core, the Community is an economic one, concerned primarily with eliminating trade barriers between Member States. Stone Sweet and Brunell illustrate this point in their data analysis of the correlation between preliminary reference referrals and transnational economic activities. They found a strong positive correlative between the amount of transnational economic activity, both in individual Member States and in the Community as a whole.[51] That is, not only is overall EU economic activity correlated with an increase in preliminary references to the Court, but those countries that are home to more transnational economic actors also send more preliminary references to the Court than other Member States. Germany, which refers more cases to the Court for preliminary references than any other Member State, is the prime example. This correlation suggests that the process of judicial rulemaking is still, at its core, bound up in economic motivations.

The reexamination of women's rights provisions, as one example, reveals that even seemingly social, rights-based directives adhere to an underlying economic rationale. Alter notes that women's rights at the EU level remain largely limited to the workplace, where women exist as economic actors.[52] She is skeptical about the ability of women to pursue anti-discriminatory rights in spheres that lack economic consequences. Indeed, even in *Defrenne*, the ECJ listened to British and Irish governments which argued that allowing all women to apply for retroactive compensation from the date of the Treaty of Rome fourteen years prior would bankrupt many businesses. Stone Street and Cichowski note that: "In effect, the judges were unwilling to punish companies—whose actions were lawful under national, but not ECJ, law—for the malfeasance of the Member States."[53] In this way, the ECJ prioritized the economic concerns of EC corporations over individual rights.

In other instances, the Court did not limit equality but instead resolved antidiscrimination cases in ways that were more favorable to the employer than to the individual, consequently limiting the neo-functionalist claim that individual rights are being upheld by EC law. In the realm of women's rights,

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51: Stone Sweet & Brunell, 92 Amer. Pol. Sc. Rev. at 77-78 (cited in note 37).
52: See Alter, *Establishing the Supremacy of European Law* (cited in note 27).
53: Stone Sweet & Cichowski, *Sex Equality* at 155 (cited in note 11).

the *Barber* case is a key example of this phenomenon.[54] Douglas Harvey Barber was an employee of the British Guardian Royal Exchange Assurance Group, a company that allowed women to access their pensions at age 57. Men, however, were not allowed the same privilege until age 62. Following in the footsteps of *Bilka,* Barber argued that this was an instance of "unequal pay for equal work" under Article 119. And in fact the Court sided with Barber, claiming that such a pension payment scheme clearly differentiated on the basis of sex in violation of Article 119. But rather than lowering the male pension age to 57 to match that of women, Guardian decided instead to *raise* the female pension age to 62 to match that of men, a move with clear economic benefits for the company but punishing to the individual female employee.[55]

A closer examination of landmark women's rights cases reveals the same pattern: in actuality, the language of these decisions is much less rights-oriented, and much more economically motivated, than is commonly believed. *Bilka*, for example, is often characterized as expanding the right of equal pay to pensions for part-time workers, a group almost entirely constituted by women. In its ruling, however, the Court also limited the expansion of this right to equal pensions by prioritizing the economic needs of the company:

> "[U]nder Article 119 a department store company may justify the adoption of a pay policy excluding part-time workers irrespective of their sex, from its occupational pension scheme on the ground that it seeks to employ as few part-time workers as possible, where it is found that the means chosen for achieving that objective corresponds to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end."[56]

If the company wished to discourage part-time workers for economic reasons, they were free to do so—even though such a decision would necessarily be a greater hardship to women than men and was thus discriminatory. Likewise, the ruling in *Jenkins* made clear that the only illegal unequal payment schemes were those in which the disparity was based

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54: *Douglas Harvey Barber v. Guardian Royal Exchange Assurance Group*, [1988] E.C.J. 262.

55: For an additional discussion of *Barber,* see Heide, 143 Int. Labor. Rev. at 303-11 (cited in note 18).

56: *Bilka,* [1986] IRLR 317 (E.C.J.).

"*exclusively*…on the difference of the sex of the workers."[57] Again, differences made for even partially economic purposes went unpunished as integration of Member States' economies and the wellbeing of the EU internal market took precedence over individual antidiscrimination rights.

This section complicates the neo-functionalist model in two important ways. First, in line with the intergovernmentalist objection, it reminds the neo-functionalists that implementing EC law requires the cooperation of Member States, and that the impact of ECJ case law will therefore be limited by the willingness of national courts to enforce EC provisions. Secondly, it turns the neo-functionalist's own spillover doctrine against itself by proving that economic spillover only expands individual social rights insofar as economic advantages, before all else, remain tenable. More broadly, these arguments challenge the neo-functionalist notion that the Court can serve as the defender of individual rights. This section's analysis suggests that individual actors have not been empowered by the creation of EC-level rights to the extent commonly portrayed in the literature. Instead, the inclinations of the national courts determine which cases do—and more critically, do not—make it to the supranational stage. This is especially problematic for the security of individual rights given that national courts have an express interest in limiting the power of the European Court regardless of the validity of the case being advanced.

IV. Another Look: Disability Antidiscrimination

Before concluding that the neo-functionalist model fails on all counts of integrating EC rights law into national legal structures, it is worth looking at another set of human rights laws in the ECJ. Disability law, like women's rights law, is premised on the notion that one should not be excluded from the social dimensions of EC life on the basis of biological accident. For this reason, the disabled are, like women, privy to a large number of legal protections at the EC level. This section will analyze the extent to which these supranational protections have translated to real-world safeguards for disabled individuals within Member States.

Protections against disability were first introduced to EC law in 1997, when Article 13 was added to the Treaty of Rome, allowing the European Council to "take appropriate action to combat discrimination based on… disability."[58] Three years later, the Council adopted the Framework Equal

57: *Jenkins,* [1981] IRLR 388 (E.C.J.) (emphasis added).

58: Treaty of Rome, art. 13. See David L. Hosking, *A High Bar for E.U. Disability Rights*, 37 Ind. L.J. 228 (2007).

Treatment Directive, more commonly known as the Equal Employment Directive, which prohibited discrimination in many spheres of public life. The first notable ECJ case using the Equal Employment Directive was in 2004, when a woman named Chacon Navas was dismissed from her job because the sudden onset of her medical disability rendered her unfit to work.[59]

At question in the case was the extent to which employers must accommodate disabilities when they hindered one's ability to work Answering that question required the ECJ to side with one of two dominant models of thinking about disability. The first model defined disability as a medical fact, limiting an individual's ability to perform her job;[60] the second argued by contrast that disability was a social construction, and that the barriers disabled people faced were largely the result of the social stigma they faced.[61] The latter, rights-based model—which would have required reducing barriers to access at all levels of employment—was more in line with the EC's increasing rights agenda in the 1990s. But the former coincided with a long history of European antidiscrimination law, which for economic reasons excluded the disabled from much of the workforce but provided for their healthcare and guaranteed them (often undesirable, low-paying) jobs.[62] Perhaps recognizing this cultural objection to a rights-based approach to disability law, the Court ruled in *Navas* that Member States were only required to adopt a minimal standard of antidiscrimination measures in regards to the disabled.[63] This allowed Member States to continue their traditional means of addressing discrimination, which included quota systems and social-assistance programs.[64]

In 2008, however, EC disability law took a more aggressive turn. *Coleman v. Attridge* prohibited not only discrimination of the disabled but also "discrimination by association [with a disabled person]."[65] While heralded as a step towards greater social inclusion for the disabled (and their caretakers), one would nevertheless expect the implementation of this equality measure to be limited in practice as per the restrictions detailed in Section III. But interestingly, "[t]he European Commission [did] not take a 'build it and they will come' approach," as they did with women's rights law.[66] Instead,

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59: *Id.* 228-36. See *Sonia Chacón Navas v. Eurest Colectividades S.A.*, [2005] E.C.J. 13.

60: See Keleman, *Disability Rights,* in *Eurolegalism* at 195-238 (cited in note 8) & Hosking, 37 Indus. L.J. at 229 (cited in note 58).

61: Hosking, 37 Indus. L.J. at 229 (cited in note 58).

62: See Keleman, *Eurolegalism* at 195-238 (cited in note 8).

63: Hosking, 37 Indus. L.J. at 232 (cited in note 58).

64: Keleman, *Eurolegalism* at 200-02 (cited in note 8).

65: *Coleman v. Attridge,* [2006] E.C.J. 306.

66: Keleman, *Eurolegalism* at 223 (cited in note 8).

the Commission "cultivate[d] litigants" by educating individuals about their rights via seminars.[67] This has had the effect of empowering individuals to bring forth litigation against employers and even against their Member States for uneven implementation of *Coleman.*[68]

Disability antidiscrimination law in the EC thus offers a rosier picture of European integration than the women's rights movement. When combined with non-legal methods of education, it appears that the EC can spur activism at the level of the individual and encourage Europeans to fight for their own rights on the ECJ stage.

V. Conclusion: Revising the Neo-functionalist Model

Under the neo-functionalist model, the European Court of Justice is seen as a vehicle of European integration and a defender of positive social rights for the individual. Yet, as this article has argued, the ECJ is actually constrained in meaningful ways by the Member States' national courts, who have self-interested reasons to preserve their own judicial autonomy and influence. Contrary to the neo-functionalist view, national courts have been able to use these structural limitations to combat ECJ influence where it conflicts with national legal and social traditions. This has prevented the penetration of EC rights law into many areas of individual life for Community members.

The example of disability antidiscrimination law, however, provides a rudimentary model for how European integration and the advancement of EC rights might successfully proceed. There are two primary lessons to be learned from the relative supranational success of disability law. The first is that activism via strategic litigation is most effective under a very specific set of circumstances: when an individual actor is backed by an interest group with a narrow advocacy that can compel the national court to refer the case to the ECJ. Promoting awareness of such limitations, as well as encouraging the creation of such groups in all nations, would allow individuals to have a greater access to those rights secured at the supranational level. In regards to women's rights, for example, dismantling the barriers in countries like France, Luxembourg, and Denmark, which do not allow individuals to take equal pay cases directly to the national court, would increase access at the individual level.[69] The second lesson to be drawn from disability law is that change can happen at the societal level through education and advocacy,

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67: *Id.*
68: *Id.* at 222.
69: Alter & Vargas 33 Comp. Pol. Stud. at 470, n. 27 (cited in note 25).

which increases the likelihood that private actors will take action when they observe a violation of EC law.

