YOU HAD ONE JOB: THE SUPREME COURT'S NEW CHANCE TO FIX THE CONSTITUTIONAL LAW OF SENTENCING FACTFINDING

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ABSTRACT

Four decades after the enactment of the federal Sentencing Reform Act, one might expect a settled consensus to have emerged addressing the constitutional constraints on implementing norms such as predictability, consistency, and uniformity in the imposition of criminal punishment in the United States. In reality, the United States Supreme Court has failed to provide stability or clarity in the doctrinal principles implicated in millions of criminal cases nationwide. Spanning a quarter century, the Apprendi v. New Jersey *line of cases has featured narrow or fragmented majorities, significant concurring opinions, and multiple instances of individual justices either overtly admitting to changing their minds or tacitly joining an opinion seemingly inconsistent with their previous views. Only one justice who participated in* Apprendi *remains on the Court, and four new justices have taken their seats since the last major decision in 2013, which was decided by a splintered 4-1-4 margin. In 2024, the Court once again evaded the enduring ambiguities. The time has come for the Court to do its job and finally bring long-overdue certainty to the constitutional law of sentencing factfinding.*

In the Apprendi *line of cases, the Court essentially has taken the view that the power to define offenses is exclusively legislative and the power to determine sentences is exclusively judicial. That view is wrong. Legislatures possess the power to determine both the ceiling and the floor of the punishment range associated with each criminal offense, and the constitutional law of sentencing factfinding rightly*

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requires that this statutory sentencing range must be based upon facts found by the jury (or admitted in a guilty plea) and not by the sentencing judge. On the other hand, legislatures do not exceed their constitutional authority when they seek to enact and enforce policy judgments, whether by enacting criminal offenses or instead by adopting or authorizing guidelines, presumptive sentences, and similar provisions that constrain sentencing judges with mandatory effect. Reasonable people can, and do, disagree about the appropriate balance between individualized punishment and systemic uniformity in the imposition of criminal sentences. That is all the more reason to reject a constitutional interpretation that denies legislatures the power to determine that balance.

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INTRODUCTION

Four decades ago, Congress enacted the federal Sentencing Reform Act of 1984,[1] one of the iconic emblems of the significant and controversial movement advocating for norms such as predictability, consistency, and uniformity in the imposition of criminal punishment in the United States.[2] The Act was not the first legislation to adopt some manner of sentencing reform, and it certainly has not been the last.[3] Years into the debates over sentencing reform, Congress and the state legislatures continue to enact statutes and amendments regulating the sentences imposed on or served by convicted offenders, sometimes increasing the severity of punishment and sometimes ameliorating previous harshness.[4]

Similarly, a quarter century has passed since the inception of the United States Supreme Court's body of decisions promulgating doctrines of constitutional law that responded to, and curtailed, such sentencing reform efforts.[5] These doctrines substantially limit the power of legislatures to directly regulate the judicial process of sentencing factfinding, treating it differently than the longstanding power of legislatures to indirectly

1. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1987.

2. *See, e.g.*, KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 2 (1998).

3. *See, e.g.*, McMillan v. Pennsylvania, 477 U.S. 79, 80–82 (1986) (addressing Mandatory Minimum Sentencing Act enacted in Pennsylvania in 1982); Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, 2372 (reducing sentencing disparity between crack cocaine and powder cocaine in federal criminal cases).

4. *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 805, 807 (enacting 18 U.S.C. § 1512(c) to increase maximum punishment for obstruction of federal official proceedings and amending 18 U.S.C. §§ 1341 & 1343 to increase maximum punishment for mail and wire fraud); First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5221 (enacting 18 U.S.C. § 3553(f)(1) to expand eligibility for "safety valve" exemption from otherwise applicable mandatory minimum sentences).

5. *See* Almendarez-Torres v. United States, 523 U.S. 224, 248–49 (1998) (Scalia, J., dissenting); *see also* Benjamin J. Priester, *Sentenced for a "Crime" the Government Did Not Prove:* Jones v. United States *and the Constitutional Limitations on Factfinding by Sentencing Factors Rather Than Elements of the Offense*, 61 L. & CONTEMP. PROBS. 249, 250 (1998) [hereinafter Priester, *Sentenced*] (discussing origin of doctrine).

constrain sentencing judges through the ordinary operation of statutes that define the elements of criminal offenses and establish their respective punishment ranges.[6] Although the rapidly evolving doctrine spanned over a dozen cases,[7] the iconic emblem of this case law is the Court's 2000 decision in *Apprendi v. New Jersey*.[8] Throughout this period, the *Apprendi* line of cases featured narrow or fragmented majorities, significant concurring opinions, and multiple instances of individual justices either overtly admitting to changing their minds or tacitly joining an opinion seemingly inconsistent with their previous views.[9] After fifteen years, the doctrine remained unstable, leaving the present and future of the doctrine deeply uncertain for lower court judges, legislators, criminal lawyers, and scholars alike.[10]

And then the Court fell quiet. It decided just two *Apprendi* doctrine cases in a decade, neither of which directly confronted the doctrinal instability.[11] Only one justice who participated in *Apprendi* remains on the Court, and four new justices have

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6. *See, e.g.*, Benjamin J. Priester, *The Canine Metaphor and the Future of Sentencing Reform: Dogs, Tails, and the Constitutional Law of Wagging*, 60 S.M.U. L. REV. 209, 212 (2007) [hereinafter Priester, *Canine Metaphor*].

7. *Almendarez-Torres*, 523 U.S. at 248–49 (Scalia, J., dissenting); Monge v. California, 524 U.S. 721, 740–41 (1998) (Scalia, J., dissenting); Jones v. United States, 526 U.S. 227, 228 (1999); Apprendi v. New Jersey, 530 U.S. 466, 472–74 (2000); Harris v. United States, 536 U.S. 545, 551–52 (2002); Ring v. Arizona, 536 U.S. 584, 588–89 (2002); Blakely v. Washington, 542 U.S. 296, 301–03 (2004); Schriro v. Summerlin, 542 U.S. 348, 349 (2004); United States v. Booker, 543 U.S. 220, 226 (2005); Washington v. Recuenco, 548 U.S. 21, 214–15 (2006); Cunningham v. California, 549 U.S. 270, 274–75 (2007); Oregon v. Ice, 555 U.S. 160, 163 (2009); Southern Union Co. v. United States, 567 U.S. 343, 373–74 (2012); Alleyne v. United States, 570 U.S. 99, 102–03 (2013); Jones v. United States, 574 U.S. 948, 948 (2014) (Scalia, J., dissenting from denial of certiorari).

8. 530 U.S. 466 (2000); Benjamin J. Priester, *Structuring Sentencing:* Apprendi*, the Offense of Conviction, and the Limited Role of Constitutional Law*, 79 IND. L.J. 863 (2004) [hereinafter Priester, *Structuring Sentencing*]; *see also* Benjamin J. Priester, *Constitutional Formalism and the Meaning of* Apprendi v. New Jersey, 38 AM. CRIM. L. REV. 281, 281–82 (2001) [*hereinafter* Priester, *Constitutional Formalism*].

9. *See* Benjamin J. Priester, Apprendi *Land Becomes Bizarro World: "Policy Nullification" and Other Surreal Doctrines in the New Constitutional Law of Sentencing*, 51 SANTA CLARA L. REV. 1, 4 (2011) [hereinafter Priester, *Bizzaro World*].

10. *See* Benjamin J. Priester, *From* Jones *to* Jones*: Fifteen Years of Incoherence in the Constitutional Law of Sentencing Factfinding*, 47 U. TOLEDO L. REV. 413, 413–14 (2016) [hereinafter Priester, *Fifteen Years*].

11. Hurst v. Florida, 577 U.S. 92, 103 (2016); United States v. Haymond, 588 U.S. 634, 643–44 (2019).

taken their seats since the last major decision in 2013,[12] which was decided by a splintered 4-1-4 margin.[13] In June 2024, the Court decided another case presenting an *Apprendi* issue,[14] although it arose from the long-troubled statutory interpretation of the recidivism sentencing enhancements contained in the federal Armed Career Criminal Act.[15] That context provided an exit ramp for the Court to rule narrowly, and for most of the justices to avoid directly engaging with core principles and controversies of *Apprendi* doctrine.

The time has come for the Court to accept responsibility for the enduring disarray in *Apprendi* doctrine. Part II evaluates the existing state of *Apprendi* doctrine in light of its developmental trajectory, which remains unstable across the four principal subsidiary components of the doctrine. Part III assesses the doctrinal views of the Court's current members and urges the Court to finally revisit and recalibrate *Apprendi* doctrine. With new membership on the bench, the entrenched viewpoints and idiosyncratic perspectives that mired the originating years of the doctrine are no longer present. With the passage of a decade's time under the existing precedent, Congress, the state legislatures, lower courts, and legal scholars have done their part to analyze, resist, adapt to, and push back against the Court's

12. *See generally Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/6GYA-Q699] (last visited Nov. 26, 2025) (demonstrating that Justice Thomas remains while Justices Kavanaugh, Gorsuch, Coney Barrett, and Jackson are newcomers since 2013).

13. *See* Alleyne v. United States, 570 U.S. 99, 102–03 (2013) (opinion of the Court as to Parts I, III-B, III-C, and IV, by Thomas, J., and plurality opinion of Thomas, J., as to Parts II and III-A); *id.* at 118 (Sotomayor, J., concurring); *id.* at 122 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 124 (Roberts, C.J., dissenting); *id.* at 132 (Alito, J., dissenting).

14. Erlinger v. United States, 602 U.S. 821, 831–42 (2024).

15. *See, e.g.*, Shepard v. United States, 544 U.S. 13, 24–25 (2005); James v. United States, 550 U.S. 192, 195 (2007); Begay v. United States, 553 U.S. 137, 139 (2008); Sykes v. United States, 564 U.S. 1, 12 (2011); Descamps v. United States, 570 U.S. 254, 269 (2013); Johnson v. United States, 576 U.S. 591, 593 (2015); Mathis v. United States, 579 U.S. 500, 511 (2016); Stokeling v. United States, 586 U.S. 73, 75 (2019); Borden v. United States, 593 U.S. 420, 423 (2021); Wooden v. United States, 595 U.S. 360, 363 (2022). The Court declined to extend the reasoning of these cases to the corresponding provisions of the U.S. Sentencing Guidelines. *See* Beckles v. United States, 580 U.S. 256, 258–64 (2017); *id.* at 279–80 (Sotomayor, J., dissenting).

decisions.[16] Now, the Court should do its job and finally bring long-overdue clarity and stability to its doctrines of the constitutional law of sentencing factfinding.

I. EXPOUNDING THE CONSTITUTIONAL LAW OF SENTENCING FACTFINDING

Until quite recently in U.S. legal history, the concept of a body of constitutional law applicable to the process of factfinding when determining the sentence to be imposed on a convicted offender simply did not exist.[17] In most jurisdictions, the single trial judge presiding over an individual's case exercised essentially unregulated discretion when determining and imposing the sentence, subject only to the maximum and minimum punishments established by the offense of conviction.[18] In addition, the judge often exercised such discretion without the

16. *See, e.g.*, Priester, *Fifteen Years*, *supra* note 10; Commonwealth v. Gill, 261 A.3d 544, 548 (Pa. Super. Ct. 2021) (interpreting state law in light of *Alleyne*); Moss v. State, 270 So. 3d 559, 560–61 (Fla. Dist. Ct. App. 2019) (interpreting state law in light of *Alleyne*); United States v. Edwards, 595 F.3d 1004, 1019 (9th Cir. 2010) (Bea, J., concurring in part and dissenting in part) ("The majority's holding that Edwards's sentence is substantively reasonable evidences an ever-widening split between our circuit's analysis of below-guidelines sentences in the context of white collar crime and that of our sister circuits.").

17. *See, e.g.*, Priester, *Structuring Sentencing*, *supra* note 8, at 868–70.

18. *See, e.g.*, *id.* at 869–70; STITH & CABRANES, *supra* note 2, at 9–14; *see also* Mistretta v. United States, 488 U.S. 361, 364, 367–68 (1989) (noting that historically appellate courts gave "virtually unconditional deference on appeal" to sentences imposed by trial judges, which was radically changed under the Sentencing Guidelines); *Erlinger*, 602 U.S. at 831–33 (describing how a sentencing judge's power is constrained by the jury's verdict based on particular facts). A small number of states use jury sentencing, rather than judicial discretion, to implement individualized punishment for convicted offenders. *See, e.g.*, Priester, *Canine Metaphor*, *supra* note 6, at 235–37, 243 n.153 (citing authorities discussing, and advocating for, states' use of jury sentencing). Prior to the mid-nineteenth century, criminal statutes often provided for mandatory determinate punishments, which require no factfinding or additional sentencing process to impose. *See, e.g.*, Priester, *Structuring Sentencing*, *supra* note 8, at 869; *see also Mistretta*, 488 U.S. at 364–65 (describing the "three-way sharing" of sentencing responsibility in which "Congress defined the maximum, the judge imposed a sentence within the statutory range . . . and the Executive Branch's parole official . . . determined the actual duration of imprisonment"); United States v. Haymond, 588 U.S. 634, 642–43, 647 (2019) (describing shift from determinate punishments to sentencing discretion). "The early history of sentencing in the United States—in particular, when sentencing switched from a system of determinate sentences to a system that gave sentencing discretion to judges—is a matter of some dispute . . . . But everyone seems to agree that discretionary sentencing was the norm by the late nineteenth century." Carissa Byrne Hessick, *The Sixth Amendment Sentencing Right and Its Remedy*, 99 N.C. L. REV. 1195, 1197–98 n.5 (2021) (citations omitted).

opportunity for either party to appeal the nature or degree of the sentence imposed.[19] A regime of indeterminate sentencing, combining judicial discretion to assess an appropriate individualized punishment for a particular offender with executive discretion to authorize early release through parole, for many years constituted the predominant mode of determining how much criminal punishment a convicted person ultimately received.[20] Even in the rarified context of capital cases, constitutional doctrine requiring a minimal framework of procedural regularity emerged in the last decades of the twentieth century.[21]

A variety of motivations coincided to produce the political consensus that supported the adoption of sentencing reform

19. *See* Priester, *Structuring Sentencing*, *supra* note 8, at 869; Hessick, *supra* note 18, at 1198; STITH & CABRANES, *supra* note 2, at 170–71; *see also* Nancy Gertner, Apprendi/Booker *and Anemic Appellate Review*, 99 N.C. L. REV. 1369, 1382–83 (2021) (describing how before the Sentencing Guidelines, "there was essentially no appellate review of federal sentencing"); *see also Erlinger*, 602 U.S. at 874–76 (Jackson, J., dissenting) (describing how a judge's sentencing "was long considered to be unreviewable").

20. *See, e.g.*, Priester, *Structuring Sentencing*, *supra* note 8, at 869–70; Priester, *Canine Metaphor*, *supra* note 6, at 235–37, 266–69; Hessick, *supra* note 18, at 1198–99; STITH & CABRANES, *supra* note 2, at 9–37 (discussing the history of criminal punishment and sentencing in the United States); *see also Haymond*, 588 U.S. at 642–43 (describing how judges and parole boards could suspend part or all of a defendant's sentence); *id.* at 667–68 (Alito, J., dissenting) (describing how prisoner's sentence can be reduced by parole); *Erlinger*, 602 U.S. at 875–76 (Jackson, J., dissenting) (describing how a judge could consider lack of remorse or particularly heinous conduct in sentencing).

21. For example, in *Williams v. New York*, the U.S. Supreme Court upheld the state trial judge's determination that a convicted murderer could not be rehabilitated and therefore should be sentenced to death, concluding that the judge's factfinding at sentencing related to the defendant's numerous uncharged burglaries and bad moral character did not violate the Due Process Clause. *See* 337 U.S. 241, 244–51 (1949). Beginning in the 1970s, the Court relied upon the Eighth Amendment to mandate procedural regularity in the sentencing phase of capital cases. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 314 (1972) (White, J., concurring) (per curiam); Gregg v. Georgia, 428 U.S. 153, 206–07 (1976); Lockett v. Ohio, 438 U.S. 586, 605 (1978); Pulley v. Harris, 465 U.S. 37, 50–51 (1984); Walton v. Arizona, 497 U.S. 639, 649–51 (1990). As part of *Apprendi* doctrine, the Court ruled that the Sixth Amendment right to a jury trial imposes an additional procedural constraint on the factfinding necessary to impose a death sentence. *See* Ring v. Arizona, 536 U.S. 584, 609 (2002); Hurst v. Florida, 577 U.S. 92, 102–03 (2016); *see also* Carissa B. Hessick & William W. Berry III, *Sixth Amendment Sentencing After* Hurst, 66 UCLA L. REV. 448, 520–21 (2019) (determining whether a person is "irreparably corrupt" depends on "the application of law to fact"); William W. Berry III, *The Sixth and Eighth Amendment Nexus and the Future of Mandatory Sentences*, 99 N.C. L. REV. 1311, 1339 (2021) ("Sixth Amendment appl[ies] to sentences that increase the statutory minimum" and maximum).

measures nationwide beginning in the 1980s.[22] For some, the primary goal involved enhancing "truth in sentencing" and reducing the frequency of (what was perceived to be) overly lenient punishments.[23] For others, the principal objective focused on increasing the likelihood that similarly situated offenders would receive similar punishment, thereby reducing unjustifiable disparities arising within the system.[24] Jurisdictions varied widely in the extent and detail of their sentencing reforms by adopting, for example, discrete constraints like mandatory-minimum sentences tied to specific factual contexts, relatively simple advisory guidelines, or the highly complex mandatory Federal Sentencing Guidelines.[25] In the aggregate, the sentencing reform movement prioritized systemic uniformity over individualized punishment, seeking to facilitate greater consistency and predictability in criminal sentencing.[26]

This substantial reinvention of the law and practice of criminal sentencing unsurprisingly resulted in constitutional challenges on both procedural and substantive grounds. Some arguments centered on a provision's impact on the defendant,

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22. *See, e.g.*, STITH & CABRANES, *supra* note 2, at 9–37 (discussing the history of penal reform in America that led to changes in 1980s).

23. *See, e.g.*, *Haymond*, 588 U.S. at 664 (Alito, J., dissenting); Priester, *Structuring Sentencing*, *supra* note 8, at 921–23; Priester, *Canine Metaphor*, *supra* note 6, at 237–38; STITH & CABRANES, *supra* note 2, at 31–32.

