

Apprendi's Limits[†]

An unprecedented transformation has occurred in the law of criminal sentencing. Although that transformation once drew less attention than it deserved, it has now provoked remarkable public comment.¹ In particular, two pending cases invite the Court to interpret last year's decision, *Blakely v. Washington*,² which one jurist heralded as "the most important criminal justice decision, not just of this past term, not just of this decade, . . . but perhaps in the history of the Supreme Court."³ The excitement is understandable. Academic and popular commentators have unanimously construed *Blakely* to mean that the Federal Sentencing Guidelines violate the Fifth and Sixth Amendments; such a conclusion would invalidate many thousands of sentences and would alter the implementation of federal criminal law forever.⁴

[†]Assistant Professor, Temple University Law School. Special thanks to David A. Hoffman, and Neil S. Siegel, who commented on earlier drafts of this article. Many thanks also to Kathryn Davidson for her thorough and prompt research assistance.

¹E.g., Joan Biskupic, *High Court Sows Confusion*, U.S.A. TODAY, July 12, 2004, at A3; Adam Liptak, *Sentencing Decision's Reach Is Far and Wide*, N.Y. TIMES, June 27, 2004, at A14; David G. Savage & Henry Weinstein, *Ruling Could Change Sentencing Nationwide*, L.A. TIMES, June 25, 2004, at A24; Henry Weinstein, *Ruling Causes Uncertainty in Sentencing*, L.A. TIMES, July 22, 2004, at A14.

²124 S. Ct. 2531 (2004).

³Douglas Berman, *Supreme Court Cleanup in Aisle 4: Blakely Is Too Big and Messy To Ignore*, at <http://slate.msn.com/id/210404> (July 16, 2004).

⁴See *supra* sources cited in note 1; accord, e.g., Bob Egelko, *Supreme Court Creates Seismic Shift in Legal System*, SAN FRANCISCO CHRONICLE, July 18, 2004 ("These are revolutionary cases," said Loyola Law School Professor Laurie Levenson. "They turned a bit of the criminal justice system upside down."); Anne Gearan, *Supreme Court Throws Sentencing Guidelines Into Question*, DET. NEWS, June 26, 2004 ("[The Court] just threw a bomb and blew everything up, and now we have to decide how to put it back together," Harvard Law School criminal law professor William J. Stuntz said. "Humpty Dumpty isn't sitting on the wall anymore." . . . "We are about to have a revolution in criminal sentencing," Stuntz said.); Charles

In dissent from the popular consensus, this Article suggests that neither *Blakely* nor its precursors invalidate the Federal Guidelines, and that the Court this term will confront an open question in deciding whether the Guidelines violate defendants' constitutional rights. More importantly, this Article will analyze the nature of the rights asserted in the pending cases, and will propose a theoretical explanation for why the Federal Guidelines should be upheld. In my view, the Federal Guidelines are valid because they impose no punishment above the maximum authorized by the jury's verdict. For constitutional purposes, a jury's verdict authorizes any sentence up to the maximum prescribed by the crime of conviction. Because federal crimes and their maximum sentences are defined *by statute*, the Constitution is not violated by *nonstatutory* Guidelines that prescribe sentences *less* than that statutory maximum. My theoretical argument finds support in the Court's recent jurisprudence, and particularly in views of the Sentencing Revolution's surprising swing voter: Justice Antonin Scalia. Without venturing to predict his vote in the pending cases, I suggest that Justice Scalia's jurisprudence concerning separation of powers and formality tend to support a limited constitutional ruling that would reject Fifth and Sixth Amendment challenges to the Federal Guidelines.

A. Background

The landmark case in modern sentencing law is *Apprendi v. New Jersey*, which prohibits judges from imposing any sentence above the "statutory maximum" for a defendant's crime of

Lane, *Jury Role In Raising Sentences Affirmed Ruling May Affect States' Procedures*, WASH. POST, June 25, 2004 ("If defendants asserted the right [*Blakely*] gives them, a very large fraction of the sentences in federal criminal cases . . . would be unconstitutional," said William J. Stuntz, a professor of law at Harvard University."); Kate Stith & William Stuntz, *Sense and Sentencing*, N.Y. TIMES, June 29, 2004.

conviction.⁵ The *Apprendi* Court invalidated a New Jersey law that allowed the sentencing judge to impose an “enhanced sentence,” greater than the ten-year statutory maximum for firearm possession, based on a judge’s post-conviction finding that the defendant’s offense qualified as a “hate crime.”⁶ With deceptive simplicity, *Apprendi* held that where a defendant is convicted of a crime whose statutory maximum is ten years’ imprisonment, the Fifth and Sixth Amendments bar the judge from imposing a prison term longer than that.⁷ To impose an “enhanced” sentence greater than the statutory maximum would be in effect to convict a defendant of one crime, yet sentence her for a different one. *Apprendi* thus forbids the use of any contested fact to increase a sentence beyond the crime of conviction’s statutory maximum, unless that fact is alleged in the indictment and proved to a jury beyond reasonable doubt, like any other element of a separate, “aggravated” offense.⁸

From the start, four dissenting Justices expressed fears that *Apprendi*’s effects would be broader than its terms.⁹ *Apprendi* to them embodied a radical ideal that, if not limited to sentences above statutory maxima, might overthrow two principles of modern sentencing, and

⁵530 U.S. 466, 490 (2000).

⁶*Id.* at 490-497; *see* N.J. STAT. ANN. § 2C:43-7(a)(3) (1999) (authorizing an “extended term” of imprisonment where “the defendant in committing the crime acted with a purpose to intimidate an individual or group . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity”).

⁷*Apprendi*, 530 U.S. at 489-492.

⁸*Id.* at 490;*cf.* *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (announcing that rule in a case of statutory interpretation concerning “constitutional doubt”).

⁹*Apprendi*, 530 U.S. at 523-54 (O’Connor, J., dissenting); *id.* at 555-66 (Breyer, J., dissenting). The other two dissenting votes were Justice Kennedy and Chief Justice Rehnquist.

prior Supreme Court case law as well. First, the dissenters were concerned with *Apprendi*'s occasional reference to facts that alter a defendant's "range" of available sentences.¹⁰ Such an approach, focused on the sentencing range open to an individual judge's discretion, would imply that *statutory minima* require the same constitutional constraints as statutory maxima; thus, judges could not impose a "mandatory minimum" sentence unless its factual basis appeared in the indictment and was proved to a jury beyond reasonable doubt.¹¹ The risk that *Apprendi* would regulate statutory minima was important because the Court had upheld mandatory minima in *McMillan v. Pennsylvania*,¹² and many sentences were later imposed under statutes that embodied *McMillan*'s rule.¹³

¹⁰*Id.* at 481, 490; *accord id.* at 501 (Scalia, J., concurring); *id.* at 520, 522 (Thomas, J., concurring).

¹¹*Id.* at 533 (O'Connor, J., dissenting); *id.* at 563 (Breyer, J., dissenting); *accord Harris v. United States*, 536 U.S. 545, 572, 577-80 (2002) (Thomas, J., dissenting).

¹²477 U.S. 79 (1986).

¹³*E.g.*, *Harris*, 536 U.S. at 567; *see, e.g.*, Pub. L. No. 104-132, § 708(a), 110 Stat. 1296 (1996) (adding mandatory minimum penalties to 18 U.S.C. § 844(f) and (i)); Pub. L. No. 104-208, § 121, 110 Stat. 3009-29 (1996) (codified at 18 U.S.C. § 2252A); Pub. L. No. 100-690, § 6371, 102 Stat. 4370 (1988) (adding mandatory minimums under 21 U.S.C. § 844(a) for serious crack possession); Pub. L. No. 99-570, § 1002, 100 Stat. 3207-2 to 3207-4 (1986) (adding mandatory minimum terms under 21 U.S.C. § 841(b)); ALA. CODE § 13A-5-6(a)(4), (5) (1994); ALASKA STAT. § 12.55.125(b) (Michie 2000) (relationship of child-murder victim to defendant); ARIZ. REV. STAT. § 13-604.02(B) (2001) (release status); COLO. REV. STAT. ANN. § 18-1-105(9) (West 1986 and Supp. 1996) ("extraordinary aggravating circumstances"); FLA. STAT. ANN. § 775.082(9)(a)(1) (West 2000 and Supp. 2002) (Prison Releasee Reoffender Act); ILL. COMP. STAT. ANN. 5/5-5-3(c)(2)(D) (West 1998) (quantity of drugs); 730 ILL. COMP. STAT. ANN. 5/3-6-3(a)(2)(iii) (West 1998) (victim suffered great bodily harm); KAN. STAT. ANN. § 21-4635 (West 2000) ("hard 40" for first degree murder); KAN. STAT. ANN. § 21-4618 (West 2000); MINN. STAT. ANN. § 609.11 (West 1987 and Supp. 2002); MD. ANN. CODE OF 1957, Art. 27, § 286 (1996 and Supp. 2001) (repeat drug offender); MD. ANN. CODE OF 1957, Art. 27, § 286D (1996 and Supp. 2001) (repeat drug offender in school zone); MD. ANN. CODE OF 1957, Art. 27, § 643B (1996 and Supp. 2001) (second conviction of crime of violence); MO. REV. STAT. § 558.018.5

The dissenters' second concern was that *Apprendi* might forbid judicial sentence enhancements above *any legal baseline*, regardless of the statutory maximum. As the dissenters knew well, the United States Sentencing Guidelines depend on nonstatutory enhancements.¹⁴ The Guidelines provide that no sentence may be imposed in excess of the crime of conviction's statutory maximum.¹⁵ But the typical case requires a judge to calculate and modify the defendant's "base offense level" using factual findings that do not derive from the indictment or the offense of conviction.¹⁶

Imagine, for example, a person convicted of bank robbery under 18 U.S.C. § 2113(a), which provides a twenty-year maximum sentence where a jury finds that the defendant forcibly

(West 2000) (predatory sexual offender); N.J. STAT. ANN. § 2C:43-6c, d (West 1995); 42 PA. CONST. STAT. § 9712(a), (b) (West 1998); 18 PA. CONST. STAT. § 6314(a) (West 2000) (delivery of controlled substance to a minor); 18 PA. CONST. STAT. § 6314(b) (West 2000) (four specified circumstances present during delivery of controlled substance); 18 PA. CONST. STAT. § 6317(b) (West 2000) (delivery of controlled substance within specified distance of school property, playground or on a school bus); 18 Pa. Const. Stat. § 7508(a) (West 2000) (nature and quality of controlled substance delivered or intended for delivery); 42 PA. CONST. STAT. § 9713(a) (West 1998) (specified offense committed in or near public transportation); 42 PA. CONST. STAT. § 9717(a) (West 1998) (victim is over 60 years of age and not a police officer); 42 PA. CONST. STAT. § 9718(a) (West 1998) (victim is either under 16 years of age or 13 years of age); 42 PA. CONST. STAT. § 9719(a) (West 1998) (offense committed by person impersonating a law enforcement officer); 75 PA. CONST. STAT. § 3742(b) (West 1996) (leaving scene of accident involving serious bodily injury or death); Virgin Islands Gun Control Act of 2001, 2001 V.I. SESS. LAWS 6493.

¹⁴*Apprendi*, 530 U.S. at 544, 550-51 (O'Connor, J., dissenting); *cf. id.* at 561 (Breyer, J., dissenting). Justice Breyer was an original member of the Sentencing Commission, *United States v. Wright*, 873 F.2d 437, 446 (1st Cir. 1989) (Breyer, J.), and he drafted the canonical theoretical explanation of the guideline system, Stephen J. Breyer, *The Federal Sentencing Guidelines and Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988).

¹⁵U.S.S.G. § 5G1.1(a); *see also* 28 U.S.C. § 994(a) (requiring all Guidelines to be consistent with statutory provisions of the United States Criminal Code).

¹⁶U.S.S.G. §§ 1B1.1, 1B1.3, 3A1.1-3C1.2, 3E1.1.

took something of value from a designated banking institution.¹⁷ Under the Federal Guidelines, a convicted defendant might receive thirty-one to forty-one months if the sentencing judge found no evidence of the amount stolen, but forty-one to fifty-one months if the sentencing judge found that \$200,000 was stolen.¹⁸ The dissenters recognized that applying *Apprendi* to nonstatutory maxima, such as “base offense levels” under the Guidelines, might unsettle numerous federal sentences imposed since the Federal Guidelines took effect in 1987.¹⁹

A third, minor concern involved Arizona’s capital punishment system, which the Court had previously upheld.²⁰ Although *Apprendi*’s majority claimed that its decision did not affect

¹⁷18 U.S.C. § 2113(a).

¹⁸See U.S.S.G. § 2B3.1(a), (b)(7)(C), Ch. 5 Pt. A.

¹⁹*Apprendi*, 530 U.S. at 544, 551 (O’Connor, J., dissenting); *id.* at 565 (Breyer, J., dissenting). Some academic commentators agreed with the dissenters that *Apprendi* would invalidate the Federal Guidelines. See, e.g., Andrew J. Fuchs, Note, *The Effect of Apprendi v. New Jersey on the Federal Sentencing Guidelines: Blurring the Distinction between Sentencing Factors and Elements of Crime*, 69 FORDHAM L. REV. 1399, 1419-26 (2001); Ethan Glass, Comment, *Whatever Happened to the Trial By Jury? The Unconstitutionality of Upward Departures Under the United States Sentencing Guidelines*, 37 GONZ. L. REV. 343, 358-62 (2001/2002); Andrew M. Levine, *The Confounding Boundaries of “Apprendi-land”: Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 390-409 (2002); Freya Russell, Casenote, *Limiting the Use of Acquitted and Uncharged Conduct at Sentencing: Apprendi v. New Jersey and Its Effect on the Relevant Conduct Provision of the United States Sentencing Guidelines*, 89 CAL. L. REV. 1199, 1201 (2001); Note, 117 HARV. L. REV. 1236, 1251-54 (2004). Other scholars assessed *Apprendi*’s impact as more limited. See, e.g., Susan N. Herman, *Applying Apprendi to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615, 621-24 (2002); Alan C. Michaels, *Truth in Convicting: Understanding and Evaluating Apprendi*, 12 FED. SENTENCING REP. 320 (2000); Jeffrey Standen, *The End of the Era of Sentencing Guidelines: Apprendi v. New Jersey*, 87 IOWA L. REV. 775, 792-801 (2002).

²⁰*Walton v. Arizona*, 497 U.S. 637 (1990).

the Arizona death penalty,²¹ the Court reversed course in *Ring v. Arizona* and held that Arizona's capital system improperly relied on judicial "aggravating factors" to kill defendants whose crime of conviction's statutory maximum was life imprisonment.²²

The dissenters' fears about mandatory minima and the Federal Guidelines were not immediately realized. In *Harris v. United States*, the Court confirmed that *McMillan* remains good law, that statutory minima are different from statutory maxima, and that judges may apply statutory minima based on factual judgments that do not derive from "elements" of the crime of conviction.²³ The Guidelines' constitutionality seemed similarly secure. After *Apprendi*, every circuit court held that nonstatutory guideline enhancements do not violate the Fifth and Sixth Amendments because the Guidelines cannot yield a sentence greater than the crime of conviction's statutory maximum.²⁴ Numerous defendants sought review of those appellate

²¹*Apprendi*, 530 U.S. at 496-97.

²²*Ring v. Arizona*, 536 U.S. 583, 597 (2002) ("Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. This was so because, in Arizona, a death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist . . ." (citations and internal quotation marks omitted)); cf. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (describing *Ring* as holding that, "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances': Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death.").

²³536 U.S. at 556-68 (plurality); accord *Blakely v. Washington*, 124 S. Ct. 2531, 2538 (2004).

²⁴*E.g.*, *United States v. Johnson*, 335 F.3d 589, 591-92 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 550 (2003); *United States v. Piggie*, 316 F.3d 789, 790-91 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 157 (2003); *United States v. Tolliver*, 351 F.3d 423, 434 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2429; *United States v. Mendez-Zamora*, 296 F.3d 1013, 1020 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 613; *United States v. Bartholomew*, 310 F.3d 912, 925-26 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 1005 (2003); *United States v. Marino*, 277 F.3d 11, 38 (1st Cir. 2002),

decisions, but the Court consistently denied certiorari, suggesting that the dissenters might have overstated *Apprendi*'s disruptive potential.²⁵

Then came *Blakely v. Washington*.²⁶ In *Blakely*, the Court applied *Apprendi* to invalidate a sentence imposed under Washington state law. The relevant provisions warrant more attention, but for now it is sufficient to note that Washington's statutory system of punishment and the Federal Guidelines were strikingly similar in content.²⁷ Indeed, the United States supported Washington and admitted that any differences between the state and federal systems might not "be sufficient [to save the Federal Guidelines] if this Court applied *Apprendi*" to Washington's

cert. denied, 122 S. Ct. 2639 (2002); *United States v. Fields*, 251 F.3d 1041, 1043-33 (D.C. Cir. 2001), *cert. denied*, 124 S. Ct. 422 (2003); *United States v. Rivera*, 282 F.3d 74, 76-77 (2d Cir. 2000), *cert. denied*, 123 S. Ct. 332 (2002); *United States v. Williams*, 235 F.3d 858 (3d Cir. 2000), *cert. denied*, 122 S. Ct. 49 (2001); *United States v. Kinter*, 235 F.3d 192, 200-02 (4th Cir. 2000), *cert. denied*, 532 U.S. 937 (2001); *United States v. Doggett*, 230 F.3d 160, 166 (5th Cir. 2000), *cert. denied*, 531 U.S. 1177 (2001); *United States v. Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000), *cert. denied*, 122 S. Ct. 552 (2001).

