

THE NON-REDELEGATION DOCTRINE

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ABSTRACT

In United States v. Booker, the Court remedied a constitutional defect in the federal sentencing scheme by rendering advisory the then-binding sentencing guidelines promulgated by the U.S. Sentencing Commission. One important but overlooked consequence of this decision is that it redelegated the power to set sentencing policy from the Sentencing Commission to federal judges. District courts now may sentence based on their own policy views instead of being bound by the policy determinations rendered by the Commission.

This Article argues that, when faced with a decision that implicates an unambiguous delegation, the courts should not redelegate unless authorized by Congress to do so. The proposed non-redelegation doctrine rests on both constitutional and practical grounds. Constitutionally, judicial redelegation raises substantial separation of powers concerns because delegation defines how Congress chooses to perform its core function of setting policy. Practically, judicial redelegation is bound to affect the substantive policies that are adopted because the policies that the agent adopts

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depend on the agent's unique characteristics and preferences. Although this Article uses Booker to illustrate the need for the presumption, the presumption could apply to other contexts in which Congress delegates its power to make policy and courts have the opportunity to alter that delegation.

TABLE OF CONTENTS

INTRODUCTION 166

I. AN OVERVIEW OF DELEGATION 169

II. DELEGATION AND REDELEGATION OF
FEDERAL SENTENCING POLICY 172

A. Delegation to the Sentencing Commission 172

B. Booker as Redelegation 181

III. THE NON-REDELEGATION DOCTRINE 191

A. Defining the Presumption Against Redelegation 191

*B. Reasons Supporting the Presumption Against
 Redelegation* 197

 1. *Separation of Powers* 197

 2. *The Effects of Delegation on Substantive Policy* 204

a. Institutional Priorities 204

b. Expertise and Access to Information 208

c. Regulatory Tools 211

d. Organizational Structure 213

CONCLUDING THOUGHTS 214

INTRODUCTION

In the landmark case *United States v. Booker*, the Supreme Court rendered the then-binding United States Sentencing Guidelines merely advisory.¹ Before *Booker*, the Sentencing Reform Act of 1984 generally required judges to impose sentences within narrow ranges prescribed by the United States Sentencing Commission. Those ranges were determined by factual findings that the sentencing judge made during a sentencing hearing. The *Booker* Court concluded that this mandatory guidelines scheme violated the Sixth Amendment right to a jury trial. It explained that the Sixth Amendment requires that any fact that increases the maximum possible punishment be found by a jury beyond a reasonable doubt.² Because a judge could increase the applicable guideline range by finding facts by a preponderance of the evidence, the Court held that the mandatory guidelines scheme was unconstitutional.³ The Court chose to remedy this constitutional violation by excising 18 U.S.C. § 3553(b), the statutory provision requiring sentencing judges to follow the Guidelines.⁴ According to the Court, this remedy best achieved Congress's goal of reducing disparity in sentencing.⁵

Booker wrought a dramatic change in sentencing law. Commentators have criticized the decision on a number of grounds, including that the Court erred in concluding that the mandatory guidelines scheme violated the Constitution,⁶ that the remedy the Court chose—rendering the Guidelines advisory—did not match up to the

1. 543 U.S. 220, 245 (2005).

2. *Id.* at 231.

3. *Id.* at 233-34.

4. *Id.* at 259.

5. *Id.* at 254.

6. *E.g.*, Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 679-80 (2006) (noting that, in its discussion of the Sixth Amendment issue, the *Booker* Court never explained how judicial fact-finding in the pre-Guidelines era could be constitutional under its reasoning); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 58 (2005) ("Why the mandatory feature of the Guidelines should have been thought to violate the Sixth Amendment, a provision designed for the protection of criminal defendants, is a puzzle.").

violation,⁷ and that the decision created unnecessary legal uncertainty because it left important questions unanswered.⁸

One critical point overlooked by this scholarship is that *Booker*'s remedy redelegated to the district courts power that Congress had assigned to the Sentencing Commission.⁹ Congress created the mandatory guidelines scheme to confine judicial discretion at sentencing.¹⁰ Traditionally, sentencing judges had sweeping discretion to impose a sentence anywhere within the broad statutory range prescribed by Congress.¹¹ In response to complaints that this broad judicial discretion led to unwarranted disparity in sentencing, Congress created the Sentencing Commission and tasked it with setting sentencing policy by promulgating mandatory sentencing guidelines that limit the sentencing range available to judges in particular cases.¹² By rendering the Guidelines advisory

7. *E.g.*, Jonathan S. Masur, *Booker Reconsidered*, 77 U. CHI. L. REV. 1091, 1104 (2010) ("What the court never fully acknowledged was the mismatch between the problem *Booker* set out to cure and the structural remedy it chose."); McConnell, *supra* note 6, at 677 ("The most striking feature of the *Booker* decision is that the remedy bears no logical relation to the constitutional violation."); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1480 (2008) (noting that the *Booker* remedy "in many respects resembles the regime that the *Booker* merits decision held unconstitutional"); see also *Kimrough v. United States*, 552 U.S. 85, 115 (2007) (Thomas, J., dissenting) (criticizing the *Booker* remedy for "fail[ing] to tailor the remedy to the wrong").

8. *E.g.*, Craig Green, *Booker and Fanfan: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L.J. 395, 417 (2005) (noting that, in failing "to recognize, much less address" a number of problems raised by the decision, *Booker* "left a gaping hole in the Court's newly tailored Sixth Amendment jurisprudence"); see also *Booker*, 543 U.S. at 311 (Scalia, J., dissenting) ("The worst feature of the scheme is that no one knows—and perhaps no one is meant to know—how advisory Guidelines ... will function in practice.").

9. In raising this critique, this Article adds to a growing literature at the intersection of administrative law and criminal law. See, e.g., Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005) [hereinafter Barkow, *Administering Crime*]; Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006) [hereinafter Barkow, *Separation of Powers*]; Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1 (2012); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998); Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CALIF. L. REV. 1 (1991).

10. See *infra* Part II.A.

11. See *infra* Part II.A.

12. See *infra* Part II.A.

and leaving sentencing to the discretion of district judges, the *Booker* Court reassigned to the district courts the power to set sentencing policy.¹³

This Article argues that redelegation of this sort is inappropriate. Because the Constitution confers on Congress the power to make policy, when Congress unambiguously delegates policy-making power to a particular agent, only that agent may exercise the delegated power. Unless Congress says otherwise, a court should not redelegate that authority, even when that redelegation would, in the eyes of the court, better achieve Congress's substantive goals. In other words, there ought to be a presumption against redelegation—a non-redelegation doctrine.

The presumption against redelegation rests on two grounds. First, judicial redelegation raises separation of powers concerns. The Constitution empowers Congress to enact policies. A delegation defines how Congress chooses to perform that task; it assigns the policy-making power to an agent instead of exercising the power itself. Redelegation interferes with this basic decision about how Congress chooses to operate. Redelegation may also affect a wide swath of policy decisions. Instead of displacing a single substantive policy decision, redelegation results in the judiciary assigning who has the power to make a whole body of policy. Redelegation potentially constitutes a greater intrusion on congressional authority than other types of judicial review. Second, Congress's decision to delegate policy-making power signifies that Congress has not chosen a particular policy. Instead, Congress leaves it to the agent to define the exact policy objectives. Because each institution has different priorities, expertise, information, and tools at its disposal, the decision of who receives delegated power will inevitably affect the ultimate substantive policy that is adopted. Thus, when Congress delegates to an agent, the content of the substantive policy that is adopted will depend on the identity of that agent.

Using the Sentencing Reform Act and *Booker* as an illustration, this Article proposes the presumption against redelegation of congressional authority. It proceeds in three parts. Part I provides a brief overview of Congress's authority to delegate. Part II

13. See *infra* Part II.B.

describes how Congress delegated authority over sentencing policy to the U.S. Sentencing Commission, and it explains how the *Booker* Court redelegated that authority to federal judges. Part III argues for the proposed presumption against redelegation. It begins by explaining how the presumption would operate. It then provides the reasons for the presumption. Using the redelegation in *Booker* as an example, it explains that the presumption is necessary to protect the separation of powers and that, because the identity of an agent is instrumental to defining the policy generated under a delegation, a court cannot redelegate without changing the policies that are adopted. The Article then offers some concluding thoughts on the broader implications of the proposed presumption, as well as some observations on the effect of the redelegation in *Booker*.

I. AN OVERVIEW OF DELEGATION

Article I of the Constitution confers on Congress the power to implement policy through legislation.¹⁴ Congress itself need not develop substantive rules through legislation. Instead, it may delegate responsibility to an agent to develop that policy.¹⁵ Through this delegation, the agent may exercise power that it otherwise lacks.¹⁶ The agent steps in and fulfills the role of Congress in setting policy.

There are various reasons why Congress may choose to delegate: members of Congress may lack the information or expertise to develop sound policy; they may be unable to agree on what policy to

14. U.S. CONST. art. I (“All legislative Powers herein granted shall be vested in a Congress of the United States.”).

15. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472-73 (2001) (recognizing Congress’s authority to delegate power to create policy); *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (upholding delegation to Sentencing Commission to promulgate binding Sentencing Guidelines); see also *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (“Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”).

16. Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 401 (“Implicit in the notion of separation of powers is a corollary principle that an agency is constitutionally empowered to act only under the authority delegated to it by the legislature.”).

adopt; or they may simply desire to foist the blame for unpopular policy choices onto someone else.¹⁷

Congress frequently delegates its power and regularly confers on administrative agencies the power to develop policy through rulemaking.¹⁸ Today, administrative agencies are the predominant federal regulators.¹⁹ The policy that agencies promulgate under their delegated power is not, however, legislation.

Congress cannot delegate its legislative power under Article I.²⁰ Instead, the delegation authorizes the agency to promulgate rules to clarify ambiguities in the legislation enacted by Congress.²¹ To ensure that an agency is merely implementing Congress's will, as opposed to legislating, Congress must provide an "intelligible principle" to guide the agency in its rulemaking.²²

Although originally created to constrain delegations, this non-delegation doctrine has over time been rendered toothless.²³ Courts have upheld many delegations that provide only minimal guid-

17. Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036-37 (2006).

18. Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation Of Powers*, 112 COLUM. L. REV. 459, 466 (2012) ("Since the New Deal, administrative agencies have carried out vast amounts of highly discretionary policymaking under broad delegations from Congress."); Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLAL. REV. 1188, 1191 (2012) ("Since the New Deal, Congress has routinely delegated broad lawmaking authority to administrative agencies charged with implementing a range of federal programs.").

19. Peter L. Strauss, Foreword, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 752 (2007) ("[A]gencies adopt roughly ten times as many rules each year as Congress adopts statutes.").

20. *Whitman*, 531 U.S. at 472. Not everyone agrees with this position, however. Some have argued that Congress can delegate its legislative power under Article I. See, e.g., *id.* at 489 (Stevens, J., concurring); 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 2.6, at 66 (3d ed. 1994) ("The Court was probably mistaken from the outset in interpreting Article I's grant of power to Congress as an implicit limit on Congress' authority to delegate legislative power."). In any event, virtually everyone agrees that a delegation is appropriate only if Congress provides intelligible principles. See *Whitman*, 531 U.S. at 472, 489-90 (Stevens, J., concurring). *But cf. id.* at 487 (Thomas, J., concurring) (suggesting that he is open to an argument that the "intelligible principle" requirement does not justify all delegations).

21. See *Whitman*, 531 U.S. at 487 (Thomas, J., concurring); *Loving v. United States*, 517 U.S. 748, 776-77 (1996) (Scalia, J., concurring).

22. *Whitman*, 531 U.S. at 472. For an overview and critique of the doctrine, see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

23. David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 473-74 (2011).

ance—including delegations to agencies to regulate as “public interest” requires²⁴ and to set prices through regulation that are “fair and equitable.”²⁵ In other words, the non-delegation doctrine places barely any limitation on Congress’s ability to delegate broad policy making authority to agencies.²⁶

Congress also frequently delegates policy-making power to the federal courts.²⁷ Sometimes Congress directs courts to develop a set of rules through their decisions.²⁸ More often, however, Congress delegates power to the courts by failing to provide unambiguous rules of decision. For example, instead of prescribing a bright-line rule, Congress may set forth a standard that directs courts to consider a variety of factors in rendering a decision.²⁹ Applying such a statute requires the judge to make policy judgments based on a balance of the various factors.³⁰ Similarly, Congress often drafts broad or imprecise statutory language³¹ and, because the judiciary is the default institution charged with “say[ing] what the law is,”³² courts have the responsibility to resolve those ambiguities through their interpretations.³³ And although judicial interpretation is

24. *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943).

25. *Yakus v. United States*, 321 U.S. 414, 420, 423 (1944).

26. See Wright, *supra* note 9, at 26. Scholars have written extensively about the scope and nature of the non-delegation doctrine. See, e.g., Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035 (2007); Posner & Vermeule, *supra* note 22; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

27. Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 421-22 (2008).

28. See, e.g., 28 U.S.C. § 2254(d)(1) (2006) (providing that a federal court may grant habeas relief to a person convicted in state court if the state court’s decision was “contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States”).

29. See, e.g., 42 U.S.C. § 12111(10)(B) (2006) (outlining factors courts must consider in determining whether requiring employer to provide accommodation for the disabled constitutes an undue hardship).

30. See Kathleen M. Sullivan, Foreword, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 59 (1992) (explaining that standards give judges broader discretion).

31. See *Mistretta v. United States*, 488 U.S. 361, 417 (1998) (Scalia, J., dissenting) (“[A] certain degree of discretion, and thus of lawmaking, *inheres* in most ... judicial action.”).

32. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

33. See *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 544 (1940) (“The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function.”); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2078 (1990).

ostensibly an exercise in determining Congress's intent,³⁴ it is generally recognized that the preferences of individual judges affect their interpretations and judicial interpretations are accordingly instances of policy making.³⁵

II. DELEGATION AND REDELEGATION OF FEDERAL SENTENCING POLICY

For much of American history, Congress set broad statutory sentencing ranges for most crimes and left judges with discretion to sentence within those ranges. In the latter half of the twentieth century, the vast disparity in sentences imposed through this discretion led Congress to change the system. But rather than prescribing limits on judicial discretion at sentencing, Congress elected to delegate that power to an agency—the U.S. Sentencing Commission. In *United States v. Booker*, the Supreme Court re delegated that authority over sentencing policy to federal judges.