In countering the neo-functionalist model, this paper does not mean to discount the empirical fact that the women's rights movement, and other rights movements in Europe, has had success. Instead, it is to cast doubt on the neo-functionalist's underlying assumption that the ECJ's actions represent a steady and progressive movement towards integration at the level of supranational rulemaking. At the end of the day, intergovernmentalism's modest but much contested observation that the only enforcement mechanism for the ECJ's rulings is the Member States themselves must stand, in spite of arguments from the neo-functionalists that individuals are empowered to keep the ECJ in line. National law and national legal actors remain very much in charge of the EC today. To change that, the EC will need to look to extra-legal methods that can enforce individual rights and ECJ provisions by changing the Member States' attitude toward integration—a tall order indeed.

State-Level Carbon Regulation and the Dormant Commerce Clause: the Use of the Public-Function Exemption

Young-Eun Kim†

I. Introduction

In 2009, the American Clean Air and Energy Act, a bill to create a national carbon cap-and-trade system, failed to pass Congress.[1] Considering the scientific certainty of anthropogenic contribution to climate change as well as its potential to cause environmental changes such as rising sea levels and extreme weather events, failure to act at a national level is very concerning.[2] In the vacuum of federal action, many states and regions have taken the initiative to enact state regulation and adopt regional initiatives to limit greenhouse gas (GHG) emissions.

As quasi-sovereign entities, states have the duty and the power, by the Tenth Amendment, to protect the health and welfare of their citizens.[3] Because of the potential negative effects climate change could have on a state's citizens, there are strong motivations for states to enact climate policies. However, states face constitutional constraints in enacting GHG reduction policies. State-level regulation that tries to limit GHG emissions may violate the dormant Commerce Clause[4] because such regulation can interfere with interstate energy markets by limiting the type of energy that in-state entities can consume. Opponents of GHG regulations, such as traditional power companies, are challenging states on the constitutionality of GHG regulation, claiming that such regulation interferes with interstate commerce and has extraterritorial reach.

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1: American Clean Energy and Security Act of 2009, H.R. 2454, 111st Cong. (2009).

2: See Thomas Stocker, et al, *Climate Chance 2013: The Physical Science Basis,* Intergovernmental Panel on Climate Change (2013), available at https://www.ipcc.ch/report/ar5/wg1/.

3: U.S. Const. Amend. X.

4: This is drawn from the Commerce Clause, which establishes that Congress alone is vested with the power to regulate interstate commerce. Thus, the states cannot impede such commerce.

In the face of these constitutional challenges, Fogel has proposed that the "public-function exemption" to the dormant Commerce Clause could justify state-level carbon regulation.[5] The public-function exemption reflects the growing deference to local governments by the courts. If an act is found to be (i) a traditional function of local government, (ii) of legitimate local concern, (iii) not facially discriminatory, and (iv) implemented in a manner that treats all private entities the same, then the act can be exempted from the reach of the dormant Commerce Clause, and thus upheld. The public-function exemption has yet to be widely used in cases concerning climate regulation. As it currently stands, the exemption seems to be too weak to influence the courts' decisions. However, there are merits to its principles and the courts should further explore the public-function exemption and better develop its applicability to state-level GHG regulation.

In this article, I will first provide background on the constitutional issues of climate regulation, including an overview of the dormant Commerce Clause and the specific nature of carbon regulation that makes it prone to challenges under that clause. I will then explain and analyze the public-function exemption argument made by Fogel, as well as its underlying principles and applications to carbon regulation policies. Then I will examine how the public-function exemption plays into two recent cases on state-level climate regulation—involving a California fuel-efficiency law and a Minnesota coal-based electricity restriction. Lastly, I will discuss the limitations of the public-function exemption and its potential implications for climate regulation.

II. The Legal Context for Carbon Regulation

The Commerce Clause specifically vests Congress with the authority to regulate interstate commerce. That clause enumerates that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[6] Because the Commerce Clause gives Congress the exclusive right to regulate commerce among states, the dormant Commerce Clause posits that states cannot enact legislation that would burden interstate commerce, even in the absence of federal regulation. As a result, state policies that discriminate against goods based on geographic origin generally violate the dormant Commerce Clause.[7]

5: Lawrence Fogel, *Serving a Public Function: Why Regional Cap-and-Trade Programs Should Survive a Dormant Commerce Clause Challenge*, 2010 Wis. L. Rev. 1313 (2010).

6: U.S. Const. Art. I, § 8, cl. 3.

7: Daniel A. Farber, *Climate Policy and the United States System of Divided Powers:*

States have a set of reserved rights, their police powers, to regulate the health and welfare of their citizens.[8] Yet regulation to ensure public welfare can be restricted by the dormant Commerce Clause if it somehow interferes with interstate commerce. To deal with such complexities, the courts have established a procedure to determine whether or not an act violates the dormant Commerce Clause. First, the court examines the legislation in question to see if it is facially discriminatory. A measure is facially discriminatory in this context if it discriminates against out-of-state goods by purposely treating them differently than in-state goods. If found facially discriminatory, the state regulation can be upheld only if the state can prove that there is no better alternative to achieve its ends. If the regulation is found to be non-discriminatory, yet still affects out-of-state business in some manner, the *Pike* balancing test is applied.[9] The *Pike* balancing test asks whether the local benefits of the regulation outweigh the negative impacts on interstate commerce. The fact that the courts use the *Pike* balancing test means that they recognize that a state's police powers can have adverse effects on interstate commerce, but that those effects are sometimes acceptable given their benefits. Lastly, legislation must also pass the extraterritoriality principle. This newer and less-developed prong of the dormant Commerce Clause is becoming a major issue for state carbon regulation, as it is currently being used to argue against such regulation.[10] Under this principle, a state law cannot interfere with activities conducted completely beyond the state's borders, even if that activity negatively harms that state's citizens. Given the nature of many GHG regulations, they are frequently challenged as facially discriminatory or extraterritorial in their reach.

Currently, there are two main approaches to regulating carbon emissions: on the regional and on the state level. On the regional level, one GHG cap-and-trade system has been functioning since 2008. The Regional Greenhouse Gas Initiative (RGGI) is a collaborative effort to reduce GHG emissions in eight Northeastern states.[11] This initiative establishes a fixed amount of emission permits based on GHG reduction goals, which are auctioned to private actors on a yearly basis; the proceeds are subsequently invested in energy-efficiency

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Dealing with Carbon Leakage and Regulatory Linkage, 3 Transnat. Environ. L. 1 (2012).

8: U.S. Const. amend. X.

9: *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970).

10: See Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 La. L. Rev. 979 (2013); Farber, 3 Transnat. Environ. L. at 12 (cited in note 7).

11: See generally Regional Greenhouse Gas Initiative, available at http://www.rggi.org/.

projects. There are currently negotiations ongoing for establishing two more regional cap-and-trade systems for the West and the Midwest: the Western Climate Initiative and the Midwestern Regional Greenhouse Gas Reduction Accord.

On the state-level, regulation that sets emission standards for electricity or fuel sources is being enacted to reduce the states' GHG emissions. However, due to the nature of electricity and the free-flow of goods in the market, it is difficult to impose regulations to decrease GHG emissions within a state. If only a particular type of energy can be produced in a state, for example, in-state consumers will switch to cheaper and less clean out-of-state energy sources not bound by the state's regulation. The state regulation will then have no effect on emissions because the state's consumers are not using cleaner energy. This conundrum is called "carbon leakage": carbon emissions in one state will increase as a result of stricter carbon regulation in another, thus ensuring that regulation merely shifts where carbon emissions originate as opposed to actually reducing the actual levels of emissions.[12] For states to pass effective legislation to reduce GHG emissions, they must avoid this leakage. It is exactly these anti-leakage components of carbon emission regulation that are most readily challenged under the dormant Commerce Clause.

There are two recent cases regarding state-level climate regulation that address the question of whether state-level carbon regulation violates the dormant Commerce Clause. The cases, together, deal with facial discrimination and extraterritorial reach. *Rocky Mountain Farmers Union v. Corey*[13] focuses upon facial discrimination and *North Dakota v. Heydinger*[14] focuses upon the extraterritorial reach of the challenged regulation.

Rocky Mountain Farmers Union v. Corey examined California's Low Carbon Fuel Standard (LCFS), which attempts to reduce GHG emissions by decreasing the carbon intensity of fuels consumed in California. The LCFS makes less carbon-intensive fuel sources more economically advantageous in California. The U.S. District Court initially found that the LCFS discriminates based on point-of-origin. In-state fuel sources were assigned lower carbon intensity values than out-of-state sources since they did not have to be transported, thereby allowing them to be marketed at lower prices than out-of-state sources. This decision was reversed by the Ninth Circuit, which adopted a less rigid view of the requirements of dormant Commerce

12: For a full discussion on carbon leakage, see Joseph MacDougald, *Why Climate Law Must Be Federal: The Clash Between Commerce Clause Jurisprudence and State Greenhouse Gas Trading Systems*, 40 Conn. L. Rev. 1431 (2007).

13: *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013).

14: *North Dakota v. Beverly Heydinger,* 2014 U.S. Dist. LEXIS 53888 (2014).

Clause doctrine.

In *North Dakota v. Heydinger*, North Dakota sued Minnesota over its Next Generation Energy Act (NGEA), which prohibits imports of coal-based electricity from new coal-power plants, regardless of whether the plant is in-state or out-of-state. North Dakota argued that, due to the interconnected nature of the electrical grid, the statute required even out-of-state electricity transactions to abide by Minnesota's statute. The district court judge focused on the question of the extraterritorial reach of the statute and concluded that it unconstitutionally violated the dormant Commerce Clause.

Overall, there are many legal challenges to state initiatives in climate regulation. State-level regulation must be comprehensive to avoid leakage, but must do so without triggering the dormant Commerce Clause. However, Fogel has argued that the legal uncertainty surrounding the constitutionality of state-level carbon regulations can be reduced by using the public-function exemption to bypass dormant Commerce Clause scrutiny of state-level climate regulation.

