SUPREME COURT OF THE UNITED STATES

Nos. 04–104 and 04–105

UNITED STATES, PETITIONER

04–104 *v.*

FREDDIE J. BOOKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES, PETITIONER

04–105 *v.*

DUCAN FANFAN

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[January 12, 2005]

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, and with whom JUSTICE SCALIA joins except for Part III and footnote 17, dissenting in part.

Neither of the two Court opinions that decide these cases finds any constitutional infirmity inherent in any provision of the Sentencing Reform Act of 1984 (SRA) or the Federal Sentencing Guidelines. Specifically, neither 18 U. S. C. A. §3553(b)(1) (Supp. 2004), which makes application of the Guidelines mandatory, nor §3742(e) (main ed. and Supp. 2004), which authorizes appellate review of departures from the Guidelines, is even arguably unconstitutional. Neither the Government, nor the respondents, nor any of the numerous *amici* has suggested that there is any need to invalidate either provision in

order to avoid violations of the Sixth Amendment in the administration of the Guidelines. The Court's decision to do so represents a policy choice that Congress has considered and decisively rejected. While it is perfectly clear that Congress has ample power to repeal these two statutory provisions if it so desires, this Court should not make that choice on Congress' behalf. I respectfully dissent from the Court's extraordinary exercise of authority.

Before explaining why the law does not authorize the Court's creative remedy, why the reasons it advances in support of its decision are unpersuasive, and why it is abundantly clear that Congress has already rejected that very remedy, it is appropriate to explain how the violation of the Sixth Amendment that occurred in Booker's case could readily have been avoided without making any change in the Guidelines. Booker received a sentence of 360 months' imprisonment. His sentence was based on four factual determinations: (1) the jury's finding that he possessed 92.5 grams of crack (cocaine base); (2) the judge's finding that he possessed an additional 566 grams; (3) the judge's conclusion that he had obstructed justice; and (4) the judge's evaluation of his prior criminal record. Under the jury's 92.5 grams finding, the maximum sentence authorized by the Guidelines was a term of 262 months. See United States Sentencing Commission, Guidelines Manual §2D1.1(c)(4) (Nov. 2003) (USSG).

If the 566 gram finding had been made by the jury based on proof beyond a reasonable doubt, that finding would have authorized a guidelines sentence anywhere between 324 and 405 months—the equivalent of a range from 27 to nearly 34 years—given Booker's criminal history. §2D1.1(c)(2). Relying on his own appraisal of the defendant's obstruction of justice, and presumably any other information in the presentence report, the judge would have had discretion to select any sentence within that range. Thus, if the two facts, which in this case

actually established two separate crimes, had both been found by the jury, the judicial factfinding that produced the actual sentence would not have violated the Constitution. In other words, the judge could have considered Booker's obstruction of justice, his criminal history, and all other real offense and offender factors without violating the Sixth Amendment. Because the Guidelines as written possess the virtue of combining a mandatory determination of sentencing ranges and discretionary decisions within those ranges, they allow ample latitude for judicial factfinding that does not even arguably raise any Sixth Amendment issue.

The principal basis for the Court's chosen remedy is its assumption that Congress did not contemplate that the Sixth Amendment would be violated by depriving the defendant of the right to a jury trial on a factual issue as important as whether Booker possessed the additional 566 grams of crack that exponentially increased the maximum sentence that he could receive. I am not at all sure that that assumption is correct, but even if it is, it does not provide an adequate basis for volunteering a systemwide remedy that Congress has already rejected and could enact on its own if it elected to.

When one pauses to note that over 95% of all federal criminal prosecutions are terminated by a plea bargain, and the further fact that in almost half of the cases that go to trial there are no sentencing enhancements, the extraordinary overbreadth of the Court's unprecedented remedy is manifest. It is, moreover, unique because, under the Court's reasoning, if Congress should decide to reenact the exact text of the two provisions that the Court has chosen to invalidate, that reenactment would be unquestionably constitutional. In my judgment, it is therefore clear that the Court's creative remedy is an exercise of legislative, rather than judicial, power.

I

It is a fundamental premise of judicial review that all Acts of Congress are presumptively valid. See *Regan* v. *Time, Inc.*, 468 U. S. 641, 652 (1984). "A ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Ibid.* In the past, because of its respect for the coordinate branches of Government, the Court has invalidated duly enacted statutes—or particular provisions of such statutes—"only upon a plain showing that Congress has exceeded its constitutional bounds." *United States* v. *Morrison,* 529 U. S. 598, 607 (2000); see also *El Paso & Northeastern R. Co.* v. *Gutierrez,* 215 U. S. 87, 97 (1909). The exercise of such power is traditionally limited to issues presented in the case or controversy before the Court, and to the imposition of remedies that redress specific constitutional violations.

There are two narrow exceptions to this general rule. A facial challenge may succeed if a legislative scheme is unconstitutional in all or nearly all of its applications. That is certainly not true in these cases, however, because most applications of the Guidelines are unquestionably valid. A second exception involves cases in which an invalid provision or application cannot be severed from the remainder of the statute. That exception is inapplicable because there is no statutory or Guidelines provision that is invalid. Neither exception supports the majority's newly minted remedy.

Facial Invalidity:

Regardless of how the Court defines the standard for determining when a facial challenge to a statute should succeed,[1] it is abundantly clear that the fact that a statute,

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[1]We have, on occasion, debated the proper interpretation of various precedents concerning facial challenges to statutes. Compare *Chicago* v. *Morales*, 527 U. S. 41, 54–55, n. 22 (1999) (plurality opinion), with

or any provision of a statute, is unconstitutional in a portion of its applications does not render the statute or provision invalid, and no party suggests otherwise. The Government conceded at oral argument that 45% of federal sentences involve no enhancements. Cf. United States Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics 39–40 (hereinafter Sourcebook).[2] And, according to two U. S. Sentencing Commissioners who testified before Congress shortly after we handed down our decision in *Blakely* v. *Washington,* 542 U. S. ___ (2004), the number of enhancements that would actually implicate a defendant's Sixth Amendment rights is even smaller. See Hearings on *Blakely* v. *Washington* and the Future of the Federal Sentencing Guidelines before the Senate Committee on the Judiciary, 108th Cong., 2d Sess., p. 2 (2004) (hereinafter Hearings on *Blakely*) (testimony of Commissioners John R. Steer and Hon. William K. Sessions III) ("[A] majority of the cases sentenced under the federal guidelines do not receive sentencing enhancements that could potentially implicate *Blakely*"), available at http://www.ussc.gov/hearings/BlakelyTest.pdf (all Internet materials as visited Jan. 7, 2005, and available in Clerk of Court's case file). Simply stated, the Government's submissions to this Court and to Congress demonstrate that the Guidelines could be constitutionally applied in their entirety, without any modifications, in the "majority of the cases sentenced under the federal guidelines." *Ibid.* On the basis of these submissions alone, this Court should have

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id., at 78–83 (SCALIA, J., dissenting), and *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). That debate is immaterial to my conclusion here, because it borders on the frivolous to contend that the Guidelines can be constitutionally applied "only in a fraction of the cases [they were] originally designed to cover." *United States* v. *Raines*, 362 U. S. 17, 23 (1960).