A. *Delegation to the Sentencing Commission*

For most of the nineteenth and twentieth centuries, federal criminal sentencing was left to the discretion of individual judges.³⁶ Under this regime, after a defendant had been convicted, the judge would conduct a separate sentencing hearing at which she would impose a sentence based on her assessment of the offender and the circumstances under which the crime was committed.³⁷ The judge's

34. In referring to "congressional intent," we do not mean to say that intentionalism is the proper method of statutory interpretation or to otherwise take a position on intentionalism, textualism, or other methods of interpretation. Rather, we use the term "congressional intent" only as a shorthand for the idea, which is basic to all methods of interpretation, that Congress has control over policy, and a court's job is to implement that policy. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2091 (2002).

35. See RICHARD A. POSNER, *OVERCOMING LAW* 235 (1995) ("Everyone professionally involved with law knows that, as Holmes put it, judges legislate 'interstitially,' which is to say they make law."); Lemos, *supra* note 27, at 425 (describing the influence of judicial preferences on interpretation and implementation).

36. KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 9 (1998).

37. Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 52 (2011).

discretion was limited by the statutory sentencing range—that is, she could not impose a sentence above the statutory maximum sentence for the crime of conviction nor a sentence below any applicable statutory minimum sentence. Those ranges, however, were ordinarily quite broad. In selecting a sentence within the broad statutory range, judges often considered a wide range of factors—including the defendant’s criminal history, employment history, family ties, educational level, military service, charitable activities, and age; harm caused by the criminal act; and the defendant’s motive.³⁸ Whether to consider any of these factors and the weight accorded to various factors were decisions left almost entirely to the discretion of individual judges.³⁹

Leaving sentencing policy to the discretion of individual judges led to widespread sentencing disparities. Because different judges had different ideas about the appropriate punishment for a particular offense and how to weigh various sentencing factors, similarly situated offenders often received different sentences.⁴⁰ For example, a widely-reported sentencing experiment in the Second Circuit revealed that “[w]here one judge sentenced a defendant to three years, another judge chose twenty years.”⁴¹

To combat these disparities, Congress enacted the Sentencing Reform Act of 1984 (the SRA).⁴² Among other things, the SRA created the United States Sentencing Commission⁴³ and delegated authority over sentencing policy to the Commission.⁴⁴ The Commission exercised this authority by creating binding sentencing guidelines that limit and channel judicial discretion at sentencing.⁴⁵

38. See STITH & CABRANES, *supra* note 36, at 22.

39. See *id.* at 14-15, 23 (recounting the broad discretion judges historically possessed regarding the identification and assessment of sentencing factors); Hessick & Hessick, *supra* note 37, at 51-57 (same).

40. See S. REP. NO. 98-225, at 74-75 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3257-58.

41. Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT’G REP. 180, 180 (1999).

42. 18 U.S.C. §§ 3551-3581 (Supp. II 2003); 28 U.S.C. §§ 991-998 (Supp. III 2003).

43. 28 U.S.C. § 991 (2006).

44. See *id.* § 991(b)(1) (authorizing the Commission to “establish sentencing policies and practices for the Federal criminal justice system”); Wright, *supra* note 9, at 7 (“The purpose of the Commission is to establish criminal sentencing policy through the promulgation of sentencing guidelines.”).

45. 28 U.S.C. § 994(a) (2006).

For each type of offense, the SRA charged the Commission with promulgating mandatory sentencing guidelines. Those guidelines identified factors that judges could consider in imposing sentences—usually various facts about how the crime was committed and the criminal background of the defendant—and set forth narrow sentencing ranges based on the presence or absence of those factors. For example, before the SRA, if a defendant violated a federal antifraud law carrying a possible punishment of up to twenty years of imprisonment, a judge could have imposed a sentence of probation—that is, no incarceration—or a sentence as high as twenty years in prison based on whatever factors the judge thought relevant.⁴⁶ After the passage of the SRA, the Guidelines constrained the judge to impose a sentence within a narrow, prescribed range. In a fraud case, a judge was required to impose a sentence in the range of fifteen to twenty-one months for an offender with no previous convictions who, for example, defrauded his business partners out of \$175,000 using a scheme that required some planning.⁴⁷ Thus, through the SRA, Congress transferred the power to set sentencing policy from individual judges to the Sentencing Commission.⁴⁸

The SRA conferred substantial discretion on the Commission to fashion sentencing policy. Although Congress articulated several principles and parameters to guide the Commission in creating Guidelines,⁴⁹ it left the Commission broad authority to set the

46. 18 U.S.C. § 1341 (2006) (stating that a person convicted of fraud under this statute “shall be fined under this title or imprisoned not more than 20 years, or both”); *see also* *United States v. Tucker*, 404 U.S. 443, 446 (1972) (“[A] trial judge in the federal judicial system generally has wide discretion in determining what sentence to impose.”).

47. *See* STITH & CABRANES, *supra* note 36, at 192-93 (giving the “real life” example of Martin Miller).

48. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 *YALE L.J.* 1681, 1703 (1992); *see also* Barkow, *Separation of Powers*, *supra* note 9, at 1042 (“[T]he Sentencing Reform Act operated to transfer significant discretionary power from the judicial branch ... to the executive branch and to Congress.”).

49. For example, the Act set forth general parameters restricting the size of any given Guideline range. 28 U.S.C. § 994(b)(2). In addition, the Act listed various factors that the Commission must consider in fashioning the Guidelines relating to the severity of the crime—such as the harm caused by the crime—and the character of the defendant—such as whether the defendant had a criminal record. However, the Commission has discretion to determine what weight to assign to each factor and the Commission may consider factors

Guidelines range for each offense. In particular, the Commission had near exclusive authority to identify which factors were relevant sentencing considerations and to specify what weight would be given to each factor.⁵⁰ The Commission used that authority to exclude a number of traditional sentencing factors from consideration; most visibly, it excluded factors about a defendant's background that previously had been treated as mitigating.⁵¹

Congress chose to delegate the task of drafting sentencing rules to the Sentencing Commission instead of prescribing sentencing policy itself for three reasons. The first was to capitalize on the expertise of the members of the Commission.⁵² Under the SRA, the Commission consists of seven members—three of whom are judges and all of whom were intended to have expertise in criminal justice⁵³—who could devote substantially more time and energy than Congress to the complex problems of designing a sentencing system.⁵⁴ To aid in that task, the SRA also provided for the hiring of a professional staff and authorized the collection of empirical data to provide a broad base of information, which the Commission could use to promulgate and update the Guidelines.⁵⁵

other than those enumerated in the Act. 28 U.S.C. § 994(c)(1)-(7). The Act further limited discretion by providing principles for the Commission to follow in promulgating the Guidelines, such as requiring the sentencing range under the Guidelines be near the top of the statutory range in certain circumstances—for example, if the offense involved violence or the defendant already had multiple prior felony convictions. 28 U.S.C. § 994(h)-(j). The Act also required that the range be near the bottom of the statutory range in other circumstances—for example, when the defendant has not committed a serious crime and has no prior convictions. *Id.* See generally *Mistretta v. United States*, 488 U.S. 361, 374-77 (1998) (discussing the limits Congress placed on the Sentencing Commission's promulgation of the Guidelines).

50. See 28 U.S.C. § 994; S. REP. NO. 98-225, at 168 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3351; see also Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 300 (1993).

51. STITH & CABRANES, *supra* note 36, at 56, 61.

52. See Feinberg, *supra* note 50, at 297; Wright, *supra* note 9, at 9; see also Barkow, *Administering Crime*, *supra* note 9, at 743 (citing expertise as one reason for the establishment of sentencing commissions).

53. 28 U.S.C. § 991(a) (2006).

54. Kevin R. Reitz & Curtis R. Reitz, *Building a Sentencing Reform Agenda: The ABA's New Sentencing Standards*, 78 JUDICATURE 189, 191 (1995) (“[L]egislatures are poorly positioned to give sustained attention to the complex workings of the sentencing system as a whole” and “the tedious business of gathering and assessing data about hundreds or thousands of cases is not likely to find its way onto the legislative agenda.”).

55. See *Kimbrough v. United States*, 552 U.S. 85, 109 (2007); S. REP. NO. 98-225, at 64

The second reason was to reduce political influence on the content of the Guidelines.⁵⁶ The theory was that, because its members were not subject to election, the Sentencing Commission could make unpopular sentencing decisions that would be too politically costly for members of Congress to make themselves.⁵⁷ Congress sought to insulate the Commission from political pressure by making it an independent agency within the judicial branch,⁵⁸ exempt from Office of Management and Budget oversight.⁵⁹ Congress also provided that its members be appointed for a fixed term of six years and removable only for cause.⁶⁰ Finally, it directed that no more than four of the seven members be members of the same party.⁶¹

That said, Congress did not completely insulate the Commission from politics. The President has the power to appoint the Commissioners with the consent of the Senate.⁶² Moreover, the SRA directed the Commission to submit the initial Sentencing Guidelines to Congress for approval,⁶³ and it required the Commission to submit subsequent amendments to Congress so that Congress has the opportunity to reject them.⁶⁴ Further exposing the Commission to political pressure was Congress's decision to exempt the Guidelines created by the Commission from judicial review under the Administrative Procedure Act's arbitrary and capricious standard.⁶⁵

(discussing the importance of the Commission's staff).

56. See Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1636-40 (2012); Feinberg, *supra* note 50, at 297; Wright, *supra* note 9, at 8-9.

57. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 934 (1991); Barkow, *Administering Crime*, *supra* note 9, at 744-45; Ronald F. Wright, *The United States Sentencing Commission as an Administrative Agency*, 4 FED. SENT'G REP. 134, 136 (1991).

58. 28 U.S.C. § 991(a) (establishing the Commission "as an independent commission in the judicial branch of the United States").

59. Barkow, *Administering Crime*, *supra* note 9, at 760 n.155.

60. 28 U.S.C. §§ 991(a), 992(a) (2006).

61. 28 U.S.C. § 991(a). These features mimic the basic structures of other independent agencies. Barkow, *Administering Crime*, *supra* note 9, at 722.

62. 28 U.S.C. § 991(a).

63. See S. REP. NO. 98-225, at 61 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3244.

64. 28 U.S.C. § 994(p) (2006).

65. S. REP. NO. 98-225, at 181 ("It is also not intended that the Guidelines be subject to appellate review under Chapter 7 of Title 5."); see also Barkow, *Separation of Powers*, *supra* note 9, at 995 (noting that the Commission "differs from virtually all other agencies because its rules cannot be challenged as arbitrary and capricious under the APA"). Congress

To survive arbitrary and capricious review, an agency must provide a reasonable justification for its actions based on a factual record; bending to political pressure does not suffice.⁶⁶ Thus, exempting the Commission from review under the arbitrary and capricious standard removes one of the principal protections against political pressure on agencies.⁶⁷

The third reason Congress chose to delegate rather than legislate itself was that lawmakers were unable to agree on substantive sentencing policy. Setting sentencing policy requires a number of value-laden decisions, and members of Congress did not share the same values.⁶⁸ Indeed, there was disagreement over the basic question of which theory of punishment to follow.⁶⁹ Congress accordingly left these decisions to the Commission.⁷⁰

The decision to delegate sentencing policy to the Commission also reflected Congress's distrust of the judiciary. Some lawmakers believed that judicial sentencing discretion resulted in unacceptably low sentences; others were more concerned that sentencing decisions were influenced by defendants' race and class.⁷¹ The core task of the Commission was to promulgate rules limiting judicial discretion in sentencing.⁷²

Various features of the SRA minimized the judiciary's influence on the development of the Guidelines. Although the SRA provided

imposed other requirements found in the Administrative Procedure Act, such as the requirement that the Commission promulgate Guidelines only after providing notice to the public of the proposed Guideline and receiving comment on that Guideline. See 28 U.S.C. § 994(x).

66. 5 U.S.C. §§ 701-706 (2006); see Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 15-16 (2009).

67. See Barkow, *Administering Crime*, *supra* note 9, at 762.

68. As Kenneth Feinberg, who served as Special Counsel to the U.S. Senate Judiciary Committee and drafted earlier versions of the SRA, noted, the political decision to delegate was made, in part, because of serious doubt about "whether congressionally proposed guidelines of such necessary detail and complexity could be enacted by securing the approval of both the full United States Senate and House of Representatives." Feinberg, *supra* note 50, at 297.

69. See S. REP. NO. 98-225, at 67-68, 77; see also Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 29 (2003).

70. S. REP. NO. 98-225, at 67-68, 77.

71. See STITH & CABRANES, *supra* note 36, at 39, 44-45.

72. *Id.* at 39 ("Liberals and conservatives alike evinced a deep suspicion of discretionary judgment by federal judges; Congress was determined to limit it.").

for judges to serve on the Commission, those judges constituted only a minority of the Commissioners.⁷³ Further limiting judicial influence on the development of the Guidelines was the exemption of the Guidelines from arbitrary and capricious review.⁷⁴ Although that deferential standard of review is intended to prevent judges from engaging in the policy-making process,⁷⁵ a judge's policy preferences may still have some effect. A policy is less likely to seem reasonable to a judge who disagrees with it.⁷⁶ Precluding judicial review of sentencing guidelines eliminates the risk of introducing judicial preferences.

To be sure, the SRA did not cut judges entirely out of the sentencing process.⁷⁷ The SRA preserved some amount of judicial discretion in three ways.

73. 28 U.S.C. § 991(a) (2006). Although the Act proclaimed that the Commission was in the judicial branch, its location in the judicial branch did not give the judiciary any special control over the Commission.

74. S. REP. NO. 98-225, at 181 ("It is ... not intended that the Guidelines be subject to appellate review.... There is ample provision for review of the Guidelines by the Congress and the public; no additional review of the Guidelines as a whole is either necessary or desirable.").

75. The role of the court in conducting that review is not to question the result reached by an agency, but instead is merely to assess the reasons given by the agency to support its actions. See Shapiro & Levy, *supra* note 16, at 425.

76. See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 870-71 (2006) (concluding that shared ideology increases likelihood of deference to an agency by federal circuit courts).

77. Indeed, one might argue that the Congress that enacted the SRA envisioned a much more robust policy role for judges. See, e.g., Baron-Evans & Stith, *supra* note 56, at 1638-39 (contending that Congress expected the judicial branch "would have the greatest ongoing influence over the development of the [G]uidelines" because of the membership of the Commission and the Commission's charge to update the Guidelines based on suggestions drawn from individual sentencings); see also Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 733-47 (1999) (recounting the lengthy legislative history of the SRA and noting both the ambiguity of the resulting statutory language regarding departures and appellate review and the views of the House, which were more solicitous of judicial discretion than the views espoused in the Senate Committee Report).