III. The Public-Function Exemption

The public-function exemption provides a new standard of review under the dormant Commerce Clause that is based upon a stronger deference to local governments. The public-function exemption is drawn largely from *United Haulers Association v. Oneida*[15] and *Kentucky Department of Revenue v. Davis*.[16] In these two cases, the Court made an explicit distinction between laws that favor private businesses, which are thus protectionist, and laws that favor local government, which are aimed at improving the well-being of a state's citizens. The Court held that laws that favor local government should be examined using a different standard than laws with economic-protectionist motivations.[17] A regulation is found to serve a public function if (i) all private enterprises are treated the same while providing services to the public, (ii) the residents bear the costs of the regulation's implementation, and (iii) the regulation fulfills a traditional local function. If these three prongs are satisfied in a particular case, then the court will review a challenged law with a lower level of scrutiny because of the law's legitimate local purpose. Even if a law seems discriminatory, this exemption allows courts to emphasize a law's legitimate local purpose and intent and thereby uphold regulations that

15: *United Haulers Association v. Oneida-Herkimer Solid Waste Mgmt. Auth.,* 550 U.S. 330 (2007).

16: *Department of Revenue of Kentucky. v. Davis*, 553 U.S. 328 (2008).

17: Fogel, 2010 Wis. L. Rev. at 1333 (cited in note 5).

might not survive traditional dormant Commerce Clause analysis.

United Haulers Association v. Oneida looked at whether an ordinance that required all private trash haulers to deposit their waste at a publicly funded and constructed county waste management facility violated the dormant Commerce Clause. In the majority opinion, Chief Justice Roberts reasoned that "unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens."[18] Because the ordinance was not intended to enrich local businesses but to improve public and environmental health, the Court found that it did not violate the dormant Commerce Clause. The waste management facility was regarded as a public facility and was therefore distinct from other private waste management plants. The court was able to make the public facility distinction because the costs of the public facility were borne by the county residents rather than outside actors. A *Pike* balancing test also found that the ordinance was non-discriminatory because the health and environmental benefits to the public were greater than the negative effects on the outside waste haulers. *UHA* marked a deviation from the norm by taking into account the distinction between a public and private facility before considering how to examine a regulation under the dormant Commerce Clause.

A similar approach was applied in *Kentucky Department of Revenue v. Davis*. In *Kentucky,* the Court upheld Kentucky's tax structure, which exempted Kentucky bonds from taxation, because "Kentucky's tax exemption favors a traditional government function without any differential treatment favoring local entities over substantially similar out-of-state interests."[19] Plaintiffs argued that the tax-exemption status interfered with the out-of-state bond market, but the Court viewed the regulation as a traditional function of the local government and therefore a public function. Thus the regulation did not violate the dormant Commerce Clause.

Fogel sees these two cases as showing a growing deference by the courts to local governments and a greater recognition of local governments' traditional police powers. Even though traditional dormant Commerce Clause doctrine already allows courts to weigh local benefits through the *Pike* balancing test if a regulation is not facially discriminatory, the public-function exemption serves as a preliminary distinction that frames how the court determines facial discrimination and how it subsequently conducts the *Pike* balancing test. Under the public-function exemption, the first questions are not whether the regulation is facially discriminatory, but, rather, who the beneficiaries are, what the intent is, and who will bear the costs.

18: *United Haulers*, 550 U.S. at 342.
19: *Davis,* 553 U.S at 343.

Lastly, the public-function exemption also establishes a basis for the limited use of the *Pike* balancing test in situations where the regulation in question is determined to serve a public function. In *Kentucky,* the Court decided not to use the *Pike* balancing test, concluding that the Court was "not institutionally suited to draw reliable conclusions of the kind that would be necessary" to conduct the test.[20] By refusing to perform a *Pike* balancing test, the Court recognized that there are limits to its judicial powers and deferred such analyses to local governments. Although a *Pike* balancing test was used in *UHA,* Justice Roberts did acknowledge the limitations of the test: "we should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause," referring to the *Pike* balancing test.[21] Additionally, the decision not to use the *Pike* balancing test in *Kentucky* demonstrates that this test might not even be applicable to cases involving the public function exemption.

IV. The Public-Function Exemption Applied to Climate Regulation

Fogel claims that the public-function exemption can be used for carbon leakage laws because the regulatory scheme can be viewed as a public facility that promotes public welfare.[22] However, the direct application of the public-function exemption on the state-level is not as clear as Fogel argues. Unlike *UHA* and *Davis,* regulation that tries to reduce GHG emissions cannot easily be described as a physical public facility or service that provides traditional services by the local government. Even though a state's motivation to enact climate regulation is largely based on human and environmental concerns, GHG reduction in and of itself is not an established function of the local government in the way waste management or historically established tax-exemption rules are. Furthermore, the provision of GHG reduction does not necessarily provide a direct and tangible benefit for the local citizens, let alone a benefit that can be quantified as easily as the negative impacts that the potential regulation may have on interstate commerce. In these circumstances, it may be difficult to argue that GHG reduction policies are serving a public function even if the policies are not facially discriminatory.

Fogel points out that the traditional/non-traditional distinction of local government functions should not be limited just to looking at historical precedent of what local governments have done, but should rather be focused

20: *Id.* at 353.
21: *United Haulers,* 550 U.S. at 347.
22: Fogel, 2010 Wis. L. Rev. at 1337 (cited in note 5).

on who benefits.[23] Unfortunately, considering the difficulty in determining the specific benefits from GHG reduction policy for state citizens, courts may find it challenging to find that the regulation directly benefits a state's citizens. This is because reducing carbon emissions in one state decreases the global pool of CO_2, such that the benefits of the reduction are dispersed broadly, without regard for jurisdictional borders. Thus, in contrast to cleaning up a chemical spill or improving water quality, the benefits of reducing CO_2 levels are not geographically confined within the state that enacted the legislation. However, *Massachusetts v. EPA* concluded that states have standing in issues concerning climate change and decided that CO_2 could be regulated as an air pollutant under the Clean Air Act.[24] Since states have the authority to regulate air pollutants and the Environmental Protection Agency now considers CO_2 an air pollutant, perhaps state regulation of CO_2 can be regarded as a traditional function of local government. This approach would lead carbon emission regulations to be evaluated differently under the dormant Commerce Clause, as they would fall under the traditional functions of local government.

Recognizing the difficulty in arguing for the benefits of state regulation, Fogel also claims that there is value in states experimenting with carbon regulation because it can increase the attention the federal government devotes to this issue as well as help evaluate which policies are the most effective. He states that "action at the state level may encourage the federal government to give attention to the issue."[25] In addition to gaining federal attention, state legislation can encourage other states to enact similar regulation on carbon emissions, which is compelling from an environmental policy standpoint. However, whether this benefit would be recognized as a local benefit under the dormant Commerce Clause remains unclear. Thus, Fogel claims that the minimal direct impacts to the state should not be a reason to prevent state-level regulation.[26] Justice Stevens, in *Massachusettes v. EPA* recognized that massive problems like climate change are not resolved "in one fell regulatory swoop" but by "whittl[ing] away at them over time, refining their preferred approach."[27] This argument supports the role that states can play in helping to "refine" the approach to tackling climate change. By experimenting with various regulations, states are in a sense bearing the costs of trying out innovative ideas, such that other states can look at their experiences for

23: *Id.* at 1342.
24: *Massachusetts v. EPA*, 549 U.S. 497 (2007).
25: Fogel, 2010 Wis. L. Rev. at 1338 (cited in note 5).
26: *Id.* at 1340 (citing Daniel Farber, *Climate Change, Federalism, and the Constitution,* 50 Ariz. L. Rev. 879 (2008)).
27: *Massachusetts,* 549 U.S. at 424.

guidance in enacting their own carbon regulation. There clearly are major benefits to state-level regulation regarding this issue, but the problem is that these benefits do not necessarily fit into the traditional local government function. However, an expanding definition of what is an appropriate local government function could help capture the experimental benefits of state-level GHG.

Fogel additionally claims that the public function designation will be especially relevant for regional GHG cap-and-trade systems because cap-and-trade systems are more likely to be regarded as a public facility than most other regulatory frameworks. Fogel argues that a cap-and-trade system requires private actors and government to work together and therefore forms a public-private partnership (PPP). This partnership, Fogel argues, causes the private actors in a cap-and-trade system to lose their "identity as a private entity devoid of government operation,"[28] so that they are subject to working with a public facility in the same manner that the waste-disposal companies had to use a public facility in *UHA*. However, Fogel's reasoning that PPPs are a public facility is weak. He argues that PPPs can be considered as public facilities because the private actors "are subject to regulation" and because of their position as an "entity within a government-operated regulatory program." [29] Yet all private actors, even those not part of PPPs, are subject to some regulation. In the example of the cap-and-trade regimes, Fogel seems to refer to the establishment of a separate private-public administrative body as the criteria for considering this PPP a public facility. However, even if the courts regarded cap-and-trade systems as PPPs that could be categorized as public facilities, similarly to the public waste management facility in *UHA,* this categorization cannot necessarily be extended to carbon regulation that falls outside of these cap-and-trade regimes.

There are multiple facets of the public-function exemption that have yet to be developed, particularly in how to distinguish a public function. However, if these issues can be addressed and clarified, the public function exemption appears a viable method by which new carbon regulations could bypass traditional dormant Commerce Clause scrutiny. The two recent cases cited earlier, *Rocky Mountain Farmers Union v. Corey* and *North Dakota v. Heydinger,* were clear opportunities to test the exemption in court. Yet, the exemption was not utilized in either case, showing that Fogel's exemption still lacks judicial sanction. The latter case is pending appeal, suggesting that the exemption's applicability there is not yet settled.