24. *See, e.g.*, Priester, *Canine Metaphor*, *supra* note 6, at 266–69; STITH & CABRANES, *supra* note 2, at 104–42; Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 1, 14–15 (2016); Hessick & Berry, *supra* note 21, at 470–71; *see also Erlinger*, 602 U.S. at 878–880, 890–93 (Jackson, J., dissenting) (describing the use of sentencing guidelines to create uniform consistency and limit sentencing inequities of defendants charged with the same crime serving different times).

25. *See, e.g.*, Priester, *Structuring Sentencing*, *supra* note 8, at 869–71; Hessick, *supra* note 18, at 1199–1200; Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 380 (2005); Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 155–56 (2005). In *Haymond* and *Erlinger*, Justice Gorsuch's opinions characterized such sentencing reforms as "innovations" that diverged from longstanding historical practice. *See* 588 U.S. at 643 ("recent legislative innovations"); 602 U.S. at 833 ("recent sentencing innovations"); *id.* at 844 n.5 ("relatively modern innovations").

26. *See, e.g.*, Priester, *Canine Metaphor*, *supra* note 6, at 237–38, 241–51, 262–69 (discussing sentencing reform measures and competing priorities of individualized punishment and systemic uniformity); Priester, *Bizarro World*, *supra* note 9, at 6 n.17 (citing sources analyzing sentencing reform movement's goals and outcomes); STITH & CABRANES, *supra* note 2, at 78–106; *see also* Mistretta v. United States, 488 U.S. 361, 363–70 (1989) (describing the history of inequitable sentencing leading to necessary reform and suggested methods).

such as denying the opportunity to argue for a lower sentence than that required by a mandatory-minimum punishment or constructively convicting the defendant of a more serious offense than the crime reflected in the jury verdict or guilty plea.[27] Other arguments emphasized the impact on the allocation of institutional power, by shifting decision-making authority away from judges or juries and into the hands of legislatures or prosecutors.[28] Over time, the Court's *Apprendi* line of cases coalesced around a certain doctrinal framing of the constitutional controversy: when and how, if at all, do legislatures have the power to mandate either the consideration (or exclusion from consideration) of particular extraverdict facts, or the punishment weight assigned to particular extraverdict facts, in a manner that successfully constrains the decision-making of the judges who determine the specific sentences for individual offenders?[29]

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27. *See, e.g.*, Priester, *Sentenced*, *supra* note 5, at 266–70; Priester, *Structuring Sentencing*, *supra* note 8, at 914–23; Hessick, *supra* note 18, at 1202 ("If a fact increases the statutory maximum sentence by reclassifying a crime under the state's criminal code, then the fact is the functional equivalent of an element.").

28. *See, e.g.*, Stephanos Bibas, Apprendi *at 20: Reviving the Jury's Role in Sentencing*, 99 N.C. L. REV. 1189, 1193 (2021) ("The real battle for power is not judges versus juries at trial, but judges versus prosecutors at sentencing (or in plea bargains based on sentencing forecasts)."); Berry, *supra* note 21, at 1317 ("The . . . effect of adopting mandatory sentencing schemes is the diversion of sentencing power from the judge to the prosecutor."); Frank O. Bowman III, *The Federal Sentencing Guidelines: Some Valedictory Reflections Twenty Years After* Apprendi, 99 N.C. L. REV. 1341, 1342 (2021) ("[T]he *Booker* decision and its subsequent embellishments are a constitutional bait and switch in which the Supreme Court disguised a judicial will to power behind a pretended concern for the Sixth Amendment jury right."). The Court's decisions are best understood as enforcing certain boundaries of legislative and judicial institutional power, rather than as protecting the interests of defendants (or juries) for their own sake. *See, e.g.*, Priester, *Structuring Sentencing*, *supra* note 8, at 891–909, 928–34; Priester, *Canine Metaphor*, *supra* note 6, at 224–26, 260–62; Priester, *Bizarro World*, *supra* note 9, at 47–54, 69–75; Hessick, *supra* note 18, at 1196 ("Especially in the federal system, the Sixth Amendment sentencing doctrine has increased the authority of judges, but it has largely failed to protect the rights of defendants."). Justice Jackson endorsed this perspective on *Apprendi* doctrine in *Erlinger*. *See* 602 U.S. at 880–85 (Jackson, J., dissenting) (citing and quoting Priester, *Bizarro World*, *supra* note 9, at 47–50).

29. *See* Priester, *Bizarro World*, *supra* note 9, at 7–8 (defining verdict facts and extraverdict facts); Priester, *Canine Metaphor*, *supra* note 6, at 252–59 (emphasizing distinction between finding existence of facts and determining punishment weight of those facts, and considering implications of distinction for constitutional law of sentencing factfinding). Such mandatory constraints would be enforced not by the legislature directly, of course, but rather through determinations of reversible error on appellate review. *See, e.g.*, Priester, *Fifteen Years*, *supra* note 10, at 422, 425; Priester, *Bizarro World*, *supra* note 9, at 13; Priester, *Canine Metaphor*, *supra* note 6, at 243–44.

Ultimately, the Court answered this question in three different contexts, yielding three different splits among the justices—differences that persisted, and evolved, as the membership of the Court changed.[30] The first seven years of *Apprendi* doctrine cases, including the key decisions in *Apprendi*, *Blakely*, and *Booker*, arose during the long Rehnquist Court, the period in which the same nine justices served together for an uninterrupted eleven years.[31] The subsequent nine years of *Apprendi* decisions, further refining and developing the doctrine, generally continued the pattern of closely divided decisions among the eleven justices serving over that span.[32] Consequently, significant uncertainties remain in each of the three contexts, as well as in the fundamental nature and status of *Apprendi* doctrine as a whole.

A. Determining or Increasing a Maximum Punishment

The first context the Court confronted in the *Apprendi* line of cases involved statutory provisions that relied upon judicial factfinding at sentencing to authorize the imposition of an increased sentence.[33] For example, the New Jersey weapons offense in *Apprendi* provided for a base sentence of five to ten years' imprisonment and an enhanced sentence of ten to twenty years if the sentencing judge found by a preponderance of the evidence that, among other criteria, the offense was committed as a hate crime.[34] Similarly, the California child sex offense in

30. *See infra* Sections II.A.–C.

31. The long Rehnquist Court lasted from Justice Breyer's appointment in 1994 until Chief Justice Rehnquist's death in 2005. *See, e.g.*, ERWIN CHEMERINKSY, THE CASE AGAINST THE SUPREME COURT 156–64 (Penguin Books ed. 2023).

32. These included the appointments of Chief Justice Roberts and Justice Alito by President George W. Bush and Justices Sotomayor and Kagan by President Barack Obama. At the time of Justice Souter's retirement, the nine justices had produced eight distinct perspectives on *Apprendi* doctrine. *See* Priester, *Bizarro World*, *supra* note 9, at 33–35; *id.* at 35 (noting that "Justice Kennedy has voted with Breyer in every case—the only consistently stable alliance in the entire line of cases"); *see also* Priester, *Fifteen Years*, *supra* note 10, at 439 n.170, 439–40 (noting that Justice Kennedy subsequently diverged with Justice Breyer in *Alleyne*).

33. *See* Almendarez-Torres v. United States, 523 U.S. 224, 248–49 (1998) (Scalia, J., dissenting); Monge v. California, 524 U.S. 721, 740–41 (1998) (Scalia, J., dissenting); Jones v. United States, 526 U.S. 227, 248–52 (1999); Apprendi v. New Jersey, 530 U.S. 466, 494–96 (2000).

34. *See* 530 U.S. at 466–69, 471.

Cunningham authorized the sentencing judge to find aggravating facts that would determine whether the convicted offender received a determinate sentence of sixteen years rather than six years,[35] while the fine imposed on the corporate defendant in *Southern Union* for improper storage of toxic chemicals was calculated based on the sentencing judge's determination of the crime's duration in days.[36] In these and related cases, the Court faced the question of whether the defendants' constitutional rights were violated through the implementation of such provisions.[37]

In adopting the *Apprendi* rule, the Court answered that question in the defendants' favor. According to the Court, the *Apprendi* rule derives from the Sixth Amendment right to jury trial,[38] interpreting that clause to declare that such sentencing enhancements are unconstitutional when they are implemented through extraverdict judicial factfinding at sentencing rather than based upon facts established as elements of the offense of conviction.[39] That is, "criminal punishment must be constrained to the limits imposed by the offense of conviction found by the jury or admitted in a guilty plea that waives the jury trial right, such that extraverdict factfinding may not lead to the imposition of a sentence more severe than the penalty authorized by the verdict facts."[40] Likewise, factfinding which increases the defendant's sentence above the maximum punishment

35. *See* Cunningham v. California, 549 U.S. 270, 274–76 (2007).

36. *See* Southern Union Co. v. United States, 567 U.S. 343, 346–47 (2012) (interpreting 42 U.S.C. § 6928(d) ("a fine of not more than $50,000 for each day")).

37. *See, e.g.*, *Apprendi*, 530 U.S. at 469, 491–92; *Cunningham*, 549 U.S. at 274.

38. In previous articles, I have elaborated my criticisms of the Court locating the source of *Apprendi* doctrine in the Sixth Amendment right to jury trial. *See* Priester, *Bizarro World*, *supra* note 9, at 47–54; Priester, *Canine Metaphor*, *supra* note 6, at 224–26, 260–66; Priester, *Structuring Sentencing*, *supra* note 8, at 891–909.

39. *See, e.g.*, Priester, *Canine Metaphor*, *supra* note 6, at 213–14; Priester, *Structuring Sentencing*, *supra* note 8, at 873–76.

40. Priester, *Fifteen Years*, *supra* note 10, at 418; *see also* Andrew Delaplane, *"Shadows" Cast by Jury Trial Rights on Federal Plea Bargaining Outcomes*, 57 AM. CRIM. L. REV. 207, 231 (2020) ("The spirit of *Apprendi* has been ignored and disregarded for plea bargaining defendants."); Hessick & Berry, *supra* note 21, at 464 ("Put differently, if a statute or sentencing scheme constrains the judge's discretion to increase a particular sentence, then a jury—and not a judge—must make the factual finding necessary to lift that constraint.").

otherwise available for the statutory offense of conviction is "tantamount to convicting the defendant of an aggravated offense,"[41] and, therefore, such factfinding must be established as verdict facts in a jury trial (or plea colloquy), rather than through the determination of extraverdict facts at sentencing.[42]

Across the *Apprendi* line of cases, a total of nine justices have adopted and applied the *Apprendi* rule. In the early *Apprendi* cases, Justices Scalia and Thomas grounded their endorsement of this doctrinal rule in an explication of historical case law and other legal materials framed in terms of originalist methods of constitutional interpretation.[43] Justices Stevens, Souter, and Ginsburg also joined the opinions creating and applying the *Apprendi* rule.[44] Later, Justices Sotomayor and Kagan consistently have supported the application of *Apprendi* doctrine,[45] and Chief Justice Roberts also has favored enforcing the *Apprendi* rule in situations involving increases to the maximum sentence.[46] Most recently, Justice Gorsuch has written two opinions

41. Priester, *Canine Metaphor*, *supra* note 6, at 214; *see* Priester, *Structuring Sentencing*, *supra* note 8, at 902–03; *see also, e.g.*, Hurst v Florida, 577 U.S. 92, 95–96 (2016) (noting that jury sentences are advisory in Florida); Hester v. United States, 586 U.S. 1104, 1106–07 (2019) (Gorsuch, J., dissenting) (finding that restitution is part of a defendant's sentence); United States v. Haymond, 588 U.S. 634, 648–49 (2019) (noting the "absurd result" of *Apprendi*'s logic).

42. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); Cunningham v. California, 549 U.S. 270, 274–75 (2007).

43. *See, e.g.*, *Apprendi*, 530 U.S. at 498–99 (Scalia, J., concurring); *id.* at 499–523 (Thomas, J., concurring); Almendarez-Torres v. United States, 523 U.S. 224, 248–49 (1998) (Scalia, J., dissenting); *see also Hurst*, 577 U.S. at 93 (Scalia and Thomas, JJ., joining opinion of the Court). Interestingly, Justice Thomas initially joined the majority in *Almendarez-Torres*, then changed his mind and joined the majority in *Apprendi* after becoming persuaded by the originalist evidence. *See Apprendi*, 530 U.S. at 520–21 (Thomas, J., concurring); Priester, *Bizarro World*, *supra* note 9, at 31–32.

44. *See, e.g.*, Priester, *Canine Metaphor*, *supra* note 6, at 230–33; Priester, *Structuring Sentencing*, *supra* note 8, at 872 n.49, 876 n.56, 880 n.102; *see also Hurst*, 577 U.S. at 93 (Stevens and Ginsburg, JJ., joining opinion of the Court).

45. *See, e.g.*, Southern Union Co. v. United States, 567 U.S. 343, 345 (2012); *Hurst*, 577 U.S. at 93 (opinion of the Court by Sotomayor, J., joined by Kagan, J.); Priester, *Fifteen Years*, *supra* note 10, at 435 & n.139.

46. *See, e.g.*, *Southern Union*, 567 U.S. at 346; Alleyne v. United States, 570 U.S. 99, 124–26, 128 (2013) (Roberts, C.J., dissenting) (defending *Apprendi* rule as to increases in statutory maximum sentences); *Hurst*, 577 U.S. at 93 (Roberts, C.J., joining opinion of the Court); Priester, *Fifteen Years*, *supra* note 10, at 434 & n.137.

in support of extending the *Apprendi* rule to additional situations.[47]

On the other hand, five justices have maintained that sentence-enhancement provisions do not present constitutional difficulties. These justices reject the application of the Sixth Amendment right to jury trial as a limitation on the sentence that may be imposed, instead pointing toward principles of fundamental fairness found in the Due Process Clause.[48] "Rather than ask whether the sentence imposed was authorized by the *particular* statutory provision for which the defendant was charged and convicted, [they] look to whether *any* statutory authority permits the sentence."[49] Initially this group of justices consisted of Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer, who opposed *Apprendi* doctrine throughout the early cases.[50] In later years, Justice Alito consistently has asserted this doctrinal perspective across his time on the Court.[51]

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47. *See* United States v. Haymond, 588 U.S. 634 (2019) (revocation of supervised release); Hester v. United States, 586 U.S. 1104 (2019) (Gorsuch, J., dissenting from denial of certiorari) (calculation of amount of restitution imposed). The facts of *Haymond* involved a judge's extraverdict finding which imposed a mandatory minimum sentence, not an increase to the defendant's maximum sentence, but Justice Gorsuch's plurality opinion defends the *Apprendi* rule as well as the *Alleyne* rule. *See Haymond*, 588 U.S. at 643–46, 648–50. Justice Gorsuch also wrote the opinion of the Court in *Erlinger* applying the *Apprendi* rule to an increased sentence under the federal Armed Career Criminal Act. *See* Erlinger v. United States, 602 U.S. 821, 825 (2024).

48. *See* Priester, *Canine Metaphor*, *supra* note 6, at 228–29 & n.84; Priester, *Structuring Sentencing*, *supra* note 8, at 872, 876.

49. Priester, *Fifteen Years*, *supra* note 10, at 433. The opinions asserting this doctrinal perspective contained disclaimers reserving the possibility that a violation of Due Process fundamental fairness might exist in the case of a particularly egregious statute (such as one purporting to authorize a severe sentence based on extraverdict factfinding despite the defendant's conviction for a trivial offense), but denied that the statutes in the cases before the Court raised any such concerns. *See* Priester, *Canine Metaphor*, *supra* note 6, at 229 & n.84.

50. *See, e.g.*, Almendarez-Torres v. United States, 523 U.S. 224, 226 (1998); *Apprendi*, 530 U.S. at 552–54 (O'Connor, J., dissenting); Priester, *Structuring Sentencing*, *supra* note 8, at 872 & nn.49 & 56; *see also Southern Union*, 567 U.S. at 360 (Breyer, J., dissenting); *Hurst*, 577 U.S. at 103 (Breyer, J., concurring in the judgment). On Justice Kennedy joining the majority opinion in *Hurst*, *see infra* note 55.

51. *See, e.g.*, Cunningham v. California, 549 U.S. 270, 295–97 (2007) (Alito, J., dissenting); *Southern Union*, 567 U.S. at 360 (Breyer, J., dissenting); Alleyne v. United States, 570 U.S. 99, 133–34 (2013) (Alito, J., dissenting); *Hurst*, 577 U.S. at 103 (Alito, J., dissenting); Priester, *Fifteen Years*, *supra* note 10, at 433–34 & n.130.

For two reasons, however, this apparent ratio of support for the *Apprendi* rule—nine justices to five—overstates the certainty and stability of the doctrine. First, nearly all of the Court's cases adopting and applying the *Apprendi* rule have been decided by narrow margins. In the first four cases, the respective defendants lost twice and won twice in 5-4 decisions,[52] including defendant Apprendi, whose twelve-year sentence violated the Sixth Amendment because the hate-crime finding had been made as an extraverdict fact.[53] The extension of *Apprendi* from offense-defining statutes to mandatory sentencing-regulating provisions, discussed in Section C below, also involved a pair of decisions by the identical 5-4 margin.[54] The Court's subsequent application of the *Apprendi* rule to additional statutory contexts occurred in decisions with 6-3 margins: requiring the jury to find the facts necessary to authorize the death sentences in *Ring* and *Hurst* or the upper-term sentence in *Cunningham*, and to determine the number of days comprising the hazardous waste violation in *Southern Union*.[55] Then, in *Oregon v. Ice*, the Court held 5-4 that the factfinding undertaken in support of imposing consecutive terms of imprisonment, rather than

52. *See Almendarez-Torres*, 523 U.S. at 226; *id.* at 248–49 (Scalia, J., dissenting); Monge v. California, 524 U.S. 721, 723 (1998); *id.* at 737 (Scalia, J., dissenting); Jones v. United States, 526 U.S. 227, 228 (1999); *id.* at 254 (Kennedy, J., dissenting); *Apprendi*, 530 U.S. at 468; *id.* at 523 (O'Connor, J., dissenting).

53. *See Apprendi*, 530 U.S. at 471, 497.

54. *See* Blakely v. Washington, 542 U.S. 296, 297 (2004); United States v. Booker, 543 U.S. 220, 225 (2005); *see also* Priester, *Bizarro World*, *supra* note 9, at 6–7 (explaining distinction between offense-defining and sentencing-regulating statutes); Priester, *Fifteen Years*, *supra* note 10, at 423–24 (discussing how "a majority of the Court has declined to recognize a distinction between statutes defining offenses and rules regulating sentencing with different applicable procedural standards").