There is real merit to the argument that Congress originally intended judges to retain more policy authority than appellate courts and the Sentencing Commission ultimately allowed. See Baron-Evans & Stith, *supra* note 56, at 1646 (detailing how "the Commission, aided by the Supreme Court, virtually eradicated the judicial departure power"). But subsequent congressional actions, including statutory changes to the standard of appellate review, indicate that, at least later, Congress endorsed a near-complete shift of policy authority to the Commission. See, e.g., PROTECT Act, Pub. L. No. 108-21, § 401, 117 Stat. 650, 675 (2003).

First, the SRA granted judges the discretion to impose a particular sentence within the range prescribed by the Guidelines.⁷⁸ That discretion was not as unfettered as it had been in the past. Before the SRA, judges had the power to choose a sentence anywhere within the statutory range. The Guidelines dictated a much narrower sentencing range that the judge could consider in imposing a sentence, but the SRA permitted judges significant discretion to select a sentence within that range.⁷⁹

The second, perhaps less visible, source of judicial discretion was the fact-finding function of courts. Under the scheme established by the SRA, judges were still required to make factual findings to determine whether an adjustment to the base Guidelines range applied. Following a defendant's conviction, the judge would conduct a separate sentencing hearing to receive evidence that could affect the Guidelines range applicable to the defendant. If a judge found by a preponderance of the evidence that an adjustment applied, the judge would adjust the Guidelines range accordingly.⁸⁰ Because a preponderance of the evidence is such an accommodating standard, and because the Commission committed the fact-finding procedures to judges,⁸¹ this function gave the courts some level of control over the applicable sentencing ranges.⁸²

Finally, although most defendants would receive a Guidelines sentence, the SRA permitted judges to impose sentences outside the

78. U.S. SENTENCING GUIDELINES MANUAL § 5C1.1(a) (2004) (“A sentence conforms with the Guidelines for imprisonment if it is within the minimum and maximum terms of the applicable Guideline range.”).

79. The SRA directs judges to consider a number of broad factors including not only facts relevant to the particular case, such as the severity of the offense and the character of the defendant, but also factors that implicate broader policy considerations, such as retributive considerations, deterrence, and incapacitative goals. *See* 18 U.S.C. § 3553(a) (Supp. II 2003).

80. *See* U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. (“The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.”).

81. *Id.* (“The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.”).

82. *See* Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 338 (2000) (noting “the hidden, but perfectly legitimate, discretion inherent in making close factual calls in decisions on guidelines application (as, for example, the determination of the amount of drugs or ‘loss’ foreseeable to a co-defendant in a narcotics or fraud conspiracy)”).

Guidelines ranges established by the Commission in certain situations. The ability to sentence outside of the Guidelines—usually referred to as the power to “depart” from the Guidelines⁸³—was quite limited. The Commission identified several aggravating and mitigating circumstances that may permit departures, including whether the defendant provided law enforcement substantial assistance in the investigation or prosecution of another individual,⁸⁴ whether the defendant caused more harm than ordinarily caused by that offense,⁸⁵ and whether the defendant had an imperfect defense.⁸⁶ Judges were also permitted to depart if they concluded that a case involved circumstances not adequately taken into consideration by the Sentencing Commission.⁸⁷ Subsequent actions by the Commission and appellate courts limited that departure ability dramatically.⁸⁸ Although there were only limited situations in which departures were permitted, the ability to depart was an important post-SRA remainder of judicial discretion. That is because judges retained comparatively broad latitude to determine how much to depart—in other words, how far below or above the Guidelines range to sentence a defendant.⁸⁹

In short, although the sentencing courts retained some limited discretion when imposing sentences, they no longer had the primary authority for setting sentencing policy.⁹⁰ Instead, the Commission was the body responsible for identifying the relevant

83. See, e.g., *Melendez v. United States*, 518 U.S. 120, 130 (1996) (discussing the “power to depart” below the statutory minimum).

84. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1989).

85. *Id.* §§ 5K2.3, 5K2.5, 5K2.8.

86. See *id.* § 5K2.10 (victim’s conduct); *id.* § 5K2.11 (lesser harms); *id.* 5K2.12 (coercion and duress); *id.* § 5K2.13 (diminished capacity); see also Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1128 (2008) (characterizing these factors as imperfect defenses).

87. 18 U.S.C. § 3553(b)(1) (Supp. II 2003). The Commission’s identified reasons for departures, see sources cited *supra* notes 84-86, were circumstances that the Commission indicated it had not “been able to take into account fully in formulating the guidelines.” U.S. SENTENCING GUIDELINES MANUAL § 5K2.0.

88. See Baron-Evans & Stith, *supra* note 56, at 1646.

89. See *generally* THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW AND PRACTICE § 10.6(d) (2013 ed.).

90. For a discussion suggesting that the SRA structured authority over federal sentencing as shared between the Commission and judges, see Wright, *supra* note 9, at 17-19.

sentencing factors and assigning weight to those factors. Judges were responsible for making factual findings necessary to calculate the Guidelines range, and, in most cases, their discretion was limited to selecting a particular sentence within the narrow ranges prescribed by the Guidelines.⁹¹

The primary policy-making authority of the Commission was enforced through strict-appellate review. Appellate courts reviewed district court calculations and applications of Guidelines ranges, and they reviewed any sentence based on a departure from the Guidelines *de novo*.⁹²

B. Booker as Redelegation

In 2005, the Supreme Court dismantled the sentencing scheme established by Congress. In a series of decisions beginning with *United States v. Booker*, the Court removed the primary authority for making sentencing policy from the Sentencing Commission and reassigned it to the federal district courts. These cases established that judges were no longer required to mechanically impose sentences within the Guidelines. The cases also instructed judges that they could deviate from the Guidelines based on wholesale policy disagreement with the Commission's policy decisions and that judges may not defer to the Commission's policy judgments, as embodied in the Guidelines.

In *United States v. Booker*, the Court held that the Sentencing Guidelines regime established by the SRA ran afoul of the Sixth Amendment jury trial right.⁹³ In particular, the *Booker* Court held that the Guidelines violated the Sixth Amendment because they allowed judges to impose sentences higher than those sentences

91. Judges also had broad discretion in imposing sentences for crimes for which the Commission had not yet promulgated a Guideline. 18 U.S.C. § 3553(b)(1) (Supp. II 2003) ("In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2).").

92. 18 U.S.C. § 3742 (Supp. III 2003). Although the *de novo* standard of review was not contained in the initial version of the SRA, early appellate review was strict and a *de novo* standard was applied to many district court decisions to depart. See *Koon v. United States*, 518 U.S. 81, 90 (1996).

93. 543 U.S. 220, 244 (2005).

that had been authorized based solely on the facts found by the jury.⁹⁴

The decision in *Booker* was based on the Court's 2000 opinion in *Apprendi v. New Jersey*.⁹⁵ At issue in *Apprendi* was a legislative sentencing enhancement that provided for an increase in the statutory maximum sentence from ten to twenty years imprisonment for the unlawful possession of a firearm if the sentencing judge found that the defendant possessed the firearm to intimidate someone because of his or her race.⁹⁶ The *Apprendi* Court held that such a statutory sentencing enhancement violated the Sixth Amendment right to a jury trial, reasoning that "[o]ther 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."⁹⁷ Relying on this principle from *Apprendi*, the *Booker* Court explained that, to the extent the guidelines system allowed judges to make findings that resulted in sentencing ranges far above those authorized solely by the jury's verdict, the mandatory guidelines system was unconstitutional.⁹⁸

Freddie Booker's case illustrates the constitutional issue. He was convicted of possessing with the intent to distribute 50 grams of crack cocaine in violation of 21 U.S.C. § 841(a)(1), which prescribes a minimum sentence of ten years in prison and a maximum sentence of life for that offense. Based solely on Booker's criminal history and the jury's finding that Booker possessed 50 grams of crack cocaine, the Sentencing Guidelines provided for a sentence of 210 to 262 months of imprisonment. The district court judge, however, did not impose a sentence within that range. Instead, the judge held a hearing and concluded by a preponderance of the evidence that Booker had possessed not merely 50 grams of crack cocaine but 658.5 grams of crack cocaine, and that he had obstructed justice. Given these findings, the judge calculated that Booker's Guidelines range was 360 months to life imprisonment,

94. *Id.*

95. 530 U.S. 466, 497 (2000).

96. *Id.* at 471.

97. *Id.* at 490.

98. 543 U.S. at 230-35.

and the judge imposed a sentence of 360 months.⁹⁹ In other words, the judge's factual findings about the amount of drugs possessed and obstruction of justice increased the maximum sentence from less than twenty-two years imprisonment to life in prison, and the findings resulted in the imposition of a sentence more than eight years longer than the maximum Guidelines sentence permitted based solely on the facts found by the jury.

The mandatory guidelines system violated the Sixth Amendment because it allowed judges to make factual findings by a preponderance of the evidence instead of requiring juries to make those findings beyond a reasonable doubt.¹⁰⁰ One obvious way to remedy this constitutional violation was for the Court to require facts that result in a higher Guidelines range to be found by a jury by proof beyond a reasonable doubt. But the Court chose not to require sentencing juries.¹⁰¹ Instead, the Court severed the provision making the Guidelines mandatory, thereby rendering the Guidelines advisory.¹⁰²

The Court explained that a sentencing court is no longer required to follow the Guidelines when imposing sentences. Instead, a court is to impose sentences based on its assessment of the factors listed in 18 U.S.C. § 3553(a).¹⁰³ Whereas before *Booker* the factors in § 3553(a)

99. *Id.* at 227.

100. *Id.* at 232.

101. Four of the Justices in the majority for the constitutional holding—the holding that the Guidelines violated the Sixth Amendment—advocated engrafting a Sixth Amendment “sentencing jury” requirement onto the existing Guidelines system to remedy the constitutional defect. *Id.* at 284-87 (Stevens, J., dissenting). But rather than endorse a sentencing jury, Justice Ginsburg—one of the five justices who found the Guidelines unconstitutional—broke ranks with the other members of the constitutional majority and joined the constitutional dissenters in fashioning the remedy that rendered the Guidelines advisory. *Id.* at 244, 246 (majority opinion).

102. *Id.* at 245 (severing 18 U.S.C. § 3553(b)(1)).

103. 18 U.S.C. § 3553(a) (2006) provides, in relevant part:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

guided a court's discretion in imposing sentences within a Guideline range,¹⁰⁴ following *Booker* courts considered the factors in § 3553(a) to select a sentence within the much broader *statutory* range. The Court reasoned that if the Guidelines were not mandatory, then they did not fall within the rule established by *Apprendi*.¹⁰⁵

To be sure, because the sentence recommended by the Guidelines is one of the factors identified in § 3553(a), sentencing courts are still required to consider the Guidelines in imposing sentences after *Booker*. But courts are no longer required simply to follow the Guidelines recommendation. Indeed, they are *forbidden* from mechanically following the Guidelines.¹⁰⁶ Courts must base a sentence on their own assessment of the § 3553(a) factors. Those factors include not only facts relevant to the particular case, such as the severity of the offense and the character of the defendant, but also factors that implicate broader policy considerations, such as retributive considerations, deterrence, and incapacitative concerns.¹⁰⁷ The statutory language does not prioritize these concerns,¹⁰⁸ and a judge's choice to prioritize retributivism or deterrence will likely affect her decision about what sentencing factors are relevant and the weight they deserve.¹⁰⁹

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- (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
 - (3) the kinds of sentences available;
 - (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines....
 - (5) any pertinent policy statement
 - (A) issued by the Sentencing Commission....
 - (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
 - (7) the need to provide restitution to any victims of the offense.

104. See *supra* note 79 and accompanying text.

105. *Booker*, 543 U.S. at 259.

106. See *Nelson v. United States*, 555 U.S. 350, 352 (2009); *Gall v. United States*, 552 U.S. 38, 50 (2007); *Rita v. United States*, 551 U.S. 338, 351-52 (2007).

107. See 18 U.S.C. § 3553(a)(2); see also *Feinberg*, *supra* note 50, at 301-02 (indicating that the text of § 3553(a) vests broad policy authority in sentencing judges).

108. See *Feinberg*, *supra* note 50, at 292-93 n.5.

109. See *Wright*, *supra* note 9, at 12 (noting that the choice of one view of the purpose of the penal system "over another may affect the importance of different types of facts for those making sentencing decisions"); see also *Hessick & Hessick*, *supra* note 37, at 87-89 (explaining how various sentencing factors are supported by one or more punishment

By rendering the Guidelines advisory and directing judges to impose sentences based on their assessment of § 3553(a), *Booker* reassigned to the individual sentencing judges the authority over sentencing policy that Congress had delegated to the Sentencing Commission in the SRA.¹¹⁰ No longer do the Commission's policy decisions, as codified in the sentencing Guidelines, bind sentencing judges. Judges must now make their own policy decisions, though they must consider the Guidelines in making those decisions.¹¹¹ *Booker* thus relegated the Commission to an advisory role and reestablished sentencing judges as the primary authority on sentencing policy, as they had been before the SRA.¹¹²

The majority opinion in *Booker* did not discuss whether re delegating the power over sentencing policy was consistent with Congress's intent. Instead, it focused solely on whether excising the provision making the Guidelines mandatory or adopting jury sentencing would better achieve Congress's goal of reducing disparity in sentencing.¹¹³ The Court explained that Congress's

theories).

110. One might argue that striking down the Guidelines did not constitute a redelegation, but simply restored the power the judiciary had before the SRA in imposing sentence. But *Booker* did not simply reestablish the pre-SRA regime. As described in Part III.A., there are significant differences between the pre-SRA and *Booker* regimes. See *infra* note 170. Moreover, even if *Booker* did simply reestablish the pre-SRA scheme, it still would constitute a redelegation. The relevant question for redelegation is whether the judiciary reassigned a power that Congress had conferred on a particular institution. That is precisely what occurred in *Booker*.

111. One might argue a similar phenomenon occurs when a court refuses to afford *Chevron* deference to agency interpretations of regulations based on the court's determination that Congress did not confer policy-making power on the agency. See *United States v. Mead Corp.*, 533 U.S. 218, 228-32 (2001). Although similar in some respects, that situation is nevertheless different in that, in that context, a court is arguably not re delegating. Instead, its determination is that Congress meant to delegate interpretive power to the courts in the first instance.

112. In the absence of legislation, courts have the default power to make policy under the common law process. But that is not so for criminal law. It has long been recognized that federal courts do not have common law power over criminal law. See Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 456-61 (2010). To the extent that courts have power to choose sentences or make sentencing policy, Congress must have conferred that power. See *Mistretta v. United States*, 488 U.S. 361, 417-18 (1989) (Scalia, J., dissenting) ("Trial judges could be given the power to determine what factors justify a greater or lesser sentence within the statutorily prescribed limits because that was ancillary to their exercise of the judicial power of pronouncing sentence upon individual defendants.").

