

dering his rights with an insufficient appreciation of what those rights are and how the decision to respond to interrogation might advance or compromise his exercise of those rights.”<sup>93</sup>

Thus, just as the Fifth Amendment’s key concern — the coercive pressures of custody — merits a rule protecting voluntariness in the Fifth Amendment context, the Sixth Amendment’s key concerns — the coercive pressures and legal complexities of criminal adjudication — merit a rule protecting voluntariness and knowingness in the Sixth Amendment context. The Court should not be less attuned to the objects of concern under the Sixth Amendment than those under the Fifth Amendment, especially when the Sixth Amendment right to counsel is in the text of the Constitution.<sup>94</sup>

5. *Sixth Amendment — Sentencing — Factfinding in Sentencing for Multiple Offenses.* — Seeking “to give intelligible content to the right of jury trial,”<sup>1</sup> the Supreme Court in *Apprendi v. New Jersey*<sup>2</sup> held that “any fact [other than recidivism] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>3</sup> Commentators, however, have found that instead of proving intelligible, the Court’s sentencing jurisprudence has been “confusing” and “incoherent.”<sup>4</sup> The *Apprendi* line of cases, they charge, has failed to provide a “sensible” principle for allocating factfinding between judge and jury.<sup>5</sup>

Last Term, in *Oregon v. Ice*,<sup>6</sup> the Court again tried to articulate *Apprendi*’s reach, holding that, in light of historical practice and respect for state sovereignty, the Sixth Amendment does not prohibit states

<sup>93</sup> *Id.* The evidence at issue in *Montejo* was a letter Montejo wrote to the victim’s wife at the police’s suggestion. It is doubtful that Montejo recognized that his waiver would allow police to encourage him to write an inculpatory letter or that such a letter could be used against him.

<sup>94</sup> Justice Scalia has consistently opposed any attempt to protect defendants based on a judgment that an apparently “free” choice has been coerced, whether under the Fifth or Sixth Amendment. He has described both *Edwards* and *Minnick* as “explicable . . . only as [efforts] to protect suspects against what is regarded as their own folly.” *Minnick v. Mississippi*, 498 U.S. 146, 166 (1990) (Scalia, J., dissenting). He has expressed his strong belief in respecting individual autonomy in other contexts, noting the importance of the “supreme human dignity of being master of one’s fate rather than a ward of the State — the dignity of individual choice.” *Indiana v. Edwards*, 128 S. Ct. 2379, 2393 (2008) (Scalia, J., dissenting). It is Justice Kennedy who distinguishes between the Fifth and Sixth Amendment contexts. Compare *Texas v. Cobb*, 532 U.S. 162, 174–77 (2001) (Kennedy, J., concurring), with *Minnick*, 498 U.S. 146 (Kennedy, J.).

<sup>1</sup> *Blakely v. Washington*, 542 U.S. 296, 305 (2004).

<sup>2</sup> 530 U.S. 466 (2000).

<sup>3</sup> *Id.* at 490.

<sup>4</sup> Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 37 (2006); see also Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 776 (2008); Kevin R. Reitz, *The New Sentencing Consensus: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1088 (2005).

<sup>5</sup> Jonathan F. Mitchell, *Apprendi’s Domain*, 2006 SUP. CT. REV. 297, 298.

<sup>6</sup> 129 S. Ct. 711 (2009).

from assigning to judges the factfinding necessary to impose consecutive, rather than concurrent, sentences for multiple offenses.<sup>7</sup> In dissent, Justice Scalia asserted that, far from illuminating *Apprendi*, the Court “muddie[d] the waters.”<sup>8</sup> Although the state sovereignty rationale did create further confusion by contradicting *Apprendi*’s tenets, the historical practice rationale appeared at first glance to clarify that *Apprendi* protects the jury’s traditional domains but not more. Nevertheless, such reliance on common law history ultimately fails to clarify for two reasons. First, this approach to the Sixth Amendment has been fraught with equivocal, contradictory, and selective interpretations of history. Second, even where Sixth Amendment traditions are relatively clear, the Court has inconsistently applied them. Therefore, in reading *Apprendi* primarily through the lens of history, the Court sent another conflicting signal about how to apply its sentencing jurisprudence.

