

CAN CONGRESS OVERTURN *GRAHAM V. FLORIDA*?

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Shortly after my recent Article, *Can Congress Overturn Kennedy v. Louisiana?*,¹ went to press, the Supreme Court released its decision in *Graham v. Florida*.² This Coda accordingly updates the Article in two ways: first, by evaluating *Graham*'s novel "national consensus" analysis; and, second, by arguing that both *Kennedy v. Louisiana*³ and *Graham* should be understood as contingent decisions potentially reversible through federal legislation. In other words, this Coda renews the Article's argument that *Kennedy* and related cases both do and should leave room for interbranch dialogue regarding the Eighth Amendment's contemporary practical meaning.

I. "NATIONAL CONSENSUS" IN *GRAHAM V. FLORIDA*

Graham held that sentences of life imprisonment without the possibility of parole may not constitutionally be imposed on juveniles convicted of nonhomicide offenses.⁴ The Court found that a national consensus supported its holding,⁵ even though the federal government, the District of Columbia, and "37 out of 50 States (a supermajority of 74%)"⁶ permitted the punishment in question. How did the Court arrive at this counterintuitive conclusion?

First, the Court dismissed available legislative evidence by reasoning that many legislatures permitted the relevant pun-

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1. Richard M. Ré, *Can Congress Overturn Kennedy v. Louisiana?*, 33 HARV. J.L. & PUB. POL'Y 1031 (2010).

2. 130 S. Ct. 2011 (2010).

3. 128 S. Ct. 2641, 2651–53 (2008).

4. *Graham*, 130 S. Ct. at 2030.

5. *Id.* at 2026.

6. *Id.* at 2049 (Thomas, J., dissenting).

ishment only by inadvertence and not by design. The relevant federal and state laws simply contained “no statutory differentiation between adults and juveniles with respect to authorized penalties.”⁷ The Court therefore concluded that “the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration.”⁸ The Court’s leading example came from Florida, which “theoretically” permitted life without parole for five-year-olds.⁹ In a similar vein, the Court noted that federal law merely “allows for the possibility of life without parole” for nonhomicide juvenile offenders.¹⁰

Graham’s new focus on the deliberateness of legislation calls to mind the Court’s statement respecting denial of rehearing in *Kennedy*.¹¹ There, the Court reasoned that a newly discovered capital rape provision in the Uniform Code of Military Justice (UCMJ) pertained only to military crimes and so did not shed significant light on civilian law norms.¹² Much like the sentencing regimes at issue in *Graham*, the “relatively obscure, low-visibility UCMJ amendment”¹³ that was overlooked before the original *Kennedy* decision arguably did not reflect a deliberate or considered legislative decision. *Graham*’s analysis may thus supply an alternative basis for the Court’s decision to deny rehearing in *Kennedy*.

Second, for affirmative evidence of national consensus *Graham* relied entirely on actually imposed sentences.¹⁴ This approach broke from the Court’s past practice. In earlier cases, the Court used actually imposed sentences to show that state laws permitting certain punishments had fallen into disuse and no longer reliably reflected popular views.¹⁵ The national consensus findings in *Atkins v. Virginia*,¹⁶ *Roper v. Simmons*,¹⁷ and

7. *Id.* at 2025 (majority opinion).

8. *Id.* at 2026.

9. *Id.* at 2025–26.

10. *Id.* at 2023 (citing 28 U.S.C. § 2241 (2006 & Supp. II 2009); *id.* § 5032 (2006)).

11. See *Kennedy v. Louisiana*, 129 S. Ct. 1, 2–3 (2008) (Kennedy, J., statement respecting the denial of rehearing).

12. *Id.*

13. Ré, *supra* note 1, at 1049.

14. *Graham*, 130 S. Ct. at 2023–25.

15. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (highlighting “the infrequency of [the punishment’s] use even where it remains on the books”).

16. 536 U.S. 304, 313–16 (2002).

17. 543 U.S. 551, 564–67 (2005).

Kennedy,¹⁸ thus primarily relied on federal and state legislation that disallowed the punishment in question. In *Graham*, however, only a minority of states prohibited the relevant punitive practice.¹⁹ Actual sentences were therefore the only affirmative evidence of national consensus capable of supporting the Court's holding.

Moreover, the actual sentencing evidence in *Graham* was qualitatively different from analogous evidence in earlier cases. In recent decades, capital sentences have generally been imposed by or in consultation with sentencing juries.²⁰ And the Court has recognized that jury-based capital sentencing decisions offer a unique window into popular views.²¹ In contrast, life sentences without parole are not typically imposed by juries.²² The unusualness of particular noncapital sentences is therefore primarily the product of sentencing guidelines, prosecutorial discretion, and judicial sentencing decisions. In other words, *Graham*'s national consensus finding ultimately rests not on a legislative or even jury-based consensus reflective of popular morality, but rather on a *modus operandi* among expert officials, including sentencing commissioners, prosecutors, and judges.

18. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2651–53 (2008) (Thomas, J., dissenting).

19. *See Graham*, 130 S. Ct. at 2023.

20. *See Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2002) (noting that only five states commit “both capital sentencing factfinding and the ultimate sentencing decision entirely to judges” (citations omitted)).

21. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (Stewart, J., plurality opinion) (“The jury also is a significant and reliable objective index of contemporary values because it is so directly involved.”); *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) (“[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.”); *see also Ring*, 536 U.S. at 616 (Breyer, J., concurring) (“Even in jurisdictions where judges are selected directly by the people, the jury remains uniquely capable of determining whether, given the community’s views, capital punishment is appropriate in the particular case at hand.”).

22. *See* Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 886 (2004) (observing that in six states—namely, Virginia, Kentucky, Missouri, Arkansas, Texas, and Oklahoma—“felons convicted by juries are routinely sentenced by juries”); Adriaan Lanni, Note, *Jury Sentencing in Non-capital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1790 (1999). Notably, *Graham* found that Kentucky and Texas did not permit life without parole to be imposed on juveniles for nonhomicide offenses. *See Graham*, 130 S. Ct. at 2036. Meanwhile, Virginia had eight juvenile nonhomicide offenders serving life-without-parole sentences and Oklahoma had just imposed such a sentence. *Id.* at 2024.

Graham makes it hard to contend, as my Article did after *Kennedy*,²³ that the Court understands the term “national consensus” to imply demonstrated majoritarian popular support.²⁴ Perhaps *Graham* is correct both that legislatures have not directly spoken to the issue and that various expert officials have made the relevant practice rare. If so, the Court might fairly conclude that there is no settled popular consensus on the subject one way or the other.²⁵ But *Graham* simply does not demonstrate that the public opposes the punishment in question. As a result, *Graham*—unlike *Kennedy*—cannot be justified based on “the idea that there are some punishments that national majorities object to and that local majorities are therefore foreclosed from imposing.”²⁶ Instead, *Graham* is best justified by a conception of the Eighth Amendment “as an outlet for unique judicial competence, or as a means of curing political pathologies.”²⁷ To be sure, *Graham*’s holding may have been conditioned on its national consensus finding, a possibility discussed in more detail below. But the Court appears to have been motivated primarily by its independent judgment analysis.²⁸

It is important to underscore how far *Graham* has traveled from *Atkins*, *Roper*, and *Kennedy*. In *Atkins* and *Roper*, the Court concluded that the federal government and most states had enacted legislation to eliminate the punishments at issue, thereby exhibiting conscious and categorical judgments against them.²⁹ And *Kennedy* concluded that, in the wake of *Furman v. Georgia*,³⁰

23. Ré, *supra* note 1, at 1083 n.235.

24. Professor Hills’s view, that “it is sufficient for the Court to show that its holding has not been *rejected* by a majority of the States,” seems closer to the mark. Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL’Y 17, 23 (2009).

25. *But see Graham*, 130 S. Ct. at 2049 (Thomas, J., dissenting) (“Not only is there no consensus against this penalty, there is a clear legislative consensus *in favor* of its availability.”).

26. Ré, *supra* note 1, at 1058.

27. *Id.* at 1060.

28. The Court’s independent judgment is informed by the similar judgments of other sentencing experts, both foreign and domestic. *See, e.g., Graham*, 130 S. Ct. at 2034 (“The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment . . . because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.”).

29. *Roper v. Simmons*, 543 U.S. 551, 564–67 (2005); *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002).

30. 408 U.S. 238 (1972).

the federal government and most states had chosen not to reinstate capital rape statutes.³¹ The consensus findings in *Atkins*, *Roper*, and *Kennedy* grounded the Court's categorical Eighth Amendment holdings in a democratic foundation. Indeed, the Court's findings—based on specific and categorical legislative decisions by at least “the federal government and a distinct majority (sixty percent) of states”³²—can plausibly be compared to the requirements for constitutional amendment set out in Article V.³³ *Graham* cannot be justified along those lines.

To the extent that *Atkins*, *Roper*, and *Kennedy* relied on legislative evidence of national consensus, their reasoning was contingent on the decisions of the political branches. *Graham* moved away from that form of contingency, but ultimately embraced others. Plainly, *Graham* is not an originalist decision and so does not rest on unchangeable historical facts.³⁴ And unlike *Lawrence v. Texas*,³⁵ *Graham*'s narrowly targeted independent judgment analysis avoided reliance on the sorts of broad traditions and aspirational values that a federal statute might transgress but could never debunk.³⁶ Thus, the key question is whether a federal statute could address the contingent considerations that underlie *Graham*'s holding.

