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 THOMAS, dissenting in part.

I join JUSTICE STEVENS' opinion for the Court, but I dissent from JUSTICE BREYER's opinion for the Court. While I agree with JUSTICE STEVENS' proposed remedy and much of his analysis, I disagree with his restatement of severability principles and reliance on legislative history, and thus write separately.

The Constitution prohibits allowing a judge alone to make a finding that 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. Application of the Federal Sentencing Guidelines resulted in impermissible factfinding in Booker's case, but not in Fanfan's. Thus Booker's sentence is unconstitutional, but Fanfan's is not. Rather than applying the usual presumption in favor of severability, and leaving the Guidelines standing insofar as they may be applied without any constitutional problem, the remedial majority converts the

Guidelines from a mandatory system to a discretionary one. The majority's solution fails to tailor the remedy to the wrong, as this Court's precedents require.

I

When a litigant claims that a statute is unconstitutional as applied to him, and the statute is in fact unconstitutional as applied, we normally invalidate the statute only as applied to the litigant in question. We do not strike down the statute on its face. In the typical case, "we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants." *United States* v. *Treasury Employees,* 513 U. S. 454, 478 (1995); see also *Renne* v. *Geary,* 501 U. S. 312, 323–324 (1991); *Board of Trustees of State Univ. of N. Y.* v. *Fox,* 492 U. S. 469, 484–485 (1989); *Brockett* v. *Spokane Arcades, Inc.,* 472 U. S. 491, 501–504 (1985). Absent an exception such as First Amendment overbreadth, we will facially invalidate a statute only if the plaintiff establishes that the statute is invalid in all of its applications. *United States* v. *Salerno,* 481 U. S. 739, 745 (1987).

Booker's case presents an as-applied challenge. Booker challenges Guidelines enhancements that, based on fact-finding by a judge alone, raised his sentence above the range legally mandated for his base offense level, determined by reference to the jury verdict. In effect, he contends that the Guidelines supporting the enhancements, and the Sentencing Reform Act of 1984 (SRA) that makes the Guidelines enhancements mandatory, were unconstitutionally applied to him. (Fanfan makes no similar contention, as he seeks to uphold the District Court's application of the Guidelines.)

A provision of the SRA, 18 U. S. C. A. §3553(b)(1) (Supp. 2004), commands that the court "*shall* impose a sentence of the kind, and within the range, referred to in subsection (a)(4)," which in turn refers to the Guidelines. (Emphasis

added.) The Court reasons that invalidating §3553(b)(1) would render the Guidelines nonbinding and therefore constitutional. Hence, it concludes, §3553(b)(1) must fall on its face.[1]

The majority's excision of §3553(b)(1) is at once too narrow and too broad. It is too narrow in that it focuses only on §3553(b)(1), when Booker's unconstitutional sentence enhancements stemmed not from §3553(b)(1) alone, but from the combination of §3553(b)(1) and individual Guidelines. Specifically, in Booker's case, the District Court increased the base offense level[2] under these Guidelines[3]: USSG §1B1.3(a)(2), which instructs that the base offense level shall (for certain offenses) take into account all acts "that were part of the same course of conduct or common scheme or plan as the offense of conviction"; §2D1.1(c)(2), which sets the offense level for 500g to 1.5kg of cocaine base at 36; and §3C1.1, which provides for a two-level increase in the offense level for obstruction of justice. The court also implicitly applied §1B1.1, which

---

[1] Because the majority invalidates 18 U. S. C. A. §3553(b)(1) (Supp. 2004) on its face, it is driven also to invalidate 18 U. S. C. A. §3742(e) (main ed. and Supp. 2004), which establishes standards of review for sentences and is premised on the binding nature of the Guidelines. See, *e.g.*, §3742(e)(2) (main ed.) (directing the court of appeals to determine whether the sentence "was imposed as a result of an incorrect application of the sentencing guidelines"); §3742(e)(3) (Supp. 2004) (directing the court of appeals to determine whether the sentence "is outside the applicable guideline range" and satisfies other factors). Given that (as I explain) there is no warrant for striking §3553(b)(1) on its face, striking §3742(e) as well only does further needless violence to the statutory scheme.

[2] Booker's base offense level (supported by the facts the jury found) was 32. See United States Sentencing Commission, Guidelines Manual §2D1.1(c)(4) (Nov. 2003) (USSG) (setting the base offense level for the crime of possession with intent to sell 50 to 150 grams of cocaine base at 32).