55. Ring v. Arizona, 536 U.S. 584, 587–88 (2002); *Cunningham*, 549 U.S. at 273; *Southern Union*, 567 U.S. at 345; *Hurst*, 577 U.S. at 93. The Court's extension of *Ring* to the Florida capital punishment statute in *Hurst* occurred by a nominal 7-2 margin, but in light of Justice Kennedy's unexplained reasons for joining the *Hurst* majority, the decision is best interpreted to reflect the same 6-3 alignment as the other *Apprendi* cases of the Roberts Court. *See supra* notes 36–37, 41–42, 46–47 and accompanying text. Justice Kennedy concurred rather than dissented in *Ring*. 536 U.S. at 613 (Kennedy, J., concurring) ("Though it is still my view that *Apprendi* [] was wrongly decided, *Apprendi* is now the law, and its holding must be implemented in a principled way."). It can be presumed that he joined the majority in *Hurst* for the same reason as *Ring*: an unwillingness to relitigate the holding of *Ring*, as Justices Breyer and Alito did, rather than due to an abrupt change in his longstanding views on *Apprendi* doctrine. *See* Priester, *Fifteen Years*, *supra* note 10, at 439–40.

concurrent sentences, for multiple counts of conviction in the same case did *not* fall within the *Apprendi* rule and its jury trial right, but rather could permissibly be undertaken by the judge alone at sentencing—despite the dissent's contention that such factfinding comparably increased the defendant's sentence beyond the otherwise available punishment.[56] Consequently, the aggregate support for the *Apprendi* rule among the justices over time is not reflected in the margins or stability of the outcomes of particular cases or the doctrine as a whole.

Second, as discussed below, the significant turnover in the Court's membership since 2017 has created a situation in which some, possibly all, of the four newest justices may hold different views than their respective predecessors regarding *Apprendi* doctrine, at least to some extent. Combined with the longstanding inability to accurately deduce an individual justice's doctrinal perspective in the *Apprendi* line of cases based on their appointing president or typical liberal or conservative orientation,[57] it is especially unclear how the Court's current (or future) lineup might align on the application of *Apprendi* doctrine—or whether the Court might be willing to overrule one or more extant precedents in this doctrinal area too.[58]

B. Determining or Increasing a Mandatory Minimum Punishment

Once a majority of the Court adopted the *Apprendi* rule for factfinding about an offender's maximum sentence, the same arguments immediately became relevant for factfinding that would create or increase a mandatory-minimum sentence—in

56. Oregon v. Ice, 555 U.S. 160, 162, 167–68 (2009); *id.* at 173–76 (Scalia, J., dissenting). Although the other seven justices voted consistently with their usual alignment in *Apprendi* cases, Justices Stevens and Ginsburg voted against applying the *Apprendi* rule in *Ice*; if either justice had voted in line with their previous pattern, Justice Scalia's dissent would have been the majority opinion. *See* Priester, *Bizarro World*, *supra* note 9, at 34 (analyzing voting alignment in *Ice*).

57. *See, e.g.*, Priester, *Fifteen Years*, *supra* note 10, at 432 & n.121; Priester, *Structuring Sentencing*, *supra* note 8, at 872–73 & n.56.

58. *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024); Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); Ramos v. Louisiana, 590 U.S. 83 (2020); Franchise Tax Bd. of Cal. v. Hyatt, 587 U.S. 230 (2019); Janus v. AFSCME, 585 U.S. 878 (2018).

the common metaphor, factfinding to set or raise the floor, as well as the ceiling, of an offender's sentence.[59] For example, the Pennsylvania statute in *McMillan* mandated the imposition, based on a finding by a preponderance of the evidence by the judge at sentencing, of a minimum five-year sentence when the defendant had "visibly possessed a firearm" during the commission of a qualifying felony offense.[60] In *Harris* and *Alleyne*, the statute contained a three-tiered structure of mandatory-minimum sentences when a firearm was involved in the defendant's federal narcotics offense: five years for possessing, seven years for brandishing, and ten years for discharging.[61] For many defendants, the *Apprendi* doctrine's rule for mandatory-minimum sentences is more important than the rule for maximum sentences because the opportunity to request leniency from the sentencing judge—seeking a punishment toward the lower end of the available options—arises with more frequency than the need to beg for mercy to avoid the highest possible available sentence.[62]

The *Apprendi* line of cases reveals a stunning scope of disagreement among the justices: seven justices who concluded that factfinding to impose mandatory-minimum sentences must be established as verdict facts, seven justices who concluded that such provisions may be imposed by extraverdict factfinding, and one justice who changed his vote[63]—switching the Court's

59. "Whether 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." Harris v. United States, 536 U.S. 545, 579 (2002) (Thomas, J., dissenting). *See also, e.g.*, *Haymond*, 588 U.S. at 644 (stating "[a]ny facts necessary to increase a person's minimum punishment (the 'floor') should be found by the jury no less than facts necessary to increase his maximum punishment (the 'ceiling')"); Priester, *Structuring Sentencing*, *supra* note 8, at 881–83 (citing Harris v. United States, 536 U.S. 545, 579 (Thomas, J., dissenting)) ("Whether 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.").

60. McMillan v. Pennsylvania, 477 U.S. 79, 81–82 & n.1 (1986) (citing 42 PA. CONS. STAT. ANN. § 9712(a)).

61. *See Alleyne*, 570 U.S. at 103–04 (applying 18 U.S.C. § 924(c)(1)(A)); *Harris*, 536 U.S. at 550–51 (same).

62. *See, e.g.*, Priester, *Structuring Sentencing*, *supra* note 8, at 905–06 & n.194.

63. *Compare Harris*, 536 U.S. at 569–72 (Breyer, J., concurring), *with Alleyne*, 570 U.S. at 122–24 (Breyer, J., concurring).

doctrinal outcome in the process. Justice Breyer wrote the decisive solo concurring opinion in the 4-1-4 *Harris* decision, permitting the imposition of a mandatory-minimum sentence by the sentencing judge.[64] Eleven years later did so again in the 4-1-4 *Alleyne* decision, which expressly overruled *McMillan* and *Harris* and held that factfinding required by mandatory-minimum sentencing provisions must be established as verdict facts.[65]

Seven justices have supported doctrinal symmetry in the *Apprendi* rule, requiring establishment as verdict facts for any factfinding that increases either the maximum sentencing ceiling or the minimum sentencing floor in an individual offender's case. "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime" and therefore must be proven as elements,[66] which also could occur through a guilty plea. Justice Thomas wrote the four-justice dissent in *Harris* and the four-justice plurality in *Alleyne* maintaining this view of the *Apprendi* rule's proper scope.[67] Collectively, the two opinions were joined by Justices Stevens, Souter, Ginsburg, Sotomayor, and Kagan.[68] More recently, Justice Gorsuch's opinion in *Haymond* definitively indicates his support for *Alleyne*'s holding and the symmetrical doctrinal rule.[69]

Two justices, however, defected from this group to favor an asymmetrical rule: applying *Apprendi* to the ceiling, but *not* to

64. *See Harris*, 536 U.S. at 449; *id.* at 569–72 (Breyer, J., concurring); *id.* at 575–80 (Thomas, J, dissenting); *see also id.* at 583 (Kennedy, J., dissenting) (emphasizing fragmented nature of Court's decision).

65. *See Alleyne*, 570 U.S. at 103. The various opinions in *Alleyne* agreed that both *Harris* and *McMillan* were overruled. *See id.* at 103, 116 (opinion of the Court by Thomas, J.); *id.* at 118, 121 (Sotomayor, J., concurring); *id.* at 132–33 (Alito, J., dissenting).

66. *Alleyne*, 570 U.S. at 103 (internal citations omitted).

67. *See Harris*, 536 U.S. at 572–82 (Thomas, J., dissenting); *Alleyne*, 570 U.S. at 111–16 (opinion of the Court by Thomas, J.).

68. *Harris*, 536 U.S. at 572; *Alleyne*, 570 U.S. at 102–03.

69. *See* United States v. Haymond, 588 U.S. 634, 645 (2019) (plurality opinion); *see also* Erlinger v. United States, 602 U.S. 821, 835 (2024) (explaining and applying *Alleyne*).

the floor, of the sentencing range.[70] Chief Justice Roberts, who generally voted in alignment with Justice Scalia's perspective on *Apprendi* doctrine after joining the Court, made the most doctrinal difference in doing so on this issue.[71] Despite being a fellow originalist, Justice Scalia did not join Justice Thomas in either *Harris* or *Alleyne*, and, despite his penchant for staking out his own idiosyncratic views in criminal procedure,[72] he did not write an opinion in either case to explain his votes. Instead, he joined, without separate comment, the opinions authored by Justice Kennedy in *Harris* and Chief Justice Roberts in *Alleyne*, each of which argued that the historical evidence did not support extending *Apprendi* to mandatory-minimum sentences.[73]

The other five justices who rejected applying the *Apprendi* requirement of factfinding by verdict facts to mandatory-minimum sentencing provisions did so because they opposed the *Apprendi* rule in the first place. Justice Kennedy wrote the plurality opinion in *Harris*, joined by Chief Justice Rehnquist and Justice O'Connor,[74] each of whom had joined the latter's dissent in *Apprendi*.[75] Justice O'Connor concurred separately in *Harris* to expressly reiterate her opposition to *Apprendi*,[76] which the plurality opinion did not do—presumably to maintain the support of Justice Scalia. Chief Justice Rehnquist had written the

70. In previous work I initially argued in support of this doctrinal position, although on different grounds than those relied upon by Justice Scalia. *See, e.g.*, Priester, *Structuring Sentencing*, *supra* note 8, at 902–09. My views on this doctrinal issue have evolved over the years. *See infra* discussion in Section III.B.

71. *See* Priester, *Fifteen Years*, *supra* note 10, at 434 n.137, 437–39; Priester, *Bizarro World*, *supra* note 9, at 31–35.

72. *See, e.g.*, Michigan v. Bryant, 562 U.S. 344, 379–80 (2011) (Scalia, J., dissenting); Arizona v. Gant, 556 U.S. 332, 354 (2009) (Scalia, J., concurring).

73. *See Harris*, 536 U.S. at 556–68 (plurality opinion of the Court by Kennedy, J.); *Alleyne*, 570 U.S. at 124–28 (Roberts, C.J., dissenting). Justice Scalia's originalist arguments nonetheless influenced these two opinions he did not write. *E.g.*, *Harris*, 536 at 559–60. Justice Kennedy's plurality opinion in *Harris* relies heavily upon Justice Scalia's previous opinions in the *Apprendi* line of cases. *See* Priester, *Canine Metaphor*, *supra* note 6, at 233–34 & nn.110–14. Chief Justice Roberts' dissenting opinion in *Alleyne* likewise cites frequently to Justice Scalia's concurring opinion in *Apprendi* in particular. *See* 570 U.S. at 126, 130.

74. *Harris*, 536 U.S. at 549.

75. *Apprendi*, 530 U.S. at 523 (O'Connor, J., dissenting).

76. *See Harris*, 536 U.S. at 569 (O'Connor, J., concurring) ("I dissented in *Jones* and *Apprendi* and still believe both were wrongly decided.").

majority opinion in *McMillan*, joined by Justice O'Connor,[77] which Justice Kennedy's plurality opinion in *Harris* reaffirmed.[78] Later, Justice Alito wrote a solo dissent in *Alleyne* that specifically reinforced his continued opposition to the *Apprendi* rule as a whole.[79]

Then there is the problem of Justice Breyer, who defected from his previous alignment with this group to reach a doctrinal result that his own view of the constitutional principles at stake did not favor.[80] In 2002, writing only for himself, Justice Breyer concurred in the judgment in *Harris* based on his agreement with the plurality's outcome: that it should be constitutionally permissible to impose mandatory-minimum provisions through extraverdict judicial factfinding at sentencing.[81] He wrote separately, however, due to his disagreement with the plurality opinion's constitutional analysis distinguishing (and implicitly retaining) the holding, reasoning, and doctrinal rule in *Apprendi*.[82] In 2013, again writing only for himself, Justice Breyer concurred in the judgment in *Alleyne*, as well.[83] He reiterated his decade-long disagreement with the *Apprendi* rule in the third sentence of his opinion,[84] then promptly acknowledged that his perspective had not carried the day on the

77. *See* McMillan v. Pennsylvania, 477 U.S. 79, 79 (1986). The majority opinion assessed the statute's constitutionality in terms of fundamental fairness under the Due Process Clause, *see id.* at 84–93, the same framework later relied upon in the opinions opposing the *Apprendi* rule. *See supra* notes 39–42 and accompanying text. Appropriately given this line of cases, *McMillan* also was a 5-4 decision, with the dissenting justices arguing that the factfinding required to impose the mandatory minimum sentence must be proven as an element of the offense (although not on the basis of the Sixth Amendment right to jury trial later relied upon in *Apprendi* doctrine). *See* 477 U.S. at 93–94 (Marshall, J., dissenting); *id.* at 96–102 (Stevens, J., dissenting).

78. *See Harris*, 536 U.S. at 566–68. The constitutional analysis in Part III of Justice Kennedy's plurality opinion was joined by Chief Justice Rehnquist and Justices O'Connor and Scalia—but not by Justice Breyer. *See id.* at 572 (Breyer, J., concurring).

79. *See* Alleyne v. United States, 570 U.S. 99, 132–34 (Alito, J., dissenting).

80. *See, e.g.*, *Harris*, 536 U.S. at 569 (Breyer, J., concurring); *Alleyne*, 570 U.S. at 122 (Breyer, J., concurring).

81. *See Harris*, 536 U.S. at 569–70.

82. *See Harris*, 536 U.S. at 569–72 (Breyer, J., concurring). Justice Breyer candidly admitted that "I cannot easily distinguish [*Apprendi*] from this case in terms of logic," but reasoned that "because I believe that extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal, consequences, I cannot yet accept its rule." *Id.* at 569 (citation omitted).

83. *See Alleyne*, 570 U.S. at 122 (Breyer, J., concurring).

84. *Id.* ("I continue to disagree with *Apprendi*.").

Court.[85] Notwithstanding his own view of what ought to be the correct doctrinal rule, he determined in *Alleyne* that "the time has come to end this anomaly in *Apprendi*'s application" and to extend the requirement of verdict factfinding to the imposition of mandatory-minimum sentences as well as to increased maximum sentences.[86]

Six years later, the Court revisited the situation of a mandatory-minimum sentence and, astoundingly, yet again decided the case by a 4-1-4 split with Justice Breyer casting the decisive vote for idiosyncratic reasons.[87] The defendant in *Haymond* faced imposition of a statutory mandatory-minimum sentence not in the context of his initial conviction and sentence, but rather upon the revocation of his supervised release for later misconduct.[88] The plurality opinion by Justice Gorsuch, joined by Justices Ginsburg, Sotomayor, and Kagan, concluded that supervised release—at least for *Apprendi-Alleyne* purposes—constitutes a part of the sentence imposed for the initial underlying conviction, and therefore a revocation proceeding which imposes a mandatory-minimum sentence is functionally equivalent to imposing one in the first instance, triggering *Alleyne*'s prohibition on extraverdict factfinding.[89] The dissenting

85. "But *Apprendi* has now defined the relevant legal regime for an additional decade. And, in my view, the law should no longer tolerate the anomaly that the *Apprendi*/*Harris* distinction creates." *Id.*

86. *Id.* at 123–24; *see also* Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 840 (2023) ("Justice Breyer's changing willingness to engage in persistent dissent brought about both a doctrinal exception's rise and its demise.").

87. *See* United States v. Haymond, 588 U.S. 634, 636 (2019).

88. *See id.* at 638–40 (describing application of 18 U.S.C. § 3583(e)(3) & (k) in defendant's revocation proceeding); *see also* James Horner, Haymond*'s Riddles: Supervised Release, the Jury Trial Right, and the Government's Path Forward*, 57 AM. CRIM. L. REV. 275, 276–77 (2020) (detailing the procedural and legal posture of *Haymond*); Kate Stith, Apprendi*'s Two Constitutional Rights*, 99 N.C. L. REV. 1299, 1301–02 (2021) (same).

89. *See Haymond*, 588 U.S. at 650; Stith, *supra* note 88, at 1302–04, 1309–10 (criticizing reasoning and implications of plurality opinion). The plurality opinion maintained that "when a defendant is penalized for violating the terms of his supervised release, what the court is really doing is adjusting the defendant's sentence for his original crime." *Haymond*, 558 U.S. at 648 n.5. In the plurality's view, a mandatory minimum applied for the first time upon revocation of supervised release should be deemed to constitute "a new and additional prison sentence" imposed upon the defendant. *Id.* at 638; *see also id.* at 648 (noting that the Constitution "ensur[es] that any accusation triggering a new and additional punishment is proven to the satisfaction of a jury beyond a reasonable doubt").

opinion by Justice Alito rejected this analysis, instead characterizing supervised release and its revocation as equivalent to historical parole and its revocation, for which no Sixth Amendment rights had ever been thought to apply and, likewise, should not apply today.[90] Consistent with having written the dissent in *Alleyne*, Chief Justice Roberts joined the dissent in *Haymond*.[91] By contrast, Justice Thomas had long supported the application of *Apprendi* to mandatory minimum sentences; he presumably joined the dissent in *Haymond* because he viewed a supervised release revocation as distinguishable from the imposition of the individual's initial sentence.[92] Given this context, it is difficult to infer the grounds on which Justice Kavanaugh also joined the dissent.[93] Finally, Justice Breyer in his solo opinion concurring in the judgment agreed with the dissent that supervised release ordinarily should not be governed by *Apprendi*

90. *See id.* at 664–65, 668 (Alito, J., dissenting); Stith, *supra* note 88, at 1306 (agreeing with reasoning and implications of dissenting opinion). The dissenting opinion repeatedly describes supervised release and revocation proceedings as "the administration of previously imposed sentences," *Haymond*, 588 U.S. at 678 n.9, rather than as imposition of a new sentence. *See also id.* at 673–74, 675, 679 (Alito, J., dissenting) (further articulating his characterization of supervised release).

91. *Id.* at 659.

92. *See id.* at 675; *see supra* notes 65, 67, and accompanying text for Justice Thomas' prior opinions on the application of *Apprendi* doctrine.