[2] See also Lodging of Government, Estimate of Number of Cases Possibly Impacted by the *Blakely* Decision, p. 2 (hereinafter Estimate).

declined to find the Guidelines, or any particular provisions of the Guidelines, facially invalid.[3]

Accordingly, the majority's claim that a jury factfinding requirement would "destroy the system," *ante,* at 9 (opinion of BREYER, J.), would at most apply to a *minority* of sentences imposed under the Guidelines. In reality, given that the Government and judges have been apprised of the requirements of the Sixth Amendment, the number of unconstitutional applications would have been even smaller had we allowed them the opportunity to comply with our constitutional holding. This is so for several reasons.

First, it is axiomatic that a defendant may waive his Sixth Amendment right to trial by jury. *Patton* v. *United States*, 281 U. S. 276, 312–313 (1930). In *Blakely* we explained that "[w]hen a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." 542 U. S., at ___ (slip op., at 14). Such reasoning applies with equal force to sentences imposed under the Guidelines. As the majority

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[3] See, *e.g., Webster* v. *Reproductive Health Services*, 492 U. S. 490, 524 (1989) (O'CONNOR, J., concurring in part and concurring in judgment) (arguing that a statute cannot be struck down on its face whenever the statute has "some quite straightforward applications . . . [that] would be constitutional"); *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 977 (1984) (REHNQUIST, J., dissenting) ("When a litigant challenges the constitutionality of a statute, he challenges the statute's application to him. . . . If he prevails, the Court invalidates the statute, not *in toto,* but only as applied to those activities. The law is refined by preventing improper applications on a case-by-case basis. In the meantime, the interests underlying the law can still be served by its enforcement within constitutional bounds"); cf. *Raines*, 362 U. S., at 21 (this Court should never "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'"); *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 514 (1990) (plurality opinion) (statutes should not be invalidated "on a facial challenge based upon a worst-case analysis that may never occur").

concedes, *ante,* at 5, only a tiny fraction of federal prosecutions ever go to trial. See Estimate 2 ("In FY02, 97.1 percent of cases sentenced under the guidelines were the result of plea agreements"). If such procedures were followed in the future, our holding that *Blakely* applies to the Guidelines would be consequential only in the tiny portion of prospective sentencing decisions that are made after a defendant has been found guilty by a jury.

Second, in the remaining fraction of cases that result in a jury trial, I am confident that those charged with complying with the Guidelines—judges, aided by prosecutors and defense attorneys—could adequately protect defendants' Sixth Amendment rights without this Court's extraordinary remedy. In many cases, prosecutors could avoid an *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), problem simply by alleging in the indictment the facts necessary to reach the chosen Guidelines sentence. Following our decision in *Apprendi*, and again after our decision in *Blakely*, the Department of Justice advised federal prosecutors to adopt practices that would enable them "to charge and prove to the jury facts that increase the statutory maximum—for example, drug type and quantity for offenses under 21 U. S. C. 841."[4] Enhancing the specificity of indictments would be a simple matter, for example, in prosecutions under the federal drug statutes (such as Booker's prosecution). The Government has already directed its prosecutors to allege facts such as the possession of a dangerous weapon or "that the defendant was an organizer or leader of criminal activity that involved five

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[4]Memorandum from Christopher A. Wray, Assistant Attorney General, U. S. Department of Justice, Criminal Division, to All Federal Prosecutors, re: Guidance Regarding the Application of *Blakely* v. *Washington,* to Pending Cases, p. 8, available at http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf (hereinafter Application of *Blakely*); see also Brief for National Association of Federal Defenders as *Amicus Curiae* 9–12.

or more participants" in the indictment and prove them to the jury beyond a reasonable doubt.[5]

Third, even in those trials in which the Guidelines require the finding of facts not alleged in the indictment, such factfinding by a judge is not unconstitutional *per se*. To be clear, our holding in Parts I–III, *ante,* at 19–20 (STEVENS, J., opinion of the Court), that *Blakely* applies to the Guidelines does not establish the "impermissibility of judicial factfinding." Brief for United States 46. Instead, judicial factfinding to support an offense level determination or an enhancement is *only unconstitutional when that finding raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant*. This distinction is crucial to a proper understanding of why the Guidelines could easily function as they are currently written.

Consider, for instance, a case in which the defendant's initial sentencing range under the Guidelines is 130-to-162 months, calculated by combining a base offense level of 28 and a criminal history category of V. See USSG ch. 5, pt. A (Table). Depending upon the particular offense, the sentencing judge may use her discretion to select any sentence within this range, even if her selection relies upon factual determinations beyond the facts found by the jury. If the defendant described above also possessed a firearm, the Guidelines would direct the judge to apply a two-level enhancement under §2D1.1, which would raise the defendant's total offense level from 28 to 30. That, in turn, would raise the defendant's eligible sentencing range to 151-to-188 months. That act of judicial factfinding would comply with the Guidelines and the Sixth Amendment so long as the sentencing judge then selected a sentence between 151-to-162 months—the lower number (151) being the bottom of offense level 30 and the higher number (162) being the

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[5] See Application of *Blakely* 9, n. 6.

maximum sentence under level 28, which is the upper limit of the range supported by the jury findings alone. This type of overlap between sentencing ranges is the rule, not the exception, in the Guidelines as currently constituted. See 1 Practice Under the Federal Sentencing Guidelines §6.01[B], p. 7 (P. Bamberger & D. Gottlieb eds. 4th ed. 2003 Supp.) (noting that nearly all Guidelines ranges overlap and that "because of the overlap, the actual sentence imposed can theoretically be the same no matter which guideline range is chosen"). Trial courts have developed considerable expertise in employing overlapping provisions in such a manner as to avoid unnecessary resolution of factual disputes, see §7.03[B][2], at 34 (2004 Supp.), and lower courts have shown themselves capable of distinguishing proper from improper applications of sentencing enhancements under *Blakely*, see, *e.g., United States* v. *Mayfield*, 386 F. 3d 1301 (CA9 2004) (upholding a two-level enhancement for firearm possession from offense level 34 to 36 because the sentencing judge selected a sentence within the overlapping range between the two levels). The interaction of these various Guidelines provisions demonstrates the fallacy in the assumption that judicial factfinding can never be constitutional under the Guidelines.