[3] The District Court applied the version of the Guidelines effective November 1, 2003.

provides general instructions for applying the Guidelines, including determining the base offense level and applying appropriate adjustments; §1B1.11(b)(2), which requires that "[t]he Guidelines Manual in effect on a particular date shall be applied in its entirety"; §6A1.3(b) p. s.,[4] which provides that "[t]he court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P."; and Rule 32(c)(1),[5] which in turn provided:

> "At the sentencing hearing, the court . . . must rule on any unresolved objections to the presentence report. . . . For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing."

Section 3553(b)(1), the listed Guidelines and policy statement, and Rule 32(c)(1) are unconstitutional as applied to Booker. Under their authority, the judge, rather than the jury, found the facts necessary to increase Booker's offense level pursuant to the listed provisions; the judge found those facts by a preponderance of the evidence, rather than beyond a reasonable doubt; and, on the basis of these findings, the judge imposed a sentence

---

[4] I take no position on whether USSG §6A1.3, a policy statement, bound the District Court. Cf. *Stinson* v. *United States,* 508 U. S. 36, 42–43 (1993); *Williams* v. *United States,* 503 U. S. 193, 200–201 (1992). In any case, Rule 32(c)(1), which had the same effect as §6A1.3, certainly bound the court.

[5] In 2002, Rule 32(c)(1) was amended and replaced with Rule 32(i)(3). The new Rule provides, in substantially similar fashion, that at sentencing, the court "must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. Rule Crim. Proc. 32(i)(3)(B) (2003).

above the maximum legally permitted by the jury's findings. Thus, in Booker's case, the concerted action of §3553(b)(1) *and* the operative Guidelines *and* the relevant Rule of Criminal Procedure resulted in unconstitutional judicial factfinding. The majority cannot pinpoint §3553(b)(1) alone as the source of the violation.

At the same time, the majority's remedy is far too broad. We have before us only a single unconstitutional application of §3553(b)(1) (and accompanying parts of the sentencing scheme). In such a case, facial invalidation is unprecedented. It is particularly inappropriate here, where it is evident that §3553(b)(1) is entirely constitutional in numerous other applications. Fanfan's case is an example: The judge applied the Guidelines to the extent supported by the jury's findings. This application of §3553(b)(1) was constitutional. To take another example, when the Government seeks a sentence within the Guidelines range supported by the jury's verdict, applying §3553(b)(1) to restrict the judge's discretion to that Guidelines range is constitutional.

Section 3553(b)(1) is also constitutional when the Government seeks a sentence above the Guidelines range supported by the jury's verdict, but proves the facts supporting the enhancements to a jury beyond a reasonable doubt. Section 3553(b)(1) provides that "the court shall *impose* a sentence of the kind, and within the range," set by the Guidelines. (Emphasis added.) It says nothing, however, about the procedures the court must employ to determine the sentence it ultimately "impose[s]." It says nothing about whether, before imposing a sentence, the court may submit sentence-enhancing facts to the jury; and it says nothing about the standard of proof. Because it does not address at all the procedures for Guidelines sentencing proceedings, §3553(b)(1) comfortably accommodates cases in which a court determines a defendant's Guidelines range by way of jury factfinding or admissions

rather than judicial factfinding.

The Constitution does not prohibit what §3553(b)(1) accomplishes—binding district courts to the Guidelines. It prohibits allowing a judge alone to make a finding that 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. Many applications of §3553(b)(1) suffer from no such vice. Yet the majority, by facially invalidating the statute, also invalidates these unobjectionable applications of the statute and thereby ignores the longstanding distinction between as-applied and facial challenges.

Just as there is no reason to strike §3553(b)(1) on its face, there is likewise no basis for striking any Guideline at issue here on its face. Respondents have not established that USSG §1B1.3(a)(2), §2D1.1(c)(2), §3C1.1, or §1B1.11(b)(2) is invalid in all its applications, as *Salerno* requires. To the contrary, numerous applications of these provisions are valid. Such applications include cases in which the defendant admits the relevant facts or the jury finds the relevant facts beyond a reasonable doubt. Like §3553(b)(1), USSG §§1B1.3(a)(2), 2D1.1(c)(2), 3C1.1, and 1B1.11(b)(2) say nothing about who must find the facts supporting enhancements, or what standard of proof the prosecution must satisfy. They simply attach effects to certain facts; they do not prescribe procedures for determining those facts. Even §1B1.1, which provides instructions for applying the Guidelines, directs an order in which the various provisions are to be applied ("[d]etermine the base offense level," §1B1.1(b), then "[a]pply the adjustments," §1B1.1(c)), but says nothing about the specific procedures a sentencing court may employ in determining the base offense level and applying adjustments.