28: Fogel, 2010 Wis. L. Rev. at 1348 (cited in note 5).
29: *Id.*

V. The Public Function Exemption in Current Court Cases

The most recent cases concerning carbon leakage laws that have been challenged under the dormant Commerce Clause are *Rocky Mountain Farmers Union v. Corey*[30] and *North Dakota v. Heydinger.*[31] The cases deal with state-level legislation that tries to lower the state's carbon footprint by preventing the import and use of certain types of carbon-intensive fuel or electricity within the state's borders to prevent carbon leakage. The arguments in the two cases so far have emphasized different aspects of the dormant Commerce Clause: in California, the case focused on the traditional question of facial discrimination, while in Minnesota, the case focused on the extraterritorial nature of the statute. In both cases, however, the language and ideas of the public-function exemption are not present, demonstrating that defendants and courts are not yet using the doctrine, even in cases where it could directly apply.

In *Rocky Mountain Farmers Union v. Corey,* out-of-state ethanol and oil producers challenged California's Low Carbon Fuel Standard (LCFS), which requires the calculation of the carbon intensity of all fuel sources. The state of California sets yearly carbon intensity reduction standards, aimed at lowering the state's carbon emissions, by requiring a reduction in the carbon intensity of fuel sources by 10%. Fuel sources that exceed the required carbon intensity reduction in a given year receive credits that can be sold in a trading market. Fuel sources that did not meet the required reduction need to purchase credits in that market to offset their carbon-intensity. The carbon intensity is calculated using a life-cycle assessment that takes into account the direct and indirect emissions from production, transportation, and consumption. To comply and trade in California, fuel suppliers can either reduce the carbon intensity of their fuel or buy credits to offset their fuel's high carbon intensity. This statute displeased many out-of-state fuel producers because longer transportation distances increased their carbon intensity value compared to similar in-state producers.

Plaintiffs first successfully sued at the district court level, claiming that the LCFS violated the dormant Commerce Clause because the carbon intensity scheme was facially discriminatory based on point of origin: out-of-state sources were assigned higher carbon intensity values and thereby economically disadvantaged compared to in-state generated sources. However, the Ninth Circuit reversed the district's court's decision by concluding that the LCFS is not facially discriminatory. The Court found that the LCFS was not trying

30: *Rocky Mountain,* 730 F.3d at 1070.
31: *Heydinger,* 2014 U.S. Dist. LEXIS 53888 (2014).

to protect California ethanol and that the higher carbon intensity values were a result of increased emissions accrued through transportation. Depending on other factors such as production, some out-of-state sources like Brazilian ethanol from sugar cane, could have lower carbon intensity values despite the higher transportation miles. Furthermore, the LCFS does not try to regulate the market outside California, and it is up to outside firms to lower the carbon intensity of their products if they wish to access the California market.[32]

The language of the public-function exemption did not take center stage in *Rocky Mountain*. The arguments focused on whether the policy was discriminatory. The district court found the purpose of the LCFS, to reduce the risks of global warming, was a "legitimate local purpose."[33] However, the "legitimate local purpose" was not considered to be a traditional function of the local government and, ultimately, the district court found the regulation to be facially discriminatory.[34] Even the Ninth Circuit Court, in its reversal of the lower court's decision, did not allude to a special public function nature of the LCFS.

In his opinion for the Ninth Circuit, Justice Gould revealed that he found state level action on climate change extremely important. Yet there is not one specific reference to *UHA* or *Kentucky* in his opinion, let alone the exemption established in *UHA*. Despite the multiple references to the necessity of California adopting such climate mitigation policies, the Ninth Circuit did not try to find a way to soften the scrutiny of the LCFS under the Commerce Clause. Once the Court found that the LCFS is not facially discriminatory and that it serves a legitimate local purpose, it could have applied the reasoning set in *UHA* to find that the policy serves a public function because (i) the purpose is not to protect in-state firms from competition, (ii) the benefit is borne by the citizens of the state, (iii) the costs are borne by the citizens, and (iv) all firms are treated the same. Furthermore, once the court declared the LCFS not to be facially discriminatory, it could have referred to *Kentucky* to argue that the *Pike* balancing test was not applicable in this case because the courts could not accurately judge the costs and benefits of carbon regulation.

Although the Ninth Circuit did not expand upon the public-function exemption, its argument about the value of states experimenting with regulation provides support for weighing benefits beyond the direct effects of local regulation when tackling issues like climate change. Judge Gould emphasized the urgency of states acting as regulatory experimenters for dealing

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32: *Rocky Mountain,* 730 F.3d at 1107.

33: *Rocky Mountain Farmers Union v. Goldstene,* 843 F. Supp. 2d 1071, 1093 (2011).

34: *Id.* at 1105.

with climate change. He declared that "California should be encouraged to continue and to expand its efforts to find a workable solution to lower carbon" and "our conclusion is reinforced by the grave need in this context for state experimentation."[35] If the role of states as experimental entities continues to be further established, especially in the context of curbing carbon emission as a "traditional" local government function, then the public function exemption might be more easily applied to cases involving state-level GHG regulation.

Rocky Mountain seems to have been a viable case for the courts to apply the public-function exemption since the LCFS has a PPP component, the offset market, which, according to Fogel, could be considered a public facility. However, no such application of the concept was utilized. The Ninth Circuit's reversal was a victory for carbon regulation, but the lack of the use of the public-function exemption in this high profile case is disappointing. Still, though, the court's recognition of the experimental benefits of state-level carbon regulation is a positive development in this case.

Another important case, *North Dakota v. Heydinger*, is about the inter-state conflict between North Dakota and Minnesota over Minnesota's Next Generation Energy Act (NGEA). The goal of the NGEA is to reduce GHG emissions by 15% of 2005 levels by 2015, by 30% by 2025, and by at least 80% by 2050. To achieve this goal, NGEA requires utilities to generate a certain percentage of electricity for retail sale from renewable energy sources, promote energy conservation, and attempt to address climate change by limiting GHG emissions.[36] The specific portion of the NGEA that is currently being challenged is the article that prohibits Minnesotan electricity consumers from importing electricity generated from new coal-fired power plants and from entering into new long-term power purchase agreements that increase carbon emissions.[37] On April 18, 2014 the district court found the statute unconstitutional because it violates the dormant Commerce Clause due to its extraterritorial reach. Judge Nelson agreed with the plaintiffs that the statute regulated electricity transactions that originate outside of Minnesota.[38]

The State of North Dakota and several electricity producers argued that Minnesota's Act regulated commerce outside of its state boundaries and thus violated the dormant Commerce Clause. Plaintiffs based their argument on the nature of the electrical grid, explaining that after electricity is produced,

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35: *Rocky Mountain,* 730 F.3d at 1097.

36: Minn Laws ch. 136-S.F.No. 145 (2007), available at https://www.revisor.mn.gov/data/revisor/slaws/2007/0/136.pdf.

37: Minn. Stat. § 216H.03, subd. 3., available at https://www.revisor.leg.state.mn.us/statutes/?id=216H.03&format=pdf.

38: *Id.* at subd. 3(2)–(3).

it is put into the grid and subsequently delivered to consumers. Therefore, it is impossible to track where the electricity from one specific producer ends up. So they claimed that even when a North Dakotan electricity supplier contracts with a North Dakotan buyer, some of the electricity generated by the supplier may end up in Minnesota, because Minnesota and North Dakota belong to the same regional transmission organization (RTO) that facilitates electricity transactions in the region. Due to this possibility, plaintiffs claimed that now all coal-based electricity producers in North Dakota would have to abide by Minnesota's statute.

Since this case focuses on the extraterritorial nature of the statute, it is not self-evident how the public-function exemption can be applied here. The public-function exemption has thus far been used in cases that revolve around facial discrimination, and dismisses facial discrimination concerns by stating that they are trumped by a statute's local purpose and benefit. The issue of extraterritorial reach is different, however, from facial discrimination, and remains unaddressed by Fogel. Because states clearly do not have the right to regulate outside of their sovereign boundaries, it is difficult to see how a statute found to have an extraterritorial reach can be exempt even if it is viewed as serving a legitimate local purpose. On the other hand, the public-function exemption could perhaps be used to soften scrutiny under the extraterritoriality principle. Once the courts recognize the law to be serving a public function, they can examine it with less scrutiny and conclude that the incidental effects on out-of-state transactions are an inevitable outcome of a legitimate local law rather than an attempt to regulate outside of the state's borders. If *Heydinger* is successfully appealed and such reasoning is used to reverse the case, the power and potential of the public-function exemption could be greatly expanded.

Additionally, this case raises interesting questions concerning the role of the electrical grid in carbon emission regulation and how infrastructure affects the legal nature of carbon regulation. The interconnectivity of the electrical grid makes electricity a unique good because there is only one way to buy and sell between states. This makes the application of interstate commerce laws difficult due to the physical limitations of the grid. Considering the interconnected nature of the electrical grid, it is interesting that the judge found Minnesota's statute unconstitutional. It is true that we cannot trace specific electrons from their source to the end point due to the nature of the grid. When a consumer contracts with a supplier, they are not actually getting their electricity from that particular supplier. Electricity contracts are only for accounting purposes—unlike most goods, we cannot differentiate and purchase a specific load of electricity. Thus, an electron generated by a North Dakotan supplier contracted with another North Dakotan consumer may be

delivered to a consumer in Minnesota. In such a circumstance, there would be no way for the state of Minnesota to know that the Minnesota consumer was using electricity from a coal power plant. In general, the consumed electricity is considered to be coming from the company the consumer contracted with, even if in reality the actual electricity used was not from that specific producer. Thus, if a North Dakotan company contracted with another North Dakotan company, there is no way to credibly claim this transaction as a transaction between North Dakota and Minnesota.

The Minnesota case raises questions about extraterritoriality and how it relates to regulation that is concerned with a very inflexible electrical grid. What happens if there is an extraterritorial aspect to a statute, which serves a legitimate local purpose, due to infrastructural limitations of a particular market? The plaintiffs correctly argue that their coal-based electricity may end up in Minnesota, but there is no way to limit the use of certain types of electricity because the grid does not allow it. This will be a fundamental issue for many states. The final outcome of this case, if it is successfully appealed, will be extremely important for the future of state-level carbon regulation that concerns the supply of electricity. The focus on the electrical market indicates the important role that a technical understanding of electricity and energy markets will play in determining the constitutionality of carbon regulations. The conflict between the physical grid and the regulations may also prove difficult for the public-function exemption. It is unclear if the grid limitations could be overcome by using the public-function exemption or if the grid would prevent the public-function exemption from being applied.

