Note

Toward a Robust Separation of Powers: Recapturing the Judiciary's Role at Sentencing

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Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge *would then be* the legislator.

—James Madison[1]

American criminal law has expanded dramatically over the last fifty years.[2] What began as a legislative attempt to codify the common law definitions of crimes quickly shifted into an expansive and detailed criminal law system.[3] During the evolution of this area of law, the allocation of power between the three branches—particularly on the issues of defining crimes and sentencing individuals—shifted from a system based on judicial discretion within broad legislative parameters toward a system based on required judicial deference to broad legislative authority to define crimes as well as determine individual sentences.[4]

This Note argues that the Supreme Court's recent sentencing jurisprudence has missed the mark by focusing too heavily on the individual rights provisions of the Sixth Amendment

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1. THE FEDERALIST NO. 47, at 310 (James Madison) (Robert Scigliano ed., 2000) (quoting Charles de Secondat Montesquieu) (internal quotation marks omitted).

2. *See* Ian Weinstein, *The Revenge of* Mullaney v. Wilbur*:* United States v. Booker *and the Reassertion of Judicial Limits on Legislative Power to Define Crimes*, 84 OR. L. REV. 393, 397 (2005).

3. *See id.* at 396–97.

4. *See id.* at 395–96.

and Due Process Clause at the expense of the structural concerns of the separation of powers. The Federal Sentencing Guidelines (Guidelines) violate the separation of powers, and the Court's jurisprudence has failed to address the problem. In its rush to ingrain the jury in the criminal process, the Court has missed the forest for the trees. The cases not only sort out the procedural requirements of the criminal process, but also the optimal balance of power between each branch of government.

Which branch of government has what power in the criminal process? This is the unstated question in the Court's sentencing cases. Congress's 1984 approval of the Guidelines was the most systematic and sweeping accumulation of power within the criminal process in the history of the Nation. The Court made multiple attempts to cure the constitutional violations resulting from Congress's action, but the analytic framework proved insufficient. Until the Court changes its analysis and recognizes the separation of powers concerns that underlie the current system, the Guidelines will continue to exert unacceptable legislative influence over the sentencing process.

Part I of this Note provides the social, legislative, and judicial history of the Guidelines and discusses the Supreme Court's conventional individual rights approach to criminal procedure. Part II analyzes the intersection between the separation of powers doctrine and the Guidelines, concluding that the Guidelines are a per se violation of the separation of powers. Part III proposes that the Court declare the Guidelines unconstitutional in their current form, but allow Congress the choice between complete invalidation of the Guidelines or requiring that all elements relevant to the Guidelines sentence be proven beyond a reasonable doubt to a jury.

I. THE HISTORY OF THE FEDERAL SENTENCING GUIDELINES

The history of the Guidelines is a culmination of social, political, and judicial developments that occurred over the past half century. This Part lays out the developments that led to the current approach to sentencing. It begins by examining America's traditional approach as well as the social and political transformations that uprooted the traditional system. It then examines the legislative history of the Guidelines as well as their practical application. Finally, this Part reviews the Su-

preme Court's approach to the criminal process and sentencing in particular.

A. FEDERAL SENTENCING: HISTORICAL OVERVIEW

Traditionally, scholars read the Constitution as separating the legislature's role of defining criminal activity, the executive's role of enforcing criminal prohibitions, the jury's role of adjudicating guilt, and the judiciary's role of sentencing the convicted.[5] The distinctions between defining, executing, adjudicating, and sentencing are at the heart of America's criminal jurisprudence and the framers' constitutional structure.[6]

This conception of separated power informed and defined the sentencing structure prior to 1984. On one hand, the legislature had nearly unfettered discretion to define the substantive aspects of the criminal law.[7] Within the confines of the Constitution,[8] the legislature was free to define crimes as it saw fit to promote its policies.[9] The furthest that the legislature would reach into sentencing was the enactment of a maximum sentence for a crime.[10] The legislature exercised no control over the sentence imposed on any individual defendant.[11]

5. *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 2 (1998) ("In the American constitutional tradition, there has heretofore been a formal distinction between the process of crime definition (the responsibility of the legislative branch) and the process of criminal sentencing within the maximum penalties provided by statute (the responsibility of the judiciary . . .).").

6. *See* Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 378–82 (2005) (demonstrating that jury adjudication was a structural requirement in line with the separation of powers); Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 463–65 (1991) (describing the rationale for the traditional tripartite separation of powers under the Constitution).

7. *See* STITH & CABRANES, *supra* note 5, at 22.

8. The Constitution places structural, procedural, and substantive limits on Congress's ability to define crimes. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

9. *See* Redish & Cisar, *supra* note 6, at 479 ("'[L]egislative' power includes only the authority to promulgate generalized standards and requirements of citizen behavior or to dispense benefits—to achieve, maintain, or avoid particular social policy results.").

10. *See* STITH & CABRANES, *supra* note 5, at 9; Louis F. Oberdorfer, Lecture, *Mandatory Sentencing: One Judge's Perspective—2002*, 40 AM. CRIM. L. REV. 11, 14 (2003).

11. *See* Oberdorfer, *supra* note 10, at 14 (describing the role the legislature played in sentencing prior to the Guidelines as limited to prescribing a "maximum, but not any minimum, sentence").

On the other hand, the judiciary exercised broad discretion at sentencing.[12] Once a jury decided the elements of a particular crime had been proven, the judge imposed on the defendant any sentence up to the statutory maximum.[13] Not only was the sentence committed to the discretion of the judge, the decision was final.[14] For the majority of the twentieth century, this system of indeterminate sentencing was the norm not only in the federal system, but also in the states.[15]

B. RECENT DEVELOPMENTS IN FEDERAL SENTENCING: 1970–PRESENT

This Section describes the shift away from the traditional model as a two-step process. The first step was the growth of social and political dissatisfaction with the traditional model's results.[16] The second was Congress's dramatic solution to the perceived problem—the Federal Sentencing Guidelines.[17]

1. Social and Political Developments of the 1970s

In the 1970s, both legislators and judges questioned the rehabilitative penal philosophy underlying the discretionary sentencing structure.[18] The "severe sentencing disparity among

12. *See* STITH & CABRANES, *supra* note 5, at 9 ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion.").

13. *See id.*

14. *See* MICHAEL TONRY, SENTENCING MATTERS 6 (1996) ("For all practical purposes, appellate review of sentences . . . was nonexistent.").

15. *Id.* at 4 ("In 1970, every state and the federal system had an 'indeterminate sentencing system' in which judges had wide discretion to decide who went to prison and to set maximum and sometimes minimum prison terms.").

16. *See* Oberdorfer, *supra* note 10, at 14 ("In the early 1970s, public outrage about increasing violent crime was growing; Congress and state legislatures were listening. From one segment of public opinion came complaints that some judges were too lenient . . . . From another segment came complaints that sentences were too long . . . .").

17. Technically, the Guidelines are a product of the United States Sentencing Commission. Congress, however, created the Commission with the express purpose of enacting the Guidelines. This Note glosses over this distinction because, although fascinating, it is not relevant to the issue discussed here. *See* Blakely v. Washington, 542 U.S. 296, 324–25 (2004) (O'Connor, J., dissenting) ("The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency . . . is irrelevant . . . . The Guidelines have the force of law . . . .").

18. *See* TONRY, *supra* note 14, at 13 (discussing the rise of "just deserts" as the dominant penal philosophy after the rejection of rehabilitation). *See generally* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L.

similarly situated defendants" eroded support for judicial discretion.[19] Research indicated that sentences for identical crimes varied by up to seventeen years.[20] The underlying issue, however, was not the disparity in and of itself but, rather, the correlation between disparate sentences and factors such as race.[21] Reformers claimed judicial discretion was to blame for the disparate sentences.[22]

In response, Congress completely overhauled the sentencing system[23] by "divest[ing] the independent Federal judiciary of the power to determine criminal sentences."[24] The shift of sentencing authority away from the independent judiciary was one of the most revolutionary developments of the criminal justice system in the last century.[25] The Sentencing Manual replaced the discretion that the framers entrusted to the federal judiciary, which had existed for two hundred years of American legal history.[26]

REV. 223 (1993) (providing a useful history of the political run-up to the Sentencing Reform Act).

19. Gardina, *supra* note 6, at 354.

20. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4–5 (1988) (detailing the motivations behind the Guidelines push). *But see* STITH & CABRANES, *supra* note 5, at 106–12 (questioning the validity of research on disparity).

21. *See* Breyer, *supra* note 20, at 5. Disparity between the sentences given to individual defendants is not inappropriate unless it is based on an irrelevant factor. *See* Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 528–29 (2007) ("Disparity inheres in any system that seeks to provide proportional punishment, that tailors the punishment to fit, not just the crime, but the criminal, and that purports to be a national system.").

22. *See* STITH & CABRANES, *supra* note 5, at 17 (explaining the perceived incompatibility of judicial discretion with the "new rehabilitation model" of incarceration); Stith & Koh, *supra* note 18, at 228–29 (discussing the continuing and forceful criticism levied by Judge Marvin E. Frankel—a federal district judge in New York—against the judicial discretion model). Congress was concerned about what would become known as the "'unjustifiably wide' sentencing disparity." Breyer, *supra* note 20, at 4.

23. *See* Gardina, *supra* note 6, at 355 ("Congress enacted sweeping sentencing reform that dramatically altered the way in which defendants convicted in federal court were sentenced.").

24. STITH & CABRANES, *supra* note 5, at 1.

25. *Id.* at 2 ("The transfer of formal sentencing authority from federal judges to the Sentencing Commission is probably the most significant development in judging in the federal judicial system since the adoption in 1938 of the Federal Rules of Civil Procedure.").

26. *See id.* at 1.

2. The Sentencing Reform Act of 1984

The Sentencing Reform Act of 1984 (SRA) accomplished this legislative reform of the sentencing system.[27] It was enacted as part of the Comprehensive Crime Control Act of 1984.[28] According to Stephen Breyer, Congress contemplated "two primary purposes" for the SRA.[29] Honesty in sentencing was the first;[30] the SRA eliminated parole as an option in sentencing and punishment.[31] Reduction of the sentencing disparity was the second purpose.[32] The SRA attempted to achieve this goal through two separate means: the creation of appellate review of sentences,[33] and the establishment of the United States Sentencing Commission (Commission) to promulgate sentencing guidelines.[34] In hindsight, the combined effect of the elimination of parole and the creation of appellate review of sentences has paled in comparison to the effect of the Commission.[35]

On November 1, 1987, the United States Sentencing Guidelines took effect.[36] The Guidelines are based on a chart or grid. The nature of the offense is on one axis and the defendant's criminal history is on the other.[37] The box in which these two categories intersect in the Sentencing Table dictates the permissible sentence.[38] The Guidelines are a legislative oddity; they have the force of law but are not attached to any particu-

27. Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.). *See generally* Stith & Koh, *supra* note 18 (discussing the politics leading up to the SRA).

28. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

29. *See* Breyer, *supra* note 20, at 4; *see also* STITH & CABRANES, *supra* note 5, at 2 ("The 1984 Act sought to achieve 'certainty and fairness' in the federal sentencing process by eliminating 'unwarranted disparity' among sentences for similar defendants committing similar offenses.").

30. Breyer, *supra* note 20, at 4.

31. *See* Sentencing Reform Act § 3624.

32. *See* Breyer, *supra* note 20, at 4.

33. *See* Sentencing Reform Act § 3742.

34. *See* Sentencing Reform Act § 991.

35. *See* STITH & CABRANES, *supra* note 5, at 2.

36. *Id.* at 1.