Moreover, there is no basis for facially invalidating §6A1.3 or Rule 32(c)(1). To be sure, §6A1.3(b) and Rule

32(c)(1) prescribe procedure: They require the judge, acting alone, to resolve factual disputes. When Booker was sentenced, §6A1.3(b) provided that "[t]he court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P." At the time, the relevant portions of Rule 32(c)(1) provided:

> "At the sentencing hearing, the court . . . must *rule* on any unresolved objections to the presentence report. . . . For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing." (Emphasis added.)

The natural meaning of "the court . . . must rule" is that the *judge*, without the jury, must resolve factual disputes as necessary. This Rule of Criminal Procedure, as applied at Booker's sentencing hearing, required the judge to make findings that increased Booker's offense level beyond the Guidelines range authorized by the jury. The application of the Rule to Booker therefore was unconstitutional.

Nonetheless, the Rule has other valid applications. For example, the Rule is valid when it requires the sentencing judge, without a jury, to resolve a factual dispute in order to decide where within the jury-authorized Guidelines range a defendant should be sentenced. The Rule is equally valid when it requires the judge to resolve a factual dispute in order to support a downward adjustment to the defendant's offense level.[6]

---

[6] The commentary to §6A1.3 states that "[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." The Court's holding today corrects this mistaken belief. The Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what

Given the significant number of valid applications of all portions of the current sentencing scheme, we should not facially invalidate any particular section of the Federal Rules of Criminal Procedure, the Guidelines, or the SRA. Instead, we should invalidate only the application to Booker, at his previous sentencing hearing, of §3553(b)(1); USSG §§1B1.3(a)(2), 2D1.1(c)(2), 3C1.1, 1B1.1, 1B1.11(b)(2), and 6A1.3(b); and Rule 32(c)(1).

II

Invalidating §3553(b)(1), the Guidelines listed above, and Rule 32(c)(1) *as applied* to Booker by the District Court leaves the question whether the scheme's unconstitutional application to Booker can be severed from the scheme's many other constitutional applications to defendants like Fanfan. Severability doctrine is grounded in a presumption that Congress intends statutes to have effect to the full extent the Constitution allows.[7] *Regan* v. *Time, Inc.*, 468 U. S. 641, 652 (1984); Vermeule, Saving Constructions, 85 Geo. L. J. 1945, 1959–1963 (1997) (hereinafter Vermeule). The severability issue may arise when a court strikes either a provision of a statute or an application of a provision. Severability of provisions is perhaps more visible than severability of applications in our case law. See, *e.g.*, *Alaska Airlines, Inc.* v. *Brock,* 480 U. S. 678, 684–697 (1987) (severing unconstitutional legislative veto provision from other provisions).[8]

---

could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant.

[7] I assume, without deciding, that our severability precedents—which require a nebulous inquiry into hypothetical congressional intent—are valid, a point the parties do not contest. I also assume that our doctrine on severability and facial challenges applies equally to regulations as to statutes. See *Reno* v. *Flores,* 507 U. S. 292, 300–301 (1993).

[8] See also 2 U. S. C. §454 ("If *any provision of this Act*, or the application thereof to any person or circumstance, is held invalid, the validity of *the remainder of the Act* and the application of such provision to

However, severability questions arise from unconstitutional applications of statutes as well. Congress often expressly provides for severance of unconstitutional applications.[9] This Court has acknowledged the severability of applications in striking down some applications of a statute while leaving others standing. In *Brockett,* 472 U. S., at 504–507, the Court invalidated a state moral nuisance statute only insofar as it reached constitutionally protected materials, relying on the statute's severability clause. And in *Tennessee* v. *Garner,* 471 U. S. 1, 4 (1985), the Court considered a state statute that authorized police to use "'all the necessary means to effect [an] arrest.'" The Court held the statute unconstitutional insofar as it allowed the use of deadly force against an unarmed, non-

---

other persons and circumstances shall not be affected thereby" (emphasis added)); 5 U. S. C. §806(b) (similar); 6 U. S. C. §102 (2000 ed., Supp. II) (similar); 7 U. S. C. §136x (similar); 15 U. S. C. §79z–6 (similar); 29 U. S. C. §114 (similar); 21 U. S. C. §901 ("If a provision of this chapter is held invalid, all valid provisions that are severable shall remain in effect").