VI. Conclusion

Despite the limitations and the lack of use of the public-function exemption so far in cases involving state-level climate regulation, the exemption still has the potential to bypass the high level of scrutiny required by dormant Commerce Clause doctrine. Even though the exemption, as conceptualized by Fogel, has not yet received judicial sanction, the developments in the two cases discussed above allude to the exemption's potential use in the future.

A major limitation to the use of the public-function exemption lies in the difficulty of attributing the direct benefits of local GHG regulation to a state's citizens. However, additional benefits of carbon regulation could be noted due to the importance of state experimentation with carbon regulation, a development that the courts are recognizing and accepting, as illustrated by Justice Gould in his reversal in the LCFS case. Furthermore, the continued establishment of what is considered a traditional function of the local government will help clear up whether climate regulation can

be considered a traditional function. Even though local governments have not historically overseen GHG regulation, the recognition of CO_2 as an air pollutant in *Massachusetts v. EPA* could be used to argue that curbing carbon emissions is now a new function of state government. These are two positive developments that could be built upon to make state-level climate regulation more applicable for the public-function exemption's use.

Moreover, the growing emphasis on the extraterritorial reach of state carbon regulation provides a new venue to try to expand the public-function exemption. Currently, extraterritoriality is beyond the scope of the exemption because the exemption has never been used to address extraterritoriality. However, similarly to reviewing a law with a legitimate local purpose with less scrutiny, a law that does not explicitly try to regulate out-of-state activities could also be subjected to less scrutiny. But, even then, the complexities of the electrical grid and how it relates to energy regulations create more uncertainties about the applicability of the public-function exemption.

Overall, it is extremely difficult to assess the future of the public-function exemption for climate regulation. With only two distinct cases, *United Haulers Association v. Oneida* and *Kentucky Department of Revenue v. Davis,* having used the exemption, it is hard to make a prediction regarding its usage. The public-function exemption is too undeveloped at this point: there is not even an established step-by-step procedure for reviewing public-function legislation under the dormant Commerce Clause. Currently, the public-function exemption just provides a new framework that allows courts to approach the public-function legislation in question with less scrutiny. If courts opt to rigorously develop the exemption in future energy regulation cases, it could become an important doctrine for state-level environmental regulation.

To Reduce the "Life of a Human Being to a Single Number": Re-Examining IQ Testing for the Intellectually Disabled on Death Row

Sydney Mendelsohn†

I. Introduction

According to his siblings, Freddie Lee Hall is intellectually disabled.[1] By the accounts of several psychiatrists, psychologists, and medical professionals who have examined him in the past, Hall has an intellectual disability.[2] In fact, even guidelines set forth by professional disability organizations provide evidence of his intellectual disability.[3] Yet one source—one largely unrepresentative number—indicates otherwise: his IQ score. Unfortunately for Hall, his IQ score, which provides outside observers with only an infinitesimal glimpse into the range of his intellectual abilities and deficits, is the only factor that matters for his life. As a convicted murderer charged with robbing a convenience store, raping, and murdering a 21-year-old pregnant woman, and fatally shooting a sheriff, Hall was sentenced to death by the Florida Supreme Court.[4] Out of Hall's nine IQ evaluations,[5] only one—his highest score, one point above 70—was examined by the Supreme Court of Florida and thus legitimized the resulting death sentence.[6] In Florida, the state looks at only one threshold when deciding whether offenders are so intellectually disabled as to be exempt from the death penalty: the rigid IQ cutoff score of 70.[7]

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1: Sara Reardon, *Science in Court: Smart Enough to Die*, 506, Nature News 284 (2014).

2: Mark Sherman, *Supreme Court Looks at Freddie Lee Hall, Death Row Inmate With Low IQ*, Huffington Post (Mar. 2, 2014), available at http://www.huffingtonpost.com/2014/03/02/freddie-lee-hall-supreme-court_n_4884825.html.

3: Reardon, 506 Nature News at 284 (cited in note 1).

4: *Hall v. Florida,* 109 So. 3d 704, 707-08 (FL 2012).

5: *Hall v. Florida,* 134 S. Ct. 1986, 1992 (2014).

6: Sherman, *Supreme Court Looks at Freddie Lee Hall, Death Row Inmate With Low IQ* (cited in note 2).

7: *Hall,* 134 S. Ct. at 1992.

For some time, scholars have debated how intellectually disabled offenders should be treated in the U.S. criminal justice system. Specifically, many have questioned whether intellectually disabled offenders convicted of capital crimes should be subject to the harshest legal punishment: the death penalty. While initially the Supreme Court permitted capital punishment for intellectually disabled offenders on a case-by-case basis, the Court eventually shifted its stance on this issue as the American public and legislators became more knowledgeable about intellectual disabilities and the social vulnerabilities that accompany them.[8] Those opposed to the death penalty for people with intellectual disabilities argue that intellectually disabled persons are often naïve, gullible, and incapable of distinguishing between right and wrong in social situations. On the other hand, others feel that it is unfair for the legal system to "place 'a certain class of individuals beyond the State's power to punish by death,'" while nondisabled individuals convicted of similar crimes face the threat of the death penalty.[9]

Since the Supreme Court banned the execution of intellectually disabled offenders in 2002 and left states with the responsibility of establishing standards for intellectual disability in criminal proceedings, state legislatures and policymakers have wrestled with defining intellectual disability appropriately to ensure that the right people are exempted from the death penalty.[10] While some states have implemented multifaceted definitions of intellectual disability in accordance with the guidelines of the American Psychological Association (APA) and the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V-TR), others have adopted rigid and unitary thresholds to determine the presence of an intellectual disability.[11] States' use of fixed metrics, such as IQ cutoff scores, to diagnose intellectual disability has serious consequences for intellectually disabled offenders. Just one point below or above the state's IQ cutoff score can either end or preserve the life of an individual with an intellectual disability, such as Freddie Lee Hall. In this article, I will contend that an IQ score, which is neither an accurate nor an all-encompassing measure of an individual's intellectual disability, should not have this degree of influence in capital punishment decisions.

In *Hall vs. Florida*, the Supreme Court placed a limit on states' previously unfettered discretion to use rigid IQ cutoff scores when making capital

8: Emily Fabrycki Reed, *The Penry Penalty: Capital Punishment and Offenders with Mental Retardation* (1993).

9: *Id.* at 4.

10: See *Atkins v. Virginia*, 536 U.S. 304 (2002).

11: John H. Blume, Sheri Johnson, & Christopher W. Seeds, *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases,* 18 Cornell J. L. & Pub. Pol'y 689 (2009).

punishment decisions for intellectually disabled offenders. It ruled that a strict IQ cutoff score of 70 is "invalid under the Constitution's Cruel and Unusual Punishments Clause."[12] Because IQ scores are imperfect estimates of intellectual function, strict cutoffs should not preclude individuals with scores within "a band or zone of 65 to 75" from presenting alternate evidence that is relevant to intellectual disability considerations.[13] However, even though the Court's decision prohibits the strict line of 70, it does not prevent states from establishing IQ thresholds in the first place, even when they may be more flexible in range. Going forward, states can still mandate that individuals *first* meet a certain IQ requirement before they examine any other evidence of an intellectual disability, such as "past performance, environment, and upbringing."[14] Notably, even though the Court admitted in *Hall v. Florida* that IQ scores are not an "infallible assessment" of intellectual functioning, the Court still allowed states to make IQ scores a priority in intellectual disability assessments.[15]

I maintain, however, that an IQ score alone does not capture—and for that matter, was never intended to capture—the multifaceted and complex nature of an intellectual disability. Therefore, I contend that states need to look beyond the IQ score when diagnosing intellectual disabilities, especially when something as sacrosanct as a human life is at stake. If states want to employ the death penalty justly, I recommend that they stop relying on proxies such as IQ scores to make intellectual disability determinations.[16] Instead, states should examine multiple sources of evidence, such as testimony from those who personally know the individual or testimony from the disabled community or medical experts, to determine if someone is mentally disabled. If there is any doubt at the end of these investigations as to an individual's intellectual disability status, I urge states to veer on the side of caution and avoid imposing the death penalty.

For the purposes of this article, I will first discuss the legal history of capital punishment for intellectually disabled offenders to establish the underlying values that provided support for the Court exempting the intellectually disabled from the death penalty. I will then evaluate the way in which several states diagnose intellectual disabilities in capital cases—that is, through the

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12: *Hall,* 134 S. Ct. at 2001.

13: *Id.* at 1999.

14: *Id.* at 1996.

15: *Id.* at 2000.

16: I am only evaluating the death penalty as it is applied to people with intellectual disabilities. The question of whether or not the death penalty, in general, qualifies as cruel, unusual, and unjust punishment is beyond the scope of this article.

use of rigid IQ cutoffs. I aim to demonstrate how this scientifically imperfect and exclusionary threshold is incompatible with the objectives of the *Atkins v. Virginia* decision. I will also evaluate the Supreme Court's response to the use of rigid IQ cutoffs more recently in *Hall v. Florida*, and consider the consequences that this decision has for intellectually disabled offenders in the future. Finally, I will explain the fatal implications of making intellectual disability determinations based on IQ scores alone, and recommend a more holistic and thorough assessment of intellectual disability that gives intellectually disabled persons at risk for capital punishment the full protection under the Eighth Amendment that they deserve.