Thomas Eugene Ice twice entered an apartment in the complex he managed and sexually assaulted an eleven-year-old girl.<sup>9</sup> An Oregon jury convicted him of two counts of burglary with intent to commit sexual abuse and four counts of sexual assault, two for touching the victim’s vagina and two for touching her breasts.<sup>10</sup> Although most states, following common law tradition, entrust to judges’ discretion whether sentences for discrete offenses shall be served consecutively or concurrently,<sup>11</sup> Oregon law provides that judges must impose concurrent sentences unless they make findings that at least one of the criminal offenses did “not arise from the same continuous and uninterrupted course of conduct,”<sup>12</sup> “was an indication of defendant’s willingness to commit more than one criminal offense,”<sup>13</sup> or “caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim.”<sup>14</sup> At sentencing, the judge first found that each burglary constituted a separate incident.<sup>15</sup> He then found that each offense of touching the victim’s vagina showed Ice’s willingness to commit more than one crime during each incident and caused greater, qualitatively

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<sup>7</sup> *Id.* at 714–15.

<sup>8</sup> *Id.* at 723 (Scalia, J., dissenting).

<sup>9</sup> *Id.* at 715 (majority opinion).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 714.

<sup>12</sup> OR. REV. STAT. § 137.123(2) (2007).

<sup>13</sup> *Id.* § 137.123(5)(a).

<sup>14</sup> *Id.* § 137.123(5)(b). The statute also allows for a consecutive sentence if at least one of the criminal offenses “caused or created a risk of causing loss, injury or harm to a different victim.” *Id.*; see also *id.* § 137.123(3) (incarcerated convicts exception).

<sup>15</sup> *Ice*, 129 S. Ct. at 715.

different harm than the burglaries did.<sup>16</sup> Based on these findings, he sentenced Ice to four consecutive and two concurrent sentences.<sup>17</sup>

Ice appealed, contending that after *Apprendi* the Sixth Amendment requires that a jury, rather than a judge, find the facts that Oregon law requires for the imposition of consecutive sentences.<sup>18</sup> The Oregon Court of Appeals affirmed without opinion,<sup>19</sup> but the Oregon Supreme Court reversed.<sup>20</sup> Writing for the court, Justice Gillette<sup>21</sup> held that Ice's sentence "conflict[ed] with the principles underpinning *Apprendi*, *Blakely*, and *Booker*, if not with the *Apprendi* rule itself" because, without a judge's factfinding, Oregon law would not have permitted consecutive sentences that increased "the quantum of punishment."<sup>22</sup> Justice Kistler dissented,<sup>23</sup> concluding that the *Apprendi* line of cases addressed only sentencing enhancements for a single offense.<sup>24</sup>

The U.S. Supreme Court reversed. Writing for the Court, Justice Ginsburg<sup>25</sup> read the *Apprendi* line narrowly to involve only sentencing for a discrete crime and reasoned that two factors — historical practice and respect for state sovereignty — weighed against extending *Apprendi*'s rule to sentencing for multiple offenses.<sup>26</sup> First, noting that "the scope of the constitutional jury right must be informed by the historical role of the jury at common law,"<sup>27</sup> she examined the historical record to determine whether the jury traditionally played a role in the decision to impose consecutive or concurrent sentences.<sup>28</sup> She found that in eighteenth-century England and nineteenth-century American states, the choice rested exclusively with the judge, and consecutive sentences were the norm.<sup>29</sup> Given this history, she found that Oregon's statute did not implicate *Apprendi*'s "core concerns" because there was "no encroachment here by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark at trial be-

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<sup>16</sup> *Id.* at 716.

<sup>17</sup> *Id.* The total sentence, constituting 340 months, was significantly longer than the 90 months Ice would have received for six concurrent sentences. *Id.* at 716 & n.5.

<sup>18</sup> See *State v. Ice*, 170 P.3d 1049, 1052 (Or. 2007).

<sup>19</sup> *State v. Ice*, 39 P.3d 291 (Or. Ct. App. 2001).

<sup>20</sup> *Ice*, 170 P.3d at 1059.

<sup>21</sup> Chief Justice De Muniz and Justices Carson, Durham, and Walters joined the opinion.

<sup>22</sup> *Ice*, 170 P.3d at 1058.

