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NOTE

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In Smith v. Doe, *the Supreme Court held that Alaska's sex offender registration and notification statute did not constitute punishment and was therefore not susceptible to challenge under the Ex Post Facto Clause. In reaching that conclusion, the Court looked to the seven factors articulated in* Kennedy v. Mendoza-Martinez. *To evaluate those factors, the Court applied a presumption of constitutionality, conducting the sort of narrow factual inquiry characteristic of rational basis review. Since* Smith, *courts have disagreed as to whether sex offender laws are punitive when applied to juveniles, and the Supreme Court has not yet addressed the issue. This Note argues that the Court should suspend the presumption of constitutionality when conducting its ex post facto inquiry for laws that burden juvenile offenders. The Court should do so because the very rationales that underlie the presumption are inapplicable in both the case of juvenile offenders and the ex post facto context. In lieu of rational basis review, this Note proposes a new framework under which the Court may evaluate laws that burden juvenile offenders. Under this new framework, a law is automatically punitive when it activates one or more of three triggers. These triggers are activated when a sanction is (1) irrevocable for life, (2) substantially likely to cause severe psychological trauma, or (3) grossly disproportionate to the culpability of the offender.*

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Introduction

Alexander D. of Michigan is not your paradigmatic sex offender.[1] When Alexander was seventeen, he was convicted of a sex offense after having sex with his fifteen-year-old girlfriend, who was below Michigan's age of consent of sixteen.[2] Since 2003, Alexander has registered as a sex offender, and his personal information has been readily available on a public internet registry.[3] As a result, he has lost jobs, fallen into poverty, and faced harassment by passersby.[4] His ex-girlfriend's parents even wrote a letter requesting his removal from the registry, but to no avail: Alexander will remain a registered sex offender until 2028.[5]

Remarkably, Alexander's story is far from unique. According to a 2009 Office of Juvenile Justice and Delinquency Prevention bulletin, juveniles comprise 25.8% of all sex offenders, and 35.6% of sex offenders known to have committed a sex offense against minors.[6] Among the juveniles who committed sex offenses against minors, almost half were convicted of "fondling,"[7] and 9.5% were, like Alexander, convicted of a "nonforcible sex offense."[8]

Thirty-four states currently require that all juveniles who have been convicted of a sex offense—whether they were convicted in criminal court as

1. *See* Human Rights Watch, Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US 37–38 (2013), https://www.hrw.org/sites/default/files/reports/us0513_ForUpload_1.pdf [https://perma.cc/SC4E-QVU5].

2. *Id.* at 37.

3. *See id.* at 37–38.

4. *Id.* at 38.

5. *Id.*

6. David Finkelhor et al., *Juveniles Who Commit Sex Offenses Against Minors*, Juv. Just. Bull., Dec. 2009, at 1, 3, https://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf [https://perma.cc/3X57-PA36].

7. *Id.* at 5.

8. *Id.*

adults or adjudicated delinquent in juvenile court—register on a sex offender registry.[9] Sixteen states and the District of Columbia require registration by only those convicted as adults.[10] Among the states that require registration of all juvenile sex offenders, nineteen states allow for publication of the juveniles' information.[11] In twelve states, judges are not given discretion to decide whether a juvenile must be subject to registration and community notification.[12] Six states require lifetime registration for juveniles who commit certain crimes.[13]

In implementing sex offender legislation, at both the state and federal level, law enforcement officials have interpreted the laws to apply retroactively.[14] Retroactive application of sex offender laws raises constitutional concerns. Under Article I, Section 9 of the U.S. Constitution, Congress is prohibited from passing an ex post facto law.[15] Article I, Section 10 imposes a similar prohibition on states.[16] The ex post facto prohibition does not apply to all retroactive laws, only laws that inflict punishment.[17]

Unsurprisingly, sex offenders convicted before the passage of registration and notification laws have brought challenges to those laws under the Ex Post Facto Clause of the U.S. Constitution.[18] With few exceptions, federal courts have been unwilling to hear such challenges, stating that sex offender laws do not constitute "punishment" and therefore cannot be assailed under the Ex Post Facto Clause.[19] Whether a law constitutes a punishment depends on several factors articulated in *Kennedy v. Mendoza-Martinez*,[20] including whether the law has a reasonable relationship to a nonpunitive purpose and

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9. *See* Nicole Pittman & Quyen Nguyen, A Snapshot of Juvenile Sex Offender Registration and Notification Laws: A Survey of the United States 32 (2011), http://www.njjn.org/uploads/digital-library/SNAPSHOT_web10-28.pdf [https://perma.cc/Y3PX-7B3W]. A juvenile may be convicted as an adult when, through one of several different procedural mechanisms which vary across jurisdictions, the juvenile's case has been transferred from juvenile to adult court. *See* 2 Thomas A. Jacobs, Children and the Law: Rights & Obligations § 8:6, at 117–20 (2016 ed.).

10. Pittman & Nguyen, *supra* note 9, at 32.

11. *Id.*

12. *Id.*

13. *Id.*

14. *See, e.g.*, Doe v. Nebraska, 734 F. Supp. 2d 882, 932–33 (D. Neb. 2010) (holding that the retroactive application of Nebraska's sex offender registration law by state officials did not violate the Ex Post Facto Clause); Applicability of the Sex Offender Registration and Notification Act, 28 C.F.R. § 72.3 (2016) (interpreting the Federal Sex Offender Registration and Notification Act to apply to "all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act").

15. U.S. Const. art. I, § 9, cl. 3.

16. *Id.* § 10, cl. 1.

17. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

18. *E.g.*, Smith v. Doe, 538 U.S. 84 (2003).

19. *See, e.g.*, *id.* at 92.

20. 372 U.S. 144 (1963).

whether the law is excessive in relation to that purpose.[21] In evaluating such factors, courts have applied a presumption of constitutionality, assuming all facts necessary to support the law's constitutionality.[22]

This Note contends that courts should suspend the presumption of constitutionality and conduct a more searching inquiry when determining whether laws that burden juvenile offenders are punitive. This Note also aims to provide a framework for assessing the constitutional rights of *all* juvenile offenders, regardless of the nature or severity of their offense. Part I provides a brief history of juvenile sex offender registration and discusses constitutional challenges to sex offender registration and, in particular, juvenile registration. Part II argues that the presumption of constitutionality is inappropriate when evaluating laws that burden juvenile offenders, since the rationales underlying the presumption are inapplicable to juvenile offenders and the ex post facto inquiry. Part III explains how a recent string of Supreme Court cases involving juvenile justice has introduced new principles into the Court's approach to the constitutional rights of juveniles, further justifying a suspension of the presumption. Finally, Part IV provides a framework under which courts should evaluate laws that burden juvenile offenders under the Ex Post Facto Clause. This framework incorporates lessons from the Court's earlier jurisprudence on the rights of juveniles discussed in Part III, and would treat as punitive sanctions that are (1) irrevocable for life, (2) substantially likely to cause significant psychological harm, and (3) grossly disproportionate to the offender's culpability.

I. A Split on Whether Juvenile Sex Offender Registration is Punitive

This Part provides an overview of courts' divergent approaches to the question of whether sex offender laws are punitive, both generally and as applied to juvenile offenders. Many sex offenders have challenged their registration requirements under the Ex Post Facto Clause.[23] For a challenge under the Ex Post Facto Clause to move forward, however, a law must be shown to

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21. *See Mendoza-Martinez*, 372 U.S. at 168–69 (1963). Altogether, the factors are as follows:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .

Id. (footnotes omitted).

22. *See, e.g.*, Hatton v. Bonner, 356 F.3d 955, 966 (9th Cir. 2004) (citing *Smith*, 538 U.S. at 103).

23. *See, e.g.*, United States v. Under Seal, 709 F.3d 257 (4th Cir. 2013) (challenging juvenile registration under the Eighth Amendment); United States v. Young, 585 F.3d 199 (5th Cir. 2009) (challenging adult registration under the Ex Post Facto Clause).

be "punitive."[24] Section I.A discusses the Court's treatment of adult sex offender registration. Section I.B examines lower courts' consideration and recent scholarly discussion of juvenile sex offender registration.