²⁵*See supra* note 24 (collecting cases). Two other factors mitigated *Apprendi*'s immediate practical effect. The first is the Court's refusal to overrule *Almendarez-Torres*, 523 U.S. 224 (1998), which permits judges to enhance a criminal sentence above the statutory maximum based on a defendant's criminal history. *But cf. Apprendi*, 530 U.S. at 520 (Thomas, J., concurring) (indicating that his necessary fifth vote as part of the *Almendarez-Torres* majority was based on "an error"); *Shepard v. United States*, 03-9168, *cert. granted*, June 21, 2004 (raising constitutional questions regarding the treatment of criminal history). Second, the Court's unanimous decision in *United States v. Cotton*, 535 U.S. 625 (2002), held that *Apprendi* errors not raised at the time of trial — *i.e.*, almost all of them before 1999 — are reviewed under stringent standards of "plain error." *Cotton* thus allowed the government to adapt to *Apprendi*'s rule prospectively without disrupting large numbers of past sentences.

²⁶124 S. Ct. at 2531.

²⁷*See infra* pp. 16-18. The dissenting Justices in *Blakely* repeatedly referred to Washington's system as a "sentencing guideline scheme[]," *e.g.*, *id.* at 2543 (O'Connor, J.), thereby seeking to stress its substantive similarity to the Federal Guidelines. The opinion of the Court, however, did not refer to Washington's system as "guidelines." This Article follows the latter convention.

statutory scheme.²⁸ That concession, whether or not accurate, advised the Court that any opinion in *Blakely* would at least abut the dominant question that has loomed since *Apprendi*: whether enhanced sentences under the Federal Guidelines are unconstitutional. Nonetheless, the Court’s opinion in *Blakely* — like that in *Apprendi* — expressly disavowed any view about the Federal Guidelines’ constitutionality.²⁹

Despite the Court’s reticence, the reaction to *Blakely* has been overwhelming. It was no surprise that *Apprendi*’s dissenters dissented again, but their rhetoric describing *Blakely*’s effect on the Federal Guidelines was unsettling.³⁰ Without mentioning prior prophecies concerning

²⁸Brief of Amicus Curiae United States of America at 9, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632); *see also id.* at 29-30 (“It is . . . not certain that this Court would ultimately conclude that the differences between the Washington system and the federal Guidelines are of constitutional magnitude.”).

²⁹Indeed, the language used by the Court in *Apprendi* and *Blakely* is markedly similar. *Compare Blakely*, 124 S. Ct. at 2538 n.9 (“The United States, as *amicus curiae*, urges us to affirm. It notes differences between Washington’s sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant. The Federal Guidelines are not before us, and we express no opinion on them.” (citation omitted)), *with Apprendi*, 530 U.S. at 497 n.21 (“The [Federal] Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.” (citing *Edwards v. United States*, 523 U.S. 511, 515 (1998) (holding that the Constitution permits a sentencing judge to determine drug type and quantity for guidelines purposes regardless of the jury’s verdict, so long as the ultimate sentence lies “within the statutory limits” relevant to the crime of conviction))).

³⁰*Blakely*, 124 S. Ct. at 2549-50 (O’Connor, J., dissenting) (“It is no answer to say that today’s opinion impacts only Washington’s scheme and not others, such as, for example, the Federal Sentencing Guidelines. . . . Indeed, [Washington’s] provision struck down today is as inoffensive to the holding of *Apprendi* as a regime of guided discretion could possibly be. . . . If the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines system that would.”); 124 S. Ct. at 2561 (Breyer, J., dissenting) (“Until now, I would have thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts. Today’s case dispels that illusion. . . . Perhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how.”).

mandatory minima, Justice O'Connor's *Blakely* dissent direly proclaimed that "[w]hat I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy."³¹ Later, Justice O'Connor characterized the *Blakely* Court's decision-making as "disgusting" and its result as a "No. 10 earthquake."³²

As though to fulfill such forecasts, the appellate courts generated what must be one of the quickest, most robust circuit conflicts on record. Discarding earlier case law as "of course no longer authoritative,"³³ Judge Posner wrote for a divided Seventh Circuit panel that guideline enhancements are invalid under *Blakely*; a divided Ninth Circuit panel agreed.³⁴ In contrast, the Fifth Circuit held that *Blakely* does not alter prior precedents upholding the Federal Guidelines; the Fourth, Sixth and Eleventh Circuits also reached that result.³⁵ The Second Circuit, sitting en banc, took the unusual response of certifying a request for Supreme Court guidance on whether guideline enhancements remain constitutionally valid, and also "request[ed]" expedited briefing and argument before the Court's term was scheduled to begin.³⁶

³¹*Id.* at 2550 (O'Connor, J., dissenting).

³²*O'Connor Disgusted by Federal Sentencing Case*, at <http://www.cnn.com/2004/LAW/07/022/oconnor.sentences.ap> (July 23, 2004) [hereinafter "*O'Connor Disgusted*"].

³³*United States v. Booker*, 375 F.3d 508, 513 (7th Cir. July 9, 2004), *cert. granted*, No. 04-104 (Aug. 2, 2004).

³⁴*Id.*; *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004).

³⁵*United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004); *accord United States v. Reese*, No. 03-1317 (11th Cir. Sept. 2, 2004); *United States v. Koch*, 2004 WL 1899930 (6th Cir. Aug. 26, 2004); *United States v. Hammoud*, 378 F.3d 426 (4th Cir. 2004).

³⁶*United States v. Peneranda*, 375 F.3d 238 (2d Cir. 2004). The Second Circuit later sided with the majority of circuits that have upheld the Guidelines. *United States v. Mincey*,

Nor did commentators calm the waters. The nation's most respected legal scholars assigned *Blakely* blockbuster status, and the academic and popular press have, without exception, characterized the Guidelines' invalidity as a foregone conclusion.³⁷ After a Judiciary Committee Hearing, the Senate unanimously resolved that the Supreme Court should address *Blakely*'s aftermath quickly.³⁸ Twelve days later, the Supreme Court granted certiorari in two guideline cases, *United States v. Booker*³⁹ and *United States v. Fanfan*,⁴⁰ capping what was a very busy summer for sentencing law.

B. A New Approach

This Article presents an uncommon view of the Supreme Court's sentencing cases, suggesting that the best interpretation of such cases would uphold the Federal Guidelines. Part One responds to the argument, in the media and some federal courts, that there is no need for analysis because *Blakely* as much as held the Federal Guidelines unconstitutional. After examining the decision's language and context, I argue that *Blakely* did not resolve any issue essential to the Guidelines' status. As the Court explained, Washington's statutory system was effectively identical to the New Jersey statutes in *Apprendi*; thus, *Blakely* broke little new legal

2004 WL 1794717 (2d Cir. Aug. 12, 2004) (per curiam).

³⁷See *supra* note 4 and accompanying text.

³⁸S. Con. Res. 130, 108th Cong. (2004) ("Now, therefore, be it Resolved by the Senate (the House of Representatives concurring), That it is the sense of Congress that the Supreme Court of the United States should act expeditiously to resolve the current confusion and inconsistency in the Federal criminal justice system by promptly considering and ruling on the constitutionality of the Federal Sentencing Guidelines.").

³⁹No. 04-104.

⁴⁰No. 04-105.

ground. In particular, the key question regarding the Guidelines remains unanswered: Neither *Blakely* nor *Apprendi* considered the validity of non-statutory limits on sentencing judges' discretion. Although certain ambiguous language in *Blakely* could be read as addressing the Federal Guidelines, the opinion's text does not require that interpretation, which would in any event contradict the Court's clear statement that it "express[ed] no opinion" about the Guidelines.⁴¹

Because *Blakely* did not legally resolve the Guidelines' constitutional status, the decision is important primarily as a predictive signal of what the Court will hold in *Booker*. Even as a matter of Court-watching, however, *Blakely*'s clearest message may be that the *Apprendi/Blakely* majority (Stevens, Scalia, Souter, Thomas, Ginsburg) has at least one member with uncertain or divergent views about the Guidelines' status. The "swing vote" in other *Apprendi* cases is *Blakely*'s author, Justice Scalia, which tends to confirm that *Blakely* left the Guidelines' constitutionality an open question, and perhaps not an easy one.

Part Two pursues theoretical issues that risk being lost in *Blakely*'s shadow.⁴² Beneath controversies over the Guidelines' constitutionality lie fundamental disagreements about the type of constitutional right that is at stake. I discuss three models of *Apprendi* rights and ultimately defend a theory rooted in separation of powers principles. The Federal Guidelines are distinct

⁴¹*Blakely*, 124 S. Ct. at 2538 n.9.

⁴²Most scholars have turned their attention to what would happen if the Court does find the Guidelines to be unconstitutional. See, e.g., Rachel E. Barkow, *The Devil You Know: Federal Sentencing After Blakely*, 16 Fed. Sent. Rep. 312 (2004); Douglas A. Berman, *Examining the Blakely Earthquake and Its Aftershocks*, 16 Fed. Sent. Rep. 307 (2004); Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 Fed. Sent. Rep. 316 (2004); Mark Osler, *The Blakely Problem and the 3x Solution*, 16 Fed. Sent. Rep. 344 (2004). Such well-traveled questions will not be considered here.

from Washington’s system because the former are rules of an independent agency within the judicial branch, while the latter are statutes. That difference is significant, and not only because, as Judge Easterbrook observes, the Court has repeatedly used the term “*statutory maximum*” in its definitions of *Apprendi* rights.⁴³ In my view, *Apprendi*’s procedural right depends on the maximum sentence that is “authorized by the jury’s verdict.”⁴⁴ Such authorization in turn depends on the legal provision that defines the crime of conviction; it does not depend on other provisions that may affect the sentence that is actually imposed. Notwithstanding other potential difficulties in identifying the definition of a crime, it is at least clear that under federal law, crimes can be defined only by congressional statutes, not by nonstatutory Guidelines from the Sentencing Commission. Accordingly, *Apprendi* should not apply to Guidelines that limit judicial discretion but are not statutes and do not define crimes.⁴⁵

⁴³*United States v. Booker*, 375 F.3d at 518 (Easterbrook, J., dissenting) (“Attributing to *Blakely* the view that it does not matter whether a given rule appears in a statute makes hash of ‘statutory maximum.’ Why did the Justices deploy that phrase in *Apprendi* and repeat it in *Blakely* (and quite a few other decisions)? Just to get a chuckle at the expense of other judges who took them seriously and thought that ‘statutory maximum’ might have something to do with statutes? Why write ‘statutory maximum’ if you mean ‘all circumstances that go into ascertaining the proper sentence’?”).

⁴⁴*Apprendi*, 530 U.S. at 494; *accord Harris*, 536 U.S. at 557, 565, 568; *Apprendi*, 530 U.S. at 490 n.16, 494; *id. see also Blakely*, 124 S. Ct. at 2538.

⁴⁵The only part of the Guidelines enacted by statute is the Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003, Public. L. No. 108-21, § 401(i), 117 Stat. 650, 672-73 (2003). There, Congress provided increases in a defendant’s offense level for trafficking in specified numbers of images that involve the sexual exploitation of a minor, and similar increases for possessing specified numbers of images that depict a minor engaged in sexually explicit conduct. Although both of those provisions clearly qualify as “statutory,” they do not produce any “statutory maximum” sentence nor do they define any crime. Thus, such guidelines would most likely not be covered by *Apprendi*, though for different reasons than are applicable to the rest of the Federal Guidelines, which do not qualify as statutory maxima in any sense. *But see* Steven L. Chanenson, *Host With Their Own Petard?*, 17 FED.

Apprendi requires a constitutional link between the statutory definition of a crime, the jury's decision to convict of the crime, and the maximum sentence imposed therefor. That connection is important, but it is also limited. Because of Congress's unique role in defining crimes and their punishments, *Apprendi* bars only sentences above the statutory maximum and does not regulate submaximal sentences under nonstatutory Guidelines.

Finally, Part Three looks ahead to *Booker*, where the Court will finally resolve whether the Guidelines violate *Apprendi*. Whether or not the Court upholds the Guidelines, reflection is apt as to how the *Blakely* "crisis" emerged, and how it could have been avoided. The particular incidents that have followed in *Blakely*'s wake indicate potentially important and enduring lessons about the roles of certain "repeat players" in the judicial process of constitutional rulemaking.

I. *Blakely* And The Power Of Dissents

A. *Blakely* and *Apprendi*

A detail often overlooked in current sentencing discussions is that, after *Apprendi*, *Blakely*'s result was easy and required little new analysis. Indeed, the *Blakely* opinion starts with an explicitly modest self-image: "This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*: . . . '[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'"⁴⁶ The Court's analysis is short and simple, and over half of the opinion rebuts

SENT. REP. ____ (forthcoming 2004) (arguing that those two statutory amendments render all of the Federal Guidelines statutory and, thus, subject to *Apprendi*).

⁴⁶*Blakely*, 124 S. Ct. at 2436 (citation omitted).

dissenters' objections, most of which were previously aired and rejected in *Apprendi*.⁴⁷

Nonetheless, the dissenters in *Blakely*, joined by numerous commentators, have argued that that case effectively determined that the Federal Guidelines are unconstitutional.⁴⁸ The first step to understanding *Apprendi* and the Guidelines is thus to challenge that claim and show that the Guidelines' constitutional status after *Blakely* is as unresolved as it was before.

The Court in *Apprendi* considered a New Jersey statute that defined unlawful firearm possession with a maximum sentence of ten years,⁴⁹ and another statute whose hate-crime enhancement allowed a twenty-year maximum sentence based on preponderance-of-evidence judicial findings.⁵⁰ Through those two provisions, New Jersey's legislature sought to provide a "true maximum sentence" (my phrase) of twenty years for unlawful firearm possession. That is, the legislature authorized a twenty-year sentence for some convicted firearm defendants, but also prescribed that judges should reserve the range's top half for those criminals who were motivated by discriminatory animus.

Apprendi held New Jersey's scheme unconstitutional, but what the Court did not hold is also important. The Court found nothing inherently unsound about New Jersey's having a twenty-year maximum sentence for unlawful firearm possession. Moreover, if New Jersey had passed a twenty-year maximum for all unlawful firearm possession, New Jersey judges could have decided on their own to apply sentences of more than ten years exclusively to

⁴⁷*Id.* at 2438-43; *see also id.* at 2536-37 nn.5-6.

⁴⁸*See supra* notes 1, 3-4, 31-33 and accompanying text.

⁴⁹N.J. STAT. ANN. § 2C:43-6(a)(2) (West 1995).

⁵⁰N.J. STAT. ANN. § 2C:43-7(a)(3) (West 1995).

hate-criminals. New Jersey's problem lay in the *method* used to pursue its goals. The Supreme Court held that New Jersey could not define a crime with one maximum sentence, but authorize judges to impose a sentence greater than that.⁵¹ The Court found that, in taking the "second step," New Jersey created a special crime of "hateful firearm possession," and allowed the elemental finding of group-based animus to be made without the safeguard of jury trial beyond reasonable doubt.⁵² In simplest terms, the Court found that the Fifth and Sixth Amendments prohibited New Jersey from convicting Apprendi of one crime and sentencing him for another.

As should be evident, *Apprendi*'s critical move was to characterize New Jersey's scheme as two formal steps, not as a functional whole authorizing twenty-year sentences for some firearm violators.⁵³ Apprendi fired bullets into the home of an African-American family because, the judge found, he disliked having neighbors who were "black in color."⁵⁴ New Jersey's political branches intended and provided that such defendants should be eligible for a sentence higher than ten years,⁵⁵ yet the Constitution barred the State from fulfilling its intent by exceeding the crime of conviction's statutory maximum.

⁵¹*Apprendi*, 530 U.S. at 490.

⁵²Similarly, in *Apprendi*'s precursor, *Jones v. United States*, 526 U.S. at 227, the Court construed the federal carjacking statute, contrary to its terms, as creating three different crimes, such that the elements of each must be presented in the indictment and to the petit jury. The "constitutional doubt" that was avoided in *Jones* has now become the constitutional rule after *Apprendi*.

⁵³A functional interpretation would not find important that the State failed to revise its ten-year "maximum." The State's goals seem evident from the statutes as written.

⁵⁴*Apprendi*, 530 U.S. at 469.

⁵⁵N.J. STAT. ANN. § 2C:43-7(a)(3) (West 1995).

In *Blakely*, Washington’s statutory scheme was phrased differently from *Apprendi*’s hate-crime enhancement, but its constitutional dimensions were the same. Like New Jersey, Washington provided a statutory maximum for the defendant’s crime of conviction, yet imposed a sentence greater than that maximum. Before 1981, Washington felonies were statutorily classified as “Class A,” “Class B,” or “Class C,” and the same maximum sentence applied to all felonies in a class.⁵⁶ For example, all Class B felonies had a statutory maximum sentence of ten years, and sentencing judges had broad discretion to impose any punishment below that maximum.⁵⁷ Washington’s legislature was dissatisfied because judicial discretion could assign the same sentence defendants convicted of different crimes, while defendants convicted of the same crime received different sentences.⁵⁸

Thus, Washington enacted a Sentencing Reform Act,⁵⁹ under which felonies received an “offense seriousness level” that was combined on a two-dimensional “grid” with a defendant’s “offender score” to produce a statutory “standard sentencing range.”⁶⁰ Also by statute, Washington provided that an “exceptional sentence” greater than that “standard sentencing

⁵⁶*Apprendi*, 124 S. Ct. at 2544 (O’Connor, J., dissenting).

⁵⁷WASH. REV. CODE ANN. § 9A.20.020(1)(b); *cf. State v. Walker*, 619 P.2d 699, 700 n.1 (Wash. App. 1980).