<sup>23</sup> Justice Balmer joined the dissent.

<sup>24</sup> *Ice*, 170 P.3d at 1060 (Kistler, J., dissenting).

<sup>25</sup> Justices Stevens, Kennedy, Breyer, and Alito joined the opinion.

<sup>26</sup> *Ice*, 129 S. Ct. at 717.

<sup>27</sup> *Id.* at 718.

<sup>28</sup> *Id.* at 717.

<sup>29</sup> *Id.* at 717–18.

tween the State and the accused.”<sup>30</sup> Where “no erosion of the jury’s traditional role was at stake,” *Apprendi* did not apply.<sup>31</sup>

Second, Justice Ginsburg added that states’ interests in their own penal systems, which “lie[] at the core of their sovereign status,” also counseled against extending *Apprendi* to consecutive sentencing.<sup>32</sup> She deemed it illogical that the Sixth Amendment would prevent states from constraining judges’ common law discretion through the practice at issue yet permit states to do so through a parallel, harsher practice: a consecutive sentence default that could be reduced to concurrent sentences by judge-found facts.<sup>33</sup> Moreover, she noted that the proposed extension of *Apprendi* would be difficult for states to administer because judges often find facts about an offense’s nature or a defendant’s character in determining complex sentencing conditions unrelated to prison time.<sup>34</sup> Furthermore, requiring juries to find facts necessary to impose consecutive sentences could compel bifurcated trials because the predicate facts could prejudice a defendant at a trial’s guilt phase.<sup>35</sup> “We will not so burden the Nation’s trial courts,” she insisted, “absent any genuine affront to *Apprendi*’s instruction.”<sup>36</sup>

In dissent, Justice Scalia<sup>37</sup> charged that Oregon’s statute was an affront to *Apprendi*’s “clear” rule because it allowed judges to find the facts necessary to increase sentences beyond what the jury verdict alone authorized.<sup>38</sup> *Apprendi*’s rule, he declared, “leaves no room for a formalistic distinction between facts bearing on the number of years of imprisonment that a defendant will serve for one count (subject to the rule of *Apprendi*) and facts bearing on how many years will be served in total (now not subject to *Apprendi*).”<sup>39</sup> This distinction, he contended, was supported only by “the same (the *very* same) arguments” regarding sentencing law history that the *Apprendi* line rejected.<sup>40</sup> The jury’s role is diminished not where judges retain their common law discretion over sentencing, but where the legislature alters the historical practice and “the length of a sentence is made to depend upon a fact removed from [the jury’s] determination.”<sup>41</sup> Regarding the state sovereignty rationale and alleged obstacles states would face in apply-

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<sup>30</sup> *Id.* at 718.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 719.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Chief Justice Roberts and Justices Souter and Thomas joined the dissent.

<sup>38</sup> *Ice*, 129 S. Ct. at 720 (Scalia, J., dissenting).

<sup>39</sup> *Id.* at 720.

<sup>40</sup> *Id.* at 721.

<sup>41</sup> *Id.*

ing *Apprendi*'s rule to consecutive sentencing, he wrote, "That is another *déjà vu* and *déjà rejeté*; we have watched it parade past before, in several of our *Apprendi*-related opinions, and have not saluted."<sup>42</sup>

Both Justice Ginsburg and Justice Scalia claimed fidelity to *Apprendi*'s rule.<sup>43</sup> On the one hand, the rule, as stated and applied in the *Apprendi* line, was offense specific,<sup>44</sup> predicated on an increase beyond the statutory maximum for "a crime."<sup>45</sup> When a court imposes consecutive sentences, it imposes a sentence that is within the statutory maximum for each offense. On the other hand, many *Apprendi*-line statements discussed the rule in terms of overall punishment.<sup>46</sup> Indeed, the *Apprendi* Court noted that "the relevant inquiry is one not of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict."<sup>47</sup> Given the ambiguity, Justice Ginsburg asserted that *Ice* turned on discovering a "principled rationale" behind *Apprendi*'s rule.<sup>48</sup>

She identified a primary and a secondary rationale: historical practice and state sovereignty. Her state sovereignty rationale, described as a background assumption intended to buttress the historical practice analysis rather than as sufficient justification in itself,<sup>49</sup> only further confused *Apprendi*'s rule because it conflicted with *Apprendi*'s core principles and because she offered little direction on applying it in future cases. However, her historical practice rationale, though not the only rational reading of *Apprendi*, was consistent with the decision, and it illustrated that the Court finds it the *Apprendi* line's most plausible interpretation. Nonetheless, while providing a clear, sensible rule in theory, this history-based doctrinal path is problematic because originalism does not offer a clear approach to sentencing law and because the Court cannot faithfully adhere to it without heading down a radical road that the Court has shown no inclination to explore.