A. *Proving Punishment:* Smith v. Doe

The Supreme Court has only considered sex offender laws through the lens of the Ex Post Facto Clause once. In *Smith v. Doe*, the Supreme Court dismissed an ex post facto challenge brought by adult sex offenders against Alaska's registration and notification law.[25] Under the Alaska law, anyone convicted of a sex offense was required to register with law enforcement officials.[26] After registration, an offender's information was forwarded to the Department of Public Safety, which maintained a registry of sex offenders' personal information, including registrants' names, aliases, addresses, and photographs.[27] While not a requirement of the law, Alaska chose to make most nonconfidential information available on the internet.[28] The central question in the case was whether Alaska's law constituted a retroactive punishment, prohibited under the Ex Post Facto Clause.[29]

To determine whether a law is punitive, courts first look to legislative intent.[30] To ascertain legislative intent, courts start with the text and structure of the statute.[31] Courts also look to the statute's manner of codification (i.e., whether it was placed in the criminal section of the state's code) and enforcement procedures.[32] If it is clear that the legislature intended to impose a punishment, then the measure is punitive and the inquiry ends there.[33] Even where a punishment is not intended, however, a law may be "so punitive either in purpose or effect" that it transforms the measure from a regulation into a punishment.[34]

Whether a law is punitive in effect depends on seven factors articulated in *Kennedy v. Mendoza-Martinez*.[35] These factors, while not "exhaustive or dispositive,"[36] serve as "useful guideposts" in the Court's analysis.[37] In *Smith*, the Court looked to five *Mendoza-Martinez* factors: "[W]hether [the

24. *Smith*, 538 U.S. at 92.

25. *Id.* at 105–06.

26. *Id.* at 90.

27. *Id.*

28. *Id.* at 91.

29. *Id.* at 89.

30. *Id.* at 92.

31. *Id.*

32. *Id.* at 94.

33. *Id.* at 92.

34. *Id.* (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)).

35. 372 U.S. 144, 168–69 (1963).

36. *Smith*, 538 U.S. at 97 (quoting United States v. Ward, 448 U.S. 242, 249 (1980)) (internal quotations omitted).

37. *Id.* (quoting Hudson v. United States, 522 U.S. 93, 99 (1997)).

scheme] . . . has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose."[38]

After concluding that the Alaska legislature did not intend to impose a punishment in passing its sex offender registration law, the Court in *Smith* moved on to the act's effects. Going through each of the first three factors articulated above, the Court concluded that each factor indicated that the measure was not punitive in effect.[39] The final two factors—the law's rational connection to a nonpunitive purpose, and whether the law is excessive in relation to that purpose—were considered by the *Smith* Court to be particularly significant[40] and therefore received the most emphasis.[41] These factors combined to form a rationality and excessiveness inquiry.

The Court found that the act passed this rationality–excessiveness inquiry. First, the Court held that the act had a legitimate nonpunitive goal of public safety.[42] According to the Court, this goal was advanced by keeping the public informed of the risks of nearby sex offenders.[43] Second, the Court found that the act was not excessive in relation to the goal of public safety.[44] The lower court found that the measure was excessive because "first . . . the statute applies to all convicted sex offenders without regard to their future dangerousness; and, second, [because] it places no limits on the number of persons who have access to the information."[45] Dealing with the lower court's first contention, the Court pointed to the "frightening and high" recidivism rates of sex offenders,[46] and comparatively high likelihood that sex offenders will be rearrested for a new rape or sexual assault after release.[47] Given a legislature's power to make universal determinations as to the dangerousness of a particular class, the evidence sufficed to support the means employed.[48] Additionally—presumably still responding to the lower court's concern that the act applied without regard to future dangerousness—the Court found that the duration of the registration period was not excessive.[49] To support this contention, the Court pointed to evidence that

38. *Id.*

39. *Id.* at 97–102.

40. *Id.* at 102 (citing United States v. Ursery, 518 U.S. 267, 290 (1996)).

41. *See id.* at 102–06.

42. *Id.* at 102–03.

43. *Id.* at 103.

44. *Id.* at 105.

45. *Id.* at 103.

46. *Id.* (quoting McKune v. Lile, 536 U.S. 24, 34 (2002)).

47. *Id.*

48. *See id.* at 104.

49. *Id.*

convicted child molesters may reoffend as late as twenty years following release.[50] Finally, as to the lower court's second argument, the number of people who have access to sex offenders' information did not render the act excessive, since sex offenders may reoffend anywhere in the country.[51]

The *Smith* Court went to great lengths to emphasize the narrowness of the rationality–excessiveness inquiry.[52] For the Court, the central question was "whether the regulatory means chosen are reasonable in light of the nonpunitive objective."[53] The inquiry was not "an exercise in determining whether the legislature has made the best possible choice to address the problem it seeks to remedy."[54] This forgiving analysis is not unlike the rational basis test applied in the equal protection context: the question is not whether the law is perfectly successful in achieving its goal, but rather whether the law has some support such that it does not constitute an arbitrary exercise of power.[55] Justice Souter, concurring in the judgment, found the case to be a close one but concluded that the laws were nonpunitive because of the "presumption of constitutionality normally accorded a State's law,"[56] which "gives the State the benefit of the doubt in close cases."[57]

Following *Smith*'s lead, circuit courts have largely deferred to the judgment of the legislature in conducting the rationality–excessiveness inquiry.[58] Indeed, with only one exception, no circuit court has ever held that a sex offender law fails the rationality–excessiveness test. The lone exception, the Sixth Circuit's opinion in *Does v. Snyder*,[59] does much to prove the rule. In *Does*, the Sixth Circuit found the retroactive application of the Michigan Sex Offenders Registration Act (SORA) to be punitive and therefore unconstitutional.[60] In conducting the rationality-excessiveness test, the court considered the legislature's stated goals of promoting public safety and reducing recidivism.[61] The court found little to no evidence on the record to support

50. *Id.* (citing Robert A. Prentky et al., Nat'l Inst. of Justice, U.S. Dep't of Justice, Child Sexual Molestation: Research Issues 14 (1997), https://www.ncjrs.gov/pdffiles/163390.pdf [https://perma.cc/FED9-49DR]).

51. *See id.* at 104–05.

52. *See id.* at 105.

53. *Id.*

54. *Id.*

55. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

56. *Smith*, 538 U.S. at 110 (Souter, J., concurring).

57. *Id.*

58. *See, e.g.*, United States v. Shannon, 511 F. App'x 487, 492 (6th Cir. 2013) (quoting *Smith*, 538 U.S. at 105); Hatton v. Bonner, 356 F.3d 955, 966 (9th Cir. 2004) (quoting *Smith*, 538 U.S. at 103).

59. 834 F.3d 696, 704–06 (6th Cir. 2016).

60. *Does*, 834 F.3d at 705–06.

61. *Id.* at 704.

the claim that SORA served either of these goals.[62] Considering the stated goal of reducing recidivism, the court found the evidence on the record demonstrated SORA had, at best, no impact on recidivism.[63] In fact, the court found evidence in the record that the law may actually *increase* the risk of recidivism.[64] Compounding the court's unwillingness to uphold SORA was the State of Michigan's failure to so much as analyze recidivism rates in the state, despite having the necessary data to do so.[65] As for public safety, the court found that the record disclosed no relationship between SORA's registration requirements and public safety whatsoever.[66] To uphold SORA, the court found, would amount to writing a blank check to the legislature to pass whatever laws it wished.[67]

B. *Judicial and Academic Treatment of Juvenile Sex Offender Registration*

Since *Smith*, courts have disagreed as to its holding's applicability to juvenile sex offender registration. Several state supreme courts have upheld challenges to sex offender laws brought by juvenile offenders on the ground that the laws imposed ex post facto punishments under their respective state constitutions.[68] In the federal courts, the majority of circuits to consider the question have dismissed such challenges, citing *Smith*.[69] The Ninth Circuit is the only federal circuit to have struck down juvenile sex offender registration under the federal Ex Post Facto Clause.[70]

In *United States v. Juvenile Male* (*Juvenile Male II*), the Ninth Circuit concluded that the federal sex offender registration law was punitive when applied to juveniles.[71] To distinguish *Smith*, the court emphasized the confidentiality of the juvenile justice system and the "pervasive and severe new

62. *Id.* at 704–05.

63. *Id.* at 704.

64. *Id.* at 704–05 (citing J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161, 161 (2011)).

65. *Id.* at 705.

66. *Id.*

67. *Id.*

68. *See, e.g.*, Doe v. State, 189 P.3d 999 (Alaska 2008) (finding Alaska's registration law punitive and therefore invalid under the ex post facto clause of Alaska's state constitution when applied retroactively); State v. Williams, 952 N.E.2d 1108 (Ohio 2011) (same under the Ohio Constitution).