The majority's answer to the fact that the vast majority of applications of the Guidelines are constitutional is that "we must determine likely intent, not by counting proceedings, but by evaluating the consequences of the Court's constitutional requirement" on every imaginable case. *Ante,* at 5 (opinion of BREYER, J.). That approach ignores the lessons of our facial invalidity cases. Those cases stress that this Court is ill suited to the task of drafting legislation and that, therefore, as a matter of respect for coordinate branches of Government, we ought to presume whenever possible that those charged with writing and implementing legislation will and can apply "the statute consistently with the constitutional command." *Time, Inc.* v. *Hill*, 385 U. S.

374, 397 (1967). Indeed, this Court has generally refused to consider "every conceivable situation which might possibly arise in the application of complex and comprehensive legislation," *Barrows* v. *Jackson*, 346 U. S. 249, 256 (1953), because "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined," *United States* v. *Raines*, 362 U. S. 17, 22 (1960). The Government has already shown it can apply the Guidelines constitutionally even as written, and Congress is perfectly capable of redrafting the statute on its own. Thus, there is no justification for the extreme judicial remedy of total invalidation of any part of the SRA or the Guidelines.

In sum, it is indisputable that the vast majority of federal sentences under the Guidelines would have complied with the Sixth Amendment without the Court's extraordinary remedy. Under any reasonable reading of our precedents, in no way can it be said that the Guidelines are, or that any particular Guidelines provision is, facially unconstitutional.

Severability:

Even though a statute is not facially invalid, a holding that certain specific provisions are unconstitutional may make it necessary to invalidate the entire statute. See generally Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv. L. Rev. 76 (1937) (hereinafter Stern). Our normal rule, however, is that the "unconstitutionality of a *part* of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted *those provisions* which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286

U. S. 210, 234 (1932) (emphasis added).[6]

Our "severability" precedents, however, cannot support the Court's remedy because there is no provision of the SRA or the Guidelines that falls outside of Congress' power. See *Alaska Airlines, Inc.* v. *Brock,* 480 U. S. 678, 684 (1987). Accordingly, severability analysis simply does not apply.

The majority concludes that our constitutional holding requires the invalidation of §§3553(b)(1) and 3742(e). The

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[6]There is a line of cases that some commentators have described as standing for the proposition that the Court must engage in severability analysis if a statute is unconstitutional in only some of its applications. See Stern 82. However, these cases simply hold that a statute that may apply both to situations within the scope of Congress' enumerated powers and also to situations that exceed such powers, the Court will sustain the statute only if it can be validly limited to the former situations, and will strike it down if it cannot be so limited. Compare *United States* v. *Reese,* 92 U. S. 214, 221 (1876) (invalidating in its entirety statute that punished individuals who interfered with the right to vote, when the statute applied to conduct that violated the Fifteenth Amendment and conduct outside that constitutional prohibition); and *Trade-Mark Cases,* 100 U. S. 82, 98 (1879) (concluding that the Trade-Mark Act must be read to "establish a uniform system of trade-mark registration" and thus was invalid in its entirety because it exceeded the bounds of the Commerce Clause); with *The Abby Dodge,* 223 U. S. 166, 175 (1912) (construing language to apply only to waters not within the jurisdiction of the States, and therefore entirely valid); and *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 30–31 (1937) (holding that the National Labor Relations Act applied only to interstate commerce, and upholding its constitutionality on that basis). These cases are thus about constitutional avoidance, not severability.

In a separate dissent, JUSTICE THOMAS relies on this principle to conclude that the proper analysis is whether the unconstitutional applications of the Guidelines are sufficiently numerous and integral to warrant invalidating the Guidelines in their entirety. See *post,* at 11. While I understand the intuitive appeal of JUSTICE THOMAS' dissent, I do not believe that our cases support this approach. In any event, given the vast number of constitutional applications, see *supra*, at 6, it is clear that Congress would, as JUSTICE THOMAS concludes, prefer that the Guidelines not be invalidated. I therefore do not believe that any extension of our severability cases is warranted.

first of these sections uses the word "shall" to make the substantive provisions of the Guidelines mandatory. See *Mistretta* v. *United States*, 488 U. S. 361, 367 (1989). The second authorizes *de novo* review of sentencing judges' applications of relevant Guidelines provisions. Neither section is unconstitutional. While these provisions can in certain cases, when combined with other statutory and Guidelines provisions, result in a violation of the Sixth Amendment, they are plainly constitutional on their faces.

Rather than rely on traditional principles of facial invalidity or severability, the majority creates a new category of cases in which this Court may invalidate any part or parts of a statute (and add others) when it concludes that Congress would have preferred a modified system to administering the statute in compliance with the Constitution. This is entirely new law. Usually the Court first declares unconstitutional a particular provision of law, and only then does it inquire whether the remainder of the statute can be saved. See, *e.g., Regan* v. *Time*, 468 U. S., at 652; *Alaska Airlines*, 480 U. S., at 684. Review in this manner *limits* judicial power by *minimizing* the damage done to the statute by judicial fiat. There is no case of which I am aware, however, in which this Court has used "severability" analysis to do what the majority does today: determine that *some* unconstitutional applications of a statute, when viewed in light of the Court's reading of "likely" legislative intent, justifies the invalidation of certain statutory sections in their entirety, their constitutionality notwithstanding, in order to save the parts of the statute the Court deemed most important. The novelty of this remedial maneuver perhaps explains why *no party* or *amicus curiae* to this litigation has requested the remedy the Court now orders. In addition, none of the federal courts that have addressed *Blakely*'s application to the Guidelines has concluded that striking down §3553(b)(1) is a proper solution.

Most importantly, the Court simply has no authority to invalidate legislation absent a showing that it is unconstitutional. To paraphrase Chief Justice Marshall, an "act of the legislature" must be "repugnant to the constitution" in order to be void. *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). When a provision of a statute is unconstitutional, that provision is void, and the Judiciary is therefore not bound by it in a particular case. Here, however, the provisions the majority has excised from the statute are perfectly valid: Congress could pass the identical statute tomorrow and it would be binding on this Court so long as it were administered in compliance with the Sixth Amendment.[7] Because the statute itself is not repugnant to the Constitution and can by its terms comport with the Sixth Amendment, the Court does not have the constitutional authority to invalidate it.

The precedent on which the Court relies is scant indeed. It can only point to cases in which a provision of law was unconstitutionally extended to or limited to a particular class; in such cases it is necessary either to invalidate the provision or to require the legislature to extend the benefit to an excluded class.[8] Given the sweeping nature of the

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[7] The predicate for the Court's remedy is its assumption that Congress would not have enacted mandatory Guidelines if it had realized that the Sixth Amendment would require some enhancements to be supported by jury factfinding. If Congress should reenact the statute following our decision today, it would repudiate that premise. That is why I find the Court's professed disagreement with this proposition unpersuasive. See *ante*, at 7 (opinion of BREYER, J.). Surely Congress could reenact the identical substantive provisions if the reenactment included a clarifying provision stating that the word "court" shall not be construed to prohibit a judge from requiring jury factfinding when necessary to comply with the Sixth Amendment. Indeed, because in my view such a construction of the word "court" is appropriate in any event, see *infra,* at 15–17, there would be no need to include the clarifying provision to save the statute.