113. Four justices endorsed a sentencing jury remedy, and they dissented. See *supra* note 101. Neither the remedial majority nor the remedial dissent discussed the redelegation issue.

basic statutory goal in enacting the SRA was to achieve uniformity by requiring sentences based on the defendant's "real conduct," instead of on the defendant's crime of conviction.¹¹⁴ According to the Court, rendering the Guidelines advisory would not thwart this goal because it would allow judges to consider the defendant's real conduct in imposing a sentence. In particular, judges would continue to consider that conduct when calculating the applicable Guidelines range. The only difference from the mandatory guidelines system would be that, post-*Booker*, judges would no longer be required to impose a sentence within the range, but rather to consider that range and the other factors identified in § 3553(a) in selecting an appropriate sentence.

As the Court acknowledged, allowing each sentencing judge to impose sentences based on her application of the § 3553(a) factors reintroduces judicial discretion that will inevitably result in less uniformity.¹¹⁵ To combat this lack of uniformity, the Court expanded appellate review of sentences.

Under the SRA, appellate review was designed to ensure that sentences fell within the Guidelines. For within-Guidelines sentences, appellate review was limited to determining whether the district court had correctly calculated and applied the Guidelines. For sentences outside the Guidelines, appellate courts reviewed the appropriateness of departures from the applicable Guidelines range *de novo*.¹¹⁶

In *Booker*, the Court replaced this two-tiered scheme with a single appellate standard of reasonableness.¹¹⁷ Under this standard, appellate courts were empowered to review all sentences—regardless whether within or outside the Guidelines range—for reasonableness.¹¹⁸ According to the Court, this appellate review for reasonableness would recover some of the uniformity lost by rendering the Guidelines advisory by allowing the circuit courts "to iron out sentencing differences" in the district courts.¹¹⁹

114. *United States v. Booker*, 534 U.S. 220, 264 (2005).

115. *Id.* at 263.

116. 18 U.S.C. § 3742(e) (Supp II 2003).

117. *Booker*, 534 U.S. at 261.

118. *Id.* at 261-62; Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 8 (2008).

119. *Booker*, 534 U.S. at 263.

The extent of *Booker*'s redelegation of the power over sentencing policy from the Commission to the courts was made clear in three subsequent cases: *Kimbrough v. United States*,¹²⁰ *Spears v. United States*,¹²¹ and *Nelson v. United States*.¹²² Following *Booker*, some circuit courts resisted recognizing district courts' sentencing policy power. They held that district courts could impose non-Guidelines sentences based on the facts of a particular case, but could not base sentences on their own *general* policy determinations about how much a particular crime should be punished.¹²³ Instead, general policy determinations about the appropriate amount of punishment for a crime in the average case should be left to the Commission.¹²⁴

The Court rejected that position in *Kimbrough v. United States*. The policy issue in that case dealt with the appropriate penalty for trafficking in crack cocaine. At the time, the Guidelines treated crack as 100 times worse than powdered cocaine. Put differently, an individual convicted of dealing 5 grams of crack cocaine was subject to the same sentence as an individual dealing 500 grams of powder cocaine.¹²⁵ The Fourth Circuit had previously concluded that district courts could not impose sentences based on a disagreement with this policy explaining that, even after *Booker*, "sentencing courts should not be in the business of making legislative judgments concerning crack cocaine and powder cocaine."¹²⁶ The Supreme Court disagreed. It reasserted that, after *Booker*, district courts are not bound by the Commission's determinations of the policies to guide sentencing determinations. Instead, the Court stressed that district courts are to impose sentences based on their independent consideration of the § 3553(a) factors.¹²⁷

Section 3553(a) directs judges to consider not only facts about the particular defendant and the crime she committed, but also broader policy concerns, including what sentence would promote respect for

120. 552 U.S. 85, 101 (2007).

121. 555 U.S. 261 (2009) (per curiam).

122. 555 U.S. 350, 352 (2009).

123. See, e.g., *United States v. Eura*, 440 F.3d 625, 633 (4th Cir. 2006), *abrogated by* *Kimbrough v. United States*, 552 U.S. 85 (2007).

124. *Id.*

125. See *Kimbrough*, 552 U.S. at 95-99.

126. *Eura*, 440 F.3d at 633.

127. *Kimbrough*, 552 U.S. at 108.

the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the defendant.¹²⁸ As pre-SRA sentencing practices indicated, individual judges disagree about what constitutes “just punishment.”¹²⁹ What is more, the various considerations identified in § 3553(a) will invariably suggest conflicting sentences for individual defendants, leaving sentencing judges to balance those concerns in individual cases.¹³⁰ And because § 3553(a) is written in such broad retributive, deterrent, and incapacitative terms, it allows judges to identify their own sentencing factors, including those excluded by the Guidelines. For example, an individual judge might conclude that an offender’s prior military service is relevant in determining just punishment for a particular offense or that a defendant’s age is a relevant consideration in assessing how to protect the public from further crimes. Under the SRA such determinations would have been prohibited, as the Guidelines identified military service and age as disfavored sentencing factors.¹³¹

Kimbrough thus confirms the breadth of the redelegation of sentencing policy power from the Commission to the district courts. Following *Kimbrough*, not only may courts impose non-Guidelines sentences based on the facts of a particular case, they also have the power to make general policy determinations about what sentencing factors are relevant and the weight those factors ought to receive.¹³² *Kimbrough* also suggested that courts are free to decide how long a sentence should be for a particular crime in the average case, so long as that sentence is within the statutory range.¹³³ Courts thus may fashion their own general rules instead of following the rules established by the Commission in imposing punishment.

128. 18 U.S.C. § 3553(a)(2) (2006).

129. See *supra* text accompanying notes 40-41.

130. See *infra* text accompanying notes 212-14.

131. See *infra* notes 215 and 270.

132. See Baron-Evans & Stith, *supra* note 56, at 1668-69.

133. See 552 U.S. 85, 110 (2007) (“[It] would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence ‘greater than necessary’ to achieve § 3553(a)’s purposes, even in a mine-run case.”).

This is not to say that the Commission plays no role after *Booker*. The Court in *Kimbrough* reiterated that § 3553(a) requires the courts to consider the Guidelines when making any sentencing determinations. More important, the Court indicated that more stringent appellate review might be appropriate in cases involving other, non-crack cocaine Guidelines.¹³⁴

In *Spears v. United States*, the Court reaffirmed the broad policy discretion afforded to judges under the reasoning of *Kimbrough*. The Eighth Circuit had held that, even after *Kimbrough*, a district court “may not categorically reject” the crack cocaine ratio set forth by the Guidelines.¹³⁵ The Supreme Court reversed, reiterating that district courts have the “authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case.”¹³⁶

Perhaps the clearest indication of redelegation can be found in *Nelson v. United States*. The sentencing judge in that case had imposed a sentence within the Guidelines range on the defendant after stating that “the Guidelines are considered presumptively reasonable, so that unless there’s a good reason ... the Guideline[s] sentence is the reasonable sentence.”¹³⁷ The Supreme Court reversed, noting that “district judges, in considering how the various statutory sentencing factors apply to an individual defendant, ‘may not presume that the Guidelines range is reasonable.’”¹³⁸ After calculating the Guidelines range, the district court must conduct an independent assessment of the § 3553(a) factors before selecting a sentence to impose. In other words, judges may not defer to the Sentencing Commission’s policy judgments as reflected in the Guidelines. They must use their own judgment to determine the appropriate sentence, and that determination will inevitably require policy determinations.

134. *See id.* at 109; *see also infra* note 278.

135. *United States v. Spears*, 533 F.3d 715, 717 (8th Cir. 2008) (en banc), *rev’d* 555 U.S. 261 (2009).

136. *Spears v. United States*, 555 U.S. 261, 264 (2009).

137. *Nelson v. United States*, 555 U.S. 350, 350-51 (2009) (per curiam) (internal quotation marks omitted).

138. *Id.* at 352 (quoting *Gall v. United States*, 552 U.S. 38, 50 (2007)).

To be clear, not all of the post-*Booker* opinions champion district court policy authority over the Commission. In the post-*Booker* case *Rita v. United States*, the Supreme Court held that courts of appeals may adopt a “presumption of reasonableness” when reviewing sentences that conform with the Guidelines.¹³⁹ In both *Rita* and, subsequently, in *Nelson*, the Court stated that this presumption only applies at the appellate level; the district court may not presume that the Guidelines sentencing range is reasonable.¹⁴⁰

In forbidding district courts from assuming Guidelines sentences are reasonable, *Rita* is thus consistent with the redelegation of sentencing policy authority from the Commission to district courts. But, as a practical matter, one must expect that *Rita*’s presumption of reasonableness is likely to preserve at least a limited policy role for the Commission.¹⁴¹ That is because the presumption has the effect of creating a bias at the appellate level towards particular substantive outcomes.¹⁴² This appellate level bias for within-Guidelines sentences, as well as statements in other post-*Booker* opinions extolling the virtues of the Commission’s policy process,¹⁴³ have led to some confusion among the circuits regarding how strictly appellate courts ought to police sentences outside of the Guidelines and how much they ought to promote continued adherence to Commission policy choices.¹⁴⁴ Indeed, even after the decision in *Booker*, many judges continue to impose within-Guidelines sentences, suggesting that the Commission’s policy choices have enduring effect.

139. 551 U.S. 338, 347 (2007).

140. *Nelson*, 555 U.S. at 352.

141. The Supreme Court appears to deny that the presumption creates a legal bias for within-Guidelines sentences, stating that the presumption has no “independent legal effect” but merely reflects the reality that a within-Guidelines sentence is likely to be reasonable. *Rita*, 551 U.S. at 350-51.

142. See Hessick & Hessick, *supra* note 118, at 20 (“In other areas of law, appellate courts often prefer one substantive outcome over another when conducting abuse of discretion review. But that preference exists because the *substantive law* prefers that outcome. In other words, a legal presumption puts a thumb on the scale in favor of a particular outcome at both the district court and [appellate] level.”).

143. See *infra* notes 276-78 and accompanying text.

144. See *infra* note 278.

III. THE NON-REDELEGATION DOCTRINE

In *Booker*, the Court redelegate sentencing authority to the district courts in an effort to achieve Congress's substantive sentencing goal of reducing unwarranted disparities in sentencing.¹⁴⁵ This Section challenges that approach. It argues that, when a court interprets a statute containing an unambiguous delegation, the court should adopt a presumption against re delegation. The Section begins by describing how the presumption would work and explaining how the presumption would have affected the decision in *Booker*. It then provides theoretical and practical reasons for the presumption.

A. Defining the Presumption Against Redelagation

When Congress unambiguously delegates policy-making authority to a particular agent, courts should adopt a presumption in favor of preserving the delegation.¹⁴⁶ Under this presumption, when a statute delegates power to an agent, a court should not re delegate that power unless the statute authorizes the court to do so.

145. That sentencing uniformity was the top priority of federal sentencing reform is conventional wisdom in the criminal justice community. *See, e.g.*, Feinberg, *supra* note 50, at 295-96 ("The first and foremost goal of the sentencing reform effort was to alleviate the perceived problem of federal criminal sentencing disparity.... Quite frankly, all other considerations were secondary."). The Act also sought to promote certainty in sentencing by abolishing parole and replacing it with terms of supervised release and so-called "truth in sentencing," which mandated that offenders serve the sentences imposed on them, with only limited credit for good behavior. Other purposes of the SRA included shifting the focus of the federal criminal justice system, adding to the knowledge base about which sentencing practices best achieve the various goals of sentencing, and revising sentencing policy in accordance with the most up to date research. *See* S. REP. NO. 98-225, at 38-39, 161-62 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221-22, 3344-45.

146. We limit our proposal to situations in which the identity of the agent is unambiguous, such as the delegation to the Sentencing Commission, which was explicit. *See infra* notes 163-64 and accompanying text. By doing so we do not mean to say that the presumption should not apply when the identity of the agency receiving the delegation is ambiguous. But we do acknowledge that the case for the presumption in that situation is less strong. In that situation it is unclear whether Congress meant to confer authority on one particular agent instead of another. Because one might err in determining to whom Congress meant to delegate, re delegating the authority may actually better achieve Congress's intent.

This presumption against judicial redelegation is similar to the traditional rule against redelegation in agency law: *delegata potestas non potest delegari*.¹⁴⁷ Under this ancient maxim, “a principal can delegate authority to an agent, but the agent cannot delegate the same authority to anyone else unless authorized by the principal to do so.”¹⁴⁸ As Justice Story explained, the principle underlying this maxim is that a delegation of authority by a principal to an agent reflects “an exclusive personal trust and confidence reposed in the particular” agent.¹⁴⁹

This maxim of agency law appears in the non-delegation doctrine.¹⁵⁰ Because the Constitution does not allow Congress to delegate its legislative power, Congress must provide in a delegation to an agency an intelligible principle to guide the agency in its rulemaking. This principle ensures that the rule is merely setting forth a policy to enforce Congress’s will.¹⁵¹

The maxim is also the source of what some have termed the “anti-redelegation doctrine”—the rule that, when Congress delegates policy-making authority to an agent, that agent ordinarily cannot redelegate that authority to another entity.¹⁵² For example, when Congress delegates the power to enter into particular types of contracts to the Department of the Army, the Army cannot

147. For an excellent description and analysis of the rule against an agent redelegating its authority, see Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORNELL L.Q. 168, 168-69 (1928).

148. Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 892 (2012); see also *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 405-06 (1928) (“The well-known maxim ‘*Delegata potestas non potest delegari*,’ applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our federal and state Constitutions than it has in private law.”).

149. JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 13, at 15 (The Lawbook Exchange 2004) (1863); see also *id.* § 14, at 15-16 (“In general, therefore, when it is intended, that an agent shall have a power to delegate his authority, it should be given to him by express terms of substitution.”).

150. See Marisam, *supra* note 148, at 891-92.

151. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472 (2001).

152. See Marisam, *supra* note 148, at 891 (coining the term “anti-redelegation doctrine”). For examples of the rule in action, see *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004) (prohibiting the FCC from delegating its power to state commissions); *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 784 n.6 (D.C. Cir. 1998) (forbidding the Control Board in the Department of Education from redelegating its delegated powers).

redelegate that power to the Department of the Interior.¹⁵³ Redlegation is allowed only if Congress has authorized the agent to redelegate.¹⁵⁴

Although the anti-redelegation doctrine is similar to the proposed presumption to preserve delegations, they are not identical. The anti-redelegation doctrine prohibits an agent from redelegating power delegated to it by Congress.¹⁵⁵ By contrast, the proposed presumption prohibits the *judiciary* from redelegating authority conferred by Congress when seeking to remedy a defective statute.