69. *See, e.g.*, United States v. Shannon, 511 F. App'x 487, 492 (6th Cir. 2013) (finding that the application of federal sex offender registration law to juveniles did not constitute punishment); United States v. W.B.H., 664 F.3d 848 (11th Cir. 2011) (finding that the application of a federal sex offender registration law to an adult for a crime committed as a juvenile did not constitute punishment). It should be noted, however, that the Sixth Circuit's later decision in *Does v. Snyder*, discussed *supra* Section I.A, which dealt with an adult challenge to Michigan's sex offender registration law, has potentially called the *Shannon* decision into doubt.

70. United States v. Juvenile Male (*Juvenile Male I*), 581 F.3d 977 (9th Cir. 2009), *amended and superseded by* 590 F.3d 924 (9th Cir. 2010), *vacated as moot,* 564 U.S. 932 (2011).

71. 590 F.3d 924, 941 (9th Cir. 2010).

and additional disadvantages that result from the mandatory registration of former juvenile offenders and from the requirement that such former offenders report in person to law enforcement authorities every 90 days for 25 years."[72] Still, the court was careful not to rest its conclusion on the rationality–excessiveness prong of *Mendoza-Martinez*. Given the "limited nature of [the court's] inquiry" and the decision in *Smith*, the court chose not to give the factor extensive weight.[73] In other words, it concluded the laws were punitive regardless of how the rationality–excessiveness inquiry might come out.

On appeal, the Supreme Court vacated the Ninth Circuit's judgment on grounds of mootness.[74] Because the plaintiff in *Juvenile Male II* had turned twenty-one during the pendency of the case, he was no longer subject to ongoing registration as a special condition of supervision (which was imposed as a condition of his sentence in juvenile court).[75] Without an ongoing injury, the Court found that the Ninth Circuit lacked jurisdiction to consider the case on the merits.[76] Given the purely procedural nature of the Supreme Court's *Juvenile Male II* ruling, it remains an open question whether sex offender registration is punitive when applied to juveniles.

Since *Juvenile Male II*, several academic articles have contended that sex offender laws are punitive in effect under *Mendoza-Martinez* when applied to juveniles.[77] In applying the rationality–excessiveness inquiry, each article has cited evidence showing that sex offender laws do not meaningfully serve their purported goals, such as reducing recidivism and protecting the public.[78] In particular, the articles point to juvenile offenders' diminished threat to society, their chances for rehabilitation, and other developmental characteristics that make sex offender registration counterproductive.[79] What these articles have failed to do, however, is show how this evidence can render these laws excessive and irrational in light of the presumption of constitutionality. Since sex offender laws typically contain some empirical support,[80]

72. *Juvenile Male II*, 590 F.3d at 927.

73. *Id.* at 941.

74. United States v. Juvenile Male, 564 U.S. 932, 933 (2011).

75. *Id.* at 933–34.

76. *Id.*

77. Catherine L. Carpenter, *Against Juvenile Sex Offender Registration*, 82 U. CIN. L. REV. 746 (2014); Amy E. Halbrook, *Juvenile Pariahs*, 65 HASTINGS L.J. 1 (2013); Robin Walker Sterling, *Juvenile-Sex-Offender Registration: An Impermissible Life Sentence*, 82 U. CHI. L. REV. 295 (2015); Jessica E. Brown, Student Work, *Classifying Juveniles "Among the Worst Offenders": Utilizing* Roper v. Simmons *to Challenge Registration and Notification Requirements for Adolescent Sex Offenders*, 39 STETSON L. REV. 369 (2010); Shannon C. Parker, Note, *Branded for Life: The Unconstitutionality of Mandatory and Lifetime Juvenile Sex Offender Registration and Notification*, 21 VA. J. SOC. POL'Y & L. 167 (2014).

78. *See* Carpenter, *supra* note 77, at 748–51; Halbrook, *supra* note 77, at 1; Sterling, *supra* note 77, at 296; Brown, *supra* note 77, at 369–70; Parker, *supra* note 77, at 194–96.

79. *See* Carpenter, *supra* note 77, at 754–55; Halbrook, *supra* note 77, at 8–17; Sterling, *supra* note 77, at 296; Brown, *supra* note 77, at 369–70; Parker, *supra* note 77, at 194–96.

80. *See, e.g.*, Smith v. Doe, 538 U.S. 84, 103 (2003) (pointing to the "frightening and high" recidivism rates among sex offenders (quoting McKune v. Lile, 536 U.S. 24, 34 (2002))).

courts have no reason to consider conflicting evidence when conducting a rational basis test.[81]

II. Juvenile Offenders and the Presumption of Constitutionality

Since *Smith*, courts have conducted the ex post facto inquiry in a highly deferential manner, applying the typical presumption of constitutionality. Nonetheless, this Part contends that the presumption is inappropriate when considering laws that burden juvenile offenders. Section II.A provides a brief background on the Supreme Court's suspension of the presumption in the equal protection context. Section II.B reviews the rationales underlying the presumption, demonstrating how those rationales are inapplicable in the context of retroactive laws that burden juvenile offenders.

A. *Presumption Suspended:* Carolene Products *and Its Progeny*

The presumption of constitutionality forms the background against which courts have considered almost all constitutional challenges to legislation.[82] Even though it is "emphatically the province and duty of the judicial department to say what the law is,"[83] declaring legislation unconstitutional remains "the gravest and most delicate duty that this Court is called on to perform."[84] Courts therefore go to great lengths to avoid invalidating legislation on constitutional grounds, presuming any state of facts necessary to satisfy whatever test must be applied to the legislation.[85]

The most-cited narrowing of this presumption can be found in footnote four in *United States v. Carolene Products*. Considering a constitutional challenge to the Filled Milk Act, the Court began with the premise that "the existence of facts supporting the legislative judgment is to be presumed."[86] In a footnote at the end of that same sentence, however, the Court implied

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But see Does v. Snyder, 834 F.3d 696, 704–05 (6th Cir. 2016) (finding that Michigan's SORA lacked any meaningful empirical support).

81. *See Smith*, 538 U.S. at 105 ("The excessiveness inquiry of our ex post facto jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy."); United States v. Shannon, 511 F. App'x 487, 492 (6th Cir. 2013) ("[A] lower rate of recidivism among juveniles does not equate to no recidivism, and even if adults have a higher recidivism rate, that does not mean that registration requirements are excessive.").

82. Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 436 (1827) ("It has been truly said, that the presumption is in favour of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality.").

83. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

84. Blodgett v. Holden, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring).

85. *See* Lawrence v. State Tax Comm'n, 286 U.S. 276, 283 (1932) ("[The presumption of constitutionality] attaches to all legislative acts, and would require us to assume that there is no state of facts reasonably to be conceived which could afford a rational basis for [supporting constitutionality].").

86. United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

that it might be willing to take a more exacting look at legislation that displays prejudice against "discrete and insular minorities" which "tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[87] In those circumstances, as well as situations implicating fundamental rights, there may be a "narrower scope for operation of the presumption of constitutionality."[88]

In the wake of footnote four came a line of cases under the Equal Protection Clause where certain minorities successfully challenged legislation that treated their particular group unfavorably.[89] Instead of ordinary "rational basis" review, the Supreme Court articulated more exacting standards for equal protection review of legislation that discriminated based on certain designated "suspect classifications," including race,[90] national origin,[91] alienage,[92] gender,[93] and perhaps illegitimacy.[94] For such classifications, courts no longer ask if "there is an evil at hand for correction, and [whether] it might be thought that the particular legislative measure was a rational way to correct it."[95] Instead, courts take a closer look at the evidence supporting the legislation to determine whether the legislature's measure was "narrowly tailored [to serve a] compelling government interest[ ]"[96] or "substantially related to" achievement of an important government interest,[97] depending on the case.

Furthermore, a law need not affect a suspect class for a court to suspend the presumption of constitutionality. Even in the equal protection context, courts have refused to apply heightened scrutiny to laws impacting certain groups while nonetheless taking a more exacting look at such legislation than they would under ordinary rational basis review.[98] The first in this line of cases was *U.S. Department of Agriculture v. Moreno*.[99] In that case, the Court invalidated an amendment to the Food Stamp Act that excluded any household containing an individual unrelated to any other member of the household from the program.[100] Looking at the legislative history, the Court

87. *Id.* at 153 n.4.

88. *Id.* at 152 n.4.

89. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982); Craig v. Boren, 429 U.S. 190 (1976); Brown v. Bd. of Educ., 347 U.S. 483 (1954), *supplemented by* 349 U.S. 294 (1955).

90. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

91. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (recognizing national origin as a suspect class in dictum).

92. Graham v. Richardson, 403 U.S 365, 372 (1971).

93. *Craig*, 429 U.S. at 210.

94. *See* Mathews v. Lucas, 427 U.S. 495 (1976).

95. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

96. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

97. *Craig*, 429 U.S. at 197.

98. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (finding that requiring a special use permit for a group home for the mentally disabled violated the Equal Protection Clause because it was motivated by animus against an unpopular group).

99. *See* 413 U.S. 528 (1973).

100. *Moreno*, 413 U.S. at 538.

determined that the amendment was adopted to exclude "hippies" from the program.[101] This motivation could not constitute a rational basis, the Court held, because naked animus toward a politically unpopular group is not a legitimate government interest.[102] The Court used similar reasoning to invalidate a zoning ordinance preventing the construction of a home for the mentally disabled.[103] And in *Romer v. Evans*, the Court used its "animus" approach to invalidate a state constitutional amendment banning civil rights protections for homosexuals.[104] In doing so, the Court acknowledged that the legislation possessed a rational basis, but found that the animus behind the legislation defeated any rational basis that might be claimed in its favor.[105] In stark contrast to traditional rational basis review, the Court in *Romer* did not assume all facts necessary to pass a rational basis test.[106]

A brief aside is necessary to explain the relevance of the Court's animus jurisprudence to this Note. This Note does not argue that sex offender laws, or any other law dealing with ex-offenders for that matter, are invalid due to animus. Instead, this Note takes the Court's animus line to evince a constitutional concern with laws that seek to harm politically unpopular groups. The Court's articulation of a framework whereby the existence of one impermissible factor—in the above cases, animus—may outweigh or negate other permissible factors will also be relevant later in this Note in its discussion on certain "triggers" that may render legislation excessive.

The relevant question for purposes of this Part is not *how* such an inquiry might be conducted, but rather *why* courts choose to conduct such an inquiry. The heightened scrutiny line of cases, together with *Carolene Products*, have led scholars to discern several important factors that compel a court to extend such scrutiny to legislation affecting a certain class. Three of those factors are relevant to this Note's analysis: (1) political powerlessness, (2) immutability, and (3) a history of discrimination.[107]

At first blush, relying on the key factors noted above, it would appear that juvenile offenders have all the makings of a protected class under *Carolene Products*. They are politically disempowered in two respects. As felons, they are unable to vote after release from prison in thirty-five states,

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101. *Id.* at 534.

102. *Id.*

103. *City of Cleburne*, 473 U.S. at 446–47 (citing *Moreno*, 413 U.S. at 534).

104. 517 U.S. 620, 632–36 (1996).

105. *Romer*, 517 U.S. at 635.

106. *See* Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 377, 396 (2012) ("The [*Romer*] Court never stated the standard of review that it was applying, but it appeared to place the burden of proving the law's rationality and legitimacy squarely on Colorado.").

107. Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV 1191, 1207 (2006). The fourth and final factor, inherent suspicion, deals with a line of cases that suggest that certain classifications are inherently suspicious. *Id.* at 1214. This factor typically only emerged in the context of race-based classifications, *id.*, and therefore does not play a role in an analysis of juvenile offenders as a class.

and are permanently disenfranchised in four states.[108] Additionally, as juveniles, they are unable to vote prior to turning eighteen in most jurisdictions in the United States.[109] The question of immutability is trickier with respect to juveniles. While everyone will eventually change the characteristic of their youth, it is impossible to change the trait at a given moment, and children did not choose to enter into the classification of being a juvenile. Ultimately, whether youth is immutable depends on the appropriate definition of immutability, a matter that is far from a settled.[110] At the very least, one plausible definition of immutability (that an immutable trait is one that is not chosen by its possessor)[111] would treat youth as an immutable characteristic. Finally, children have faced discrimination, albeit of a widely socially tolerable variety, throughout history.[112] Nonetheless, no court has explicitly recognized ex-offenders, juveniles, or juvenile offenders, as a suspect class, and many have outright rejected that characterization.[113]

Merely falling within the letter of footnote four, then, is insufficient to accord a class protected status. Indeed, some consider classifying any group of ex-offenders as a suspect class to be a most absurd extension of the *Carolene Products* principles.[114] Many groups have faced a history of discrimination and political disempowerment due to immutable characteristics; to designate each of those groups as protected classes would effectively destroy the presumption of constitutionality, turning the Equal Protection Clause into an ever-present referee of the legislative process, designating the minority the eternal winners and the majority eternal losers.

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108. The Sentencing Project, Fact Sheet: Felony Disenfranchisement 4 (2014), http://www.sentencingproject.org/wp-content/uploads/2015/12/Felony-Disenfranchisement-Laws-in-the-US.pdf [https://perma.cc/WJQ8-PX4E].

109. *But see* Elena Schneider, *Students in Maryland Test Civic Participation and Win Right to Vote*, N.Y. Times, Jan. 9, 2015, at A12, https://www.nytimes.com/2015/01/10/us/politics/students-in-maryland-test-civic-participation-and-win-right-to-vote.html?_r=0 [https://perma.cc/6AUU-ZHB6] (discussing two cities in Maryland that lowered the voting age to 16).

110. *See* Michael A. Helfand, *The Usual Suspect Classifications: Criminals, Aliens and the Future of Same Sex Marriage*, 12 U. Pa. J. Const. L. 1, 3–9 (2009) (discussing competing definitions of immutability and arguing in favor of a definition of immutability that depends on whether someone "chose" to enter into their classification).

111. *See id.* at 47.

112. *See, e.g.*, Brant K. Brown, Note, *Scrutinizing Juvenile Curfews: Constitutional Standards & the Fundamental Rights of Juveniles & Parents*, 53 Vand. L. Rev. 653, 671–72 (2000) (discussing various ways in which children have been discriminated against throughout history, including prohibitions on purchase of "girlie" magazines and selling magazines in a public place, as well as prohibitions on driving and voting).

113. *See* Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (refusing to recognize age as a suspect classification under the Equal Protection Clause); United States v. Juvenile Male (*Juvenile Male III*), 670 F.3d 999, 1008 (9th Cir. 2012) (finding that juvenile sex offenders over the age of fourteen were not a suspect class under the Equal Protection Clause); United States v. LeMay, 260 F.3d 1018, 1030 (9th Cir. 2001) ("Sex offenders are not a suspect class.").

114. *E.g.*, Jessica A. Clarke, *Against Immutability*, 125 Yale L.J. 2, 84 (2015) (warning against the "slippery slope" of expanding equal protection and characterizing ex-offenders as "the reductio ad absurdum of expansive concepts of the protected class").

B. *Rationales for the Presumption and Juvenile Offenders in the Ex Post Facto Context*

This Section will outline the basic rationales for the presumption of constitutionality and explain how they are inapplicable to laws that burden juvenile offenders and to the ex post facto inquiry. As established above, extending protected status to juvenile offenders on the basis of the *Carolene Products* principles alone would prove too much. In order to advocate for a suspension of the presumption for juvenile offenders, then, it is necessary to look beyond the face of *Carolene Products* and its progeny to determine the scope of the presumption of constitutionality. This Section focuses on the basic rationales underlying the presumption in order to determine its breadth. If those rationales are inapplicable, the presumption ought not to apply.

There are four rationales for the presumption of constitutionality. First, courts presume constitutionality because legislatures are democratically accountable.[115] Legislators, not courts, are chosen directly by the people, and it is the legislators who have been entrusted with the responsibility to make sensitive policy decisions.[116] Second, the presumption is justified by the institutional superiority of the legislature.[117] While the process of judicial factfinding is a narrow one—pertaining only to the parties before the court—the legislative process is more far-reaching: legislatures conduct hearings, consult experts, and take testimony over a long period of time.[118] Third, the presumption is grounded in "due respect" for legislators: as a coordinate branch of government, the judiciary should respect the determinations of the legislature.[119] Finally, the presumption is based on considerations of administrability: a finding of unconstitutionality inevitably gives rise to a host of new lawsuits and may slow down the legislative process in the future.[120]

The intuition underlying the democratic accountability rationale is that the Constitution embodies certain republican ideals, including the proposition that "policy decisions should be made by the legislators who are accountable to the people through elections."[121] By electing lawmakers, voters decide whom they trust to make certain policy determinations.[122] When a

115. F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 Notre Dame L. Rev. 1447, 1469 (2010).

116. *Id.* (citing John Hart Ely, Democracy and Distrust 74 (1980)).