37. *See* Gardina, *supra* note 6, at 357. The nature of the offense is determined by taking the base level offense and adding or subtracting levels based on predetermined factors. *See id.* The defendant's criminal history is also adjusted according to predetermined factors. *See id.*

38. *Id*.

lar crime.[39] Until 2005, when the Supreme Court decided *United States v. Booker*,[40] the Guidelines effectively left the judge little or no power to sentence outside of this predetermined range.[41] The courts began hearing challenges to the constitutionality of this novel system almost immediately.[42]

C. JUDICIAL APPROACH TO SENTENCING

This Section details the Supreme Court's sentencing jurisprudence. It describes the cases prior to the enactment of the Guidelines and highlights the development of the individual rights analysis. It then discusses the cases that, either directly or indirectly, affected the Guidelines as well as the analysis used to decide the cases. This Section focuses on the Court's use of the individual rights provisions of the Sixth Amendment as the core constitutional challenge and method of analysis relating to the Guidelines.

1. Pre-Guidelines Jurisprudence

The Supreme Court's sentencing jurisprudence traces back to *In re Winship*.[43] The narrow issue presented was whether proof beyond a reasonable doubt was required when adjudicating juvenile cases.[44] The Court emphatically concluded that, whether juvenile or adult, the Due Process Clause requires proof beyond a reasonable doubt for every element of the crime charged.[45] Despite the simplicity of the Court's command, this case touched off a barrage of legislative and judicial activity attempting to define not only what constitutes an element of a

39. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 1A1.1, 1B1.6 (2007) (describing the authority under which the Guidelines are set forth and the organization and structure of the Guidelines).

40. 543 U.S. 220 (2005).

41. *See* Gardina, *supra* note 6, at 357.

42. *See* Stith & Koh, *supra* note 18, at 281 ("Since they were promulgated in 1987, the Federal Sentencing Guidelines have been the subject of considerable attention, receiving little praise and much criticism from the legal community.").

43. 397 U.S. 358 (1970).

44. *Id.* at 359.

45. *Id.* at 364 ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

crime, but also which branch of government has the power to provide such a definition.[46]

Mullaney v. Wilbur[47] was the Court's first attempt at dealing with the issues raised in the wake of *In re Winship*. It indicated that the Court was unwilling to allow state legislatures to circumvent *In re Winship*.[48] The issue presented was whether Maine could utilize a rebuttable presumption of malice aforethought in cases where intentional, unlawful killing had been proven.[49] Relying on *In re Winship*, the Court held that, because malice aforethought was a defined element of the crime of murder, Maine could not shift the burden of proof to the defendant.[50] Instead, as in *In re Winship*, the Due Process Clause required Maine to prove malice aforethought beyond a reasonable doubt.[51]

Beginning with *In re Winship* and *Mullaney*, the pendulum of criminal sentencing power rested squarely on the side of jury adjudication and judicial sentencing discretion.[52] As a result of the societal and political issues during the late 1970s and early 1980s, the pendulum quickly swung toward legislative intervention in all aspects of the criminal process.[53] *Patterson v. New York*[54] and *McMillan v. Pennsylvania*[55] demonstrated how firmly entrenched the legislature was in all aspects of the criminal process.[56]

In *Patterson*, the Court dealt with a statute nearly identical to the one at issue in *Mullaney*.[57] The only difference was

46. *See* McMillan v. Pennsylvania, 477 U.S. 79, 83–87 (1986) (distinguishing between sentencing factors and elements); Patterson v. New York, 432 U.S. 197, 208–211 (1977) (discussing the need for certain elements in common law crimes); Mullaney v. Wilbur, 421 U.S. 684, 692–704 (1975) (discussing the use of presumptions in elements).

47. 421 U.S. 684 (1975).

48. *See id.* at 698.

49. *Id.* at 684–87.

50. *Id.* at 704.

51. *Id.*

52. *See* Weinstein, *supra* note 2, at 403 (discussing the system of broad judicial discretion in place prior to *Patterson v. New York*).

53. *See id.* at 413 ("[U]nfettered judicial sentencing discretion gave way to a variety of legislatively imposed reviewable sentencing requirements . . . .").

54. 432 U.S. 197 (1977).

55. 477 U.S. 79 (1986).

56. *See* Weinstein, *supra* note 2, at 413 (describing *McMillan* as a triumph of the legislature over the judiciary for control of the sentencing process).

57. *See Patterson*, 432 U.S. at 198 (describing the New York murder statute as including only two elements—the intent to cause the death of another

New York's decision to remove malice aforethought from the definition of murder, yet allow it as an affirmative defense.[58] Unlike *Mullaney*, the Court upheld the conviction under New York's statute.[59] Since malice aforethought was not an element of the crime, the Court reasoned, *In re Winship*'s holding was satisfied.[60] In a dissent that foreshadowed *Apprendi v. New Jersey*,[61] Justice Lewis Powell argued that the Court ignored the underlying issue by allowing the legislature to undefine crimes and circumvent the due process requirements of *In re Winship*.[62]

Despite the seismic shift of power recognized in *Patterson*, the constitutional issues at play were due process and the Sixth Amendment. It was a matter of how the legislature defined crimes and the implications of that decision for the rights of individual defendants. It did not implicate the separation of powers because the legislature had not yet co-opted the judge's power to determine an individual sentence.[63]

McMillan v. Pennsylvania[64] completed the shift towards legislative power. The case involved a challenge to a Pennsylvania statute that required the mandatory imposition of a five-year minimum sentence if the sentencing judge concluded, by a preponderance of the evidence, that the crime was committed while visibly possessing a firearm.[65] Visible possession of a firearm was not a statutorily defined element of the underlying crime but, rather, a fact to be determined at sentencing according to an independent statute.[66] Relying on the logic of *Patter-*

person, and actually causing the death of another person—and not including malice aforethought as an element).

58. *Id.* at 212–13 (distinguishing Maine's murder statute from the one at issue in *Patterson* by showing that Maine's statute defined murder as unlawful killing with malice aforethought).

59. *Id.* at 216.

60. *Id.* at 215–16.

61. 530 U.S. 466 (2000).

62. *See Patterson*, 432 U.S. at 228 (Powell, J., dissenting) ("The *Winship*/*Mullaney* test indentifies those factors of such importance, historically, in determining punishment and stigma that the Constitution forbids shifting to the defendant the burden of persuasion when such a factor is at issue.").

63. *See* Weinstein, *supra* note 2, at 411 ("This broad legislative power to define crimes was counterbalanced by broad judicial sentencing discretion . . . .").

64. 477 U.S. 79 (1986).

65. *Id.* at 83.

66. *See id.* at 81. The Pennsylvania statute at issue was a sentencing statute dealing with crimes committed while in possession of a firearm. It provided (at the time *McMillan* was decided), in effect, that certain felonies, de-

son, the Court concluded that visibly possessing a firearm was a "sentencing factor," and as such, the sentence did not violate the due process requirements of *In re Winship*.[67] The distinction between an element of a crime and a "sentencing factor" was premised on the notion that the firearm provision did not increase the statutorily determined punishment range, but rather limited the sentencing judge's discretion within that statutory range by imposing a minimum sentence.[68]

Justice John Paul Stevens dissented, arguing that there must be a meaningful distinction between aggravating and mitigating factors.[69] Based on that distinction, Pennsylvania's statute was unconstitutional because it allowed an unproven fact to aggravate the sentence.[70] As a counterpoint, the legislature could define crimes extremely broadly but allow the defendant to prove mitigating factors, similar to *Patterson*.[71]

The Court focused exclusively on individual rights rather than structural concerns.[72] *In re Winship*'s individual rights concerns were satisfied because the Court concluded that the firearms provision was a sentencing factor rather than an element of the crime.[73] The Court remained silent on the separation of powers issue because it was not raised as part of the challenge. Despite *McMillan*'s individual rights focus, the first challenge to the Guidelines nevertheless dealt with the separation of powers.

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fined in other sections of the Code, were punishable by a minimum of five years in prison if committed while in possession of a firearm. 42 PA. CONS. STAT. § 9712 (1982). The statutes defining the crimes made no mention of the mandatory minimum sentences. *See McMillan*, 477 U.S. at 85–86. The fact that the defendant possessed a firearm was not proven to the jury. *See id.* at 82.

67. *McMillan*, 477 U.S. at 86 ("While visible possession might well have been included as an element of the enumerated offenses . . . *Patterson* teaches that we should hesitate to conclude that Due Process bars the State from pursuing its chosen course in the area of defining crimes . . . .").

68. *Id.* at 87–88.

69. *Id.* at 100 (Stevens, J., dissenting).

70. *Id.* at 103–04.

71. *Id.* at 99.

72. *See id.* at 90 (majority opinion) (discussing the due process requirements and concluding that due process does not require certain facts to be proved simply because many states require such proof).

73. *See id.* at 87–88 ("Section 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to *limit the sentencing court's discretion in selecting a penalty* within the range already available to it without the special finding of visible possession of a firearm." (emphasis added)).

2. Judicial Interpretation of the Guidelines

In 1989, the Court decided *Mistretta v. United States*,[74] the first challenge to the validity of the Guidelines. The questions presented were whether Congress's delegation of power to the Commission was excessive, and whether the creation of the Commission violated the separation of powers doctrine.[75] The Court answered both questions negatively and upheld the delegation of power.[76] Justice Antonin Scalia wrote a scathing lone dissent, arguing that the Commission—comprised of members of the executive and judicial branches—was exercising legislative power by effectively defining crimes.[77] *Mistretta* was the only time that the Court has been faced with a separation of powers challenge to the Guidelines.[78] The Court looked only at the alleged judicial involvement in legislating instead of dealing with the issue broadly. It did not address the legislature's involvement in individual sentencing.

Having decided the delegation and separation of powers issues in *Mistretta*, the Court returned to the individual rights analysis developed from *In re Winship* to *McMillan*. *Jones v. United States*[79] foreshadowed the application of that analysis to the Guidelines. The Court's decisions in *Jones* and *Apprendi v. New Jersey*[80] signaled that the judicial branch was finally willing to push back against the legislative encroachment that became entrenched in *Patterson* and *McMillan*.[81]

A federal car-jacking statute was at issue in *Jones*.[82] The narrow question presented was one of statutory interpretation—whether the statute "defined three distinct offenses or a

74. 488 U.S. 361 (1989).

75. *Id.* at 371–72; *see also* Mark Nielsen, Mistretta v. United States *and the Eroding Separation of Powers*, 12 HARV. J.L. & PUB. POL'Y 1049, 1049 (1989).

76. *Mistretta*, 488 U.S. at 412.

77. *Id.* at 427 (Scalia, J., dissenting) (describing the Commission as a "junior-varsity Congress"). Justice Scalia argued that the Commission violated the separation of powers because it was exercising legislative power. *Id.* at 426–27.

78. *Cf.* Nielsen, *supra* note 75, at 1055 ("The Court viewed Mistretta's separation-of-powers claim as containing three distinct arguments—the first emphasizing the Commission's location, the second its composition, and the third its potential vulnerability to executive control.").

79. 526 U.S. 227 (1999).

80. 530 U.S. 466 (2000).

81. *See* Weinstein, *supra* note 2, at 426–27 (arguing that *Jones* and *Apprendi* signaled a move back towards the *Mullaney* framework).

82. *Jones*, 526 U.S. at 229.

single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict."[83] Justice David Souter—joined by Justices Scalia, Clarence Thomas, Ruth Bader Ginsburg, and Stevens—concluded that the former was the proper interpretation.[84]

The relevant aspect of *Jones*, however, was not the holding of the case but, rather, the reasoning Justice Souter used to reach that decision. He argued that the latter interpretation would raise serious Sixth Amendment and due process concerns.[85] Relying on the analysis stemming from *In re Winship*, Justice Souter argued that removing facts that increase punishment from the jury's consideration is inconsistent with the Sixth Amendment and due process.[86] In the wake of *Patterson* and *McMillan*, *Jones* breathed new life into the Sixth Amendment and Due Process Clause arguments as they related to the Guidelines.[87]

Similar to *Jones*, the Court's decision in *Apprendi* was important to the Guidelines but did not deal with them directly. At issue was a due process claim arising out of a sentence under a New Jersey hate crimes statute.[88] The question presented was whether a judge—sitting without a jury at sentencing—could impose a sentence above the maximum allowed on the jury's findings, based on evidence proved by preponderance at sentencing.[89] Justice Stevens, writing for the majority, stated that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[90]

The analytical framework that emerged from *Jones* and *Apprendi* focused exclusively on the individual rights of the ac-

83. *Id.*

84. *Id.*

85. *See id.* at 244 ("It is therefore no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn.").

