ing was buttressed by a consensus of mental health professionals that an IQ test score should be read not as a single fixed number, but as a range.[164]

The Court's conclusion that execution of juveniles constitutes cruel and unusual punishment evolved in much the same manner. Initially, a closely divided Court invalidated one statutory scheme that permitted capital punishment to be imposed for crimes committed before age 16, but upheld other statutes authorizing capital punishment for crimes committed by 16- and 17-year-olds. Important to resolution of the first case was the fact that Oklahoma set no minimum age for capital punishment, but by separate provision allowed juveniles to be treated as adults for some purposes.[165] Although four Justices favored a flat ruling that the Eighth Amendment barred the execution of anyone younger than 16 at the time of his offense, concurring Justice O'Connor found Oklahoma's scheme defective as not having necessarily resulted from the special care and deliberation that must attend decisions to impose the death penalty. The following year Justice O'Connor again provided the decisive vote when the Court in *Stanford v. Kentucky* held that the Eighth Amendment does not categorically prohibit imposition of the death penalty for individuals who commit crimes at age 16 or 17. Like Oklahoma, neither Kentucky nor Missouri [166] directly specified a minimum age for the death penalty. To Justice O'Connor, however, the critical difference was that there clearly was no national consensus forbidding imposition of capital punishment on 16- or 17-year-old murderers, whereas there was such a consensus against execution of 15-year-olds.[167]

Although the Court in *Atkins v. Virginia* contrasted the national consensus said to have developed against executing the mentally retarded with what it saw as a lack of consensus regarding execution of juvenile offenders over age 15,[168] less than three years later the Court held that such a consensus had developed. The Court's

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[164] This range, referred to as a "standard error or measurement" or "SEM" is used by many states in evaluating the existence of intellectual disability. 572 U.S. ___, slip op at 12. The dissent, however, denies that there is a consensus of the states on the matter, and criticizes the majority for finding such consensus, not in prevailing societal norms, but in the evolving standards of professional societies. Id. at 5–6, 2 (Alito, J., dissenting).

[165] Thompson v. Oklahoma, 487 U.S. 815 (1988).

[166] Wilkins v. Missouri was decided along with *Stanford*.

[167] *Compare Thompson*, 487 U.S. at 849 (O'Connor, J., concurring) (two-thirds of all state legislatures had concluded that no one should be executed for a crime committed at age 15, and no state had "unequivocally endorsed" a lower age limit) *with Stanford*, 492 U.S. at 370 (15 of 37 states permitting capital punishment decline to impose it on 16-year-old offenders; 12 decline to impose it on 17-year-old offenders).

[168] 536 U.S. at 314, n.18.