93. Since joining the Court, Justice Kavanaugh has voted in alignment with Chief Justice Roberts more frequently than any other colleague. *See, e.g.*, Meghan Dalton, *Calling Balls and Strikes? Chief Justice Roberts in October Term 2019*, 97 NOTRE DAME L. REV. 1327, 1340 n.101 (2022) ("Kavanaugh and Roberts have aligned in 88.5% of divided cases and 92.5% of cases overall on average since Kavanaugh joined the Court in October Term 2018."); ANGIE GOU, ELLENA ERSKINE & JAMES ROMOSER, SCOTUSBLOG, STAT PACK FOR THE SUPREME COURT'S 2021-22 TERM 15 (July 1, 2022), https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf [https://perma.cc/YKS6-BGK9] (listing charts indicating that Justice Kavanaugh joined the same opinions as Chief Justice Roberts "in full" in 86% of cases and "in part" in 97% of cases, the highest percentages of agreement among any pair of justices on the Court during the October 2021 term). This might suggest that Justice Kavanaugh follows Justice Scalia's perspective on *Apprendi* doctrine, too. It is also possible, though, that Justice Kavanaugh shares Justice Thomas's perspective on *Apprendi-Alleyne* doctrine (and agrees that it does not apply in *Haymond*), rather than Justice Scalia's. Or perhaps he did not need to make a definitive choice between the two doctrinal approaches, because both reached the same outcome in *Haymond*. The only clear inference to be gleaned from *Haymond* is that Justice Kavanaugh does not share the same view of *Apprendi-Alleyne* doctrine as Justice Gorsuch. *See* Daniel Harris, *Supreme Court Justices Neil Gorsuch and Brett Kavanaugh Clash Over Federal Regulation and Criminal Justice*, 24 CHAP. L. REV. 339, 367 (2021).

doctrine principles,[94] but he concluded that the particular statute used against Haymond could not fairly be classified as a supervised release provision and instead constituted punishment for an aggravated offense in violation of the *Alleyne* rule.[95]

Needless to say, the level of support on the Court for the *Alleyne* rule applying *Apprendi* principles to mandatory-minimum sentences remains quite difficult to accurately assess.

C. Determining a Mandatory Guidelines Sentencing Range

At the time, it was widely recognized that the Court's adoption of the *Apprendi* rule necessarily also called into question the continued constitutionality of "sentencing guidelines" and related provisions that constrain the decision-making authority of a sentencing judge when determining the particular punishment for an individual offender.[96] Yet an important difference also raised significant questions about whether, how, and to what extent *Apprendi* doctrine would—or should—be applied to them: the distinction between offense-defining statutes and sentencing-regulating provisions.[97]

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94. *Haymond*, 588 U.S. at 657–58 (Breyer, J., concurring in the judgment); *see also* Nancy J. King, *Constitutional Limits on the Imposition and Revocation of Probation, Parole, and Supervised Release After* Haymond, 76 VAND. L. REV. 83, 86–87 (2023) ("In these scholarly discussions, Justice Breyer's controlling opinion is hardly mentioned, and its effect on *state* law ignored. I give Justice Breyer's concurrence the attention it deserves and explain why he and the four dissenting Justices in *Haymond* were right to resist the extension of *Apprendi* to the revocation context.").

95. *See Haymond*, 588 U.S. at 658–59 ("I agree with the plurality that this specific provision of the supervised-release statute, § 3583(k), is unconstitutional . . . . Taken together, these features of § 3583(k) more closely resemble the punishment of new criminal offenses. . . .").

96. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 544 (2000) (O'Connor, J., dissenting); Susan N. Herman, *Applying* Apprendi *to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615, 621–22 (2002); Jeffrey Standen, *The End of the Era of Sentencing Guidelines:* Apprendi v. New Jersey, 87 IOWA L. REV. 775, 779 (2002); Jane A. Dall, Note, *"A Question for Another Day": The Constitutionality of the U.S. Sentencing Guidelines under* Apprendi v. New Jersey, 78 NOTRE DAME L. REV. 1617, 1618 (2003).

97. *See* Beckles v. United States, 580 U.S. 256, 262 (2017) (recognizing distinction between "laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses") (emphasis in original); *see also* Priester, *Bizarro World*, *supra* note 9, at 6–7 (distinguishing "offense-defining" and "sentencing-regulating" statutes); Priester, *Constitutional Formalism*, *supra* note 8, at 289–91 (discussing "offense-defining" and "sentencing-regulating" statutes in the context of *Apprendi*).

Both types of provisions—those that define criminal offenses and those that regulate the imposition of a sentence—play a role in determining the extent of a sentencing judge's authority in an individual case. In *Apprendi* and *Harris*/*Alleyne*, the pertinent statutes undeniably defined the criminal offense for which the defendant had been convicted; the contested issue involved how to implement the statutes' accompanying language setting forth gradations of punishment based on enumerated facts.[98] In *Blakely* and *Booker*, by contrast, the sentencing guidelines employed when punishing the offenders expressly and unambiguously did *not* define new crimes, but rather regulated only the sentencing judge's exercise of power to undertake extraverdict factfinding and assignment of punishment weight to the verdict and extraverdict facts established in the record.[99] Significantly, in many states and the Federal Sentencing Guidelines, the details of such determinations regarding sentencing factfinding and punishment weight were not directly enacted by the legislature, but rather were found in a body of regulations adopted by an administrative agency exercising delegated power to promulgate rules following a familiar process of data gathering, expert input, and deliberative rulemaking.[100] Given the emphasis in the *Apprendi* line of cases on protecting the prerogatives of the jury and judge from improper encroachment by the legislature, the adoption and implementation of administrative agency regulations readily could be deemed qualitatively different from legislatively enacted statutory directives.[101]

98. *See* Apprendi v. New Jersey, 530 U.S. 466, 469 (2000); Harris v. United States, 536 U.S. 545, 545 (2002); Alleyne v. United States, 570 U.S. 99, 99 (2013). In *Apprendi* and *Alleyne*, the Court held that the *Apprendi* doctrine required such statutes to be interpreted as defining multiple offenses with factfinding by jury verdict or guilty plea, rather than as defining a single offense of conviction and separate sentencing-regulating gradations determined later by the sentencing judge. *See, e.g.*, Priester, *Fifteen Years*, *supra* note 10, at 421; Priester, *Bizarro World*, *supra* note 9, at 9–10.

99. Blakely v. Washington, 542 U.S. 296, 298–301 (2004); United States v. Booker, 543 U.S. 225, 227–30 (2005)*; see, e.g.*, Priester, *Fifteen Years*, *supra* note 10, at 422–24.

100. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 368–70, 374–79 (1989).

101. *See generally Blakely*, 542 U.S. at 313–14 (2004) ("The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the 'unanimous suffrage

Within a few years of *Apprendi*, therefore, the Court had to decide whether the ceilings and floors generated by such sentencing guidelines would be subject to the same constitutional doctrine as the maximum and minimum sentences contained in offense-defining statutes.[102]

By the same 5-4 alignment as *Apprendi*, the Court held that its rule also applied to sentencing-regulating provisions to the extent that they impose *mandatory* constraints upon the judge determining an offender's punishment.[103] If the sentencing judge must comply with a constraint to avoid reversible error on appeal, then whether that constraint originates in an offense-defining statute or in a sentencing-regulating provision is constitutionally irrelevant under the Court's doctrine.[104] For example, in *Blakely v. Washington*, the defendant was convicted of a kidnapping offense with a statutory maximum punishment of ten years' imprisonment.[105] The sentencing judge's authority to impose punishment upon him was significantly constrained, however, by the state's sentencing guidelines—based on the verdict facts alone the available punishment range was 49-53 months, and the judge imposed 90 months after finding by a preponderance of the evidence that Blakely had acted with

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of twelve of his equals and neighbours [sic],' rather than a long employee of the state.") (citation omitted).

102. Prior to *Alleyne*, the *Blakely-Booker* rule was uniformly understood to permit extraverdict factfinding that increased the lower end of a mandatory sentencing guidelines range (beneath the guidelines maximum authorized by the verdict facts), but only so long as the *Harris* holding as to statutory mandatory minimums remained good law. *See, e.g.*, Priester, *Fifteen Years*, *supra* note 10, at 423–24; Priester, *Canine Metaphor*, *supra* note 6, at 231–33. Although the Court has yet to directly address the issue after *Alleyne*, the doctrinal consequences of that decision for sentencing-regulating provisions are readily apparent. *See, e.g.*, Hessick, *supra* note 18, at 1213 n.111 ("At the time *Booker* was decided, the relevant limit on sentencing authority was whether the judge could not impose a higher sentence without a factual finding. The Court has since decided that factual findings which prohibit a judge from imposing a lower sentence also raise Sixth Amendment problems."); *see also* Ben Ashworth, *Between a Rock and a Hard 50: The Effect of the* Alleyne *Decision on Kansas' Sentencing Procedures*, 24 KAN. J.L. & PUB. POL'Y 273, 282–86 (2015) (explaining judicial and legislative action in Kansas based on recognition that state's post-*Apprendi* laws relying on verdict facts to establish maximum sentence, but not minimum sentence, had become unconstitutional after *Alleyne*).

103. *See Booker*, 543 U.S. at 225, 233.

104. *See* Priester, *Bizarro World*, *supra* note 9, at 11–13.

105. *Blakely*, 542 U.S. at 298–99.

deliberate cruelty.[106] Similarly, in *United States v. Booker*, the defendant was convicted of a federal narcotics distribution offense with a statutory punishment range of ten years to life.[107] Again, the authority of the sentencing judge to punish the defendant was significantly constrained by the Federal Sentencing Guidelines—a punishment range of 210-262 months was authorized based on the verdict facts alone, and the judge imposed 360 months based on extraverdict findings of drug quantity and obstruction of justice.[108] In both cases, the four dissenters continued to reject the *Apprendi* rule even for offense-defining statutes, and accordingly argued that the sentences imposed pursuant to sentencing-regulating provisions necessarily should also be constitutionally permissible.[109] Likewise, in both cases, the five-justice majority held that the sentences were unconstitutional because the defendant's punishment had been increased based on extraverdict factfinding and the operation of mandatory provisions of law.[110] Thus, after *Blakely* and *Booker*, "any provision of law, statutory or otherwise, which links a mandatory increase in the maximum punishment to the finding of a particular fact is tantamount to creating an aggravated offense such that the triggering fact must be treated as an offense

106. *See id.* at 299–300. In Washington, the sentencing guidelines had been promulgated by the legislature rather than an administrative agency, but the guidelines nevertheless unambiguously related only to the determination of an individual offender's punishment rather than the statutory definition of criminal offenses. *See id.*; *id.* at 316 (O'Connor, J., dissenting).

107. *Booker*, 543 U.S. at 227. The consolidated companion case *United States v. Fanfan* involved a comparable scenario: a statutory punishment range of five to forty years, a Guidelines range of sixty-three to seventy-eight months based on the verdict facts alone, and an imposed sentence of 188 months based on the judge's extraverdict factfinding of drug quantity and the defendant's leadership role. *See* United States v. Fanfan, 542 U.S. 956, 956 (2004); Fanfan v. United States, No. 03-47, 2004 WL 1723114, at *5–6 (D. Me. June 28, 2004), *vacated and remanded sub nom.*, United States v. Booker, 543 U.S. 220 (2005).

108. *See Booker*, 543 U.S. at 227. The United States Sentencing Guidelines were then, and continue to be, promulgated by the United States Sentencing Commission pursuant to power delegated to the agency by Congress. *See, e.g.*, *id.* at 237–39; Mistretta v. United States, 488 U.S. 361, 371–74 (1989) ("[W]e harbor no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements.").

109. *See Blakely*, 542 U.S. at 314 (O'Connor, J., dissenting); *id.* at 329–30 (Breyer, J., dissenting); *Booker*, 543 U.S. at 326–27 (Breyer, J., dissenting in part).

110. *See Blakely*, 542 U.S. at 303–05; *Booker*, 543 U.S. at 232–35; *see also* Priester, *Canine Metaphor*, *supra* note 6, at 216–19 (discussing the implications of *Booker* and *Blakely*); Priester, *Bizarro World*, *supra* note 9, at 11–13 (same).

element for that enhanced sentence to be constitutionally valid."[111]

The greatest impact of *Blakely* and *Booker* ultimately resulted not from the expansion of a defendant's *Apprendi* right to verdict factfinding in individual cases, but rather from the broader need to revisit the entire endeavor of sentencing reform to bring sentencing practice in the aggregate into conformity with *Apprendi* doctrine.[112] Some states were unaffected by *Blakely*, either because they had retained judicial discretion in sentencing or because their sentencing guidelines operated only in an advisory, rather than mandatory, manner in shaping the punishment decisions of their judges.[113] States which had adopted mandatory sentencing guidelines, however, faced the need to change their sentencing regimes to avoid systemic violations of *Apprendi-Blakely* doctrine.[114] Unsurprisingly, for federalism reasons the Court did not require affected states to select any particular response to the *Blakely* holding, and the affected states pursued a variety of different paths.[115] Some states chose to modify their previously mandatory guidelines into advisory

111. Priester, *Fifteen Years*, *supra* note 10, at 423; *see e.g.*, Alleyne v. United States, 570 U.S. 99, 108 (2013) (explaining that "facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt").

112. *See* Douglas A. Berman, *Assessing Federal Sentencing after* Booker, 17 FED. SENT'G. REP. 291 (2005) (assessing post-*Booker* federal sentencing reform); Aaron J. Rappaport, *What the Supreme Court Should Do: Save Sentencing Reform, Gut the Guidelines*, 17 FED. SENT'G REP. 46 (2004) (evaluating the implications of *Blakely* on federal guidelines system); Rachel E. Barkow, *The Devil You Know: Federal Sentencing After* Blakely, FED. SENT'G REP. 312 (2004) (commenting on the implications of *Blakely*); *see also* Priester, *Canine Metaphor*, *supra* note 6, at 215 n.18, 216 n.29, 217 n.33 (citing extensive quantity of scholarly publications addressing broad impacts of *Blakely* and *Booker*).

113. *See, e.g.*, Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 785 (2008) ("[T]wenty-nine states and the District of Columbia [] were not immediately affected by the *Blakely* and *Booker* opinions. Seventeen of these states granted judges unfettered discretion . . . . Eight jurisdictions had guideline systems in place that were sufficiently [advisory] . . . . And five others used jury sentencing."); *see also id.* at 802 (listing unaffected states and describing their respective contexts).

114. In other words, no state actually tried to flaunt the Court's ruling in *Blakely* and continue implementing a now-unconstitutional system (presumably because their own state courts would just continue vacating and remanding unlawful sentences). Instead, the state legislatures reacted to *Blakely*. *See id.* at 785–86.

115. *See id.* at 785–88.

provisions,[116] while others opted to retain the mandatory impact of their guidelines by shifting their procedural operation from extraverdict facts to verdicts facts.[117] To date, the Court has yet to even grant certiorari to review a state's "*Blakely* fix" for previously mandatory sentencing guidelines, much less deem a state's response to be constitutionally inadequate.

At the federal level, of course, such a policy choice ought to be made by Congress—and yet two decades later, no legislative response to *Booker* has been forthcoming.[118] At the time of the *Booker* decision, the nature of the Court's merits ruling necessitated that it also reach a holding regarding the immediate remedial fate of the then-existing Federal Sentencing Guidelines: that is, how to cure any *Apprendi* violations present on the record of pending cases,[119] as well as how to avoid *Apprendi* violations in

116. *See* Priester, *Canine Metaphor*, *supra* note 6, at 248–49 & n.179; Nancy J. King, *Handling Aggravating Facts After* Blakely*: Findings from Five Presumptive-Guidelines States*, 99 N.C. L. REV. 1241, 1246 (2021); Bibas & Klein, *supra* note 113, at 785–88, 797–801.

117. *See* Priester, *Canine Metaphor*, *supra* note 6, at 248–49 & n.180; King, *supra* note 116 at 1290–91; Bibas & Klein, *supra* note 113, at 785–88, 797–801; *see also* Blakely v. Washington, 542 U.S. 296, 309–10 (2004) (noting that Kansas enacted legislation adopting such a change following state supreme court decision applying *Apprendi*). This adjustment was often referred to as "Blakely-izing" mandatory guidelines. *See, e.g.*, Priester, *Canine Metaphor*, *supra* note 6, at 248–49; Priester, *Bizarro World*, *supra* note 9, at 19.

118. Even the Sentencing Commission has neglected its responsibilities: "Yet in the fifteen years since [*Booker*] . . . , the Commission has refused [to] do the obviously necessary thing: recraft the federal sentencing system to accommodate the *Booker* holding either by designing a guidelines structure in which sentencing factors are triable to a jury or by rethinking the Guidelines as a purely advisory system. Instead, the Commission has remained paralyzed." Bowman, *supra* note 28, at 1363; *see also* Zachary C. Bolitho, *A Suggestion for Making the Federal Sentencing Guidelines and the U.S. Sentencing Commission Reflect the Realities of Post-*Booker *Sentencing*, 34 FED. SENT'G REP. 221, 221 (2022) (describing how Justice Stephen Breyer—a founding member of the U.S. Sentencing Commission—"lamented that 'nothing happened'" with his suggestions for reform).

119. Had Congress enacted legislation to reassert the mandatory effect of the Sentencing Guidelines and cure their *Apprendi* violations, such statutory amendments presumably would have been written with prospective application only; their application to previously final cases or already pending cases would have violated the Ex Post Facto Clause. *See* Peugh v. United States, 569 U.S. 530, 538 (2013). The Court's ruling in *Booker* did not affect previously final cases due to the parameters of retroactivity doctrine for constitutional decisions, which provides that "new" rules of constitutional law are given effect only currently and prospectively (i.e., to pending and future cases), with two very narrow exceptions. *See, e.g.*, Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004) (discussing doctrine originating in Teague v. Lane, 489 U.S. 288, 311 (1989)). Applying those doctrinal principles, the Supreme Court and lower courts consistently have held that decisions in the *Apprendi* line of cases do not have retroactive effect. *See Schriro*, 542 U.S. at 353; McKinney v. Arizona, 589 U.S. 139, 145 (2020); Joan L. Larsen, *Ancient Juries and*

future cases until, as many expected, such time as Congress enacted legislation responsive to *Apprendi-Booker* doctrine.[120] With some additional clarification and elaboration in subsequent cases, and amid the reality of persistent Congressional inaction, the Court's seemingly tentative and temporary solution has served as the policy and procedural settlement of federal sentencing practice for two decades.[121]

Due to the Court's extension of the *Apprendi* rule to the Guidelines, the merits holding of *Booker* foreclosed the implementation of the Guidelines and their authorizing statutes as written in most cases.[122] Accordingly, the Court's remedial analysis focused on the question of severability: could the unconstitutional components of the Guidelines be severed, allowing the remainder of the regime to function without them, or were the unconstitutional components so central to the Guidelines regime that the entire edifice must fall with them? The Court divided 5-4 on this issue—differently than its split on the merits.[123] Four members of the merits majority concluded that the mandatory nature of the Guidelines was a fundamental aspect of their enactment and purpose, and therefore could not be

Modern Judges: Originalism's Uneasy Relationship with the Jury, 71 OHIO ST. L.J. 959, 999 & n.218 (2010) ("Every circuit to consider the question has likewise held that *Booker* does not apply retroactively.").

