

# GRAHAM v. FLORIDA: JUSTICE KENNEDY'S VISION OF CHILDHOOD AND THE ROLE OF JUDGES

TAMAR R. BIRCKHEAD\*

*This short essay examines Graham v. Florida, the United States Supreme Court decision holding that the Eighth Amendment's Cruel and Unusual Punishments Clause does not permit a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime. This essay argues that Justice Anthony Kennedy's majority opinion is grounded not only in Roper v. Simmons, which invalidated the death penalty for juvenile offenders on Eighth Amendment grounds, and Kennedy v. Louisiana, which held that the Eighth Amendment prohibited the death penalty for the offense of rape of a child, but also in Establishment Clause cases set in the context of public schools and Fourteenth Amendment Due Process Clause cases upholding parental notification requirements for teenagers seeking abortions. Whereas many journalists and scholars consider Justice Kennedy a "legal pragmatist" who lacks an overarching philosophy to guide his decisionmaking, in each of these opinions his view of childhood and the proper role of judges is consistent: children and adolescents are unformed works in progress, in the midst of both character and brain development, who are particularly susceptible to direct as well as indirect forms of coercion. As a result, according to Justice Kennedy, when determining what liberty interests are protected by the United States Constitution, the role of judges and the courts is to ensure that youth mitigates rather than aggravates. Further, although juvenile justice advocates have heralded Graham as a clear victory, the opinion may raise as many questions as it seeks to answer.*

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\* Assistant Professor of Law, University of North Carolina at Chapel Hill School of Law (tbirckhe@email.unc.edu). I am particularly grateful for the comments of Sara Sun Beale, Barbara Fedders, Eric Muller, and Gene Nichol during and subsequent to a discussion of *Graham v. Florida* at the UNC Summer Workshop Series, as they helped crystallize my views of the case. Of course, the arguments advanced therein and all errors and omissions are my own.

On May 17, 2010, the United States Supreme Court decided the case of *Graham v. Florida*,<sup>1</sup> holding that the Eighth Amendment's Cruel and Unusual Punishments Clause does not permit offenders convicted of nonhomicide crimes committed as minors to be sentenced to life in prison without the possibility of parole (JLWOP).<sup>2</sup> Writing for the majority, Justice Anthony Kennedy applied a form of Eighth Amendment comparative analysis that previously had been reserved only for capital cases to conclude that evolving standards of decency no longer support this type of sentence for this category of offenders.<sup>3</sup> Justice Kennedy contended that because "a sentencing practice itself" (i.e., JLWOP) was in question, the appropriate analysis was found in death penalty cases that exempted entire classes of offenders who had committed a range of crimes, rather than term-of-years cases that analyzed whether the gravity of a specific crime justified the severity of an individual sentence.<sup>4</sup> Without explicitly acknowledging the Court's apparent departure from its long-standing "death is different" jurisprudence,<sup>5</sup> Justice Kennedy followed the approach of cases that prohibited the execution of the mentally retarded, juveniles, and those convicted of child rape.<sup>6</sup> In so doing, he

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1. *Graham v. Florida*, 130 S. Ct. 2011 (2010).

2. *Id.* at 2034. "JLWOP" refers to sentences of life without the possibility of parole for offenses committed by "juveniles" or youth under the age of eighteen.

3. *Id.* at 2021–23.

4. *Id.* at 2022–23; *cf.* *Ewing v. California*, 538 U.S. 11 (2003) (finding no Eighth Amendment violation for a twenty-five-years-to-life sentence under a state recidivist statute for a defendant who had stolen several golf clubs); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (finding no Eighth Amendment violation for a life-without-parole sentence imposed upon a first offender possessing a large quantity of cocaine).

5. *Graham*, 130 S. Ct. at 2022–23 (discussing the Court's death penalty jurisprudence); *see also id.* at 2038–39 (Roberts, C.J., concurring in the judgment) ("Treating juvenile life sentences as analogous to capital punishment is at odds with our longstanding view that 'the death penalty is different from other punishments in kind rather than degree.'"); *id.* at 2045 n.1 (Thomas, J., dissenting) ("The Court radically departs from the framework those precedents establish by applying to a noncapital sentence the categorical proportionality review its prior decisions have reserved for death penalty cases alone . . . . Today's decision eviscerates that distinction. 'Death is different' no longer."). *Cf.* William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. (forthcoming 2010) (arguing that *Graham* did not abandon "death is different" jurisprudence but was instead premised on the view that JLWOP is similar to the death penalty and different than other forms of noncapital punishment); Robert Smith & G. Ben Cohen, Commentary, *Redemption Song: Graham v. Florida and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86, 90–91 (2010) (arguing that the distinction between categorical challenges to a sentencing practice and challenges to an individual sentence is "more semantic than substantive").