117. *Id.* at 1472.

118. *See id.* at 1473 ("Legislatures have more resources than courts to gather information—they have large staffs, general subpoena power, and large institutions such as the Congressional Research Service to facilitate their factfinding . . . .").

119. *Id.* at 1462 (quoting United States v. Morrison, 529 U.S 598, 607 (2000)). The due-respect rationale closely resembles the legitimacy rationale—namely, the rationale that overturning legislation threatens the legitimacy of the legislature. *See id.* at 1483. For purposes of this Note, they will be discussed as one and the same.

120. *Id.* at 1482.

121. *Id.* at 1469 (citing Ely, *supra* note 116, at 74).

122. *See id.*

court strikes down democratically enacted laws, it runs the risk of displacing a legislature's policy judgments with its own, thereby impeding the democratic process.[123] When plaintiffs—be they bakery owners, kosher butchers, or opticians—are negatively impacted by certain laws, their grievances may be expressed through the democratic process.[124]

In the case of juvenile offenders, however, the democratic-accountability rationale is inapplicable.[125] As *Carolene Products* and later cases recognize, this rationale necessitates a well-functioning democratic process.[126] When the individuals impacted by a law have had no say in its passage, there is less reason to privilege the viewpoints of legislators over those of unelected judges by virtue of their accountability to voters. From the perspective of a disenfranchised juvenile felon, the judge and the legislator look exactly the same: he didn't elect either of them.[127] Through this lens, the case of juvenile offenders is particularly compelling. Not only are juvenile offenders precluded from voting by virtue of their age,[128] it is possible they will remain disenfranchised into some of their adulthood, and perhaps the rest of their lives.[129]

Moreover, for juvenile offenders—particularly juvenile sex offenders—it makes little difference that parents may represent the juvenile offenders' interests through the democratic process. For sex offenders, any surrogate voice that an offender's parents might provide must contend with the cacophony of worried parents who fear that their child will be the next victim of a sex offender, and not that their child will become a sex offender himself.[130] And while other types of juvenile offenders may not face the same prejudice, many lack one or both parents to act as stand-ins in the political

123. *Id.*

124. *See id.* ("If the people disapprove of legislation, they may replace their representatives in Congress, and the new representatives may enact more popular laws.").

125. *See* Ramos v. Town of Vernon, 353 F.3d 171, 181 (2d Cir. 2003) (noting that juveniles' lack of a right to vote places youth outside of "those political processes ordinarily . . . relied upon to protect minorities" (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)) (internal quotation marks omitted)).

126. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 628 (1969) ("The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people." (footnote omitted)); United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (discussing prejudice "which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities").

127. *See* discussion *supra* Section I.A.

128. Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of the Electoral Majority*, 77 Brook. L. Rev. 1447, 1448 (2012) ("The voting age in every U.S. state is eighteen . . . .").

129. *See* The Sentencing Project, *supra* note 108, at 1.

130. *See* Kristen M. Zgoba, *Spin Doctors and Moral Crusaders: The Moral Panic Behind Child Safety Legislation*, 17 Crim. Just. Stud. 385, 386 (2004) (discussing how sensationalized media coverage of child abductions and sex crimes have created a "fear factor" among parents, leading them to demand stricter restrictions on sex offenders).

process. A 2010 survey revealed that less than half of youths in custody were raised by both parents; 11% were not raised by either parent.[131]

The institutional-superiority rationale is similarly inapplicable.[132] Under this rationale, courts should defer to legislatures because legislatures have more expertise, better resources, and greater "familiarity with [the] local conditions" that gave rise to the legislation in question.[133] But the reach of this rationale is unclear, since a court has more expertise than a legislature on certain matters. For example, the Supreme Court has refused to defer to the legislature on whether a certain activity has a substantial impact on interstate commerce, considering it a "judicial[,] rather than a legislative, question."[134]

The structure of the Constitution and the Court's holdings illustrate that the determination of whether a law constitutes a punishment is much better suited for the judiciary than the legislature. The Bill of Attainder Clause prohibits the legislature from determining the guilt or innocence of a particular party or prescribing an appropriate punishment for a particular party.[135] The Court's subsequent interpretations of that clause reflect an understanding that the act of punishment is a judicial task.[136] Similarly, the Eighth Amendment limits the degree to which a legislature may impose punishment.[137] Through its Eighth Amendment jurisprudence, the Court has independently confronted factual questions regarding the excessiveness of a punishment.[138] If questions of such comparatively recent vintage as whether an activity has "a substantial relation to interstate commerce"[139] fall

131. Andrea J. Sedlak & Carol Bruce, *Youth's Characteristics and Backgrounds: Findings from the Survey of Youth in Residential Placement*, JUV. JUST. BULL., Dec. 2010, at 1, 6, https://www.ncjrs.gov/pdffiles1/ojjdp/227730.pdf [https://perma.cc/R7FD-J6QM].

132. *See generally* Hessick, *supra* note 115, at 1472.

133. *Id.* (quoting Leathers v. Medlock, 499 U.S. 439, 451–52 (1991)).

134. United States v. Morrison, 529 U.S 598, 614 (2000) (quoting United States v. Lopez, 514 U.S. 549, 557 n.2 (1995)).

135. U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1.

136. *See* United States v. Brown, 381 U.S. 437, 445 (1965) ("Thus the Bill of Attainder Clause . . . reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons."); Cummings v. Missouri, 71 U.S. 277, 323 (1866) ("[T]he legislative body . . . [passes a Bill of Attainder when it] exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilty of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; *and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence*." (emphasis added)).

137. U.S. CONST. amend. VIII.

138. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 67 (2010) (conducting "judicial exercise of independent judgment" to determine whether life without parole was excessive when applied to juveniles who did not commit homicide).

139. *Morrison*, 529 U.S. at 608–09 (quoting United States v. Lopez, 514 U.S. 549, 558–59 (1995)).

within the purview of judges, then whether something is punishment is also a judicial question.

In the case of laws targeting juvenile offenders, legislatures often prove an inferior forum to air the relevant facts and make policy decisions. In the mid to late nineties, state legislatures began to advocate a "get tough" approach to juvenile justice, advocating for more punitive sanctions for juvenile offenders.[140] These developments came despite declining juvenile crime rates.[141] A review of these developments suggests that legislators were pandering to the public's fears rather than responding to empirical data on the threats posed by juvenile offenders and the best way to abate those threats.[142] One study attributed this tendency to lawmakers' fear of public backlash: softening policies toward juvenile offenders, or any offenders for that matter, could spell the kiss of death for political careers.[143] Judges, by contrast, are not, and in our constitutional system must not be, subject to the pressures of public outrage.[144] Instead, we expect judges to make decisions calmly and without fear of popular reprisal.[145] Accordingly, judges are better suited to confront questions related to the punishment of juvenile offenders.

The administrability and due-respect rationales merit less discussion. Those concerns often arise when a court overturns legislation, yet the invalidation of a sex offender law does not implicate these concerns any more than other cases in which the court has invalidated legislation. Take, for instance, the Supreme Court's invalidation of federal legislation in *United States v. Lopez*.[146] In that case, the Court invalidated federal legislation prohibiting the possession of a gun on school grounds, finding that Congress did not have the power to make such a law.[147] This ruling raised due-

140. Sacha M. Coupet, Comment, *What to Do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1307 n.17 (2000).

141. Peter J. Benekos & Alida V. Merlo, *Juvenile Justice: The Legacy of Punitive Policy*, 6 YOUTH VIOLENCE & JUV. JUST. 28, 30 (2008).

142. Coupet, *supra* note 140, at 1307.

143. Benekos & Merlo, *supra* note 141, at 29.

144. *See* THE FEDERALIST NO. 78, at 453 (Alexander Hamilton) (Am. Bar Ass'n ed., 2009) ("This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.").

145. *Cf.* United States v. Brown, 381 U.S. 437, 445 (1965) ("Every one must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited—the very class of cases most likely to be prosecuted by this mode." (quoting 1 COOLEY, CONSTITUTIONAL LIMITATIONS 536–37 (8th ed. 1927))).

146. 514 U.S. 549 (1995).

