SUPREME COURT OF THE UNITED STATES

No. 99–478

CHARLES C. APPRENDI, JR., PETITIONER *v.* NEW JERSEY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

[June 26, 2000]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join, dissenting.

Last Term, in *Jones* v. *United States*, 526 U. S. 227 (1999), this Court found that our prior cases suggested the following principle: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.*, at 243, n. 6. At the time, JUSTICE KENNEDY rightly criticized the Court for its failure to explain the origins, contours, or consequences of its purported constitutional principle; for the inconsistency of that principle with our prior cases; and for the serious doubt that the holding cast on sentencing systems employed by the Federal Government and States alike. *Id.*, at 254, 264–272 (dissenting opinion). Today, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in *Jones*.

I

Our Court has long recognized that not every fact that bears on a defendant's punishment need be charged in an indictment, submitted to a jury, and proved by the gov-

ernment beyond a reasonable doubt. Rather, we have held that the "legislature's definition of the elements of the offense is usually dispositive." *McMillan* v. *Pennsylvania,* 477 U. S. 79, 85 (1986); see also *Almendarez-Torres* v. *United States,* 523 U. S. 224, 228 (1998); *Patterson* v. *New York,* 432 U. S. 197, 210, 211, n. 12 (1977). Although we have recognized that "there are obviously constitutional limits beyond which the States may not go in this regard," *id.*, at 210, and that "in certain limited circumstances *Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged," *McMillan*, *supra*, at 86, we have proceeded with caution before deciding that a certain fact must be treated as an offense element despite the legislature's choice not to characterize it as such. We have therefore declined to establish any bright-line rule for making such judgments and have instead approached each case individually, sifting through the considerations most relevant to determining whether the legislature has acted properly within its broad power to define crimes and their punishments or instead has sought to evade the constitutional requirements associated with the characterization of a fact as an offense element. See, *e.g.*, *Monge* v. *California,* 524 U. S. 721, 728–729 (1998); *McMillan*, *supra*, at 86.

In one bold stroke the Court today casts aside our traditional cautious approach and instead embraces a universal and seemingly bright-line rule limiting the power of Congress and state legislatures to define criminal offenses and the sentences that follow from convictions thereunder. The Court states: "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." *Ante*, at 24. In its opinion, the Court marshals virtually no authority to support its extraordinary rule. Indeed, it is remarkable that the Court cannot identify a *single instance*, in the

over 200 years since the ratification of the Bill of Rights, that our Court has applied, as a constitutional requirement, the rule it announces today.

According to the Court, its constitutional rule "emerges from our history and case law." *Ante*, at 26. None of the history contained in the Court's opinion requires the rule it ultimately adopts. The history cited by the Court can be divided into two categories: first, evidence that judges at common law had virtually no discretion in sentencing, *ante*, at 11–13, and, second, statements from a 19th-century criminal procedure treatise that the government must charge in an indictment and prove at trial the elements of a statutory offense for the defendant to be sentenced to the punishment attached to that statutory offense, *ante*, at 13–14. The relevance of the first category of evidence can be easily dismissed. Indeed, the Court does not even claim that the historical evidence of nondiscretionary sentencing at common law supports its "increase in the maximum penalty" rule. Rather, almost as quickly as it recites that historical practice, the Court rejects its relevance to the constitutional question presented here due to the conflicting American practice of judges exercising sentencing discretion and our decisions recognizing the legitimacy of that American practice. See *ante*, at 14–15 (citing *Williams* v. *New York*, 337 U. S. 241, 246 (1949)). Even if the Court were to claim that the common-law history on this point did bear on the instant case, one wonders why the historical practice of judges pronouncing judgments in cases between private parties is relevant at all to the question of criminal punishment presented here. See *ante*, at 12–13 (quoting 3 W. Blackstone, Commentaries on the Laws of England 396 (1768), which pertains to "remed[ies] prescribed by law for the redress of injuries").

Apparently, then, the historical practice on which the Court places so much reliance consists of only two quotations taken from an 1862 criminal procedure treatise. See

ante, at 13–14 (quoting J. Archbold, Pleading and Evidence in Criminal Cases 51, 188 (15th ed. 1862)). A closer examination of the two statements reveals that neither supports the Court's "increase in the maximum penalty" rule. Both of the excerpts pertain to circumstances in which a common-law felony had also been made a separate statutory offense carrying a greater penalty. Taken together, the statements from the Archbold treatise demonstrate nothing more than the unremarkable proposition that a defendant could receive the greater statutory punishment only if the indictment expressly charged and the prosecutor proved the facts that made up the statutory offense, as opposed to simply those facts that made up the common-law offense. See *id.*, at 51 (indictment); *id.*, at 188 (proof). In other words, for the defendant to receive the statutory punishment, the prosecutor had to charge in the indictment and prove at trial *the elements* of the statutory offense. To the extent there is any doubt about the precise meaning of the treatise excerpts, that doubt is dispelled by looking to the treatise sections from which the excerpts are drawn and the broader principle each section is meant to illustrate. See *id.*, at 43 ("Every offence consists of certain acts done or omitted under certain circumstances; and in an indictment for the offence, it is not sufficient to charge the defendant generally with having committed it, . . . but all the facts and circumstances constituting the offence must be specially set forth"); *id.*, at 180 ("Every offence consists of certain acts done or omitted, under certain circumstances, all of which must be stated in the indictment . . . and be proved as laid"). And, to the extent further clarification is needed, the authority cited by the Archbold treatise to support its stated proposition with respect to the requirements of an indictment demonstrates that the treatise excerpts mean only that the prosecutor must charge and then prove at trial *the elements* of the statutory offense. See 2 M. Hale, Pleas of

the Crown *170 (hereinafter Hale) ("An indictment grounded upon an offense made by act of parliament must by express words bring the offense within the substantial description made in the act of parliament"). No Member of this Court questions the proposition that a State must charge in the indictment and prove at trial beyond a reasonable doubt the actual elements of the offense. This case, however, concerns the distinct question of when a fact that bears on a defendant's punishment, but which the legislature has not classified as an element of the charged offense, must nevertheless be treated as an offense element. The excerpts drawn from the Archbold treatise do not speak to this question at all. The history on which the Court's opinion relies provides no support for its "increase in the maximum penalty" rule.