Justice Ginsburg's state sovereignty rationale confused *Apprendi* doctrine by reviving the type of federalism argument rejected in *Apprendi* and by failing to explain how courts should balance the interests of states with those of defendants. In *Apprendi*, federalism argu-

<sup>42</sup> *Id.* at 722.

<sup>43</sup> *See id.* at 717, 719 (majority opinion); *id.* at 720 (Scalia, J., dissenting).

<sup>44</sup> *See id.* at 714 (majority opinion).

<sup>45</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (emphasis added); *accord* *Cunningham v. California*, 127 S. Ct. 856, 864 (2007) (quoting the same language); *United States v. Booker*, 543 U.S. 220, 228 (2005) (same); *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (same).

<sup>46</sup> *See, e.g., Booker*, 543 U.S. at 232; *Ring v. Arizona*, 536 U.S. 584, 602 (2002).

<sup>47</sup> *Apprendi*, 530 U.S. at 494 (emphasis added).

<sup>48</sup> *Ice*, 129 S. Ct. at 719 (quoting *Cunningham*, 127 S. Ct. at 872 (Kennedy, J., dissenting)) (internal quotation marks omitted).

<sup>49</sup> *See id.* at 717 (describing the historical practice rationale as *Apprendi*'s "animating principle" and adding that "[i]n undertaking this [historical] inquiry, we remain cognizant that administration of a discrete criminal justice system is among [a state's] basic sovereign prerogatives").

ments lost out to concerns about safeguarding defendants' rights.<sup>50</sup> Neither the states' call for more convenient, pragmatic sentencing practices nor judicial deference to state legislatures was grounds for demarcating the Sixth Amendment's scope.<sup>51</sup> In *Ice*, however, Justice Ginsburg embraced the opposite approach, citing states' rights as an additional reason to allow legislatures to limit judges' discretion over sentencing. More troublingly, she did not explain how these rediscovered federalism concerns affect a sentencing scheme's constitutionality, despite conceding that "not every state initiative will be in harmony with Sixth Amendment ideals."<sup>52</sup> Instead of suggesting how these concerns aid the Court in determining which initiatives violate the Constitution, she optimistically invoked *Apprendi*'s language that "structural democratic constraints" will discourage states from violating defendants' rights<sup>53</sup> — a doubtful aspiration, given these rights' low political salience.<sup>54</sup> Without guidance on how to determine whether political safeguards have failed or how to balance the competing interests when they do,<sup>55</sup> the state sovereignty rationale does not provide an intelligible principle for defining *Apprendi*'s scope.

Justice Ginsburg's historical practice rationale, though, offered two advantages that the state sovereignty rationale lacked: foundation in an existing interpretation of *Apprendi* and creation of an ostensibly bright-line rule. Her originalist rule was consistent with one reading of *Apprendi*, which relied on the jury's historical role to define the jury trial right.<sup>56</sup> *Apprendi* sought to preserve the jury's traditional role of finding every element of a crime by requiring "sentencing factors" that would have been considered "elements" during the Founding era to be found by juries rather than by judges.<sup>57</sup> "Any possible distinction between an 'element' of a felony offense and a 'sentencing factor,'" the

<sup>50</sup> See *Apprendi*, 530 U.S. at 524–25, 550–51 (O'Connor, J., dissenting); *id.* at 559–64 (Breyer, J., dissenting); Berman & Bibas, *supra* note 4, at 49–50, 52.

<sup>51</sup> Justice O'Connor and Professor David Alan Sklansky have noted these related federalism and separation of powers concerns. See *Apprendi*, 530 U.S. at 525 (O'Connor, J., dissenting) ("[T]he Court today . . . embraces a universal and seemingly bright-line rule limiting the power of Congress and state legislatures . . ."); David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1695 (2009) ("By and large, *Apprendi*, *Blakely*, and *Booker* have shifted power not from judges to juries, or from legislatures to juries, but from legislatures to judges.").