⁵⁸David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME AND JUSTICE 71, 126-28 (M. Tonry, ed. 2001). Similar problems arose with respect to other jurisdictions’ “indeterminate sentencing” schemes. *See, e.g.*, S. Rep. No. 98-225, p. 38 (1983); U.S.S.C.A.N. 1983, 3182, 3221 (Senate Report on precursor to federal Sentencing Reform Act of 1984); Breyer, *supra* note 5, at 5.

⁵⁹1981 WASH. LAWS, ch. 137, p. 534.

⁶⁰WASH. REV. CODE ANN. §§ 9.94A.120, 9.94A.310 (2000).

range” could be imposed only if the judge found “substantial and compelling reasons justifying an exceptional sentence.”⁶¹ Regardless of any “exceptional sentence,” however, Washington’s preexisting limits for classes of felony (*e.g.*, ten years for Class B) remained in effect.⁶²

The facts of *Blakely* illustrate how the Washington statutes worked in practice. Blakely was indicted for second-degree kidnaping; he pleaded guilty to that offense and acknowledged that he used a firearm.⁶³ By statute, a second-degree kidnaping conviction carried an offense seriousness level of V and, because kidnaping is a crime of violence, an offender score of 2.⁶⁴ Under the State’s grid, a conviction of second-degree kidnaping thus carried a standard sentencing range of at least thirteen to seventeen months,⁶⁵ and use of a firearm increased that offense level by thirty-six months.⁶⁶ Because Blakely’s plea agreement acknowledged firearm use, his statutory sentencing range was therefore forty-nine to fifty-three months.⁶⁷

Washington provided that, where a sentencing judge found that the offense was committed with “deliberate cruelty,” the judge could impose an “exceptional sentence” of up to

⁶¹WASH. REV. CODE ANN. § 9.94A.120 (2000); *see also* WASH. REV. CODE ANN. § 9.94A.390 (2000) (providing an illustrative list of factors that may be considered in imposing an exceptional sentence).

⁶²WASH. REV. CODE ANN. § 9.94A.420 (2000).

⁶³*Blakely*, 124 S. Ct. at 2534; *see* WASH. STAT. CODE REV. §§ 9A.40.030(1), 10.99.020(3)(p), 9.94A.125 (2000).

⁶⁴WASH. STAT. CODE REV. §§ 9.94A.320 & App. 27, 9.94A.360 (2000).

⁶⁵WASH. STAT. CODE REV. § 9.94A (2000).

⁶⁶WASH. STAT. CODE REV. § 9.94A.310(3)(b) (2000).

⁶⁷*Blakely*, 124 S. Ct. at 2534.

ten years for Class B felonies.⁶⁸ At Blakely’s sentencing hearing, the court made a *sua sponte* finding of deliberate cruelty and imposed an “exceptional sentence” of ninety months.⁶⁹ Blakely claimed that that sentence violated *Apprendi* because it increased his sentence above second-degree kidnaping’s fifty-three-month statutory maximum.⁷⁰ The sentencing judge disagreed, holding that the ten-year maximum for Class B felonies was the only relevant “statutory maximum.”⁷¹

In both *Apprendi* and *Blakely*, the State sought to authorize different statutory maxima for defendants who were, in the State’s view, convicted of “the same crime.” The State claimed that, despite the maximum provided in the statute defining the crime of conviction, the “true maximum sentence” was that which the judge was allowed to impose post-enhancement. However, the Supreme Court rejected that argument and held that, when the legislature authorizes an increased sentence above the statutory maximum, it effectively and impermissibly creates “two crimes,” without subjecting the aggravating element to jury trial and proof beyond reasonable doubt.

The State of Washington, and the United States as *amicus curiae*, claimed that *Blakely* differed from *Apprendi*, but those arguments misunderstood *Apprendi*’s rule. Washington argued that its statutory scheme was valid because, unlike *Apprendi*, Washington judges retained discretion both to determine whether a case evinced “substantial and compelling reasons

⁶⁸WASH. REV. CODE ANN. §§ 9.94A.120, 9.94A.390(2)(h)(iii) (2000).

⁶⁹*Blakely*, 124 S. Ct. at 2535.

⁷⁰*Id.* at 2535.

⁷¹*Id.* at 2536.

justifying an exceptional sentence” and to decide what counts as a “substantial and compelling reason.”⁷² Even without hindsight, it seems evident that such judicial discretion could not matter. If New Jersey’s *Apprendi* problem was that it authorized sentences above the statutory maximum, that flaw would necessarily persist if enhancements were imposed at the judge’s option, or if they depended on findings of “hate crime *or another appropriately aggravating factor.*” As the *Blakely* Court held: “Whether the judge’s authority to impose an enhanced sentence depends on finding a specific fact (as in *Apprendi*), one of several facts (as in *Ring*), or any aggravating fact (as here), it remains the case that the jury’s verdict does not authorize the sentence.”⁷³

Washington also asked the Supreme Court to defer to state courts’ holdings that the Sentencing Reform Act did not create new statutory maxima, but merely structured judicial discretion.⁷⁴ The Court rejected that notion, repeating its earlier statement that state-law labels

⁷²Respondent’s Brief at 15-16, 21-26, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632); *see also* Brief of United States at 14-15, 17-18, 20-22, *Blakely* (No. 02-1632) (arguing that *Apprendi* applies only where the legislature “specifies” a factual finding that would authorize a sentence above the statutory maximum); *id.* at 18-20 (claiming that *Apprendi* applies only to “factual findings,” not matters of “discretionary judgment”).

⁷³124 S. Ct. at 2538.

⁷⁴Respondent’s Brief at 22-23, 26-27, 31-32, *Blakely* (No. 02-1632). Washington also claimed that *Apprendi* did not govern because the ten-year limit caps any otherwise applicable “standard sentencing range.” Wash. Br. 17-20. That ten-year limit had no relevance to *Blakely*’s sentence, however, and did not change the Court’s determination that *Blakely*’s sentence was greater than the statutory maximum for second-degree kidnaping. *See id.* at 2537 (“[P]etitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with ‘deliberate cruelty.’”).

do not limit *Apprendi*'s constitutional substance.⁷⁵ Just as statutory names like “element” or “sentencing factor” do not control whether a particular finding requires indictment and trial by jury, the *Blakely* Court refused to follow state-court denials that Washington had created “statutory maximum sentences” governed by *Apprendi*.⁷⁶ If *Blakely* has any abiding legal significance, it is only for having clarified that, as was implicit in *Apprendi*, the criteria for determining the relevant “statutory maximum” are matters of federal constitutional law.⁷⁷ In other respects, the two cases are nearly identical. Each involved a defendant who was convicted of one crime and sentenced for another.

B. *Blakely*'s “Statutory Maximum”

The parts of *Blakely* that have received the most attention are the paragraphs that explain why *Blakely*'s statutory maximum was fifty-three months, the maximum prescribed for second-degree kidnaping, not the ten-year maximum applicable to all Class B felonies:

Our precedents make clear . . . [that] the “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the*

⁷⁵124 S. Ct. at 2539 (claiming that “[n]ot even *Apprendi*'s critics would advocate this absurd result); *Ring*, 536 U.S. at 610 (Scalia, J., concurring) (“I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives — whether the statute calls them elements of the offense, sentencing factors, or Mary Jane — must be found by the jury beyond a reasonable doubt.”).

⁷⁶*Cf. id.* at 2547 (O'Connor, J., dissenting) (citing state statutes and a state court case as proof that “Washington's Sentencing Reform Act did not alter the statutory maximum sentence to which [*Blakely*] was exposed”).

⁷⁷Although the text states the Court's dominant thinking on the relationship between state and federal law under *Apprendi*, the Court's broad disdain for state legal characterizations may at some level conflict with *Ring*'s statement that “the Arizona court's construction of the State's own law is authoritative.” *Ring*, 536 U.S. at 603 (citing *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)).

facts reflected in the jury verdict or admitted by the defendant. See Ring, [536 U.S. at 602] (“the maximum he would receive if punished according to the facts reflected in the jury’s verdict alone” (quoting *Apprendi*, [530 U.S. at 483])); *Harris v. United States*, [536 U.S. at 563] (plurality opinion) (same); *cf. Apprendi*, [530 U.S. at 488] (facts admitted by the defendant). In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” and the judge exceeds his proper authority.

The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. . . . Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. The “maximum sentence” is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator).⁷⁸

Like *Apprendi*, *Harris*, and *Ring*, the above-quoted paragraphs from *Blakely* do not address the constitutionality of nonstatutory sentencing rules. Instead, the Court merely explained why *Blakely*’s statutory maximum was fifty-three months instead of ten years. By statute and the jury’s verdict, *Blakely* was convicted of “second-degree kidnaping,” not of “deliberately cruel kidnaping” or “exceptional kidnaping.” The Court held that a jury’s guilty verdict concerning second-degree kidnaping — and the facts supporting that conviction — do not authorize the State to impose a sentence greater than *that crime*’s fifty-three-month statutory maximum.⁷⁹ Although the Court purported to offer an interpretation of the term “statutory maximum,” it seems likely given *Blakely*’s facts that the Court was focused on the word “maximum,” whose meaning was contested in *Blakely*, rather than the word “statutory,” which was not.

⁷⁸124 S. Ct. at 2537 (footnote omitted).

⁷⁹*Id.*

The Court’s indisputable holding concerning *Blakely*’s statutory maximum under Washington law has been overshadowed by the opinion’s debatable implications for the Federal Guidelines. Specifically, some district and appellate courts have characterized *Blakely*’s definition of “statutory maximum” as equally applicable to the Guidelines’ nonstatutory sentence enhancements.⁸⁰ That interpretation isolates two statements from the above paragraphs: “[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. . . . Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed.”⁸¹

To be sure, federal judges (like Washington judges) must explain their sentencing decisions, and federal enhancements or departures upward from the defendant’s base offense level often rely on “additional facts” that are not elements of the crime of conviction. Also, if federal judges (like Washington judges) make any decision that affects a defendant’s sentence without explaining that decision’s basis, the sentence imposed could be “reversed.”⁸²

However, to grant those similarities controlling weight would misread *Blakely*’s text and would also overlook its context. First, as a linguistic matter, the quoted passage from *Blakely* purports to define “statutory maximum,” yet the Federal Guidelines, like all other nonstatutory

⁸⁰*See, e.g., Booker*, 375 F.3d at 513; *Ameline*, 376 F.3d at 967; *accord, e.g., United States v. Medas*, 323 F. Supp. 2d 436 (E.D.N.Y. 2004); *United States v. Shamblin*, 322 F. Supp. 2d 757, 766 (S.D.W. Va. 2004); *United States v. Montgomery*, 324 F. Supp. 2d 1266, 1270 (D. Utah 2004); *United States v. Croxford*, 324 F. Supp. 2d 1230, 1238-39 (D. Utah 2004).

⁸¹124 S. Ct. at 2537.

⁸²*Id.*

sentencing rules, fall outside any plausible meaning of that term. The Guidelines are issued by the Sentencing Commission, an independent entity in the judicial branch.⁸³ Such Guidelines are submitted to Congress for approval⁸⁴ (like various rules of judicial procedure and many administrative regulations), but they do not comport with constitutional requirements of Presentment and Signature and thus are not statutes.⁸⁵ If, as some have suggested, the quoted language from *Blakely* effectively declares the Guidelines unconstitutional, why would the Court repeat the term “statutory maximum”? Is Justice Scalia redefining “statutory” to extend beyond its traditional, constitutional meaning? Is the term “statutory” a mistake, a vestige, or in Judge Easterbrook’s terms, “a chuckle at the expense of other[s] . . . who took them seriously and thought that ‘statutory maximum’ might have something to do with statutes?”⁸⁶ Undoubtedly, some jurists argue that the statutory character of a sentencing rule should not be important under *Apprendi*.⁸⁷ But the moment one adopts such a theory is the moment that the term “statutory maximum” should be discarded, not defined. There is no evidence that *Blakely*’s majority went that far.

Second, *Blakely* explains that a contested sentence enhancement violates *Apprendi* if it imposes a sentence greater than that authorized by the jury’s verdict or (an awkward phrase) the

⁸³28 U.S.C. § 991 (“There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission.”).

⁸⁴28 U.S.C. § 994(q).

⁸⁵U.S. CONST. art. I, § 7. The only exception to the rule that Guidelines are not statutes is the Feeny Amendment, *see supra* note 46.

⁸⁶*Booker*, 375 F.3d at 518 (Easterbrook, J., dissenting).

⁸⁷*See infra* pp. 62-65 (responding to such views).

facts supporting that verdict.⁸⁸ Such a rule has no necessary consequence for the Federal Guidelines. In issuing a guilty verdict, the jury finds that the defendant committed all of a crime's elements, and the maximum punishment authorized by the jury's verdict is the maximum attached to the crime of conviction. Before *Blakely*, it was well established that a defendant convicted of bank robbery under 18 U.S.C. § 2113(a) was convicted *of that statutory offense*, and further that the jury's verdict constitutionally authorized any sentence up to that crime's twenty-year maximum.⁸⁹ From such a perspective, the Guidelines do not affect the maximum sentence that a judge may constitutionally impose. They merely limit the conditions under which a judge may impose specific sentences *below that maximum*. Accordingly, although the judge may make "additional findings" that alter a defendant's sentence, and the sentence may be "reversed" if those findings are improper or misapplied,⁹⁰ neither the findings, their effect, nor the risk of reversal are significant under *Apprendi* because they do not authorize judges to "inflict[] punishment that the jury's verdict alone does not allow,"⁹¹ *i.e.*, the statutory maximum for the crime of conviction.

Does *Blakely* invite us to rethink these premises, perhaps concluding that federal crimes of conviction are defined by guideline base offense levels, not statutes? For constitutional

⁸⁸"Our precedents make clear . . . [that] the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." *Blakely*, 124 S. Ct. at 2537.

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Id.*

purposes, does *Blakely* hold that bank robbers are convicted of 18-U.S.C.-§-2113(a)-U.S.S.G.-§§-2B3.1(a), with a “statutory maximum” of thirty-one to forty-one months if there is no jury trial with respect to amount, but of 18-U.S.C.-§-2113(a)-U.S.S.G.-§-2B3.1(b)(7)(C) if \$200,000 was stolen? To describe the Guidelines base offense levels as “statutory maxima” would, to say the least, radically revise the terminology of federal criminal law and would transform current views of the “maximum” authorized by a federal jury’s verdict.

We will return to the issues raised above, but my present point is only that, contrary to popular perceptions, *Blakely* did not consider such questions and certainly did not answer them. Instead, the Court simply restated *Apprendi*’s rule that a State may not define a crime (second-degree kidnaping) with one maximum sentence, yet allow a judge to impose a sentence greater than that.⁹² The fact that Washington and New Jersey used markedly different “forms” and “labels” to describe their statutory maxima did not alter their statutes’ “effect,” which was to create two separate crimes with two statutory maxima.⁹³ *Blakely*’s maximum was fifty-three months, not ten years, just as *Apprendi*’s maximum was ten years, not twenty, and *Ring*’s was life imprisonment, not death. Although the language varies slightly, the two-step logic in each case is identical, and *Blakely* did not consider the separate issue of whether nonstatutory

⁹²*Blakely*, 124 S. Ct. at 2537 (“[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.”).

⁹³*Cf. Apprendi*, 530 U.S. at 494 (“[L]abels do not afford an acceptable answer. . . . [T]he relevant inquiry is one not of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict.” (internal quotation marks omitted)). Note that the “effect” at issue is imposing “a greater punishment than that authorized by the jury’s guilty verdict.” As shall be discussed, that statement does not deny that the jury’s “authorization” is itself a formal concept. *See infra* pp. 53-58.

sentencing rules should be treated as “statutory maxima.”

Third, it seems especially inapt to read *Blakely*’s ambiguous language as applying to the Federal Guidelines because the majority explicitly stated that it “express[ed] no opinion” on that subject.⁹⁴ The most defensible view of the *Blakely* opinion as a whole is, as its terms suggest, that the Court merely reiterated and applied reasoning that earlier “precedents make clear” concerning a State’s ability to impose punishment greater than the crime of conviction’s statutory maximum.⁹⁵ None of those earlier cases explained — in dicta or by implication — whether the same principle should govern the nonstatutory Federal Guidelines, and neither did *Blakely*.

C. Court-Watching

To be sure, what many observers find interesting about *Blakely* is not its legal significance, but its potential value in predicting the Court’s future behavior in *Booker*, which will determine the Guidelines’ validity. *Blakely* not only represents the Court’s most recent *Apprendi* analysis, it also was authored by Justice Scalia, whose “swing vote” will decide the Guidelines’ fate. That said, reading tea leaves is an uncertain business, and upon examination, *Blakely*’s signals do not reveal a Court that seems overly eager to invalidate the Guidelines.

With some irony, the strongest evidence that *Blakely* undermines the Federal Guidelines is the vehemence of the four dissenting Justices.⁹⁶ Indeed, Judge Posner cited *Blakely*’s dissents

⁹⁴*Blakely*, 124 S. Ct. at 2538 n.9.