120. *See, e.g.*, United States v. Booker, 543 U.S. 220, 265 (2005) ("Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.").

121. Bowman, *supra* note 28, at 1342; *see* Frank O. Bowman III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227, 1230 (2014).

122. At the time, some argued that the Court could (or should) have retained the mandatory force of the Sentencing Guidelines in all applications except those which actually violated the *Apprendi* rule on the facts—i.e., the *Booker* merits majority only deemed unconstitutional extra-verdict factfinding that actually increased the particular defendant's sentence above the maximum Guidelines sentence authorized by the verdict facts. *See Booker*, 543 U.S. at 272–73, 284–85 (Stevens, J., dissenting in part). This interpretation of *Booker* and the Guidelines was only feasible, however, while *Harris* remained the governing rule for factfinding that increased the minimum sentence. *See* Priester, *Canine Metaphor*, *supra* note 6, at 218 (discussing illustrative example offered by Justice Stevens in *Booker*). After *Alleyne*, most Sentencing Guidelines factfinding—except for factfinding to apply mitigating provisions that *reduce* the defendant's sentence—would violate *Apprendi* doctrine by increasing the maximum sentence, minimum sentence, or both. *See* Stith *supra* note 88, at 1300.

123. *Booker*, 543 U.S. at 225–27.

severed; in their view, Congress would have enacted no Guidelines at all rather than non-mandatory ones.[124] Led by Justice Breyer, a founding member of the Sentencing Commission and longtime defender of the Guidelines,[125] the four merits dissenters argued in favor of severability. They concluded that, had it known of the constitutional infirmity created by *Apprendi* doctrine, Congress nonetheless would have wanted to enact and implement as much of the Guidelines as possible, even if fully mandatory force was not an available option.[126] By severing two parts of the existing regime—the requirement that District Court judges render a sentence within the specific range generated by the Guidelines and the *de novo* appellate review of Guidelines sentences in the Courts of Appeals—the Guidelines would become advisory, rather than mandatory, and consequently could function seamlessly in all cases without generating any *Apprendi* violations.[127] Without writing separately to explain her reasons, Justice Ginsburg joined both the merits majority and the remedial majority, providing Justice Breyer with a fifth vote for his severability analysis.[128]

Despite this fragmented and tenuous origin, however, the remedial solution adopted by the Court has proven to be enduring. In three 2007 decisions, most significantly *Rita v. United States*, the Court provided additional clarification to the lower federal courts about the meaning and application of its *Booker* remedy.[129] After *Rita*, the statutory and Guidelines regime is

124. *See Booker*, 543 U.S. at 272, 274, 280, 284, 291, 300–03 (Stevens, J., dissenting in part). Under this view, the Guidelines would have continued to operate with mandatory effect in all federal sentencing proceedings, except when an *Apprendi-Booker* violation would occur by increasing the maximum punishment imposed on a particular defendant based on extraverdict factfinding. *See id.* at 288; *see also supra* note 108 (noting how the Guidelines were and continue to be validly promulgated by the United States Sentencing Commission).

125. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 31 (1988).

126. *See Booker*, 543 U.S. at 258–60, 264–65 (Breyer, J., majority opinion).

127. *Id.* at 264–65.

128. *Id.* at 225.

129. *See* Rita v. United States, 551 U.S. 338, 351 (2007); Gall v. United States, 552 U.S. 38, 46–47 (2007); Kimbrough v. United States, 552 U.S. 85, 101 (2007); *see also* Nelson v. United States, 555 U.S. 350, 351 (2009) (per curiam) (applying *Rita* to explain how "the sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the

implemented in the following manner: the District Court is required to calculate the Guidelines sentencing range, then additionally to consider the statutory § 3553(a) factors before determining the final sentence imposed, which may or may not fall within the Guidelines range.[130] Moreover, the Court of Appeals will reverse if a procedural error occurred, but substantive review of the sentence is limited to its "reasonableness" under the highly deferential abuse of discretion standard.[131]

In the aggregate, this *Booker-Rita* reasonableness review framework has gained the support of ten justices.[132] Only Justice Scalia consistently suggested that *Booker-Rita* reasonableness review might be insufficient to avoid all *Apprendi* violations.[133] On the other hand, only Justice Alito interprets *Booker-Rita* reasonableness review as permitting the Guidelines to hold "significant weight" in the sentencing decision, rather than being

individual defendant in light of the statutory sentencing factors"); Spears v. United States, 555 U.S. 261, 263–65 (2009) (per curiam) (further clarifying the district courts sentencing authority under *Booker* and *Kimbrough*).

130. *See Rita*, 551 U.S. at 348–51; *Gall*, 552 U.S. at 49–51; Beckles v. United States, 580 U.S. 256, 265 (2017).

131. *See Rita*, 551 U.S. at 347; *see also* Priester, *Bizarro World*, *supra* note 9, at 22–28; Priester, *Fifteen Years*, *supra* note 10, at 441–46. Although the Guidelines are advisory under the *Booker-Rita* framework, a sentence imposed following an incorrect calculation of the Guidelines range may constitute reversible error on appeal even when the defendant failed to object to the error in the District Court. *See* Molina-Martinez v. United States, 579 U.S. 189, 194, 198–201 (2016) (clarifying operation of plain error review under FED. R. CRIM. P. 52(b) in such a situation); *see also* Rosales-Mireles v. United States, 585 U.S. 129, 132 (2018) (clarifying that "in the ordinary case" such a situation "will warrant relief" under plain error review on appeal). Moreover, by requesting a specific sentence in the District Court, the defendant has properly preserved a *Booker-Rita* reasonableness claim for appeal. *See* Holguin-Hernandez v. United States, 589 U.S. 169, 173–75 (2020).

132. In addition to the original five members of the *Booker* remedial majority (Justices Breyer, O'Connor, Kennedy, Ginsburg, and Chief Justice Rehnquist), 543 U.S. at 225, Justices Stevens and Souter—after some initial hesitation—ultimately accepted the Court's understanding of *Booker-Rita* reasonableness review. *See* Priester, *Fifteen Years*, *supra* note 10, at 442–43; *Rita*, 551 U.S. at 360–61 (Stevens, J., concurring); *id.* at 384 (Souter, J., dissenting); *Gall*, 552 U.S. at 46–53 (Stevens, J., majority opinion); *Gall*, 552 U.S. at 60–61 (Souter, J., concurring). Chief Justice Roberts joined the majority opinion in all three 2007 decisions, and Justices Sotomayor and Kagan have voted consistently in support of *Booker-Rita* reasonableness review. *See* Priester, *Fifteen Years*, *supra* note 10, at 443.

133. *See* Priester, *Fifteen Years*, *supra* note 10, at 425–26, 444–45. Ultimately, Justice Scalia advocated for the view that "all sentences below the statutory maximum are substantively reasonable." Jones v. United States, 574 U.S. 948, 948 (2014) (Scalia, J., dissenting from denial of certiorari).

advisory.[134] And only Justice Thomas asserts that the *Booker* decision's severability analysis should be repudiated, restoring the Guidelines to mandatory effect in all situations except when it would violate the *Apprendi* rule on the facts of a particular case.[135]

The Court has yet to meaningfully revisit the doctrine since the appointment of any of the four newest justices.[136] "To the surprise of practically everyone, the mandatory-turned-advisory system that the courts jury-rigged from *Booker*'s conclusion that advisory guidelines would be constitutionally acceptable became not an interim placeholder pending a thorough overhaul but an accepted and (so far) enduring replacement for the pre-*Apprendi-Booker* regime."[137] Thousands of published opinions from the Courts of Appeals interpreting and applying *Booker-Rita* reasonableness review have failed to provide consistency in analytical approach.[138] With zero grants of certiorari across more than fifteen years, however, it appears the Court has been satisfied with the doctrinal approach and individual

134. *Gall*, 552 U.S. at 61 (Alito, J., dissenting); *Kimbrough*, 552 U.S. at 116 (Alito, J., dissenting); Priester, *Fifteen Years*, *supra* note 10, at 444.

135. *See Kimbrough*, 552 U.S. at 116 (Thomas, J., dissenting) ("Although I joined Justice Scalia in *Rita* accepting the *Booker* remedial opinion as a matter of 'statutory *stare decisis*,' I am now convinced that there is no principled way to apply the *Booker* remedy—certainly not one based on the statute.") (internal citations omitted); Priester, *Fifteen Years*, *supra* note 10, at 445–46; *see also id.* at 427–29 (describing doctrinally discordant turn of phrase in Justice Thomas' plurality opinion in *Alleyne*).

136. Justice Gorsuch recused from a 2018 case examining the extent of a District Court judge's obligation to explain a revised sentence imposed upon resentencing following a Sentencing Commission amendment producing a reduction in the applicable Guidelines range. *See* Chavez-Mezsa v. United States, 585 U.S. 109, 110 (2018); *id.* at 121–23. (Kennedy, J., dissenting). He also joined a 7-2 majority opinion clarifying the proper standard for applying plain error review on appeal in cases involving Guidelines miscalculations in the District Court proceedings. *See* Rosales-Mireles v. United States, 585 U.S. 129, 131, 134–35 (2018).

137. Bowman, *supra* note 28, at 1342.

138. As of August 2025, Westlaw's database reports that *Rita* has been cited over 6,000 times, and *Gall* nearly 18,000 times, in opinions issued by the U.S. Courts of Appeals. Yet one review of the cases has concluded that "the circuit courts are deeply divided as to how to perform substantive reasonableness review under *Gall v. United States*." Dawinder S. Sidhu & Kelsey Robinson, *Child Pornography and Criminal Justice Reform*, 43 CARDOZO L. REV. 2157, 2194 (2022); *see id.* at 2194–200 (describing circuit split in detail). "The Court is well aware of those different legal standards, and it has opted not to review them and provide uniform appellate standards for the country." Hessick, *supra* note 18, at 1219.

outcomes produced by its now-entrenched remedial solution.[139] Many outside the Court, however, do not share this appraisal.[140]

D. From 1998 to 2024: The Recidivism Exception

Due to the quirks of path dependency, from the beginning, *Apprendi* doctrine has included a recidivism exception.[141] For almost as long, it has been recognized as dissonant with the doctrine as a whole, and therefore a potential target for abrogation.[142] Yet the exception endures.[143]

Under the *Apprendi* rule, only factfinding by jury verdict or guilty plea can raise the ceiling of the mandatory sentencing

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139. Petitioners have overtly asked the Court to address and resolve such circuit splits, but the Court has denied review every time. *See, e.g.*, Petition for Writ of Certiorari, at i, Demma v. United States, 141 S. Ct. 620 (2020) (No. 19-1260), 2020 WL 2095044; United States v. Demma, 948 F.3d 722 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 620 (2020); Brief for the Center on the Administration of Criminal Law as Amici Curiae Supporting Petitioner at 2–3, Blagojevich v. United States, 584 U.S. 930 (2018) (No. 17-658), 2017 WL 6054690; United States v. Blagojevich, 854 F.3d 918 (7th Cir. 2017), *cert. denied*, 584 U.S. 930 (2018). *See also* Hessick, *supra* note 18, at 1219 n.153 (citing *Demma* as "a case that squarely presented two appellate review circuit splits"). Professor Hessick concludes that the "most likely" explanation for the Court's inaction is "that the Court is willing to sacrifice uniformity of law—giving up its ordinary role of resolving different legal rules in the circuits—in order to encourage more within-Guidelines sentences." *Id.* at 1219–20 (internal citations omitted).

140. *See, e.g.*, Nancy Gertner, *Note to the New Sentencing Commission: Start from Scratch*, 35 FED. SENT'G REP. 6, 6 (2022) ("The Federal Sentencing Guidelines [], promulgated in 1987, are due for substantial overhauling."); Gertner, *supra* note 19, at 1382–83 (critiquing the historical origin of sentencing appellate review in the United States in comparison to other countries' that are guided by proportionality principles); Bowman, *supra* note 28, at 1342 ("I think the persistence of the advisory federal sentencing Guidelines in their current form is regrettable."); Hessick, *supra* note 18, at 1232–38 (evaluating advisory guidelines under Sixth Amendment principles).

141. *See, e.g.*, Priester, *Fifteen Years*, *supra* note 10, at 417 n.28; Priester, *Structuring Sentencing*, *supra* note 8, at 876–87; *see also* United States v. Haymond, 588 U.S. 634, 644 n.3 (2019) ("The Court has recognized two narrow exceptions to *Apprendi's* general rule . . . . Prosecutors need not prove to a jury the fact of a defendant's prior conviction or facts that affect whether a defendant with multiple sentences serves them concurrently or consecutively.") (internal citations omitted).

142. *See, e.g.*, Priester, *Canine Metaphor*, *supra* note 6, at 213 n.8; Priester, *Structuring Sentencing*, *supra* note 8, at 877–79; *see also* Erlinger v. United States, 602 U.S. 821, 849 (2024) (Thomas, J., concurring) ("In this case, the Court acknowledges the sharp conflict between *Almendarez-Torres* and the Sixth Amendment."); Shepard v. United States, 544 U.S. 13, 27 (2005) (Thomas, J., concurring in part and concurring in the judgment) ("[A] majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."); Apprendi v. New Jersey, 530 U.S. 466, 489–90 (2000) (acknowledging that it has been argued that *Almendarez-Torres* was incorrectly decided).

143. *See Erlinger*, 602 U.S. at 837–42.

range.[144] Under the recidivism exception to that rule, however, extraverdict factfinding can be used to establish the defendant's own prior criminal record, even when doing so results in an increased maximum sentence. Thus, it is unconstitutional to impose a sentence above the otherwise available maximum sentence—say, a sentence of 15 years instead of a maximum of 10 years—based on extraverdict factfinding that the defendant committed a hate crime, a high-dollar fraud, or caused injury during a carjacking.[145] But if that same sentence—five more years than the otherwise available 10-year maximum—resulted from taking account of the defendant's criminal record, then the recidivism exception means that no constitutional violation occurred in that situation. The recidivism exception likewise would apply under *Alleyne* and *Blakely-Booker* when the factfinding used to impose mandatory-minimum sentences or increased mandatory sentencing guidelines relates to the defendant's criminal record.

The principle that became *Apprendi* doctrine emerged in 1998 in Justice Scalia's dissent in *Almendarez-Torres v. United States*,[146] a 5-4 decision authorizing imposition by the sentencing judge of a recidivism enhancement that increased the maximum punishment for a federal immigration offense from two years to twenty years when the offender's criminal record contained a previous aggravated felony conviction.[147] By the time of *Apprendi* two years later, Justice Thomas had repudiated his position in *Almendarez-Torres* and joined the 5-4 *Apprendi* majority in adopting the *Apprendi* rule.[148] Each of the subsequent decisions in the *Apprendi* line of cases, however, involved other

144. *See Apprendi*, 530 U.S. at 495–96.

145. *See id.* at 490; Blakely v. Washington, 542 U.S. 296, 313–14 (2004).

146. *See* 523 U.S. 224, 248–49 (1998) (Scalia, J., dissenting); *see also* Monge v. California, 524 U.S. 721, 740–41 (1998) (Scalia, J., dissenting) (discussing the constitutionality of sentencing enhancement when the plaintiff had been "functionally" acquitted of the crime used as an enhancement).

147. *See Almendarez-Torres*, 523 U.S. at 226–27.

148. *See Apprendi*, 530 U.S. at 520 (Thomas, J., concurring); *see also* Jones v. United States, 526 U.S. 227, 234–35 (1999) (recognizing "the history of treating recidivism as a sentencing factor" discussed in *Almendarez-Torres* as support for upholding recidivism enhancement).

forms of extraverdict factfinding.[149] Consequently, the Court began its statement of the *Apprendi* rule with the caveat "other than the fact of a prior conviction"—formally retaining the holding of *Almendarez-Torres* even as the doctrinal rule followed the reasoning and rule from the dissent.[150] The Court continued to consistently state the rule with the recidivism exception in future cases reaching the constitutional issue.[151] The Court did the same in its decisions undertaking statutory interpretation and constitutional avoidance analysis of the sentencing enhancements contained in the federal Armed Career Criminal Act (ACCA), which are based upon additional determinations about the nature of the offender's prior convictions and not merely their factual existence in the individual's criminal record.[152] Despite its seemingly tenuous doctrinal status, the recidivism exception stuck around.

The Court's consideration of *Erlinger v. United States* in 2024 overtly returned the recidivism exception to the fore.[153] Erlinger's federal felon-in-possession conviction, on its own terms, authorized a sentence of up to 10 years' imprisonment.[154] Under the ACCA, however, a factual finding that his prior felony convictions had been committed on "different occasions"

149. *See, e.g.*, Harris v. United States, 536 U.S. 545, 550–52 (2002) (considering the manner of firearm's use during drug offense); Ring v. Arizona, 536 U.S. 584, 597–98 (2002) (aggravating factors supporting imposition of death sentence); *Blakely*, 542 U.S. at 298–301 (considering the manner of committing kidnapping offense); Cunningham v. California, 549 U.S. 270, 274–77 (2007) (analyzing the vulnerability of victim and manner of committing child sex offense).

150. *Apprendi*, 530 U.S. at 490; *see also Jones*, 526 U.S. at 243 n.6 ("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.").

151. *See, e.g.*, *Harris*, 536 U.S. at 550; *Blakely*, 542 U.S. at 301–02; Southern Union Co. v. United States, 567 U.S. 343, 346 (2012). *But see* Alleyne v. United States, 570 U.S. 99, 107–08 (2013) ("In *Apprendi*, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed.").

152. *See, e.g.*, Mathis v. United States, 579 U.S. 500, 511 (2016); Descamps v. United States, 570 U.S. 254, 269 (2013); Shepard v. United States, 544 U.S. 13, 24 (2005).

153. 602 U.S. 821 (2024).