<sup>52</sup> *Ice*, 129 S. Ct. at 719.

<sup>53</sup> *Id.* (quoting *Apprendi*, 530 U.S. at 490 n.16) (internal quotation mark omitted).

<sup>54</sup> See Mitchell, *supra* note 5, at 323 ("[T]he right of jury trial seems an especially poor candidate for reliance on political safeguards . . .").

<sup>55</sup> See, e.g., G. Ben Cohen et al., *A Cold Day in Apprendi-land: Oregon v. Ice Brings Unknown Forecast for Apprendi's Continued Vitality in the Capital Sentencing Context*, HARV. L. & POL'Y REV. ONLINE 3, Apr. 24, 2009, [http://www.hlpronline.com/Smith\\_HLPR\\_042409.pdf](http://www.hlpronline.com/Smith_HLPR_042409.pdf) (criticizing the unpredictability that may arise from the *Ice* "balancing test").

<sup>56</sup> See *Apprendi*, 530 U.S. at 477–83.

<sup>57</sup> See *id.* at 494 & n.19; Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1477 (2008).

*Apprendi* Court noted, “was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.”<sup>58</sup> Hence, it concluded that the “historic link between verdict and judgment” precluded “the novelty of a legislative scheme” that essentially redefined jury-found elements as judge-found sentencing factors.<sup>59</sup> Several post-*Apprendi* opinions highlighted the decision’s originalist basis, noting, for example, that *Apprendi* relied on whether the finding of a fact was understood as within “the domain of the jury . . . by those who framed the Bill of Rights,”<sup>60</sup> that *Apprendi* ensured that the jury would “exercise the control that the Framers intended,”<sup>61</sup> and that the decision rested on “the Sixth Amendment’s historical and doctrinal foundations.”<sup>62</sup>

Justice Ginsburg’s formulation of the historical practice rationale also established a theoretically bright-line rule. Invoking *Apprendi*, she asserted that “the Sixth Amendment does not countenance legislative encroachment on the jury’s traditional domain.”<sup>63</sup> The test she thus explicated was whether the practice had traditionally belonged to the jury. If it had, then it was implicit in the Sixth Amendment substantive jury right’s original meaning and must be enforced today. If not, then the Sixth Amendment does not protect the practice. Ice likely lost the case when he conceded that he had “no quarrel with [the Court’s account] of consecutive sentencing practices through the ages.”<sup>64</sup> As the Court found that the determination of consecutive or concurrent sentences was not part of the jury’s traditional domain, it reasoned that “*Apprendi*’s core concern is inapplicable to the issue at hand, [and] so too is the Sixth Amendment’s restriction on judge-found facts.”<sup>65</sup> Oregon’s statute was therefore valid.<sup>66</sup>

Justice Ginsburg’s originalist rule was not *Apprendi*’s only plausible reading or bright-line rule. In addition to its historical basis, *Apprendi* relied on the rationales that adopting a bright-line rule for sentencing factfinding would prevent a gradual erosion of the jury trial right,<sup>67</sup> that the Constitution does not allow for judicial inquisi-

<sup>58</sup> *Apprendi*, 530 U.S. at 478 (footnote omitted).

<sup>59</sup> *Id.* at 482–83.

<sup>60</sup> *Harris v. United States*, 536 U.S. 545, 557 (2002).

<sup>61</sup> *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

<sup>62</sup> *Cunningham v. California*, 127 S. Ct. 856, 864 (2007).

<sup>63</sup> *Ice*, 129 S. Ct. at 717.

<sup>64</sup> *Id.* at 717–18 (quoting Brief for Respondent at 32, *Ice*, 129 S. Ct. 711 (2009) (No. 07-901), 2008 WL 320007).

<sup>65</sup> *Id.* at 718.

<sup>66</sup> *Id.* at 719.