⁹⁵*Id.*

⁹⁶The “irony” derives from the fact that *Blakely*’s dissenters would, least of anyone, wish for *Apprendi* to invalidate the Guidelines.

and the majority's coy response as affirmative evidence of the Guidelines' legal infirmity.⁹⁷ Justice O'Connor's dissent refused to accept the *Blakely* Court's explicit statement that it had not addressed the Guidelines. Writing for herself and three colleagues, Justice O'Connor repeatedly suggested that the Court's decision, "whether intended or not," would spell the Guidelines' doom.⁹⁸ In a section that her colleagues did not join, O'Connor's rhetoric was even more dramatic: "It is no answer . . . that today's opinion impacts only Washington's scheme and not . . . the Federal Sentencing Guidelines. The fact that the Federal Sentencing Guidelines are promulgated by . . . the Judicial Branch is irrelevant to the majority's reasoning. . . . [T]he Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate."⁹⁹ Other dissenting opinions were milder in tone, but each expressed similar concern for the Federal Guidelines' post-*Blakely* future.¹⁰⁰

⁹⁷*Booker*, 375 F.3d at 511 ("The majority in *Blakely*, faced with dissenting opinions that as much as said that the decision doomed the federal sentencing guidelines, might have said, no it doesn't; it did not say that."); *id.* at 513 ("Justice Scalia, now speaking for a majority of the Court, in *Blakely*, though he replied to the dissenting Justices at length, did not say that they were wrong to suggest that the federal sentencing guidelines could not be distinguished from the Washington sentencing guidelines.").

⁹⁸*Id.* at 2543 (O'Connor, J., dissenting) ("The legacy of today's opinion, whether intended or not, will be the consolidation of sentencing power in the State and Federal Judiciaries. (emphasis added)); *accord, e.g., id.* at 2546 ("Under the majority's approach, any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense."); *id.* at 2548 ("The consequences of today's decision will be as far reaching as they are disturbing. . . . Numerous other States have enacted guidelines systems, as has the Federal Government. Today's decision casts constitutional doubt over them all (citations omitted)).

⁹⁹124 S. Ct. at 2549-50 (O'Connor, J., dissenting).

¹⁰⁰*Id.* at 2251 (Kennedy, J., dissenting) ("To be sure, this case concerns the work of a state legislature, and not of Congress. If anything, however, this distinction counsels even greater judicial caution."); *id.* at 2252 (Breyer, J., dissenting) ("Until now, I would have thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing

Even with strong words, however, four votes do not make a majority. Given the *Blakely* Court's choice not to address the Federal Guidelines (despite Justice O'Connor's upset), one might wonder why the dissents matter much. After all, the dissenters in *Blakely* are the same jurists who disagreed with *Apprendi* in the first place, and who at that time predicted that mandatory minima and determinate sentencing would soon be invalid.¹⁰¹ Despite their vantage point, such Justices' views may warrant as much skepticism as authority, especially because *Blakely*'s dissents largely reiterate their earlier arguments that *Apprendi* rendered the Guidelines unconstitutional.¹⁰² In *Apprendi*, as in *Blakely*, a majority of the Court explicitly refused to address the Guidelines,¹⁰³ and the *Apprendi* Court drily described the dissents as "treat[ing] us to a lengthy disquisition on the benefits of determinate sentencing schemes, and the effect of [*Apprendi*] on the federal Sentencing Guidelines."¹⁰⁴ Given the Court's quick response to the dissenters' concerns five years ago in *Apprendi*, it is predictable that the Court would be similarly brief when those same arguments were rehearsed in *Blakely*.

Another reason that *Blakely*'s dissenters might misperceive the scope of that ruling is

reform efforts. Today's case dispels that illusion. . . . Perhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how.").

¹⁰¹*See supra* notes 10-22.

¹⁰²*Compare Apprendi*, 530 U.S. at 544 ("[I]n light of the adoption of determinate-sentencing schemes by many States and the Federal Government, the consequences of the Court's . . . rules in terms of sentencing schemes invalidated by today's decision will likely be severe."), and *id.* at 551-52, with *id.* at *supra* note 24 (collecting cases upholding the Guidelines after *Apprendi*).

¹⁰³*Blakely*, 124 S. Ct. at 2538 n.9; *Apprendi*, 530 U.S. at 497 n.21.

¹⁰⁴*Apprendi*, 530 U.S. at 497 n.21.

that, as we shall soon see, the deciding vote in the pending guideline cases is *Blakely*'s author, Justice Scalia. Few would rely too heavily on a Scalian dissent to predict the future scope of a majority opinion by Justice O'Connor. In many respects, no two Justices are more different. To hazard guesses regarding the Rehnquist Court's future behavior (if one must), it is often important to identify the fifth "swing vote" and analyze the issues with an eye toward that Justice's perspective. The only difference here is the Justice in question.

The *Apprendi/Blakely* majority — Justices Stevens, Scalia, Souter, Thomas, and Ginsburg — do not typically vote together in close cases, and it has already become clear that they do not agree on the nature and scope of *Apprendi*. In fact, *United States v. Harris* illustrates that the fifth, narrowest vote is Justice Scalia's.¹⁰⁵ In *Harris*, the Court considered whether *Apprendi* should apply to mandatory minima, and thus whether *McMillan v. Pennsylvania* should be overruled.¹⁰⁶ Although Justice Stevens's *Apprendi* opinion reserved that question, his vigorous dissent in *McMillan* suggested that he would vote to strike down mandatory minima.¹⁰⁷ Justice Thomas's concurring opinion, which the majority cited favorably, likewise described a jury right whose adverse "consequence . . . [for] *McMillan* should be plain enough."¹⁰⁸ None in the *Apprendi* majority disputed the merits of Justice Thomas's concurrence, and Justice Scalia

¹⁰⁵536 U.S. at 545.

¹⁰⁶477 U.S. 79 (1986).

¹⁰⁷See *McMillan v. Pennsylvania*, 477 U.S. 79, 95-103 (1986) (Stevens, J., dissenting); accord *Jones*, 526 U.S. at 253 ("[I]n my view, a proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence . . ."). Indeed, it seems at least possible that Justice Stevens's opinion for the Court in *Apprendi* suppressed his personal views in order to hold a fifth vote for the majority.

¹⁰⁸530 U.S. at 518 (Thomas, J., concurring).

joined its analysis in large part, though not its discussion of *McMillan*.¹⁰⁹

Ultimately, however, the fifth vote in *Harris* for preserving *McMillan* and mandatory minima was Justice Scalia, who forced the rest of *Apprendi*'s majority into dissent. Justice Thomas noted without satisfaction that only a plurality of the Court would admit that *Apprendi* and *Harris* were even reconcilable.¹¹⁰ But even though Justice Scalia may be the only one who thinks that both *Apprendi* and *Harris* were rightly decided, his is the only vote that matters.

As I shall discuss, the result in *Harris* is crucial to understanding the theory underlying the Court's *Apprendi* jurisprudence.¹¹¹ But even at a descriptive level, *Harris* may help to explain why *Blakely* reads as it does. The Justice who assigned the Court's opinion in *Blakely* was the majority's most senior member, Justice Stevens. In controversial cases, where the result depends on an unstable majority, opinions are often assigned to the Justice whose views are most narrow or most uncertain, thereby reducing any risk that the majority could splinter in reasoning or result.¹¹² Justice Scalia's authorship of *Blakely* fits that pattern. The lack of concurring opinions in *Blakely* might indicate a consensus among the majority that the case needed nothing beyond Justice Scalia's simple explanation. Or the five may have said nothing about the

¹⁰⁹*Id.* at 498, 519-524.

¹¹⁰536 U.S. at 583 (Thomas, J., dissenting) ("Justice Breyer concurs in the judgment but not the entire opinion of the Court This leaves only a minority of the Court embracing the distinction between *McMillan* and *Apprendi* that forms the basis of today's holding, and at least one Member explicitly continues to reject both *Apprendi* and *Jones*." (citations omitted)).

¹¹¹*See infra* pp. 45-52.

¹¹²Such assignments also mitigate the risk that a dissenter might persuade a "swing voter" to switch sides, on the theory that judges are often most loyal to opinions that they themselves have written.

Guidelines because, *as a five-vote majority*, there was nothing on which all five could agree.

Thanks in part to the United States' *amicus* brief, the Court in *Blakely* knew that its decision could easily be written to resolve the Federal Guidelines' constitutional status. Yet the Court did not do so. Furthermore, if the Court had wished last year, or any other year after *Apprendi*, to decide the Guidelines' constitutionality, there was an abundant pool of federal defendants seeking certiorari on that issue. Despite the lack of a circuit split,¹¹³ would the Court allow tens of thousands of federal sentences to be imposed, year after year, under conditions that they viewed as deeply unconstitutional? Could judges who care so much for the jury right care so little about a continuous practice of unconstitutional sentencing? Even more directly, why would the Court not take a federal "companion case" if *Blakely*'s issues indeed disposed of the Guidelines' status?¹¹⁴ Such questions may not command clear answers. But they do illustrate that the only solid conclusion to be drawn from *Blakely*'s context is the same message within its ambiguous text: For reasons known only to the Court, the majority deliberately opted to resolve *Blakely* without explicitly or implicitly determining the Federal Sentencing Guidelines'

¹¹³*See generally* SUP. CT. R. 10(a) (listing conflict among federal appellate courts as a factor that, "although neither controlling nor fully measuring the Court's discretion, indicate[s] the character of the reasons the Court considers").

¹¹⁴*Blakely*'s procedural details confirm that the Court had a significant opportunity to select a companion case. *Blakely*'s petition for certiorari was discussed at three of the Court's conferences (September 29, October 10, and October 17, 2003); the merits briefs of Washington and the United States were filed on January 23, 2004; argument was heard on March 23, 2004; and the Court's opinion did not issue until June 24, 2004. *See* Supreme Court Docket, at <http://www.supremecourtus.gov/docket/02-1632.htm> (last visited Sept. 1, 2004). Even if the Court somehow underestimated *Blakely*'s potential relevance to the Federal Guidelines when certiorari was granted, there were several months when that potential relevance was quite clear.

constitutionality.¹¹⁵ For federal sentencing, *Blakely* was not a legal “earthquake”;¹¹⁶ it was at most a preliminary tremor.

II. *Apprendi*’s Principle

Thus far, I have set forth an unconventional interpretation of *Blakely*, arguing that the case neither decides nor implies a decision regarding the dispositive legal issues that surround the Federal Guidelines. This Part will look deeper into the Court’s pre-*Blakely* jurisprudence. In order to determine whether *Apprendi* requires indictment and jury trial for factors that increase a sentence above a nonstatutory baseline, one must understand the theoretical basis for *Apprendi*’s rule in the first place. Justice Scalia and other members of the Court have divided and even oscillated in describing the fundamental character of *Apprendi* rights. Thus, before further exploring my own view, which depends on the legislative definition of a crime of conviction, I will consider two competing theories and explain why they are unconvincing.

¹¹⁵There are jurists, including Justices O’Connor and Breyer, who might criticize the Court for invalidating *Blakely*’s state sentence without addressing the important questions that arise under the federal system. See *O’Connor Disgusted*, *supra* note 34; *Blakely*, 124 S. Ct. at 2561 (Breyer, J., dissenting) (“[T]his case affects tens of thousands of criminal prosecutions, including federal prosecutions. . . . Given this consequence and the need for certainty, I would not proceed further piecemeal; rather, I would call for further argument on the ramifications of the concerns I have raised. But that is not the Court’s view.”)

Such criticism must shift its focus if *Blakely*’s silence derived from a need to ease frictions among the five-Justice majority. Although much is made of the federal system’s current “chaos,” that chaos might have been worse if the Court had considered the Federal Guidelines’ constitutionality, thereby aggravating individual Justices’ differences into concurring opinions with responses, and perhaps failing to produce a majority opinion altogether.

¹¹⁶16 Fed. Sent. Rep. tit. (entitling the volume “The *Blakely* Earthquake”).

A. A Model Of Substantive Rights

What might be called a “substantive interpretation” of *Apprendi* would insist that the jury play a principal role in determining the actual amount of punishment a defendant receives.

Although no jurist has explicitly endorsed such a strong vision of *Apprendi* rights, it is the most intuitively appealing characterization of *Apprendi* because it alone focuses on effects that matter to defendants in the real world. For a substantive interpretation, different definitions of crimes are not abstractions; they are inextricably connected to levels of actual punishment: “Why, after all, would anyone care if they were convicted of murder, as opposed to manslaughter, but for the increased penalties for the former offense, which in turn reflect the greater moral opprobrium society attaches to the act?”¹¹⁷ From such a vantage point, the fundamental principle of criminal law is a “necessary link between punishment and crime,”¹¹⁸ *i.e.*, a proportionality between factual elements of guilt and the increments of penalty imposed.

A substantive interpretation of *Apprendi* would require that, if the jury is constitutionally responsible for determining guilt, that finding must have a clear, operative connection to the actual punishment that a defendant receives. Arguably, without that firm relationship to actual sentencing, the jury’s verdict would fade in importance and would decide “guilt” in name only.¹¹⁹ Moreover, an intimate link between verdict and punishment protects the defendant’s interests in

¹¹⁷*Harris*, 536 U.S. at 576 (Thomas, J., dissenting).

¹¹⁸*Id.*

¹¹⁹*Cf. Jones*, 526 U.S. at 243 (“If a potential penalty might rise from 15 years to life on a nonjury determination, the jury’s role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping: in some cases, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment.”).

notice, because the factual elements to be found by the jury must also appear in the indictment. In its purest form, a substantive interpretation would find a violation of *Apprendi* wherever the jury's verdict rests on one set of facts, but the defendant's sentence is based, in any operative part, on different facts found by a judge. Such a regime would require the face of the indictment and the crime of conviction to inform a defendant of every allegation that will be used to determine the "kind, degree, or range of punishment"¹²⁰ imposed after conviction. The substantive interpretation would thus invalidate the Federal Guidelines because many defendants' sentences are affected by a judge's independent, post-conviction determinations.

Despite its simplicity and attention to "real-world" consequences, the substantive interpretation lacks support among judges or scholars because it leaves insufficient space for this country's history of judicial factfinding. Under indeterminate sentencing, which was the hallmark of United States criminal law for most of its history, crimes of convictions could and often did entail broad statutory ranges of punishment.¹²¹ At sentencing, judges would consider numerous facts other than the crime of conviction's elements, including socially valuable projects, apparent malice, projected recidivism, penitence, prior criminal acts, and much else.¹²² Each or all of those facts could form indispensable, legally authorized components of a judge's decision to impose an increased sentence, and none of them had any clear or necessary relationship to the jury's verdict.

¹²⁰*Apprendi*, 530 U.S. at 501 (Thomas, J., concurring).

¹²¹Kate Stith & Jose A. Cabranes, *Judging Under the Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1248 (1997).

¹²²*Id.* at 1248-49.

Indeterminate sentencing's pedigree rebuts any assertion that the Constitution requires a detailed, active role for juries in sentencing. For example, there is no question that the Constitution allows defendants to be convicted of a crime with a broad statutory range, and the Constitution allows judges to impose any sentence in that range based on a preponderance of evidence regarding facts that are not elements of the offense. That is so even if a judge details the factual findings supporting the sentence, even if there is a "routine" sentence that the judge imposes in the absence of "additional evidence" at sentencing, and even if all judges in the jurisdiction choose, in their individual discretion, to employ the same baseline sentence and the same grounds for imposing a larger sentence.

Imagine a hypothetical bank robber who pleads guilty to an offense with a statutory sentence of five years to life. To support the plea bargain, the prosecution proves only, as the hypothetical statute requires, that the defendant removed money by force from a bank. At sentencing, however, the prosecution introduces evidence that the defendant used a machine gun, took hostages, tried to kill a security guard, and had previously committed several similar robberies.¹²³ Imagine a sentencing judge who, in a detailed opinion, explains that five to seven years would be appropriate in a "garden variety" bank robbery, but this crime's seriousness deserved more. The judge further calculates that any robbery involving a hostage warrants at least fifteen years, any attempted machine gunning earns an additional ten years, and a criminal history like the defendant's merits six years more. Our hypothetical defendant is thus sentenced

¹²³To complete the scenario, one could also imagine evidence that the defendant was a now-recovered drug abuser, who was a decorated military veteran of the First Iraq War, and was so genuinely repentant of her crime that she had become a strong participant and role model in anti-drug and anti-crime organizations. To incorporate such mitigating facts would not alter any of the text's conclusions.

to thirty-eight years' imprisonment — thirty-one years above what the judge would have imposed without her “additional findings” — based largely on facts that were not presented in the indictment, found by a jury, or proved beyond reasonable doubt. Yet there is no *Apprendi* problem in sight.¹²⁴

The fact that such an indeterminate sentencing system is not only permissible, but incontestably permissible, tempers the norms typically offered to support *Apprendi*'s rule. For example, although it is commonplace that juries must find “every fact that is legally essential to the punishment [imposed],”¹²⁵ that statement means less than it seems. From a defendant's perspective, the phrase “legally essential” imposes serious limits on *Apprendi*'s significance.¹²⁶ Defendants wish to know the sentence that they will receive if convicted. Their interest in knowing a hypothetical sentence that they “might” receive is derivative, regardless of whether it is phrased as a “maximum,” a “minimum,” or a “range.” To be concrete, notice of a statutory maximum is nearly worthless if all sentences are imposed far below that maximum, and notice of a minimum is likewise empty if all actual sentences lie well above it. Indeed, knowledge of one's “range” of punishment is practically useful only if that range is very small, or if one knows

¹²⁴*Cf. Harris*, 536 U.S. at 560 (plurality) (“It does not matter, for the purposes of the constitutional analysis, that . . . the State provides that a fact shall give rise both to a special stigma and to a special punishment. Judges choosing a sentence within the range do the same, and ‘[j]udges, it is sometimes necessary to remind ourselves, are part of the State.’ *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)” (internal quotation marks omitted)).

¹²⁵*Blakely*, 124 S. Ct. at 2536 & n.5 (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769), and 1 J. BISHOP, CRIMINAL PROCEDURE 50-56 (2d ed. 1872)); accord *Apprendi*, 530 U.S. at 476-83, 489-90 & n.15.