Like the traditional anti-redelegation presumption, the presumption against judicial redelegation should not be absolute. Because Congress has the power to allocate power, it also has the power to allow the courts to reallocate that power.¹⁵⁶ Thus, even when Congress has unambiguously delegated authority to one agent, the presumption should be rebutted when Congress also authorizes the courts to redelegate.

Saying that the presumption should be rebuttable leaves the question of how strong the presumption should be. Some presumptions are strong and can be rebutted only by an express statutory provision.¹⁵⁷ Others are weaker and may be rebutted by any indication of congressional intent in other statutory provisions or the legislative history.¹⁵⁸ The presumption against judicial

153. See *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988) (striking down an effort by the Army to redelegate to the Department of the Interior power that Congress delegated to the Army, explaining that the redelegation was “inconsistent with the administrative structure that Congress enacted into law”).

154. See *STORY*, *supra* note 149, § 13, at 14; *Duff & Whiteside*, *supra* note 147, at 168; *Marisam*, *supra* note 148, at 891. Current law does not require that Congress explicitly allow redelegation. Courts have adopted a presumption that Congress intends to allow agency officials to subdelegate to inferior officers within the agency. See *U.S. Telecom Ass’n*, 359 F.3d at 565 (“When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent.”).

155. *Marisam*, *supra* note 148, at 891.

156. *Cf. STORY*, *supra* note 149, § 14, at 15 (explaining that a principal may authorize an agent to redelegate its power).

157. See *Dep’t of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (“[A] waiver [of sovereign immunity] must ... be ‘unequivocally expressed’ in the statutory text.”).

158. See, e.g., *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984) (“Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.”).

redelegation should be strong. It should certainly be stronger than the traditional anti-redelegation presumption because it involves a court redistributing the power instead of the agent itself.¹⁵⁹ When Congress delegates policy making to an agent, it presumably trusts the judgment of the agent in making that policy, including the agent's decision to redelegate to make policy. Similar trust does not extend to a court that is not the recipient of the delegation,¹⁶⁰ and increasing the strength of the presumption would reduce the court's ability to manipulate policy through redelegation.¹⁶¹

That said, our goal here is not to define precisely what it would take to rebut the presumption to preserve delegations. Instead, our argument is only that the presumption should be rebuttable. At the least, the presumption should be rebutted when Congress provides by statute that a court may redelegate authority if necessary to avoid invalidating a statute.

Applying the presumption to *Booker* would have changed the Court's approach in its remedial opinion.¹⁶² Nothing in the SRA

159. The traditional anti-redelegation presumption is not particularly strong; an express statutory provision is not necessary to rebut it. See *U.S. Telecom Ass'n*, 359 F.3d at 565. Indeed, courts have adopted a presumption that Congress intends to allow agency officials to subdelegate to inferior officers within the agency. See *id.* ("When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent.").

160. Still, we take no position on the precise standard for rebutting the presumption against redelegation. Indeed, it may be that the strength of the presumption should vary depending on the circumstances of the case. Arguably, the presumption should be stronger when the court seeks to redelegate to achieve a particular substantive outcome than when redelegation is necessary to avoid a conclusion that a statute is unconstitutional. The redelegation in *Booker* was of the former sort. Although redelegation was *one* way of avoiding a conclusion of unconstitutionality, it was not the *only* way. See *United States v. Booker*, 543 U.S. 220, 275-76 (2004) (Stevens, J., dissenting) (explaining that jury sentencing would avoid unconstitutionality). The Court chose to redelegate on the view that it would better achieve particular substantive policies. See *id.* at 252, 254.

161. It also imposes higher enactment costs on the legislature seeking to rebut the presumption, see Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 2 (2008), but because the identity of an agent may affect the policy adopted, see *infra* Part III.B.2, Congress is unlikely to support redelegation in the name of pursuing a particular policy.

162. When a court is confronted with a statute that is unconstitutional in some respect, it may strike down the whole statute, or it may sever those provisions that are unconstitutional and uphold the remainder of the statute. See *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330-31 (2006). Whether to strike the whole statute or sever the unconstitutional provision depends on Congress's intent. *Id.* But gleaning Congress's

suggests that Congress meant to allow judicial redelegation. The text of the SRA unambiguously assigns the power over sentencing policy to the Commission by empowering it to promulgate Guidelines¹⁶³ and directing courts to follow those Guidelines.¹⁶⁴ The SRA does not contain language suggesting that the judiciary should reassign that function, or assume that role itself, if necessary to preserve the balance of the SRA. Further, other portions of the SRA—such as the exemption of the Guidelines from arbitrary and capricious review¹⁶⁵ and the provision limiting judges to only a minority of the Commission¹⁶⁶—suggest that Congress meant to limit substantially the judiciary’s influence on the policy-making process. The legislative history also confirms that Congress meant to exclude courts from the policy-making process. Among other things, Congress rejected a proposal to make the guidelines merely advisory.¹⁶⁷

The only provision that arguably gives courts the power to fashion sentencing policy is 18 U.S.C. § 3553(b), which authorizes a court to impose “an appropriate sentence” when there is no applicable Guideline.¹⁶⁸ One might argue that, because this provision authorizes courts to impose a sentence in the absence of a Guideline, Congress must have intended to allow courts to have the power to set sentencing policy in the event the Guidelines were rendered advisory. But that argument is not well taken. Read in

preferences is particularly difficult to do in such a situation because of its counterfactual nature. A court must ascertain not what Congress actually intended, but what it would have intended had it known that part of the statute would be unconstitutional. See Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 744-45 (2010).

163. 28 U.S.C. § 994 (Supp. II 2003).

164. 18 U.S.C. § 3553(b)(1) (Supp. II 2003) (requiring the court to “impose a sentence of the kind, and within the range” of the Guidelines).

165. See *supra* note 74 and accompanying text; S. REP. NO. 98-225, at 181 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3364 (stating that judicial review of the “guidelines ... is [n]either necessary [n]or desirable”).

166. See 28 U.S.C. § 991(a) (Supp. III 2003).

167. See S. REP. NO. 98-225, at 79; see also STITH & CABRANES, *supra* note 36, at 41.

168. 18 U.S.C. § 3553(b)(1) (“In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.”).

conjunction with the provisions authorizing the Commission to promulgate Guidelines and requiring the courts to follow the Guidelines, the clear import of the exception in § 3553(b) is to allow a court to impose a sentence in the rare instance that the court faces a situation not covered by a Guideline. That is a far cry from granting courts a general power to set sentencing policy.¹⁶⁹

One might ask, if redelegation were not an option, what other remedy could the Court have adopted? Entirely striking down those portions of the SRA that created the Commission and the Guidelines would arguably result in even more judicial power over sentencing policy than the *Booker* remedy,¹⁷⁰ which maintains at least some role for the Commission and the Guidelines.¹⁷¹ But total invalidation was not the only remedial option. Another option—an option supported by four dissenting justices—was to require a jury to find facts resulting in a higher Guidelines range beyond a reasonable doubt.¹⁷² Although a sentencing jury may have had other

169. *Cf. Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2882-83 (2010) (concluding that statutory provisions authorizing extraterritorial application of a law in some circumstances are insufficient to establish that the law is generally applied extraterritorially).

170. Whether striking down the Guidelines in their entirety, rather than making them “advisory,” represents a redelegation of authority over sentencing policy to the same degree as the *Booker* remedy is debatable. Striking down the Guidelines in their entirety presumably would have restored federal criminal sentencing to its pre-SRA status. As discussed in the text accompanying notes 36-41, judges had significant discretion at sentencing, including the ability to base their sentencing decisions on their own views about issues of policy. But *Booker* did not reestablish sentencing procedures that existed before the SRA. The decision invalidated only part of the SRA and left in place other provisions that differentiate current sentencing from the historic practice. For example, it did not strike down the requirement that judges articulate their reasons for imposing a sentence in each case. *See* 18 U.S.C. § 3553(c). Indeed, the Court itself did not purport to establish a return to historic sentencing practices. *See infra* note 218. To the contrary, it created new procedures such as the broader appellate review of all sentencing decisions. *See United States v. Booker*, 543 U.S. at 220, 260 (2005); *see also* Hessick & Hessick, *supra* note 118, at 8. These features of post-*Booker* sentencing were intended to promote uniformity in sentencing, *see* 543 U.S. at 263, but they will also doubtlessly result in more visible and coherent sentencing policy *by the judiciary* than existed prior to the SRA.

171. The precise nature of that role is still a matter of dispute. For example, although the Court held in *Booker* that the Guidelines are merely advisory, it has also held that the Guidelines are sufficiently law-like that the retroactive application of a Guideline prescribing a higher sentence than the Guideline in effect at the time of the offense violates the Ex Post Facto Clause. *Peugh v. United States*, 133 S. Ct. 2072 (2013).

172. *Booker*, 543 U.S. at 271, 284-85 (Stevens, J., dissenting).

drawbacks,¹⁷³ it would not have resulted in reallocation of sentencing policy authority from the Commission to the courts.¹⁷⁴ Yet another option available to the Court was to strike down those portions of the Guidelines that presented constitutional problems—for example, the provisions directing judges to increase sentences based on particular factual findings—and leave it to the Commission to determine whether it could fashion alternative provisions that did comport with the Constitution. Because other, non-redelegation remedies were available to the Court, it should not have redelegated sentencing policy authority to the federal courts.¹⁷⁵

B. Reasons Supporting the Presumption Against Redelegation

1. Separation of Powers

Separation of powers underlies many judicial doctrines and presumptions.¹⁷⁶ The basic idea of the separation of powers is that different bodies hold the power to enact, enforce, and interpret the law.¹⁷⁷ As is well known, the reason for the division of power is the

173. The remedial majority opposed sentencing fact juries because it believed that such a process would result in sentences based on plea negotiations, rather than the real conduct underlying each crime. *Id.* at 256.

174. To be sure, instituting a sentencing jury would be a redelegation. But the redelegation is of fact-finding instead of policy, and accordingly is substantially less pernicious. More importantly, the redelegation would be commanded by the Constitution itself. Under the constitutional ruling in *Booker*, Congress does not have discretion to assign to judges fact-finding that may increase a potential sentence. The Constitution requires that juries find those facts. *See id.* at 230.

175. There were also remedial options that would have resulted in less redelegation than the *Booker* remedy. For example, the United States argued that the Guidelines should be advisory only in those cases with sentence-enhancing factors. Reply Brief for United States at 19, *United States v. Booker*, 543 U.S. 220 (2005) (Nos. 04-104, 04-105) (“[I]n cases without sentence-enhancing facts, the Guidelines can operate precisely as Congress and the Commission intended without implicating any Sixth Amendment issue.”).

176. *See, e.g.*, William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA.L. REV. 1007, 1023 (1989) (gathering such presumptions); *see also* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 388, 406-07 (1819) (interpreting “necessary and proper” liberally to avoid judicial interference with congressional policy choices).

177. *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880) (“It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government ... are divided into the three grand departments, the executive, the legislative, and the judicial.”); THE FEDERALIST NO. 47, at 266 (James Madison) (E. H. Scott ed., 1898)

mistrust of government.¹⁷⁸ Placing all power in the hands of one entity risks the abuse of that power. Separating the power of policy enactment from law interpretation and enforcement allows one branch to limit the actions of the others.

The particular division of power adopted in the Constitution is designed to secure popular sovereignty while preserving the ability to enforce the law impartially.¹⁷⁹ To that end, the Constitution assigns the policy-making power to Congress,¹⁸⁰ which is accountable to the public through periodic elections.¹⁸¹ This accountability makes legislative policies more likely to reflect the will of the people. At the same time, the Constitution entrusts the power to interpret those laws and enter judgment based on those interpretations to the judiciary,¹⁸² which the Constitution insulates from popular opinion through life tenure and salary guarantees.¹⁸³ Although these protections make the courts ill-suited to enact policy, they allow the courts to interpret the laws in an impartial way without fear of popular reprisal.¹⁸⁴ This division of power preserves the ability of the people to control the government and its policies¹⁸⁵ while still allowing the laws to be enforced in an impartial way.¹⁸⁶

(“The accumulation of all powers [l]egislative, [e]xecutive, and [j]udiciary, in the same hands ... may justly be pronounced the very definition of tyranny.”)

178. Martin H. Redish & Elizabeth J. Cisar, “*If Angels Were to Govern*: The Need for Pragmatic Formalism in Separation of Powers Theory”, 41 DUKE L.J. 449, 456-57 (1991).

179. Jerry L. Anderson & Christopher Poynor, *A Constitutional and Empirical Analysis of Iowa’s Administrative Rules Review Committee Procedure*, 61 DRAKE L. REV. 1, 72 (2012) (“[O]ne of the salient purposes of separating powers is accountability: the public needs to know who is responsible for particular actions so they may respond at the ballot box.”).

180. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States.”).

181. *Id.* §§ 2, 3 (requiring elections every two years for representatives and every six years for senators).

182. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

183. *Id.*

184. *Evans v. Gore*, 253 U.S. 245, 251-53 (1920).

185. THE FEDERALIST NO. 51, at 331 (James Madison) (E. H. Scott ed., 1895).

186. THE FEDERALIST NO. 78, at 453-54 (Alexander Hamilton) (E. H. Scott ed., 1898) (“[T]he independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society.”).

This arrangement risks, however, that members of the unaccountable judiciary will substitute their policy preferences for those expressed by Congress in a statute. To minimize that risk, the role of the courts is narrowly defined simply to give effect to the policies expressed by Congress in a statute.¹⁸⁷ A court may disregard Congress's policy preferences only when enforcing those preferences would violate the Constitution.¹⁸⁸

Often, the policies enacted by Congress are substantive—policies that seek to regulate or encourage behavior.¹⁸⁹ Statutes appropriating money to fund highway maintenance, outlawing money laundering, and providing tax deductions for charitable giving are examples. But substantive policies are not the only policies that Congress enacts. A decision to delegate to a particular agent is itself a policy decision. It is a decision not to adopt a precise substantive policy itself, but to assign that responsibility to an agent.¹⁹⁰ For example, when Congress authorizes the EPA to promulgate regulations on the emission of air pollutants,¹⁹¹ Congress is leaving to the EPA the task of setting policy on emissions instead of fashioning an air pollution policy itself.¹⁹²

Although all judicial overrides of congressional policy decisions present separation of powers concerns,¹⁹³ a judicial decision disturbing a delegation constitutes a greater intrusion than a

187. *See, e.g.*, *Hines v. Lowrey*, 305 U.S. 85, 90 (1938) (“Congress alone is vested with constitutional power to determine the wisdom of this policy.”); *see also* *Pac. Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680, 690 (2012) (“[I]f Congress’ coverage decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them.” (quoting *Herb’s Welding, Inc. v. Gray*, 470 U.S. 414, 427 (1985))).