<sup>67</sup> See *Blakely v. Washington*, 542 U.S. 296, 306–08 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000); Stephanos Bibas, Essay, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 194 (2005).

tion,<sup>68</sup> and that defendants must have clear notice of the maximum penalties they face.<sup>69</sup> Justice Scalia considered these arguments more integral to *Apprendi* than Founding-era history, which he deemed irrelevant in *Ice*.<sup>70</sup> Not originalism but rather a desire for a categorical rule against any judicial factfinding that increases sentences motivated his interpretation of *Apprendi*.<sup>71</sup> Because Justice Ginsburg's rule and Justice Scalia's bright-line alternative are mutually exclusive, yet each is arguably compatible with the *Apprendi* line, *Ice* is significant for clarifying that *Apprendi*'s principal touchstone was history, not Justice Scalia's categorical approach, thus narrowing the possible lines of reasoning that lower courts may use in future *Apprendi*-line cases.

Although *Ice* clarified *Apprendi*'s principal rationale, it failed to clear the *Apprendi* waters as a whole because of the opacity of originalist evidence in the sentencing context. Founding-era sentencing law is difficult to discern and does not offer unitary solutions about what specific constitutionally enshrined practices existed. When the Sixth Amendment was ratified, for example, almost every state punished most felonies by death,<sup>72</sup> so it was typically unnecessary for juries or judges to find additional facts to enhance sentences or to decide whether sentences should be served concurrently or consecutively.<sup>73</sup> Nevertheless, there was discretion even within this system, as juries could factor sentencing consequences into their verdicts and judges could grant the benefit of clergy, order alternative sentences like corporal punishment, or recommend executive clemency.<sup>74</sup> Because the issue of sentencing enhancements never arose, consecutive sentencing was rare, and informal alternative practices existed, pre-1791 history does not provide a unitary original understanding of sentencing law.<sup>75</sup> Furthermore, after 1791, when penitentiaries began to replace capital and corporal punishment, states responded differently to the new sentencing system.<sup>76</sup> Most delegated nearly unrestrained authority to judges to select prison terms, but several gave discretion to the jury in-

<sup>68</sup> See *Blakely*, 542 U.S. at 306–07; Sklansky, *supra* note 51, at 1658.

<sup>69</sup> See *Blakely*, 542 U.S. at 309; *Apprendi*, 530 U.S. at 478, 483 n.10; Bibas, *supra* note 67, at 194–95.

<sup>70</sup> See *Ice*, 129 S. Ct. at 721 (Scalia, J., dissenting); Transcript of Oral Argument at 11–12, *Ice*, 129 S. Ct. 711 (2009) (No. 07-901), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/07-901.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-901.pdf).

<sup>71</sup> See Bibas, *supra* note 67, at 202.

<sup>72</sup> See Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI-KENT L. REV. 937, 937 (2003).

<sup>73</sup> See Bibas, *supra* note 67, at 196.

<sup>74</sup> See Berman & Bibas, *supra* note 4, at 61; King, *supra* note 72, at 979, 986.

<sup>75</sup> See, e.g., *Jones v. United States*, 526 U.S. 227, 244 (1999) (“[T]he scholarship of which we are aware does not show that a question exactly like this one was ever raised and resolved in the period before the framing.”).

<sup>76</sup> See Bibas, *supra* note 67, at 196.



stead.<sup>77</sup> In short, Founding-era sentencing law was “in flux”<sup>78</sup> and “relatively untidy,”<sup>79</sup> making it difficult to discern rules for today.

As a result, the Court’s applications of an original understanding of sentencing law have been inconsistent. *Apprendi*’s view that Founding-era judges possessed “very little explicit discretion in sentencing” contradicts the accounts in *Ice* and earlier cases that judges had substantial sentencing independence in the early Republic.<sup>80</sup> Professor Bernadette Meyler has noted that within the *Apprendi* line each case “simultaneously attempts to construct a univocal originalist interpretation of the historical sources and contradicts the account provided by other cases treating the same subject.”<sup>81</sup> Even where the Justices agree on the history, they may disagree on its implication. In *Ice*, Justice Ginsburg read judges’ common law discretion to impose consecutive sentences to permit states to limit that discretion through mandatory judicial factfinding, as it was not within the jury’s province.<sup>82</sup> Justice Scalia, however, read the same history to permit states to retain the historic discretion but not to impose judicial factfinding.<sup>83</sup>