[8] In *Sloan* v. *Lemon*, 413 U. S. 825 (1973), the Court concluded that legislation reimbursing parents for tuition paid to private schools ran

remedy ordained today, the majority's assertions that it is proper to engage in an *ex ante* analysis of congressional intent in order to select in the first instance the statutory provisions to be struck down is contrary to the very purpose of engaging in severability analysis—the Court's remedy expands, rather than limits, judicial power.

There is no justification for extending our severability cases to cover this situation. The SRA and the Guidelines can be read—and are being currently read—in a way that complies with the Sixth Amendment. If Congress wished to amend the statute to enact the majority's vision of how the Guidelines should operate, it would be perfectly free to do so. There is no need to devise a novel and questionable method of invalidating statutory provisions that can be constitutionally applied.

II

Rather than engage in a wholesale rewriting of the SRA, I would simply allow the Government to continue doing

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afoul of the Establishment Clause and struck down the law in its entirety, even as applied to parents of students in secular schools. The Court did not, as the majority would have us do, strike down particular parts of the statute. In *Welsh* v. *United States*, 398 U. S. 333, 361–363 (1970), Justice Harlan, writing alone, concluded that a statutory provision that allowed conscientious objectors to be exempt from military service only if their views were religiously based violated the Establishment Clause. He then concluded that, rather than deny the exception to religiously based objectors it should be extended to moral objectors, in large part because "the broad discretion conferred by a severability clause" was not present in the case. *Id.*, at 365. Finally, in *Heckler* v. *Mathews*, 465 U. S. 728, 739, n. 6 (1984), the Court stated the obvious rule that when a statute provides a benefit to one protected class and not the other, the Court is faced with the choice of requiring the Legislature to extend the benefits, or nullifying the benefits altogether. None of these cases stands for the sweeping proposition that where parts of a statute are invalid in certain applications, the Court may opine as to whether Congress would prefer facial invalidation of some, but not all, of the provisions necessary to the constitutional violation.

what it has done since this Court handed down *Blakely*—prove any fact that is *required* to increase a defendant's sentence under the Guidelines to a jury beyond a reasonable doubt. As I have already discussed, a requirement of jury factfinding for certain issues can be implemented without difficulty in the vast majority of cases. See *supra*, at 6–10.

Indeed, this already appears to be the case. "[T]he Department of Justice already has instituted procedures which would protect the overwhelming majority of future cases from *Blakely* infirmity. The Department of Justice has issued detailed guidance for every stage of the prosecution from indictment to final sentencing, including alleging facts that would support sentencing enhancements and requiring defendants to waive any potential *Blakely* rights in plea agreements." Hearings on *Blakely* 1–2.[9] Given this experience, I think the Court dramatically overstates the difficulty of implementing this solution.

The majority advances five reasons why the remedy that is already in place will not work. First, the majority points to the statutory text referring to "the court" in arguing that jury factfinding is impermissible. While this text is no doubt evidence that Congress *contemplated* judicial factfinding, it does not demonstrate that Congress thought that judicial factfinding was so essential that, if forced to choose between a system including jury determinations of certain facts in certain cases on the one hand,

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[9] The Commissioners went on to note that, "[e]ven if *Blakely* is found to apply to the federal guidelines, the waters are not as choppy as some would make them out to be. The viability of the [Guidelines] previously was called into question by some after [*Apprendi* v. *New Jersey,* 530 U. S. 466 (2000)]. After an initial period of uncertainty, however, the circuit courts issued opinions and the Department of Justice instituted procedures to ensure that future cases complied with *Apprendi*'s requirements and also left the guidelines system intact." Hearings on *Blakely* 1.

and a system in which the Guidelines would cease to restrain the discretion of federal judges on the other, Congress would have selected the latter.

As a textual matter, the word "court" can certainly be read to include a judge's selection of a sentence as supported by a jury verdict—this reading is plausible either as a pure matter of statutory construction or under principles of constitutional avoidance. Ordinarily, "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones* v. *United States*, 526 U. S. 227, 239 (1999) (quoting *United States ex rel. Attorney General* v. *Delaware & Hudson Co.,* 213 U. S. 366, 408 (1909)). This principle, which "has for so long been applied by this Court that it is beyond debate," *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U. S. 568, 575 (1988), is intended to show respect for Congress by presuming it "legislates in the light of constitutional limitations," *Rust* v. *Sullivan,* 500 U. S. 173, 191 (1991).

The Court, however, reverses the ordinary presumption. It interprets the phrase "[t]he court . . . shall consider" in 18 U. S. C. A. §3553(a) (Supp. 2004) to mean: the judge shall consider and impose the appropriate sentence, but the judge shall not be constrained by any findings of a jury. See *ante*, at 5 (opinion of BREYER, J.) (interpreting the word "court" to mean "'the judge without the jury'"). The Court's narrow reading of the statutory text is unnecessary. Even assuming that the word "court" should be read to mean "judge, and only the judge," a requirement that certain enhancements be supported by jury verdicts leaves the ultimate sentencing decision exclusively within the judge's hands—the judge, and the judge alone, would retain the discretion to sentence the defendant anywhere within the required Guidelines range and within overlap-

ping Guidelines ranges when applicable. See *supra*, at 8–9. The judge would, no doubt, be limited by the findings of the jury in *certain cases*, but the fact that such a limitation would be required by the Sixth Amendment in those limited circumstances is not a reason to adopt such a constrained view of an Act of Congress.[10]

In adopting its constrictive reading of "court," the majority has manufactured a broader constitutional problem than is necessary, and has thereby made necessary the extraordinary remedy it has chosen. I pause, however, to stress that it is not this Court's holding that the Guidelines must be applied consistently with the Sixth Amendment that has made the majority's remedy necessary. Rather, it is the Court's miserly reading of the statutory language that results in "constitutional infirmities." See *ante*, at 11 (opinion of BREYER, J.)