154. *Id.* at 825 (citing 18 U.S.C. § 922(g)). Justice Gorsuch's majority opinion further described the sentencing range as "between 0 and 10 years in prison." *Id.* at 834.

required a sentence of 15 years to life imprisonment.[155] On the record, the sentencing judge specifically determined that the appropriate and "fair" sentence would be five years, and that the fifteen years mandated by the ACCA was "excessive" in his case.[156] For Erlinger, imposing the ACCA sentence implicated both *Apprendi*—the extraverdict factfinding resulted in a sentence of 15 years, greater than the otherwise-available 10 years maximum—and *Alleyne*—the extraverdict factfinding resulted in a mandatory minimum of 15 years, precluding the exercise of discretion to impose a lower sentence.[157] Thus, whether the extraverdict factfinding to impose the ACCA sentence violated the Court's constitutional doctrine depended entirely on whether the general *Apprendi-Alleyne* rule applied, or instead, whether the *Almendarez-Torres* recidivism exception applied; the briefing in the case reflected this inflection point.[158] At oral argument, multiple justices directly questioned the advocates about the scope and meaning of *Almendarez-Torres* and whether it was correctly decided or should be overruled.[159] In the end, though, the Court's decision once again maintained the doctrinal status quo.

All nine justices joined opinions retaining—at least for now—the recidivism exception. For three justices, Justice Kavanaugh's dissenting opinion not only defended the *Almendarez-Torres* recidivism exception as affirmatively correct, but also argued that it should be broadly construed to encompass a wide range of factfinding related to the circumstances of

155. *Id.* at 826; *see* 18 U.S.C. § 924(e)(1) ("In the case of a person who violates section 922(g) of this title and has three previous convictions . . . committed on occasions different from one another . . . .").

156. *Erlinger*, 602 U.S. at 826–271.

157. *Id.* at 833–35; *id.* at 853–54 (Kavanaugh, J., dissenting).

158. *See, e.g.*, Petition for Writ of Certiorari at 6, 16, *Erlinger*, 602 U.S. 821 (No. 23-370); Brief for Petitioner at 11, 25–26, *Erlinger*, 602 U.S. 821 (No. 23-370); Brief for Respondent in Support of Petitioner at 141–16, *Erlinger*, 602 U.S. 821 (No. 23-370); Brief of Court-Appointed Amicus Curiae in Support of Judgment Below at 10–13, *Erlinger*, 602 U.S. 821 (No. 23-370).

159. *See, e.g.*, Transcript of Oral Argument at 5, 10–11, 17, *Erlinger*, 602 U.S. 821 (No. 23-730) [hereinafter Transcript of Oral Argument] (demonstrating that some Justices, including but not limited to, Justice Thomas, Justice Kavanaugh, and Justice Jackson, questioned whether the case required addressing broader constitutional issues, including the continued validity and historical underpinnings of *Almendarez-Torres*).

past offenses, as opposed to factfinding related to the circumstances of the present offense, which is governed by *Apprendi* doctrine.[160] By contrast, Justice Gorsuch's majority opinion for six justices acknowledged the dubious status of *Almendarez-Torres* but concluded that *Erlinger* could be resolved within the existing parameters of the recidivism exception.[161] The *Almendarez-Torres* recidivism exception did not apply, and the *Apprendi-Alleyne* rule required factfinding by verdict facts to increase Erlinger's sentence, because the sentence enhancement imposed was based not simply on the "fact" of his prior convictions, but rather upon additional factfinding to determine whether those crimes occurred on "different occasions" for ACCA purposes.[162] Like the rest of *Apprendi* doctrine, the recidivism exception is the product of closely divided opinions and lingering unresolved uncertainties spanning more than two decades.

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160. *See Erlinger*, 602 U.S. at 867 (Kavanaugh, J., dissenting). Justice Kavanaugh argued that the recidivism exception authorizes extraverdict factfinding relating to "the who, what, when, and where of prior offenses" when those findings "are relevant not to the defendant's guilt for the present offense but rather to the length of the defendant's sentence." *Id.* at 854–56. Justice Jackson joined all of Justice Kavanaugh's analysis of the recidivism exception, *see id.* at 851, *id.* at 873 (Jackson, J., dissenting), although she did not join the portion of his opinion discussing harmless error. *See id.* at 851, 859 (Kavanaugh, J., dissenting). Justice Jackson's solo dissent elaborated her views on *Apprendi* doctrine more broadly. *See id.* at 873–78 (Jackson, J., dissenting). Finally, Justice Alito previously had called for jettisoning all of *Apprendi* doctrine, *see, e.g.*, Alleyne v. United States, 570 U.S. 99, 132–34 (2013) (Alito, J., dissenting), and seemingly facetiously proposed at oral argument that the Court might overrule *Apprendi* rather than *Almendarez-Torres*. *See* Transcript of Oral Argument, *supra* note 159, at 6–7. Nonetheless, he joined Justice Kavanaugh's dissenting opinion without separate comment. *See Erlinger*, 602 U.S. at 85 (Kavanaugh, J., dissenting).

161. *See Erlinger*, 602 U.S. at 836–42. On the implications of this holding, see Chad Flanders, *The Impact of* Erlinger v. United States *on State Recidivist Sentencing Laws*, 82 WASH. & LEE L. REV. ONLINE 456, 457 (2025).

162. *See Erlinger*, 602 U.S. at 836. Chief Justice Roberts's solo concurrence emphasized the dissent's point that *Apprendi* violations in the ACCA "different occasions" context may constitute harmless error. *See id.* at 849–50 (Roberts, C.J., concurring); *id.* at 859–60 (Kavanaugh, J., dissenting). Justice Thomas's solo concurrence agreed that existing precedent was sufficient to decide the case, but expressly called for overruling *Almendarez-Torres* in an appropriate case granted certiorari for that purpose. *See id.* at 850–51 (Thomas, J., concurring).

II. THE OPPORTUNITY TO REVISIT AND RECALIBRATE *APPRENDI* DOCTRINE

After the long and tortured rollercoaster ride that constituted the originating years of *Apprendi* doctrine, it is difficult to infer the reason(s) behind the Court's abrupt and conspicuous quiet decade following its ruling in *Alleyne*. Had the Court simply exhausted its willingness to address these constitutional issues, or did it step back from its interventionist role in this doctrine because it had settled upon a consensus doctrinal equilibrium? Did the justices resolve their enduring and contentious disputes over the conceptual and pragmatic dynamics in the doctrine, or did they submerge them beneath the waves of bigger and more prominent constitutional law controversies? Has *Apprendi* doctrine reached its terminus, necessitating only infrequent marginal clarifications and interpretations, or is the tempest poised to reemerge with a vengeance at any moment? Both the terms of the doctrine itself, and its (ambiguous) status as (potentially) settled precedent, remain uncertain. What might the future hold for *Apprendi* doctrine—and, perhaps more importantly, what *should* its future be?

A. The Implications of New Appointments

As is surely obvious from the preceding discussion, *Apprendi* doctrine is not an area of constitutional law where it is easy to predict a justice's perspective or voting alignment based on familiar factors such as professed interpretive methodology, ideological orientation, partisan affiliation, or typical voting-pattern colleagues on the Court. Consequently, each new justice faces the opportunity to examine and address *Apprendi* doctrine with something close to a blank slate, unbound by preconceptions or expectations that their arrival on the Court necessarily indicates any particular point of view.

In the first fifteen years following the *Apprendi* decision, the gradual appointment of new justices resulted in an ongoing

equilibrium roughly maintaining the doctrinal status quo.[163] Justice Thomas is the only member of the *Apprendi* Court still on the bench. Three justices have unfolded views equivalent to their respective predecessors: Alito, Sotomayor, and Kagan replacing O'Connor, Souter, and Stevens.[164] Chief Justice Roberts has supported the majority position on the *Apprendi* rule, unlike Rehnquist, although they have comparable positions in *Alleyne* and *Booker-Rita* cases.[165] Nothing guaranteed, however, that such a trend of generally similar views would occur then or will persist in the future.

The four newest justices joined the Court during the quiet decade and, accordingly, have had fewer opportunities to reveal or determine their views on the *Apprendi* doctrine. Nonetheless, the available evidence suggests that the doctrinal equilibrium remains perilously unstable and that a very real possibility exists that each future appointment could shift, or even reverse, that balance by comparison to the current justice who is replaced.

While on the Court, Justice Gorsuch has staked out a strongly held perspective on *Apprendi* doctrine, including writing the lead opinions in *Haymond* and *Erlinger*.[166] As a justice, his opinions expressly endorse the holdings and rationales of *Apprendi* and *Alleyne*, as well as twice urging their extension to additional scenarios.[167] Although that basic doctrinal position aligns with Justice Thomas's longstanding view, only Justice Sotomayor joined in the extensions urged by Justice Gorsuch.[168] It appears to be the case, then, that Justice Gorsuch currently follows one of the most vibrant interpretations of *Apprendi* doctrine of any justice, viewing it as an important constitutional

163. *See supra* Sections II.A.–C.

164. *See supra* notes 45, 51, 65, 132 and accompanying text.

165. *See supra* notes 71, 132 and accompanying text.

166. *See* United States v. Haymond, 588 U.S. 634, 636 (2019); *Erlinger*, 602 U.S. at 824.

167. *See Erlinger*, 602 U.S. at 833–34 (enhancing ACCA sentence); United States v. Haymond, 588 U.S. 634, 642–46 (2019) (revoking supervised release); Hester v. United States, 586 U.S. 1104, 1105–07 (2019) (Gorsuch, J., dissenting from denial of certiorari) (calculating amount of restitution imposed).

168. *See Haymond*, 588 U.S. at 637; *Hester*, 586 U.S. at 1105.

protection for criminal defendants and convicted offenders that should not be construed narrowly. Interestingly, however, his written opinions during more than a decade of service on the Tenth Circuit provided little indication of the strength or scope of his view.[169] Confirmed to the appeals court in 2006, then-Judge Gorsuch wrote a variety of panel majority opinions that reflect routine applications of *Apprendi*, *Booker*, and reasonableness review and the corresponding Tenth Circuit precedent.[170] In a footnote in one such case, he included a citation that could be understood as an implicit endorsement of Justice Thomas's doctrinal understanding.[171] Moreover, he apparently encountered no cases that led him to write separately, either concurring or dissenting, to take issue with Circuit or Court precedent on *Apprendi* issues.[172] From a sparse track record, therefore, emerged a champion of *Apprendi* principles.

Justice Kavanaugh similarly served on the D.C. Circuit from 2006 until his appointment to the Court,[173] but his perspective on *Apprendi* doctrine as a justice remains less definitive. While he did not join any of the three opinions by Justice Gorsuch, in each instance it is possible the divergence is due to the discrete contexts of the particular cases rather than fundamental

169. In one case, Judge Gorsuch wrote fairly extensively on the interaction between the sentencing judge's overall discretion under *Rita*, and *Gall* on the one hand, and a statutory consecutive mandatory minimum sentence on the other. *See* United States v. Smith, 756 F.3d 1179, 1182–83, 1193 (10th Cir. 2014).

170. *See, e.g.*, United States v. Todd, 515 F.3d 1128, 1134–39 (10th Cir. 2008); United States v. McComb, 519 F.3d 1049, 1053–57 (10th Cir. 2007); United States v. Ruiz-Terrazas, 477 F.3d 1196, 1203 (10th Cir. 2007); United States v. Goodwin, 541 F. App'x 851, 852–53 (10th Cir. 2013); United States v. Diesel, 238 F. App'x 398, 400–01 (10th Cir. 2007); United States v. Gutierrez-Palma, 201 F. App'x 576, 577–78 (10th Cir. 2006).

171. *See* United States v. Adame-Orozco, 607 F.3d 647, 651 n.6 (10th Cir. 2010) (citing and quoting Shepard v. United States, 544 U.S. 13, 27 (2005) (Thomas, J., concurring in part and concurring in the judgment)) (explaining that the *Almendarez–Torres* recidivism exception "has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that [it] was wrongly decided").

172. *See, e.g.*, United States v. Huckins, 529 F.3d 1312, 1320 (10th Cir. 2008) (Gorsuch, J., concurring) ("[T]he government has advanced before us no argument why this case should be reversed under *Gall*, and the government's failure to contest this appeal under governing legal authority leaves us with no choice but to affirm.").

173. *Brett M. Kavanaugh*, HIST. SOC'Y OF THE D.C. CIR., https://dcchs.org/judges/kavanaugh-brett-m/ [https://perma.cc/7C5S-ZNNR] (last visited Nov. 9, 2025).

disagreements over the core principles of *Apprendi* doctrine.[174] He also did not join Justice Jackson's separate dissent in *Erlinger* elaborating her critical perspective on the doctrine's flaws,[175] nor has he otherwise engaged with the substance of the doctrine.[176] Unlike Gorsuch, however, then-Judge Kavanaugh did write in significant detail about his perspective on *Apprendi-Booker* doctrine while on the Court of Appeals.[177] When writing for panel majorities, he emphasized the appellate court's duty to follow the Supreme Court's decisions.[178] When writing separately, on the other hand, he expressed a view on *Booker* and its aftermath that generally aligned with Justice Scalia's view that the *Booker* remedy and its subsequent elaboration in *Rita* and *Gall* were insufficient to avoid the constitutional violations

174. *See* United States v. Haymond, 588 U.S. 634, 636 (2019); Hester v. United States, 586 U.S. 1104, 1105 (2019) (Gorsuch, J., dissenting from denial of certiorari); *see supra* note 93 and accompanying text (explaining difficulties with inferring why Justice Kavanaugh joined dissenting opinion in *Haymond*). Similarly, Justice Kavanaugh's dissent in *Erlinger* thoroughly examined the *Almendarez-Torres* recidivism exception, *see Erlinger*, 602 U.S. at 851, 861–72 (Kavanaugh, J., dissenting), but gave no significant consideration to the merits of the broader *Apprendi-Alleyne* doctrine. *See id.* at 853–54.

175. *See Erlinger*, 602 U.S. at 871–72 (Jackson, J., dissenting); *see supra* notes 160–62 and accompanying text.

176. Justice Kavanaugh wrote the 5-4 majority opinion in *McKinney v. Arizona* that rejected a challenge to a death sentence based on *Ring* and *Hurst* on grounds of the non-retroactivity of those decisions. *See* 589 U.S. 139, 144–45 (2020). He also joined without separate comment Justice Breyer's unanimous opinion for the Court clarifying how a defendant may preserve for appellate review a claim that a federal sentence is substantively unreasonable. *See* Holguin-Hernandez v. United States, 589 U.S. 169, 171 (2020).

177. *See* Rory Little, *Judge Kavanaugh's Record in Criminal Cases*, SCOTUSBLOG (Aug. 27, 2018, 00:00 ET), http://www.scotusblog.com/2018/08/judge-kavanaughs-record-in-criminal-cases/ [https://perma.cc/Q6U2-H76N].

178. *See, e.g.*, United States v. Smith, 640 F.3d 358, 369 (D.C. Cir. 2011) ("As a lower court, we of course remain bound by *Almendarez-Torres*."); United States v. Gardellini, 545 F.3d 1089, 1096 (D.C. Cir. 2008) ("And it is not our role to fight a rear-guard action to preserve quasi-mandatory Guidelines."); United States v. Settles, 530 F.3d 920, 924 (D.C. Cir. 2008) ("For those reasons, Congress or the Sentencing Commission certainly could conclude as a policy matter that sentencing courts may not rely on acquitted conduct. But under binding precedent, the Constitution does not prohibit a sentencing court from relying on acquitted conduct."). In a separate opinion, Judge Kavanaugh suggested that he would support revisiting Supreme Court precedents permitting a sentencing judge to consider conduct for which the defendant had been acquitted or never charged. *See* United States v. Bell, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("At least as a matter of policy, if not also as a matter of constitutional law, I would have little problem with a new federal sentencing regime along those lines . . . . But that would be a constitutional rule far different from the one we now have or have historically had.").

recognized by the reasoning and ramifications of the *Booker* merits holding.[179] While on the D.C. Circuit, he also testified before a public hearing of the United States Sentencing Commission in support of mandatory, rather than advisory, sentencing guidelines as a matter of policy.[180] How his views might manifest today, in a case before the Court squarely presenting an *Apprendi* doctrine question, is not easy to predict.

These indications seem to suggest an increase in support for *Apprendi* doctrine relative to the positions of their predecessors. Justice Scalia embraced *Apprendi* as to increases in the maximum sentence, but he rejected its extension to mandatory minimum sentences.[181] Justice Gorsuch, by contrast, fully supports the *Alleyne* rule, as well.[182] Justice Kennedy dissented in *Apprendi*, *Booker*, and *Alleyne*, opposing the evolution of the doctrine throughout its inception and progression.[183] The limited clues in Justice Kavanaugh's record imply he does not share such views. If he did, one might expect to have seen more critical sentiments toward *Apprendi* doctrine, rather than intimations that he holds views similar to Justice Scalia's—and

179. *See* United States v. Brown, 892 F.3d 385, 414–16 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part); In re Sealed Case, 527 F.3d 188, 193–95 (D.C. Cir. 2008) (Kavanaugh, J., dissenting); United States v. Henry, 472 F.3d 910, 918–22 (D.C. Cir. 2007) (Kavanaugh, J., concurring). In one case, Judge Kavanaugh made the connection directly: "Our substantive review of district court sentences accordingly must be limited. Otherwise, the term 'advisory' will lose all meaning, and the Sixth Amendment problem with the Guidelines will persist." *Sealed Case*, 527 F.3d at 199 (citing Kimbrough v. United States, 552 U.S. 85, 114 (2007) (Scalia, J., concurring), and United States v. Henry 472 F.3d 910, 918–22 (D.C. Cir. 2007) (Kavanaugh, J., concurring)). *See also* David Patton, *Justice Kennedy's Criminal Justice Legacy*, 34 CRIM. JUST. 29, 32 (2019) (describing Justice Kennedy's position on *Apprendi* doctrine and concluding that "[b]ased on Kavanaugh's writings before joining the Supreme Court, it is a safe bet to say that he will reliably vote to continue the Scalia-driven revolution").

180. *See Public Hearing Before the United States Sentencing Commission*, 111th Cong. 32, 27 (2009) (Statement of Brett Kavanaugh, J., Court of Appeals for the District of Columbia), https://www.ussc.gov/sites/default/files/Public_Hearing_Transcript_0.pdf [https://perma.cc/JA5S-9R5A]. In particular, Judge Kavanaugh emphasized that "[i]n an advisory-only system, judges . . . necessarily are going to bring their own personal philosophies, their personal views on particular issues[,] into the courtroom, and that troubles me . . . ." *Id.* at 40.