II. Legal History and Its Implications

In the U.S., there are two primary purposes for capital punishment: retribution and deterrence. The first principle underlying capital punishment is a "life for a life."[17] This major tenet underlying capital punishment is formally known as retribution, which is the theory that people who commit capital crimes should receive punishments that are "proportional and directly related to the defendant's blameworthiness."[18] Essentially, the idea is that criminals guilty of the most heinous crimes should get what they deserve.[19] Another theory that provides justification for the death sentence in cases involving capital crimes is deterrence. There are two types of deterrence. Special deterrence involves inflicting a punishment, such as the death penalty, on someone to prevent that offender from ever committing any other crimes again in the future.[20] The second type of deterrence is general deterrence, which means "punishing an individual or all offenders [to] deter potential criminals from similar criminal actions because they fear punishment."[21] When deciding whether an offender will receive the death penalty, the Supreme Court demands that courts have a "legitimate punitive purpose," namely retribution or deterrence, in order for the punishment to be "permissible under the Eighth Amendment."[22]

In *Penry v. Lynaugh*,[23] the Supreme Court held that capital punishment for intellectually disabled offenders does not constitute a "cruel and unusual punishment" and is a permissible outcome of cases that involve brutal conduct

17: Reed, *The Penry Penalty* at 27 (cited in note 8).
18: *Id.* at 6.
19: *Id.*
20: *Id.* at 25-26.
21: *Id.* at 25.
22: *Id.* at 24.
23: 492 U.S. 302 (1989).

by people with intellectual disabilities.[24] This decision established the legality of executing intellectually disabled persons "on a case-by-case basis 'as long as judges and juries consider their mental retardation before sentencing.'"[25] The Court's reasoning for its decision was that since the petitioner was only mildly or moderately "retarded," he was thus capable of knowing right from wrong and understanding the criminality of his actions.[26]

Several years later, the Court confronted another case in which an intellectually disabled individual was convicted of capital murder and sentenced to death. In *Atkins v. Virginia,*[27] the Supreme Court reversed its decision in *Penry* and held that "executions [of mentally disabled criminals] are 'cruel and unusual punishments' prohibited by the Eighth Amendment."[28] A primary reason that the Court cites for its decision is that "a significant number of States have concluded that death is not a suitable punishment for mentally retarded criminals."[29] The Court wanted to ensure that its decision reflected an emerging national consensus, since, over time, popular opinions had shifted and the American public and legislators came to oppose the execution of intellectually disabled people convicted of capital crimes. As community programs for intellectually disabled individuals increasingly surfaced throughout the nation, the American population gradually "became enlightened by a humane justice."[30] The American public became more knowledgeable about intellectual disability and more understanding of the needs and basic human rights of those with intellectual disabilities. This prompted general societal disdain for inflicting such a severe punishment on such a vulnerable group of individuals.

In *Atkins*, the Court also banned capital punishment for people with intellectual disabilities because it did not believe that "either justification underpinning the death penalty [retribution for or deterrence of capital

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24: *Id.* at 340.

25: Reed, *The Penry Penalty* at 1 (cited in note 8). The Supreme Court and professional disability organizations have shifted from using the term "mental retardation" to using the term "intellectual disability" in order to keep up with changes in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders. In this article, I use the term mental retardation only when my sources refer to intellectual disability as such.

26: *Penry,* 492 U.S. at 337-38.

27: 536 U.S. 304 (2002).

28: *Id.*

29: *Id.* at 321.

30: *Hall,* 134 S. Ct. at 1992 (quoting *Weems v. United States,* 217 U.S. 349, 378 (1910)).

crimes] applies to mentally retarded offenders."[31] In regards to retribution, the Court contended that "mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions."[32] Essentially, the Court believed that the mental capacities of intellectually disabled persons are commensurate with that of children. Therefore, in social situations where an opportunity for maladaptive behavior exists, people with intellectual disabilities lack the ability to "voice internally to [themselves], 'Wait a minute, I'd better not do this'" before they commit a crime.[33]

The absence of purposefulness and moral reasoning in intellectually disabled persons' criminal actions, due to their disability, absolves them of personal responsibility for the crime.[34] Consequently, because intellectually disabled persons are not blameworthy for their crimes and the "Constitution requires the highest degree of culpability for death to be a proportionate punishment," the retributive purpose of the death penalty is not served by sentencing intellectually disabled offenders to death.[35] Likewise, the deterrence purpose of the death penalty is not accomplished by sentencing intellectually disabled persons to death. This is because cognitive and behavioral deficits "make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."[36] In essence, the execution of intellectually disabled offenders will rarely deter other intellectually disabled offenders from committing similar capital crimes. The last reason that the Supreme Court cited for avoiding the death penalty in cases involving people with intellectual disabilities is that those with mental disabilities "face a 'special risk of wrongful execution,'" since their disability often prompts them to "give false confessions, [be] poor witnesses, and [provide less than] meaningful assistance to their counsel."[37]

In the aftermath of *Atkins v. Virginia*, there have been many objections to the Supreme Court's prohibition on capital punishment for intellectually disabled offenders. For one, many believe that it is unfair for intellectually disabled persons to have preferential treatment in the criminal justice system,

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31: *Atkins*, 536 U.S. at 319.
32: *Id.* at 318.
33: Reed, *The Penry Penalty* at 2 (cited in note 8).
34: *Id.*
35: *Id.* at 22.
36: *Atkins*, 536 U.S. at 320.
37: *Hall,* 134 S. Ct. at 1993 (quoting and citing *Atkins,* 536 U.S. at 321).

especially when "as many as 20% of the more than 3100 people on death row in the United States may have some level of intellectual disability."[38] At bottom in this argument is that the only way that persons with intellectual disabilities will be able to "share equally in the benefits and privileges of society" is if they get what they "deserve" just like everyone else by receiving the same penalties for similar crimes.[39] Other attacks on the Court's ruling in *Atkins* note that "eighty-five percent of persons with mental retardation—and most capital defendants with mental retardation—fall in the 'mild' classification," and thus may not be so different from those with standard intelligence.[40] Many feel that not all intellectually disabled individuals should be pardoned from the death penalty when a substantial number are "competent enough to stand trial and have a 'rational and factual understanding of the proceedings against'" them.[41]

Upon further examination of people with mild intellectual disabilities, the Court determined that even "those with mild mental retardation" frequently still have significant "intellectual and adaptive behavior deficits" that qualify them as intellectually disabled.[42] While the Court established that exemptions from the death penalty would be primarily based on the legal label of intellectual disability, it did not explicitly provide states with a formal definition of what intellectual or social deficits constitute intellectual disability.[43] The Court left the states with the difficult task of determining the threshold level of mental incapacity that warrants exemption from capital punishment. Many states have accepted the clinical definition of intellectual disability provided by the American Association on Intellectual and Developmental Disabilities (AAIDD) and the American Psychiatric Association in its *Diagnostic and Statistical Manual of Mental Disorders*:

38: Reardon, 506 Nature News at 285 (cited in note 1).

39: Reed, *The Penry Penalty* at 55 (cited in note 8).

40: Blume, Johnson, & Seeds, 18 Cornell J. L. & Pub. Pol'y at 694 (cited in note 11).

41: Reed, *The Penry Penalty* at 5 (cited in note 8).

42: John Matthew Fabian, William W. Thompson, & Jeffrey B. Lazarus, *Life, Death, and IQ: It's Much More than Just a Score: Understanding and Utilizing Forensic Psychological and Neuropsychological Evaluation in Atkins Intellectual Disability/Mental Retardation Cases,* 59 Clev. St. L. Rev. 399, 401 (2011).

43: *Atkins*, 536 U.S. at 321.

> "(1) Significant sub-average general intellectual functioning;
>
> (2) significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety; and,
>
> (3) onset must occur before age 18."[44]

Conversely, other states, such as Florida, have significantly narrowed the definition of intellectual disability through case law. For example, the Florida Supreme Court "requires that…[intellectually disabled persons] show an IQ test score of 70 or below before presenting any additional evidence of [their] intellectual disability."[45] Florida and similar states abstain from any considerations of individual limitations in adaptive functioning if the subject has received a high enough score on the IQ exam. Therefore, these states greatly rely on an individual's performance on an IQ test to gauge whether an individual is intellectually disabled. These states have traditionally set their IQ cutoff line at 70 since that figure is approximately two standard deviations below the societal mean.[46] However, more recently, states have differed in how strictly they abide by this specific line. Florida and its ilk have enforced a "fixed cutoff at 70," without "acknowledging the error inherent in using a test score without necessary adjustment."[47] On the other hand, other states follow DSM and AAIDD guidelines that enforce "clinical definitions for intellectual disability," and, which "by their express terms, rejected a strict IQ test score at 70…and which have long included the SEM [IQ measurement errors]."[48]

44: Reported in Fabian, Thompson, & Lazarus, 59 Clev. St. L. Rev. at 402 (cited in note 42). Even under the DSM's standard, the first prong of diagnosing intellectual disability is primarily determined using IQ scores.

45: *Hall,* 134 S. Ct. at 1992.

46: Blume, Johnson, & Seeds, 18 Cornell J. L. & Pub. Pol'y at 694 (cited in note 11).

47: *Hall,* 134 S. Ct. at 1996. And see: "A significant majority of States" do not enforce rigid IQ cutoff scores to diagnose intellectual disabilities. Even though state laws might "be interpreted to require a bright-line cutoff," most states consider the "inherent imprecision of the test itself" and thus enforce their cutoff scores more leniently, utilize higher cutoff scores at 75 or above, or allow "defendants to present additional evidence of intellectual disability even when their IQ test score is above 70." *Id.* at 1996-97.

48: *Id.* at 1998-99.

IIIa. Ramifications of Using IQ Scores: Accuracy of IQ Thresholds and Measurement Devices

IQ exams were devised to measure academic intelligence by testing an individual's "verbal, mathematical, spatial, visualization, classification, logic and pattern recognition skills."[49] The initial purpose of the IQ test was not to "assess the criminal mind"[50] but rather to "identify potential school failures."[51] Therefore, questions found on IQ tests, such as "what is the number that is one half of one quarter of one tenth of 480" or "which of the cubes is the same as the unfolded cube below," are often irrelevant to the determination of whether someone's disability renders them too socially vulnerable to be held morally culpable for a criminal act.[52] While answers to these questions do allow courts to get an overall sense of an individual's "general intellectual functioning, "they do not provide courts with the information necessary to assess whether people with intellectual disabilities have the requisite moral cognition to make them eligible for execution."[53]

States might argue, however, that there needs to be an objective way to diagnose something as complex as an intellectual disability. Without such a stringent standard that fairly assesses each offender in the same way, many believe that intellectual disability determinations will be made using "vague, constantly evolving—and sometimes contradictory—diagnostic criteria established by organizations committed to expanding *Atkins'* reach."[54] In this vein, if states veer from using hard, scientific data to determine intellectual disabilities, it is more likely that they will use divergent standards to evaluate different people, making intellectual disability determinations through subjective and sometimes "non-professional" assessments.[55] While many legal experts do not trust intellectual disability diagnoses that are made without "scientifically based" standards such as IQ scores, there are overwhelming reasons as to why IQ scores are an unreliable diagnostic criterion that legal experts should not solely rely on when making binding intellectual disability

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49: See an example IQ test provided by IQ Test Labs (2014), available at http://www.intelligencetest.com.