6. *Graham*, 130 S. Ct. at 2022 (citing *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper v. Simmons*, 543 U.S. 551 (2005) and *Kennedy v. Louisiana*, 128 S. Ct. 2641, *opinion modified on denial of reh'g*, 129 S. Ct. 1 (2008)).

found that a national consensus against JLWOP existed;<sup>7</sup> that penological theory, whether premised upon retribution, deterrence, incapacitation, or rehabilitation, failed to provide adequate justification for JLWOP;<sup>8</sup> and that a new categorical rule was necessary, given the insufficiency of the alternatives for addressing the constitutional concerns raised by the imposition of JLWOP.<sup>9</sup> Justice Kennedy also relied upon what he characterized as a “global consensus” against the practice, demonstrated by the sentencing laws and practices of the international community vis-à-vis juvenile nonhomicide offenders.<sup>10</sup> Although some critics of the opinion consider it yet another example of Justice Kennedy’s idiosyncratic approach to decisionmaking,<sup>11</sup> an examination of his nomination testimony as well as his earlier opinions addressing the rights of minors suggests otherwise.

### I. JUSTICE KENNEDY’S JUDICIAL PHILOSOPHY

The underpinnings of the jurisprudential approach and philosophy espoused in *Graham* are found in the testimony given by Justice Kennedy during his United States Supreme Court nomination hearings in 1987.<sup>12</sup> When asked what standards a judge should follow in determining whether government action has violated an individual’s right to human dignity, Justice Kennedy explained that he considers whether the action results in “the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her own self-fulfillment, [or] the inability of a person to reach his or her own potential.”<sup>13</sup> Echoes of this sentiment are found in his

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7. *Graham*, 130 S. Ct. at 2026–27.

8. *Id.* at 2028–30 (finding that minors are not as morally culpable or susceptible to deterrence as adults; that because incorrigibility cannot be accurately determined, juvenile offenders should not be incapacitated for life; and that because many prison policies deny those without the possibility of parole access to programs, counseling, and treatment, rehabilitation is not a viable justification for JLWOP).

9. *Id.* at 2030.

10. *Id.* at 2033.

11. See, e.g., Chris Cassidy, *Court Sides with Kids Sentenced to Life in Epic Battle over Our Constitutional Rights*, SLATE, May 19, 2010, [http://www.huffingtonpost.com/chris-cassidy/court-sides-with-kids-sen\\_b\\_581880.html](http://www.huffingtonpost.com/chris-cassidy/court-sides-with-kids-sen_b_581880.html) (describing Justice Kennedy’s approach to judicial decision-making as “fickle,” with the *Graham* opinion serving as the most recent example); see also *infra* note 53 and accompanying text.

12. *Nomination of Anthony M. Kennedy to be Assoc. Justice of the Supreme Court of the U.S.: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 180 (1987) (statement of Judge Anthony M. Kennedy).

13. *Id.*

subsequent opinions explicating his substantive due process views,<sup>14</sup> his notion of the independent role of judges,<sup>15</sup> and his belief in the potential for young offenders to be redeemed.<sup>16</sup>

One of the rationales for *Graham*'s holding, for example, was premised on the negative impact of a juvenile defendant's youth on the attorney–client relationship.<sup>17</sup> Justice Kennedy recognized that because juveniles mistrust authority figures and have a limited understanding of the criminal justice system, they are less likely than adult defendants to work effectively with their lawyers, and as a result are at a distinct disadvantage in criminal proceedings.<sup>18</sup> He found that a case-by-case analysis of whether to impose JLWOP failed to take into account the “developmental incompetence” of youth<sup>19</sup> or the unique challenges faced by attorneys representing juveniles.<sup>20</sup> He contended that because many minors, like mentally incapacitated defendants,<sup>21</sup> cannot meaningfully assist counsel, the quality of their

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14. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”).

15. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 563–64 (2005) (“We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.”).

16. See, e.g., *id.* at 573–74 (“When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.”).

17. *Graham*, 130 S. Ct. at 2032.

18. *Id.* See also Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 272–73 (2005) (stating that children generally do not work with attorneys as well as adults because of their developing cognitive skills, emphasis on short-term consequences, and lack of understanding of the attorney-client relationship).