In his concurring opinion, JUSTICE THOMAS cites additional historical evidence that, in his view, dictates an even broader rule than that set forth in the Court's opinion. The history cited by JUSTICE THOMAS does not require, as a matter of federal constitutional law, the application of the rule he advocates. To understand why, it is important to focus on the basis for JUSTICE THOMAS' argument. First, he claims that the Fifth and Sixth Amendments "codified" pre-existing common law. Second, he contends that the relevant common law treated any fact that served to increase a defendant's punishment as an element of an offense. See *ante*, at 2–4. Even if JUSTICE THOMAS' first assertion were correct— a proposition this Court has not before embraced— he fails to gather the evidence necessary to support his second assertion. Indeed, for an opinion that purports to be founded upon the original understanding of the Fifth and Sixth Amendments, JUSTICE THOMAS' concurrence is notable for its failure to discuss any historical practice, or to cite any decisions, predating (or contemporary with) the ratification of the Bill of Rights. Rather, JUSTICE THOMAS divines

the common-law understanding of the Fifth and Sixth Amendment rights by consulting decisions rendered by American courts well after the ratification of the Bill of Rights, ranging primarily from the 1840's to the 1890's. Whatever those decisions might reveal about the way American state courts resolved questions regarding the distinction between a crime and its punishment under general rules of criminal pleading or their own state constitutions, the decisions fail to demonstrate any settled understanding with respect to the definition of a crime under the relevant, preexisting common law. Thus, there is a crucial disconnect between the historical evidence JUSTICE THOMAS cites and the proposition he seeks to establish with that evidence.

An examination of the decisions cited by JUSTICE THOMAS makes clear that they did not involve a simple application of a long-settled common-law rule that any fact that increases punishment must constitute an offense element. That would have been unlikely, for there does not appear to have been any such common-law rule. The most relevant common-law principles in this area were that an indictment must charge the elements of the relevant offense and must do so with certainty. See, *e.g.*, 2 Hale *182 ("Touching the thing wherein or of which the offense is committed, there is required a certainty in an indictment"); *id.*, at *183 ("The fact itself must be certainly set down in an indictment"); *id.*, at *184 ("The offense itself must be alledged, and the manner of it"). Those principles, of course, say little about when a specific fact constitutes an element of the offense.

JUSTICE THOMAS is correct to note that American courts in the 19th century came to confront this question in their cases, and often treated facts that served to increase punishment as elements of the relevant statutory offenses. To the extent JUSTICE THOMAS' broader rule can be drawn from those decisions, the rule was one of those courts' own

invention, and not a previously existing rule that would have been "codified" by the ratification of the Fifth and Sixth Amendments. Few of the decisions cited by JUSTICE THOMAS indicate a reliance on pre-existing common-law principles. In fact, the converse rule that he identifies in the 19th American cases– that a fact that does not make a difference in punishment need not be charged in an indictment, see, *e.g.*, *Larned* v. *Commonwealth*, 53 Mass. 240, 242–244 (1847)– was assuredly created by American courts, given that English courts of roughly the same period followed a contrary rule. See, *e.g.*, *Rex* v. *Marshall*, 1 Moody C. C. 158, 168 Eng. Rep. 1224 (1827). JUSTICE THOMAS' collection of state-court opinions is therefore of marginal assistance in determining the original understanding of the Fifth and Sixth Amendments. While the decisions JUSTICE THOMAS cites provide some authority for the rule he advocates, they certainly do not control our resolution of the *federal constitutional* question presented in the instant case and cannot, standing alone, justify overruling three decades' worth of decisions by this Court.

In contrast to JUSTICE THOMAS, the Court asserts that its rule is supported by "our cases in this area." *Ante*, at 23. That the Court begins its review of our precedent with a quotation from a dissenting opinion speaks volumes about the support that actually can be drawn from our cases for the "increase in the maximum penalty" rule announced today. See *ante*, at 17–18 (quoting *Almendarez-Torres*, 523 U. S., at 251 (SCALIA, J., dissenting)). The Court then cites our decision in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), to demonstrate the "lesson" that due process and jury protections extend beyond those factual determinations that affect a defendant's guilt or innocence. *Ante*, at 18. The Court explains *Mullaney* as having held that the due process proof-beyond-a-reasonable-doubt requirement applies to those factual determinations that, under a State's criminal law, make a difference in

the degree of punishment the defendant receives. *Ante*, at 18. The Court chooses to ignore, however, the decision we issued two years later, *Patterson* v. *New York*, 432 U. S. 197 (1977), which clearly rejected the Court's broad reading of *Mullaney*.

In *Patterson*, the jury found the defendant guilty of second-degree murder. Under New York law, the fact that a person intentionally killed another while under the influence of extreme emotional disturbance distinguished the reduced offense of first-degree manslaughter from the more serious offense of second-degree murder. Thus, the presence or absence of this one fact was the defining factor separating a greater from a lesser punishment. Under New York law, however, the State did not need to prove the absence of extreme emotional disturbance beyond a reasonable doubt. Rather, state law imposed the burden of proving the presence of extreme emotional disturbance on the defendant, and required that the fact be proved by a preponderance of the evidence. 432 U. S., at 198–200. We rejected Patterson's due process challenge to his conviction:

> "We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch." *Id.*, at 210.

Although we characterized the factual determination under New York law as one going to the mitigation of culpability, *id.*, at 206, as opposed to the aggravation of the punishment, it is difficult to understand why the rule adopted by the Court in today's case (or the broader rule

advocated by JUSTICE THOMAS) would not require the overruling of *Patterson*. Unless the Court is willing to defer to a legislature's formal definition of the elements of an offense, it is clear that the fact that Patterson did not act under the influence of extreme emotional disturbance, in substance, "increase[d] the penalty for [his] crime beyond the prescribed statutory maximum" for first-degree manslaughter. *Ante*, at 24. Nonetheless, we held that New York's requirement that the defendant, rather than the State, bear the burden of proof on this factual determination comported with the Fourteenth Amendment's Due Process Clause. *Patterson*, 432 U. S., at 205–211, 216; see also *id.*, at 204–205 (reaffirming *Leland* v. *Oregon*, 343 U. S. 790 (1952), which upheld against due process challenge Oregon's requirement that the defendant, rather than the State, bear the burden on factual determination of defendant's insanity).