Second, the Court argues that simply applying *Blakely* to the Guidelines would make "real conduct" sentencing more difficult. While that is perhaps true in some cases, judges could always consider relevant conduct obtained from a presentence report pursuant to 18 U. S. C. A. §3661 (main ed.) and USSG §6A1.1 in selecting a sentence within a Guidelines range, and of course would be free to consider any such circumstances in cases in which the defendant pleads guilty and waives his *Blakely* rights. Further, in many cases the Government could simply prove additional facts to a jury beyond a reasonable

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[10] This argument finds support in the Government's successful adaptation to our decision in *Apprendi*. After that decision, prosecutors began to allege more and more "sentencing factors" in indictments. See *supra*, at 7–8. The Government's ability to do so suggests that the Guidelines are far more compatible with "jury factfinding" than the Court admits. And, the fact that Congress is presumably aware of the Government's practices in light of *Apprendi*, yet has not condemned the practices or taken any actions to reform them, indicates that limited jury factfinding is, contrary to the majority's assertion, compatible with legislative intent. See *ante*, at 7 (opinion of BREYER, J.).

doubt—as it has been doing in some cases since *Apprendi*—or, the court could use bifurcated proceedings in which the relevant conduct is proved to a jury after it has convicted the defendant of the underlying crime.

The majority is correct, however, that my preferred holding would undoubtedly affect "real conduct" sentencing in certain cases. This is so because the goal of such sentencing—increasing a defendant's sentence on the basis of conduct not proved at trial—is contrary to the very core of *Apprendi*. That certain applications of "relevant conduct" sentencing are unconstitutional should not come as a complete surprise to Congress: The House Report recognized that "real offense" sentencing could pose constitutional difficulties. H. R. Rep. No. 98–1017, p. 98 (1984). In reality, the majority's concerns about relevant conduct are nothing more than an objection to *Apprendi* itself, an objection that this Court rejected in Parts I–III, *ante* (opinion of STEVENS, J.).

Further, the Court does not explain how its proposed remedy will ensure that judges take real conduct into account. While judges certainly may do so in their discretion under §3553(a), there is no indication as to how much or to what extent "relevant conduct" should matter under the majority's regime. Nor is there any meaningful standard by which appellate courts may review a sentencing judge's "relevant conduct" determination—only a general "reasonableness" inquiry that may discourage sentencing judges from considering such conduct altogether. The Court's holding thus may do just as much damage to real conduct sentencing as would simply requiring the Government to follow the Guidelines consistent with the Sixth Amendment.

Third, the majority argues that my remedy would make sentencing proceedings far too complex. But of the very small number of cases in which a Guidelines sentence would implicate the Sixth Amendment, see *supra*, at 5–7,

most involve drug quantity determinations, firearm enhancements, and other factual findings that can readily be made by juries. I am not blind to the fact that some cases, such as fraud prosecutions, would pose new problems for prosecutors and trial judges. See *ante*, at 7–10 (opinion of BREYER, J.). In such cases, I am confident that federal trial judges, assisted by capable prosecutors and defense attorneys, could have devised appropriate procedures to impose the sentences the Guidelines envision in a manner that is consistent with the Sixth Amendment. We have always trusted juries to sort through complex facts in various areas of law. This may not be the most efficient system imaginable, but the Constitution does not permit efficiency to be our primary concern. See *Blakely* v. *Washington,* 542 U. S., at ___ (slip op., at 17–18).

Fourth, the majority assails my reliance on plea bargaining. The Court claims that I cannot discount the effect that applying *Blakely* to the Guidelines would have on plea-bargained cases, since the specter of *Blakely* will affect those cases. However, the majority's decision suffers from the same problem to a much greater degree. Prior to the Court's decision to strike the mandatory feature of the Guidelines, prosecutors and defendants alike could bargain from a position of reasonable confidence with respect to the sentencing range into which a defendant would likely fall. The majority, however, has eliminated the certainty of expectations in the plea process. And, unlike my proposed remedy, which would potentially affect only a fraction of plea bargains, the uncertainty resulting from the Court's regime change will infect the entire universe of guilty pleas which occur in 97% of all federal prosecutions.

The majority also argues that applying *Blakely* to the Guidelines would allow prosecutors to exercise "a power the Sentencing Act vested in judges," see *ante*, at 14 (opinion of BREYER, J.), by giving prosecutors the choice

whether to "charge" a particular fact. Under the remedy I favor, however, judges would still be able to reject factually false plea agreements under USSG §6B1.2(a), and could still consider relevant information about the offense and the offender in every single case. Judges could consider such characteristics as an aid in selecting the appropriate sentence within the Guidelines range authorized by the jury verdict, determining the defendant's criminal history level, reducing a defendant's sentence, or justifying discretionary departures from the applicable Guidelines range. The Court is therefore incorrect when it suggests that requiring a supporting jury verdict for certain enhancements in certain cases would place certain sentencing factors "beyond the reach of the judge entirely." See *ante*, at 14 (opinion of BREYER, J.).

Moreover, the premise on which the Court's argument is based—that the Guidelines as currently written prevent fact bargaining and therefore diminish prosecutorial power—is probably not correct. As one commentator has noted,

> "prosecutors exercise nearly as much control when guidelines tie sentences to so-called 'real-offense' factors. . . . One might reasonably assume those factors are outside of prosecutors' control, but experience with the Federal Sentencing Guidelines suggests otherwise; when necessary, the litigants simply bargain about what facts will (and won't) form the basis for sentencing. It seems to be an iron rule: guidelines sentencing empowers prosecutors, even where the guidelines' authors try to fight that tendency." Stuntz, Plea Bargaining and Criminal Law's Disappearing Shadow, 117 Harv. L. Rev. 2548, 2559–2560 (2004) (footnote omitted).

Not only is fact bargaining quite common under the current system, it is also clear that prosecutors have substan-

tial bargaining power.[11] And surely, contrary to the Court's response to this dissent, *ante*, at 13–14 (opinion of BREYER, J.), a prosecutor who need only prove an enhancing fact by a preponderance of the evidence has more bargaining power than if required to prove the same fact beyond a reasonable doubt.

Finally, the majority argues that my solution would require a different burden of proof for enhancements above the maximum authorized by the jury verdict and for reductions. This is true because the requirement that guilt be established by proof beyond a reasonable doubt is a constitutional mandate. However, given the relatively few reductions available in the Guidelines and the availability of judicial discretion within the applicable range, this is unlikely to have more than a minimal effect.

In sum, I find unpersuasive the Court's objections to allowing Congress to decide in the first instance whether the Guidelines should be converted from a mandatory into a discretionary system. Far more important than those objections is the overwhelming evidence that Congress has already considered, and unequivocally rejected, the regime that the Court endorses today.