86. *Id.* at 248 ("The point is simply that diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled.").

87. *See* Weinstein, *supra* note 2, at 426–27 (arguing that *Jones* signaled a return to the individual rights model of *Mullaney*).

88. Apprendi v. New Jersey, 530 U.S. 466, 468–69 (2000).

89. *Id.* at 469.

90. *Id.* at 490.

cused.[91] That framework developed as the standard constitutional challenge to sentences under the Guidelines.[92] The separation of powers issue was brushed under the rug because the Court rolled out the red carpet for the Sixth Amendment challenge.[93] There was no apparent need to address the separation of powers in the context of the Guidelines because the Court had not addressed it in the prior decisions other than *Mistretta*.[94]

Blakely v. Washington[95] was the final link between the Court's individual rights analysis and the Guidelines. The defendant directly challenged the constitutionality of Washington's sentencing guidelines under the Sixth Amendment.[96] Writing for the majority, Justice Scalia held that the application of Washington's guidelines—which were substantially the same as the Federal Guidelines—was unconstitutional under the Sixth Amendment when used to sentence a defendant to a longer prison term than would have been allowed based on the evidence heard by the jury.[97]

In *United States v. Booker*,[98] the Court finally tackled the ostensible conflict between the Guidelines and *Apprendi*. The case was a direct challenge to the constitutionality of the Guidelines when used to impose a sentence above the statutory maximum based solely on the facts found by the jury at trial.[99] What appeared on its face to be a simple application of *Blakely* ended up as a compromise decision, resulting in two separate majority opinions as well as four separate dissenting opinions.[100] The constitutional majority[101] held that *Blakely*'s rea-

91. *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1042–43 (2006) (arguing that the Court focused solely on the defendant's individual rights instead of the Guidelines' structural problems).

92. *See* Rita v. United States, 127 S. Ct. 2456, 2462 (2007); United States v. Booker, 543 U.S. 220, 226–27 (2005).

93. *See* Barkow, *supra* note 91, at 1042–43.

94. *See id.* at 1041–43.

95. 542 U.S. 296 (2004).

96. *Id.* at 301.

97. *Id.* at 313.

98. 543 U.S. 220 (2005).

99. *See id.* at 226 (Stevens, J., delivering the opinion of the Court in part) ("The question presented in each of these cases is whether an application of the Federal Sentencing Guidelines violated the Sixth Amendment.").

100. *See id.* at 225.

101. Of the two majority opinions, the first, written by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg, concluded that the

soning also applies to the Federal Guidelines.[102] The remedial majority,[103] however, held that, in light of the constitutional majority's decision, the appropriate remedy was to excise those provisions of the SRA that have the effect of making the Guidelines mandatory.[104]

The result left the Guidelines in limbo. They were no longer mandatory, but the remedial majority articulated that sentencing judges were still required to take them into consideration.[105] Sentencing judges must now go through a two-step process to determine the appropriate sentence.[106] Calculating the appropriate Guidelines sentence is the first step.[107] Next, the judge decides whether that sentence is reasonable in light of the considerations set forth in 18 U.S.C. § 3553(a).[108] This determination of reasonableness became the next point of conflict for the courts. A circuit split developed over whether it was appropriate to accord a presumption of reasonableness to sentences that fell within the appropriate Guidelines range.[109]

The Supreme Court took up that question in *Rita v. United States*.[110] *Rita* was the Court's first decision on the Guidelines since the upheaval of *Booker*. It held that a federal appellate court "may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentenc-

Sixth Amendment as interpreted in *Blakely* and *Apprendi* did apply to the Guidelines. *See id.* at 226–27. This will be referred to as the "constitutional majority" to avoid confusion with the second majority opinion.

102. *Id.*

103. The second majority opinion, written by Justice Breyer and joined by Justices Rehnquist, Kennedy, O'Connor, and Ginsburg, decided the appropriate remedy for the constitutional violation. *See id.* at 245 (Breyer, J., delivering the opinion of the Court in part). This will be referred to as the "remedial majority."

104. *Id.* at 245.

105. *See id.* at 264.

106. 3 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 526.1 (3d ed. 2004).

107. *Id.*

108. *Id.*

109. *Compare* United States v. Hunt, 459 F.3d 1180 (11th Cir. 2006) (accepting the position that sentences that are properly calculated and fall within the Guidelines' range are presumed to be reasonable), *and* United States v. Lewis, 436 F.3d 939 (8th Cir. 2006) (same), *with* United States v. Fernandez, 443 F.3d 19 (2d Cir. 2006) (taking the position that sentences that fall within the Guidelines range are not presumed to be reasonable), *and* United States v. Cooper, 437 F.3d 324 (3d Cir. 2006) (same).

110. 127 S. Ct. 2456 (2007).

ing Guidelines."[111] As a corollary, it held that this presumption does not violate the Sixth Amendment as it has been interpreted in *Apprendi* and *Booker*.[112] Again, the Court was silent on the separation of powers. Justice Scalia wrote a concurring opinion but took issue with the majority's opinion.[113] "The Court," Justice Scalia wrote, "has reintroduced the constitutional defect that *Booker* purported to eliminate."[114] According to Justice Scalia, the perception of which branch of the government controls individual sentences is the only difference between the pre-*Booker* system and the post-*Rita* system.[115]

Rita dealt only with appellate review of sentences falling within the applicable Guidelines range.[116] Most recently, in *Gall v. United States*[117] and *Kimbrough v. United States*,[118] the Court addressed the contentious issue of "reasonableness" review for sentences that deviated from the applicable Guidelines range.[119] It held that appellate courts could not require a showing of "extraordinary" circumstances to justify a deviation from the Guidelines range.[120] Although both Justice Ginsburg, in *Kimbrough*, and Justice Stevens, in *Gall*, took pains to reaffirm the advisory nature of the Guidelines post-*Booker*,[121] they were steadfast in asserting that the Guidelines remain the default for individual sentences.[122] The Court said that the Guidelines

111. *Id.* at 2462.

112. *Id.* at 2467.

113. *See id.* at 2474 (Scalia, J., concurring).

114. *Id.* at 2476.

115. *See id.* ("If a sentencing system is permissible in which some sentences cannot lawfully be imposed by a judge unless the judge finds certain facts by a preponderance of the evidence, then we should have left in place the compulsory Guidelines that Congress enacted, instead of imposing this jerry-rigged scheme of our own.").

116. *See id.* at 2463 (Breyer, J., majority opinion).

117. 128 S. Ct. 586 (2007).

118. 128 S. Ct. 558 (2007).

119. *See Gall*, 128 S. Ct. at 591; *Kimbrough*, 128 S. Ct. at 564.

120. *See Gall*, 128 S. Ct. at 595 ("We reject, however, an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range.").

121. *See id.* at 594; *Kimbrough*, 128 S. Ct. at 564 ("We hold that, under *Booker*, the cocaine Guidelines, like all other Guidelines, are advisory only . . . .").

122. *See Gall*, 128 S. Ct. at 594 ("It is also clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications."); *Kimbrough*, 128 S. Ct. at 574.

are the baseline for sentencing, but a district judge may, after "serious consideration," vary from the structure if it is "reasonable" in the case at bar.[123]

With the exception of *Mistretta*, the Supreme Court's Guidelines jurisprudence focuses exclusively on the individual rights concerns of the Sixth Amendment and Due Process Clause.[124] This is likely a result of inertia from the pre-Guidelines cases such as *Jones* and *Apprendi*. Although that analysis is necessary when dealing with the Guidelines, it is not sufficient.[125] The Guidelines present structural problems that are not adequately resolved by the individual rights analysis. By relying exclusively on the individual rights analysis, the Court has created a blind spot in its sentencing jurisprudence and fashioned incomplete remedies as a result.

II. THE SEPARATION OF POWERS DOCTRINE AND THE FEDERAL SENTENCING GUIDELINES

The Supreme Court's individual rights focus has come at the expense of the Guidelines' structural infirmity—the separation of powers.[126] In the context of the criminal process, the individual rights provisions of the Sixth Amendment, the Due Process Clause, and the structural concerns of the separation of powers are two sides of the same coin.[127] The Guidelines cases are unsatisfying because the Court is only dealing with one side of the coin.[128] Although addressing different symptoms, both

123. *See Gall*, 128 S. Ct. at 596 ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."); *Kimbrough*, 128 S. Ct. at 574 ("As explained in *Rita* and *Gall*, district courts must treat the Guidelines as the 'starting point and initial benchmark.'").

124. *See* Rita v. United States, 127 S. Ct. 2456, 2462 (2007); United States v. Booker, 543 U.S. 220, 226–27 (2005).

125. *See* Barkow, *supra* note 91, at 1042–43 (stating that the separation of powers analysis is a necessary corollary to the individual rights analysis).

126. *See id.* at 1042. ("[I]ts failure to focus on the separation of powers and the structural check provided by the jury led it to miss the real problem with the Guidelines . . . .").

127. *See* Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (arguing that the framers believed that individual rights and the separation of powers were so intertwined that a Bill of Rights was unnecessary given the structural protections of the Constitution itself); THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 1, at 546–51 (arguing that no Bill of Rights is necessary to protect the liberty of the individual and, in fact, that such a bill would weaken the rights protected by the structure of the Constitution).

128. *See* Barkow, *supra* note 91, at 1012–16 (arguing that both procedural

are attacking the same problem—governmental tyranny—from different perspectives.[129] The individual rights protections—without the structural counterparts—are insufficient.[130] Until the Court deals with the structural concern, it will never fully resolve the constitutional infirmities that have been haunting the Guidelines.

A. SEPARATION OF POWERS AND THE CONSTITUTIONAL STRUCTURE

This Section provides an overview of separation of powers theory. It begins with a discussion of the framers' motivations and understanding. It then describes the structural safeguards that the framers included in the Constitution and analyzes the Court's enforcement of those safeguards in the criminal context. It argues that while the Court's sentencing cases have defined and protected the structural roles of the legislature and jury, they have failed to offer parallel safeguards for the structural role of the judiciary.

1. Rationale: The Framers' Mistrust of Aggregated Power

A "profound mistrust of government" and a fear of tyranny that arises from the aggregation of power lay at the heart of any theory of separation of powers.[131] According to the framers, the separation of powers is second in importance only to the ability of government to control the governed.[132] They recognized that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny."[133] James Madison equated tyranny with the mere accumulation of excess power.[134] The separation of powers was a

and structural constitutional safeguards were intended as checks on governmental abuse).

129. THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 1, at 546–51.

130. *See Clinton*, 524 U.S. at 450–51 (Kennedy, J., concurring); Barkow, *supra* note 91, at 1034 ("The individual rights perspective misses these structural concerns and cannot bear the weight of policing the inequalities that the separation of powers is designed to address.").

131. Redish & Cisar, *supra* note 6, at 456–57. "If men were angels," wrote James Madison, "no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 331.

132. *See* THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 331.

133. THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 307–08.

134. Redish & Cisar, *supra* note 6, at 464.

doctrine of prevention; the goal was to avoid accumulation of power before it occurred.[135]

The framers imposed a structure with three distinct branches as a means of avoiding tyranny.[136] The division of power between the three branches was a "prophylactic" to prevent any one branch from acquiring sufficient power to "subvert popular sovereignty and individual liberty."[137] Although the ultimate end is the protection of individual liberty, the doctrine of separation of powers is an internal structural check on accumulation of power.[138]

2. Structure: The Separation of Powers Inherent in the Constitution

The framers recognized that the criminal process is particularly ripe for abuses and carefully crafted a system to minimize that possibility.[139] Within the criminal process, power is divided between the legislature, the executive, the jury, and the judge.[140] The role of the legislature is to define criminal activi-

135. *See* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 121 (William Peden ed., Univ. of N.C. Press 1982) (1787) ("The time to guard against corruption and tyranny, is before they shall have gotten hold of us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.").