Patterson is important because it plainly refutes the Court's expansive reading of *Mullaney*. Indeed, the defendant in *Patterson* characterized *Mullaney* exactly as the Court has today and we *rejected* that interpretation:

> "*Mullaney*'s holding, it is argued, is that the State may not permit the blameworthiness of an act *or the severity of punishment authorized for its commission* to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt. In our view, the *Mullaney* holding should not be so broadly read." *Patterson*, *supra*, at 214–215 (emphasis added) (footnote omitted).

We explained *Mullaney* instead as holding only "that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." 432 U. S., at

215. Because nothing had been presumed against Patterson under New York law, we found no due process violation. *Id.*, at 216. Ever since our decision in *Patterson*, we have consistently explained the holding in *Mullaney* in these limited terms and have rejected the broad interpretation the Court gives *Mullaney* today. See *Jones*, 526 U. S., at 241 ("We identified the use of a presumption to establish an essential ingredient of the offense as the curse of the Maine law [in *Mullaney*]"); *Almendarez-Torres*, 523 U. S., at 240 ("[*Mullaney*] suggests that Congress cannot permit judges to increase a sentence in light of recidivism, or any other factor, not set forth in an indictment and proved to a jury beyond a reasonable doubt. This Court's later case, . . . *Patterson* v. *New York*, however, makes absolutely clear that such a reading of *Mullaney* is wrong"); *McMillan*, 477 U. S., at 84 (same).

The case law from which the Court claims that its rule emerges consists of only one other decision— *McMillan* v. *Pennsylvania*. The Court's reliance on *McMillan* is also puzzling, given that our holding in that case points to the rejection of the Court's rule. There, we considered a Pennsylvania statute that subjected a defendant to a mandatory minimum sentence of five years' imprisonment if a judge found, by a preponderance of the evidence, that the defendant had visibly possessed a firearm during the commission of the offense for which he had been convicted. *Id.*, at 81. The petitioners claimed that the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's jury trial guarantee (as incorporated by the Fourteenth Amendment) required the State to prove to the jury beyond a reasonable doubt that they had visibly possessed firearms. We rejected both constitutional claims. *Id.*, at 84–91, 93.

The essential holding of *McMillan* conflicts with at least two of the several formulations the Court gives to the rule it announces today. First, the Court endorses the follow-

ing principle: "'[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts *that increase the prescribed range of penalties* to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" *Ante*, at 24 (emphasis added) (quoting *Jones*, 526 U. S., at 252–253 (STEVENS, J., concurring)). Second, the Court endorses the rule as restated in JUSTICE SCALIA's concurring opinion in *Jones*. See *ante*, at 24. There, JUSTICE SCALIA wrote: "'[I]t is unconstitutional to remove from the jury the assessment of facts *that alter the congressionally prescribed range of penalties* to which a criminal defendant is exposed." *Jones*, 526 U. S., at 253 (emphasis added). Thus, the Court appears to hold that any fact that increases or alters *the range* of penalties to which a defendant is exposed— which, by definition, must include increases or alterations to either the minimum or maximum penalties— must be proved to a jury beyond a reasonable doubt. In *McMillan*, however, we rejected such a rule to the extent it concerned those facts that increase or alter the minimum penalty to which a defendant is exposed. Accordingly, it is incumbent on the Court not only to admit that it is overruling *McMillan*, but also to explain why such a course of action is appropriate under normal principles of *stare decisis*.

The Court's opinion does neither. Instead, it attempts to lay claim to *McMillan* as support for its "increase in the maximum penalty" rule. According to the Court, *McMillan* acknowledged that permitting a judge to make findings that expose a defendant to greater or additional punishment "may raise serious constitutional concern." *Ante*, at 20. We said nothing of the sort in *McMillan*. To the contrary, we began our discussion of the petitioners' constitutional claims by emphasizing that we had already "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identi-

fied fact' the State must prove that fact beyond a reasonable doubt." 477 U. S., at 84 (quoting *Patterson*, 432 U. S., at 214). We then reaffirmed the rule set forth in *Patterson*— "that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive." *McMillan*, 477 U. S., at 85. Although we acknowledged that there are constitutional limits to the State's power to define crimes and prescribe penalties, we found no need to establish those outer boundaries in *McMillan* because "several factors" persuaded us that the Pennsylvania statute did not exceed those limits, however those limits might be defined. *Id.*, at 86. The Court's assertion that *McMillan* supports the application of its bright-line rule in this area is, therefore, unfounded.

The Court nevertheless claims to find support for its rule in our discussion of one factor in *McMillan*— namely, our statement that the petitioners' claim would have had "at least more superficial appeal" if the firearm possession finding had exposed them to greater or additional punishment. *Id.*, at 88. To say that a claim may have had "more superficial appeal" is, of course, a far cry from saying that a claim would have been upheld. Moreover, we made that statement in the context of examining one of several factors that, in combination, ultimately gave "no doubt that Pennsylvania's [statute fell] on the permissible side of the constitutional line." *Id.*, at 91. The confidence of that conclusion belies any argument that our ruling would have been different had the Pennsylvania statute instead increased the maximum penalty to which the petitioners were exposed. In short, it is clear that we did not articulate any bright-line rule that States must prove to a jury beyond a reasonable doubt any fact that exposes a defendant to a greater punishment. Such a rule would have been in substantial tension with both our earlier acknowledgment that *Patterson* rejected such a rule, see

477 U. S., at 84, and our recognition that a state legislature's definition of the elements is normally dispositive, see *id.*, at 85. If any single rule can be derived from *McMillan*, it is not the Court's "increase in the maximum penalty" principle, but rather the following: When a State takes a fact that has always been considered by sentencing courts to bear on punishment, and dictates the precise weight that a court should give that fact in setting a defendant's sentence, the relevant fact need not be proved to a jury beyond a reasonable doubt as would an element of the offense. See *id.*, at 89–90.