19. *Graham*, 130 S. Ct. at 2032. See also Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 828–31 (2005) (discussing the unique features of developmental or adjudicative incompetence, in which immaturity-based impairments can render a young offender unable to understand the charges against him, the nature of the proceedings, or to assist his attorney in his defense).

20. *Graham*, 130 S. Ct. at 2032. See generally Tamar R. Birckhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 RUTGERS L. REV. 959 (2010) (discussing the cultural and systemic challenges faced by attorneys representing juveniles).

21. See *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007) (granting habeas relief and remanding case based on prisoner’s claim that he was denied meaningful opportunity to be heard on question of competence to be executed); *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (“Mentally retarded defendants may be less able to give meaningful assistance to their counsel.”); see also Dan Markel, *May Minors be Retributively Punished After Panetti (and Graham)?*, 23 FED. SENT’G REP. (forthcoming 2010) (arguing that minors, like the presently incompetent, are not fit objects for the state’s blaming practices associated with retributive punishment).

representation is likely to be compromised on a categorical level. Therefore, Justice Kennedy concluded, JLWOP as a sentencing practice should be barred for nonhomicide offenses.<sup>22</sup> In this way, *Graham* reestablished Justice Kennedy's commitment to ensuring that the court system takes an appropriate account of a juvenile's youth, thereby giving young offenders some "hope of restoration."<sup>23</sup>

Justice Kennedy's nomination testimony also addressed his approach to constitutional interpretation, in which he rejected the doctrine of original intent.<sup>24</sup> He instead contended that although it is "highly relevant what the framers thought . . . theirs is not the entire body of contemporary opinion and contemporary expression that we look to."<sup>25</sup> This view presaged his reliance in *Graham* on extrajudicial sources. For instance, to support his view that young offenders are incomplete works in progress for whom redemption remains a viable possibility, Justice Kennedy cited social science research on adolescent behavior as well as neuro-scientific data on brain development.<sup>26</sup> He also relied on the laws of other nations, the vast majority of which bar JLWOP in all circumstances, in contrast to the United States, the only country to impose it for nonhomicide crimes.<sup>27</sup>

## II. *ROPER V. SIMMONS*

In addition to Justice Kennedy's nomination testimony, critical motivating factors for the *Graham* decision are reflected in the language and holding of *Roper v. Simmons*,<sup>28</sup> in which Justice Kennedy—again writing for the majority—held that the Eighth Amendment prohibited capital punishment for offenders who were minors when they committed their crimes.<sup>29</sup> The parallels between the two opinions' rationales are striking. In *Simmons*, Justice Kennedy was unwilling to tolerate the risk that jurors would objectify violent juvenile offenders, judge them through the lens of stereotype and bias,

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22. *Graham*, 130 S. Ct. at 2032.

23. *Id.* at 2027.

24. *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Before the S. Comm. on the Judiciary*, 100th Cong. 180 at 150 (1987) (testimony of Judge Anthony M. Kennedy).

25. *Id.*

26. *Graham*, 130 S. Ct. at 2026.

27. *Id.* at 2033–34 (finding that only eleven countries allow JLWOP and that the U.S. is the only country to impose the punishment for nonhomicides).

28. *Roper v. Simmons*, 543 U.S. 551 (2005).

29. *Id.* at 575.

and consider their youth as an aggravating rather than a mitigating factor in sentencing.<sup>30</sup> If, as he contended, psychiatric experts are unable to distinguish between adolescents who act out of “transient immaturity” and those who commit crimes reflecting “irreparable corruption,” jurors cannot reliably be expected to make such distinctions.<sup>31</sup> Similarly, in *Graham*, Justice Kennedy was unwilling to tolerate the risk that a judge or jury would sentence a minor to JLWOP based on a “discretionary, subjective” judgment that the youth was incorrigible and could not be redeemed.<sup>32</sup> Although he conceded that it was “salutary” that some state laws *required* prosecutors to consider age when making charging decisions, he found such safeguards inadequate to block a court from imposing JLWOP on an offender who was not morally culpable.<sup>33</sup> In both opinions Justice Kennedy concluded that a case-by-case approach could not reliably separate out those juveniles with the capacity for change; only a categorical rule that drew a bright line between childhood and adulthood was sufficient to avoid the imposition of punishment disproportionate to the crime.<sup>34</sup>

