

The second type comprises challenges to particular sentencing practices as being categorically impermissible, but categorical restrictions had theretofore been limited to imposing the death penalty on those with diminished capacity. In *Graham*, Justice Kennedy broke new ground and recognized a categorical restriction on life without parole for nonhomicide offenses by juveniles, citing considerations and applying analysis similar to those used in his juvenile capital punishment opinion in *Roper*.<sup>242</sup> In considering objective indicia of a national consensus on the sentence, the *Graham* opinion looked beyond statutory authorization—thirty-seven states and the District of Columbia permitted life without parole for some juvenile nonhomicide offenders—to actual imposition, which was rare outside Florida. Justice Kennedy also found support “in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over.”<sup>243</sup> After finding that a consensus had developed against the sentencing practice at issue, Justice Kennedy expressed an independent judgment that imposing life without parole on juveniles for nonhomicide offenses failed to serve legitimate penological goals adequately.<sup>244</sup> Factors in reaching this conclusion included the severity of the sentence, the relative culpability of juveniles, and the prospect for their rehabilitation.<sup>245</sup>

The concept of proportionality also drove Justice Kagan’s analysis in *Miller v. Alabama*, a case questioning the imposition of mandatory life imprisonment without parole on juveniles convicted of homicide.<sup>246</sup> Her analysis began by recounting the factors, stated in *Roper* and *Graham*, that mark children as constitutionally different from adults for purposes of sentencing: Children have diminished capacities and greater prospects for reform. Nevertheless, these factors, even when coupled with the severity of a life without parole sentence, did not lead Justice Kagan to bar life without parole for juveniles in homicide cases categorically. Her more immediate

<sup>242</sup> See 543 U.S. 551 (2005). Concurring in the judgment in *Graham*, Chief Justice Roberts resolved the case under a proportionality test, finding the majority’s categorical restriction to be unwise and unnecessary in *Graham*’s circumstances. 560 U.S. \_\_\_, No. 08–7412, slip op. (Roberts, C.J., concurring).

<sup>243</sup> 560 U.S. \_\_\_, No. 08–7412, slip op. at 29.

<sup>244</sup> For a parallel discussion in *Roper*, see 543 U.S. 551, 568–75 (2005).

<sup>245</sup> In dissent, Justice Thomas, joined by Justice Scalia and, in part, by Justice Alito, questioned both the basis and the reach of the majority opinion. In addition to strongly objecting to adopting any categorical rule in a nonhomicide context, Justice Thomas pointedly criticized the conclusion that the legislative and judicial records established a consensus against imposing life without parole on juvenile offenders in nonhomicide cases. He also disparaged the majority’s independent judgment on the morality and justice of the sentence as wrongfully pre-empting the political process. 560 U.S. \_\_\_, No. 08–7412, slip op. (Thomas, J., dissenting).

<sup>246</sup> 567 U.S. \_\_\_, No. 10–9646, slip op. (2012).