147. *Lopez*, 514 U.S. at 567.

respect concerns by invalidating an act passed by a coordinate branch in its entirety.[148] The case also raised administrability concerns by opening the door to a host of new challenges to Congress's Commerce Clause power,[149] some of which were ultimately successful.[150] There is nothing special about the case of sex offender laws, or other related criminal justice statutes, that makes overturning them less respectful or less administrable than a ruling like *Lopez*.

Taken together, the inapplicability of each of the rationales for the presumption should lead courts to conduct a more exacting inquiry when evaluating sex offender laws that burden juveniles to determine whether they constitute punishment. This approach carries forward the principles of *Carolene Products* and its progeny by protecting a politically disempowered group, responding to legislatures' consideration of impermissible factors, and preserving the Court's ability to review legislation for constitutionality free from the biases of voting majorities.

III. Children Are Different: The *Miller* Line and the Presumption

While the Court has not explicitly suspended the presumption of constitutionality for laws that burden juvenile offenders, it has begun to move in that direction in a series of recent Fifth and Eighth Amendment cases related to juvenile sentencing and interrogation. Section III.A summarizes these cases and discusses three characteristics recognized in these cases that make children different for constitutional purposes. Section III.B examines the relevance of these three characteristics in the ex post facto context. Section III.C asserts that these cases herald a suspension of the presumption of constitutionality for laws that burden juvenile offenders.

A. *The* Miller *Line: The Constitutional Rights of Juveniles*

Recent Supreme Court decisions have created a special constitutional space for children. The underlying ethos of this jurisprudential shift is that "children are different."[151] Each case in this line recognizes certain distinguishing characteristics that make all children different for constitutional purposes.

148. *Id.* at 549.

149. Louis H. Pollak, *Foreword*, 94 Mich. L. Rev. 533, 551 (1995) ("There will, at a minimum, be substantial transaction costs in the form of litigation fleshing out what *Lopez* means.").

150. *E.g.*, United States v. Morrison, 529 U.S. 598, 602, 617 (2000) (finding the civil remedy of the Violence Against Women Act to be invalid as Commerce Clause legislation).

151. Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012).

The first of these cases dealt with the use of the death penalty on children. Christopher Simmons committed capital murder at the age of seventeen.[152] After he turned eighteen, he was sentenced to death.[153] In *Roper v. Simmons*, the Court found that Christopher's death sentence was unconstitutional, holding that carrying out the death penalty on anyone for a crime committed before the age of eighteen was per se unconstitutional under the Eighth and Fourteenth Amendments.[154] The Court based this conclusion on several factors. First, the Court noted that a majority of legislatures have proscribed the use of the death penalty on juveniles.[155] Additionally, and most relevant for the purposes of this Note, the Court recognized that children possess certain distinguishing characteristics that make them less deserving of the most severe punishments.[156] These characteristics are discussed at greater length in the following Section.

In *Graham v. Florida*, the Court expanded this per se ban to the sentence of life without the possibility of parole (LWOP) for juvenile offenders who did not commit homicide.[157] In that case, Terrance Graham was convicted of armed burglary, a crime he committed at the age of sixteen, and was sentenced to life in prison.[158] Because Terrance was convicted in Florida, a state that had abolished its parole system, Terrance had "no possibility of release except [by] executive clemency."[159] Looking again to national consensus, the Court found that only eleven states actually imposed LWOP for juvenile nonhomicide offenders (although twenty-six did allow it).[160] Following *Roper*, the Court pointed to the distinguishing characteristics that make juveniles less deserving of the most severe punishments.[161] In *Miller v. Alabama*, the Court went even further, holding mandatory LWOP unconstitutional for all juvenile offenders and allowing for LWOP to be imposed only after an individualized hearing.[162]

The principle that children are different is not limited to the sentencing context, or even the Eighth Amendment context. As the *Miller* Court recognized, "[I]t is the odd legal rule that does *not* have some form of exception for children."[163] In *J.D.B. v. North Carolina*, the Court carried the principle that children are different beyond the Eighth Amendment and held that a child's age properly informs the *Miranda* custody analysis under the Fifth

152. Roper v. Simmons, 543 U.S. 551, 556 (2005).

153. *Id.*

154. *Id.* at 578–79.

155. *Id.* at 568.

156. *Id.* at 568–75.

157. 560 U.S. 48, 82 (2010).

158. *Graham*, 560 U.S. at 48.

159. *Id.*

160. *Id.* at 64.

161. *Id.* at 69–71.

162. 132 S. Ct. 2455, 2475 (2012). The Court later held that *Miller* applies retroactively. Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

163. *Miller*, 132 S. Ct. at 2470.

Amendment.[164] In *J.D.B.*, the petitioner, a thirteen-year-old, was adjudicated delinquent in juvenile court based on statements obtained after officers questioned him in a closed-door conference room at his school.[165] The officers did not read J.D.B. his *Miranda* warnings.[166] J.D.B.'s public defender filed a motion to suppress, contending that the statement was unlawfully obtained since the questioning in the conference room constituted a custodial interrogation, which required *Miranda* warnings.[167] Whether there has been a custodial interrogation depends on two objective factors: the circumstances surrounding the interrogation and whether a reasonable person, in light of those circumstances, would feel at liberty to leave.[168] In *J.D.B.*, the Court found that courts must consider a child's age in conducting this analysis.[169] Instead of a "reasonable person" standard, the Court effectively imposed a "reasonable juvenile" standard for custody analysis.[170] In reaching its conclusion, the Court once again emphasized children's distinguishing characteristics.[171]

B. *Children's Differences*

Each case in the *Miller* line took notice of certain distinguishing characteristics borne by juveniles that make them different for constitutional purposes. Upon closer examination, these differences prove applicable and highly relevant in the ex post facto context.

First, the *Miller* line recognizes that children are more psychologically vulnerable and more susceptible to negative outside influences.[172] In *J.D.B.*, for example, the court reiterated that "events that 'would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.'"[173] This increased vulnerability is of particular importance in the *Miranda* analysis, since, as discussed above, *Miranda* protections attach only where, as an objective matter, the suspect would not feel at liberty to leave the interrogation setting.[174]

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164. 564 U.S. 261, 272, 274–75, 281 (2011).

165. *J.D.B.*, 564 U.S. at 265–68.

166. *Id.* at 266.

167. *Id.* at 266–67.

168. *Id.* at 270.

169. *Id.* at 271–72.

170. Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in* J.D.B. v. North Carolina *for Purposes of the* Miranda *Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 517 (2012).

171. *J.D.B.*, 564 U.S. at 272–77.

172. *Id.* at 275 (citing Roper v. Simmons, 543 U.S. 551, 569 (2005)).

173. *Id.* at 272 (quoting Haley v. Ohio, 332 U.S. 596, 599 (1948) (plurality opinion)).

174. *Id.* at 270 (citing Stansbury v. California, 511 U.S. 318, 322 (1994) (per curiam)).

Second, the *Miller* line declares that children are less culpable than their adult counterparts.[175] In his concurring opinion, Justice Breyer explained that this is because of a "lack of maturity and underdeveloped sense of responsibility."[176] Diminished culpability factors strongly into the inquiry regarding proportionality, which requires that a sanction be graded to the culpability of the offender, considering both the offender's characteristics and the severity of his offense.[177]

Third, the *Miller* line stands for the proposition that a child's criminal tendencies are not fixed, and that children are more likely to reform.[178] The Court based this conclusion on both "common sense" and "science and social science as well."[179] For example, studies have shown that only a small proportion of adolescent offenders "develop entrenched patterns of problem behavior."[180] The Court also noted "fundamental differences between juvenile and adult minds," especially in "parts of the brain involved in behavior control."[181]

As scholars have recognized, the characteristics recognized in the *Miller* line migrate quite easily to the Court's ex post facto doctrine.[182] The first characteristic—children's heightened vulnerability—bears on the "affirmative disability or restraint" factor of *Mendoza-Martinez*. As the Ninth Circuit recognized in *Juvenile Male*, what may be a trivial burden for an adult can be a significant one for a child.[183] This harm goes beyond the simple release of otherwise confidential information pertaining to juvenile justice proceedings. Current research shows that juvenile sex offenders are subject to harassment and have significant trouble finding a job, reintegrating, and finding housing as a result of registration and notification.[184]

The second characteristic—children's diminished culpability—is relevant to whether a measure is excessive in relation to its nonpunitive goal. Culpability might appear at first to be inapplicable in the ex post facto context. If children are indeed less culpable it should change the punishment

175. Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012) (citing Graham v. Florida, 560 U.S. 48, 72 (2010)).