The facts underlying *Simmons* and *Graham* vividly illustrate these principles. In *Simmons*, which involved the violent murder of a woman by seventeen-year-old Christopher Simmons and a younger boy, the prosecutor pointedly argued during the penalty phase of the trial that the jury should consider Simmons’ youth as an *aggravating* factor when determining whether a death sentence was appropriate: “Think about age. Seventeen years old. Isn’t that scary? Doesn’t that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.”<sup>35</sup> In *Graham* the sentencing judge explicitly concluded that seventeen-year-old Terrance Jamar Graham, who had prior armed burglary charges and was alleged to have committed subsequent robberies, was unalterably depraved: “[Y]ou decided that this is how you were going to lead your life and that there is nothing that we can do for you . . . . [W]e can’t help you any further. We can’t do anything

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30. *Id.* at 572–73. See Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 WASH. & LEE L. REV. 385, 390–91 (2008) (discussing the bases for Justice Kennedy’s decision in *Simmons*).

31. *Simmons*, 543 U.S. at 573.

32. *Graham*, 130 S. Ct. at 2031.

33. *Id.* at 2030–31 (discussing the laws of Florida, the jurisdiction in which the juvenile, Graham, was sentenced).

34. *Id.* at 2031–32; *Simmons*, 543 U.S. at 573–74.

35. *Simmons*, 543 U.S. at 558.

to deter you.”<sup>36</sup> In both opinions Justice Kennedy asserted that the graphic brutality of the crimes and the seeming incorrigibility of the offenders increased the risk that the fact-finder would be unable to appreciate the significance of the defendant’s youth at sentencing.<sup>37</sup>

A further similarity between *Simmons* and *Graham* is the majority’s contention in each case that the holding was narrow and circumscribed. Upon acknowledging in *Simmons* that the death penalty might have some deterrent effect, Justice Kennedy emphasized that JLWOP remained a viable punishment that was itself “a severe sanction, in particular for a young person.”<sup>38</sup> Five years later he highlighted in *Graham* that although JLWOP was now barred for nonhomicide offenses, the state was not “required” to release a juvenile offender during his natural life and, thus, the possibility that these defendants would remain imprisoned had not been foreclosed.<sup>39</sup> Justice Kennedy underscored that *Graham* forbade states only from deciding “at the outset” that young offenders were intrinsically incapable of redemption and would never be fit to reenter society.<sup>40</sup> However, the fact that *Graham*’s reasoning relied so heavily upon *Simmons* belies such sentiments,<sup>41</sup> giving credence to the view that these holdings would inevitably be extended to other contexts.<sup>42</sup>

### III. KENNEDY V. LOUISIANA

In addition to *Simmons*, the reasoning in *Graham* also relied upon the Eighth Amendment case of *Kennedy v. Louisiana*, which held that capital punishment for the offense of rape of a child is cruel and

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36. *Graham*, 130 S. Ct. at 2031.

37. *Id.* at 2031–32; *Simmons*, 543 U.S. at 572–73.

38. *Simmons*, 543 U.S. at 572. *See also Graham*, 130 S. Ct. at 2039 (Roberts, J., concurring in the judgment) (“Indeed, *Roper* explicitly relied on the possible imposition of life without parole on some juvenile offenders.”).

39. *Id.* at 2030

40. *Id.*

41. *See id.* at 2022, 2026, 2028 (citing *Simmons* in support of the Court’s holdings).

42. *See, e.g., Simmons*, 543 U.S. at 621 (Scalia, J., dissenting) (“If juries cannot make appropriate determinations in cases involving murderers under eighteen, in what other kinds of cases will the Court find jurors deficient? . . . Why not take other mitigating factors, such as considerations of childhood abuse or poverty, away from juries as well?”); *Graham*, 130 S. Ct. at 2046 (Thomas, J., dissenting) (“No reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law’s third, fourth, fifth, or fiftieth most severe penalties as well.”). *See infra* note 83 and accompanying text (discussing areas into which *Graham*’s holding could potentially be extended, including challenges to JLWOP sentences for homicide as well as homicide-related offenses such as felony-murder).

unusual.<sup>43</sup> Justice Kennedy revealed his vision of childhood in the opinion's implicit suggestion that severely victimized youth have the potential for physical and psychological recovery and that because of the unformed nature of their characters, even these children have the capacity to change and, thus, to heal.<sup>44</sup> This view is analogous to his portrayal in *Graham* of young offenders as "not as well formed" and therefore "more capable of change" than adults.<sup>45</sup> *Kennedy v. Louisiana* also set out Justice Kennedy's view of the role of the courts with his characterization of child rape as a brutal crime that "in many cases will overwhelm a decent person's judgment," increasing the risk that jurors could not consistently balance aggravating factors against mitigating circumstances.<sup>46</sup> This view was reiterated in *Graham* with the assertion that judges must exercise "independent judgment" to ensure that an adolescent offender's youth is treated as mitigating and not aggravating at sentencing.<sup>47</sup>