II. CAN CONGRESS STILL OVERTURN *KENNEDY V. LOUISIANA*?

Graham demonstrates that the Supreme Court's Eighth Amendment jurisprudence is in a state of flux. Still, the best reading of the Court's extant case law is that *Kennedy* is democratically reversible. To illustrate this point, consider the contingent nature of *Graham*'s reasoning.

31. See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2651 (2008). In fact, most states had turned away from capital rape laws even before *Furman*. See Ré, *supra* note 1, at 1100 n.289.

32. Ré, *supra* note 1, at 1043.

33. *Id.* at 1098–1103 (comparing and contrasting the Court's “national consensus” analysis with Article V's requirement that constitutional amendments be passed by supermajority votes in Congress and then ratified by three-quarters of the state legislatures).

34. Some punishments, such as torture, are prohibited by the Eighth Amendment because it is an unchangeable historical fact that the Framers intended to prohibit such punishments. See *id.* at 1040 & n.25.

35. 539 U.S. 558, 573–74 (2003).

36. Ré, *supra* note 1, at 1082–86.

First, a federal statute that specifically permitted the death penalty for child rape would plainly be distinguishable from the federal and state laws that *Graham* dismissed. Again, the statutes that *Graham* set aside did not exhibit “deliberate, express, and full legislative consideration” of the relevant punitive practice.³⁷ *Graham* thus stopped short of holding that evolving standards of decency might forbid a punishment even in the face of a deliberately drafted countervailing federal statute. The Court’s reservation is particularly important to the extent that the moral component of its independent judgment analysis aspires to be, and should be, consistent with national views expressed through constitutionally prescribed processes.³⁸ As my Article observed, it may make sense for the Court’s national consensus analysis to rely on evidence of actually imposed sentences when, as in *Graham*, the import of relevant Article I federal legislation is “ambiguous.”³⁹ But “insofar as federal legislation does speak to a material question of national consensus, courts should defer to [that] constitutionally privileged answer.”⁴⁰ *Graham*’s focus on the deliberateness of relevant sentencing legislation suggests that the Court might yet agree with that proposition.

Second, a federal statute specifically designed to overturn *Kennedy* could not be criticized based on a dearth of actually imposed sentences. In *Graham*, the Court emphasized that the federal government had rarely, if ever, obtained life-without-parole sentences for nonhomicide juvenile offenders, despite ample opportunity to do so over a long period of time.⁴¹ But analogous evidence would not exist immediately after the enactment of a federal statute attempting to overturn *Kennedy* because prosecutors and juries would not yet have had the lawful opportunity to impose the relevant punishments. Useful evidence of actually imposed punishments would therefore require time to accumulate. And if it turned out that the relevant

37. *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010).

38. Ré, *supra* note 1, at 1070–72.

39. *Id.* at 1050.

40. *Id.*

41. See *Graham*, 130 S. Ct. at 2024. The Court’s original opinion emphasized that only a small number of federal prisoners fell in this category. See *Graham v. Florida*, No. 08-7412, slip op. at 12–13 (May 17, 2010). However, the U.S. Solicitor General’s Office later determined that no federal prisoner “is serving a life without parole sentence solely for a juvenile nonhomicide crime completed before the age of 18.” *Graham*, 130 S. Ct. at 2024 n.*. The Court accordingly amended its initial opinion. *Id.*

punishments were regularly imposed, those results would support the legislation's constitutionality. Of course, that result is not guaranteed. And "if in the years after countervailing federal legislation it were *still* true that the punishment had rarely been imposed," then "evidence from actually imposed punishments" might eventually "cast doubt on countervailing evidence from federal legislation."⁴² In the meantime, however, experience would not have shown whether capital legislation relating to child rape might find regular application.

Third, and most importantly, a federal statute designed to overturn *Kennedy* might challenge the factual premises underlying the Court's independent judgment. *Graham* underscored this point by emphasizing that "[n]o recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles."⁴³ *Graham* thus considered the possibility that "developments in psychology and brain science" might have called into question the Court's past independent judgment findings.⁴⁴ And when justifying its categorical rule, *Graham* clarified that "*existing* state laws" were "insufficient" because they invited unduly "subjective" sentencing determinations.⁴⁵ *Graham*'s reasoning thus acknowledges that different laws could have yielded a different result. One might imagine, for example, that a sentencing regime incorporating psychological findings could reliably identify any nonhomicide juvenile offenders who are also lifelong psychopaths.⁴⁶ In *Kennedy*, too, the Court's independent judgment

42. Ré, *supra* note 1, at 1050.

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

44. *Id.*

45. *Id.* at 2031 (emphasis added).