188. *See, e.g.*, *Chung Fook v. White*, 264 U.S. 443, 446 (1924) (stating that the “duty” of the courts is “simply to enforce the law as it is written, unless clearly unconstitutional”).

189. This is not to say that other law, such as procedural rules, cannot also affect behavior. *See* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring) (“The line between procedural and substantive law is hazy.”). To the contrary, procedural requirements often influence behavior. Our point is only that all regulations—even regulations that do not immediately and obviously affect primary behavior—embody policy choices.

190. *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994); *Watts*, *supra* note 66, at 32 (explaining how delegations leave policy decisions to agencies).

191. *See* Clean Air Act, 42 U.S.C. § 7401(c) (2006).

192. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 529-30 (2007) (discussing EPA’s discretion under § 202(a)(1) of the Clean Air Act to regulate emissions from motor vehicles).

193. *See, e.g.*, *Heckler v. Edwards*, 465 U.S. 870, 881 (1984).

decision displacing a substantive policy.¹⁹⁴ First, delegation defines the process by which Congress exercises its policy-making power: through the delegation, Congress allocates that power to an agent. Courts have long recognized that they should not question the internal workings of Congress. For example, so long as Congress complies with the procedures prescribed by the Constitution,¹⁹⁵ courts will not inquire into how Congress develops its policies.¹⁹⁶ That is because judicial oversight poses the risk of the judiciary hijacking the policy-making process. A similar concern applies to delegation. A delegation sets forth how Congress plans to develop policies, and redelegation risks a court substituting its judgment for the one Congress made.¹⁹⁷ The Supreme Court recognized precisely this point in *ETSI Pipeline Project v. Missouri*.¹⁹⁸ There, Congress delegated to the Department of the Army the power to enter into contracts regarding the use of water from a Missouri River reser-

194. Separation of powers concerns are heightened when it is the judiciary that is redelegating, instead of the agent to which power has been allocated. In that situation, the courts have the ability to give themselves policy-making authority. This is too much authority for one branch to hold. See THE FEDERALIST NO. 47, *supra* note 177, at 266 (“The accumulation of all powers [l]egislative, [e]xecutive, and [j]udiciary, in the same hands ... may justly be pronounced the very definition of tyranny.”). To be sure, there is no blanket prohibition on courts making policy. Courts regularly make policy in fashioning common law and when interpreting and applying ambiguous statutes. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 102-04 (1921). But courts hold that power only when Congress has not acted—or has acted in a fashion that invites judicial policy making. Martin H. Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg*, 83 NW. U. L. REV. 853, 857 (1989). Once Congress enacts legislation prescribing a policy, or assigning the power to set policy to an entity other than the courts, courts must enforce that legislation.

195. See, e.g., *INS v. Chadha*, 462 U.S. 919, 951-52 (1983). Indeed, courts often do not even ask whether constitutional procedures were followed. See, e.g., *United States v. Ballin*, 144 U.S. 1, 4 (1892) (refusing to examine whether Congress had a quorum in enacting law); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 680 (1892) (refusing to require Congress to provide records relating to enactment in its journals).

196. See *Owen v. City of Independence, Mo.*, 445 U.S. 622, 667 (1980) (Powell, J., dissenting) (“[T]he operational policies of the government itself are activities that lie peculiarly within the competence of ... legislative bodies.”); cf. *Nixon v. United States*, 506 U.S. 224, 226, 228 (1993) (dismissing as a political question a challenge to the Senate’s decision to delegate to a committee the authority to try an impeachment).

197. This same concern of judicial interference with legislative choices provides an explanation for the substantial weakening of the non-delegation doctrine. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1786 (2012).

198. 484 U.S. 495 (1988).

voir.¹⁹⁹ The Court held that the Army could not redelegate that contracting authority to the Department of the Interior, explaining that the redelegation was “inconsistent with the administrative structure that Congress enacted into law.”²⁰⁰

Second, redelegation ordinarily has broader consequences than merely displacing a substantive policy. When a court substitutes its substantive preferences for those expressed by Congress, the court affects only that single substantive policy in that legislation. For example, if a court interprets a statute designed to forbid cars in a park as allowing cars in the park, that interpretation alters only that policy on cars in the park. By contrast, a congressional delegation does not set forth just one substantive policy goal but instead empowers an agent to fashion a range of substantive policies. That authorization can be extremely broad.²⁰¹ Various statutes have delegated to agencies the power to promulgate rules in particular areas so long as they promote the “public interest,”²⁰² are “fair and equitable,”²⁰³ or are “requisite to protect the public health.”²⁰⁴ A judicial redelegation transferring the power to set policy to a different body changes the process for establishing a broad range of substantive policy.²⁰⁵

Booker provides an example of the breadth of policies that may be affected by a redelegation. The SRA delegated substantial authority to the Commission to prescribe sentencing policy.²⁰⁶ It did not simply authorize the Commission to decide which factors should matter in distinguishing offenders from each other at sentencing and what weight to assign to those factors.²⁰⁷ The SRA empowered the Commission to make basic, fundamental policy choices such as picking the theories of punishment on which to base the Guidelines.²⁰⁸

199. *Id.* at 497-98.

200. *Id.* at 516-17.

201. *See supra* text accompanying notes 23-26.

202. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 215 (1943).

203. *Yakus v. United States*, 321 U.S. 414, 420-23 (1944).

204. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

205. *Id.*

206. The delegated power was so broad as to elicit a non-delegation doctrine challenge in *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

207. *See supra* note 49 and accompanying text; *see also* Feinberg, *supra* note 50, at 300.

208. STITH & CABRANES, *supra* note 36, at 52; Feinberg, *supra* note 50, at 299-300.

Booker also illustrates why courts should not redelegate in an attempt to achieve a substantive goal. The Court concluded that redelegation was necessary to achieve Congress's substantive goal of reducing unwarranted disparities in sentencing.²⁰⁹ But a substantive goal of sentencing uniformity means nothing in the abstract. Sentencing uniformity does not call for sentencing all offenders the same; rather, it requires treating similar offenders similarly and different offenders differently. Deciding which grounds should constitute relevant differences involves policy choices.²¹⁰ Congress did not make those policy choices, but delegated that task to the Commission. In other words, Congress's substantive goal is best characterized not as promoting sentencing uniformity, but as promoting uniformity *according to the principles articulated by the Commission*.²¹¹

Empowering the Commission to select among the theories of punishment on which to base the Guidelines is perhaps the most visible example of Congress's broad policy delegation to the Commission. The different theories of punishment—retributivism, deterrence, incapacitation, and rehabilitation—often require the imposition of different sentences based on the same facts.²¹² For

209. *United States v. Booker*, 543 U.S. 220, 250-52 (2005). That sentencing uniformity was the top priority of federal sentencing reform is conventional wisdom in the criminal justice community. *E.g.*, Feinberg, *supra* note 50, at 295-96 ("The first and foremost goal of the sentencing reform effort was to alleviate the perceived problem of federal criminal sentencing disparity.... Quite frankly, all other considerations were secondary."). The Act also sought to promote certainty in sentencing by abolishing parole and replacing it with terms of supervised release and so-called "truth in sentencing," which mandated that offenders serve the sentences imposed on them, with only limited credit for good behavior. Other purposes of the SRA included shifting the focus of the federal criminal justice system, adding to the knowledge base about what sentencing practices best achieve the various goals of sentencing, and revising sentencing policy in accordance with the most up to date research. *See* S. REP. NO. 98-225, at 38-39, 161-62 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3221-22, 3344-45.

210. *See* STITH & CABRANES, *supra* note 36, at 51-52.

211. Similar reasoning underlies the deference required under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984). *Chevron* holds that, when Congress delegates to an agency the authority to interpret an ambiguous statute, courts must defer to the agency's interpretation because the delegation signifies Congress's decision to allow the agency to make substantive policy choices about how to implement the statute. *See* Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 3 (2004).

212. As Paul Robinson and Barbara Spellman have explained, sentencing policy consists of multiple, distinct decisions. First, one must set the goal or theory of punishment. Those

example, a retributivist is likely to believe that a youthful defendant is less culpable than other offenders and, therefore, would suggest that a more lenient sentence is appropriate.²¹³ In contrast, an individual who prioritizes incapacitation would impose a longer sentence on a youthful defendant because youth is one of the best predictors of recidivism.²¹⁴ For its part, the Commission ultimately decided that age ordinarily should neither increase nor decrease a sentence,²¹⁵ perhaps based on the Commission's conclusion that it could not select a single theory of punishment to govern the Guidelines.²¹⁶

Age is but one example of the countless policy choices that Congress delegated to the Commission and that *Booker* re delegated to the federal courts.²¹⁷ Although Congress could have answered all of these policy questions, it assigned that task to the Commission. *Booker* upset this arrangement, disrupting how Congress chose to implement its function of prescribing policy.²¹⁸

general statements of theory then must be translated into articulable rules. Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1129 (2005). At an individual sentencing, the decision maker must make additional decisions, such as what occurred when the offense was committed and how to apply the articulable rules to those facts. *Id.* at 1130-32.

213. Congress identified age as one of the factors that the Commission might want to include in the Guidelines, but it did not require age to be a factor. 28 U.S.C. § 994(d)(1) (2006).

214. Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 535 (2012).

215. U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2010).

216. See STITH & CABRANES, *supra* note 36, at 53-56.

217. See U.S. SENTENCING COMMISSION, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 33-34 (2012) (discussing how courts have taken differing positions on whether age ought to be considered a relevant sentencing factor post-*Booker*).

218. One might seek to minimize the redelegation on the ground that *Booker* simply restored federal sentencing practice as it existed prior to the passage of the SRA. But courts had the power to set sentencing policy before the SRA only because other statutes conferred that power on them. The delegation to the Commission in the SRA signified Congress's judgment to remove the judiciary from that role and reassign it to the Commission. See STITH & CABRANES, *supra* note 36, at 39, 44-45. In any event, *Booker* itself did not purport to establish a return to historic sentencing practices. To the contrary, it claimed its result flowed from what remained of the SRA after the provision making the Guidelines mandatory was excised. *United States v. Booker*, 543 U.S. 220, 259 (2005).

2. *The Effects of Delegation on Substantive Policy*

The separation of powers threat resulting from judicial interference with a congressional delegation is not merely some theoretical, abstract concern. Disrupting a delegation can change the very policy that the government adopts and pursues. A delegation leaves policy decisions to an agent.²¹⁹ What policy an agent adopts depends on a variety of factors, including its priorities; its expertise; its access to information; the tools with which it can regulate; and its organizational structures.²²⁰ Because each agent differs in at least some of these respects, changing which agent makes the policy decision is likely to affect the policies that are adopted.

What this means is that, as a general matter, one cannot sensibly enforce the policy objectives of a statutory scheme that contains a delegation without enforcing the delegation itself. The agent's identity may be the best indication of Congress's preferred policy goals, especially when a statute contains a broad delegation. As the remainder of this Section explains, there are a number of reasons that a delegation, therefore, must be enforced to determine the policy to be pursued.

a. Institutional Priorities

The priorities of an agent may affect the substantive policy choices that the agent makes. When a principal delegates to an agent, the agent has some level of discretion in carrying out the commands of the principal.²²¹ How an agent exercises that discretion inevitably will be influenced by the agent's own preferences and priorities. Suppose Paul wants to give to charity and is

219. *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994); Watts, *supra* note 66, at 37-38 (explaining how delegations leave policy decisions to agencies).

220. See, e.g., Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 458-59 (2009) (noting the agreement "among legal scholars that institutional design affects substantive policy outcomes").

221. Conferring discretion on the agent raises the possibility that the principal will have different preferences from the agent. See, e.g., D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 694 (2013). One reason that a principal may delegate to one instead of another agent is to reduce that "slack." Stephenson, *supra* note 17, at 1043.

choosing between delegating that responsibility to Jenny, who is passionate about saving animals, and Micah, who wants to eradicate cancer. Whom Paul picks is likely to determine the charities that receive his money. Jenny is likely to give the money to animal shelters, whereas Micah is more likely to give the money to organizations committed to fighting cancer.

The importance of the decision maker's priorities on the content of policy decisions is often discussed in the context of constitutional delegations. One reason that Congress, and not the courts, has lawmaking power is that Congress is more likely to implement the will of the people.²²² Members of Congress are elected by the people and may be voted out of office at the next election if they fail to enact popular policies.²²³ The priority of federal judges, by contrast, is to decide cases and protect individual rights. To protect federal judges in performing that task, the Constitution provides them with life tenure and salary guarantees.²²⁴ Consequently, Congress is more likely than the courts to produce policies that align with the preferences of the people.²²⁵

The various administrative agencies each have a different set of priorities. Some agencies focus on law enforcement; some on international relationships; some on preventing discrimination; and others focus on countless other areas of importance. These priorities differ from those of the courts, and Congress's decision to delegate to an agency instead of the courts will inevitably affect the ultimate policy that is adopted.

222. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 630 (1993) ("The countermajoritarian difficulty posits that the 'political' branches are 'legitimate' because they further majority will, while courts are illegitimate because they impede it.").

223. *Bush v. Gore*, 531 U.S. 98, 155 (2000) (Breyer, J., dissenting) ("However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about.").

224. U.S. CONST. art. III, § 1; see also Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 301 (2002).

225. Barkow, *supra* note 224, at 301. This is not to say that the electoral structure always works. Sometimes judicial decisions more accurately reflect popular sentiment than Congress. See Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113 (2012) (gathering examples of judicial decisions more accurately reflecting popular preferences).