Justice Kennedy's arguably paternalistic inclination to deny the decisionmaking capacity of youth in the name of protecting them is also evinced in both of these cases. In *Kennedy v. Louisiana* Justice Kennedy asserted that due to their inherent immaturity, child victims should not undergo the trauma of testifying in a capital sex offense case or be implicated by the state's decision to seek the death penalty.<sup>48</sup> In *Graham* Justice Kennedy's opinion was premised on the view that because minors are not as culpable for their actions as adults, they are "less deserving of the most severe punishments."<sup>49</sup> He further contended in *Kennedy* that it was not clear that the child victim's "hurt" would be in any way "lessened when the law permit[ted] the death of the perpetrator" rather than only life without parole or a term-of-years sentence.<sup>50</sup> He suggested that a state that punishes child rape by death may in fact *add* to the risk of non- or underreporting by children and remove a strong incentive for rapists *not* to kill their victims.<sup>51</sup> Similarly, Justice Kennedy asserted in *Graham* that JLWOP sentences prevented young offenders from

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43. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008).

44. *See id.* at 2662–63 (discussing whether imposing the death penalty balances the wrong to the victim in child rape and other nonhomicide cases).

45. *Graham*, 130 S. Ct. at 2026.

46. *Kennedy*, 128 S. Ct. at 2660–61.

47. *Graham*, 130 S. Ct. at 2031–32.

48. *Kennedy*, 128 S. Ct. at 2660–61.

49. *Graham*, 130 S. Ct. at 2026–27.

50. *Kennedy*, 128 S. Ct. at 2662.

51. *Id.* at 2663–64.



accessing vocational training and rehabilitative services while incarcerated, thereby categorically denying them the possibility of redemption—a disproportionate punishment for juveniles who did not commit homicide.<sup>52</sup>

#### IV. FIRST AMENDMENT AND DUE PROCESS CASES

Despite critics' claims that Justice Kennedy's jurisprudential approach lacks integrity,<sup>53</sup> the *Graham* decision is also consistent with his opinions addressing the rights of youth outside the context of Eighth Amendment analysis. For instance, in writing for the majority in the Establishment Clause case of *Lee v. Weisman*,<sup>54</sup> Justice Kennedy considered the matter from the perspective of the fourteen-year-old when holding that the inclusion of invocation and benediction by a member of the clergy at a public middle school graduation violated the student's rights under the First Amendment.<sup>55</sup> Recognizing that adolescents are often under pressure from peers to conform and that implicit pressure to stand or maintain respectful silence may be subtle but is "as real as any overt compulsion," Justice Kennedy held that prayer exercises in public schools carry "a particular risk of indirect coercion."<sup>56</sup> In holding that school prayer may appear to the dissenter or nonbeliever as an attempt "to employ the machinery of the State to enforce a religious orthodoxy,"<sup>57</sup> Justice Kennedy credited "the real conflict of conscience faced by the young student" and asserted that "[o]ur society would be less than true to its heritage if it lacked abiding concern for the values of its young people."<sup>58</sup>

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52. *Graham*, 130 S. Ct. at 2029–30.

53. See, e.g., FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 1–2 (2009) (referencing the "general consensus" that Justice Kennedy lacks "a consistent approach to constitutional interpretation"); THOMAS R. HENSLEY ET AL., THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES 75 (1997) (stating that Justice Kennedy "does not appear to have a consistent judicial philosophy to guide his decision making"); TINSLEY E. YARBROUGH, THE REHNQUIST COURT AND THE CONSTITUTION 17, 36 (2000) (describing Justice Kennedy as "a legal pragmatist" who "refused to commit himself to a single, overarching theory of interpretation"); Robert Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319, 323 (1992) (stating that Justice Kennedy's nomination testimony suggested "to say the least, an undeveloped, mushy legal philosophy").

54. *Lee v. Weisman*, 505 U.S. 577 (1992).

55. *Id.* at 592–93.

56. *Id.* at 592–94.

57. *Id.* at 592.