The Court’s selective use of history, often drawn from sources written long after the Founding, has also compromised the originalist approach to sentencing law. *Apprendi* and Justice Thomas’s concurrence, for example, relied on treatises and cases from more than a half-century after the Sixth Amendment was ratified.<sup>84</sup> Likewise, the *Ice* Court constructed its history from an 1858 treatise and what Justice Ginsburg termed “early” American cases, which were from the nineteenth century’s final decades.<sup>85</sup> Indeed, she cited only one Founding-era case, which was not from the United States.<sup>86</sup> In light of the nineteenth-century transformation of sentencing law and jury law more generally,<sup>87</sup> these sources are not persuasive evidence of Founding-era sentencing practices and thus the Sixth Amendment’s original mean-

<sup>77</sup> See King, *supra* note 72, at 937–38, 990–92.

<sup>78</sup> Bibas, *supra* note 67, at 196.

<sup>79</sup> King, *supra* note 72, at 988.

<sup>80</sup> Compare *Apprendi v. New Jersey*, 530 U.S. 466, 479 (2000) (quoting John Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700–1900*, at 13, 36 (Antonio Padoa Schioppa ed., 1987)), with *Ice*, 129 S. Ct. at 717–18, *Mistretta v. United States*, 488 U.S. 361, 364–65 (1989), and *Williams v. New York*, 337 U.S. 241, 246 (1949).

<sup>81</sup> Bernadette Meyler, *Towards a Common Law Originalism*, 59 *STAN. L. REV.* 551, 566 (2006).

<sup>82</sup> See *Ice*, 129 S. Ct. at 717–18.

<sup>83</sup> See *id.* at 721 (Scalia, J., dissenting).

<sup>84</sup> See *Apprendi*, 530 U.S. at 476–78, 482 n.9, 489 n.15; *id.* at 499–523 (Thomas, J., concurring).

<sup>85</sup> *Ice*, 129 S. Ct. at 717 & n.9, 718 & n.10.

<sup>86</sup> See *id.* at 717 n.8.

<sup>87</sup> See generally AKHIL REED AMAR, *AMERICA’S CONSTITUTION* 241–42 (2005); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 142–43 (1977); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 *U. CHI. L. REV.* 867, 906–11 (1994).

ing.<sup>88</sup> Given the Court's equivocal, contradictory, and selective applications of sentencing history, the historical practice rationale has not served as the neutral, bright-line rule that the Court has sought.

More generally, this rationale has failed to provide a logical limiting principle for when the jury's traditional domain does or does not define the contemporary jury trial right. Even before *Ice*, lower court judges, following the Court's use of history in *Apprendi* and other constitutional criminal procedure cases,<sup>89</sup> invoked Founding-era practices in calling for radical revisions to Sixth Amendment law. In the mandatory minimum sentencing context, for example, some observed that within the Founding-era jury's domain was the right to consider the potential sentence and to nullify the law.<sup>90</sup> Based on nullification's history, Judge Lynch proposed to instruct a jury about an offense's mandatory minimum so that the jury could make an informed decision about whether to nullify, but he was stopped by the Second Circuit.<sup>91</sup> Judge Weinstein, however, later reasoned that the *Apprendi* line had overruled the Second Circuit and held that he himself had committed reversible error when he declined to tell a jury about a mandatory minimum because the jury historically had the right to consider the sentence and to nullify.<sup>92</sup> "Whatever the judicial system's evaluation of modern juries and their proper role," he found, "the Supreme Court has recently instructed us that in matters of sentencing as well as hearsay, it is necessary to go back to the practice as it existed in 1791 to construe the meaning of constitutional provisions such as the Sixth Amendment."<sup>93</sup> He too was reversed by the Second Circuit, which stated that if the "general principles" of the *Apprendi* line mean that nullification should be reauthorized in the sentencing context, "that is a decision we must leave to the Supreme Court."<sup>94</sup>

<sup>88</sup> See Bibas, *supra* note 67, at 196.

<sup>89</sup> See, e.g., Danforth v. Minnesota, 128 S. Ct. 1029, 1035 (2008) ("[Crawford] 'turn[ed] to the historical background of the [Confrontation] Clause to understand its meaning,' and relied primarily on legal developments that had occurred prior to the adoption of the Sixth Amendment to derive the correct interpretation." (second alteration in original) (citations omitted) (quoting Crawford v. Washington, 541 U.S. 36, 43 (2004))); see also Recent Case, 122 HARV. L. REV. 990, 990 (2009).