136. Bowsher v. Synar, 478 U.S. 714, 722 (1986) (describing "a vigorous Legislative Branch," an "independent Executive Branch," and an "equally independent" judicial branch).

137. Redish & Cisar, *supra* note 6, at 463.

138. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 860 (1986) (Brennan, J., dissenting) ("The Framers also understood that a principal benefit of the separation of judicial power from the legislative and executive powers would be the protection of individual litigants from decisionmakers susceptible to majoritarian pressures."); THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 1, at 546–47, 550–51.

139. *See* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."); *cf.* Barkow, *supra* note 91, at 994 ("[A]s a matter of traditional constitutional interpretation, a strict separation of powers in criminal law matters has a stronger textual and historical pedigree than in other contexts.").

140. *See* THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 307 ("[T]he legislative, executive, and judiciary departments ought to be separate and distinct."); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS 81–104 (1998) (discussing the centrality of the jury in the criminal process); Barkow, *supra* note 91, at 1015–17 (discussing the role that each branch plays in the criminal process). Because the role of the executive branch is peripheral to this analysis, it is not detailed here. Briefly, the role of the executive is to prosecute individuals who violate the statutes passed by Congress. *See* Redish & Cisar,

ty.[141] Congress makes policy decisions regarding what conduct or activities ought to be proscribed by law.[142] It then defines and proscribes that conduct in a statute.[143] Along with the definition, the legislature articulates a range of acceptable sanctions for violation of the statute.[144]

Generally speaking, this was the approach prior to the early 1980s.[145] Since that time, Congress has attempted to exercise control over the sentences imposed on individual defendants.[146] This is inconsistent with the original understanding of separation of powers because the *legislature exercises judicial power* in violation of Articles I and III.[147] The *Apprendi* line examined the boundaries of legislative power through the individual rights analysis. The implicit question was always whether the legislature had the power to take the action that it did.[148] On the surface, the cases questioned whether the legislature's action violated the Sixth Amendment or due process rights of an

supra note 6, at 480 (arguing that the existence of an executive power presupposes a law to be executed).

141. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.").

142. *See* Redish & Cisar, *supra* note 6, at 479 ("'[L]egislative' power includes only the authority to promulgate generalized standards and requirements of citizen behavior or to dispense benefits—to achieve, maintain, or avoid particular social policy results.").

143. *See id.*

144. *See* NICHOLAS N. KITTRIE ET AL., SENTENCING, SANCTIONS, AND CORRECTIONS 81 (2d ed. 2002) ("The legislature exercises neither primary nor secondary responsibility in the sentencing process. Even so, the legislature does play an initial pivotal role in the sentencing process (a) by defining and proscribing certain activities as criminal, (b) by prescribing the corresponding sanctions, and (c) by establishing the sentencing structure and defining the roles of the actors.").

145. *See* Douglas A. Berman, *Foreward: Beyond* Blakely *and* Booker*: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 654–55, 658–59 (2005).

146. *See id.*

147. *See* THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 310 ("Were the power of judging joined with the legislature, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*."); Redish & Cisar, *supra* note 6, at 455 n.24 ("The separation of powers protections are, in fact, explicitly embodied in the text—in portions of Articles I, II, and III that convey to each branch a specific type of governmental power.").

148. *See* Apprendi v. New Jersey, 530 U.S. 466, 476–77 (2000); McMillan v. Pennsylvania, 477 U.S. 79, 83–91 (1986); Patterson v. New York, 432 U.S. 197, 198, 201–02, 210 (1977).

individual, but, as a consequence, they defined the structural role of the legislature.[149]

The role of the jury is to adjudicate guilt based on the legislative definitions.[150] Under the framers' structure, the jury decides the guilt or innocence of the defendant.[151] The question is whether the accused committed the act proscribed by the statute. If the jury is convinced beyond a reasonable doubt that the accused committed the act, he is found guilty and handed over to the judge to articulate an appropriate sanction.[152]

The line of cases from *In re Winship* through *Rita*, with the exception of *Mistretta*, all focused on this discrete aspect of the structure.[153] These cases entrenched the jury as a fundamental individual right in the criminal process.[154] As a consequence, they also cemented the structural function of the jury.[155] In deciding the implicit question of whether the legislature's action was a legitimate exercise of power, the Court focused of whether the action removed responsibility from the jury.[156] Accordingly, they delineated the structural role of the jury.

The judge's role is to sentence individuals who have been convicted by a jury based on his discretion and experience.[157] If

149. *See Apprendi*, 530 U.S. at 477–84 (implying that the legislature's actions were not within its powers); *McMillan*, 477 U.S. at 83–91 (implying that the legislature had broad power to define the elements of crimes).

150. *See* Barkow, *supra* note 91, at 1015 ("The Constitution therefore provides in Article III—the Article establishing the judicial role in government—that the trial of all crimes must be by jury.").

151. *See id.* (describing the jury's unreviewable power to acquit).

152. *See* Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 743–44 (1980).

153. *See Apprendi*, 530 U.S. at 476–77; *McMillan*, 477 U.S. at 84–87; *cf. In re* Winship, 397 U.S. 358, 359–64 (1970).

154. *See* United States v. Booker, 543 U.S. 220, 230–33 (2005); *Apprendi*, 530 U.S. at 476–78.

155. By requiring that all facts of consequence be proven *to a jury*, the cases ensured that none of the other branches could usurp the jury's role of adjudicating guilt.

156. *See, e.g.*, *Apprendi*, 530 U.S. at 476–77, 490.

157. *See id.* at 481 ("[J]udges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case."); Schulhofer, *supra* note 152, at 743–44. Implicit in the traditional roles of juries and judges is a distinction between guilt and culpability. *Cf.* Weinstein, *supra* note 2, at 407–08 (discussing the distinction between guilt and culpability in relation to the Court's decision in *Mullaney v. Wilbur*). Guilt is defined as having committed the acts proscribed in the statute. *See* STITH & CABRANES, *supra* note 5, at 22 (discussing the relationship between the adjudication of guilt and proof of the elements of a crime). Culpability is the blameworthiness of the defendant. *See id.* Juries decide whether the defen-

a defendant is convicted by a jury of robbery, and, according to the legislature, robbery is punishable by anywhere from one to five years in prison, the judge is free to take into account anything relevant to the defendant's culpability in determining where, between one and five years, the sentence ought to fall. This allows the sentences to be tailored, not only to the crime, but to the criminal as well.[158] This discretion prevents the government from imposing unjust sentences because of mechanical legislative "diktats."[159]

The Court's sentencing cases provide scant support for the judge's function in the criminal context. Unlike the jury, the cases did not contemplate the judge as a fundamental aspect of the individual rights analysis.[160] And unlike the legislature, the cases did not involve a challenge to judicial action.[161] Accordingly, the decisions did not provide the same protection for the structural role of the judiciary.[162]

The framers' separation of powers was a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[163] For this system to work, each branch must be "entirely free from the control or coercive influence, direct or indirect . . . of the others."[164] That means, in the criminal arena, the judiciary must exercise its traditional

dant's actions conformed to the statutory definition. *See Apprendi*, 530 U.S. at 477 (noting the jury's role in determining whether a defendant is guilty of every statutory element of a crime). Judges, on the other hand, determined what the punishment should be, within the statutory range, based on an interpretation of the defendant's culpability. *See id.* at 482. Judges were entrusted with this responsibility because of their unique position allowing them to see all of the defendants coming through the system and to compare their actions.

158. *See* Gertner, *supra* note 21, at 528–29 ("Disparity inheres in any system that seeks to provide proportional punishment, that tailors the punishment to fit, not just the crime, but the criminal, and that purports to be a national system.").

159. *See* STITH & CABRANES, *supra* note 5, at 14, 22, 30.

160. *Cf. Apprendi*, 530 U.S. at 476–80 (focusing on the jury's role in protecting individual rights).

161. *Cf.* McMillan v. Pennsylvania, 477 U.S. 79, 83–91 (1986) (arguing that the legislature's action did not violate the defendant's Sixth Amendment or due process rights).

162. Again, the *Apprendi* line focused on the interplay between the legislatures and the juries. Although the framework used was individual rights, the result was an understanding of those branches roles in relation to one another. Because the judge was not part of the framework, his role eluded description and protection.

163. Buckley v. Valeo, 424 U.S. 1, 122 (1976).

164. Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).

role—sentencing—independently of the legislature in order to maintain the integrity of the constitutional structure and prevent the tyranny at which the structure was aimed.[165] The Court's jurisprudence has failed to protect the judiciary's role from legislative encroachment.

B. THE GUIDELINES AS A VIOLATION OF THE SEPARATION OF POWERS

The Guidelines are a violation of the structure crafted by the framers and laid out in the Constitution.[166] They are a legislative effort to exert control over individual sentences, rather than define crimes and general sentencing ranges.[167] The legislature usurps judicial power by removing the traditional discretion afforded to sentencing judges and replacing it with ministerial duties.[168] Keeping in mind the traditional roles discussed above, Justice William Rehnquist's statement in *McMillan*, that the law "operates solely to limit the sentencing court's discretion in selecting a penalty within the range,"[169] is evidence of the separation of powers violation inherent in this type of legislation.[170] The solitary role of the sentencing judge in the criminal process is to exercise his discretion and determine individual sentences.[171] Insofar as the Guidelines remove that discretion, they are a violation of the separation of powers.[172]

165. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 860 (1986) (Brennan, J., dissenting) ("The federal judicial power, then, must be exercised by judges who are independent of the Executive and the Legislature in order to maintain the checks and balances that are crucial to our constitutional structure.").

166. *See* Barkow, *supra* note 91, at 1042 ("The Guidelines therefore take constitutional power away from the judiciary, thereby increasing the power of Congress and the executive.").

167. *See* Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1946 (1988) (discussing the Commission's role as creating a system of guidelines that took into account all relevant aspects in sentencing an individual).

168. *See* Barkow, *supra* note 91, at 1042 (arguing that the SRA transferred power away from the judicial branch and towards the legislative branch).

169. McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986).

170. Granted, the statute in *McMillan* was not part of the Guidelines. But the mandatory minimums discussed there have the same constitutional problems as the Guidelines.

171. *See* Schulhofer, *supra* note 152, at 743–44.

172. *See* THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 309 ("[W]here the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."); STITH & CABRANES, *supra* note 5,

1. Separation of Powers and the Pre-*Booker* Guidelines

The Guidelines prior to *Booker* presented the same separation of power problem that was implicit in the statutory provisions in *Jones* and *Apprendi*.[173] In both *Jones* and *Apprendi*, the legislatures attempted to use "sentencing factors" to limit judicial discretion in individual sentencing, rather than to define the elements of a crime.[174] In *Jones*, the Court avoided the structural issue by interpreting the statute to define multiple crimes with distinguishing elements that must be proven to a jury.[175] This resolved any potential separation of powers conflict by interpreting the legislature's act as a definition of three separate crimes with more narrow sentencing ranges, rather than one crime with limitations on judicial sentencing discretion. The separation of powers is not offended as long as Congress defines a crime and prescribes a range based on the elements of that crime, instead of defining facts, not proven to a jury, that limit judicial discretion within that range.

In *Apprendi*, the Court took a slightly different approach. The Court effectively left New Jersey with two options: it could either stop applying the hate crimes statute at sentencing, or it could prove the elements of that statute to the jury.[176] If the state chose the former, there is no constitutional problem because the sentence would be based only on the elements proven to the jury. If the state chose the latter, similar to *Jones*, the application of the hate crimes statute would create a new statute, the elements of which must be proven to a jury.[177] In ei-

at 82 ("The federal Sentencing Guidelines . . . seek not to *augment* but to *replace* the knowledge and experience of judges.").