58. *Id.* at 596, 598. Justice Kennedy's adherence to this principle of government coercion was latent in earlier Establishment Clause cases in which he found *no evidence* that the state had taken steps to advance one religion over another. See, e.g., *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 260–61 (1990) (Kennedy, J., concurring in part and concurring in

Likewise, in the context of the Due Process Clause, Justice Kennedy voted to uphold state statutes requiring parental notification for teenagers seeking abortions. He acknowledged that although his ideal of the compassionate and mature parent may not exist in every instance, to assume otherwise would be to “deny all dignity to the family.”<sup>59</sup> In finding such laws constitutionally valid even without judicial bypass provisions, Justice Kennedy focused on the apparent needs of children in asserting that the exclusion of parents from the decisionmaking process “is to risk, or perpetuate, estrangement or alienation from the child when she is in the greatest need of parental guidance and support.”<sup>60</sup>

These opinions reflect and expand upon Justice Kennedy’s vision of childhood and his view of the judicial role. Each reiterates his belief that in cases concerning children and adolescents, courts must show heightened sensitivity regardless of the context, and judges must use their independent judgment to ensure that vital liberty interests—both of the youth and the family unit—are protected. In Justice Kennedy’s view, whether young people are pressured to conform to a specific religious practice,<sup>61</sup> left to decide whether to have an

abortion,<sup>62</sup> or sentenced as adults for serious felonies,<sup>63</sup> their youth

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judgment) (finding that a federal statute did not violate the Establishment Clause by allowing religious clubs to meet on school premises where there was no government coercion); *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) (stating that the public display of a menorah and a crèche was not an instance in which “the government’s power to coerce has been used to further the interests of Christianity or Judaism in any way,” as they are but passive symbols of religious holidays).

59. *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 520 (1990). See *Hodgson v. Minnesota*, 497 U.S. 417, 482–85 (1990) (Kennedy, J., concurring in judgment in part and dissenting in part) (discussing “the State’s interest in acknowledging and promoting the role of parents in the care and upbringing of their children”).

60. *Hodgson*, 497 U.S. at 486. *But see, e.g., id.* at 462–66 (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing that the parental notification requirement “can have severe physical and psychological effects” on young women and that it is “especially devastating for minors who live in fear of physical, psychological, or sexual abuse”); Marcia D. Greenberger & Katherine Connor, *Parental Notice and Consent for Abortion: Out of Step with Family Law Principles and Policies*, 23 *FAM. PLAN. PERSP.* 31, 31, 35 (1991) (arguing that parental consent and notice laws, such as those upheld in *Hodgson*, can “cause serious harm” by “spark[ing] a family upheaval that otherwise would not occur,” and are “out of step with the common state practice of allowing minors themselves to consent to medical services relating to sensitive health concerns, particularly those services related to sexual activity”).

61. *Weisman*, 505 U.S. at 592–93.

62. *Hodgson*, 497 U.S. at 486.

63. *Graham v. Florida*, 130 S. Ct. 2011, 2029 (2010).

must be acknowledged, accommodated, and ultimately protected.

## V. CRITIQUES OF *GRAHAM*

Justice Kennedy's opinion in *Graham* drew criticism from both ends of the political spectrum. Some juvenile justice advocates and scholars argued that by ordering states merely to provide an "opportunity" for release, the opinion did not go far enough in protecting young offenders from disproportionately punitive sentences.<sup>64</sup> They asserted that the Court failed to provide guidance or objective standards to the states for evaluating a youth's maturity or amenability to treatment.<sup>65</sup> As a result, given that the "means and mechanisms for compliance" with the Court's order are within each individual state's discretion, the victory—they contend—is but Pyrrhic.<sup>66</sup>

The arguments presented in *Graham*'s dissenting opinions provide the opposing view, which reflects themes also expressed by the *Simmons* dissenters. Justice Thomas in *Graham* and Justice Scalia in *Simmons* both offered classic originalist critiques of Justice Kennedy's view of the role of judges and the courts.<sup>67</sup> Premised on a traditional reading of American history and an adherence to "centuries-old" practice, Justices Thomas and Scalia argued (respectively) that the *Graham* and *Simmons* majorities had flagrantly imposed their "own sense of morality and retributive justice" on state lawmakers and voters.<sup>68</sup> In *Graham* Justice Thomas took issue with the substitution of the Court's judgment for that of "our fellow citizens."<sup>69</sup> He argued against the necessity of a categorical rule, as the jury process "necessarily admits of human error," as does the "process of judging

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64. See, e.g., Jeffrey Fagan, *Juvenile Justice Delayed? Rather than Set a Uniform Standard to Reduce Harsh Sentences for Minors, the Court in Graham Left Compliance Mechanisms up to the States*, NAT'L L.J. 38 (June 14, 2010) ("Rather than establishing a firm principle of discounted culpability that would cabin harsh sentencing for all minors, *Graham* instead offers eligible juveniles a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' The 'means and mechanisms for compliance' are left up to the states." (quoting *Graham*, 130 S. Ct. at 2016)).