III

Even under the Court's innovative approach to sever-

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[11] See M. Johnson & S. Gilbert, The U. S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey 7–9 (1997) (noting that among federal judges and probation officers, there is widespread "frustration with the power and discretion held by prosecutors under the guidelines" and that "guidelines are manipulated through plea agreements"); Saris, Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective, 30 Suffolk U. L. Rev. 1027, 1030 (1997); see also Nagel & Schulhofer, A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines, 66 S. Cal. L. Rev. 501, 560 (1992) (arguing that fact bargaining is common under the Guidelines and has resulted in substantial sentencing disparities).

ability analysis when confronted with unconstitutional applications of a statute, its opinion is unpersuasive. It assumes that this Court's only inquiry is to "decide whether we would deviate less radically from Congress' intended system (1) by superimposing the constitutional requirement announced today or (2) through elimination of some provisions of the statute." *Ante*, at 3 (opinion of BREYER, J.). I will assume, consistently with the majority, that in this exercise we should never use our "remedial powers to circumvent the intent of the legislature," *Califano* v. *Westcott*, 443 U. S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part), and that we must not create "a program quite different from the one the legislature actually adopted," *Sloan* v. *Lemon*, 413 U. S. 825, 834 (1973).

In the context of this framework, in order to justify "excising" 18 U. S. C. A. §§3553(b)(1) (Supp. 2004) and 3742(e) (main ed. and Supp. 2004), the Court has the burden of showing that Congress would have preferred the remaining system of discretionary Sentencing Guidelines to not just the remedy I would favor, but also to *any* available alternative, including the alternative of total invalidation, which would give Congress a clean slate on which to write an entirely new law. The Court cannot meet this burden because Congress has already considered and overwhelmingly rejected the system it enacts today. In doing so, Congress revealed both an unmistakable preference for the certainty of a binding regime and a deep suspicion of judges' ability to reduce disparities in federal sentencing. A brief examination of the SRA's history reveals the gross impropriety of the remedy the Court has selected.

History of Sentence Reform Efforts:

In the mid-1970's, Congress began to study the numerous problems attendant to indeterminate sentencing in the

federal criminal justice system. After nearly a decade of review, Congress in 1984 decided that the system needed a comprehensive overhaul. The elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress' principal aim. See Feinberg, Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission, 28 Wake Forest L. Rev. 291, 295–296 (1993) ("The first and foremost goal of the sentencing reform effort was to alleviate the perceived problem of federal criminal sentencing disparity. . . . Quite frankly, all other considerations were secondary"); see also Breyer, Federal Sentencing Guidelines Revisited, 2 Fed. Sentencing Rptr. 180 (1999) ("In seeking 'greater fairness,' Congress, acting in bipartisan fashion, intended to respond to complaints of unreasonable disparity in sentencing—that is, complaints that differences among sentences reflected *not simply* different offense conduct or different offender history, but the fact that *different judges* imposed the sentences" (emphases added)). As Senator Hatch, a central participant in the reform effort, has explained: "The discretion that Congress had conferred for so long upon the judiciary and the parole authorities was *at the heart of sentencing disparity*." The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System, 28 Wake Forest L. Rev. 185, 187 (1993) (hereinafter Hatch) (emphasis added).

Consequently, Congress explicitly rejected as a model for reform the various proposals for advisory guidelines that had been introduced in past Congresses. One example of such legislation was the bill introduced in 1977 by Senators Kennedy and McClellan, S. 1437, 95th Cong., 1st Sess. (as reported by the Senate Judiciary Committee on Nov. 15, 1977) (hereinafter S. 1437), which allowed judges

to impose sentences based on the characteristics of the individual defendant and granted judges substantial discretion to depart from recommended guidelines sentences. See Stith & Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 Wake Forest L. Rev. 223, 238 (1993) (hereinafter Stith & Koh). That bill never became law and was refined several times between 1977 and 1984: Each of those refinements made the regime more, not less, restrictive on trial judges' discretion in sentencing.[12]

Passage of the Sentencing Reform Act of 1984:

Congress' preference for binding guidelines was evident in the debate over passage of the SRA itself, which was predicated entirely on the move from a discretionary guidelines system to the mandatory system the Court strikes down today. The SRA was the product of competing versions of sentencing reform legislation: the House bill, H. R. 6012, 98th Cong., 2d Sess., authorized the creation of discretionary guidelines whereas the Senate bill, S. 668, 98th Cong., 2d Sess., provided for binding guidelines and *de novo* appellate review. The House was splin-

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[12] Incidentally, the original version of S. 1437 looked much like the regime that the Court has mandated today—it directed the sentencing judge to consider a variety of factors, only one of which was the sentencing range established by the Guidelines, and subjected the ultimately chosen sentence to appellate review under a "clearly unreasonable" standard. See S. 1437, §101 (proposed 18 U. S. C. §§2003(a), 3725(e)). That law was amended twice before it passed, the first time to include a mandatory directive to trial judges to impose a sentence within the Guidelines range, and the second time to change the standard of review from "'clearly unreasonable'" to "'unreasonable.'" See Stith & Koh 245 (detailing amendments to S. 1437 prior to passage). It is worth noting that Congress had countless opportunities over the course of seven years of debate to enact the law the Court creates today. Congress' repeated rejection of proposed legislation constitutes powerful evidence that Congress did not want it to become law.

tered regarding whether to make the Guidelines binding on judges, but the vote in the Senate was an overwhelming 85 to 3 in favor of binding Guidelines. 130 Cong. Rec. 1649 (1984); see generally Stith & Koh 261–266. Eventually, the House substituted the Senate version for H. R. 6012, and the current system of mandatory Guidelines became law. 130 Cong. Rec. 29730 (1984).

The text of the law that actually passed Congress (including §§3553(b)(1) and 3742(e)) should be more than sufficient to demonstrate Congress' unmistakable commitment to a binding Guidelines system. That text *requires* the sentencing judge to impose the sentence dictated by the Guidelines ("the court shall impose a sentence of the kind, and within the range" provided in the Guidelines unless there is a circumstance "not adequately taken into consideration by the" Guidelines), and §3742(e) gives §3553(b)(1) teeth by instructing judges that any sentence outside of the Guidelines range without adequate explanation will be overturned on appeal.[13] Congress' chosen regime was carefully designed to produce uniform compliance with the Guidelines. Congress surely would not have taken the pains to create such a regime had it found the Court's system of discretionary guidelines acceptable *in any way*.

The accompanying Senate Report and floor debate make plain what should be obvious from the structure of the statute: Congress refused to accept the discretionary system that the Court implausibly deems most consistent with congressional intent.[14] In other words, given the

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[13] See Stith & Koh 269–270; see also Wilkins, Newton, & Steer, Competing Sentencing Policies in a "War on Drugs" Era, 28 Wake Forest L. Rev. 305, 313 (1993) (same).

[14] See, *e.g.,* 133 Cong. Rec. 33109 (1987) (remarks of Sen. Hatch) ("[T]he core function of the guidelines and the underlying statute . . . is to reduce disparity in sentencing and restore fairness and predictability to the sentencing process. Adherence to the guidelines is therefore

choice between the statute created by the Court today or a clean slate on which to write a wholly different law, Congress undoubtedly would have selected the latter.