181. *See supra* notes 70–73 and accompanying text.

182. *See supra* note 166 and accompanying text.

183. *See* Apprendi v. New Jersey, 530 U.S. 466, 554 (2000) (Breyer, J., dissenting); United States. v. Booker, 543 U.S. 220, 326 (2005) (Kennedy, J., dissenting in part); Alleyne v. United States, 570 U.S. 99, 124 (2013) (Roberts, J., dissenting).

assuming he does, it remains unclear whether Justice Kavanaugh supports the *Alleyne* rule, as well. Conversely, it is also possible that Justice Kavanaugh might—if the votes emerged to do so—follow his policy priors and form part of a majority to abrogate the *Blakely-Booker-Rita* component of the doctrine and permit the implementation of mandatory sentencing-regulating provisions using extraverdict factfinding.[184] Overall, however, it seems fair to surmise at this juncture that Justice Kavanaugh is a supporter, rather than an opponent, of *Apprendi* doctrine generally, which would mark a substantial change compared to Justice Kennedy.[185]

Justice Barrett joined the majority opinion in *Erlinger*,[186] which presumably suggests that she accepts the basic foundations of *Apprendi* doctrine and rejects the broad scope for the recidivism exception advocated by the dissent.[187] Beyond that, however, the particulars of her views are unknown—or perhaps not yet fully formed. During her time as a law professor and her three years as a judge on the Seventh Circuit, she did not write directly about *Apprendi* doctrine or the Federal Sentencing Guidelines.[188] She addressed in two Court of Appeals opinions another issue of federal sentencing law, the scope of relief provided by the First Step Act of 2018, adopting a textualist interpretation of the statute that rejected the defendants' arguments that they were eligible for more lenient sentences under the Act.[189] To the extent Justice Barrett generally supports

184. Justice Kavanaugh has twice written opinions in criminal procedure cases extensively addressing the role of *stare decisis*, once in favor of overruling a precedent, *see* Ramos v. Louisiana, 590 U.S. 83, 115–32 (2020) (Kavanaugh, J., concurring in part), and once against overruling a precedent, *see* Erlinger v. United States, 602 U.S. 821, 851–71 (Kavanaugh, J., dissenting). One could imagine reasoning along similar lines either to overrule, or to decline to overrule, the *Blakely-Booker* prohibition on mandatory sentencing guidelines.

185. *Compare supra* notes 178–81 and accompanying text (collecting Justice Kavanaugh's opinions), *with* cases cited *supra* note 183 (collecting Justice Kennedy's opinions).

186. *See Erlinger*, 602 U.S. at 824–25.

187. *See id.* at 825, 837 (rejecting the dissenting Justices' reasoning).

188. *The Current Court: Justice Amy Coney Barrett*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/supreme-court-justices/associate-justice-amy-coney-barrett/ [https://perma.cc/2PQL-V4CK] (last visited Nov. 9, 2025).

189. The interpretation followed by the panel opinion written by Judge Barrett was rejected by the majority opinion of the en banc Seventh Circuit in an appeal involving a co-defendant in

the Court's extant principles of *Apprendi*, *Alleyne*, and *Booker-Rita* reasonableness review, though, her position on the doctrine may be comparable with that of Justice Ginsburg, whom she replaced.

Justice Jackson's views about *Apprendi* doctrine, like Justice Gorsuch's, did not emerge into full public knowledge until she joined the Court. In a fascinating and remarkable bit of fortuity, as a young lawyer Justice Jackson served as a law clerk to Justice Breyer during the October 1999 Term[190]—when *Apprendi v. New Jersey* was briefed, argued, and decided, and in which Justice Breyer dissented.[191] Prior to becoming a judge, her career included time as an assistant special counsel at the Sentencing Commission and as a federal public defender.[192] In four years as a judge on the District Court for the District of Columbia (D.D.C.), she presided over sentencing proceedings for convicted offenders,[193] but would not have had occasion to opine on the interpretation or application of *Booker-Rita* reasonableness review on appeal. She wrote one published opinion interpreting a contentious provision of the Sentencing Guidelines,[194]

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the same case. *See* United States v. Sparkman, 973 F.3d 771, 775 (7th Cir. 2020) ("Precedent forecloses Sparkman's argument that he is entitled to the First Step Act's more lenient penalty for his second firearm offense."); *see also* United States v. Uriarte, 975 F.3d 596, 611 (7th Cir. 2020) (en banc) (Barrett, J., dissenting) ("Under the plain text of the statute, the First Step Act does not apply to Uriarte.").

190. Melissa Quinn, Nancy Cordes & Jacob Rosen, *What to Know About Supreme Court Justice Ketanji Brown Jackson*, CBS NEWS (June 30, 2022, at 16:44 ET), https://www.cbsnews.com/news/who-is-ketanji-brown-jackson-supreme-court-justice/ [https://perma.cc/7Q78-67UZ].

191. *See* Brief for Petitioner, Apprendi v. New Jersey, 530 U.S. 466 (2000) (No. 99-478), 2000 WL 35843; Oral Argument, *Apprendi*, 530 U.S. at 466 (No. 99-478), 2000 WL 349724; 530 U.S. at 466, 555–66 (Breyer, J., dissenting); *see also id.* at 523 (Breyer, J., joining dissenting opinion by O'Connor, J.).

192. *See* Quinn et al., *supra* note 190.

193. Then-Judge Jackson's experience imposing sentences on convicted federal offenders became a point of contention during her Supreme Court nomination confirmation hearings. *See, e.g.*, Domenico Montanaro, *GOP Questions for Jackson in Her Hearings Were About Midterm Messaging — 4 Takeaways*, NPR (Mar. 23, 2022, 17:33 ET), https://www.npr.org/2022/03/23/1087238896/ketanji-brown-jackson-hearing-gop-midterm-messaging [https://perma.cc/K4JQ-K7YN].

194. *See* United States v. Crummy, 249 F. Supp. 3d 475, 476–77 (D.D.C. 2017) (construing and applying loss calculation under U.S.S.G. § 2B1.1(b)(1) to explain sentence imposed for conspiracy to commit wire fraud).

as well as two published opinions granting motions for compassionate release under the First Step Act.[195] While serving concurrently as Vice Chair of the United States Sentencing Commission and U.S. District Judge, she co-authored an evaluation of the development of the Sentencing Guidelines provisions applicable to corporations and other organizational offenders, including the "carrot and stick" enforcement philosophy of encouraging such entities to create and implement compliance programs to proactively prevent criminal misconduct within the organization and by its employees and agents.[196] During her year on the D.C. Circuit, then-Judge Jackson did not write any published opinions regarding *Apprendi* doctrine or the Federal Sentencing Guidelines.[197] At the time of her appointment to the Supreme Court, therefore, Justice Jackson had extensive direct personal experience with criminal litigation and federal sentencing law and policy, but she had given little public indication of her perspective toward *Apprendi* doctrine and its ramifications for broader policy debates.

With her lengthy solo dissent in *Erlinger*, Justice Jackson revealed that she indeed holds views on *Apprendi* doctrine comparable to those of her mentor and former boss Justice Breyer,[198] including fundamentally an "overarching view that *Apprendi*

195. *See* United States v. Greene, 516 F. Supp. 3d 1, 4, 18 (D.D.C. 2021); United States v. Johnson, 464 F. Supp. 3d 22, 25 (D.D.C. 2020).

196. *See* KETANJI BROWN JACKSON & KATHLEEN COOPER GRILLI, U.S. SENT'G COMM'N, "CARROT AND STICK" PHILOSOPHY: THE HISTORY OF THE ORGANIZATIONAL SENTENCING GUIDELINES AND THE EMERGENCE OF EFFECTIVE COMPLIANCE AND ETHICS PROGRAMS 1.25 (2014), https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2014/org_article.pdf [https://perma.cc/MHK6-JU3P]. In public remarks at an American Bar Association event in March 2025, Justice Jackson expressed her ongoing concerns about the Sentencing Guidelines provisions applicable to white-collar offenders. *See* Luc Cohen, Karen Freifeld & Chris Prentice, *US Supreme Court Justice Jackson Calls for Revisiting Sentencing Guidelines*, REUTERS (Mar. 6, 2025, at 12:27 ET), https://www.reuters.com/legal/us-supreme-court-justice-jackson-calls-revisiting-sentencing-guidelines-2025-03-06/ [perma.cc/6NBC-DEMD] ("U.S. Supreme Court Justice Ketanji Brown Jackson said on Thursday she would support revisiting sentencing guidelines for white collar crime because the current framework leads to uneven punishments.").

197. This is my conclusion from my research from reviewing and word-searching her published opinions in Westlaw.

198. This is not merely implicit: Justice Jackson repeatedly cites Justice Breyer's opinions from the *Apprendi* line of cases in her *Erlinger* dissent. *See* Erlinger v. United States, 602 U.S. 821, 872 n.1, 879 (2024) (Jackson, J., dissenting).

was wrongly decided"—along with a recognition that it "is probably infeasible at this point" to claw back the entire line of cases and body of doctrine it has developed.[199] Like previous dissents in the *Apprendi* line of cases, Justice Jackson asserts that the Due Process Clause, not the Sixth Amendment, would provide the appropriate basis for deeming fundamentally unfair sentencing laws to be unconstitutional.[200] Her dissent thoroughly considers the major issues and disputes in the doctrine: the institutional roles and powers of legislatures, juries, and judges power over sentencing;[201] the historical practice of criminal sentencing in the United States and the need to respond to contemporary circumstances;[202] and the practical consequences of *Apprendi* doctrine for the functioning of sentencing law, policy, and practice.[203] She cites scholarly evaluations of the doctrine as well as the Court's precedent,[204] defending the view that *Apprendi* doctrine does not actually empower juries or protect defendants, but rather enhances the authority of sentencing judges at the expense of the policy-making authority of legislatures.[205] "Ultimately, then," she writes, "all the *Apprendi* rule accomplishes on the ground is impeding legislative directives to courts about the exercise of judicial discretion when sentencing—a development that, in my view, does not redound to the benefit of defendants collectively, the criminal justice system, or our democratic society."[206]

Finally, the opinions in *Erlinger* demonstrate that the interpretive methodological disputes on the Court—in the *Apprendi* line of cases and in constitutional cases more broadly—will not be fading any time soon. For example, Justice Gorsuch

199. *Id*. at 872. If the Court can take the monumental step of abolishing *Chevron* deference in administrative law after forty years, however, *see* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024), then the abrogation of *Apprendi-Booker* doctrine after twenty years perhaps might not be quite so infeasible after all.

200. *See Erlinger*, 602 U.S. at 888 (Jackson, J., dissenting).

201. *Id.* at 873–75.

202. *Id.* at 1875 n.2, 1875–80.

203. *See id.* at 872–73, 884–90, 983–97.

204. *Id.* at 870–71 n.1, 874–79 n.2, 881–89.

205. *See id.* at 877–86.

206. *Erlinger*, 602 U.S. at 898.

maintains that the historical evidence is insufficient to support the existence of a recidivism exception to the originalist *Apprendi* rule, while Justice Kavanaugh counters that the historical evidence shows that U.S. law has contained no tradition of recidivism factfinding by the jury.[207] Similarly, Justice Gorsuch insists that originalism requires jury factfinding for recidivism enhancements like the ACCA and "other recent sentencing innovations," while Justice Jackson argues against jury factfinding for sentence enhancements principally on grounds of pragmatism.[208] From the beginning, the *Apprendi* line of cases has featured a clash between formalist and functionalist approaches to the constitutional law of sentencing factfinding, which helps to explain what otherwise might appear to be inexplicable alignments of the justices.[209] While *Apprendi* doctrine has long produced alliances and disagreements among the justices that do not reflect the conventional wisdom of their ideological or

207. *See id.* at 845–47 (opinion of the Court by Gorsuch, J.); *id.* at 862–68 (Kavanaugh, J., dissenting).

208. *Id.* at 831–34 (opinion of the Court by Gorsuch, J.). *Compare id.* at 835 n.1, 842–44 n.5, 845 (finding that the sentencing court erred in taking the decision from the jury), *with id.* at 879–84, 888–89, 893–98 (Jackson, J., dissenting) (reaching the opposite conclusion, concluding that the "'strict evidentiary procedural limitations'" make juries unsuitable to make this determination). Justice Gorsuch accuses Justice Jackson of failing to "meaningfully engage with the Constitution, its original meaning and history, or our precedents" in order to follow her "personal views." *Id.* at 835 n.1. Justice Jackson twice criticizes Justice Gorsuch for exalting "constitutional theory" over other important considerations, *id.* at 888, 896–97 (Jackson, J., dissenting), and further describes Justice Gorsuch's perspective as out of touch with "real life," *id.* at 872–73, "unworkable in practice," *id.* at 889, founded on "unrealistic expectations," *id.* at 897, and reliant upon "a theoretical concept that bears no relationship to how sentencing actually works in a courtroom." *Id.* at 898.

209. *See, e.g.*, Priester, *Constitutional Formalism*, *supra* note 8, at 289–92, 302; Priester, *Structuring Sentencing*, *supra* note 8, at 896–98; Joshua B. Fischman, *Politics and Authority in the U.S. Supreme Court*, 104 CORN. L. REV. 1513, 1514–19 (2019); Harris, *Supreme Court Justices Clash*, *supra* note 93, at 394–400 (analyzing Justice Gorsuch as a formalist and Justice Kavanaugh as a pragmatist). Professor Fischman examines the *Apprendi* line of cases as one illustration of the contrast between two approaches to deciding constitutional questions addressing "which legal actors have authority to make which determinations under which circumstances." Fischman, *supra*, at 1517; *see also id.* at 1543–48 (explaining the dispute between the formalist and functionalist approaches to deciding constitutional questions). In the constitutional law of sentencing factfinding, *see id.* at 1548–52, he demonstrates that "[f]or the authority formalists, the Sixth Amendment preserved the role of the jury in finding all facts that were necessary to establish a criminal offense . . . . The authority functionalists, by contrast, took flexible positions on the jury trial right whenever it could interfere with the fair administration of criminal justice." *Id.* at 1548.

political predispositions, the constitutional law of sentencing factfinding certainly is not insulated against the hydraulic pressures of the justices' conceptual viewpoints and normative values, either.

B. Getting the Doctrine Right This Time

If the Court were to end its quiet decade and bring resolution to the unresolved uncertainties in *Apprendi* doctrine, what *should* those rules look like afterward? Aside from the apparently continuing divergent perspectives among the justices—much less the unknowable views of one or more future ones—what would constitute the doctrinally optimal outcome for the constitutional law of sentencing factfinding?

Any answer to these questions should begin with first principles. Everyone agrees with the high-level general command that verdict facts—established in a jury verdict or a guilty plea—rather than extraverdict factfinding by the presiding judge must be used to determine the offense(s) for which the defendant is being convicted.[210] It is the jury, not the judge, who decides whether the defendant is guilty of petty larceny or grand larceny, manslaughter or murder, wire fraud or a RICO pattern of racketeering activity, trespass in the Capitol or seditious conspiracy.[211] Moreover, everyone agrees that the judge at sentencing cannot impose a punishment that is not authorized by the statute(s) under which the defendant has been convicted, whether that means life imprisonment for petty theft or probation for a violent offense with mandatory imprisonment.[212] The point may seem almost too basic to contest, but it matters: the

210. *See* Apprendi v. New Jersey, 530 U.S. 466, 477–78 (2000). For decisions reaffirming this principle, *see, e.g.*, *Erlinger*, 602 U.S. at 843 (citing Mathis v. United States, 579 U.S. 500, 510 (2016)). The *Apprendi* principles are "so firmly entrenched" that the Court has ruled several prior cases inconsistent with them. *Id.* at 833–34 (citing Hurst v. Florida, 577 U.S. 92, 101–02 (2016) (overruling Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam), and Spaziano v. Florida, 468 U.S. 447 (1984))).

211. *See Apprendi*, 530 U.S. at 873–74; *see also Mathis*, 579 U.S. at 504 (distinguishing facts and elements, holding that elements, or "'constituent parts' of a crime's legal definition," are what the jury "must find beyond a reasonable doubt to convict the defendant").

212. *See Apprendi*, 530 U.S. at 481, 496–97; Ewing v. California, 538 U.S. 11, 14–21 (2003).

legislature defines crimes and their corresponding punishment ranges, the executive charges the individual defendant, the jury (or a guilty plea) establishes the count(s) of conviction, and the judge imposes sentence consistent with the legal authority provided by those three preceding steps.

Those first principles are, as a matter of constitutional interpretation, thoroughly overdetermined. Although the text of the Constitution does not directly address the matter—we wouldn't be here if it did!—structural constitutional reasoning fully supports them.[213] Originalist justices on the Court have maintained that the original meaning of the Sixth Amendment includes such basic principles.[214] The history and tradition of the U.S. criminal justice system likewise demonstrate a longstanding commitment to those principles. The Court's precedent in the *Apprendi* line of cases, whatever its faults, has relied upon those foundational principles for a quarter century.[215] Constitutional values, too, would insist that fundamental rights like proof beyond a reasonable doubt and jury trial must be preserved and enforced, not evaded or diluted.[216] While pragmatic considerations are often given as grounds for permitting, rather than invalidating, legislative efforts to regulate the sentencing process, it is simply not persuasive to claim that retaining these fundamental first principles regarding the allocation of authority among different actors in the criminal justice system is somehow unmanageable or unrealistic.

The difficulty, of course, involves how to transpose those essentially incontestable first principles into operational doctrine in the particular context of late-twentieth and early-twenty-first-century sentencing provisions. Originalism and tradition,

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213. *See, e.g.*, Priester, *Sentenced*, *supra* note 5, at 271–80; Priester, *Structuring Sentencing*, *supra* note 8, at 892–96.

214. *See supra* note 43 and accompanying text.

215. *See generally Apprendi*, 530 U.S. 466 (emphasizing the foundational principle that juries determine facts and judges impose sentences accordingly); Erlinger v. U.S., 602 U.S. 821 (2024) (surveying constitutional fact-finding).