Consider, for example, the difference in the policies that the Department of Justice and the courts would adopt relating to warrantless searches of vehicles by law enforcement officers. The mission of the Department of Justice is to enforce the laws and prosecute violations.²²⁶ It is likely to draft policies that favor granting officials broad authority to search vehicles without warrants. By contrast, because protecting individual rights is a core mission of the courts, the courts are more likely to adopt policies limiting warrantless searches of vehicles.²²⁷

Agencies may also prioritize external opinions more than federal courts. The Constitution does not insulate agencies from external pressures as it does the courts. Agency heads do not have life tenure during good behavior, nor do they have salary guarantees.²²⁸ Instead, Congress has discretion over an agency's design, and it may choose to allow more external influence on agency decisions. For example, Congress may impose procedures that force the agency to take greater account of legislative opinion by demanding that the agency submit its proposed regulations to Congress for approval. Such procedures reduce the slack between the agency and Congress; they make an agency more likely to honor Congress's goals than pursue its own.²²⁹ Similarly, Congress may make the agency take account of the executive's opinion by, for example, making the head of the agency removable. Likewise, Congress may require the agency to receive public input through notice and comment before issuing a regulation, and respond to those comments in the federal register.²³⁰ Requiring agencies to take account

226. See, e.g., 28 U.S.C. § 515 (2006) (establishing authority to prosecute criminal violations).

227. This is not to say that the Department of Justice (DOJ) does not seek to protect individual rights. Rather, the point is that, because the DOJ is assigned the task of enforcing criminal law, it is likely to give less priority to protecting rights that may impede that law enforcement. See, e.g., Michael Wilson, *Careful What You Wish For: The Tax Practitioner-Client Privilege Established by the Internal Revenue Service Restructuring and Reform Act of 1998*, 51 FLA. L. REV. 319, 337 (1999) (recounting that the DOJ viewed a particular privilege as "an obstacle to the investigation and prosecution of fraud matters").

228. Unlike federal judges, who are provided life tenure and salary guarantees. U.S. CONST. art. III, § 1.

229. Stephenson, *supra* note 17, at 1043.

230. 5 U.S.C. § 553 (b) (2006).

of these views will similarly influence the policies that the agency pursues.

In the case of sentencing policy, the Commission was designed to be far more responsive to external views than are the federal courts. Article III strongly insulates judges from political pressures through life tenure and salary guarantees.²³¹ The Commission is substantially less insulated. Indeed, in the years after its formation, the Commission was heavily criticized for its politicized nature.²³² Under the SRA, the Commission must submit the initial Guidelines and Guideline amendments to Congress for approval;²³³ Commissioners are term limited,²³⁴ and Commissioners may be removed for cause.²³⁵ Congress can also more easily monitor sentencing policies promulgated by the Commission because those policies are set forth in a discrete body of Guidelines,²³⁶ whereas the policies that courts generate are scattered across thousands of decisions.²³⁷ This political accountability places pressure on the Commission to adopt more severe sentencing policies because the public consistently supports harsher crime control measures, and elected officials reap

231. U.S. CONST. art. III, § 1.

232. See Barkow, *Administering Crime*, *supra* note 9, at 765 (noting that, despite its institutional design, which seemed to insulate the Commission from political pressure, “the Sentencing Commission was a highly politicized agency from the outset”); Baron-Evan & Stith, *supra* note 56, at 1662 (characterizing the environment at the Commission as “highly politicized and far from neutral”); Wright, *supra* note 9, at 84-85 (noting “internal disagreement and criticism” at the Commission, as well as external criticism of the Commission for “responding to political pressure rather than to the information it collects”).

233. See 28 U.S.C. § 994(p) (2006); S. REP. NO. 98-225, at 61 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3244. The SRA provides that Congress has 180 days to disapprove a Guideline or policy statement; they go into effect if Congress does not act. See Barkow, *Administering Crime*, *supra* note 9, at 760-61 (noting that this 180-day delay facilitates congressional oversight of Commission policies).

234. 28 U.S.C. § 992(b)(1)(A) (2006).

235. 28 U.S.C. § 991(a) (2006).

236. See Barkow, *Administering Crime*, *supra* note 9, at 731-32; Wright, *supra* note 9, at 21.

237. See Hessick, *supra* note 86, at 1113 n.8 (noting the difficulty in accessing information about sentencing practices). Judges also have a greater ability to obscure the policy choices that they make by framing their sentencing determinations in terms of factual findings. See Barkow, *Administering Crime*, *supra* note 9, at 731-32; see also Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After Kimbrough*, 93 MARQ. L. REV. 717, 732-33 (2009) (recounting situations in which courts recharacterized sentencing policy as sentencing fact-finding).

political rewards by taking so-called “tough on crime” positions.²³⁸ Further pushing the Commission towards harsher penalties is the presence of a representative of the Department of Justice as an *ex officio* Commissioner,²³⁹ as well as the appointment of Commissioners with previous experience as prosecutors.²⁴⁰ Put simply, because of their differing levels of susceptibility to external pressure, the priorities of the Commission and federal judges differ significantly, and those priorities are key when it comes to the development of sentencing policy.

b. Expertise and Access to Information

The expertise and access to information of an agent may also affect the policies that it adopts. Policymakers do not make policy for its own sake; they make policy to address actual problems. What policy is adopted depends on the policymaker’s perception of the need to combat particular evils and how to combat those evils. As a general matter, the more information and expertise that a policymaker has, the greater the likelihood that the policymaker will make a “better” policy.²⁴¹ The informed, expert policymaker is more likely both to better understand the issues at stake and to fashion more nuanced policies than the underinformed policymaker. That is most clear for policies that have objectively correct answers.

238. See Barkow, *Administering Crime*, *supra* note 9, at 748-52. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (explaining the long history of expanding criminal laws, the process and resulting incentive of creating criminal laws, and suggesting solutions to the attendant problems).

239. 28 U.S.C. § 991(a) (2006). The Commission need not include representatives from the defense bar, *see id.*, and the inclusion of the DOJ has been criticized as skewing the priorities of the Commission towards prosecutors. See Baron-Evans & Stith, *supra* note 56, at 1645 n.76 (collecting sources). For example, a former Commissioner noted the influence of the DOJ’s *ex officio* representative in convincing the Commission to increase sentencing associated with fraud offenses. See Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 AM. CRIM. L. REV. 289, 319-20 (1989).

240. Barkow, *Administering Crime*, *supra* note 9, at 764 (footnote omitted) (“Of the twenty-three people who have served as commissioners, thirteen were former prosecutors—and that does not include the *ex officio* members appointed by the Attorney General. Moreover, for much of the Commission’s existence, there have been enough former prosecutors on the Commission to form a majority, or close to it, at any one time.”).

241. Stephenson, *supra* note 17, at 1042-43.

For questions that have objectively correct answers based on empirical data, administrative agencies are generally better equipped to fashion policy.²⁴² Agency employees generally have more expertise in those areas than judges, and they have greater access to relevant information than courts. They may conduct studies, gather data, and widely solicit public input to inform their determinations. By contrast, courts must rely on the information that the parties present to them or that they find through their limited independent research.²⁴³ For some other questions, such as how to interpret a constitutional provision according to a particular method of interpretation, courts may be better suited because of the legal training that judges receive.

To be sure, many questions do not have objective answers but depend more on value judgments. Resolving those questions depends more on ideology or some other value held by the policymaker than the information possessed by the policymaker or his expertise. But even for those questions, information and expertise can affect the policy because they allow the policymaker to make more fully informed value judgments.

For example, expertise and information cannot provide answers to all questions of sentencing policy. To the contrary, many sentencing policies—such as which sentencing factors are relevant and how much weight to assign to each factor—depend on value judgments that cannot be resolved through expertise or empirical data.²⁴⁴ And even with respect to those punishment questions that

242. To be sure, empirical data cannot provide an absolutely certain answer; it can, however, strongly suggest an answer. *See, e.g.*, Christopher B. Seaman, *Willful Patent Infringement and Enhanced Damages After In Re Seagate: An Empirical Study*, 97 IOWA L. REV. 417, 432 (2012).

243. These differences are highly visible in the context of sentencing policy. Judges have limited information to inform their sentencing decisions. They must rely on the facts of the individual defendant and crime, the arguments presented by the parties, and whatever professional experience the judge may have. By contrast, the Commission has broad authority to conduct studies and gather data, and it has a professional staff to analyze that data. *See, e.g.*, Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 693-94 (2005) (discussing the demotion of federal judges from “policy-makers” to “fact-finders” under the Guidelines).

244. Barkow, *Administering Crime*, *supra* note 9, at 734 (observing that sentencing commissions may not have the same informational advantages as other agencies, especially with respect to decisions that touch upon punishment theories); *see* Wright, *supra* note 9, at 10, 12 (“Obviously, formulating sentencing policy involves some pure value choices.... Values

do turn on empirical questions—such as what sentencing policy might best reduce crime—“it is not clear that experts greatly illuminate the issues because the existing knowledge is so limited.”²⁴⁵ Still, expertise and access to information may influence an institution’s choices for value judgments.

That appears to have been the case for the Sentencing Commission, which elected to base the initial Guidelines on an empirical analysis of past sentencing practice rather than select among competing theories of punishment.²⁴⁶ The Commission also favored quantitative sentencing judgments, such as incremental Guidelines adjustments for measurable factors,²⁴⁷ over moral judgments—such as balancing the personal characteristics of a defendant against the crime she committed.²⁴⁸

Related to the expertise and information that the policymaker has is the policymaker’s composition. A policy-making body with multiple members brings more experience, knowledge, and viewpoints to the policy-making process than a single individual.²⁴⁹ This greater breadth of information increases the likelihood of a policymaker correctly answering questions with objectively correct answers.

Larger membership may also affect the policies that depend solely on value judgments, especially when the members hold different ideological views. The presence of different ideologies may prompt discussion, and it may reduce the likelihood that the policy-

not susceptible of empirical verification will always dominate sentencing decisions.”).

245. Barkow, *Administering Crime*, *supra* note 9, at 734. *But see* Wright, *supra* note 9, at 11 n.33 (describing the value of empirical data “regardless of the theory of sentencing purposes at work”).

246. STITH & CABRANES, *supra* note 36, at 55, 59; Breyer, *supra* note 41, at 181.

247. As Kate Stith and José Cabranes have noted, the most common sentencing factor found in the Guidelines is “*quantity*—with the result that the severity of a sentence is heavily dependent on quantifiable factors such as the amount of drugs in a drug conspiracy, the amount of money stolen in a bank robbery, or the number of unlawful aliens harbored in an illegal immigration scheme.” STITH & CABRANES, *supra* note 36, at 68-69; *see also id.* at 55 (noting that the Guidelines reflect a “strict, quantitative sentencing calculus” approach).

248. *See id.* at 56 (“[T]he Commission never has explained why it chose to exclude a variety of factors (especially those relating to the personal history of the defendant) from the sentencing calculus.”).

249. F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 679 (2009).

making body makes the value judgment based solely on ideology.²⁵⁰ Studies have shown that ideological diversity on a judicial panel dampens the effect of the ideology on the outcome of a case.²⁵¹ Similar effects may occur in administrative agencies.²⁵²

c. Regulatory Tools

Equally important are the tools that an agent has to implement its policy choices. Consider, for example, a delegation to the Occupational Safety & Health Review Commission (OSHRC), which has the power only to adjudicate claims relating to workplace safety, or a delegation to the federal courts, which similarly can formulate policy only in the course of adjudication because of the constraints of Article III. These procedural limitations may affect the policy that the agent adopts. As the aphorism that “hard cases make bad law” reflects, the specific facts of a case may exert influence on the development of the rule announced in the decision.²⁵³ The rule may be tailored in part to achieve an outcome in the particular case before the court, instead of being fashioned with a broad set of cases in mind.

Moreover, because of the fact-specific nature of cases, adjudicative bodies are unlikely to develop a coherent body of policies. They tend to generate policies piecemeal as issues appear in a case, instead of fashioning each policy with an eye towards developing a larger, unified body of policy.²⁵⁴ For example, a case presenting an

250. The Commission enjoys ideological diversity because under the SRA no more than four commissioners may be from the same political party. 28 U.S.C. § 991(a) (Supp. II 2009). In contrast, a sentencing judge is a single-member body.

251. CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 140 (2006) (“[D]iverse views, on any particular panel, are likely to ... produce outcomes, and arguments, that are different and better [because] they include a mix of perspectives.”).

252. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1185 (2012) (“[B]y diversifying the perspectives an agency takes into account, we think it is likely to make decisions better and more likely to survive judicial review.”).

253. See Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006) (suggesting that the common law method in general may lead to bad law because the facts of each case influence the development of law).

254. F. Andrew Hessick, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 931 (2009) (“Courts make rules only in the context of deciding cases. A case

issue about energy tariffs is unlikely to consider an issue about energy conservation, although the decision how to regulate one may influence the decision how to regulate the other. This organic process may well lead to conflicting and incoherent policies.

Contrast rulemaking by an administrative agency. Rulemaking is more akin to legislation than adjudication; the agency sets forth a rule in a non-adversarial setting to regulate future conduct. Rulemaking, therefore, is more likely to produce a wholesale policy based on the average case, instead of a single case as with the courts. Moreover, unlike a court, an agency engaging in rulemaking may regulate an entire field at once. It may tailor multiple policies in a coherent way. The Federal Energy Regulatory Commission, for example, may craft an energy policy at the same time as an energy conservation rule.²⁵⁵ And to the extent their policies do not cohere, the agency may initiate the process to correct those policies instead of waiting for an appropriate case.

The difference in regulatory tools for the Commission and the federal courts is obvious. The Commission fashions policy at a wholesale level through generally applicable guidelines, whereas the courts develop sentencing policy on a case-by-case basis.²⁵⁶ The difference between those approaches may affect policy in various ways. The wholesale approach by the Commission likely generates policies that are less influenced by the equities of a particular case than the courts. Social science research suggests that sentencing preferences are less harsh in the context of individual cases than in the abstract.²⁵⁷ By the same token, the Commission's detached

presenting a question about the well-pleaded complaint rule is unlikely to contain a question about the *Rooker-Feldman* doctrine as well. Consequently, a court is susceptible to develop each of the doctrines of federal question jurisdiction independently instead of with a single cohesive vision of federal question jurisdiction in mind."); see Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 650-51 (2001).

255. See J.R. DeShazo & Jody Freeman, *Public Agencies As Lobbyists*, 105 COLUM. L. REV. 2217, 2219-20 (2005).

256. See *Mistretta v. United States*, 488 U.S. 361, 413, 420 (1989) (Scalia, J., dissenting) (noting that the Commission "exercise[s] no governmental power other than the making of laws" through the Guidelines process, and further noting that this "lawmaking function of the Sentencing Commission is completely divorced from any responsibility for execution of the law or adjudication of private rights under the law").

257. See Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1780-81 (1999). This may explain why individual

approach may lead to less nuanced policy choices than those produced by the courts.

d. Organizational Structure

The organizational structure of an agent, and the extent to which the decisions of those agents are binding, may also shape the policies that are adopted. Delegating policy to a single agent will produce greater uniformity than dispersing power among multiple agents. Although each agent may have similar priorities, information, expertise, and tools, the personal experience and viewpoints of each agent may lead the various agents to adopt different policies.