¹²⁶*Cf. Jones*, 526 U.S. at 248 (“It is not, of course, that anyone today would claim that every fact with a bearing on sentence must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution.”).

the *distribution of sentences* within the range. Under indeterminate sentencing, for crimes with a broad statutory range, there is a tangible sense that a defendant's conviction is only a preliminary step toward the sentencing phase, where practical decisions are made regarding the defendant's actual sentence. Thus, although the defendant's interest in avoiding significant judicial sentence enhancements may support *Apprendi* rights, it is not a value that helps to define those rights.

B. A Model Of Judicial Discretion

Another constitutional theory that would invalidate the Federal Guidelines was espoused by Justice Thomas in his *Apprendi* concurrence (which Justice Scalia joined in part)¹²⁷ and his *Harris* dissent (which Justices Stevens, Souter, and Ginsburg joined).¹²⁸ Although Justice Thomas at times refers to substantive consequences, it is clear on reflection that his theory accounts for indeterminate sentencing only by moving away from the practical consequences that matter most to criminal defendants. In taking that step, Justice Thomas's model centers on the "range of available punishment," *i.e.*, the scope of available judicial discretion.

¹²⁷*Apprendi*, 503 U.S. 499-524 (Thomas, J., concurring).

¹²⁸*Harris*, 536 U.S. at 572-83 (Thomas, J., dissenting).

1. *Apprendi*'s Concurrence¹²⁹

Justice Thomas described the fundamental question in *Apprendi* as “what constitutes a ‘crime.’”¹³⁰ In turn, he defined “crime” by reference to “elements,” which include “every fact that is by law a basis for imposing or increasing punishment One need only look to the

¹²⁹As a brief note on methodology, Justice Thomas’s *Apprendi* opinion relies heavily on historical materials that were not compiled in any brief or modern scholarship. That history is not analyzed in detail here, because it provides neither a theoretical account of *Apprendi* rights, nor direct answers concerning the Guidelines’ constitutionality. Nonetheless, one should mention that Justice Thomas’s overall characterization of the record is overstated: “A long line of essentially uniform authority . . . stretching from the earliest reported cases after the founding until well into the 20th century, establishes that the original understanding of which facts are elements was even broader than the rule [regarding statutory maxima] that the Court adopts today.” *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring). In *Harris*, the Solicitor General indicated several flaws in Justice Thomas’s analysis concerning mandatory minima, Respondent’s Brief at 32-36, *Harris v. United States*, 536 U.S. 524 (2002) (No. 00-10666), and Justice Thomas did not respond to those criticisms or reassert his argument’s historical merit. *E.g.*, *Harris*, 536 U.S. at 574 (Thomas, J., dissenting) (“According to the plurality, the historical practices underlying [*Apprendi*] . . . do not support extension . . . to facts that increase a defendant’s mandatory minimum sentence. Such fine distinctions with regard to vital constitutional liberties cannot withstand scrutiny.”); *id.* at 580 (“Looking to the *principles* that animated the decision in *Apprendi* and the *bases* for the historical practice upon which *Apprendi* rested (rather than to the historical pedigree of mandatory minimums), there are no *logical* grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum.” (emphasis added)).

Moreover, Justice Thomas’s reliance on statements from late-nineteenth century treatises, which did not identify federal constitutional differences between jury-bound elements and judicial sentence enhancements, fails as evidence that would “confirm[]” founding-era understandings. *See Apprendi*, 530 U.S. at 510-512 (Thomas, J., dissenting) (citing 1 J. BISHOP, LAW OF CRIMINAL PROCEDURE 50 (2d ed. 1870), 1 J. BISHOP NEW CRIMINAL PROCEDURE 49 (4th ed. 1895), 1 J. BISHOP COMMENTARIES ON CRIMINAL LAW (5th ed. 1872)); 1 J. BISHOP, LAW OF CRIMINAL PROCEDURE 54 (stating, without explanation, that judicial consideration of aggravating factors to increase a defendant’s sentence “is an entirely different thing from punishing one for what is not alleged against him”). Even if the Constitution did incorporate “established principles” of common-law history, Justice Thomas’s relevant common-law authorities all arise decades after the Bill of Rights’ ratification.

¹³⁰*Apprendi*, 530 U.S. at 499 (Thomas, J., concurring); *Harris*, 536 U.S. at 575 (Thomas, J., dissenting).

kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.”¹³¹ Justice Thomas’s definition of “element” uses two phrases to describe the same basic idea. Under the primary iteration, Justice Thomas would apply *Apprendi* to any fact that is “by law” a “basis for . . . increasing punishment.” As suggested above, the term “by law” has a special meaning in this context.¹³² Justice Thomas would not invalidate any sort of indeterminate sentencing, even though such systems would otherwise seem to qualify as imposing and increasing sentences “by law.”¹³³ Instead, Justice Thomas characterizes *Apprendi* as providing a limited right against determinate sentencing enhancements, that is, against provisions that attach punishment to facts *by rule*, not as a matter of unchanneled judicial discretion. The Federal Guidelines would presumably be invalid under Justice Thomas’s rule because the effect of statutory and nonstatutory rules on judges’ discretion is the same, and several on the Court have described the Guidelines as “having

¹³¹*Apprendi*, 530 U.S. at 501 (Thomas, J., concurring); *accord, e.g., id.* at 502 (“[A] fact that is by law the basis for imposing or increasing punishment is an element.”); *id.* at 506 (“[I]f a statute increased the punishment of a common-law crime . . . based on some fact, then that fact must be charged in the indictment in order for the court to impose the increased punishment.”); *id.* at 508 (noting that a “fact is an element because it increases the punishment by law”); *id.* at 510 (“[T]he indictment must . . . contain an averment of every particular thing which enters into the punishment.” (quoting 1 J. Bishop, *LAW OF CRIMINAL PROCEDURE* 50 (2d ed. 1892))); *id.* at 515 (“[A] crime includes any fact to which punishment attaches.”); *id.* at 521 (“If a fact is by law the basis for imposing or increasing punishment — for establishing or increasing the prosecution’s entitlement — it is an element.”).

¹³²*See supra* p. 37.

¹³³Thus, Justice Thomas differentiates between *Apprendi*’s rule concerning “what the Constitution requires the prosecution to do in order to entitle itself to a particular kind, degree, or range of punishment,” and “constitutional constraints [that] apply . . . to the imposition of punishment within the limits of that entitlement.” *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring).

the force and effect of law.”¹³⁴

Justice Thomas’s focus on “increasing” punishment “by law” raises important theoretical issues. First, as a normative matter, it is not clear why the Constitution should provide greater procedural protections to defendants subject to rule-based sentencing than to those subject to discretion-based sentencing. Imagine two judges, one applying indeterminate sentencing and the other using the Guidelines. They might impose the same sentence on defendants convicted of the same statutory crime, relying on the same factual findings, using the same post-conviction evidence, to prove the same uncharged conduct, and applying the same evidentiary standards. Why should the Constitution treat them differently? Is it because indeterminate sentencing better comports with “due process” or rights to a “jury trial”? Justice Thomas has never directly confronted such questions, but it is hard to see any inherent danger in punishment “by law” — *i.e.*, by rule — that would merit special safeguards under *Apprendi*.

A second problem is to determine, in Justice Thomas’s view, what types of sentencing “rules” might violate the Fifth and Sixth Amendments. For example, does a rule’s impermissible status turn on its content, or maybe its origin? Imagine the following scenarios for a bank robber whose statutory sentencing range is five years to life: (1) The individual judge imposes a sentence of thirty-eight years. (2) The judge explains that her “normal” sentence for bank robbery is five to seven years, but this defendant’s violent and dangerous conduct deserves

¹³⁴*Apprendi*, 530 U.S. at 523 n.11 (Thomas, J., dissenting) (quoting *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting)); accord *United States v. Watts*, 519 U.S. 148, 160 (1997) (Stevens, J., dissenting); see also 18 U.S.C. § 3553 (providing that a district court “shall impose a sentence of the kind, and within the range, referred to in [the Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines”).

thirty-eight years. (3) The judge explains that, in her court, she always imposes fifteen years above “normal” for crimes with hostages, ten years for crimes with attempted machine gunning, and six years for defendants with multiple prior offenses; thus, this defendant receives thirty-eight years. (4) The judge imposes a thirty-eight-year sentence, explaining that every court in the jurisdiction, including hers, follows the above system, with narrowly defined exceptions for extraordinary circumstances. (5) The system of rules is promulgated by a group of judges, who enforce it upon one another through ordinary appellate channels. (6) A congressionally-organized Sentencing Commission in the judicial branch issues the rules.

Option (1) is clearly valid under ordinary indeterminate sentencing principles, but beyond that, it is hard to see where any relevant line should be drawn. If Justice Thomas’s “right” is one granting purely individualized sentencing, (2) or (3) might be invalid. If the right protects individual judges’ discretion, aggregation under (4) or (5) might be problematic. If judges are allowed “voluntarily” to surrender their discretion, constitutional problems might emerge only when Congress creates an entity to structure judicial discretion, as under (6). There may be plausible policy arguments in favor of each of these lines, but such incidents of organization and operation seem distant from any core concern of the Fifth or Sixth Amendments.

Third, Justice Thomas’s theory must explain what type of enforcement mechanism might give a “sentencing rule” its impermissibly mandatory character. One possibility would be to look at legislative labels, such that the Federal Guidelines would be valid if they were literally rephrased as “persuasive authority” but were otherwise kept the same. Another possibility would be to focus on appellate review, holding invalid any regime where, as a practical matter, the

sentencing judge could be reversed for imposing a sentence outside the “rules.”¹³⁵ But what if Congress retained the Guidelines’ formally mandatory tone and repealed only its provision for appellate review,¹³⁶ such that the Guidelines lacked any enforcement mechanism other than the sentencing judge’s oath and lawful conscience? Perhaps Justice Thomas would look to informal coercion as a possible source of “rules.” Examples include a system where adherence to hortatory Guidelines becomes a litmus test at confirmation, and decisions that do not follow such Guidelines are reported to Congress for criticism.¹³⁷ Similarly, Congress might require detailed explanations, upon risk of reversal, as justification for any departure from such “persuasive” Guidelines. Such political and bureaucratic coercion could conceivably mimic the force of substantive appellate review. Finally, Justice Thomas might determine whether something is a binding “rule” by looking directly to its practical effects. Under that approach, it might matter if every judge in fact follows the Guidelines, regardless of how the rules are phrased or formally enforced.

One cannot know whether any or all of the above factors would be relevant in determining whether a rule has impermissibly restricted judicial discretion. But it is at least certain that, if Justice Thomas’s theory were given authoritative force, future cases might render

¹³⁵This view that “reversal” might be constitutionally critical might also seek support in *Blakely*’s definition of a “statutory maximum,” 124 S. Ct. at 2537, which is discussed above, *see supra* notes 80-97 and accompanying text.

¹³⁶*See* 18 U.S.C. § 3742 (“Review of a Sentence”).

¹³⁷*Cf.* 28 U.S.C. § 476 (requiring a semiannual report to Congress of certain delayed matters on each judge’s docket).

his vision's practical details almost as difficult to identify as its normative basis.¹³⁸

A fourth problem with Justice Thomas's prohibition against any rule-bound "increas[e]" in punishment is his failure to explain how such "increases" relate to the jury's verdict. Every increase must be an increase "over" some baseline, and the constitutionally prescribed baseline under *Apprendi* is the sentence authorized by the jury's verdict.¹³⁹ Although Justice Thomas seems to assume that any rule-bound fact to cause punishment above the judicially "normal" sentence is an "increased sentence," that assumption is at least controversial and undefended.¹⁴⁰ Because Justice Thomas does not indicate how to determine what sentence a jury's verdict authorizes, nor why the jury's authorization should turn on a sentencing judge's range of discretion, his standard for "increasing punishment" lacks a necessary component.

An alternate phrasing within Justice Thomas's definition of "elements" would attach constitutional safeguards to any fact that increases the punishment to which "the prosecution is by law entitled for a given set of facts."¹⁴¹ Those words seem unhelpful, however, because

¹³⁸A slightly different possibility would be to interpret Justice Thomas's phrase "by law" not as a standard against rules, but only against rules of specified content. One might then argue that aggravators in an indeterminate system are not a basis for increasing a sentence "by law," because the judge is allowed to choose which types of conduct warrant any additional punishment. *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring). *Blakely*'s lesson is otherwise. There, the Court easily and correctly held that a legislature cannot escape *Apprendi*'s rule by failing to specify which particular facts authorize a sentence above the statutory maximum: "Whether the judge's authority to impose an enhanced sentence depends on finding a specific fact (as in *Apprendi*), one of several facts (as in *Ring*), or any aggravating fact (as here), it remains the case that the jury's verdict does not authorize the sentence." 124 S. Ct. at 2538.

¹³⁹See *supra* note 52 and accompanying text.

¹⁴⁰For a different interpretation, that the jury's verdict authorizes the statutory maximum, see *infra* pp. 53-58.

¹⁴¹*Apprendi*, 530 U.S. at 520 (Thomas, J., concurring).

Justice Thomas does not explain what prosecutorial “entitlement” might mean. For example, how could the prosecution be “entitled” to any level of punishment other than the sentence that a particular defendant “deserves,” *i.e.*, the sentence that the judge actually imposes in an individual case? Again, the United States’ history of indeterminate sentencing dictates that judges, not just juries, may determine particular sentences in particular cases, and Justice Thomas accepts that practice as valid.¹⁴² Thus, the prosecution’s “entitlement” must refer not to the actual amount of punishment that a defendant receives, but to the permissible “range of punishment” available as a matter of judicial discretion. Accordingly, under both iterations, Justice Thomas’s definition of “elements” implicitly characterizes *Apprendi* rights as incorporating a fundamental opposition to sentencing rules and a corresponding preference for judicial discretion. As discussed above, that opposition and preference lack any apparent basis in constitutional principle or practical reason.¹⁴³

2. *Harris*’s Dissent

Although Justice Thomas’s theory concerning the significance of a “range of punishment” first appeared in Part III of his *Apprendi* concurrence, which no other Justice joined, important features of that theory were clarified by his discussion of mandatory minima in *Harris*.¹⁴⁴ Justice Thomas’s *Harris* dissent also merits attention because, joined by Justices

¹⁴²*See supra* notes 134-135 and accompanying text.

¹⁴³*See supra* p. 40.

¹⁴⁴Incidentally, Justice Scalia’s concurring opinion in *Apprendi*’s precursor, *Jones v. United States*, also seemed to endorse a range-based analysis: “[I]t is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed.” 526 U.S. at 253 (Scalia, J., concurring).

Stevens, Souter, and Ginsburg, it may best articulate the views of those Justices who might vote to invalidate the Guidelines.

Mandatory minima posed a difficult, and ultimately divisive, issue for *Apprendi*'s majority. On one hand, mandatory minima's practical effects on defendants argued against their constitutionality. For many crimes, to change the statutory minimum yields a much higher sentence than would a changed maximum. Also, an altered minimum affects defendants in the lowest and least culpable range of offenders, who might inspire sympathy, while maxima matter only for the most culpable defendants, who are judged to deserve extraordinary sentences. If *Apprendi* stood for the proposition that juries should find all important factual components of a defendant's sentence, modern minima would often qualify. However, *Apprendi* cannot require all "important" facts to be found by the jury without invalidating indeterminate sentencing, under which judicial findings matter a great deal.¹⁴⁵ Indeed, where a statutory range is broad, the sentencing judge's factual findings and judgments are often the most important component of the defendant's sentence. Such findings are indisputably valid, even though their factual bases may not be alleged in an indictment or proved to a jury.¹⁴⁶

On the other hand, aspects of *Apprendi*'s logic recommended upholding mandatory

¹⁴⁵*See supra* pages 35-36; *cf. Harris*, 536 U.S. at 549 ("After the accused is convicted, the judge may impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed. Though these facts may have a substantial impact on the sentence, they are not elements, and are thus not subject to the Constitution's indictment, jury, and proof requirements.").

¹⁴⁶*Harris*, 536 U.S. at 562 ("Judges . . . have always considered uncharged 'aggravating circumstances' that, while increasing the defendant's punishment, have not 'swell[ed] the penalty above what the law has provided for the acts charged.'" (quoting Bishop, CRIMINAL PROCEDURE 54)).

minima. The basic problem with sentencing above the statutory maximum is that the defendant receives a punishment above what the jury authorized. Thus, a defendant who wrongly receives a super-maximal punishment is, without more, entitled to a lesser sentence. Not so with statutory minima. A defendant facing an altered minimum could have received the same sentence regardless of a raised minimum. For a bank robber whose statutory sentencing range is five years to life, if the judge applies a seven-year mandatory minimum for discharging a firearm and imposes a sentence of seven years, that same punishment could have been imposed without the mandatory minimum. For a bank robber who receives twelve years, it also may be irrelevant whether the minimum was five years or seven. Indeed, whenever a defendant's sentence is reversed because of a judicial mandatory minimum, the defendant could have received exactly the same sentence without further action by the jury. To be clear, this is not because *Apprendi* claims concerning mandatory minima are "harmless,"¹⁴⁷ and the argument does not depend on what the judge would have done absent the raised minimum. Rather, the fact that the sentence could have been the same illustrates that the defendant's punishment was in any event authorized by the jury's conviction. From that viewpoint, there is no *Apprendi* problem at all.