50: Reardon, 506 Nature News at 285 (cited in note 1).

51: Stephen Greenspan & Harvey N. Switzky, *Execution Exemption Should Be Based on Actual Vulnerability, Not Disability Label,* 13 Ethics & Behavior 19, 20 (2003).

52: *IQ Test Labs* (cited in note 49).

53: Blume, Johnson, & Seeds, 18 Cornell J. L. & Pub. Pol'y at 701 (cited in note 11).

54: Reardon, 506 Nature News at 285 (cited in note 1).

55: *Id.* at 286.

determinations.

One reason why IQ scores should not be given such high priority in capital punishment decisions is because the Standard Error of Measurement (SEM) undermines their scientific validity.[56] No IQ score is free of measurement errors because of the "behavior of the tester or the manner in which the tester provides the test, the environment in which the test is taken and its immediate effect during the test upon the subject, or other factors, such as the properties of the test instrument."[57] Setting a rigid IQ cutoff score completely ignores the relevance of IQ measurement errors, which usually range from 3 to 5 points.[58] The gap between an IQ score of 70 and 75 is a life-or-death matter for intellectually disabled offenders, yet the difference between these scores may have everything to do with errors involving environmental and personal factors—such as the test-takers' health; the ambient prison noise; the test-takers' level of concentration, preparedness, or luck; or "the subjective judgment involved in scoring certain questions on the exam"—and nothing to do with any meaningful difference in mental capacities.[59]

In *Hall v. Florida*, the Court noted that "a test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself."[60] The Court contended that states with a mandatory cutoff set at 70 need to either account for test measurement errors or abandon this strict IQ cutoff altogether.[61] While it would be straightforward if the number 70 were picked to be the IQ cutoff score because it is the precise level at which someone is incontestably disabled, the Court made it clear that there are no compelling justifications for why that specific number is more indicative of intellectual disability than, say, 65 or 75. According to the Court, the SEM makes it so that "an individual score is best understood as a range, *e.g.* five points on either side of the recorded score."[62] Therefore, the practice of choosing a single number to neatly divide

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56: Blume, Johnson, & Seeds, 18 Cornell J. L. & Pub. Pol'y (cited in note 11).

57: *Id.* at 698.

58: *Id.*

59: *Hall,* 134 S. Ct. at 1995.

60: *Id.*

61: It is important to note that Florida state law intended to account for testing errors that might undermine the credibility of a single standardized score. The State allowed for a broader range of IQ scores that would demonstrate an intellectual disability and even allowed, in certain circumstances, "defendants to introduce multiple scores." *Id.* at 2007 (Alito, J., dissenting). However, the Florida Supreme Court interpreted the State's statute in a way that ignored SEM considerations. Thus, the Florida Supreme Court chose to focus its analysis on a single IQ score. See *Hall,* 109 So. 3d at 709.

62: *Hall,* 134 S. Ct. at 1995.

the population into people who score at the threshold level or below and are legally classified as intellectually disabled, and people who score above the threshold level and are not intellectually disabled, is incompatible with the reality of IQ testing. There are actually no clear demarcations that discern the intellectually disabled from the non-disabled.

While the Court's mandate to take the SEM into account offers a significant way to make IQ scores more credible, it is important to realize that there are additional factors that make IQ scores weak metrics in the first place. For example, certain state courts, such as those of Florida, Kentucky, and Virginia, take the IQ score at face value and put no effort in trying to uncover the underlying factors that may sway the IQ score in one particular direction.[63] These states may not base their analyses on an individual's actual intellectual functioning. Ensuring that an IQ score accurately represents an individual's intellectual functioning becomes even more challenging when states determine the punishment for people who have taken the IQ test multiple times and have received a range of IQ scores, "which can vary widely depending on the type of test and the version used."[64] Numerous versions of the IQ test, with varying levels of credibility, are utilized in post-*Atkins* proceedings. There is the WAIS-IV test, the Stanford Binet test, and the Wechsler Adult Intelligence Scale test, just to name a few. Because "justice aims for surety in imposing the death penalty," the fallible nature of IQ exams as measurement devices undermines the rationales that states rely on to justify the use of cutoff scores.[65]

On the contrary, the dissent in *Hall v. Florida* argues that the availability of multiple IQ scores for a single individual is beneficial because it actually helps reduce the "risk of testing error."[66] The idea is that multiple evaluations enable the individual to seek more testing if he senses that "a statistical error rate prevented any of his tests from reflecting his true score."[67] Accordingly, legal experts can then consider the numerous results to analyze the individual's intellectual capacity more critically than would be possible if they only had a single test. Ultimately, even if this method allows experts to consider a more robust set of evidence, it does not eliminate the trouble that legal experts will have to go through to find which test is the most reliable. This problem might be particularly amplified for attorneys or judges in capital cases who do not have proper training in IQ testing. These legal actors could easily fail

63: *Id.* at 1995-96.
64: Reardon, 506 Nature News at 285 (cited in note 1).
65: Reed, *The Penry Penalty* at 23 (cited in note 8).
66: *Hall,* 134 S. Ct. at 2007 (Alito, J., dissenting).
67: *Id.*

to realize that IQ scores for intellectually disabled offenders are imperfect, if not frequently completely incorrect, assessments of individuals' cognitive abilities.

The "inherent imprecision" of IQ scores, which stems from the SEM and the "complicated endeavor" of analyzing multiple IQ scores,[68] undermines the dissent's claim that "IQ scores are the best way to measure intellectual functioning."[69] Whenever states use IQ scores to assess intellectual disabilities, there will be uncertainty as to whether the chosen IQ score "best" represents a defendant's intellectual functioning at the time of the alleged crime. Therefore, there will always be a struggle with "distinguish[ing] the right IQ score from the wrong one."[70] States often approach this problem by searching for "testimony from one or two professionals who only know an individual within the brief…context of a test administration and who, in fact, may have little training in the" field.[71] Unfortunately, the attempt to choose the "right" test that most closely captures an individual's intellectual functioning is a futile effort because any test serves, at best, as only a proxy of an individual's mental capacity. Since everyone experiences his or her intellectual disability differently, the conventional and nondescript questions featured on IQ tests cannot possibly identify the nuanced characteristics of each person's unique mental state. Therefore, I argue that rather than searching for evidence of an intellectual disability within the "artificial" context of the testing room, states should search for an intellectual disability in its real context: one's day-to-day life.[72]

IIIb. The Limited Scope of IQ Exams

While an IQ score may pinpoint certain intellectual shortcomings that contribute to producing an intellectual disability, it does not measure "personal factors such as motivation, lifestyle, race, gender, educational level, coping skills, past and current life experiences, and psychological assets [that] may play a role in the manifestation of a disability."[73] Similarly, IQ scores do not encompass "environmental factors such as the physical, social, and attitudinal environment in which people conduct their lives…which ultimately impact

68: *Id.* at 1996.
69: *Id.* at 2007-08 (Alito, J., dissenting).
70: Fabian, Thompson, & Lazarus, 59 Clev. St. L. Rev. at 413 (cited in note 42).
71: Greenspan & Switzky, Ethics & Behavior at 25 (cited in note 51).
72: *Id.* at 25-26.
73: Fabian, Thompson, & Lazarus, 59 Clev. St. L. Rev. at 410 (cited in note 42).

human behavioral and cognitive functioning."[74] Even though IQ exams don't reflect the many contextual factors that are inextricably linked to a mental disability, the courts take the IQ score at face value. I argue that one's mental capacity is not a characteristic that can be measured with mathematical precision. An intellectual disability is a "changeable, flexible, and malleable condition" that spans the course of an individual's lifetime and eventually becomes intertwined with one's identity.[75] While the results of a standardized test provide courts with a snapshot of an individual's intellectual functioning at a single point in time, these results do not reflect an individual's full experience with an intellectual disability. Because IQ scores fail to "address the real complicated nuances" of intellectual disability, they are incomprehensive assessments of intellectual disability.[76]

Even though intellectual disability is a disorder characterized by deficits in academic intelligence, it is noteworthy that the main reason that the Court exempts intellectually disabled persons from capital punishment is because "people with mental retardation have limited social intelligence; that is, there is reason to believe that they function in their dealings with other people in a significantly impaired manner."[77] The Court believes that these social deficits make intellectually disabled persons naïve, gullible, and "more susceptible to being talked by nondisabled persons into committing a crime without necessarily intending to."[78] Because IQ tests touch only minimally upon these elements of social intelligence, many professional disability organizations argue that alternate diagnostic criteria for intellectual disability should embrace "current research on intelligence—which includes the ability to learn and solve problems, relate to other people and function in society."[79] Undeniably, a focus on an individual's social and practical skills, rather than purely on one's academic skills, will be more relevant to a court's inquiry into the individual's intellectual and moral capabilities at the moment of the alleged crime.

Owing to the fact that a "primary distinguishing characteristic [of intellectual disability] has, historically, been social incompetence," there is agreement among professional organizations that the definition of intellectual disability must include "adaptive functioning."[80] Many believe that assessing individuals' adaptive behaviors is a better way to determine whether they

74: *Id.*
75: *Id*.
76: *Id.* at 405.
77: Greenspan & Switzky, Ethics & Behavior at 23 (cited in note 51).
78: *Id.* at 23.
79: Reardon, 506 Nature News at 585 (cited in note 1).
80: Greenspan & Switzky, Ethics & Behavior at 20 (cited in note 51).