Congress' Method of Reducing Disparities:

The notion that Congress had any confidence that *judges* would reduce sentencing disparities by considering relevant conduct—an idea that is championed by the Court, *ante*, at 10–11 (opinion of BREYER, J.)—either ignores or misreads the political environment in which the SRA passed. It is true that the SRA instructs sentencing judges to consider real offense and offender characteristics, 28 U. S. C. A. §994 (main ed. and Supp. 2004), but Congress only wanted judges to consider those characteristics within the limits of a mandatory system.[15] The

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properly required under the law except in . . . rare and particularly unusual instances . . ."); *id.,* at 33110 (remarks of Sen. Biden) ("That notion of allowing the courts to, in effect, second-guess the wisdom of any sentencing guideline is plainly contrary to the act's purpose of having a sentencing guidelines system that is mandatory, except when the court finds a circumstance meeting the standard articulated in §3553(b). It is also contrary to the purpose of having Congress, rather than the courts, review the sentencing guidelines for the appropriateness of authorized levels of punishment"); S. Rep. No. 98–223, p. 76 (1983) (noting that the Senate Judiciary Committee "resisted [the] attempt to make the sentencing guidelines more voluntary than mandatory, because of the poor record of States reported in the National Academy of Science Report which have experimented with 'voluntary' guidelines"); *id.*, at 34–35 (citing the "urgent need for" sentencing reform because of sentencing disparities caused "directly [by] the unfettered discretion the law confers on [sentencing] judges and parole authorities responsible for imposing and implementing the sentence"); *id.*, at 36–43, 62 (cataloging the "astounding" variations in federal sentencing and criticizing the unfairness of sentencing disparities).

[15] Indeed, the Court's contention that real conduct sentencing was the principal aim of the SRA finds no support in the legislative history. The only authority the Court cites is 18 U. S. C. §3661, which permits a judge to consider any information she considers relevant to sentencing. See *ante*, at 6 (opinion of BREYER, J.). That provision, however, was

Senate Report on which the Court relies, see *ante*, at 6, clearly concluded that the existence of sentencing disparities "can be traced directly to the unfettered discretion the law confers on those judges . . . responsible for imposing and implementing the sentence." S. Rep. No. 98–225, p. 38 (1983). Even in a system in which judges could not impose sentences based on "relevant conduct" determinations (absent a plea agreement or supporting jury findings), sentences would still be every bit as certain and uniform as in the status quo—at most, the process for imposing those sentences would be more complex. The same can hardly be said of the Court's chosen system, in which *all* federal sentencing judges, in *all* cases, regain the unconstrained discretion Congress eliminated in 1984.

The Court's conclusion that Congress envisioned a sentencing judge as the centerpiece of its effort to reduce disparities is remarkable given the context of the broader legislative debate about what entity would be responsible for drafting the Guidelines under the SRA. The House version of the bill preferred the Guidelines to be written by the Judicial Conference of the United States—the House Report accompanying that bill argued that judges had vast experience in sentencing and would best be able to craft a system capable of providing sentences based on

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enacted in 1970, see Pub. L. 91–452, §1001(a), 84 Stat. 951, and thus provides *no evidence whatsoever* of Congress' intent when it passed the SRA in 1984. Clearly, Congress thought that real conduct sentencing could not effectively address sentencing disparities without a binding Guidelines regime. For this reason, traditional sentencing goals have always played a minor role in the Guidelines system: "While the thick-as-your-wrist Guideline Manual specifically directs sentencing judges to make thousands of determinations on discrete points, not *once* does it expressly direct that a specific decision leading to the applicable guideline range on the 256-box grid should or must turn on an individualized consideration of the traditional goals of sentencing." Osler, Uniformity and Traditional Sentencing Goals in the Age of Feeney, 16 Fed. Sentencing Rptr. 253, 253–254 (2004).

real conduct without excessive disparity. See H. R. Rep. No. 98–1017, at 93–94. Those in the Senate majority, however, favored an independent commission. They did so, whether rightly or wrongly, based on a belief that federal judges could not be trusted to impose fair and uniform sentences. See, *e.g.,* 130 Cong. Rec. 976 (1984) (remarks of Sen. Laxalt) ("The present problem with disparity in sentencing . . . stems precisely from the failure of [f]ederal judges—individually and collectively—to sentence similarly situated defendants in a consistent, reasonable manner. There is little reason to believe that judges will now begin to do what they have failed to do in the past"). And, at the end of the debate, the few remaining Members in the minority recognized that the battle to empower judges with more discretion had been lost. See, *e.g., id.,* at 973 (remarks of Sen. Mathias) (arguing that "[t]he proponents of the bill . . . argue in essence that judges cannot be trusted. You cannot trust a judge . . . you must not trust a judge"). I find it impossible to believe that a Congress in which these sentiments prevailed would have ever approved of the discretionary sentencing regime the Court enacts today.

Congressional Activity Since 1984:

Congress has not wavered in its commitment to a binding system of Sentencing Guidelines. In fact, Congress has rejected each and every attempt to loosen the rigidity of the Guidelines or vest judges with more sentencing options. See Hatch 189 ("In ensuing years, Congress would maintain its adherence to the concept of binding guidelines by consistently rejecting efforts to make the guidelines more discretionary"). Most recently, Congress' passage of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. 108–21, 117 Stat. 650, reinforced the mandatory nature of the Guidelines by expanding *de*

novo review of sentences to include all departures from the Guidelines and by directing the Commission to limit the number of available departures. The majority admits that its holding has made the PROTECT Act irrelevant. See *ante,* at 18 (opinion of BREYER, J.) (admitting that after the Court's remedy, the PROTECT Act's provisions "have ceased to be relevant"). Even a cursory reading of the legislative history of the PROTECT Act reveals the absurdity of the claim that Congress would find acceptable, under any circumstances, the Court's restoration of judicial discretion through the facial invalidation of §§3553(b)(1) and 3742(e).[16] In sum, despite Congress' unequivocal demand that the Guidelines operate as a binding system, and in the name of avoiding any reduction in the power of the sentencing judge vis-à-vis the jury (a subject to which Congress did not speak), the majority has erased the heart of the SRA and ignored in their entirety all of the Legislative Branch's post-enactment expressions

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[16] Although there was no accompanying committee report attached to the PROTECT Act, the floor debates over the Act's relevant provisions belie the majority's contention that a discretionary Guidelines system is more consistent with Congress' intent than the holding I would adopt. See 149 Cong. Rec. S5113, S5121–S5122 (Apr. 10, 2003) (remarks of Sen. Hatch) (arguing that the PROTECT Act "says the game is over for judges: You will have some departure guidelines from the Sentencing Commission, but you are not going to go beyond those, and you are not going to go on doing what is happening in our society today on children's crimes, no matter how softhearted you are. That is what we are trying to do here. . . . We say in this bill: We are sick of this, judges. You are not going to do this anymore except within the guidelines set by the Sentencing Commission"); *id.,* at S5123 ("[T]rial judges systematically undermine the sentencing guidelines by creating new reasons to reduce these sentences"); *id.,* at S6708, S6711 (May 20, 2003) (remarks of Sen. Kennedy) ("The Feeney Amendment effectively strips Federal judges of discretion to impose individualized sentences, and transforms the longstanding sentencing guidelines system into a mandatory minimum sentencing system. It limits in several ways the ability of judges to depart downwards from the guidelines").

of how the Guidelines are supposed to operate.