173. *Compare* United States v. Booker, 543 U.S. 220, 226–27 (2005), *and* Blakely v. Washington, 542 U.S. 296, 299–301 (2004), *with* Apprendi v. New Jersey, 530 U.S. 466, 496–97 (2000), *and* Jones v. United States, 526 U.S. 227, 232, 252 (1999).

174. *See Apprendi*, 530 U.S. at 468–71; *Jones*, 526 U.S. at 230–32.

175. *See Jones*, 526 U.S. at 251–52 ("In sum, the Government's view would raise serious constitutional questions on which precedent is not dispositive. Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions. This is done by construing § 2119 as establishing three separate offenses by the specification of distinct elements . . . .").

176. *See Apprendi*, 530 U.S. at 490–92, 497 (holding that the procedure challenged in the case is unacceptable, but not mandating a particular remedy).

177. Because the underlying crime in *Apprendi* was unlawful possession of a firearm, the new crime would be aggravated unlawful possession of a firearm. The elements of the aggravated crime, which must be proven to a jury, would include all of the elements of the hate crime statute. This would be comparable to the distinction between grand and petit larceny, all elements of

ther option, returning the legislature back to its constitutional role and removing it from individual sentencing resolves the separation of powers issue.[178]

The mandatory Guidelines system in place prior to *Booker* contained the same separation of powers problem. Functioning as an independent statute, the Guidelines limited judicial discretion within statutory ranges rather than defining elements of a crime.[179] The legislature commanded the sentencing judge to prescribe a particular sentence for a particular defendant based on facts not defined as elements of the underlying crime.[180] This was a *legislative exercise of judicial power*; precisely the aggrandizement that the separation of powers was intended to prevent.[181]

To be clear, this is a distinct separation of powers problem than the one addressed in *Mistretta*.[182] There, the Court considered whether Congress's delegation to the Commission empowered the judicial or executive branch to *exercise legislative power*.[183] The more pertinent question now—consistent with the framers' separation of powers concerns—is whether the Guidelines allow *Congress to exercise judicial power*.[184] The

which would have to be proven to a jury. *See id.* at 501 (Thomas, J., concurring) ("Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact . . . the core crime and the aggravating fact together constitute an aggravated crime, just as grand larceny is an aggravated form of petit larceny.").

178. *See* Redish & Cisar, *supra* note 6, at 479 (describing the legislature's role as "promulgat[ing] generalized standards and requirements of citizen behavior").

179. *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1697 (1992) ("Guidelines are administrative handcuffs that are applied to judges and no one else.").

180. *See id.* at 1696 ("The judge sentences 'by the book.' He imposes sentences in the traditional manner, after following the guidelines *and making pivotal determinations of fact*." (emphasis added)).

181. *See* THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 316 ("The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."); Redish & Cisar, *supra* note 6, at 465 ("Each branch is limited to the exercise of the power given to it, which, in turn, is exclusive of the power exercised by the other branches . . . .").

182. *Cf.* Mistretta v. United States, 488 U.S. 361, 380–85 (1989) (discussing the separation of powers in regard to Congress's delegation of authority to the Commission, not in terms of the Commission's exercise of that authority).

183. *See id.*

184. The framers were more concerned with aggrandizement of power by the legislature than by the other branches. *See* THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 317 ("[The legislative department's] consti-

questions are mutually exclusive. It is perfectly consistent to uphold *Mistretta*'s conclusion—that Congress's delegation to the Commission does not violate the separation of powers—while, at the same time, arguing that the Commission's Guidelines are in violation.[185] In other words, the creation of the Commission itself is not problematic but that the way in which *the Commission exercised the power* granted to it by Congress *is* problematic. The Court did not consider this distinction because *Booker* adopted the individual rights framework from the *Apprendi* line.[186] As a result, it did not discuss whether the remedy would implicitly resolve the structural issue in the same way as the *Jones* and *Apprendi* remedies.[187]

2. Separation of Powers and Post-*Booker* Sentencing

The *Booker* problem was the legislature's imposition of a sentencing system that is independent of the crimes tried in front of juries.[188] This, akin to the *Apprendi* line, presents both individual rights and structural problems.[189] The legislature implemented a system that divested judges of the discretion to sentence within the statutory ranges and exerted control over individual sentences. The *Booker* remedy—severing the mandatory nature of the Guidelines—does not resolve the separation of powers problem.[190] The remedial majority's decision lacks the implicit structural resolution of the *Jones* and *Apprendi* solutions.[191] Justice Breyer focused exclusively on individual

tutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask . . . the encroachments which it makes on the coördinate departments.").

185. It is necessary to recognize the distinction between Congress's grant of authority to the Commission and the way in which the Commission exercised that authority. The former is a question of the judicial exercise of legislative power while the latter questions the legislative exercise of judicial power.

186. *Cf.* United States v. Booker, 543 U.S. 220, 226–27 (2005) (dealing only with the Sixth Amendment implications).

187. *Cf. id.* at 245–49 (Breyer, J., delivering the opinion of the Court in part) (comparing the relative merits of different remedies in terms of congressional intent and individual rights but not explicitly addressing structural concerns).

188. *Cf. id.* at 226–27 (Stevens, J., delivering the opinion of the Court in part).

189. *See* Barkow, *supra* note 91, at 1042–43 (arguing that the individual rights analysis ignored the structural problems).

190. *See id.* (arguing that the Court's focus on individual rights has caused it to miss the structural problem underlying the Guidelines).

191. *Compare Booker*, 543 U.S. at 245 (Breyer, J., delivering the opinion of the Court in part) (severing the mandatory nature of the Guidelines but leav-

rights and deference to Congress while he ignored the parallel separation of powers violation inherent within the Guidelines.[192] Rather than accepting the previous successful models—*Jones* and *Apprendi*—the remedial majority opted to explore less "radical" constitutional solutions.[193] The question then, is whether the less "radical" resolution is also less effective.

Proponents of the *Booker* decision argue that the advisory Guidelines resolves the structural problem since judges are no longer forced to sentence in accordance with the narrow Guidelines ranges.[194] In a very formalistic sense, that analysis is correct. It fails to take into account, however, a deeper understanding of the motivations behind the separation of powers.[195] The structural problem with the Guidelines was not that the legislature forced judges to sentence within narrower ranges; such sentencing can be constitutional so long as the legislature defined narrower crimes and attached narrower statutory ranges.[196] Instead, the problem was that the legislature exerted control over the sentences given to individual defendants and limited judicial discretion by pressuring judges to sentence in a particular fashion.[197] The advisory Guidelines retain those more subtle violations.[198] After *Booker*, although Congress is defining crimes with broad sentencing ranges, it continues to exert pressure on judges to sentence within the Guidelines.[199]

ing the system in place as advisory), *with* Apprendi v. New Jersey, 530 U.S. 466, 492, 497 (2000) (holding that sentences in accordance with the hate crimes statute were unconstitutional unless the elements of the hate crime were proven to a jury rather than a judge), *and* Jones v. United States, 526 U.S. 227, 251–52 (1999) (interpreting a New Jersey statute as defining separate crimes rather than sentencing factors that limit judicial discretion).

192. *See Booker*, 543 U.S. at 245, 267–68 (Breyer, J., delivering the opinion of the Court in part).

193. *See id.* at 247 (discussing which solution would be the least radical).

194. *See* Weinstein, *supra* note 2, at 429–32 (suggesting that defining the Guidelines as nonmandatory may resolve the power struggle between the branches).

195. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 629–30 (1935) (discussing indirect, as well as direct, coercion as inconsistent with the separation of powers).

196. *See* McMillan v. Pennsylvania, 477 U.S. 79, 95–96 (1986) (Stevens, J., dissenting); Patterson v. New York, 432 U.S. 197, 210 (1977).

197. *Cf.* Redish & Cisar, *supra* note 6, at 465 ("Each branch is limited to the exercise of the power given to it, which, in turn, is exclusive of the power exercised by the other branches . . . .").

198. *See* Barkow, *supra* note 91, at 1043 (suggesting that the mandatory nature is only part of the larger problem—the expansion of legislative power).

199. *See id.*

Though not as overt as the mandatory Guidelines, the post-*Booker* system is still a legislative attempt to control individual sentences and, as such, is a violation of the separation of powers.[200]

3. *Rita v. United States*: Judicial Acquiescence and Legislative Coercion

The post-*Rita* system was nothing more than judicial hide-the-ball on separation of powers.[201] The Court, as well as some commentators, argue that *Booker* and *Rita* were the final step in swinging the pendulum back towards the judiciary—in effect, resolving both the individual rights and structural problems.[202] One scholar, for example, argued that the current cases are "*Mullaney*'s revenge" because they restored judicial discretion to its pre-*McMillan* level.[203] Justice Scalia's dissent in *Rita,* however, makes clear that all that has actually changed since *Mistretta* is the perception of which branch controls individual sentences.[204] That perception is misleading. The Court's decision in *Rita* simply put a gloss of judicial credence on a system that has been a violation of the separation of powers since its inception.[205]

Far from a complete solution, the *Booker* remedy at least resolved the formal separation of powers violation by eliminating mandatory compliance with the Guidelines.[206] *Rita* reintroduced part of the formal problem that *Booker* resolved. The only distinction between the Guidelines after *Rita* and the Guidelines before *Booker* was which branch of government re-

200. *See id.*

201. *Cf.* Rita v. United States, 127 S. Ct. 2456, 2476 (2007) (Scalia, J., concurring) (arguing that *Rita* reintroduces the "constitutional defect" that *Booker* was aimed at, but does so through judicial rather than legislative means).

202. *See id.* at 2474 (Stevens, J., concurring) ("I trust that those judges who had treated the Guidelines as virtually mandatory during the post-*Booker* interregnum will now recognize that the Guidelines are truly advisory."); Weinstein, *supra* note 2, at 409 (arguing that *Booker* was the final step in returning to the system supported in *Mullaney*).

203. *See* Weinstein, *supra* note 2, at 409.

204. *See Rita*, 127 S. Ct. at 2476 (Scalia, J., concurring) (arguing that the Court has reintroduced the problem that *Booker* purported to resolve, but did so under the guise of judicial authority).

205. *Cf. id.* (stating that the Court has effectively returned to the pre-*Booker* problem, without addressing the separation of powers directly).

206. *Cf.* Weinstein, *supra* note 2, at 429–32 (suggesting that defining the Guidelines as nonmandatory may resolve the power struggle between the branches).

quires compliance.[207] It is, however, a distinction without a difference.

In *Rita*, the Court effectively mandated compliance with the Guidelines.[208] *Booker*'s structural implication made clear that Congress could not force the judiciary to conform to Congress's wishes on individual sentencing.[209] *Rita*, on the other hand, indicated that *the Court* was willing to pressure the judiciary to do just that.[210] This is structural formalism gone awry. Not only is it inconsistent with the subtle understanding of the separation of powers discussed in relation to the *Booker* remedy, it is a return to a more formal violation.

After *Booker*, Congress could only *indirectly* control individual sentencing through the advisory Guidelines. After *Rita*, Congress could *directly* control individual sentencing through judicially endorsed Guidelines. The Court was acquiescing to congressional involvement in individual sentencing and handing Congress almost complete control over the traditional role of the judiciary. This is wholly inconsistent with the framers' understanding of the separation of powers.[211] Sentencing judges were not free to exercise their discretion without congressional interference simply because the Guidelines are not *legislatively* mandatory.[212] Congress continued to exert a coercive force over judicial discretion and individual sentencing.[213] So long as the Guidelines are in place, and allow sentences based on facts not proved beyond a reasonable doubt to a jury, they will present a problem for the separation of powers.[214]

207. *See Rita*, 127 S. Ct. at 2476 (Scalia, J., concurring).

208. Although not saying it explicitly, the evidence indicates that lower courts have taken *Rita* as an endorsement of the Guidelines. *See, e.g.*, United States v. Gammicchia, 498 F.3d 467, 468 (7th Cir. 2007). Judge Posner went so far as to indicate that appealing a within-Guidelines sentence could be construed as frivolous. *Id.* The Court's decision makes it much more likely that sentencing judges will comply with the Guidelines to avoid reversal or remand on appeal.