The *Harris* Court held that mandatory minima are constitutional and noted that, "[s]ince sentencing ranges came into use, defendants have not been able to predict from the face of the indictment precisely what their sentence will be; the charged facts have simply made them aware of the 'heaviest punishment' they face if convicted."¹⁴⁸ In dissent, Justice Thomas (joined by

¹⁴⁷See generally FED. R. CR. P. 52(a) ("Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

¹⁴⁸*Harris*, 536 U.S. at 562 (plurality) (quoting Bishop, CRIMINAL PROCEDURE, 54); see *id.* at 557 (plurality) ("*Apprendi* said that any fact extending the defendant's sentence beyond the

Stevens, Souter and Ginsburg) advanced a position similar to his *Apprendi* concurrence. Without casting doubt on “judicial discretion to impose ‘judgment *within the range* prescribed by statute,’” Justice Thomas insisted that a criminal does have a “constitutional right to know . . . the circumstances that will determine the applicable *range of punishment* and to have those circumstances proved beyond a reasonable doubt.”¹⁴⁹ Even though it is true that defendants could receive the same punishment regardless of a changed minimum,¹⁵⁰ Justice Thomas proclaimed that “[w]hether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed,” because any change in the minimum sentence necessarily “constitut[es] an increased penalty.”¹⁵¹

From a practical viewpoint, the terms of Justice Thomas’s argument are illogical. To raise the “floor” of a defendant’s minimum sentence does not necessarily cause greater punishment, because the defendant’s actual sentence might be equal to or greater than the

maximum authorized by the jury’s verdict would have been considered an element of an aggravated crime . . . by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum . . . for the jury’s verdict has already authorized the judge to impose [that sentence] with or without the [additional] finding.”).

¹⁴⁹*Harris*, 536 U.S. at 575 (Thomas, J., dissenting).

¹⁵⁰*Id.* at 578 (Thomas, J., dissenting).

¹⁵¹*Id.* at 579-80 (Thomas J., dissenting). Justice Thomas also flirted briefly (as he did in *Apprendi* itself) with a substantive vision of *Apprendi*, objecting that, “under the decision today, . . . key facts *actually responsible for fixing* a defendant’s punishment need not be charged in an indictment or proved beyond a reasonable doubt,” and that “the defendant [under *Harris*] cannot predict the judgment from the face of the felony.” *Id.* at 578-79 (Thomas, J., dissenting) (emphasis added). As we have seen, such objections are by their terms inconsistent with indeterminate sentencing, which has exactly those results. *See infra* pages 35-36.

elevated minimum in any event.¹⁵² The intuition that a defendant is made “worse off” by an increased minimum assumes — and is valid proportionate to — the probability that the defendant would otherwise receive a sentence below that increased minimum. To take an easy example, if a defendant’s sentence were determined by a random number generator, an increased minimum sentence would increase the average expected sentence. Individuals’ sentences are not random, however. Some defendants may have a realistic chance of receiving a minimal or near-minimal sentence, depending on, *inter alia*, prosecutorial selectivity, conviction rates, criminal statutes, and the method of calculating punishment. On the contrary, defendants who commit extremely serious offenses may have no realistic chance of receiving a near-minimum sentence. It is thus case-dependent whether an increased statutory minimum will make any particular defendant “worse off,” and if so, by how much.¹⁵³

Justice Thomas’s analysis becomes more sensible if one assumes that he is focused, not on a defendant’s actual punishment, which the mandatory minimum may not affect, but on the hypothetically available range of sentences. As we have seen, that difference matters as a general theoretical matter,¹⁵⁴ but it takes on special practical importance in the context of mandatory

¹⁵²That is perhaps why Justice Thomas provides empirical analysis of actual sentences imposed under the federal statute at issue in *Harris*, 536 U.S. at 578 (Thomas, J., dissenting). Despite that contingent factual analysis, it seems clear that Justice Thomas’s reasoning rests primarily on principles that are independent of the actual distribution of sentences in practice. *Cf. id.* at 579 (“[O]ur fundamental constitutional principles cannot alter depending on degrees of sentencing severity.”).

¹⁵³To repeat for clarity, none of this is to deny that, in the current federal system, mandatory minima make an enormous difference in the sentences of a substantial number of defendants, especially including those who occupy the lower end of the applicable statutory sentencing range.

¹⁵⁴*See supra* notes 124-25.

minima. In *Apprendi* and *Ring*, the constitutional right at stake was one against unduly harsh sentences and unjustified deprivations of life or liberty. That was not the issue in *Harris*, however, because the defendant could have received the same sentence even without the increased minimum. Justice Thomas was thus forced to characterize all *Apprendi* jurisprudence as concerning, not increased sentences, but effects on the *range of sentencing*, regardless of whether the increase affected “floor” or “ceiling,” and regardless of whether the defendant’s actual sentence would actually change. Justice Thomas asserted a legal parallel between allowing judicial discretion to sentence above the statutory maximum and stripping judicial discretion by raising the statutory minimum. That parallel would bar a sentencing judge from imposing any statutory rule that limits the judge’s discretion to sentence within the otherwise applicable range. If a bank robber’s statutory sentence were five-to-life, and the sentencing judge applied a seven-year minimum because a firearm was discharged, Justice Thomas’s logic would find a constitutional violation (albeit a harmless one) even if the judge explicitly indicated that she would have imposed seven years’ imprisonment regardless of the minimum.

Although Justice Thomas’s interpretation of *Apprendi* rights had not been considered in the Court’s prior cases, that interpretation was squarely rejected in *Harris*. Because Justice Scalia, as *Harris*’s fifth vote, did not write, one must look to Justice Kennedy’s plurality opinion, which Scalia joined in full.¹⁵⁵ The plurality’s critical step was to distinguish between the sentence imposed by the judge and the maximum authorized by the jury’s verdict. “When a

¹⁵⁵The plurality’s opinion on these points did not draw five votes because Justice Breyer refused to agree that *Apprendi* and *Harris* could be reconciled. *Harris*, 536 U.S. at 569-572 (Breyer, J., concurring in part and concurring in the judgment). Because Justice Breyer’s vote to uphold the Guidelines is beyond doubt, his disagreement with plurality’s doctrinal analysis is not material for present purposes, and it does not affect the operative authority of *Harris*’s reasoning.

judge sentences the defendant to a mandatory minimum, no less than when the judge chooses a sentence within the [sentencing] range, the grand and petit juries already have found all the facts necessarily to authorize . . . the sentence.”¹⁵⁶ In such contexts, “additional” judicial factfinding — on whatever standard of proof — is irrelevant. “The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries — and without contradicting *Apprendi*.”¹⁵⁷ The plurality quoted Justice Scalia’s *Apprendi* concurrence: “[B]ecause . . . the judge’s choice of sentences within the authorized range may be influenced by facts not considered by the jury, a factual finding’s practical effect cannot by itself control the constitutional analysis. The Fifth and Sixth Amendments ensure that the defendant ‘will never get *more* punishment than he bargained for when he did the crime,’ but they do not promise that he will receive ‘anything less’ than that.”¹⁵⁸ “Within the range authorized by the jury’s verdict . . . the political system may channel judicial discretion . . . by requiring defendants to serve minimum terms after judges make certain factual findings.”¹⁵⁹

If the Guidelines’ constitutional status were to be decided by the dissenters in *Harris*, the result would be clear. Although the Guidelines are rules of the Sentencing Commission, not

¹⁵⁶*Harris*, 536 U.S. at 565 (plurality).

¹⁵⁷*Id.*

¹⁵⁸*Id.* at 566 (plurality) (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)); *see also id.* (“The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury — even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed. That a fact affects the defendant’s sentence, even dramatically so, does not by itself make it an element.”).

¹⁵⁹*Id.* at 567 (plurality).

Congress, they certainly limit sentencing judges' discretion. Indeed, as Washington argued in *Blakely*, judges often had more discretion under the State's statutory system than would be provided by the Federal Guidelines in similar circumstances.¹⁶⁰ But in *Harris*, where the judicial-discretion model would have had a clear impact, Justice Thomas could not attract a fifth vote. Whether that failure was due to his position's theoretical problems, or to difficulties in drawing distinctions,¹⁶¹ it suggests that the judicial-discretion model may not represent a sustainable theory of *Apprendi* rights.

On the other hand, if the *Harris* dissenters do prevail in *Booker*, they will need to develop a plausible normative basis for their judicial-discretion model, and they will confront two doctrinal options in future cases. First, they could adopt a theory focused on a sentencing judge's formal discretion. Such a model would find no constitutional violation so long as a judge remains theoretically autonomous. It would not matter whether some or all sentences in fact follow collectively promulgated rules, so long as those rules are enforced by some mechanism other than direct appellate review.

Second, the *Harris* dissenters might choose a robust vision of judicial discretion. That theoretical model, however, might require searching inquiry into whether a particular sentencing judge is imposing her own, individualized assessment of a defendant's punishment, rather than some collective assessment that is directly "imposed" by others. At present, one cannot know what sort of "rules" Justice Thomas would strike down and, by implication, what sort of

¹⁶⁰Respondent's Brief at 24-26, 34, *Blakely* (No. 02-1632); cf. *Blakely*, 124 S. Ct. at 2549-50 (O'Connor, J., dissenting) ("If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack [than Washington's scheme].").

¹⁶¹*See supra* pp.41-45.

“discretion” he would protect. But it seems likely that any answers to such questions would raise significant, if not prohibitive, theoretical and practical problems.

C. A Model of Statutory Maxima

There is a third interpretation of *Apprendi*, which would impose heightened constitutional procedures only when a sentence is imposed above the statutory maximum for the crime of conviction. The statutory maximum is significant under such a theory because it marks the maximum sentence authorized by a jury’s verdict. The Court often articulates *Apprendi* rights by reference to the term “statutory maximum” and the maximum prescribed by the “legislature.”¹⁶²

¹⁶²*See, e.g., Blakely*, 120 S. Ct. at 2536 (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.” (quoting *Apprendi*, 530 U.S. at 490) (emphasis added)); *id.* at 2536 (defining “statutory maximum for *Apprendi* purposes); *Ring*, 536 U.S. at 589 (noting that defendants “are entitled to a jury determination of any fact on which the *legislature* conditions an increase in their maximum punishment” (emphasis added)); *id.* at 604 (“[I]f the *legislature* defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] . . . the core crime and the aggravating fact together constitute an aggravated crime” (quoting *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring) (emphasis added)); *Harris*, 536 U.S. at 549 (“Legislatures define crimes in terms of the facts that are their essential elements, and constitutional guarantees attach to these facts.”); *id.* (“After the accused is convicted, the judge may impose a sentence within a range *provided by statute*, basing it on various facts relating to the defendant and the manner in which the offense was committed.” (emphasis added)); *id.* at 563 (limiting *McMillan*’s holding “to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury’s verdict”); *id.* at 565 (“[T]he facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.”); *Apprendi*, 530 U.S. at 481 (disclaiming any view “that it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case” (emphasis original)); *id.* at 494 n.19 (“[W]hen the term ‘sentence enhancement’ is used to describe an increase beyond the maximum authorized *statutory sentence*, it is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict.” (emphasis added)); *id.* at 495 (“The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant’s very liberty, and for the

But the Court has never explained why it should matter that a provision connecting criminal conduct with punishment is legislative, rather than judicial or executive. Before addressing that issue directly, it bears note that a theory based on statutory maxima would avoid several problems with the substantive and judicial-discretion theories. For example, focusing on statutory maxima explains why indeterminate sentencing is permissible: All judicial findings and adjustments in an indeterminate system operate, by definition, underneath the maximum prescribed by statute. Likewise, one need not probe deep meanings of “judicial discretion” or explain why *Apprendi* rights turn on such discretion. Under a statutory-maximum theory, the simple and dispositive question is whether a statute has attached a maximum sentence to a set of criminal acts. If so, then any increase in a defendant’s sentence beyond that maximum violates the defendant’s right to indictment and jury trial beyond reasonable doubt. This Part will argue that the statutory-maximum model is consistent with the Court’s *Apprendi* jurisprudence, and with a view of separated powers that assigns primary responsibility to legislatures for defining criminal conduct and its maximum punishment.

1. Theoretical Exposition

To understand why the statutory character of sentencing rules might matter, one could first turn to *Apprendi*’s precursor, *Jones v. United States*.¹⁶³ The *Jones* Court construed a federal criminal statute as creating multiple “aggravated offenses,” which required indictment and jury

heightened stigma associated with an offense the legislature has selected as worthy of greater punishment.”).

¹⁶³526 U.S. at 227.

trial of their “aggravating facts.”¹⁶⁴ In the Court’s view, Congress in effect created separate crimes by enacting a statute that imposed different maximum sentences for different criminal conduct.¹⁶⁵ *Apprendi* expanded *Jones* and held that the Constitution requires heightened procedures for any provision that increases punishment above the crime of conviction’s statutory maximum, regardless of the label used to describe that additional punishment.¹⁶⁶ In other words, statutes with the effect of “defining crimes” have constitutional significance regardless of their legislative label or intended purpose.

Consistent with *Jones* and *Apprendi*, I suggest that the statutory maximum is important because it describes the harshest punishment that the jury has authorized by its guilty verdict.¹⁶⁷ The crime of conviction is the statutory link between culpable conduct and a maximum sentence. The jury applies the statutory definition of that crime in finding a defendant guilty, and the same definition sets constitutional limits on the punishment that can be imposed. Under the statutory-maximum model, the Constitution’s requirements are satisfied so long as the sentence imposed lies beneath the statutory maximum, and it makes no constitutional difference how judicial discretion is used, or restricted, in imposing a sub-maximal sentence.

¹⁶⁴*Id.* at 251-52.

¹⁶⁵*Id.*

¹⁶⁶*Apprendi*, 530 U.S. at 494.

¹⁶⁷Although judges seldom if ever allow juries to know their verdict’s sentencing consequences, see Sherry F. Colb, *A Significant Decision That May Not Matter: The Supreme Court Holds That Only Juries, Not Judges, Can Make The Factual Determinations That Increase Sentences*, at <http://writ.findlaw.com/colb/20040629.html> (June 29, 2004) (last visited August 31, 2004), that does not change that function of a jury’s verdict as a prerequisite to the imposition of a legally permissible punishment.

By its terms, the above argument explains why *Apprendi* should not apply to the Sentencing Guidelines: Because the Guidelines are not statutory, they do not affect or exceed the maximum punishment authorized by statute and the jury’s verdict.¹⁶⁸ Under federal law, Congress has unique authority to define crimes, and that authority manifests criminal law’s basic concern for separation of powers.¹⁶⁹ Courts cannot define federal crimes on their own authority, nor can courts modify the statutory terms of a federal crime. For the executive branch to do so would be equally unsound. The authority to define criminal conduct is reserved for Congress. And that is true even though “nonstatutory” federal crimes could conceivably be issued with broad public notice and could, aside from their origin, be applied to defendants just like statutory crimes. Nor is the reservation of legislative power to define crimes is the only instance of separated powers in criminal law. Judges cannot prosecute defendants, nor can legislatures condemn them, even though certain “functional” aspects of those prosecutions and judgments might be deemed acceptable if performed by entities within the proper branch. Criminal law is one area where constitutional separations can be sharply drawn and strictly enforced.

The Sentencing Commission is an independent agent within the judicial branch.¹⁷⁰

¹⁶⁸See U.S.S.G. § 5G1.1(a); see also 28 U.S.C. § 994(a) (requiring all Guidelines to be consistent with statutory provisions of the United States Criminal Code).

¹⁶⁹*Cf. United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483, 490 (2001) (“[U]nder our constitutional system . . . federal crimes are defined by statute, rather than by common law.”); *United States v. Hudson & Goodwin*, 11 U.S. 32, 33 (1812) (“[I]t would not follow that the Courts of that Government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”).

¹⁷⁰28 U.S.C. § 991 (establishing an “independent commission in the judicial branch of the United States”).

Congress did not intend to grant the Commission power to alter statutory definitions of crime by creating sub-statutory “lesser included offenses,” such as “bank robbery without evidence of amount.”¹⁷¹ As we have seen, however, legislative intent is not always dispositive for *Apprendi* purposes. Indeed, if the Commission had the effective power to “expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict,” *i.e.*, the statutory crime of conviction, such power would without doubt be unconstitutional.¹⁷² But the Commission has no such power. The courts of appeals had unanimously upheld the Federal Guidelines against *Apprendi* challenge precisely because guideline sentencing never exceeds the statutory maximum.¹⁷³ According to the conventional narrative, Congress chose high maximum sentences for some crimes, which in turn produced broad sentencing ranges. Congress then asked the judicial branch to rationalize, through the newborn Sentencing Commission, judges’ discretion to choose sentences within those statutory sentencing ranges. The Judiciary’s involvement in sentencing policy, however, was never thought to alter the underlying crimes for which any sentence was prescribed.¹⁷⁴

¹⁷¹See generally *supra* 5-6 (discussing 18 U.S.C. § 2113(a) and U.S.S.G. § 2B3.1).

¹⁷²*Apprendi*, 530 U.S. at 495.

¹⁷³See *supra* note 24 (collecting cases).

¹⁷⁴In *Mistretta v. United States*, the Court upheld the Sentencing Commission against separation of powers objections. 488 U.S. at 380-412. Justice Scalia dissented on the ground that the Sentencing Commission impermissibly exercised no “governmental power other than the making of laws.” *Id.* at 412-27. Presumably, Scalia’s objection would have been even stronger had he also believed that the Commission was making laws that were, in effect, redefining crimes.

That conventional explanation retains force. To rephrase earlier examples,¹⁷⁵ it is indisputable that an individual judge could make case-by-case factual findings at sentencing; an individual judge could make those decisions using her own set of sentencing rules; and a group of several judges could opt to use the same rules. Perhaps aggressive judicial-discretion theorists would object if sentencing rules were crafted and imposed by appellate courts instead of trial courts.¹⁷⁶ As discussed above, however, it seems unclear that the validity, for Fifth and Sixth Amendment purposes, of judicially constructed sentencing rules should turn on such details. What is important is not whether the Sentencing Commission qualifies, in Judge Posner's words, as a "superjudge."¹⁷⁷ Instead, the critical issue is that the Commission lies within the judiciary, and it (like individual judges) operates within, and does not alter, the system of statutory rules

¹⁷⁵See *supra* pp. 41-42.