The majority's answer to this overwhelming history is that retaining a mandatory Guidelines system "is not a choice that remains open" given our holding that *Blakely* applies to the Guidelines. *Ante*, at 22. This argument—essentially, that the *Apprendi* rule makes determinate sentencing unconstitutional—has been advanced repeatedly since *Apprendi*. See, *e.g.,* 530 U. S., at 549–554 (O'CONNOR, J., dissenting); *Blakely*, 542 U. S., at ___ (slip op., at 1) (O'CONNOR, J., dissenting); *id.*, at ___ (slip op., at 18–19) (BREYER, J., dissenting). These prophecies were self fulfilling. It is not *Apprendi* that has brought an end to determinate sentencing. This Court clearly had the power to adopt a remedy that both complied with the Sixth Amendment and also preserved a determinate sentencing regime in which judges make regular factual determinations regarding a defendant's sentence. It has chosen instead to exaggerate the constitutional problem and to expand the scope of judicial invalidation far beyond that which is even arguably necessary. Our holding that *Blakely* applies to the Sentencing Guidelines did not dictate the Court's unprecedented remedy.

IV

As a matter of policy, the differences between the regime enacted by Congress and the system the Court has chosen are stark. Were there any doubts about whether Congress would have preferred the majority's solution, these are sufficient to dispel them. First, Congress' stated goal of uniformity is eliminated by the majority's remedy. True, judges must still *consider* the sentencing range contained in the Guidelines, but that range is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in 18 U. S. C. A. §3553(a). The result is certain to be a return to the same type of sentencing

disparities Congress sought to eliminate in 1984. Prior to the PROTECT Act, rates of departure from the applicable Guidelines sentence (via upward or downward departure) varied considerably depending upon the Circuit in which one was sentenced. See Sourcebook 53–55 (Table 26) (showing that 76.6% of sentences in the Fourth Circuit were within the applicable Guidelines range, whereas only 48.8% of sentences in the Ninth Circuit fell within the range). Those disparities will undoubtedly increase in a discretionary system in which the Guidelines are but one factor a judge must consider in sentencing a defendant within a broad statutory range.

Moreover, the Court has neglected to provide a critical procedural protection that existed prior to the enactment of a binding Guidelines system. Before the SRA, the sentencing judge had the discretion to impose a sentence that designated a minimum term "at the expiration of which the prisoner shall become eligible for parole." 18 U. S. C. §4205(b) (1982 ed.) (repealed by Pub. L. 98–473, §218(a)(5), 98 Stat. 2027). Sentencing judges had the discretion to reduce a minimum term of imprisonment upon the recommendation of the Bureau of Prisons. §4205(g) (1982 ed.). Through these provisions and others, see generally §§4201–4215, all of which were effectively repealed in 1984, it was the Parole Commission—not the sentencing judge—that was ultimately responsible for determining the length of each defendant's real sentence. See, *e.g.,* S. Rep. No. 98–225, at 38. Prior to the Guidelines regime, the Parole Commission was designed to reduce sentencing disparities and to provide a check for defendants who had received excessive sentences. Today, the Court reenacts the discretionary Guidelines system that once existed without providing this crucial safety net.

Other concerns are likely to arise. Congress' demand in the PROTECT Act that departures from the Guidelines be closely regulated and monitored is eviscerated—for there

can be no "departure" from a mere suggestion. How will a judge go about determining how much deference to give to the applicable Guidelines range? How will a court of appeals review for reasonableness a district court's decision that the need for "just punishment" and "adequate deterrence to criminal conduct" simply outweighs the considerations contemplated by the Sentencing Commission? See 18 U. S. C. A. §§3553(a)(2)(A)–(B) (main ed.). What if a sentencing judge determines that a defendant's need for "educational or vocational training, medical care, or other correctional treatment in the most effective manner," §3553(a)(2)(D), requires disregarding the stiff Guidelines range Congress presumably preferred? These questions will arise in every case in the federal system under the Court's system. Regrettably, these are exactly the sort of questions Congress hoped that sentencing judges would not ask after the SRA.

The consequences of such a drastic change—unaided by the usual processes of legislative deliberation—are likely to be sweeping. For example, the majority's unnecessarily broad remedy sends every federal sentence back to the drawing board, or at least into the novel review for "reasonableness," regardless of whether those individuals' constitutional rights were violated. It is highly unlikely that the mere application of "prudential doctrines" will mitigate the consequences of such a gratuitous change.

The majority's remedy was not the inevitable result of the Court's holding that *Blakely* applies to the Guidelines. Neither *Apprendi*, nor *Blakely*, nor these cases made determinate sentencing unconstitutional.[17] Merely requir-

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[17] Moreover, even if the change to an indeterminate system were necessary, the Court could have minimized the consequences to the system by limiting the application of its holding to those defendants on direct review who actually suffered a Sixth Amendment violation. *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), does not require blind application of every part of this Court's holdings to all pending cases,

ing all applications of the Guidelines to comply with the Sixth Amendment would have allowed judges to distinguish harmless error from error requiring correction, would have required no more complicated procedures than the procedural regime the majority enacts today, and, ultimately, would have left most sentences intact.

Unlike a rule that would merely require judges and prosecutors to comply with the Sixth Amendment, the Court's systematic overhaul turns the entire system on its head *in every case*, and, in so doing, runs contrary to the central purpose that motivated Congress to act in the first instance. Moreover, by repealing the right to a determinate sentence that Congress established in the SRA, the Court has effectively eliminated the very constitutional right *Apprendi* sought to vindicate. No judicial remedy is proper if it is "not commensurate with the constitutional violation to be repaired." *Hills* v. *Gautreaux*, 425 U. S. 284, 294 (1976). The Court's system fails that test, frustrates Congress' principal goal in enacting the SRA, and violates the tradition of judicial restraint that has heretofore limited our power to overturn validly enacted statutes.

I respectfully dissent.

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but rather, requires that we apply any new "rule to all *similar cases* pending on direct review." *Id.*, at 323. For obvious reasons, not *all* pending cases are made *similar* to Booker and Fanfan's merely because they involved an application of the Guidelines.