209. *Cf.* United States v. Booker, 543 U.S. 220, 226–27 (2005).

210. *Rita*, 127 S. Ct. at 2463.

211. *See* THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 309 ("[W]here the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.").

212. *See Booker*, 543 U.S. at 259, 264 (Breyer, J., delivering the opinion of the Court in part) (commanding that sentencing judges continue to give weight to the Guidelines despite their advisory nature).

213. *See id.*

214. *See* Apprendi v. New Jersey, 530 U.S. 466, 490, 497 (2000).

4. *Gall v. United States*: A Step in the Right Direction?

After *Rita*, many circuits took the Court's endorsement of the Guidelines to heart and effectively made them mandatory, by way of appellate review, in all but the most extraordinary cases.[215] Without question, *Gall* and *Kimbrough* are a step in the right direction. The focus of the opinions has moved from the Sixth Amendment concerns that dominated *Booker* and *Rita*, to the underlying issue of judicial discretion.[216] Despite the glowing rhetoric endorsing judicial discretion,[217] the Court failed to resolve the structural problem that persisted in the wake of *Booker*. Individual sentences are still tethered, albeit more loosely, to the Guidelines in violation of the separation of powers.

Although the Court claims that the Guidelines are *truly* advisory,[218] they retain an unacceptable coercive influence over the judiciary's role at sentencing. Both the requirements placed on the sentencing judges as well as the presumptions on appeal are evidence of the continued coercive force of the Guidelines.

Kimbrough and *Gall* each made clear that the Guidelines must remain the "baseline" or "starting point" for district judges in their sentencing analysis.[219] *Kimbrough* is a perfect example. The Court upheld the variance from the Guidelines *because* the sentencing judge followed the proper analytical procedure.[220] He calculated the appropriate Guidelines sen-

215. *See, e.g.*, United States v. Gammicchia, 498 F.3d 467, 468 (7th Cir. 2007) (suggesting that a sentence within the Guidelines has a presumption of reasonableness and that the appeal in this case was "frivolous").

216. *See* Gall v. United States, 128 S. Ct. 586, 605 (2007) (Alito, J., dissenting) ("It is telling that the rules set out in the Court's opinion in the present case have nothing to do with juries or factfinding and, indeed, that not one of the facts that bears on petitioner's sentence is disputed. What is at issue, instead, is the allocation of authority to decide issues of substantive sentencing policy, an issue on which the Sixth Amendment says absolutely nothing.").

217. *See id.* at 596–97 (Stevens, J., majority opinion) (discussing the sentencing judge's role of weighing all the appropriate factors, not just the Guidelines, when imposing a sentence); Kimbrough v. United States, 128 S. Ct. 558, 570–75 (2007) (rejecting the prosecution's argument that sentencing judges do not have discretion on the issue of 100-to-1 crack/cocaine disparity).

218. *See Gall*, 128 S. Ct. at 594; *Kimbrough*, 128 S. Ct. at 570.

219. *See, e.g.*, *Gall*, 128 S. Ct. at 596 ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").

220. *See Kimbrough*, 128 S. Ct. at 574–75 (upholding the district court's sentence because the judge followed the correct procedure in varying from the Guidelines).

tence and justified his deviation therefrom.[221] This is an example of both the progress that has been made and the steps that still remain to be taken. Justice Ginsburg recognized the institutional competence of the sentencing judge, and the judiciary as a whole, in matters of individual sentencing.[222] The decision does not, however, give the sentencing judge the complete discretion contemplated in the framers' separation of powers.[223] Although the Court makes clear that deviations from the Guidelines are acceptable, judicial discretion is still tethered to, and limited by, the Guidelines.[224] This is a step forward, but is not the final step necessary to resolve the structural issue.

The coercive influence of the Guidelines is also apparent on appeal. Although *Gall* and *Kimbrough* make clear that below-Guidelines sentences do not have to be justified by extraordinary circumstances,[225] those sentences are not granted the presumption of reasonableness that *Rita* bestowed on within-Guidelines sentences.[226] This disparity is stark proof of the congressional thumb-pressing in favor of within-Guidelines sentences. Again, this is a congressional exercise of judicial power over individual sentences and is inconsistent with a meaningful separation of powers.[227]

Despite some flowery rhetoric, neither *Gall* nor *Kimbrough* did anything beyond reaffirming the Court's decision in *Booker*. The cases stated unequivocally that the Guidelines are *truly* advisory.[228] But that is nothing more than a restatement of the remedial majority's position from *Booker*.[229] As a result, neither *Gall* nor *Kimbrough* resolved the more subtle separation of

221. *See id.* at 575–76.

222. *See id.* at 574–75 (arguing for deference to the decisions of district judges because of their particular "institutional strengths").

223. *Cf. id.* at 574 (stressing the continued importance of the Guidelines as "benchmark[s]" that represent the compiled wisdom of the Commission).

224. *See id.*

225. *See, e.g.*, Gall v. United States, 128 S. Ct. 586, 595 (2007).

226. *Compare* Rita v. United States, 127 S. Ct. 2456, 2459 (2007) (holding that circuits may apply a presumption of reasonableness to within-Guidelines sentences), *with Gall*, 128 S. Ct. at 597 (rejecting a presumption of unreasonableness for outside-Guidelines sentences, but failing to endorse the same presumption of reasonableness that *Rita* granted to within-Guidelines sentences).

227. *Cf.* Barkow, *supra* note 91, at 1043 (arguing that the mandatory nature is only part of the larger problem—the expansion of legislative power); Redish & Cisar, *supra* note 6, at 465 ("Each branch is limited to the exercise of the power given to it, which, in turn, is exclusive of the power exercised by the other branches . . . .").

228. *See Gall*, 128 S. Ct. at 594; *Kimbrough*, 128 S. Ct. at 564.

229. *See* United States v. Booker, 543 U.S. 220, 245 (2005).

powers violations that persisted after *Booker*. To the Court's credit, these cases did repudiate some of the formal separation of powers violations that certain circuits had endorsed in the wake of *Rita*. The Court made clear that neither the legislature nor the circuit courts could *mandate* compliance with the Guidelines. This, however, leaves the sentencing system in the same place that it was after *Booker*; Congress continues to exert pressure on judges to sentence within the Guidelines. Though not as overt as the mandatory Guidelines, the current system, like the post-*Booker* system, is still a legislative attempt to control individual sentences and, as such, is a violation of the separation of powers.

5. Necessity of Addressing the Separation of Powers

The Court's recent decisions—*Rita*, *Gall*, and *Kimbrough*—show a recognition of the structural problem, but, rather than address the issue, the Court decided to use sleight of hand to jerry-rig a solution.[230] Language in both *Booker* and *Rita* indicates that the Justices are aware of the underlying structural problem.[231] Unfortunately, the Court disregarded the separation of powers and attempted to use a narrow individual rights analysis to solve a broader problem.[232] Assuming that the Court is aware of the issue, it is important to consider whether there is a compelling reason *why* it has chosen not to address the structural concerns.

One possibility is that the Court considers the individual rights protections of the Bill of Rights sufficient protection against governmental tyranny.[233] Over the last fifty years, the Court created a robust system for protecting defendants

230. *See Rita*, 127 S. Ct. at 2476 (Scalia, J., concurring) ("If a sentencing system is permissible in which some sentences cannot lawfully be imposed by a judge unless the judge finds certain facts by a preponderance of the evidence, then we should have left in place the compulsory Guidelines that Congress enacted, instead of imposing this jerry-rigged scheme of our own.").

231. *See id.* at 2477 ("But there is a fundamental difference, one underpinning our entire *Apprendi* jurisprudence, between facts that *must* be found in order for a sentence to be lawful, and facts that individual judges *choose* to make relevant to the exercise of their discretion.").

232. *See* Barkow, *supra* note 91, at 1042–43.

233. *See* Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("In recent years, perhaps, we have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights."); Barkow, *supra* note 91, at 1031–32 (discussing why the separation of powers is underenforced in the criminal arena).

through the Bill of Rights.[234] As long as the system is functioning correctly, rigid enforcement of the separation of powers is superfluous because the individual rights provisions are ultimately aimed at the same evil—government invasion of individual liberty.[235] Unfortunately, robust enforcement of the Bill of Rights does not render the separation of powers impotent.[236] The rights encoded in the Bill of Rights are judicial process rights. If the legislature is allowed to exercise judicial power, in violation of the separation of powers, there is no assurance that the judicial process rights would apply.[237] Consequently, a violation of the separation of powers could result in individual rights violations that bypass the judicial process.[238] The argument that the separation of powers is less important because of the Bill of Rights misunderstands the primacy of the separation of powers in the framers' structure.

Another possibility for why the Court has not addressed the structural concerns is that they have not been raised in the challenges. This is related to the first possibility. One consequence of the Court's robust individual rights analysis is that defendants came to rely on the Bill of Rights for their constitutional challenges.[239] All of the Guidelines challenges were based on the Sixth Amendment or Due Process Clause rather than separation of powers principles.[240] Nevertheless, this does not relieve the Court of its duty to resolve constitutional infirmities. The Court recognizes the ability of appellate courts to raise issues that were not addressed by the parties sua

234. *See* Barkow, *supra* note 91, at 1032.

235. *See id.* at 1031–32 ("[I]f the individual rights protections serve the same function as the [separation of powers] . . . there would not be the same need for greater enforcement of the separation of powers in the criminal arena.").

236. *See Clinton*, 524 U.S. at 450 (Kennedy, J., concurring) ("It would be a grave mistake, however, to think a Bill of Rights in Madison's scheme then or in sound constitutional theory now renders separation of powers of lesser importance.").

237. *See* Barkow, *supra* note 91, at 1033 ("[I]f the legislature were permitted to adjudicate criminal matters, none of the protections that apply to Article III courts would apply, nor would the legislature be subject to the rules of judicial process.").

238. *See id.* at 1033 ("[I]f Congress were allowed to have judicial powers, the protections associated with judicial process could be bypassed.").

239. *See id.* at 1032.

240. *See* Rita v. United States, 127 S. Ct. 2456, 2465–66 (2007); United States v. Booker, 543 U.S. 220, 226–27 (2005); Blakely v. Washington, 542 U.S. 296, 298 (2004).

sponte.[241] If there is ever a time when sua sponte decision making is appropriate, it is when the structural integrity of the Constitution is at stake.

A final possibility is that the Court is dodging the separation of powers to avoid revisiting *Mistretta*, which appears to be settled law. As discussed earlier, however, the Court can attend to the structural problems raised by the Guidelines without disrupting *Mistretta*. *Mistretta* did not address the separation of powers concern at issue here—the *legislative exercise of judicial power*.[242] And the structural concern at issue in *Mistretta*—the executive and judicial exercise of legislative power—need not be addressed in this context. For that reason, the Court's apprehension about addressing the separation of powers because of *Mistretta* is unfounded.

Regardless of the rationale, the Court's decision to focus solely on the individual rights protections created a cumbersome system that does not fully resolve the constitutional problems.[243] The Court is attempting to tweak a fundamentally flawed system rather than trashing a failed experiment and beginning anew. Although this measured, deferential approach may be effective, or even laudable, in certain situations, it is unacceptable when dealing with the criminal process. The criminal process is too vulnerable to abuse and tyranny to allow structural violations to persist.[244] Congress, through the Guidelines, has stripped the judiciary of its role in the criminal process.[245] The Court must step forward and reassert judicial control over sentencing. "[A] mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[246]

241. *See* Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 287 (2002) (citing U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439 (1993)).

242. *Cf.* Mistretta v. United States, 488 U.S. 361, 380–85 (1989) (dealing with the delegation of legislative power to the Commission and the placement of the Commission in the judicial branch).

243. *See* Barkow, *supra* note 91, at 1031–33, 1042–43.

244. *See id.* at 1031–34.

245. *See* STITH & CABRANES, *supra* note 5, at 83 ("The judge's prescribed role is largely limited to factual determinations and rudimentary arithmetic operations.").

246. THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 321.

III. ALTERNATIVES TO THE FEDERAL SENTENCING GUIDELINES

Booker and *Rita* proved the insufficiency of the individual rights analysis for dealing with the more fundamental separation of powers problems that underlie the Guidelines.[247] This Part returns to the issue in *Booker* and evaluates the remedial options with an eye toward the separation of powers. It lists the five reasonable alternatives to the Guidelines and discusses their implications for separation of powers, concluding that only two resolve the structural problems inherent in the Guidelines. It then contrasts the remaining two solutions and concludes that the differences between them are matters of public policy, rather than constitutional law. Finally, this Part proposes that the critical decision between the remaining options ought to be left to Congress, as policymaking is a realm traditionally reserved to the legislature.

A. CONCEIVABLE SOLUTIONS AND THE SEPARATION OF POWERS IMPLICATIONS

The Court has—either implicitly or explicitly—recognized five conceptual alternatives to the Guidelines. Each of these five solutions has slightly different implications for the separation of powers analysis. The first option is to return to a mandatory Guidelines system. Although a conceptual possibility, this is not a serious option after *Apprendi* or the constitutional majority's decision in *Booker*.[248] As discussed above, the pre-*Booker* Guidelines were inconsistent with any robust understanding of the separation of powers.[249] Retaining the pre-*Booker* Guidelines is not a viable solution.[250] It is mentioned here only as a reference point by which to measure the other options.

The "undefined approach" is the second possible solution. Justice Stevens described this approach in his *McMillan* dis-

247. *Cf.* Rita v. United States, 127 S. Ct. 2456, 2463 (2007) (discussing the rationale behind the presumption of reasonableness for sentences within the Guidelines); United States v. Booker, 543 U.S. 220, 226–27 (2005) (analyzing the Guidelines in light of the Sixth Amendment); Barkow, *supra* note 91, at 1042–43 (discussing the failure of *Booker* to address the separation of powers issue).

248. *Cf. Booker*, 543 U.S. at 226–27; Apprendi v. New Jersey, 530 U.S. 466, 497 (2000).

249. *See* Barkow, *supra* note 91, at 1042–43.

250. *Booker*, 543 U.S. at 232.

sent.[251] Under this system, the legislature defines very basic crimes punishable by extremely wide sentencing ranges.[252] Within that range, Congress defines mitigating factors or affirmative defenses that the judge must take into account. Through those mitigating factors and affirmative defenses, Congress exerts some control over the sentences given to the defendants.[253] This is similar to the system the Court approved in *Patterson*.[254]

Removing the sections of the statute that render the Guidelines mandatory is the third option.[255] The remedial majority in *Booker* endorsed this approach.[256] The Guidelines remain in place, but are not binding on sentencing judges.[257] The judge is instructed to take the Guidelines into account when making his ruling but is no longer forced to comply.[258]

Both of these possibilities—the "undefined approach" and the advisory Guidelines—are more effective than the retention of the pre-*Booker* system, but they fail to resolve the structural problems. They are attempts to resolve the individual rights issue while side-stepping the separation of powers issue. Under these systems, the Sixth Amendment and the Due Process Clause are satisfied since the elements of the crime are proven to a jury.[259] But the legislature still controls, through influence and judicial acquiescence, the individual sentences given out to defendants.[260] Without question, Congress's influence is less heavy-handed than under the mandatory Guidelines. Neverthe-

251. *See* McMillan v. Pennsylvania, 477 U.S. 79, 100–04 (1986) (Stevens, J., dissenting).

252. *See id.*

253. *See id.*

254. Patterson v. New York, 432 U.S. 197, 210–11 (1977) (upholding New York's murder statute despite its lack of a mens rea component). Technically, the provision in *Patterson* was an affirmative defense rather than a mitigating factor, but the comparison is still effective. The point is that the legislature is defining crimes with broad sentencing ranges but indicating that certain facts ought to decrease the defendants' exposure to punishment.

255. *See Booker*, 543 U.S. at 245 (Breyer, J., delivering the opinion of the Court in part) ("We conclude that this provision must be severed and excised . . . .").

256. *See id.*

257. *See id.* at 264 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.").

258. *Id.*

259. *See* Apprendi v. New Jersey, 530 U.S. 466, 497 (2000); *In re* Winship, 397 U.S. 358, 385–86 (1970).

260. *See* Barkow, *supra* note 91, at 1042–43.

less, subtle legislative coercion of judicial authority is no less a violation of the separation of powers.[261]

The fourth solution is to hold the Guidelines unconstitutional and scrap the entire system.[262] This is a return to the pre-Guidelines sentencing system of *Mullaney*, whereby Congress defines crimes with a range of possible sentences and the sentencing judge has discretion to sentence anywhere within that range.[263] This is no different from the system in place prior to *McMillan*.[264]

The fifth and final option, the "jury-proof Guidelines," retains the mandatory nature of the Guidelines but requires that all facts necessary to determine the sentence under the Guidelines be proven to a jury.[265] Justice Stevens presented this solution in his *Booker* dissent.[266] Conceptually, this is no different than complete invalidation because the legislature is defining facts that, if proved to a jury, trigger a punishment range.[267]

An example will prove helpful. Assume, for the sake of this hypothetical, that a mandatory guidelines system is in place. Assume that Congress has defined larceny as "the unlawful taking of chattels" and prescribed a maximum punishment of ten years in prison. Assume that the guidelines instruct the sentencing judge that, if he finds at sentencing that the chattel is worth more than fifty dollars, then the appropriate punishment is between five and ten years. Finally, assume that the

261. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 629–30 (1935) (discussing whether indirect, as well as direct, coercion is inconsistent with the separation of powers).

262. *See id.*

263. *But see* Weinstein, *supra* note 2, at 429–30 (arguing that a complete invalidation is unnecessary to return to a pre-*McMillan* sentencing scheme).

264. *See generally* Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975).

265. *See* United States v. Booker, 543 U.S. 220, 284–85 (2005) (Stevens, J., dissenting) ("I would simply allow the Government to continue doing 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.").

266. *See id.*

267. *See id.* at 284–85 (Stevens, J., dissenting) (arguing that jury fact-finding under the Guidelines passes the requisite constitutional tests). In practice, this system would be slightly odd, but not actually any different from the first option. It would make the factors in the Guidelines elements of crimes that are independently defined in other statutes. To discover what elements must be proven, the prosecutor would be forced to look not only at the underlying statute but also at the Guidelines.

Court holds the system unconstitutional and is fashioning a remedy.[268]

Under the fourth solution—complete invalidation—the guidelines would be meaningless. The definition of larceny would be "unlawful taking of chattels" and the maximum punishment would be ten years in prison. The judge would be free to sentence a man convicted of larceny to anywhere between zero and ten years depending on the judge's knowledge and experience.

Under the jury-proof Guidelines the definition of larceny would change as a result of the guidelines. There would effectively be two separate crimes: "Larceny of chattels worth less than fifty dollars," with a punishment range of zero to five years, and "Larceny of chattels worth more than fifty dollars," with a punishment range of five to ten years. If the jury convicted a man of the latter, the judge would then be free to sentence him to anywhere between five and ten year depending on the judge's discretion.

Both of these options have positive implications for the structural problems inherent in the Guidelines. They resolve the separation of powers issue by placing the legislature back in the position of defining crimes and sentencing ranges instead of limiting judicial discretion within a range.[269] Once the jury determines that the defendant committed the proscribed act, the judge is free to exercise his discretion and sentence the individual defendant anywhere within the statutory range. Congress's action in both of these solutions defines crimes and attaches punishment ranges but does not limit judicial discretion within those ranges.

Given that these solutions—complete invalidation and the jury-proof Guidelines—are the only alternatives that resolve the structural issues, the next step is to contrast the relative merits of complete invalidation against those of a mandatory Guidelines system requiring jury proof of the relevant facts.

B. COMPLETE INVALIDATION VERSUS JURY-PROOF GUIDELINES

Structurally, these two solutions are indistinguishable. It is, therefore, necessary to examine the relative merits of these options on factors above and beyond the separation of powers.

268. This is precisely the issue that was presented to the remedial majority in *Booker*. *Id.* at 246 (Breyer, J., delivering the opinion of the Court in part).

269. *See* Redish & Cisar, *supra* note 6, at 479 (defining the legislative role).

The following discussion examines these alternatives in light of the individual rights concerns, the opportunity for sentencing disparity, and the ease of implementation. While neither alternative is perfect, they are both superior to the current system because—as this Section will make clear—their problems do not arise from the Constitution. This Section concludes that the Court—in accordance with the separation of powers—must allow Congress to make the decision between these two options because the decision rests on policy determinations, rather than on constitutional analysis.

1. Complete Invalidation: The Return to *Mullaney*

Employing the rhetoric of the remedial majority, invalidating the Guidelines outright and returning to a pre-1984 sentencing structure is the most "radical" resolution.[270] There is no question that this option resolves the individual rights concerns of the Sixth Amendment and the Due Process Clause. The Court has consistently upheld the traditional sentencing system in the face of individual rights challenges.[271] According to *Apprendi*, the individual rights provisions entitle the defendant to proof beyond a reasonable doubt to a jury of every element of a crime.[272] This would not be an issue with a return to the pre-Guidelines system. Returning to the larceny example, under the complete invalidation solution, the elements of larceny are that a chattel was taken and that the taking was unlawful. Before being convicted, the accused would be entitled to proof beyond a reasonable doubt to a jury on both of those elements. This fully satisfies the individual rights concerns of the Sixth Amendment and the Due Process Clause.

With the structural and individual rights concerns alleviated, the question is one of disparity.[273] There is little ques-

270. *See* United States v. Booker, 543 U.S. 220, 245–47 (2005) (Breyer, J., delivering the opinion of the Court in part) (discussing which remedy would deviate least radically from Congress's intent).

271. *See, e.g.*, Patterson v. New York, 432 U.S. 197, 216 (1977) (upholding a conviction under the New York murder statute on the grounds that the New York system was consistent with the Due Process Clause).

272. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

273. Disparity is particularly relevant in this context because of the role it played in leading to the creation of the Guidelines in the first place. Given that sentencing disparity was a principal motivation behind the Guidelines, it is intuitive to prefer an alternative that minimizes the perceived problem.

tion that the traditional sentencing system is susceptible to disparities in sentencing.[274] As long as judges are allowed discretion to sentence within a statutory range, there will be disparities between the sentences imposed on individual defendants.[275] This is, however, not necessarily a negative. A primary justification for judicial discretion is to ensure proportionality in sentencing.[276] For centuries, the American criminal justice system recognized that no two defendants are alike and that the sentence ought to be tailored to each specific case.[277] It is, therefore, not entirely clear that reducing sentencing disparity is a laudable goal.[278] It is possible that the mechanical application of uniform sentences to all defendants, regardless of individual circumstances, will lead to as many, if not more, unjust sentences than will judicial discretion.[279] As such, disparate sentences may actually be more "just" than the uniform sentences promoted by the Guidelines.[280] If this is the case, it is difficult to justify support for the Guidelines.

This is true, however, only if the disparity is not a result of *illegitimate* sentencing factors such as race or social class. This was the primary criticism of the traditional model prior to the Guidelines.[281] The studies upon which those criticisms were based, however, have been called into question.[282] Based on

274. *See* Stith & Koh, *supra* note 18, at 228–29 (surveying the criticisms levied against the traditional model, particularly those regarding disparity in sentencing).

275. *See* Gertner, *supra* note 21, at 528–29 ("Disparity inheres in any system that seeks to provide proportional punishment, that tailors the punishment to fit, not just the crime, but the criminal, and that purports to be a national system.").

276. *See id.*

277. *See* STITH & CABRANES, *supra* note 5, at 104–06 (arguing that uniformity in sentencing is not consistent with just sentencing).

278. *Id.*

279. *See id.* at 105 ("We reject the premise of sentencing reformers that *uniform* treatment mean *equal* treatment, and thus that judicial discretion . . . necessarily denies justice.").