¹⁷⁶In previous discussion, that possibility was set forth as Option (5). See *supra* p. 42. Incidentally, Justice Scalia's separation of powers objection might also apply to rules from courts of appeals; in his view, such rules might arrogate the legislative power to "mak[e] the laws." *Mistretta*, 488 U.S. at 413. Of course, Justice Scalia's separation of powers objection has no lawsuit connection to constitutional claims under the Fifth and Sixth Amendments.

Court-watchers might nonetheless suggest that Justice Scalia's vote in *Mistretta* means that he would relish a chance to overturn the Guidelines, albeit on a different ground. Of course anything is possible, but two contrary thoughts bear mention. First, in opinions after *Mistretta*, Justice Scalia has appeared ready to apply the Guidelines on their own terms, without regard for his view concerning their constitutionality. Second, Justice Scalia's situation in *Booker* may be similar to that in *Ring*, where the Court interpreted Arizona's rules concerning "aggravating factors." 536 U.S. at 609 (Scalia, J., concurring). Justice Scalia noted that many States had adopted such procedural mechanisms in response to the Supreme Court's death penalty jurisprudence. In Justice Scalia's view, the Court's decisions imposing such requirements "had no proper foundation in the Constitution," and he expressed "reluctance to magnify [such] burdens . . . on the States" by requiring that aggravating factors be proved beyond reasonable doubt. *Id.* at 610. Scalia's opinion in *Ring* nonetheless followed his views of *Apprendi*, not his collateral views regarding the context to which it was applied.

¹⁷⁷*Booker*, 375 F.3d at 512.

that defines crimes and sets the maximum punishments that are constitutionally authorized by a jury's guilty verdict.

2. Doctrinal Basis

The statutory-maximum theory finds support in at least three aspects of the Court's post*Apprendi* jurisprudence. First, the two-step analysis at *Apprendi*'s core indicates that, when the legislature defines a crime, that statutory definition is constitutionally important. Legislative definitions of crimes attach maximum sentences to criminal conduct, and those maxima cannot be "supplemented" by "sentencing enhancements."¹⁷⁸ On the contrary, to impose a super-maximal sentence effectively defines a "new crime," and constitutional protections are necessary for each of that crime's elements.

Conversely, the statutory-maximum theory suggests that Congress's definition of a crime is unaltered by nonstatutory "*sentencing limitations.*" Under such a view, *Apprendi*'s procedural protections would apply if and only if a defendant is convicted under the definition of one crime, and sentenced under a different one. The Federal Guidelines do not trigger such constitutional requirements because they lack the authority to create a lesser crime, and they have no effect on the scope of a defendant's conviction. As discussed above, it makes little sense to describe the Guidelines' base offense level as "redefining" a defendant's crime of conviction, and no one would say such a thing current parlance.¹⁷⁹ Everything that occurs under the Guidelines, including all judicial factfinding, is designed to, and does in fact, operate beneath the

¹⁷⁸*Apprendi*, 530 U.S. at 490-497.

¹⁷⁹*See supra* page 25.

congressionally prescribed maximum punishment.¹⁸⁰

Second, Justice Scalia's *Blakely* opinion conflicts, at least in part, with any theory based on judicial discretion. Washington sought to defend its statutory scheme by arguing that the fifty-three month "standard sentencing range" was not a true statutory maximum because the trial judge retained discretion to depart from that range, even on grounds that were not enumerated within any statute.¹⁸¹ That discretion did not change *Blakely*'s result. Justice Scalia responded to one of the dissents by saying that "the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury."¹⁸² Similarly, it is irrelevant that nonstatutory Federal Guidelines may *restrict* judicial discretion, resulting in a lower offense level than the maximum authorized by the statute. Effects on judicial discretion are, without more, categorically insufficient to change a crime's statutory definition and maximum.

Justice Scalia in *Apprendi* wrote that, after a valid conviction, the Constitution allows defendants to receive far less than the statutory maximum through the "mercy of a tenderhearted judge," early release due to a "tenderhearted parole commission," or a commutation a "tenderhearted governor."¹⁸³ The Federal Sentencing Guidelines are seldom called "tenderhearted," but the operative fact is the same. Under the Guidelines, "the criminal will

¹⁸⁰See U.S.S.G. § 5G1.1(a); *see also* 28 U.S.C. § 994(a) (requiring all Guidelines to be consistent with statutory provisions of the United States Criminal Code).

¹⁸¹Respondent's Br. at 21-26, *Blakely* (No. 02-1632).

¹⁸²*Blakely*, 124 S. Ct. at 2531.

¹⁸³*Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).

never get *more* punishment than he bargained for when he did the crime.”¹⁸⁴ Put precisely, no defendant will receive a greater punishment than what the statute defining the crime authorizes upon a jury’s conviction.

Third, the Court has repeatedly referred to modern legislatures’ ability to structure the discretion of sentencing judges.¹⁸⁵ Even Justice Scalia’s *Blakely* opinion disclaimed “find[ing] determinate sentencing schemes unconstitutional.”¹⁸⁶ Rather, the Court addressed how a system of determinate sentencing “could be implemented in a way that respects the Sixth Amendment.”¹⁸⁷ That suggestion would seem illusory, and perhaps disingenuous, if the application of *Blakely*’s analysis were to find that determinate sentencing could only be implemented by placing all facts that might increase the “base offense level” in an indictment and proving them to a jury beyond reasonable doubt.

The cornerstone of all determinate sentencing regimes is a judge’s rule-bound responsibility for making post-conviction findings and prescribing a sentence. Such systems could hardly function if every post-conviction finding that “increased” a sentence above

¹⁸⁴*Id.*

¹⁸⁵*See, e.g., Harris*, 536 U.S. at 558 (plurality) (“In the latter part of the 20th century, many legislatures, dissatisfied with sentencing disparities among like offenders, implemented measures regulating judicial discretion. These systems maintained the statutory ranges and the judge’s factfinding role but assigned a uniform weight to factors judges often relied upon when choosing a sentence.”).

¹⁸⁶*Blakely*, 124 S. Ct. at 2540 (quoting Washington Br. 34).

¹⁸⁷*Id.* Any tension between this formalism and *Apprendi*’s statement that “the relevant inquiry is one not of form, but of effect” is superficial. 530 U.S. at 495. The latter inquiry was whether the “required finding expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict.” *Id.* The question of what the jury’s verdict authorizes is necessarily formal, at least in part. *See infra* pp. 53-58.

nonstatutory base offense levels had to be listed in the indictment and proved to a jury beyond reasonable doubt. What would a judge be left to “determine” at sentencing? The ministerial results of the jury’s findings? Findings that could only reduce a defendant’s sentence? Any such result would seem extraordinary in light of Justice Scalia’s assertion that he was not “find[ing] determinate sentencing schemes unconstitutional,” but was only invalidating certain of their procedural incarnations.¹⁸⁸

Under a statutory-maximum theory of *Apprendi*, by contrast, it is relatively easy to identify which determinate sentencing schemes are unconstitutional. Invalid systems are ones that effectively prescribe one statutory maximum, attached to lesser crime, yet allow imposition of a greater sentence pursuant to what is in effect the statutory definition of a second, greater crime. *Apprendi*, *Ring*, and *Blakely* all involved such unconstitutional schemes, but *Booker* does not.

3. Objections And Responses

Opposition to a statutory-maximum theory derives from its preoccupation with legislative action. Its strongest form, advanced by Judge Posner, argues that applying *Apprendi* to congressional rules, but not to Commission Guidelines, absurdly implies that “an administrative agency is to be deemed a more responsible, a more authoritative, fount of criminal law than a legislature.”¹⁸⁹ How can the Commission do by guideline what Congress cannot by statute?

As previous discussion suggests,¹⁹⁰ that characterization builds from a flawed premise.

¹⁸⁸*Blakely*, 124 S. Ct. at 2540 (quoting Washington Br. 34).

¹⁸⁹*Booker*, 375 F.3d at 512.

¹⁹⁰*See supra* pp. 52-62.

Under the statutory-maximum model, constitutional analysis is different for statutory and nonstatutory judicial rules *because of* Congress’s unique authority to define crimes and prescribe statutory maxima. It is what *the Commission cannot do* that creates the constitutional difference. The statutory-maximum theory provides that, for constitutional purposes, the congressionally prescribed maximum is what governs, and such statutory rules present the (otherwise elusive) “baseline” against which any impermissibly “increased” sentence is measured.¹⁹¹

No judicial rule, despite its practical and legal force as a limit on judicial discretion, can create “lesser included offenses” where Congress has not done so. If a jury convicts of bank robbery under 18 U.S.C. § 2113(a), with a twenty-year maximum sentence, that is the crime of conviction, and that is the maximum sentence. Not more, but also not less. An entity within the Judicial Branch may create rules that limit judicial discretion and reduce some defendants’ statistically expected sentence, but such an entity cannot lower a federal crime’s statutory maximum nor redefine the statutory crime of conviction. As a pragmatist, Judge Posner implicitly characterizes what a sentencing rule “does” by its effect on defendants and, perhaps, on judges’ discretion. Each of those standards, however, is a problematic basis for interpreting *Apprendi*.¹⁹²

A weaker version of the same critique might accuse the statutory-maximum model of “formalism.” How can it matter whether a particular rule is applied by statute or by guideline, when their effects on defendants and judges is the same? Again, however, one must note that substantive effects on defendants and judicial discretion often lack dispositive weight under

¹⁹¹*See supra* p. 44 (explaining problem of baselines).

¹⁹²*See supra* pp. 33-52.

Apprendi. From a defendant's perspective, indeterminate sentencing could permissibly impose punishment in any case (or, with imagination, in every case) identical to the sentence imposed under the Federal Guidelines. On the facts of *Apprendi*, New Jersey's legislature could raise the statutory maximum for unlawful firearm possession to twenty years, and state judges could in every case (at the legislature's "suggestion") apply the top half of that range only after themselves finding that the offense qualified as a hate crime. It seems equally clear that New Jersey could, after raising the statutory maximum to twenty years, impose a statutory minimum of ten years for hate crimes.

For an overly vigorous critic of the statutory-maximum model, *Apprendi* itself could be derided as "formalist" because it applies differently to regimes with the same effect for defendants and sentencing judges. Indeed, *Apprendi*'s dissenters have continuously attacked that feature of the Court's jurisprudence,¹⁹³ and Justice O'Connor would almost certainly repeat that critique today.¹⁹⁴ Such analysis might lead one to reject *Apprendi* as a whole, but it should not invalidate the Guidelines.

From a different perspective, to accuse *Apprendi* of formalism is just another way to say that the case protects other values. *Apprendi* exists neither to protect defendants from judicially determined punishment, nor to ensure the predominance of individual judges in determining such punishment. Instead, *Apprendi* is a narrower rule that requires a connection between the legislature's definition of a crime, a jury's verdict of conviction, and the maximum that may be

¹⁹³*Apprendi*, 530 U.S. at 523-54 (O'Connor, J., dissenting); *id.* at 555-66 (Breyer, J., dissenting).

¹⁹⁴*Cf. Blakely*, 124 S. Ct. at 2547 ("[I]t is difficult for me to discern what principle besides doctrinaire formalism actually motivates today's decision . . .") (O'Connor, J., dissenting).

imposed for that crime. In Justice Scalia’s terms, *Apprendi* is not a “mere procedural formality,” designed to benefit criminal defendants, but is “a fundamental reservation of power in our constitutional structure.”¹⁹⁵ It is a systemic rule that preserves a jury’s importance in authorizing a defendant’s maximum sentence, but also respects legislative authority to define the maximum punishment for criminal conduct, and to structure judicial sentencing beneath that statutory maximum.

Finally, although *Apprendi* does not yield any profound substantive rights for criminal defendants, it remains an important landmark in constitutional law. As Justice Scalia’s concurring opinion explains, had *Apprendi* been decided otherwise — allowing a defendant to be convicted of one crime and punished above that crime’s maximum sentence — the right to a jury trial would be wholly contingent on legislative preference.¹⁹⁶ Justice Scalia’s language was strong, and he dared the dissenters to articulate a different constitutional view: “What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury *does* guarantee if, as they assert, it does not guarantee — what it has been assumed to guarantee throughout our history — the right to have a jury determine those facts that determine the maximum sentence the law allows. They provide no coherent alternative.”¹⁹⁷ That challenge remains unmet. Thus, until a better theory of *Apprendi* rights emerges — or until jury rights are conceded to be a matter for legislative choice — the statutory-maximum model stands as a principled explanation of the Fifth and Sixth Amendments, with deep roots in constitutional

¹⁹⁵*Id.* at 2538.

¹⁹⁶*Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).

¹⁹⁷*Id.*

separation of powers, respect for indeterminate sentencing, and legislative power to define crimes and prescribe maximum punishments.

III. Constitutional Rulemaking and *Booker*

In *Booker*, amidst great uproar, the Court will answer the controversial and important question of whether the Federal Sentencing Guidelines are unconstitutional. The public outcry surrounding that decision is itself significant, and although the public reaction is partly motivated by the legal issues' magnitude, it also stems from a perceived "chaos" that has arisen after *Blakely*. According to conventional wisdom, *Blakely*'s merits and its chaos go hand in hand. Recent disruptions in the criminal legal system are hailed by some as overdue "growing pains" through which courts must confront the inevitable fact that the Guidelines are unconstitutional.¹⁹⁸ Such disruptions are reviled by other jurists as a "natural disaster" that has brewed since *Apprendi* and has now overflowed.¹⁹⁹ From both perspectives, systemic disarray is the direct and inevitable result of the applicable constitutional principle. In such commentators' view, apart from a different result in *Blakely* or *Apprendi*, the current upheaval could not have been helped.

The interpretation of *Apprendi* set forth in Part II conflicts with that account. This Article argues that there is nothing "inevitable" about the result in *Booker*. On the contrary, the Court has a fractured view of *Apprendi*'s meaning, and the outcome in the pending cases will depend on Justice Scalia's swing vote, which has proved hard to predict, from *Apprendi* (where he joined most of Justice Thomas's concurrence), to *Harris* (where he joined *Apprendi*'s dissenters), to *Ring* and *Blakely* (where *Apprendi*'s majority was reunited). The statutory-maximum approach

¹⁹⁸*See, e.g.*, Berman, *supra* note 4, at 307.

¹⁹⁹*See, e.g.*, 124 S. Ct. at 2550 (O'Connor, J., dissenting).

also suggests that this summer’s confusion was anything but “natural.” *Apprendi* did not itself require any such upheaval, which is why every court of appeals had earlier upheld the Guidelines as constitutional.²⁰⁰ Whatever has happened in the judicial system between *Blakely* and *Booker*, this Article implies that it is not the simple result of those two cases’ substantive significance.

In this Part, I will use the uncertainty surrounding the Court’s *Booker* decision to analyze how different actors contributed to making the road from *Blakely* to *Booker* so uneven. Although the *Blakely* “crisis” may seem historically anomalous, the behavior of various entities in the process provides a negative case study of how national judicial rules can be developed. Regardless of how the Court decides the pending guideline cases, it is not too early to examine recent events for broader lessons about legal institutions’ behavior regarding *Blakely*, in the hope that such insights might apply outside the sentencing sphere and might mitigate the risk of similar judicial “crises” in the future.

Such analysis might begin by imagining that the *Booker* Court were to adopt the statutory-maximum model and uphold the Guidelines. Under that scenario, *Blakely*’s statement that it “express[ed] no view” of the Guidelines would prove similar to *Apprendi*’s claim that it did not address mandatory minima (which *Harris* later upheld).²⁰¹ Of course, one could criticize *Blakely*’s ambiguous language defining “statutory maxima” as ambiguous,²⁰² but the Court’s opinion also might have been distorted by its inability, as a five-vote majority, to agree on what

²⁰⁰*See supra* note 24 (collecting cases).

²⁰¹*See supra* p. 7.

²⁰²*But cf. supra* pp. 21-24 (arguing that the most natural reading of that passage would not affect the Guidelines).

should be said about the Guidelines.²⁰³

By contrast, the dissenters' strong rhetoric and post-decision comments were unconstrained by the bureaucratic need to attract votes.²⁰⁴ There is a wide range of reasonable views on the proper role of judicial dissents, especially those of Supreme Court Justices.²⁰⁵ But in discussing the Guidelines' constitutionality, which presented an issue of obvious national importance and uncertain result, *Blakely's* dissenters would have been well-served to maintain a more judicious tone. The Court's highest tradition of dissents could trace to Brandeis, Harlan, Holmes, and others whose powerful words coincided with, and perhaps helped to cause, a principled change in favor of their views.²⁰⁶ The dramatic rhetoric of *Blakely's* dissenters, however, only gave shelter to their enemies. Thus, those who argue that the Guidelines are unconstitutional now are able to cite *Blakely's* dissents as a primary proof.²⁰⁷ Perhaps *Blakely's* dissenters were trying to force a decision regarding the Federal Guidelines, to persuade a swing voter to change, to draw public attention, or just to vent after losing another battle over *Apprendi*.

²⁰³*See supra*

²⁰⁴*See, e.g., Blakely*, 124 S. Ct. at 2549-50; *id.* 124 S. Ct. at 2561 (Breyer, J., dissenting); *O'Connor Disgusted*, *supra* note 34

²⁰⁵*See, e.g.,* Robert Post, *The Supreme Court as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267 (2001); Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781 (2000); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 431-32 (1986).