Apart from *Mullaney* and *McMillan*, the Court does not claim to find support for its rule in any other pre-*Jones* decision. Thus, the Court is in error when it says that its rule emerges from our case law. Nevertheless, even if one were willing to assume that *Mullaney* and *McMillan* lend some support for the Court's position, that feeble foundation is shattered by several of our precedents directly addressing the issue. The only one of those decisions that the Court addresses at any length is *Almendarez-Torres*. There, we squarely rejected the "increase in the maximum penalty" rule: "Petitioner also argues, in essence, that this Court should simply adopt a rule that any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement. We have explained why we believe the Constitution, as interpreted in *McMillan* and earlier cases, does not impose that requirement." 523 U. S., at 247. Whether *Almendarez-Torres* directly refuted the "increase in the maximum penalty" rule was extensively debated in *Jones*, and that debate need not be repeated here. See 526 U. S., at 248–249; *id.*, at 268–270 (KENNEDY, J., dissenting). I continue to agree with JUSTICE KENNEDY that *Almendarez-Torres* constituted a clear repudiation of the rule the Court adopts today. See *Jones*, *supra*, at 268 (dissenting opinion). My understanding is bolstered by *Monge* v. *California*, a decision relegated to a footnote by

the Court today. In *Monge*, in reasoning essential to our holding, we reiterated that "the Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed." 524 U. S., at 729 (citing *Almendarez-Torres*). At the very least, *Monge* demonstrates that *Almendarez-Torres* was not an "exceptional departure" from "historic practice." *Ante*, at 21.

Of all the decisions that refute the Court's "increase in the maximum penalty" rule, perhaps none is as important as *Walton* v. *Arizona*, 497 U. S. 639 (1990). There, a jury found Walton, the petitioner, guilty of first-degree murder. Under Arizona law, a trial court conducts a separate sentencing hearing to determine whether a defendant convicted of first-degree murder should receive the death penalty or life imprisonment. See *id.*, at 643 (citing Ariz. Rev. Stat. Ann. §13–703(B) (1989)). At that sentencing hearing, the judge, rather than the jury, must determine the existence or nonexistence of the statutory aggravating and mitigating factors. See *Walton*, 497 U. S., at 643 (quoting §13–703(B)). The Arizona statute directs the judge to "'impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in [the statute] and that there are no mitigating circumstances sufficiently substantial to call for leniency.'" *Id.*, at 644 (quoting §13–703(E)). Thus, under Arizona law, a defendant convicted of first-degree murder can be sentenced to death *only if* the judge finds the existence of a statutory aggravating factor.

Walton challenged the Arizona capital sentencing scheme, arguing that the Constitution requires that the jury, and not the judge, make the factual determination of the existence or nonexistence of the statutory aggravating factors. We rejected that contention: "'Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of

such a sentence has been soundly rejected by prior decisions of this Court.'" *Id.*, at 647 (quoting *Clemons* v. *Mississippi*, 494 U. S. 738, 745 (1990)). Relying in part on our decisions rejecting challenges to Florida's capital sentencing scheme, which also provided for sentencing by the trial judge, we added that "'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" *Walton*, *supra*, at 648 (quoting *Hildwin* v. *Florida*, 490 U. S. 638, 640–641 (1989) *(per curiam)*).

While the Court can cite no decision that would require its "increase in the maximum penalty" rule, *Walton* plainly rejects it. Under Arizona law, the fact that a statutory aggravating circumstance exists in the defendant's case "'increases the maximum penalty for [the] crime'" of first-degree murder to death. *Ante*, at 9 (quoting *Jones*, *supra*, at 243, n. 6). If the judge does not find the existence of a statutory aggravating circumstance, the maximum punishment authorized by the jury's guilty verdict is life imprisonment. Thus, using the terminology that the Court itself employs to describe the constitutional fault in the New Jersey sentencing scheme presented here, under Arizona law, the judge's finding that a statutory aggravating circumstance exists "exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Ante*, at 16 (emphasis in original). Even JUSTICE THOMAS, whose vote is necessary to the Court's opinion today, agrees on this point. See *ante*, at 26. If a State can remove from the jury a factual determination that makes the difference between life and death, as *Walton* holds that it can, it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence to which a defendant is exposed.

The distinction of *Walton* offered by the Court today is

baffling, to say the least. The key to that distinction is the Court's claim that, in Arizona, the jury makes all of the findings necessary to expose the defendant to a death sentence. See *ante*, at 31 (quoting *Almendarez-Torres*, 523 U. S., at 257, n. 2 (SCALIA, J., dissenting)). As explained above, that claim is demonstrably untrue. A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty. Indeed, at the time *Walton* was decided, the author of the Court's opinion today understood well the issue at stake. See *Walton*, 497 U. S., at 709 (STEVENS, J., dissenting) ("[U]nder Arizona law, as construed by Arizona's highest court, a first-degree murder is not punishable by a death sentence until at least one statutory aggravating circumstance has been proved"). In any event, the extent of our holding in *Walton* should have been perfectly obvious from the face of our decision. We upheld the Arizona scheme specifically on the ground that the Constitution does not require the jury to make the factual findings that serve as the "'prerequisite to imposition of [a death] sentence,'" *id.*, at 647 (quoting *Clemons*, *supra*, at 745), or "'the specific findings authorizing the imposition of the sentence of death,'" *Walton*, *supra*, at 648 (quoting *Hildwin*, *supra*, at 640–641). If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today.

The distinction of *Walton* offered by JUSTICE THOMAS is equally difficult to comprehend. According to JUSTICE THOMAS, because the Constitution requires state legislatures to narrow sentencing discretion in the capital-punishment context, facts that expose a convicted defendant to a capital sentence may be different from all other facts that expose a defendant to a more severe sentence.

See *ante*, at 26–27. JUSTICE THOMAS gives no specific reason for excepting capital defendants from the constitutional protections he would extend to defendants generally, and none is readily apparent. If JUSTICE THOMAS means to say that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence, his reasoning is without precedent in our constitutional jurisprudence.