65. *Id.*

66. *Id.*

67. See generally *Graham*, 130 S. Ct. at 2043–58 (Thomas, J., dissenting); *Simmons*, 543 U.S. at 608–30 (Scalia, J., dissenting).

68. *Graham*, 130 S. Ct. at 2058 (Thomas, J., dissenting); *Simmons*, 543 U.S. at 615–16 (Scalia, J., dissenting).

69. *Graham*, 130 S. Ct. at 2043 (Thomas, J., dissenting).

in which we engage”;<sup>70</sup> and he warned that the decision opened the door for a whole host of line-drawing problems.<sup>71</sup> In *Simmons* Justice Scalia challenged the majority’s “implausible assertion” that a national consensus existed against capital punishment for offenders who committed murder before age eighteen.<sup>72</sup> He argued that the application of a categorical prohibition of the death penalty for all minors was arbitrary and unwarranted, as capital cases already required individualized consideration of each defendant.<sup>73</sup> Justice Scalia concluded by rejecting “out of hand” the notion that American law “should conform to the laws of the rest of the world.”<sup>74</sup>

Although several of these points are valid and have rhetorical appeal, perhaps the most provocative dissenting argument expressed in both *Simmons* and *Graham* challenged the majority’s reliance on empirical data from sociological studies to establish that juveniles are too impressionable and unformed to warrant either execution or JLWOP.<sup>75</sup> In *Simmons* Justice Scalia referenced studies that seemingly contradicted the Court’s conclusions, including research relied upon in an earlier case by *Simmons* amici to support the position that adolescents have the cognitive ability to make an informed choice to terminate a pregnancy.<sup>76</sup> In response to Justice Scalia’s claims that the amici had “flip-flopped” between the abortion case and *Simmons*, prominent psychologists have asserted that although both cases involved adolescent decisionmaking, the legal issues implicated were very different, and the research in each case addressed “distinct aspects of adolescent behavior and attributes.”<sup>77</sup> In *Graham* Justice

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70. *Id.* at 2055.

71. *Id.* at 2057.

72. *Simmons*, 543 U.S. at 608 (Scalia, J., dissenting).

73. *Id.* at 620.

74. *Id.* at 624.

75. *Id.* at 617 (“[The majority] never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding.”); *Graham*, 130 S. Ct. at 2054–56 (Thomas, J., dissenting) (arguing that “generalizations” from social science are irrelevant to constitutional rulemaking and challenging the majority’s interpretation of the data).

76. *Simmons*, 543 U.S. at 617–18 (Scalia, J., dissenting) (citing studies relied upon in *Hodgson v. Minn.*, 497 U.S. 417 (1990), which upheld parental notification requirements for teens seeking abortions). See also *supra* notes 59–60 and accompanying text (discussing Justice Kennedy’s opinion in *Hodgson*).

77. See Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop,”* 64 AM. PSYCHOL. 583, 585 (2009). See also *id.* at 593 (urging those who seek “a uniform answer to questions about where we should draw the line between adolescence and adulthood for different purposes under the law . . . [to] consider the asynchronous nature of psychological

Thomas similarly argued that the Court “misstate[d] the [psychological] data” and improperly relied upon its own view of “morality and social conditions.”<sup>78</sup> Justice Kennedy’s failure to respond to—or even acknowledge—these critiques is a legitimate weakness of both opinions.

Neither dissent, however, recognized the ways in which its own analysis offered merely an alternate value judgment to the one made by the majority. A commitment to an interpretation of constitutional and statutory text in which the words have fixed meaning—unchanged since the days of the framers—may be just as subjective a choice as Justice Kennedy’s focus on the institutional intent indicated by the text.<sup>79</sup> Perhaps the strongest objection to the use of originalist jurisprudence by Justices Scalia and Thomas is the apparent inconsistency with which they apply it, invoking it in cases such as *Simmons* and *Graham* while “stretch[ing] or even ignor[ing it] entirely if it interferes with strongly held policy preferences” (as in federal affirmative action, school integration, and gender discrimination cases).<sup>80</sup> What remains consistent, however, are the critiques of the dissenters when confronted with categorical bars to specific types of sentences for juveniles; if *Graham*’s holding is ultimately extended to other kinds of offenses or groups of offenders, such arguments will likely be reiterated.