280. *See id.* ("A *just* sentence must also be a reasoned sentence and a proportional sentence, imposed through procedures that comport with basic understandings of fairness and Due Process of law in a constitutional scheme of checks and balances.").

281. *See* Breyer, *supra* note 20, at 4–5 (discussing unwarranted disparity as a motivating factor behind the Guidelines); *see also* STITH & CABRANES, *supra* note 5, at 104 ("Reduction of 'unwarranted sentencing disparities' was a—probably *the*—goal of the Sentencing Reform Act of 1984.").

282. *See* STITH & CABRANES, *supra* note 5, at 106–12 (criticizing the pre-Guidelines empirical research on sentencing disparity and factors such as race).

more current research, it does not appear that the sentencing disparities were correlated with the illegitimate factors.[283]

Even if judges did not take illegitimate factors into account, it is not beyond their power to do so under the traditional system. The issue, then, is whether a system can be put in place that is consistent with the traditional model but also *ensures* that judges do not consider illegitimate factors while exercising their discretion. While crafting such a system is beyond the scope of this analysis, there is no reason to believe that it is an insurmountable obstacle. It is worth pointing out, however, that *illegitimate* disparity is the largest potential drawback of the traditional sentencing model.[284]

The final issue is the ease of implementation. This is, on its face, a selling point for the traditional model. The system was in place for over a century in this country and returning to it would require nothing more than the invalidation of the Guidelines.[285] Opponents of the traditional model have advanced various arguments on this issue.[286] The primary arguments are that judges do not want the responsibility associated with broad discretion[287] or that they lack any special competence in the area of sentencing.[288] These objections, however, do not carry significant weight.

First, sentencing is intended to be a solemn, difficult affair that the Constitution entrusted to the judiciary.[289] Our system does not allow Congress to avoid difficult or distasteful policy decisions simply because it does not want the responsibility. In the same way, it must not allow judges to shirk their sentenc-

283. *See id.* at 111 ("In particular, every study of the *federal courts* in the pre-Guidelines era found that *race* was *not* a significant factor in explaining variation in sentences.").

284. *See id.*

285. *See* United States v. Booker, 543 U.S. 220, 245–50 (2005) (Breyer, J., delivering the opinion of the Court in part).

286. *See* Gertner, *supra* note 21, at 537–38 (describing judges' reactions to the prospect of abandoning the Guidelines).

287. Alex Kozinski, *Carthage Must Be Destroyed*, 12 FED SENT'G REP. 67, 67 (2002) ("I found sentencing traumatic in the pre-Guidelines days. . . . Somehow I felt it was wrong for one human being to have that much power over another. . . . Sentencing ranges [under the Guidelines] are narrow and presumably take into account all of those factors I don't feel competent to weigh . . . .").

288. *See* Gertner, *supra* note 21, at 537–38 (describing judges' reactions to the prospect of abandoning the Guidelines).

289. *See* Oberdorfer, *supra* note 10, at 14 (describing sentencing prior to the Guidelines as a "serious and solemn ceremony").

ing duty because it is unpleasant. Judicial sentencing ensures that the government contemplates the decision to divest a person of his liberty in each and every case.[290] Forcing an agent of the government—the judge—to stand eye-to-eye with the defendant and make a decision regarding the length of imprisonment injects a level of individuality into the system.[291] While it is certainly easier for a judge to apply the Guidelines mechanically, that comes with the risk of a more fundamentally unfair sentence from the failure to take into account each person's independent circumstances.[292]

Second, it is difficult to believe that judges have somehow lost the ability to exercise their discretion since 1984.[293] To argue that judges are not competent to decide appropriate sentences flies in the face of two centuries worth of criminal jurisprudence.[294] There is no reason to believe that judges are any less competent at sentencing now than they were prior to the implementation of the Guidelines.

On balance, a return to the traditional sentencing model is an attractive solution. Not only does it resolve the individual rights concerns, it is also a simple solution to implement. The question for Congress is what level of disparity is acceptable as a matter of public policy. Again, this is not a question within the particular competence of the judiciary.

2. Jury-Proof Guidelines

The jury-proof Guidelines proposed by Justice Stevens are a less radical option than complete invalidation.[295] Consistent

290. *See* STITH & CABRANES, *supra* note 5, at 78.

291. *See id.* ("The judge's power—duty—to weigh *all* of the circumstances of the particular case, and *all* of the purposes of criminal punishment, represented an important acknowledgement of the moral personhood of the defendant and the moral dimension of crime and punishment."); Gertner, *supra* note 21, at 538 ("[Sentencing] is about proportionality; it requires individualizing so that the punishment fits the crime.").

292. *See* STITH & CABRANES, *supra* note 5, at 105 (defining a just sentence as one that is proportional, reasoned, and procedurally correct); Oberdorfer, *supra* note 10, at 16 (describing the inherent risk of unfair sentences associated with the rigidity of the Guidelines).

293. *See* Gertner, *supra* note 21, at 538 (rejecting arguments that judges are somehow incompetent to determine appropriate sentences).

294. *See id.* at 527 (discussing the pre-Guidelines conception of judges as "expert[s]" in sentencing).

295. Justice Breyer argued in *Booker* that this was a more radical departure than advisory Guidelines. *See* United States v. Booker, 543 U.S. 220, 246–49 (2005) (Breyer, J., delivering the opinion of the Court in part). But, because an advisory Guidelines system fails to address the separation of powers,

with the traditional model, there is little doubt that this system would resolve the individual rights problems.[296] In fact, this system was originally conceived with those problems in mind.[297] Under the individual rights analysis, the question is whether all facts necessary to impose a particular punishment have been proven to a jury beyond a reasonable doubt.[298] The jury-proof Guidelines are perfectly consistent with those individual rights concerns. Returning again to the larceny example, under the jury-proof Guidelines there are two separate crimes: "Larceny of chattels worth more than fifty dollars" and "Larceny of chattels worth less than fifty dollars." This system imposes an additional element—the value of the chattel—that must be proven to a jury. Before being convicted, a defendant would be entitled to proof beyond a reasonable doubt to a jury of all of the elements, including the value of the chattel. Like the complete invalidation system, this fully satisfies the individual rights concerns of the Sixth Amendment and the Due Process Clause. The jury-proof Guidelines would undoubtedly create more specific crimes with narrower sentencing ranges, but that is irrelevant to the individual rights question.[299]

Whereas the traditional model raises concerns about disparity, the jury-proof Guidelines err on the side of consistency.[300] Incorporating the jury into the Guidelines system would, as the larceny example suggested, effectively create new crimes

it is not an acceptable option.

296. Even the remedial majority in *Booker* recognized that jury fact-finding was a sufficient solution to the constitutional issues. *See id.* (accepting Stevens' jury-proof system as a possible solution, but rejecting it on prudential grounds).

297. *See id.* at 284–85 (Stevens, J., dissenting) (arguing that the appropriate solution to the individual rights concerns arising from the Guidelines is to require jury fact-finding for sentencing).

298. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

299. The legislature is free, within the confines of the Constitution, to define crimes and sentencing ranges as it sees fit. *See* Redish & Cisar, *supra* note 6, at 479–80. There is no due process or Sixth Amendment problem if the legislature decides to divide larceny into two separate crimes, petit and grand larceny, with more narrow sentencing ranges attached to each, so long as the element that distinguishes the two is proven to a jury.

300. *See* United States v. Booker, 543 U.S. 220, 296–97 (2005) (Stevens, J., dissenting) (arguing that Congress's intent to minimize disparities is the centerpiece of this system).

with much narrower sentencing ranges.[301] This limited range for judicial discretion would make it nearly impossible for the disparities that occurred in the 1970s to repeat themselves. Certainly disparities could arise, just as they did under the traditional model. But the scope of the disparity would likely be smaller because the ranges available under the Guidelines are extremely narrow compared to the traditional sentencing ranges.

The difficulty of implementation is the major drawback of this system.[302] The remedial majority in *Booker* cited this as one of the main reasons it decided to forego this alternative.[303] Justice Breyer argued that this system would place a massive administrative burden on the prosecution and the jury.[304] There is credence to this argument. Requiring that all elements of a Guidelines sentence be proven to a jury forces the prosecutor to be very specific with the crime charged and proven.[305] It also complicates the jury's decision.[306] Justice Stevens responded to these arguments in his *Booker* dissent.[307] He argued first that the parade-of-horribles that Justice Breyer envisioned was unlikely to occur with any frequency.[308] His second, and more convincing argument, was that "the Constitution does not permit efficiency to be [the] primary concern."[309] The jury is rarely, if ever, the most efficient means of adjudicating guilt, but it is the system chosen by the framers and ingrained in the Constitution.[310]

301. *See id.*

302. *See id.* at 254 (Breyer, J., delivering the opinion of the Court in part).

303. *See id.* ("Third, the sentencing statutes, read to include the Court's Sixth Amendment requirement, would create a system far more complex than Congress could have intended.").

304. *See id.* (describing the procedural difficulties that might face juries and prosecutors under the "jury-proof Guidelines").

305. *See id.* ("How would courts and counsel work with an indictment and a jury trial that involved not just whether a defendant robbed a bank but also how?").

306. *See id.* at 254–55 (indicating all of the minute factual matters that the jury would have to decide and arguing that this would unduly hamper the criminal system).

307. *See id.* at 288–89 (Stevens, J., dissenting).

308. *See id.* (arguing that those procedural difficulties would only be implicated in a "small number" of cases).

309. *Id.* at 289 (citing Blakely v. Washington, 542 U.S. 296, 312–13 (2004)).

310. *See* Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) ("[The jury trial] has never been efficient; but it has always been free."); Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention

That argument carries weight against the advisory Guidelines adopted by the remedial majority but not against complete invalidation. The argument that the advisory Guidelines should be adopted instead of the jury-proof Guidelines because they are more efficient and easier to implement can easily be trumped by arguing that the advisory Guidelines are a violation of the separation of powers. That argument doesn't work against complete invalidation. Because they are on equal constitutional footing, the efficiency and ease of implementation of the two systems can be directly compared. It is not, however, the Court's role to make that decision.

In the end, the differences between the traditional model and the jury-proof Guidelines—namely, sentencing disparity and administrative burdens—are matters of public policy that Congress rather than the judiciary ought to decide. Both alternatives resolve the structural and individual rights concerns. Constitutionally, the options are indistinguishable. The differences arise in the discussion of disparity and the burdens of implementation, which are properly within the purview of Congress. Congress must weigh the importance of uniform sentences against the added administrative burdens associated with retaining the Guidelines. The most the Court can do is hold the Guidelines unconstitutional and make the acceptable alternatives clear for Congress. The ultimate decision, however, must lie in the hands of a politically accountable branch of government.

CONCLUSION

Defendants have attacked, and the Supreme Court has thoroughly examined, the individual rights implications of the Federal Sentencing Guidelines. Unfortunately, the Court has overlooked the parallel structural violation. The unique solution created in *Booker* and *Rita*, however, exposed the hidden separation of powers issue. This Note demonstrates that the Guidelines are a legislative attempt to control individual sentencing and a legislative exercise of judicial authority in violation of the separation of powers. So long as the Guidelines remain in place, without requiring proof before a jury, they will take power away from the judiciary and increase the power of Congress in violation of the separation of powers.

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of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.").

The Court's sentencing jurisprudence failed to take the separation of powers into account and, as a result, created insufficient remedies to the constitutional problems underlying the Guidelines. The individual rights analysis derived from the *Apprendi* line of cases has proven inadequate to deal with the structural concerns presented by the Guidelines. To fully resolve the constitutional issues, the Court must acknowledge the separation of powers and incorporate it into the analysis.

That does not mean that the Guidelines must necessarily be abolished. The Court can present Congress with constitutionally sound alternatives to the Guidelines. Presenting this choice to Congress would treat the Guidelines in the same way that the Court has treated prior legislative actions. It is possible for the Court to resolve all of the constitutional issues while at the same time allowing Congress the flexibility to promote whichever constitutional policy it so chooses.