In sum, the Court's statement that its "increase in the maximum penalty" rule emerges from the history and case law that it cites is simply incorrect. To make such a claim, the Court finds it necessary to rely on irrelevant historical evidence, to ignore our controlling precedent (*e.g.*, *Patterson*), and to offer unprincipled and inexplicable distinctions between its decision and previous cases addressing the same subject in the capital sentencing context (*e.g.*, *Walton*). The Court has failed to offer any meaningful justification for deviating from years of cases both suggesting and holding that application of the "increase in the maximum penalty" rule is not required by the Constitution.

II

That the Court's rule is unsupported by the history and case law it cites is reason enough to reject such a substantial departure from our settled jurisprudence. Significantly, the Court also fails to explain adequately why the Due Process Clauses of the Fifth and Fourteenth Amendments and the jury trial guarantee of the Sixth Amendment require application of its rule. Upon closer examination, it is possible that the Court's "increase in the maximum penalty" rule rests on a meaningless formalism that accords, at best, marginal protection for the constitu-

tional rights that it seeks to effectuate.

Any discussion of either the constitutional necessity or the likely effect of the Court's rule must begin, of course, with an understanding of what exactly that rule is. As was the case in *Jones*, however, that discussion is complicated here by the Court's failure to clarify the contours of the constitutional principle underlying its decision. See *Jones*, 526 U. S., at 267 (KENNEDY, J., dissenting). In fact, there appear to be several plausible interpretations of the constitutional principle on which the Court's decision rests.

For example, under one reading, the Court appears to hold that the Constitution requires that a fact be submitted to a jury and proved beyond a reasonable doubt only if that fact, as a formal matter, extends the range of punishment *beyond the prescribed statutory maximum*. See, *e.g.*, *ante*, at 24. A State could, however, remove from the jury (and subject to a standard of proof below "beyond a reasonable doubt") the assessment of those facts that define narrower ranges of punishment, *within the overall statutory range*, to which the defendant may be sentenced. See, *e.g.*, *ante*, at 28, n. 19. Thus, apparently New Jersey could cure its sentencing scheme, and achieve virtually the same results, by drafting its weapons possession statute in the following manner: First, New Jersey could prescribe, in the weapons possession statute itself, a range of 5 to 20 years' imprisonment for one who commits that criminal offense. Second, New Jersey could provide that only those defendants convicted under the statute who are found by a judge, by a preponderance of the evidence, to have acted with a purpose to intimidate an individual on the basis of race may receive a sentence greater than 10 years' imprisonment.

The Court's proffered distinction of *Walton* v. *Arizona* suggests that it means to announce a rule of only this limited effect. The Court claims the Arizona capital sen-

tencing scheme is consistent with the constitutional principle underlying today's decision because Arizona's first-degree murder statute itself authorizes both life imprisonment and the death penalty. See Ariz. Rev. Stat. Ann. §13–1105(C) (1989). "[O]nce a *jury* has found the defendant *guilty* of *all the elements* of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.'" *Ante*, at 31 (emphasis in original) (quoting *Almendarez-Torres*, 523 U. S., at 257, n. 2 (SCALIA, J., dissenting)). Of course, as explained above, an Arizona sentencing judge can impose the maximum penalty of death only if the judge first makes a statutorily required finding that at least one aggravating factor exists in the defendant's case. Thus, the Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense. In real terms, however, the Arizona sentencing scheme removes from the jury the assessment of a fact that determines whether the defendant can receive that maximum punishment. The only difference, then, between the Arizona scheme and the New Jersey scheme we consider here– apart from the magnitude of punishment at stake– is that New Jersey has not prescribed the 20-year maximum penalty in the same statute that it defines the crime to be punished. It is difficult to understand, and the Court does not explain, why the Constitution would require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes.

Under another reading of the Court's decision, it may mean only that the Constitution requires that a fact be submitted to a jury and proved beyond a reasonable doubt if it, as a formal matter, *increases* the range of punishment *beyond that which could legally be imposed absent that fact*. See, *e.g.*, *ante*, at 16, 24. A State could, however, remove from the jury (and subject to a standard of proof

below "beyond a reasonable doubt") the assessment of those facts that, as a formal matter, *decrease* the range of punishment *below that which could legally be imposed absent that fact*. Thus, consistent with our decision in *Patterson*, New Jersey could cure its sentencing scheme, and achieve virtually the same results, by drafting its weapons possession statute in the following manner: First, New Jersey could prescribe, in the weapons possession statute itself, a range of 5 to 20 years' imprisonment for one who commits that criminal offense. Second, New Jersey could provide that a defendant convicted under the statute whom a judge finds, by a preponderance of the evidence, *not* to have acted with a purpose to intimidate an individual on the basis of race may receive a sentence no greater than 10 years' imprisonment.

The rule that JUSTICE THOMAS advocates in his concurring opinion embraces this precise distinction between a fact that increases punishment and a fact that decreases punishment. See *ante*, at 3 ("[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)"). The historical evidence on which JUSTICE THOMAS relies, however, demonstrates both the difficulty and the pure formalism of making a constitutional "elements" rule turn on such a difference. For example, the Wisconsin statute considered in *Lacy* v. *State*, 15 Wis. *13 (1862), could plausibly qualify as either increasing or mitigating punishment on the basis of the same specified fact. There, Wisconsin provided that the willful and malicious burning of a dwelling house in which "the life of no person shall have been destroyed" was punishable by 7 to 14 years in prison, but that the same burning at a time in which "there was no person lawfully in the dwelling house" was punishable by only 3 to 10 years in prison. Wis. Rev. Stat., ch. 165, §1 (1858). Although the statute appeared to make the *absence* of persons from the affected

dwelling house a fact that mitigated punishment, the Wisconsin Supreme Court found that the *presence* of a person in the affected house constituted an aggravating circumstance. *Lacy*, *supra*, at *15–*16. As both this example and the above hypothetical redrafted New Jersey statute demonstrate, see *supra*, at 20, whether a fact is responsible for an increase or a decrease in punishment rests in the eye of the beholder. Again, it is difficult to understand, and neither the Court nor JUSTICE THOMAS explains, why the Constitution would require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes.