176. *Id.* at 2475 (Breyer, J., concurring) (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)).

177. *Id.* (majority opinion).

178. *Id.* at 2464–65 (citing Graham v. Florida, 560 U.S. 48, 68 (2010)).

179. *Id.* at 2464 (citing Roper v. Simmons, 543 U.S. 551, 569 (2005)).

180. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

181. *Id.* (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)).

182. *See* Sterling, *supra* note 77, at 313 ("[E]ach of the Court's aforementioned [children are different] cases contributes to the reasoning necessary to hold that sex-offender registration is punishment for juveniles."); *see also* Parker, *supra* note 77 at 189–96 (reviewing social science research on juveniles to demonstrate its impact on each of the *Mendoza-Martinez* factors).

183. *See* United States v. Juvenile Male (*Juvenile Male II*), 590 F.3d 924, 926 (9th Cir. 2009).

184. *See* Halbrook, *supra* note 77, at 17 (discussing the special burdens on juvenile sex offenders and their families associated with registration).

they receive, but it should not bear on whether or not something is a punishment in the first place. Still, while courts have not yet considered culpability as a factor in the ex post facto context, it has played a role in the similar rational basis test of the Equal Protection Clause.[185] Additionally, courts consider a host of factors when determining whether a sanction is excessive,[186] and culpability intuitively factors into such a test. For example, consider a hypothetical punishment that, to keep streets clean, requires civil commitment of those who have littered. In that case, the low blameworthiness of litterers (in reference to the offense) weighed against the severe burden of civil commitment would be a factor in determining whether the burden is excessive in relation to its goal. Similarly, the low culpability of juvenile offenders (in reference to their characteristics) is relevant to whether sex offender registration is excessive in relation to its goal.

The third characteristic—that children have greater prospects for reform—strongly implicates the rationality–excessiveness prong of the Court's *Mendoza-Martinez* analysis: whether the measure is rationally related to a nonpunitive purpose and whether it is excessive in relation to that purpose. While the Court in *Smith* made only brief references to empirical data on recidivism, it placed a significant weight on the high recidivism statistics among sex offenders.[187] For juvenile offenders, however, recidivism rates are low.[188] One study, for example, revealed that juvenile sex offenders were significantly less likely than other juvenile offenders to be charged with any general or felony offense after release.[189] Additionally, juvenile sex offenders do not show a significantly different rate of recidivism for sexual offenses as compared to other juvenile offenders.[190] Further, juvenile sex offenders are more likely than adult sex offenders to cease inappropriate sexual behavior if

185. *See* Plyler v. Doe, 457 U.S. 202, 220 (1982) (finding that a state lacked a rational basis for discriminating against undocumented children in education because it imposed a burden on the basis of "a legal characteristic over which [the] children can have little control," and that there was no rational justification "for penalizing these children for their presence within the United States").

186. *See* Smith v. Doe, 538 U.S. 84, 103–05 (2003) (considering the geographical reach, risk assessment, and length of time of sex offender registration).

187. *See id.* at 103 (citing McKune v. Lile, 536 U.S. 24, 34 (2002)).

188. Michael F. Caldwell, *Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Offenders*, 19 SEX ABUSE 107 (2007) [hereinafter Caldwell, *Sexual Offense Adjudication*]; Halbrook, *supra* note 77, at 13 (citing Michael F. Caldwell et al., *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism*, 14 PSYCHOL. PUB. POL'Y & L. 89, 101 (2008)) (discussing juvenile sex offenders' low rates of recidivism); Elizabeth J. Letourneau & Kevin S. Armstrong, *Recidivism Rates for Registered and Nonregistered Juvenile Sex Offenders*, 20 SEXUAL ABUSE: J. RES. & TREATMENT 393, 403 (2008); Franklin E. Zimring et al., *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort Study*, 26 JUST. Q. 58, 58 (2009); Franklin E. Zimring et al., *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?*, 6 CRIMINOLOGY & PUB. POL'Y 507, 522 (2007)).

189. Caldwell, *Sexual Offense Adjudication*, *supra* note 188, at 110.

190. *Id.*

they receive appropriate treatment.[191] Between the Court's recognition of juvenile offenders' greater prospects for reform[192] and the scholarly recognition of juvenile sex offenders' low recidivism rates, the Court has good reason to consider juvenile sex offender registration excessive in relation to its nonpunitive goal.

C. *The* Miller *Line and the Presumption of Constitutionality*

Beyond recognizing basic facts about juveniles, the *Miller* line reflects the Court's willingness to take a more exacting look at government measures that impact juveniles. In the Eighth Amendment context, the Court has been generally hesitant to strike down punishments as cruel and unusual.[193] What has motivated the Court in the *Miller* line, unlike past Eighth Amendment cases, was not the nature of the punishment, but the nature of the punished. With the exception of *Atkins v. Virginia* (striking down the death penalty when used on someone who was mentally disabled),[194] the *Miller* line represents the only instance where the Supreme Court has carved out a specific class of individuals who may not be subject to certain punishments.

Additionally, the methodology in *Miller* exhibited less deference to legislatures than previous cases. Instead of conducting its usual "objective indicia" analysis—tallying the laws of each state to ascertain national consensus before exercising its judgment (a rough form of deference)—the *Miller* Court relied exclusively on precedent and empirical data.[195] Tallying was inappropriate in *Miller*, according to Justice Kagan, because the case involved the requirement of more process before punishment, rather than a categorical bar on certain punishments.[196]

Nonetheless, scholars have recognized that the methodology employed by Justice Kagan in *Miller* is widely applicable throughout Eighth Amendment cases.[197] Professor Ian Farrell sees *Miller* as paving the way for the Court to employ a strict scrutiny analysis to punishments that impact particular groups (such as children or the mentally disabled), punish certain crimes (such as crimes of omission), or are of a certain severity (death).[198]

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191. Halbrook, *supra* note 77, at 11 (citing Ass'n for the Treatment of Sexual Abusers, A Reasoned Approach: Reshaping Sex Offender Policy to Prevent Child Sexual Abuse 15 (2011)).

192. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (citing Graham v. Florida, 560 U.S. 48, 68 (2010)).

193. *See, e.g.*, Ewing v. California, 538 U.S. 11, 28–31 (2003) (affirming sentence of twenty-five years to life in prison under a three strikes law).

194. 536 U.S. 304 (2002).

195. Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 Fla. St. U. L. Rev. 853, 900–01 (2013) (citing Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012)).

196. *See Miller*, 132 S. Ct. at 2471 (citing Graham v. Florida, 560 U.S. 48, 68 (2010)).

197. *See, e.g.*, Farrell, *supra* note 195, at 902–03.

198. *See id.* at 856–57.

The process-versus-categorical-bar distinction, Farrell recognizes, has no basis in precedent.[199] After all, the Court looked to objective indicia in past Eighth Amendment "process" cases.[200] This quibble may not have much bearing on a discussion of juvenile sex offender registration, since a finding that registration is excessive in relation to its nonpunitive goal may only require individualized assessment for future risk (i.e., more process).[201] Whatever the methodological implications of *Miller*, each case in the *Miller* line demonstrates the Court's willingness to rely on empirical data and independent judgment instead of deferring to legislative judgment when considering sanctions that burden juveniles.[202]

Given the methodology of the *Miller* line, and *Miller* in particular, it appears that the Court is moving toward a suspension of the presumption of constitutionality for government actions that impact juvenile offenders. The weakness of the rationales discussed in Part II, together with the principles of the *Miller* line, command a suspension of the presumption.

IV. Three Triggers: A Proposed Framework

The previous two Parts explained why a departure from the presumption of constitutionality is appropriate when assessing laws that burden juvenile offenders. This Part briefly details how the Court should conduct the ex post facto inquiry for laws that impact juvenile offenders after suspending the presumption of constitutionality. This Part contends that courts should find laws punitive when they impose requirements on juvenile offenders that are (1) irrevocable for life, (2) substantially likely to cause objectively severe psychological harm, or (3) grossly disproportionate to the offender's culpability.

Typically, after a court suspends the presumption of constitutionality, it will conduct an inquiry that is more searching than rational basis review.[203] Under the Equal Protection Clause, courts apply tiers of scrutiny.[204] For classifications on the basis of race, for example, courts apply strict scrutiny, asking whether the measure in question is narrowly tailored to serve a compelling government interest.[205] The lowest tier of scrutiny above simple rational basis is the Court's rational basis plus test.[206] Under that test, the

199. *See id.* at 902–03.