<sup>90</sup> See, e.g., Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury: Sparf and Hansen v. United States Reconsidered*, 46 AM. J. LEGAL HIST. 353, 419–21 (2004); see also United States v. Polizzi, 549 F. Supp. 2d 308, 404–43 (E.D.N.Y. 2008), *rev'd sub nom.* United States v. Polouizzi, 564 F.3d 142 (2d Cir. 2009). Scholars agree that when the Sixth Amendment was ratified, the jury was understood to have the right to nullify. See generally AKHIL REED AMAR, THE BILL OF RIGHTS 97–103 (1998); LARRY D. KRAMER, THE PEOPLE THEMSELVES 157–58 (2004); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377.

<sup>91</sup> See United States v. Pabon-Cruz, 391 F.3d 86, 88–90 (2d Cir. 2004).

<sup>92</sup> *Polizzi*, 549 F. Supp. 2d at 448–50.

<sup>93</sup> *Id.* at 421.

<sup>94</sup> *Polouizzi*, 564 F.3d at 160.

In *Ice*, the Supreme Court chose to reinforce the historical practice rationale, a rationale that, read literally, scholars have suggested, could logically mean the end not only of prohibitions on jury nullification,<sup>95</sup> but also of plea bargaining and other basic tenets of modern sentencing law.<sup>96</sup> Strict adherence to *Ice*'s bright-line rule that the jury's traditional domain may not be encroached upon — that a “decision that . . . traditionally belonged to the jury”<sup>97</sup> must belong to the jury today — would force the Court either to change radically its Sixth Amendment jurisprudence or to explicate difficult distinctions between the *Apprendi* line's core concern and the core concerns of other jury-right considerations. Although it may be grounded in the *Apprendi* line's reasoning, the *Ice* Court's rule, based principally on the jury's Founding-era rights and practices, only perpetuates the incoherence drowning *Apprendi* because it does not explain how or when to apply originalism. In Sixth Amendment law, where often “the historical soil is absent or a morass,”<sup>98</sup> a bright-line originalist approach may be rare, and even when the original understanding is reasonably clear, the Court may not agree on its implications. In the sentencing law context, *Ice*'s originalism may have sullied the already muddied waters.

6. *Sixth Amendment — Witness Confrontation — Testimony of Crime Lab Experts.* — In its 2004 decision in *Crawford v. Washington*,<sup>1</sup> the Supreme Court refused to determine whether laboratory test results are testimonial evidence, which is subject to the requirements of the Confrontation Clause of the Sixth Amendment. Since this decision, confusion has plagued trial and appellate courts attempting to distinguish testimonial from nontestimonial evidence, as illustrated by the multitude of rationales used to justify admitting or excluding such evidence.<sup>2</sup> Last Term, in *Melendez-Diaz v. Massachusetts*,<sup>3</sup> the Court held that certificates of analysis (which state the results of state laboratory tests) are testimonial evidence that may not be admitted without

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<sup>95</sup> See, e.g., Raoul Berger, *Justice Samuel Chase v. Thomas Jefferson: A Response to Stephen Presser*, 1990 BYU L. REV. 873, 889–90; Chris Kemmitt, *Function over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 106–07 (2006); Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 434 (1998) (noting a “renaissance of academic support for jury nullification,” including originalism-based argumentation).

<sup>96</sup> See, e.g., Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 446 n.351 (2009) (“I believe that a fully recognized collective jury trial right would mandate major procedural changes in guilty pleas and plea bargaining.”); Bibas, *supra* note 67, at 202 (“A radical originalist might have outlawed plea bargaining . . .”).

<sup>97</sup> *Ice*, 129 S. Ct. at 719.

<sup>98</sup> Bibas, *supra* note 67, at 204.

<sup>1</sup> 541 U.S. 36 (2004).

<sup>2</sup> See *United States v. Left Hand Bull*, No. CR 05-30106(01)-CBK, 2009 WL 2030544 (D.S.D. July 13, 2009); *People v. Milner*, No. B206735, 2009 WL 2025944 (Cal. Ct. App. July 14, 2009).

<sup>3</sup> 129 S. Ct. 2527 (2009).