[9] See 2 U. S. C. §454 ("If any provision of this Act, or the *application* thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the *application of such provision to other persons and circumstances* shall not be affected thereby" (emphasis added)); 5 U. S. C. §806(b) (similar); 6 U. S. C. §102 (2000 ed., Supp. II) (similar); 7 U. S. C. §136x (similar); 15 U. S. C. §79z–6 (similar); 29 U. S. C. §114 (similar); 21 U. S. C. §901 (in relevant part, "[i]f a provision of this chapter is held invalid in one or more of its applications, the provision shall remain in effect in all its valid applications that are severable"); see also Vermeule 1950, n. 26 ("There is a common misconception that severability analysis refers only to the severance of provisions or subsections enumerated or labeled independently in the official text of the statute. In fact, however, severability problems arise not only with respect to different sections, clauses or provisions of a statute, but also with respect to applications of a particular statutory provision when some (but not all) of those applications are unconstitutional"); Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv. L. Rev. 76, 78–79 (1937) ("One [type of severability question] relates to situations in which some *applications* of the same language in a statute are valid and other applications invalid").

dangerous suspect; but it declined to invalidate the statute on its face, specifically noting that the statute could be applied constitutionally in other circumstances. *Id.,* at 11–12. In *Brockett* and *Garner*, then, the Court recognized that the unconstitutional applications of the statutes were severable from the constitutional applications. The Court fashioned the remedy narrowly, in keeping with the usual presumption of severability.

I thus disagree with JUSTICE STEVENS that severability analysis does not apply. *Ante*, at 11, and n. 6 (opinion dissenting in part).[10] I acknowledge that, as a general matter, the Court often disposes of as-applied challenges to a statute by simply invalidating particular applications of the statute, without saying anything at all about severability. See *United States* v. *Grace,* 461 U. S. 171, 183 (1983) (concluding that statute that prohibited carrying banners in the United States Supreme Court Building and on its grounds was unconstitutional as applied to the sidewalks surrounding the building); *Edenfield* v. *Fane,* 507 U. S. 761, 763 (1993) (striking down a solicitation ban on certified public accountants as applied "in the business context"); *Treasury Employees,* 513 U. S., at 501–503 (REHNQUIST, C. J., joined by SCALIA and THOMAS, JJ., dissenting) (expressing view that injunction against honoraria ban should be tailored to unconstitutional applications).

---

[10] I do, however, agree with JUSTICE STEVENS that JUSTICE BREYER grossly distorts severability analysis by using severability principles to determine which provisions the Court should strike as unconstitutional. *Ante*, at 12–14 (STEVENS, J., dissenting in part). JUSTICE BREYER's severability analysis asks which provisions must be cut from the statute to fix the constitutional problem. *Ante*, at 2–6, 15–16 (opinion of the Court). Normally, however, a court (1) declares a provision or application unconstitutional, using substantive constitutional doctrine (not severability doctrine), and only then (2) asks (under severability principles) whether the remainder of the act can be left standing. JUSTICE BREYER skips the first step, which is a necessary precursor to proper severability analysis.

Such decisions (in which the Court is silent as to applications not before it) might be viewed as having conducted an implicit severability analysis. See *id.,* at 485–489 (O'CONNOR, J., concurring in judgment in part and dissenting in part). A better view is that the parties in those cases could have raised the issue of severability, but did not bother, because (as is often the case) there was no arguable reason to defeat the presumption of severability. The unconstitutional applications of the statute were fully independent of and severable from the remaining constitutional applications. Here, the question is squarely presented: the parties press it, and there is extraordinary reason to clarify the remedy, namely, that our decision potentially affects every sentencing by the federal courts.

I therefore proceed to the severability question—whether the unconstitutional application of §3553(b)(1); USSG §§1B1.3, 2D1.1(c)(2), 3C1.1, 1B1.1, 1B1.11(b)(2), and 6A1.3; and Rule 32(c)(1) to Booker is severable from the constitutional applications of these provisions. That is, even though we have invalidated the application of these provisions to Booker, may other defendants be sentenced pursuant to them? We presume that the unconstitutional application is severable. See, *e.g.*, *Regan,* 468 U. S., at 653. This presumption is a manifestation of *Salerno*'s general rule that we should not strike a statute on its face unless it is invalid in all its applications. Unless the Legislature clearly would not have enacted the constitutional applications independently of the unconstitutional application, the Court leaves the constitutional applications standing. 468 U. S., at 653.