46. See *id.* at 2054 (Thomas, J., dissenting) ("[R]esearch relied upon by the *amici* cited in the Court's opinion differentiates between adolescents for whom antisocial behavior is a fleeting symptom and those for whom it is a lifelong pattern." (citing Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 678 (1993))); see also Marnie E. Rice, *Violent Offender Research and Implications for the Criminal Justice System*, 52 AM. PSYCHOLOGIST 414, 414 (1997) ("[P]sychopathic offenders are especially likely to be violent, [and] future violence can be predicted with considerable accuracy among men who have committed at least 1 violent offense."); cf. STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 51 ("Most psychopaths showed signs of malice from the time they were children. They bullied smaller children, tortured animals, lied habitually, and were incapable of empathy or remorse, often despite normal family backgrounds and the best efforts of their distraught parents. Most experts on psychopathy believe that it comes from a genetic predisposition, though in some cases it may come from early brain damage."). But see Walter Glannon, *Moral Responsibility and the Psy-*

rested on contingent premises of fact and law. A federal statute could evaluate “available empirical evidence on whether imposing capital punishment for child rape yields social benefits, such as deterrence.”⁴⁷ And a federal statute enforcing the Eighth Amendment might “address the Supreme Court’s concerns regarding the arbitrary imposition of capital punishment.”⁴⁸ For example, such a law could “limit the use of child victim testimony, especially when uncorroborated, and specify mandatory aggravating and mitigating factors so as to structure and curb capital juries’ sentencing discretion.”⁴⁹ If the Court’s independent judgment is more important than ever after *Graham*, then so too are deliberate legislative efforts to address the Court’s constitutional concerns.

This is not to say that *Kennedy* and *Graham* are equally susceptible to democratic correction. Contingency, after all, is “case dependent.”⁵⁰ For example, *Kennedy*’s concerns regarding unreliable child witnesses and unbridled jury discretion seem relatively easy for Congress to address. In contrast, *Graham*’s focus on the biology of adolescence, if scientifically sound, may narrowly confine Congress’s practical ability to react.⁵¹ Any such limits, however, would only affirm that the Court retains the ultimate responsibility to demarcate the bounds of Eighth Amendment rights.⁵² Consistent with that role, the Court’s own reasoning has left room in a limited range of circumstances for legislative feedback and inter-branch dialogue.⁵³

chopath, 1 NEUROETHICS 158, 158 (2008) (arguing that the “cognitive and affective impairment of the psychopath justifies mitigated responsibility, but not excuse”); Stephen J. Morse, *Psychopathy and Criminal Responsibility*, 1 NEUROETHICS 205, 205 (2008) (arguing that because psychopaths “lack moral rationality,” they should be “excused from crimes that violate the moral rights of others”).

47. Ré, *supra* note 1, at 1105.

48. *Id.*

49. *Id.*

50. *Id.* at 1086.

51. See *supra* text accompanying note 43.

52. See *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (“In accordance with the constitutional design, ‘the task of interpreting the Eighth Amendment remains our responsibility.’” (quoting *Roper v. Simmons*, 543 U.S. 551, 575 (2005))).

53. Ré, *supra* note 1, at 1063–64.

CONCLUSION

Sentencing reformers should embrace the possibility of legislatively reversible Eighth Amendment jurisprudence. Insofar as the Court's decisions accord with national views, there will be no political impetus for countervailing federal legislation. Even if the Court were to deviate from popular norms, the busy political branches are unlikely to respond to narrow cases like *Graham*, which did nothing more than entitle a small group of offenders to the mere possibility of eventual parole.⁵⁴ On the other hand, an avowedly contingent Eighth Amendment jurisprudence would offer broader Eighth Amendment holdings greater democratic legitimacy. By inviting legislative input, the Court might also catalyze federal efforts to enforce the Eighth Amendment, much as *Furman* prompted the improved capital sentencing procedures ultimately endorsed in *Gregg v. Georgia*.⁵⁵ In this way, a deliberate congressional response to *Kennedy* might yield reforms in state sentencing processes extending well beyond the relatively limited bounds of the Court's recent holdings.⁵⁶ Such reforms would result in more esteem for the Court, more justice for criminal defendants, and a more public role for our Eighth Amendment.

54. See *Graham*, 130 S. Ct. at 2030 ("A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like *Graham* some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.").

55. 428 U.S. 153 (1976).

56. See Ré, *supra* note 1, at 1062 n.114 ("A federal effort to overrule *Kennedy* might be a test case in anticipation of more far-reaching congressional oversight of death penalty processes.").