If either of the above readings is all that the Court's decision means, "the Court's principle amounts to nothing more than chastising [the New Jersey Legislature] for failing to use the approved phrasing in expressing its intent as to how [unlawful weapons possession] should be punished." *Jones*, 526 U. S., at 267 (KENNEDY, J., dissenting). If New Jersey can, consistent with the Constitution, make precisely the same differences in punishment turn on precisely the same facts, and can remove the assessment of those facts from the jury and subject them to a standard of proof below "beyond a reasonable doubt," it is impossible to say that the Fifth, Sixth, and Fourteenth Amendments require the Court's rule. For the same reason, the "structural democratic constraints" that might discourage a legislature from enacting either of the above hypothetical statutes would be no more significant than those that would discourage the enactment of New Jersey's present sentence-enhancement statute. See *ante*, at 24, n. 16 (majority opinion). In all three cases, the legislature is able to calibrate punishment perfectly, and subject to a maximum penalty only those defendants whose cases satisfy the sentence-enhancement criterion. As JUSTICE KENNEDY explained in *Jones*, "[n]o constitutional values are served by so formalistic an approach,

while its constitutional costs in statutes struck down . . . are real." 526 U. S., at 267.

Given the pure formalism of the above readings of the Court's opinion, one suspects that the constitutional principle underlying its decision is more far reaching. The actual principle underlying the Court's decision may be that any fact (other than prior conviction) that has the effect, *in real terms*, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt. See, *e.g.*, *ante*, at 28 ("[T]he 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?"). The principle thus would apply not only to schemes like New Jersey's, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (*e.g.*, the federal Sentencing Guidelines). JUSTICE THOMAS essentially concedes that the rule outlined in his concurring opinion would require the invalidation of the Sentencing Guidelines. See *ante*, at 27, n. 11.

I would reject any such principle. As explained above, it is inconsistent with our precedent and would require the Court to overrule, at a minimum, decisions like *Patterson* and *Walton*. More importantly, given our approval of— and the significant history in this country of— discretionary sentencing by judges, it is difficult to understand how the Fifth, Sixth, and Fourteenth Amendments could possibly require the Court's or JUSTICE THOMAS' rule. Finally, in light of the adoption of determinate-sentencing schemes by many States and the Federal Government, the consequences of the Court's and JUSTICE THOMAS' rules in terms of sentencing schemes

invalidated by today's decision will likely be severe.

As the Court acknowledges, we have never doubted that the Constitution permits Congress and the state legislatures to define criminal offenses, to prescribe broad ranges of punishment for those offenses, and to give judges discretion to decide where within those ranges a particular defendant's punishment should be set. See *ante*, at 14–15. That view accords with historical practice under the Constitution. "From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion. The great majority of federal criminal statutes have stated only a maximum term of years and a maximum monetary fine, permitting the sentencing judge to impose any term of imprisonment and any fine up to the statutory maximum." K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1998) (footnote omitted). Under discretionary-sentencing schemes, a judge bases the defendant's sentence on any number of facts neither presented at trial nor found by a jury beyond a reasonable doubt. As one commentator has explained:

> "During the age of broad judicial sentencing discretion, judges frequently made sentencing decisions on the basis of facts that they determined for themselves, on less than proof beyond a reasonable doubt, without eliciting very much concern from civil libertarians. . . . The sentence in any number of traditional discretionary situations depended quite directly on judicial findings of specific contested facts. . . . Whether because such facts were directly relevant to the judge's retributionist assessment of how serious the particular offense was (within the spectrum of conduct covered by the statute of conviction), or because they bore on a determination of how much rehabilitation the offender's character was likely to need, the sentence would be higher or lower, in some specific degree determined by the judge, based on

> the judge's factual conclusions." Lynch, Towards A Model Penal Code, Second (Federal?), 2 Buffalo Crim. L. Rev. 297, 320 (1998) (footnote omitted).

Accordingly, under the discretionary-sentencing schemes, a factual determination made by a judge on a standard of proof below "beyond a reasonable doubt" often made the difference between a lesser and a greater punishment.

For example, in *Williams* v. *New York*, a jury found the defendant guilty of first-degree murder and recommended life imprisonment. The judge, however, rejected the jury's recommendation and sentenced Williams to death on the basis of additional facts that he learned through a presentence investigation report and that had neither been charged in an indictment nor presented to the jury. 337 U. S., at 242–245. In rejecting Williams' due process challenge to his death sentence, we explained that there was a long history of sentencing judges exercising "wide discretion in the sources and types of evidence used to assist [them] in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id.*, at 246. Specifically, we held that the Constitution does not restrict a judge's sentencing decision to information that is charged in an indictment and subject to cross-examination in open court. "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." *Id.*, at 251.

Under our precedent, then, a State may leave the determination of a defendant's sentence to a judge's discretionary decision within a prescribed range of penalties. When a judge, pursuant to that sentencing scheme, decides to increase a defendant's sentence on the basis of certain contested facts, those facts need not be proved to a jury beyond a reasonable doubt. The judge's findings, whether by proof beyond a reasonable doubt or less, suffice for purposes of the Constitution. Under the Court's deci-

sion today, however, it appears that once a legislature constrains judges' sentencing discretion by prescribing certain sentences that may only be imposed (or must be imposed) in connection with the same determinations of the same contested facts, the Constitution requires that the facts instead be proved to a jury beyond a reasonable doubt. I see no reason to treat the two schemes differently. See, *e.g.*, *McMillan*, 477 U. S., at 92 ("We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance"). In this respect, I agree with the Solicitor General that "[a] sentence that is constitutionally permissible when selected by a court on the basis of whatever factors it deems appropriate does not become impermissible simply because the court is permitted to select that sentence only after making a finding prescribed by the legislature." Brief for United States as *Amicus Curiae* 7. Although the Court acknowledges the legitimacy of discretionary sentencing by judges, see *ante*, at 14–15, it never provides a sound reason for treating judicial factfinding under determinate-sentencing schemes differently under the Constitution.