Here, the presumption of severability has not been overcome. In light of the significant number of constitutional applications of the scheme, it is far from clear that Congress would not have passed the SRA or allowed Rule 32 to take effect, or that the Commission would not have promulgated the particular Guidelines at issue, had either

body known that the application of the scheme to Booker was unconstitutional. *Ante*, at 5–10 (STEVENS, J., dissenting in part). As noted above, many applications of the Guidelines are constitutional: The defendant may admit the necessary facts; the Government may not seek enhancements beyond the offense level supported by the jury's verdict; the judge may find facts supporting an enhancement but (taking advantage of the overlap in Guidelines ranges) sentence the defendant within the jury-authorized range; or the jury may find the necessary facts.

Certainly it is not obvious that Congress would have preferred the entirely discretionary system that the majority fashions. The text and structure of the SRA show that Congress meant the Guidelines to bind judges. One of the purposes of the Commission, as set forth in the SRA, was to

> "provide *certainty* and fairness in meeting the purposes of sentencing, *avoiding unwarranted sentencing disparities* among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U. S. C. §991(b)(1)(B) (emphases added).

Accordingly, Congress made the Guidelines mandatory and closely circumscribed courts' authority to depart from the Guidelines range. 18 U. S. C. A. §3553(b)(1) (Supp. 2004). Congress also limited appellate review of sentences imposed pursuant to the Guidelines to instances in which the sentence was (1) in violation of law, (2) a result of an incorrect application of the Guidelines, (3) outside the applicable Guidelines range, or (4) in the absence of an applicable Guideline, plainly unreasonable. §3742(e) (main ed. and

Supp. 2004). Striking down §3553(b)(1) and the Guidelines only as applied to Booker (and other defendants who have received unconstitutional enhancements) would leave in place the essential framework of the mandatory system Congress created. Applying the Guidelines in a constitutional fashion affords some uniformity; total discretion, none. To suggest, as JUSTICE BREYER does, that a discretionary system would do otherwise, *ante*, at 7–11, 21–22 (opinion of the Court), either supposes that the system is discretionary in name only or overlooks the very nature of discretion. Either assumption is implausible.

The majority says that retaining the SRA and the Guidelines "engraft[s]" a jury trial requirement onto the sentencing scheme. *Ante*, at 3 (opinion of BREYER, J.). I am, of course, aware that, though severability analysis may proceed "by striking out or disregarding words [or, here, applications] that are in the [challenged] section," it may not proceed "by inserting [applications] that are not now there"; that would constitute legislation beyond our judicial power. *United States* v. *Reese,* 92 U. S. 214, 221 (1876). By allowing jury factfinding in some cases, however, we are no more "engrafting" a new requirement onto the statute than we do every time we invalidate a statute in some of the applications that the statute, on its face, appears to authorize. See, *e.g.*, *Brockett* v. *Spokane Arcades, Inc.,* 472 U. S. 491 (1985). I therefore do not find the "engraftment" label helpful as a means of judging the correctness of our severability analysis.

Granted, part of the severability inquiry is "whether the statute [as severed] will function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc.,* 480 U. S., at 685. Applying the Guidelines constitutionally (for instance, when admissions or jury findings support all upward enhancements) might seem at first glance to violate this principle. But so would the Government's proposal of applying the Guidelines as a whole to some

defendants, but not others. The Court's solution violates it even more clearly by creating a system that eliminates the mandatory nature of the Guidelines. In the end, nothing except the Guidelines as written will function in a manner perfectly consistent with the intent of Congress, and the Guidelines as written are unconstitutional in some applications. While all of the remedial possibilities are thus, in a sense, second-best, the solution JUSTICE STEVENS and I would adopt does the least violence to the statutory and regulatory scheme.

* * *

I would hold that §3553(b)(1), the provisions of the Guidelines discussed above, and Rule 32(c)(1) are unconstitutional as applied to Booker, but that the Government has not overcome the presumption of severability. Accordingly, the unconstitutional application of the scheme in Booker's case is severable from the constitutional applications of the same scheme to other defendants. I respectfully dissent from the Court's contrary conclusion.