²⁰⁶*See, e.g., New State Ice Co. v. Liebman*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting); *Gitlow v. New York*, 268 U.S. 652, 672-673 (1925) (Holmes, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting); *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

²⁰⁷*See supra* p. 31.

Whatever the goal, it is clear that those dissents have had serious unintended consequences that, given subsequent events, have tended to tip the balance *against* the dissenters' legal position.

The second major contribution to *Blakely*'s aftermath came from the courts of appeals, whose speedy and bold reactions to *Blakely* also tested the limits of their proper role. *Blakely* was decided on June 24, 2004.²⁰⁸ After only ten business days, on July 9, 2004, Judge Posner issued an opinion for the Seventh Circuit finding the Guidelines unconstitutional.²⁰⁹ On July 14, Judge Merritt did likewise for the Sixth Circuit, followed by Judge Paez for the Ninth Circuit on July 21, and by Judges Lay and Bright for the Eighth Circuit on July 23.²¹⁰ On July 12, Second Circuit certified the Guidelines' constitutionality to the Supreme Court, and the Second Circuit, as though it were an overeager litigant, "request[ed]" that the Supreme Court hold expedited briefing and argument during its summer recess.²¹¹

Putting aside the merits of those cases, their most remarkable characteristic may be their speed. Anyone who has studied or practiced in the federal appellate system knows that such quick decisions are truly remarkable. Perhaps acknowledging that fact, Judge Posner sought to explain his need for speed: "We have expedited our decision in an effort to provide some

²⁰⁸*Blakely*, 124 S. Ct. at 2531.

²⁰⁹*Booker*, 375 F.3d at 508.

²¹⁰*United States v. Montgomery*, No. 02-20247 (6th Cir. July 14, 2004), *vacated for reh'g en banc*, 2004 WL 1562904 (6th Cir. July 19, 2004), *and dismissed*, 2004 WL 1637660 (6th Cir. July 23, 2004); *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004); *United States v. Mooney*, No. 02-3388 (8th Cir. July 23, 2004), *vacated for reh'g en banc*, 2004 WL 1696960 (Aug. 6, 2004).

²¹¹*Peneranda*, 375 F.3d at 238; *cf. United States v. Mincey*, 2004 WL 1794717 (2d Cir. Aug. 12, 2004) (per curiam) (upholding the Guidelines pending the Supreme Court's decision in *Booker*).

guidance to the district judges (and our own court's staff), who are faced with an avalanche of motions for resentencing in the light of [*Blakely*]."²¹² The credibility of that rationale, however, is reduced by historical context. After *Apprendi*, defendants in every federal court, including the Seventh Circuit, filed numerous challenges to the Guidelines' constitutionality. Every court of appeals ultimately rejected those claims.²¹³ Moreover, no court of appeals heard oral argument and decided such issues in the span of two weeks. Why the sudden rush to accept a constitutional claim that the appellate courts, including the Supreme Court in its certiorari practice, had unanimously ignored since *Apprendi* was decided five years earlier?²¹⁴

Without a doubt, the appellate courts' haste partly owes to certain judges' belief that *Blakely* (unlike *Apprendi*) held the Guidelines unconstitutional, a belief that I do not share.²¹⁵ Yet even that appraisal of the merits may have been influenced by the uncommon speed of the process. Complexities often seem simpler when time is short. In any event, two more dubious motives are also possible. First, Judge Posner's opinion seems to express interest in forcing constitutional questions regarding the Federal Guidelines into the Supreme Court.²¹⁶ The Second

²¹²*Booker*, 375 F.3d at 510.

²¹³*See supra* note 24 (collecting cases).

²¹⁴If anything, the need for a quick decision is less now than it was when *Apprendi* was decided, because the Supreme Court has held that *Apprendi* rights can be forfeited and are not retroactive. *See Cotton*, 535 U.S. 625; *Sattazahn*, 537 U.S. at 111. Those rules seriously limit the number of defendants with valid constitutional claims; they correspondingly mitigate any time pressure from a potential "tidal wave" of appeals to be considered.

²¹⁵*See supra* Part I.

²¹⁶*Booker*, 375 F.3d at 510 ("We cannot of course provide definitive guidance; only the Court and Congress can do that; our hope is that an early opinion will help speed the issue to a definitive resolution.").

Circuit’s certification decision is a more direct expression of similar sentiments.²¹⁷ Such lower federal judges’ desire to place their cases *on* the Supreme Court’s docket is a rarity in modern practice, and one that seems quite outside such judges’ proper role. One obvious aspect of the modern shift toward discretionary certiorari jurisdiction (as opposed to Supreme Court appeals of right) is the congressional policy to grant the Supreme Court authority and discretion to determine its own caseload.²¹⁸ Naturally, there are rare circumstances that would call for lower courts to act quickly in order to deal with a particularly exigent circumstances.²¹⁹ There is serious reason to doubt, however, that *Blakely* presented such circumstances.

The desire for quick review by the Supreme Court likely derived from a sense that *Blakely*’s failure to consider the Federal Guidelines left significant “unfinished business” for the Court to address. Insofar as appellate judges sincerely sought to accelerate their cases in order to “aid” the Supreme Court in attending to its work, they ignored the obvious fact that cases in the federal appellate courts have generated — for several years — more than enough petitions for certiorari raising that issue. At this point, the Supreme Court needed no additional help. More likely, the appellate courts were (not so) subtly criticizing the Court’s *Blakely* decision. Judge Posner, perhaps his generation’s most renowned judge, must have known that his *Booker* opinion would cause significant controversy, and would also encourage other courts to decide quickly,

²¹⁷*Peneranda*, 375 F.3d at 238.

²¹⁸*See generally* RICHARD H. FALLON, JR., ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1552-55 (5th ed. 2003) (outlining the historical development and purposes of certiorari jurisdiction).

²¹⁹*See McConnell v. Fed. Election Comm.*, 540 U.S. 93 (2003) (addressing the constitutionality of the Bipartisan Campaign Reform Act of 2002 in the year before an election).

perhaps agreeably to his approach. The quick release of Judge Posner's opinion assured its position as a resource, intellectually and politically, for other judges inclined to invalidate the Guidelines. And the more judges invalidated the Guidelines, the quicker the Court would have to intervene. Indeed, that is just what happened.²²⁰

Another questionable factor in some judges' decisions might be their antipathy toward the Guidelines, which limit judicial power and can require extraordinarily harsh sentences. As one commentator put it, "The most public, steady, and compelling criticism of the guidelines has come from federal judges. . . . Judges [have spoken] early and often about their displeasure with the sentencing rules." Although Judge Merritt has participated in debates over guideline policy, it is not clear whether any other appellate judge involved with post-*Blakely* decisions has strong views about the Guidelines.²²¹ Much less could one suggest that any such predilections could have affected a court's decision about timing or otherwise. The more limited point is that appearances often matter in judicial business, and, if the Guidelines are upheld, the speed and merits of the recent court of appeals' decisions could be reexamined in a critical light. The very possibility of that reexamination, combined with ample opportunity for more measured consideration, is sufficient to recommend a more patient approach, which would have allowed appellate and certiorari practice to run at a pace closer to normal.

Thus far, I have examined post-*Blakely* conduct on the assumption that the *Booker* Court

²²⁰See *supra* pp. 10-11, 68-69.

²²¹Gilbert S. Merritt, *A Straightforward Proposal to Reform Sentencing Guidelines*, 5 FED. SENT. REP. 233 (1993) (proposing change in order to "create a fairer, less harsh system that reintroduces rehabilitation and flexibility").

will uphold the Federal Guidelines. On the opposite assumption — that the Court invalidates the Guidelines — the behavior of different entities comes into focus. For example, an important contributor to the post-*Blakely* “chaos” is the federal government, whose litigation tactics unintentionally fed the frenzy. Of particular note is the government’s decision to support the State of Washington as an *amicus curiae*, and its seemingly gratuitous prediction to the Court that, if Washington lost in *Blakely*, “[i]t is . . . not certain that this Court would ultimately conclude that the differences between the Washington system and the federal Guidelines are of constitutional magnitude.”²²² Although such words in the abstract may seem mild, to the *Booker* Court, they risk projecting a forecast of defeat. Perhaps no appraisal of the government’s litigation tactics in *Blakely* can escape the distortions of hindsight, but the statutory-maximum theory in Part II and the *Apprendi* analysis in Part I at least suggest that the government could have kept its powder dry in *Blakely*, or at least could have struck a slightly different tone to mitigate risks that losing *Blakely* would be given undue importance in the now-pending federal cases.

One last institution warranting attention is the Court itself, and in particular its practice regarding petitions of certiorari, which will be subject to significant criticism if the Guidelines are held unconstitutional. As discussed previously, the Court has for years denied the petitions of federal defendants who sought to challenge the Guidelines on *Apprendi* grounds.²²³ If those

²²²United States Brief at 29-30, *Blakely* (No. 02-1632); *see also id.* at 9 (“[I]t is uncertain whether [any] distinctions would be sufficient if this Court applied *Apprendi* here, since the United States Sentencing Guidelines have the force and effect of law, and it is theoretically possible to calculate a guidelines sentence based on the facts reflected in the jury verdict alone . . .”).

²²³*See supra* note 24 and accompanying text.

denials caused thousands of defendants to be sentenced under a scheme that the Court believes is unconstitutional, and, as appeals became final, caused thousands of other defendants to lose their right to challenge such sentences, then the Court’s refusal to grant certiorari could become hard to understand.²²⁴

The best explanation for such pre-*Blakely* denials of certiorari is that one or more Justices were at the time uncertain about the Guidelines’ constitutional status. Absent a circuit conflict, the Court is often justified in avoiding questions, even important ones, where the Justices are unsure of the result. When certiorari was granted in *Blakely*, however, the landscape changed. Similarities between the content of Washington’s system and the Federal Guidelines illustrated that the Guidelines’ constitutionality could be implicated, and the possibility of “avoiding” the question became increasingly remote. Furthermore, at the time certiorari was granted, and while *Blakely* was pending, the Court had ample opportunity to grant a federal “companion case,” which would directly raise the Federal Guidelines’ constitutionality, if the Court believed that the federal Guidelines walked in constitutional lockstep with Washington’s statutory scheme.²²⁵

²²⁴As discussed previously, *see supra* note 113 and accompanying text, the Supreme Court often does not grant certiorari unless the decisions of two or more lower courts are in conflict. That is by no means a hard or fast rule, however, and without more, it should not have precluded a grant in these circumstances.

²²⁵*Id.* (collecting dates). A different rationale that sometimes justifies the Court’s decision not to grant certiorari is allowing the issue to “percolate” in the courts of appeals, so that the Court may reach its own conclusions with the benefit of other judges’ assessments. Such reasoning would ring hollow here, because, just as the Court has received numerous petitions for certiorari, it also has received reasoned decisions on this issue from every circuit. *See supra*, note 24 (collecting cases). The only “new” question is how the courts of appeals should react to the ambiguities of the *Blakely* opinion, but because that question lies within the Supreme Court’s unique competence, it is hard to see much benefit in gaining outside judges’ “interpretations” of the Court’s language and subtext.

Although the above discussion uses alternate hypotheses (“What if the Guidelines are constitutional? What if they are not?”) to highlight the conduct of different entities, most of the emergent institutional lessons are quite independent of what the *Booker* Court ultimately does.²²⁶ For example, a more restrained judicial role would be commendable for the dissenting Justices and the courts of appeals regardless of whether their substantive analysis ultimately proves correct and the Guidelines are struck down. Similarly, the government’s *Blakely* brief could have been more moderate regardless of the result in *Booker*. For the Court to invalidate the Guidelines might suggest that the government put too many eggs in *Blakely*’s basket, and endangered its subsequent credibility in seeking to distinguish the Guidelines from Washington’s failed statutory system. Alternatively, if the *Booker* Court rules in the government’s favor, that might imply (as Part I indicates) that the best strategy would have been not to participate in *Blakely* at all.

The disruption that arise from *Blakely* to *Booker* derives from a combination of actions undertaken by various repeat players in the federal judicial system, in a context where the Court’s jurisprudence was so recent and dynamic that significant tentativeness would have been appropriate. The dissenters’ strong rhetoric, and Justice O’Connor’s public comments, initiated a substantial media spectacle; the lower federal courts, led by the nation’s most prominent court of appeals judge, validated those fears nearly immediately; and government lawyers have continued to litigate, trying to ignore the failed “line in the sand” that seemed to be drawn in *Blakely*. Other

²²⁶The Supreme Court’s certiorari practice is, of course, an exception. As discussed *supra*, pp. 72-73, if *Booker* strikes down the Guidelines, then the Court’s denials of certiorari seem highly questionable. On the other hand, if *Booker* upholds the Guidelines, there is nothing unseemly about the Court’s decision to wait until an appropriate federal case arose.

courts, commentators, and practitioners have now joined the fray, and discussions have largely turned to what should happen after the Court invalidates the Guidelines, with less attention to whether the Court should do so, and if so why. This Article has analyzed those latter questions, but in doing so, it has suggested that the chaotic events since *Blakely* are no “earthquake” arising from inevitable natural forces. They are a product of various institutional choices, many of which stretched or exceeded the limits of their proper role. To recognize the existence and importance of such decisions may be the first step toward a discussion of the most suitable ways to cope with the perennial problems of incomplete constitutional rules and undertheorized Court decisions, both of which are well illustrated by *Blakely* itself.²²⁷ In the pending guideline cases, it might seem unfortunate that the constitutionality of the Guidelines, and in many respects the future of federal criminal law, must now be decided under turbulent and accelerated circumstances. The chain of post-*Blakely* events reveal how some participants in the federal appellate system could have ameliorated the “crisis,” and that illustration in turn identifies the

²²⁷The work of two important scholars confirms the importance of pursuing such projects. Professor Cass Sunstein has argued for a theory of “minimalism,” under which the Supreme Court does and should decide cases “narrowly” and “shallowly.” See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10-11 (1999); Cass R. Sunstein, *The Smallest Court in the Land*, N.Y. TIMES, July 4, 2004, at 9. The difficulty with such judicial methodologies is that they create the sorts of theoretical and administrative gaps that have caused such problems in the *Blakely* context.

Similarly, Professor Bickel drew attention to the Court’s ability to avoid deciding certain sorts of difficult questions using jurisdictional and technical maneuvers, including manipulation of certiorari practice, that he grouped under the name “passive virtues.” See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Josephine Ann Bickel 1986) (1962); Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). The questions raised in the text suggest that similar issues arise for other federal courts, and that the “virtues” and “vices” of passivity, action, minimalism, and maximalism often vary significantly with context. An adequate general theory of such variations remains to be developed.

importance of adherence to institutional roles within a system of constitutional rulemaking.

IV. CONCLUSION

At the very least, the path from *Blakely* to *Booker* has made for captivating judicial theater. The current “scene” has three main characters. One is Justice Stevens, *Apprendi*’s author and architect, for whom the Sentencing Revolution derives from a longstanding opposition to mandatory minima²²⁸ and a broad concern to provide criminal defendants with robust, fair procedures.²²⁹ Second is Justice Breyer, who drafted and defended the Guidelines as an original member of the Sentencing Commission; those Guidelines constitute his most significant legal product to date and are a major part of his potential legacy. Third is Justice Scalia, who must decide which of his colleagues will prevail. For Scalia, *Booker* presents a jurisprudential tension: He long opposed the Guidelines on separation of powers grounds,²³⁰ yet separation of powers principles lead to upholding those Guidelines against Fifth and Sixth Amendment challenges.²³¹ Scalia authored *Blakely*, which has been credited (and blamed) with

²²⁸See *McMillan*, 477 U.S. at 95-103 (Stevens, J., dissenting);

²²⁹See, e.g., *Ewing v. California*, 538 U.S. 11, 32-35 (2003) (Stevens, J., dissenting) (arguing that a “three-strikes” sentence under California violates Eighth Amendment standards of proportionality); *Hope v. Pelzer*, 536 U.S. 730 (2002) (holding that the Eighth Amendment prohibits prolonged use of a “hitching post” to restrain convicts) (Stevens, J.); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of mentally retarded criminals is unconstitutional) (Stevens, J.); *Mickens v. Taylor*, 535 U.S. 162, 179 (2002) (Stevens, J., dissenting) (arguing that the Sixth Amendment requires courts to investigate conflicts of interest of which they reasonably should have known).

²³⁰See *Mistretta* 488 U.S. at 380-412 (Scalia, J., dissenting).

²³¹For a similar dilemma that Justice Scalia confronted in applying *Apprendi* to the Arizona death penalty, see *Ring*, 536 U.S. at 609-10 (Scalia, J., concurring), and *supra* note 175.

threatening the Guidelines, but he is also well-known for seeking elegant rules; the statutory-maximum theory would provide such a rule, and would also avoid inserting courts into detailed substantive oversight of criminal law.

Of course, we cannot know what will happen. But it is important that neither the intra-Court drama, nor the immense social and political consequences that hang in the balance, should submerge the basic constitutional questions presented, questions that merit careful theoretical and doctrinal analysis. This Article has sought to identify the most important issue that remains unanswered after *Blakely*: whether nonstatutory sentencing rules are constitutionally regulated by *Apprendi*. And it has proposed a theory of *Apprendi* rights that is consistent with this country's history of indeterminate sentencing, which grants judges the authority to control actual punishment, and with legislative primacy to define crimes and their maximum punishment. If the Court were to adopt that theory, it would uphold the Federal Guidelines. However, if the Guidelines do not survive *Booker*, the problems identified in this Article provide an open challenge for future interpretations of *Apprendi*. The Court has never articulated a plausible alternative to the statutory-maximum model, and if it seeks to do so in *Booker*, a great deal of new theoretical and explanatory work will need to be done.