JUSTICE THOMAS' attempt to explain this distinction is similarly unsatisfying. His explanation consists primarily of a quotation, in turn, of a 19th-century treatise writer, who contended that the aggravation of punishment within a statutory range on the basis of facts found by a judge "'is an entirely different thing from punishing one for what is not alleged against him.'" *Ante*, at 22 (quoting 1 J. Bishop, Commentaries on Law of Criminal Procedure §85, p. 54 (rev. 2d ed. 1872)). As our decision in *Williams* v. *New York* demonstrates, however, that statement does not accurately describe the reality of discretionary sentencing conducted by judges. A defendant's actual punishment can be affected in a very real way by facts never alleged in an indictment, never presented to a jury, and

never proved beyond a reasonable doubt. In Williams' case, facts presented for the first time to the judge, for purposes of sentencing alone, made the difference between life imprisonment and a death sentence.

Consideration of the purposes underlying the Sixth Amendment's jury trial guarantee further demonstrates why our acceptance of judge-made findings in the context of discretionary sentencing suggests the approval of the same judge-made findings in the context of determinate sentencing as well. One important purpose of the Sixth Amendment's jury trial guarantee is to protect the criminal defendant against potentially arbitrary judges. It effectuates this promise by preserving, as a constitutional matter, certain fundamental decisions for a jury of one's peers, as opposed to a judge. For example, the Court has recognized that the Sixth Amendment's guarantee was motivated by the English experience of "competition . . . between judge and jury over the real significance of their respective roles," *Jones*, 526 U. S., at 245, and "measures [that were taken] to diminish the juries' power," *ibid.* We have also explained that the jury trial guarantee was understood to provide "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968). Blackstone explained that the right to trial by jury was critically important in criminal cases because of "the violence and partiality of judges appointed by the crown, . . . who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure." 4 Blackstone, Commentaries, at 343. Clearly, the concerns animating the Sixth Amendment's jury trial guarantee, if they were to extend to the sentencing

context at all, would apply with greater strength to a discretionary-sentencing scheme than to determinate sentencing. In the former scheme, the potential for mischief by an arbitrary judge is much greater, given that the judge's decision of where to set the defendant's sentence within the prescribed statutory range is left almost entirely to discretion. In contrast, under a determinate-sentencing system, the discretion the judge wields within the statutory range is tightly constrained. Accordingly, our approval of discretionary-sentencing schemes, in which a defendant is not entitled to have a jury make factual findings relevant to sentencing despite the effect those findings have on the severity of the defendant's sentence, demonstrates that the defendant should have no right to demand that a jury make the equivalent factual determinations under a determinate-sentencing scheme.

The Court appears to hold today, however, that a defendant is entitled to have a jury decide, by proof beyond a reasonable doubt, every fact relevant to the determination of sentence under a determinate-sentencing scheme. If this is an accurate description of the constitutional principle underlying the Court's opinion, its decision will have the effect of invalidating significant sentencing reform accomplished at the federal and state levels over the past three decades. JUSTICE THOMAS' rule, as he essentially concedes, see *ante*, at 27, n. 11, would have the same effect.

Prior to the most recent wave of sentencing reform, the Federal Government and the States employed indeterminate-sentencing schemes in which judges and executive branch officials (*e.g.*, parole board officials) had substantial discretion to determine the actual length of a defendant's sentence. See, *e.g.*, U. S. Dept. of Justice, S. Shane-DuBow, A. Brown, & E. Olsen, Sentencing Reform in the United States: History, Content, and Effect 6–7 (Aug. 1985) (hereinafter Shane-DuBow); Report of Twentieth

Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment 11–13 (1976) (hereinafter Task Force Report); A. Dershowitz, Criminal Sentencing in the United States: An Historical and Conceptual Overview, 423 Annals Am. Acad. Pol. & Soc. Sci. 117, 128–129 (1976). Studies of indeterminate-sentencing schemes found that similarly situated defendants often received widely disparate sentences. See, *e.g.*, Shane-Dubow 7; Task Force Report 14. Although indeterminate sentencing was intended to soften the harsh and uniform sentences formerly imposed under mandatory-sentencing systems, some studies revealed that indeterminate sentencing actually had the opposite effect. See, *e.g.*, A. Campbell, Law of Sentencing 13 (1978) ("Paradoxically the humanitarian impulse sparking the adoption of indeterminate sentencing systems in this country has resulted in an actual increase of the average criminal's incarceration term"); Task Force Report 13 ("[T]he data seem to indicate that in those jurisdictions where the sentencing structure is more indeterminate, judicially imposed sentences tend to be longer").

In response, Congress and the state legislatures shifted to determinate-sentencing schemes that aimed to limit judges' sentencing discretion and, thereby, afford similarly situated offenders equivalent treatment. See, *e.g.*, Cal. Penal Code Ann. §1170 (West Supp. 2000). The most well known of these reforms was the federal Sentencing Reform Act of 1984, 18 U. S. C. §3551 *et seq.* In the Act, Congress created the United States Sentencing Commission, which in turn promulgated the Sentencing Guidelines that now govern sentencing by federal judges. See, *e.g.*, United States Sentencing Commission, Guidelines Manual (Nov. 1998). Whether one believes the determinate-sentencing reforms have proved successful or not— and the subject is one of extensive debate among commentators— the apparent effect of the Court's opinion

today is to halt the current debate on sentencing reform in its tracks and to invalidate with the stroke of a pen three decades' worth of nationwide reform, all in the name of a principle with a questionable constitutional pedigree. Indeed, it is ironic that the Court, in the name of constitutional rights meant to protect criminal defendants from the potentially arbitrary exercise of power by prosecutors and judges, appears to rest its decision on a principle that would render unconstitutional efforts by Congress and the state legislatures to place constraints on that very power in the sentencing context.