## VI. CONCLUSION

One of the many questions left to address is the legacy of *Graham*:

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maturation, especially during periods of dramatic and rapid change across multiple domains of functioning”).

78. *Graham*, 130 S. Ct. at 2054–56 (Thomas, J., dissenting).

79. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 631–32 (1992) (Scalia, J., dissenting) (arguing that Justice Kennedy’s majority opinion, which held that the First Amendment forbids clergy-led prayer at public school ceremonies, “invents a boundless, and boundlessly manipulable, test of psychological coercion” that is “bereft of any reference to history” and “lays waste a tradition as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally.”). See also COLUCCI, *supra* note 53 at 2–7 (discussing Justice Kennedy’s rejection of originalist jurisprudence in favor of a “moral vision of constitutional liberty”).

80. See, e.g., Scott Lemieux, *Scalia and Thomas: Originalist Sinners*, AM. PROSPECT, June 29, 2007, [http://www.prospect.org/cs/articles?article=scalia\\_and\\_thomas\\_originalist\\_sinners](http://www.prospect.org/cs/articles?article=scalia_and_thomas_originalist_sinners) (discussing the “sporadic commitment” of Justice Scalia and Justice Thomas to originalist methods). See also Gene R. Nichol, *Justice Scalia and the Printz Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953, 968–73 (1999) (discussing the inconsistencies with which Justice Scalia approaches constitutionalism and his frequent departures from originalism).

What is the opinion's significance for Eighth Amendment jurisprudence? Although the United States Supreme Court has never before applied a categorical rule to the noncapital punishment context, *Graham* could provide the basis for challenging JLWOP sentences for homicides as well as for homicide-related offenses such as felony–murder. Justice Kennedy's view that an offender's youth is mitigating and not aggravating could be extended to argue that if the youth did not kill or have the intent to kill, or is otherwise not death-eligible, no penological interest is served in allowing for JLWOP. Likewise, *Graham* could ultimately support barring term-of-year sentences that are the practical equivalent of JLWOP, such as ones that only provide for parole review after thirty- or forty-years' imprisonment. If JLWOP is in essence a sentence mandating that young offenders die in prison,<sup>81</sup> it may be indistinguishable from decades-long incarcerative sentences that do not allow for even the possibility of release until the offender is well into middle-age. Moreover, now that juveniles have been categorically exempted from JLWOP for nonhomicides, courts may be confronted with challenges to life without parole sentences from adult defendants who are psychologically incapacitated, mentally retarded, or even acutely drug addicted. If their transgressions are found to be less morally reprehensible than those who are not similarly impaired, the argument that they too are unfit objects of the state's sentencing laws may require additional categorical exemptions from certain types of punishment. Given that an estimated 2,500 juveniles are serving JLWOP in the United States, of whom only 129 have been sentenced for nonhomicide crimes,<sup>82</sup> the long-term significance of *Graham* may be found in its precedential effect rather than its direct impact.<sup>83</sup>

Finally, what of Justice Kennedy's arguably romantic notions and paternalistic rhetoric vis-à-vis children? Will *Graham* be invoked to limit adolescents' decisionmaking capacity outside the realm of criminal court? Can the Justice who most consistently holds the

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81. Brief for Petitioner at 6, *Sullivan v. Florida*, 130 S. Ct. 2059 (2010) (No. 08-7621), 2009 WL 2159656 at \*6; *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010) (“Terrance Graham’s [life without parole] sentence guarantees he will die in prison without any meaningful opportunity to obtain release . . .”).

82. *Facts and Opinions on Juvenile Life without Parole*, JUV. JUST. UPDATE (Civic Research Inst., Kingston, N.J.) June–July 2010, at 9.

83. See Marsha Levick, *Kids Really Are Different: Looking Past Graham v. Florida*, 87 CRIM. L. REP. 1, 3–4 (July 14, 2010) (stating that *Graham* “opened the door” to extending its ruling to juvenile felony murder cases as well as to juveniles serving lengthy terms-of-years for nonhomicides).

Supreme Court's swing vote be persuaded to adopt a more nuanced, textured vision of young people, one that exempts them from the harshest forms of punishment while also recognizing and respecting their autonomy in other contexts? Although speculating as to what the Supreme Court will decide next is of less value than reading tea leaves, suffice it to say that in future cases implicating the rights of children, Justice Kennedy's vision and philosophy will inevitably remain a critical—if not dominant—factor.