216. *See, e.g.*, In re Winship, 397 U.S. 358, 359 (1970) (establishing proof beyond a reasonable doubt as a due process right for a criminal conviction); Ramos v. Louisiana, 590 U.S. 83, 93 (2020) (requiring a unanimous jury for all criminal convictions under the Sixth Amendment).

for example, do not identify the Court's *Apprendi* rules, as such, within the historical record.[217] And of course not, because legal notions like "three strikes" mandatory-minimum statutes for violent recidivists or sentencing guidelines to restrain the discretionary authority of trial judges did not exist centuries ago, nor even have meaningful analogues. Like so many other areas of constitutional law, the development of doctrine for the constitutional law of sentencing factfinding requires the exercise of thoughtful legal judgment in good faith.[218]

The Court reached the correct constitutional interpretation, and its doctrinal implementation, in adopting the *Apprendi-Alleyne* rule: when the legislature exercises its power to enact offense-defining statutes, enumerated facts linked to establishing or increasing the maximum or minimum ends of the sentencing range are elements of the offense, and consequently, verdict factfinding must be used to prove them in the record.[219] Put another way, when the legislature is writing the criminal code, a single statutory section containing multiple tiers of punishment based on specific factual scenarios (often, but not always, denominated in separate subsections) must be interpreted and applied, as a matter of constitutional law, no differently than if the legislature had enacted multiple statutory sections containing those respective maximum and minimum sentences. Doctrinally, it does not matter whether the criminal code defines § 101 simple robbery and § 102 armed robbery or instead defines § 100(a) simple robbery and § 100(b) armed robbery; either way, the link between the factual presence of the defendant's weapon and an increase in the maximum sentence, minimum sentence, or both constitutes an element of an aggravated offense for constitutional purposes. Among others, *Jones*, *Apprendi*, and *Cunningham* correctly applied this rule to hold the defendants'

217. *See, e.g.*, United States v. Haymond, 588 U.S. 634, 669–73 (2019) (Alito, J., dissenting) (arguing that revocation of supervised release has no historical analogue pertinent to the original meaning of the Sixth Amendment). *But see id.* at 639–44 (Gorsuch, J., majority opinion) (recounting historical precedent related to traditional meaning of criminal jury trials).

218. *See, e.g.*, H. JEFFERSON POWELL, THE PRACTICE OF AMERICAN CONSTITUTIONAL LAW, at xii–xiii (2022).

219. *Apprendi*, 530 U.S. at 490; Alleyne v. United States, 570 U.S. 99, 103 (2013).

enhanced sentences—above the otherwise available statutory maximum sentence—were unconstitutional because they had been imposed based on extraverdict factfinding rather than verdict facts.[220] Likewise, *Alleyne* correctly held that the factfinding which causes an increase to the mandatory-minimum sentence contained in a criminal offense—precluding the otherwise available possibility of a lower sentence—is also unconstitutional unless it occurs through verdict facts rather than extraverdict factfinding.[221] The legislature possesses the power to determine both the ceiling and the floor of the punishment range associated with each criminal offense, but the constitutional law of sentencing factfinding requires that this statutory sentencing range must be based upon facts found by the jury (or admitted in a guilty plea) and not by the sentencing judge.

This *Apprendi-Alleyne* rule should not include a recidivism exception, and the Court should formally abrogate it. Most importantly, the recidivism exception is a relic of path dependency, not a strongly justified exclusion from the foundational premises of the rule. If *Almendarez-Torres* had been decided in 2002 rather than 1998, the exception would never have existed in the first place. Justices and scholars have criticized the exception from inception and on a consistent and recurring basis since then.[222] It is probably true, as the dissenting justices noted

220. *See* Jones v. United States, 526 U.S. 227, 229, 243 & n.6 (1999); *Apprendi*, 530 U.S. at 471, 490, 497; Cunningham v. California, 549 U.S. 270, 274–76 (2007).

221. *See Alleyne*, 570 U.S. at 103. In previous articles in the early years of the *Apprendi* line of cases, I supported the *Apprendi* rule as to increases in the maximum sentence but defended the *Harris* holding excluding increases to the minimum sentence from the rule. *See* Priester, *Sentenced*, *supra* note 5, at 290–94; Priester, *Constitutional Formalism*, *supra* note 8, at 301–08; Priester, *Structuring Sentencing*, *supra* note 8, at 896–909. Upon further reflection, including the persuasive arguments made by other scholars, I now believe the *Apprendi-Alleyne* rule constitutes the optimal constitutional interpretation for applying the constitutional law of sentencing factfinding to legislatively enacted offense-defining statutes. *Cf.* Priester, *Bizarro World*, *supra* note 9, at 75–78 (arguing that overruling *Harris*, as later occurred in *Alleyne*, would create a defensible doctrinal outcome for offense-defining statutes, but should not be extended to sentencing-regulating provisions). The best understanding of the constitutional rule is not that it distinguishes between maximum and minimum sentences, but rather that it distinguishes between offense-defining statutes and sentencing-regulating provisions—and permits the latter, but not the former, to create or increase mandatory sentencing ranges that may be implemented with extraverdict factfinding.

222. *See supra* note 142.

in *Erlinger*, that a defendant's prior convictions present a particular risk of prejudice with the jury compared to other factfinding that alters the maximum or minimum statutory sentence.[223] Courts and defendants have procedural means to mitigate this risk,[224] however, and a defendant certainly benefits from the requirement of proof beyond a reasonable doubt in the rare instances when the individual actually disputes the existence or nature of their criminal record.[225] Ultimately, the reasons proffered in support of the exception are not sufficient to overcome the weight of the rule itself: just like any other factual determination with the same effect, when factfinding about the defendant's prior criminal record increases the upper or lower limits of the sentencing range, the pertinent information must be established as verdict facts rather than extraverdict facts.

On the other hand, the Court reached the incorrect constitutional interpretation, and a correspondingly flawed doctrinal implementation, when it adopted the *Blakely-Booker* rule: nothing in the Sixth Amendment specifically, or the constitutional structure of criminal procedure generally, demarcates the authority over sentencing factfinding as exclusively judicial in a manner that renders unconstitutional legislative efforts at

223. *See* Erlinger v. United States, 602 U.S. 821, 865–67 (2024) (Kavanaugh, J., dissenting); *id.* at 889–90 (Jackson, J., dissenting).

224. *See id.* at 847–48 (opinion of the Court); *id.* at 865–70 (Kavanaugh, J., dissenting); *id.* at 889–93 (Jackson, J., dissenting).

225. The Court acknowledged this point as far back as *Apprendi*. *See* Apprendi v. New Jersey, 530 U.S. 466, 489–90 (2000) (noting that, as a matter of "logical application of our reasoning today," the rights to jury trial and proof beyond a reasonable doubt "should apply if the recidivist issue were contested"). In a recent case, the defendant contested whether a prior conviction remained legally valid, and accordingly asked the Court to overrule *Almendarez-Torres* and require proof beyond a reasonable doubt that this conviction remained part of the defendant's criminal record. Petition for Writ of Certiorari at 7, Lee v. United States, 100 F.4th 484 (4th Cir. 2024) (No. 24-366) ("Mr. Lee argued that his New York conviction had been vacated based on a motion he filed in state court in July 2020 . . . . But the district court credited three documents proffered by the government . . . and found that Mr. Lee's prior conviction constituted a serious drug felony."); *see also id.* at 5–8, 20–30; United States v. Lee, 100 F.4th 484 (4th Cir. 2024), *cert. denied*, 145 S. Ct. 444 (2024). "Until *Almendarez Torres* is overruled, criminal defendants facing a sentencing enhancement based on the fact of a prior conviction will be denied the protection of demanding that fact be decided by a jury of their peers beyond a reasonable doubt, even if they have a basis for contesting that fact (as did Mr. Lee)." Petition for Writ of Certiorari, *supra*, at 28.

regulating the sentencing process.[226] The act of deciding which facts should be considered (or not considered) at sentencing, and then deciding the normative weights of those facts when they are found to be present (or absent) in a particular defendant's case, is not a matter uniquely within the competence of judges.[227] Legislatures do not exceed their own constitutional authority when they seek to enact and enforce policy judgments, whether they do so by means of the enactment of criminal offenses or instead through the promulgation of guidelines, presumptive sentences, and similar provisions that constrain sentencing judges with mandatory effect. Although the Constitution does not compel it, legislatures are entitled to conclude—as a policy judgment—that systemic interests in consistency, uniformity, and fairness across cases ought to supersede the decision-making discretion of individual trial judges.[228] Likewise, individual judges have no entitlement to a constitutional power to engage in "policy nullification" that rejects the criminalization or punishment policies duly enacted by the people's representatives, or by a commission or other body wielding delegated power.[229] Contrary to the Court's conclusion in *Blakely* and *Booker*, the implementation of generally applicable mandatory sentencing-regulating provisions in a particular

226. *See* Blakely v. Washington, 542 U.S. 296, 313–14 (2004); United States v. Booker, 543 U.S. 220, 226–27 (2005).

227. *See* Priester, *Canine Metaphor*, *supra* note 6, at 252–66.

228. *See* Bowman, *supra* note 28, at 1346, 1350 ("Prior to the Sentencing Reform Act and the Guidelines, federal sentencing was, practically speaking, lawless . . . . I have always believed that the decision to introduce law to front-end judicial sentencing choices was correct."); *id.* at 1351 ("Nonetheless, in a system of *law*, the decision about whether to consider each of the potentially relevant factors in any given case and, if so, how to weigh it, ought not be left to the unguided discretion of individual judges."). *But see* Berry, *supra* note 21, at 1334–40 (arguing that Sixth and Eighth Amendments should be interpreted to impose constraints on mandatory sentences). Similarly, changes in the Court's doctrines of administrative law may further reinforce the principle that the Sentencing Commission too lacks power to adopt provisions or interpretations of the Sentencing Guidelines that courts deem to be contradictory to the statutory text and policies enacted by Congress. *See, e.g.*, United States v. Bricker, 135 F.4th 427, 430 (2025) ("[W]e conclude that the Commission overstepped its authority and issued a policy statement that is plainly unreasonable under the statute and in conflict with the separation of powers. We therefore hold that U.S.S.G. § 1B1.13(b)(6) is invalid."); *see also id.* at 439–45 (addressing *Loper Bright* and related doctrines of administrative law as applied the Commission's authority).

229. *See* Priester, *Bizarro World*, *supra* note 9, at 54–75.

defendant's case is *not* tantamount to constructively convicting the defendant of an aggravated offense; instead, it constitutes a separate and distinct determination of the appropriate punishment for the specific circumstances of the offense and offender that is, for constitutional purposes, qualitatively identical to the factfinding and normative determinations made by individual judges throughout the history and tradition of the U.S. criminal justice system.[230] Whether a given jurisdiction conducts sentencing through broad judicial discretion, detailed mandatory guidelines, or something in between, the constitutional law of sentencing factfinding ought to equally permit the use of extra-verdict facts in determining each offender's punishment consistent with the governing sentencing-regulating provisions.

From this perspective, the constitutional law of sentencing factfinding can be understood as recognizing two distinct powers and enforcing the boundary between them. In the *Apprendi* line of cases, the Court seemingly has taken the view that the power to define offenses is exclusively legislative and the power to determine sentences is exclusively judicial. That view is wrong. When the legislature enacts offense-defining laws, *Apprendi-Alleyne* doctrine ensures that defendants are only punished for the crime of which they were convicted, as established in the verdict facts.[231] By linking the maximum and minimum limits of the statutory sentencing range to the verdict facts, the rule preserves longstanding principles of the constitutional structure of criminal procedure.[232] Conversely, when the legislature or a sentencing commission promulgates sentencing-

230. In a recent essay, Judge Bibas offered a different characterization of the historical trajectory of sentencing proceedings in trial courts:

> [B]y the early nineteenth century, judges had broad discretion to sentence within wide ranges. The jury trial was historical, backward-looking, factual, and focused on whodunit. The sentencing was forward-looking, assessing amenability to rehabilitation . . . But by the 1970s . . . the sentencing reform movement began to create sentencing guidelines to structure and channel judicial sentencing discretion . . . So rather than exercising open-ended, therapeutic discretion in the name of rehabilitation, judges were now finding discrete facts that led to particular punishments.

Bibas, *supra* note 28, at 1190–91.

231. *See* Erlinger v. United States, 602 U.S. 821, 832–35 (2024).

232. *See id.*

regulating provisions, the use of extraverdict facts to implement those requirements does not constitute an unconstitutional interference with the constitutional prerogatives of the judge or jury. Similar to clear statement rules in other areas of constitutional law,[233] the constitutional law of sentencing factfinding insists that the legislature exercises its distinct powers distinctly. This explains why, for example, punishment gradations within a statute that defines an offense will be construed as defining multiple offenses.[234] Likewise, when the legislature or a commission does expressly exercise the sentencing-regulating power, the *Apprendi-Alleyne* requirement of verdict facts cannot apply, and the use of extraverdict factfinding to implement mandatory sentencing provisions is constitutionally permissible. So long as we can tell which power the legislature has exercised in which instance, we can properly apply the constitutional criminal procedure doctrines applicable to each without either power subsuming the other.

Finally, the doctrinal resolutions described in this section necessarily implicate the role of *stare decisis* in constitutional law. From a legal realist perspective, perhaps the concern is mostly moot given the Roberts Court's willingness to overrule precedent.[235] Nonetheless, it is worth noting that traditional *stare decisis* analysis does not strongly counsel against overruling the relevant decisions: *Almendarez-Torres* for the recidivism exception, and *Blakely* and *Booker* for the extension of the *Apprendi* rule to sentencing-regulating provisions. Each of these

233. *See* Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 356–57 (2019) ("A clear statement rule is a particularly strong presumption that a judge uses when interpreting a statute to protect certain values or interests . . . . Our proposal expands the universe of clear statement rules to vindicate values that are necessary to a fair and just criminal justice system."); *e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 594 (1992); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 399 (2010); Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Litigation*, 84 TUL. L. REV. 1067, 1067–70 (2010).

234. *Cf.* Hessick, *supra* note 18, at 1204–05 (distinguishing between factfinding of facts enumerated in offense-defining statutes and factfinding of facts, which may or may not be enumerated in any statute or guidelines, relevant only to the determination of the sentence).

235. *See, e.g.*, Melissa Murray, *Stare Decisis and Remedy*, 73 DUKE L.J. 1501, 1507–17 (2024); Note, *The Thrust and Parry of Stare Decisis in the Roberts Court*, 137 HARV. L. REV. 684, 685 (2023).

cases were decided by a 5-4 margin, sharply contested at the time, criticized as erroneous since then, and could easily be characterized as wrongly decided—though *egregiously* wrong may be in the eye of the beholder. At least for *Almendarez-Torres*, it is credible to assess that the recidivism exception has not become unworkable and that legislatures have relied on its presence for a quarter century,[236] but the reliance analysis typically focuses on the interests and expectations of individuals and other private actors, rather than the continued usage of a given procedural rule.[237] For *Blakely-Booker*, by contrast, the unworkability argument is far stronger, particularly in the federal courts: the ongoing struggle to implement *Booker-Rita* reasonableness review and reconcile the objectives of the Sentencing Guidelines with the "advisory" nature commanded by the *Booker* remedial majority could surely be characterized as persuasive evidence that mandatory guidelines would be considerably easier to administer. Similarly, overruling *Blakely* and *Booker* would give more power to legislatures, not less, and it seems unlikely that prospective criminal offenders would plan their conduct differently depending on whether the jurisdiction's sentencing provisions are advisory or mandatory.[238] Ultimately, then, traditional *stare decisis* analysis does not foreclose a fair-minded justice from concluding that these cases should be overruled in service of adopting the optimal constitutional interpretation and implementing doctrine for the constitutional law of sentencing factfinding.

236. *See* Erlinger v. United States, 602 U.S. 821, 861–871 (2024) (Kavanaugh, J., dissenting).

237. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 233–35 (2009) (overruling precedent relating to doctrinal framework for granting or denying qualified immunity); United States v. Gaudin, 515 U.S. 506, 519–22 (1995) (overruling precedent to require jury, not judge, to make finding of materiality in criminal fraud cases); Payne v. Tennessee, 501 U.S. 808, 828–30 (1991) (overruling precedent relating to admissibility of victim impact statements in capital sentencing proceedings).

238. *See, e.g.*, *Gaudin*, 515 U.S. at 521 (explaining that *stare decisis* "is somewhat reduced, however, in the case of a procedural rule such as this, which does not serve as a guide to lawful behavior").

CONCLUSION

Reasonable people can, and do, disagree about the appropriate balance between individualized punishment and systemic uniformity in the imposition of criminal sentences. That is all the more reason to reject a constitutional interpretation that denies legislatures the power to determine that balance, and that denies to the states the ability to adopt different balances from one another, and thereby generate empirical evidence on the benefits and detriments of various approaches.[239] Professor Bowman rightly calls upon the Court to change course and provide the "constitutional space to create sensible new sentencing schemes for both federal and state courts."[240] By disempowering legislatures from experimenting with many possible alternatives for sentencing reform, *Apprendi* doctrine has impeded the search for fairness in individual cases and in the system as a whole. The time has come to let that search begin anew, without the Court's wrongly constricted view of the allocation of authority over criminal sentencing.

Closing a recent essay, Professor Stith opined that "One thing seems certain: we have not seen the last of *Apprendi*."[241] Despite the relatively placid second decade of the doctrine compared to the tempestuous first, that prediction is a good one. We can only hope that the Court's next major excursion into *Apprendi* Land,[242] when it comes, finally properly calibrates the constitutional law of sentencing factfinding.

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239. *See* Bowman, *supra* note 28, at 1362 ("I hope the day will come when the Court will revisit the mess they made and substitute, as they might have from the outset, a constitutional theory that allows for a sensible balance of law and judicial discretion in criminal sentencing."); *see id.* at 1365–67 (elaborating how the Court should revise its doctrine to permit such a balance); *see also* Sam J. Merchant, *A World Without Federal Sentencing Guidelines*, 102 WASH. U. L. REV. 1031, 1031 (2025) ("This Article argues that sentencing within a guideline framework, or within a data-based framework when guidelines are inapplicable, provides more certainty and minimizes unwarranted disparities.").

240. *See* Bowman, *supra* note 28, at 1366.; *see, e.g.*, Amy Baron-Evans & David Patton, *A Response to Judge Pryor's Proposal to "Fix" the Guidelines: A Curse Worse Than the Disease*, 29 FED. SENT'G REP. 104 (2017); Richard S. Frase, *Sentencing Guidelines in American Courts: A Forty-Year Retrospective*, 32 FED. SENT'G REP. 109, 109–10 (2019).

241. Stith, *supra* note 87, at 1310.

242. *See* Priester, *Bizarro World*, *supra* note 9, at 1 n.1.