Finally, perhaps the most significant impact of the Court's decision will be a practical one— its unsettling effect on sentencing conducted under current federal and state determinate-sentencing schemes. As I have explained, the Court does not say whether these schemes are constitutional, but its reasoning strongly suggests that they are not. Thus, with respect to past sentences handed down by judges under determinate-sentencing schemes, the Court's decision threatens to unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of the Court's decision today. Statistics compiled by the United States Sentencing Commission reveal that almost a half-million cases have been sentenced under the Sentencing Guidelines since 1989. See Memorandum from U. S. Sentencing Commission to Supreme Court Library, dated June 8, 2000 (total number of cases sentenced under federal Sentencing Guidelines since 1989) (available in Clerk of Court's case file). Federal cases constitute only the tip of the iceberg. In 1998, for example, federal criminal prosecutions represented only about 0.4% of the total number of criminal prosecutions in federal and state courts. See National Center for State Courts, A National Perspective: Court Statistics Project (federal and state court filings, 1998), http://www.ncsc.dni.us/divisions/

research/csp/csp98-fscf.html (showing that, in 1998, 57,691 criminal cases were filed in federal court compared to 14,623,330 in state courts). Because many States, like New Jersey, have determinate-sentencing schemes, the number of individual sentences drawn into question by the Court's decision could be colossal.

The decision will likely have an even more damaging effect on sentencing conducted in the immediate future under current determinate-sentencing schemes. Because the Court fails to clarify the precise contours of the constitutional principle underlying its decision, federal and state judges are left in a state of limbo. Should they continue to assume the constitutionality of the determinate-sentencing schemes under which they have operated for so long, and proceed to sentence convicted defendants in accord with those governing statutes and guidelines? The Court provides no answer, yet its reasoning suggests that each new sentence will rest on shaky ground. The most unfortunate aspect of today's decision is that our precedents did not foreordain this disruption in the world of sentencing. Rather, our cases traditionally took a cautious approach to questions like the one presented in this case. The Court throws that caution to the wind and, in the process, threatens to cast sentencing in the United States into what will likely prove to be a lengthy period of considerable confusion.

III

Because I do not believe that the Court's "increase in the maximum penalty" rule is required by the Constitution, I would evaluate New Jersey's sentence-enhancement statute, N. J. Stat. Ann. §2C:44–3 (West Supp. 2000), by analyzing the factors we have examined in past cases. See, *e.g.*, *Almendarez-Torres*, 523 U. S., at 242–243; *McMillan*, 477 U. S., at 86–90. First, the New Jersey statute does not shift the burden of proof on an essential ingredient of

the offense by presuming that ingredient upon proof of other elements of the offense. See, *e.g.*, *id.*, at 86–87; *Patterson*, 432 U. S., at 215. Second, the magnitude of the New Jersey sentence enhancement, as applied in petitioner's case, is constitutionally permissible. Under New Jersey law, the weapons possession offense to which petitioner pleaded guilty carries a sentence range of 5 to 10 years' imprisonment. N. J. Stat. Ann. §§2C:39–4(a), 2C:43–6(a)(2) (West 1995). The fact that petitioner, in committing that offense, acted with a purpose to intimidate because of race exposed him to a higher sentence range of 10 to 20 years' imprisonment. §2C:43–7(a)(3). The 10-year increase in the maximum penalty to which petitioner was exposed falls well within the range we have found permissible. See *Almendarez-Torres*, *supra*, at 226, 242–243 (approving 18-year enhancement). Third, the New Jersey statute gives no impression of having been enacted to evade the constitutional requirements that attach when a State makes a fact an element of the charged offense. For example, New Jersey did not take what had previously been an element of the weapons possession offense and transform it into a sentencing factor. See *McMillan*, 477 U. S., at 89.

In sum, New Jersey "simply took one factor that has always been considered by sentencing courts to bear on punishment"– a defendant's motive for committing the criminal offense– "and dictated the precise weight to be given that factor" when the motive is to intimidate a person because of race. *Id.*, at 89–90. The Court claims that a purpose to intimidate on account of race is a traditional *mens rea* element, and not a motive. See *ante*, at 26–27. To make this claim, the Court finds it necessary once again to ignore our settled precedent. In *Wisconsin* v. *Mitchell*, 508 U. S. 476 (1993), we considered a statute similar to the one at issue here. The Wisconsin statute provided for an increase in a convicted defendant's pun-

ishment if the defendant intentionally selected the victim of the crime because of that victim's race. *Id.*, at 480. In a unanimous decision upholding the statute, we specifically characterized it as providing a sentence enhancement based on the "motive" of the defendant. See *id.*, at 485 (distinguishing between punishment of defendant's "criminal conduct" and penalty enhancement "for conduct *motivated* by a discriminatory point of view" (emphasis added)); *id.*, at 484–485 ("[U]nder the Wisconsin statute the same criminal conduct may be more heavily punished if the victim is selected because of his race . . . than if no such *motive* obtained" (emphasis added)). That same characterization applies in the case of the New Jersey statute. As we also explained in *Mitchell*, the motive for committing an offense has traditionally been an important factor in determining a defendant's sentence. *Id.*, at 485. New Jersey, therefore, has done no more than what we held permissible in *McMillan;* it has taken a traditional sentencing factor and dictated the precise weight judges should attach to that factor when the specific motive is to intimidate on the basis of race.

The New Jersey statute resembles the Pennsylvania statute we upheld in *McMillan* in every respect but one. That difference— that the New Jersey statute increases the maximum punishment to which petitioner was exposed— does not persuade me that New Jersey "sought to evade the constitutional requirements associated with the characterization of a fact as an offense element." *Supra*, at 2. There is no question that New Jersey could prescribe a range of 5 to 20 years' imprisonment as punishment for its weapons possession offense. Thus, as explained above, the specific means by which the State chooses to control judges' discretion within that permissible range is of no moment. Cf. *Patterson*, *supra*, at 207–208 ("The Due Process Clause, as we see it, does not put New York to the choice of abandoning [the affirmative defense] or under-

taking to disprove [its] existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment"). The New Jersey statute also resembles in virtually every respect the federal statute we considered in *Almendarez-Torres*. That the New Jersey statute provides an enhancement based on the defendant's motive while the statute in *Almendarez-Torres* provided an enhancement based on the defendant's commission of a prior felony is a difference without constitutional importance. Both factors are traditional bases for increasing an offender's sentence and, therefore, may serve as the grounds for a sentence enhancement.

On the basis of our prior precedent, then, I would hold that the New Jersey sentence-enhancement statute is constitutional, and affirm the judgment of the Supreme Court of New Jersey.