Consider delegations to administrative law judges (ALJs). A variety of statutes assign adjudicative authority in the heads of various agencies, and many of those agency heads have delegated that adjudicative task to ALJs.²⁵⁸ Each ALJ assigned to an agency has the same tools, access to information, and tasks. But not all ALJs considering the same claim would come to the same conclusion. Instead, their holdings may differ.²⁵⁹ Moreover, the decisions of those ALJs do not create binding rules, giving rise to the possibility that other ALJs will support different policies in future similar cases.

Contrast a congressional delegation to an agency to create rules through rulemaking. The purpose of rulemaking is to create one uniform rule. Unlike the adjudicative power, rulemaking is centralized in one body within the agency; different components of the agency cannot produce different, conflicting rules. Moreover, the rule promulgated by that body is binding. This delegation structure

judges have used their post-*Booker* policy authority to impose less severe sentences in various categories of offenses, such as cases involving white collar fraud and child pornography. U.S. SENTENCING COMMISSION, *supra* note 217, at 6.

258. See Daniel F. Solomon, *Summary of Administrative Law Judge Responsibilities*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 475, 517 (2011) (describing the roles of administrative law judges in various agencies).

259. See, e.g., Elizabeth S. Ferguson, Note, *Untangling "Operation Common Sense": Reopening and Review of Social Security Administration Disability Claims*, 87 MICH. L. REV. 1946, 1960 (1989) ("This was a reference to the Bellmon Amendments, which provided a statutory mandate requiring the [Social Security Administration] to create a review procedure to begin overseeing ALJ decisions to increase uniformity.").

is thus more likely to produce a uniform policy than a delegation to several agents.

The courts and Sentencing Commission have drastically different organizational structures. Under the SRA, the Commission was the sole entity responsible for setting policy through binding guidelines.²⁶⁰ By contrast, each district court has independent power to set policy. The dispersion of authority among the district courts greatly increases the likelihood of divergent policies. Although *Booker* sought to reduce these differences through appellate review, the standard of review it adopted is unlikely to result in sentencing uniformity. Appellate courts review sentencing decisions only to determine whether they are “unreasonable.”²⁶¹ Such a deferential standard is incapable of eliminating all the discrepancies in the policies enforced by the various district judges.²⁶² Indeed, following *Booker*, different circuits have developed different policies regarding sentencing for various types of offenses, including immigration and child pornography cases.²⁶³

CONCLUDING THOUGHTS

When Congress delegates power to a particular agent, a court should presume that it cannot redelegate that power to another. This proposed non-redelegation doctrine has both constitutional and practical foundations. Separation of powers demands that courts not unduly interfere with Congress’s legislative power. The non-redelegation doctrine acknowledges that Congress sometimes exercises its legislative power by developing its own substantive policy through legislation, but it also sometimes delegates responsibility to an agent to develop that policy. Thus, frustrating a delegation is an interference with Congress’s legislative power.

260. Although the Commission is a multimember body, it acts as a single entity based on majority votes. See 28 U.S.C. § 994(a) (2006).

261. *United States v. Booker*, 543 U.S. 220, 261 (2005).

262. See U.S. SENTENCING COMMISSION, *supra* note 217, at 8 (“The Commission’s review of case law and sentencing appeals data suggests that the current system of appellate review is not an adequate tool to promote uniformity in sentencing.”). See generally Hessick & Hessick, *supra* note 118, at 3 (explaining how the twin *Booker* remedies of district court discretion and appellate court review are fundamentally incompatible).

263. See Hessick, *supra* note 237, at 730-33, 734-36.

From a practical standpoint, the non-redelegation doctrine recognizes that the substantive policy likely to be developed after a delegation is inextricably bound up with the identity of the agent to whom policy-making authority is delegated. A delegation confers discretion on the agent, and how the agent exercises that discretion depends on its preferences and institutional design.

Although this Article has developed the presumption in the context in which a court redelegates to preserve an otherwise unconstitutional statute, the presumption need not be limited to that circumstance. Courts may seek to redelegate power for other reasons. For example, consider a statute delegating to the Department of Energy the power to regulate a promising new, but potentially very dangerous, energy source. If the Department fails to promulgate rules quickly enough for a reviewing court, or if the rules it adopts are not rigorous enough for the court, the court may seek to redelegate that power to another agency or to the judiciary itself.²⁶⁴ But that re delegation would inevitably impact the policies that are pursued. The presumption would impede courts from assuming this role.

One might argue that a presumption against re delegation is unnecessary because Congress may simply enact new legislation if it disagrees with the court's re delegation. But enacting new legislation is often difficult to do. Congress may have more pressing matters on its agenda, and even if it were to take up the issue, the members may disagree on whether to delegate to the original agent again, to delegate to some other agent, or to pursue some other course all together. Indeed, the *Booker* Court specifically invited Congress to take action to remedy federal sentencing.²⁶⁵ Congress

264. One example of re delegation is the entry of structural injunctions against government institutions to remedy constitutional violations. See Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265. Through the injunction, the court redelegates from the supervised institution to itself the role of developing policy. See *Brown v. Plata*, 131 S. Ct. 1910, 1954 (2011) (Scalia, J., dissenting) ("When a judge manages a structural injunction, however, he will inevitably be required to make very broad empirical predictions necessarily based in large part upon policy views.").

265. *Booker*, 543 U.S. at 265 ("Ours, of course, is not the last word: The ball now lies in Congress' court.").

has held multiple hearings on the matter, but has taken no action to date.

The aftermath of *Booker* demonstrates in real world terms the effects of redelegation. In several areas, federal judges have applied sentencing policies that differ substantially from those adopted by the Commission. One particularly visible example of this divergence is in the context of child pornography.²⁶⁶ Based in part on external pressure from Congress, the Commission promulgated Guidelines imposing severe penalties on those offenders convicted of possessing child pornography.²⁶⁷ Since the *Booker* decision, a number of federal judges have criticized these Guidelines,²⁶⁸ and judges routinely impose sentences for child pornography below the Guidelines range.²⁶⁹ The treatment of an offender's military service provides another example of divergence. In its Guidelines, the Commission

266. See, e.g., Mark Hansen, *A Reluctant Rebellion*, ABA J., June 2009, at 1, 54; Dan Herbeck, *Sentencing Guidelines May Undergo Revision*, THE BUFFALO NEWS, Dec. 6, 2009, at A2, available at 2009 WLNR 24692343; Lynne Marek, *Sentences for Possession of Child Porn May Be Too High, Judges Say*, NAT. L. J., Sept. 10, 2009, at 1; Amir Efrati, *Judges Trim Jail Time for Child Porn*, WALL ST. J. (Jan. 19, 2010), <http://online.wsj.com/article/SB10001424052748704363504575003271494106644.html>.

267. See Jesse P. Basbaum, Note, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts*, 61 HASTINGS L.J. 1281, 1289-92 (2010); TROY STABENOW, DECONSTRUCTING THE MYTH OF CAREFUL STUDY: A PRIMER ON THE FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES 3-30 (2008), available at http://www.fd.org/docs/select-topics---sentencing/child-porn-july-revision.pdf#search=deconstructing_the_myth; see also U.S. SENTENCING COMMISSION, *supra* note 217, at 59 ("In child pornography non-production offenses ... average sentences have increased significantly over the periods due to statutory changes, congressional directives to the Commission to increase guideline penalties, and Commission-initiated amendments.").

268. See, e.g., *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1110 (N.D. Iowa 2009); *United States v. Johnson*, 588 F. Supp. 2d 997, 1004-05 (S.D. Iowa 2008); *United States v. Hanson*, 561 F. Supp. 2d 1004, 1011-12 (E.D. Wis. 2008); *United States v. Grinbergs*, No. 8:05CR232, 2008 WL 4191145, at *10 (D. Neb. Sept. 8, 2008); *United States v. Ontiveros*, No. 07-CR-333, 2008 WL 2937539, at *7-8 (E.D. Wis. July 24, 2008).

269. See U.S. SENTENCING COMMISSION, *supra* note 217, at 73 ("Sentencing in child pornography non-production offenses has been markedly different from any other offense type. In recent years, the rates of non-government sponsored below range sentences have exceeded within range rates."); Carissa Byrne Hessick, *Post-Booker Leniency in Child Pornography Sentencing*, 24 FED. SENT. REP. 87, 87 (2011) ("[I]n 2010, more than 40 percent of below-Guideline sentences that were not sponsored by the government were imposed in child pornography sentences. That is the highest rate for any offense type in the federal system."); Hansen, *supra* note 266, at 56 ("[M]ore than one third of all child porn defendants sentenced for nonproduction-related offenses in 2007—351 out of 1,025 offenders—received sentences below the recommended guidelines.").

stated that military service was “not ordinarily relevant,”²⁷⁰ but following *Booker*, a number of judges elected to impose shorter sentences on military veterans.²⁷¹

The divergence is not limited to a difference between the courts and the Commission. Different courts have adopted different policies from each other as well.²⁷² Not all district judges, for example, have reduced sentences based on an offender’s military service. The *Booker* Court assumed that these differences could be “ironed out” through appellate review in the circuit courts. But the appellate review of sentencing decisions is deferential and thus incapable of eliminating all the discrepancies in the policies enforced by the various district judges. Moreover, the circuit courts themselves have disagreed on the appropriate sentences for various types of offenses.²⁷³

It may be that the courts will apply policies that are preferable to the Commission’s. Federal sentencing policy has become increasingly harsh²⁷⁴ and, at times, insensible.²⁷⁵ But Congress delegated

270. U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (2007). Historically, military service was often treated as a mitigating sentencing factor. See Hessick, *supra* note 86, at 1116-17. The initial Guidelines did not specifically indicate whether military service ought to affect a defendant’s sentence. When federal judges began departing from the Guidelines based on prior military service and other good works, the Commission responded by promulgating a Guideline indicating that military service is “not ordinarily relevant” at sentencing, and thus essentially prohibited federal judges from accounting for such service at sentencing. *Id.* at 1120-21.

271. *United States v. Nellum*, No. 2:04CR30PS, 2005 WL 300073, at *4 (N.D. Ind. Feb. 3, 2005); see also Amir Efrati, *Judges Consider New Factor at Sentencing: Military Service*, WALL ST. J. (Dec. 31, 2009), <http://onlinewsj.com/article/SB126221697769110969.html>. In response to the district court judges’ decisions, the Sentencing Commission recently amended the Guidelines to ease its restriction on the consideration of military service. See 75 Fed. Reg. 27,388, 27,391 (proposed May 14, 2010).

272. The U.S. Sentencing Commission reports that judges are increasingly sentencing outside of the Guidelines, and that the sentence actually imposed on offenders after *Booker* increasingly depends upon the identity of the sentencing judge. U.S. SENTENCING COMMISSION, *supra* note 217, at 8. In other words, those judges who sentence outside the Guidelines are doing so using factual and policy considerations that are not consistent with one another. See *id.*; see also Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker*, 63 STAN. L. REV. 1 (2010).

273. See U.S. SENTENCING COMMISSION, *supra* note 217, at 6; Hessick, *supra* note 237, at 730-36.

274. The increasingly punitive nature of federal and state sentencing policies are the result of a number of shortcomings in the political process—an underinformed electorate, Carissa Byrne Hessick, *Mandatory Minimums and Popular Punitiveness*, 2011 CARDOZO L. REV. DE NOVO 23, 24-28; media portrayals that perpetuate misperceptions about crime, Sara

to the Commission the task of creating sentencing policy, and the possible superiority of the courts' policies does not justify redelegation.

Indeed, decisions since *Booker* reveal an effort by the Court to mitigate the effects on substantive sentencing law caused by its redelegation. It has held that sentences imposed within the Guidelines range may be presumptively reasonable.²⁷⁶ It has repeatedly stressed that the Commission is better suited than the courts in formulating sentencing policy because of its ability to gather data and the expertise of its staff.²⁷⁷ And it has suggested that circuit courts should afford greater weight to Commission policy judgments that are the result of the Commission's access to national data and the expertise of its staff.²⁷⁸ These deviations from *Booker* reestab-

Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 402 (2006); and politicians who are willing to adopt flawed penal policies to appear tough on crime, Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1977-83 (2006).

275. See, e.g., STABENOW, *supra* note 267, at 26-30 (demonstrating how the Guidelines regularly imposed harsher sentences on possessors of child pornography than on defendants who sexually assaulted children).

276. See *Rita v. United States*, 551 U.S. 338, 341 (2007).

277. See *Gall v. United States*, 552 U.S. 38, 46 (2007); *Rita*, 551 U.S. at 348-50; see also *United States v. Jones*, 531 F.3d 163, 173 n.7 (2d Cir. 2008) ("*Kimbrough* and *Gall* both emphasize that, after *Booker*, the Guidelines' claim on judicial respect derives from the fact that the Sentencing Commission 'has the capacity courts lack' to frame Guidelines on the basis of 'empirical data and national experience, guided by a professional staff with appropriate expertise.'" (quoting *Kimbrough v. United States*, 552 U.S. 85, 109 (2007))).

278. In *Kimbrough*, the Court held that district courts were free to sentence outside the Guidelines based on a policy disagreement with the crack cocaine Guideline. The opinion was limited to crack cocaine, and it appeared to place some limits on the ability of district courts to sentence based on policy disagreements to cases involving particular Guidelines. The Court intimated that district courts were not constrained by the crack/powder sentencing ratio because the crack cocaine "Guidelines do not exemplify the Commission's exercise of its characteristic institutional role." 552 U.S. at 109. In "formulating Guidelines ranges for crack cocaine offenses," the Court noted "the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of 'empirical data and national experience.'" *Id.* (citing *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)). The Court noted that "in the ordinary case, the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.'" *Id.* (quoting *Rita v. United States*, 551 U.S. 338, 350 (2007)). And, in such an ordinary case—that is, in a case in which the Guidelines in question *do* "exemplify the Commission's exercise of its characteristic institutional role"—"closer review may be in order" when a district court bases its decision to impose a non-Guidelines sentence on a policy disagreement. *Id.* The Court reiterated this possibility of "closer review"

lish, to some degree, the importance of the Commission and the Guidelines, but they are only second best solutions to the problem caused by the initial redelegation.

in a subsequent case, *Spears v. United States*, stating that a district court's "inside the heartland departure (which is necessarily based on a policy disagreement with the Guidelines and necessarily disagrees on a categorical basis) may be entitled to less respect." 555 U.S. 261, 264 (2009) (internal quotation marks omitted).