200. *Id.* at 902 (citing Woodson v. North Carolina, 428 U.S. 280, 288 (1976)).

201. *See* Halbrook, *supra* note 77, at 54 (arguing for individualized risk assessment before a juvenile is placed on a sex offender registry).

202. Even where the Court did tally the legislative pronouncements of other states, the Court did not find them "determinative" of the Eighth Amendment question, and turned to "[t]he judicial exercise of independent judgment." Graham v. Florida, 560 U.S. 48, 67 (2010); *see, e.g.*, *id.* at 67–71 (considering social science data and precedent in determining that LWOP for juvenile offenders did not serve legitimate penological goals).

203. *E.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

204. *See id.*

205. *Id.*

206. *See* Romer v. Evans, 517 U.S. 620, 635 (1996).

existence of animus toward a particular community overrides any rational basis that might exist for the legislation and renders the law constitutionally invalid.[207]

When analyzing laws that impact juvenile offenders, courts should apply a standard similar to the Court's rational basis plus approach. Instead of having animus defeat a rational basis, however, three "triggers" should hold the place of "animus." If any one of these triggers is activated by a law, courts should find that the law is excessive in relation to its nonpunitive purpose and declare the law punitive. These three triggers—(1) lifetime irrevocability, (2) substantial likelihood of objectively severe psychological harm, and (3) gross disproportionality—closely track the three principles of the Court's "children are different" jurisprudence discussed above.[208]

The value of this trigger-based framework becomes clear when applied specifically to laws requiring retroactive juvenile registration. Under the first trigger, courts should invalidate juvenile registration as an ex post facto punishment if it imposes registration that is irrevocable for life. This closely relates to the idea that children have greater prospects for reform.[209] Lifetime juvenile registration runs afoul of this ideal. First, lifetime registration has been shown to impede reform: for example, registration socially isolates juveniles, potentially increasing criminal behavior.[210] Second, and relatedly, the Court has recognized that most juveniles outgrow criminal behavior,[211] and that such behavior is largely attributable to youthful characteristics.[212] In light of this, it is manifestly senseless to force them to register as offenders until the day of their death. This trigger, unlike the following two, is suited to a facial challenge: if a statute imposes lifetime irrevocability, it is invalid in all applications.

Under the second trigger, courts should consider juvenile registration punitive where it is substantially likely to cause objectively severe psychological harm. As the Court has recognized, juveniles are more vulnerable than adults.[213] Research into juvenile sex offenders corroborates this judicial declaration. As one scholar has noted,

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207. *See id.*

208. *See* discussion *supra* Part III.

209. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (citing Graham v. Florida, 560 U.S. 48, 68 (2010)).

210. *See* Halbrook, *supra* note 77, at 17 (citing Richard Tewksbury, *Experiences and Attitudes of Registered Female Sex Offenders*, 68 FED. PROBATION 30, 31 (2004)) (discussing the isolation that results from sex offender registration and residency restriction, which may potentially increase risky delinquent or criminal behavior); Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, ANALYSES SOC. ISSUES & PUB. POL'Y, Dec. 2007, at 1, 3–4.

211. *See Miller*, 132 S. Ct. at 2464 (citing Roper v. Simmons, 543 U.S. 551, 570 (2005)).

212. *Id.* at 2464–65 ("We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences . . . enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" (quoting Graham v. Florida, 560 U.S. 48, 68 (2010))).

213. J.D.B. v. North Carolina, 564 U.S. 261, 273 (2011) (citing Roper v. Simmons, 543 U.S. 551, 569 (2005)).

> Research on adolescent brain development indicates that youth are particularly vulnerable to the stigma and isolation that registration and notification create. To be labeled and therefore self-identified as a "sex offender" as a child will likely permanently undermine a person's self-worth and create lasting mental health problems such as depression and substance abuse.[214]

This trigger also relates to the above-referenced ideal that children have great prospects for reform. With severe psychological trauma comes a potentially greater likelihood of reoffending.[215] Precisely what constitutes objectively severe psychological trauma remains an open and difficult question. Nonetheless, there are many areas of law courts may look to for guidance. Common law doctrine surrounding negligent and intentional infliction of emotional distress, for example, is rife with line drawing regarding psychological injuries.[216] This trigger would be evaluated under an as-applied rubric. That is to say, the psychological damage must be severe for the particular offender, taking into account the offender's predisposition.

Finally, courts should consider juvenile registration punishment when it is grossly disproportionate to the offender's culpability, both in reference to the severity of his offense and his distinguishing characteristics. This trigger responds to juveniles' reduced culpability.[217] As discussed above, the relation between the sanction and a person's culpability bears on whether the matter is excessive in relation to a nonpunitive purpose; when a government measure necessitates the infliction of a grossly disproportionate burden, the possibility of excess grows.[218] Take, for example, the case of Alexander D. Alexander is currently subject to registration requirements because he had sex with his fifteen-year-old girlfriend when he was seventeen.[219] Alexander's diminished culpability (as well as his diminished dangerousness) makes his registration obligations excessive. In a case like Alexander's, the third trigger should be activated, making his long-term registration a punishment that is prohibited by the Ex Post Facto Clause. This prong allows for a tailoring of the registration period to meet the requirements of proportionality, since it is the length, and not the fact, of a term of registration that makes it disproportionate. Similar to the second trigger, challenges under this trigger would be brought as applied.

A likely criticism of the last two triggers is that they require case-by-case analysis, leading to costly litigation and unequal outcomes. This may be the case, but it is the very risk *Miller* and *J.D.B.* insist we take. Because of the

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214. Parker, *supra* note 77, at 192 (quoting Nastassia Walsh & Tracy Velazquez, *Registering Harm: The Adam Walsh Act and Juvenile Sex Offender Registration*, CHAMPION, Dec. 2009, at 20, 23).

215. *See* Halbrook, *supra* note 77, at 17.

216. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965) (discussing what constitutes "severe" emotional distress).

217. *See Miller*, 132 S. Ct. at 2464–65 (citing Graham v. Florida, 560 U.S. 48, 68–69 (2010)).

218. *See* discussion *supra* Section III.B.

219. HUMAN RIGHTS WATCH, *supra* note 1, at 37–38.

special circumstances of juveniles, individualized consideration in matters of juvenile justice are especially important.[220] Though *Miller* may be read to require only individualized consideration for the most severe punishments, *J.D.B.* expanded the requirement of individualized consideration beyond punishment. In creating a "reasonable juvenile" standard for the Miranda custody analysis, *J.D.B.* opted in favor of a less administrable solution for the sake of protecting juveniles' constitutional rights.[221] With these cases comes a recognition that uniform solutions and hard-and-fast rules will not suffice when it comes to juveniles.

Another potential criticism of this framework is that it is inferior to a legislative solution. It might instead be preferable to alter sentencing guidelines or allow for individualized consideration in the sex offender statutes themselves. Such a solution would admittedly be more administrable and uniform. While such a solution would be preferable, political realities preclude it. For reasons discussed above, legislatures have proven a poor forum for considering the rights of juvenile offenders.[222] The lack of political will to soften restrictions on juvenile offenders, together with the lack of democratic accountability to juvenile offenders, makes the development of sound policy in this area highly unlikely.[223]

Condensing the excessiveness inquiry for juveniles into three triggers allows a legislature to continue juvenile registration in cases where it remains reasonable. Unlike a strict scrutiny test, the state need not show that its scheme is nearly perfect. Instead, it need only show that the legislation avoids certain pitfalls.

Conclusion

Without a presumption of constitutionality, the Court could conduct the *Mendoza-Martinez* analysis without a thumb on the scale in favor of the legislation's constitutionality. It is appropriate to suspend the presumption because of the legislature's lack of democratic accountability to juvenile offenders, as well as its comparative lack of institutional competence in areas relating to juvenile crime and punishment. In lieu of the current *Mendoza-Martinez* analysis, courts should adopt a new framework. Under the new framework, courts should determine that sanctions constitute punishment where one of three triggers is activated. Assuming the soundness of previous scholarship relating to juvenile sex offender registration, it will not be difficult for plaintiffs to demonstrate that juvenile sex offender registration—as currently administered—activates one of these triggers, and does so frequently.

220. *See Miller*, 132 S. Ct. at 2467.

221. *See* J.D.B. v. North Carolina, 564 U.S 261, 271–81 (2011).

222. *See* discussion *supra* Section II.B.

223. *See* discussion *supra* Section II.B.