"have sufficient moral responsibility to be subjected to capital punishment."[81] Such an approach looks at "factors ranging from empathy and social skills to impulse control and judgment."[82] Both professional disability organizations and the Supreme Court indicate that it would be a mistake to dismiss an intellectual disability diagnosis just because someone has an IQ above 70, without first contemplating an individual's deficits in adaptive functioning. For example, the Court repeatedly emphasized in *Atkins* that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills…that became manifest before age 18."[83] The Court mentioned these clinical definitions, crafted by the AAIDD and the APA in the then-current *DSM-IV-TR*, in its opinion to assert that "state measures for ascertaining mental retardation in capital cases…would be 'appropriate'—or 'constitutional'—so long as they 'generally conformed to these clinical definitions.'"[84] Apparently, the Court intended for intellectually disabled offenders convicted of capital crimes to receive a "fair assessment of adaptive functioning" in addition to being evaluated based on IQ scores, instead of being cursorily classified by IQ scores alone.[85] If there is alternative evidence available that provides information about an individual's mental capacity, then there is no reason why courts should rely on only one standard of intellectual functioning.

In fact, many intellectually disabled offenders may not legally qualify for the intellectual disability label when only one standard of intellectual functioning is used. However, they may still possess social and intellectual deficits that would make the death penalty an excessive punishment. For example, "limited social intelligence (with consequent social vulnerability) is a characteristic of a wide range of brain-based syndromes and disorders, including many who fall above the (artificial) upper IQ limit and, thus, are ineligible for the [mental retardation] label and the legal protections associated with it."[86] Specifically, capital punishment debated in the murder trial of Richard Lapointe, a man born with Dandy-Walker syndrome, which is a "congenital brain malformation."[87] Despite the fact that many individuals with this disorder are deemed intellectually disabled because of their "severe social intelligence and social communication deficits," the state was pushing

81: *Atkins*, 536 U.S. at 339 (Scalia, J., dissenting) (citations omitted).
82: Reardon, 506 Nature News at 585 (cited in note 1).
83: *Atkins*, 536 U.S. at 318.
84: Blume, Johnson, & Seeds, 18 Cornell J. L. & Pub. Pol'y at 691 (cited in note 11).
85: *Id.* at 704.
86: Greenspan & Switzky, Ethics & Behavior at 1 (cited in note 51).
87: *Id.* at 6.

for the death penalty because his IQ score was in the "low to normal range."[88] In seeking the death penalty, the state completely ignored the petitioner's "overt and serious brain-based medical condition associated with naiveté" and "dramatic history of being socially manipulated."[89] The state's obsessive focus on one exam score distracted it from seeing the bigger picture. Even though both medical evidence and social considerations indicated the presence of an intellectual disability, the court's narrow criteria for intellectual disability permitted it to "reduce the life of a human being to single number."[90]

In *Hall v. Florida,* the Court ruled that states must allow individuals with IQ scores "'between 70 and 75 or lower' [to] show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning."[91] Though the Court thereby barred states from exclusively considering a fixed IQ score in determining a defendant's intellectual disability, it does not go far enough in doing so. The Court's decision still leaves room for states to deny individuals the ability "to present additional evidence of intellectual disability, including testimony regarding adaptive deficits" if they do not satisfy the first prong of the intellectual disability definition—that is, if they have not already met the IQ threshold.[92] Despite the Court's acknowledgement that adaptive functioning is one of the "defining characteristics of intellectual disability," it still permits states to treat adaptive functioning considerations as subordinate to IQ scores in intellectual disability determinations.[93]

IV. Conclusion

Because some states have stressed the importance that a solitary number has for intellectual disability considerations, they have lost sight of the Court's main goal in *Atkins*: to prevent those with social or intellectual vulnerabilities from being subject to a punishment "reserved for the most brutal, vicious, and heinous of crimes."[94] By allowing courts to instantaneously reject each person with an above-threshold score from the intellectual disability classification, states have risked issuing the death penalty to people who don't deserve such an extreme punishment. In *Hall*, the Supreme Court obstructed states in their attempts to make these potentially impulsive and fatal decisions by requiring states to look at whether "a defendant's IQ test score falls within

88: *Id.* at 24.
89: *Id.* at 25.
90: Reardon, 506 Nature News at 286 (cited in note 1).
91: *Hall,* 134 S. Ct. at 2000.
92: *Id.* at 2001.
93: *Id.* at 1994 (citations omitted).
94: Reed, *The Penry Penalty* at 22 (cited in note 8).

the test's acknowledged and inherent margin of error" before denying someone a death penalty exemption. However, even though *Hall* requires states to treat IQ scores more flexibly by considering a range, it still accepts the use of IQ cutoff scores among states as a primary method for diagnosing intellectual disabilities. And even though the Court validated the adaptive functioning prong of the intellectual disability definition in its opinion, states may still legally disregard adaptive functioning considerations in cases where individuals fail to demonstrate intellectual disability through their IQ score. In fact, the Court "places substantial reliance" on medical and clinical communities to create IQ thresholds that can discern intellectually disabled persons from their nondisabled counterparts.[95] As long as states' bright lines take into account the IQ test's SEM, the Court accepts the practice of relying primarily on IQ scores.

It is important to note that the Court thus still condones attempts made by states to quantify a disability by using an IQ score—so long as they rely on the expertise of medical and clinical communities when doing so. Nonetheless, no matter how squarely the courts follow the medical community's diagnostic framework for utilizing IQ scores—and no matter how precise this framework is—there are qualities of an intellectual disability that can never be expressed in a single number. In the Court's own words, an "intellectual disability is a condition, not a number."[96] Here, the Court essentially acknowledged that there will certainly be cases in which states will not be able to pigeonhole an individual with a multifaceted condition into a pre-established and narrow IQ range designated for people with intellectual disabilities.

In line with *Hall* decision, I argue that state guidelines must emerge in order to address the fact that intellectually disabled individuals on death row cannot be precisely categorized by their IQ scores. State policymakers need to create guidelines that *mandate* the consideration of evidence beyond IQ scores—namely, indicators of adaptive functioning abilities and deficits—no matter whether the IQ threshold is met or not. If state policy and lawmakers place as much emphasis on the second prong of the intellectual disability definition—the adaptive functioning prong—as they do on the first prong—intellectual functioning as measured by IQ scores—courts will no longer unjustifiably narrow the meaning of an intellectual disability to a standardized score. This approach is consistent with the Court's belief that "it is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment."[97]

Furthermore, a call to action for state law and policymakers to create such

95: *Hall,* 134 S. Ct. at 2000.
96: *Id.* at 2001.
97: *Id.*

guidelines will underscore the significance of the adaptive functioning prong in the legal system and in society. The creation of legal frameworks within states that acknowledge the multifaceted nature of intellectual disabilities, as well as the start of a dialogue in society that revolves around these state-level proceedings, will promote a shift from a strictly clinical perspective of an intellectual disability to a more holistic one. Adaptive functioning guidelines will require state courts to move towards a more person-centered approach when examining an individual and his or her intellectual disability. The person—in the flesh—will ultimately need to be considered, not simply his or her quantifiable score. If states cannot defend their decision to execute someone with more evidence than a mere test booklet, then they clearly do not recognize the complexities of the life that they are taking away.

To ensure that courts can be certain that an individual has an intellectual disability in capital punishment decisions, mandated state guidelines must instruct courts to learn about an individual's behaviors from the standpoints of those who know the individual best, and thoroughly examine the offender in realistic settings. Courts should communicate with multiple authoritative sources, such as the individual's family members, peers, teachers, or clinicians, for example, who frequently spend time with the individual and would be able to attest to the impact of a disability on everyday life. By incorporating multiple perspectives into an inquiry of a person's intellectual capacity, not only will courts be able to get a more accurate and holistic picture of the essential qualities of the individual, but courts will also be able to identify biases that might stem from particular sources. Because no one intellectual disability assessment technique is foolproof, the more information that the courts have about an individual's real experience with his or her disability, the better.

Lastly, another way that courts can learn about an individual's lived experiences with a disability is by engaging more fully with the disability community. State guidelines should protect intellectually disabled offenders from being subject to the decisions of legal experts who are not familiar with disability issues, or only have a very clinical understanding of disability. Policymakers need to ensure that legal experts are more fully educated by those who have the deepest experience with disability issues, such as disability advocates and scholars, people with intellectual disabilities themselves, and families of those with intellectual disabilities. Interacting with the disability community will allow legal experts to learn how an intellectual disability manifests in real-life settings, as opposed to how an intellectual disability manifests in the "artificial context" of a testing room.[98] This will prompt legal

98: Greenspan & Switzky, Ethics & Behavior at 25 (cited in note 51).

experts to think about individuals with intellectual disabilities as human beings, rather than as quantifiable numbers on a piece of paper.

Before the Supreme Court's decision regarding Hall, the Florida court ignored the testimony of past clinicians that Hall "is mentally retarded, has always been mentally retarded, and will be mentally retarded for the remainder of his life."[99] They ignored the testimony of his sixteen siblings, who say he "had struggled to keep up" and "was mentally like a child."[100] They ignored the fact that when he was young and didn't understand something, "his mother beat him, once while he was tied up in a bag strung over fire."[101] They ignored the fact that he stutters, does not know how to read, and is afraid of the dark.[102] They even ignored the fact that Hall has actually received multiple IQ scores below the threshold of 70, with one IQ score as low as 60.[103] So when the state decided to sentence Freddie Lee Hall to death, they did not have a true grasp of who Freddie Lee Hall was. In light of the Supreme Court decision, the Florida court might spare the death sentence for individuals like Freddie Lee Hall in the future, whose IQ scores fall within the margin of error of the state's IQ cutoff score. But the Supreme Court's decision does not leave us with a firm guarantee that courts will pay attention to crucial information about an individual's life experience; courts may still fail to look beyond a defendant's test score. Without attempting to understand the full picture of the life that hangs in the balance, courts will not give people with intellectual disabilities the full thought, deliberation, and respect they deserve.

99: Reardon, 506 Nature News at 285 (cited in note 1).

100: *Id.* at 284.

101: *Id.*

102: *Id.* at 285.

103: Sherman, *Supreme Court Looks at Freddie Lee Hall, Death Row Inmate With Low IQ* (cited in note 2).

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