MACHINEGUNNING REASON: SENTENCING FACTORS AND MANDATORY MINIMUMS IN *United States v. O'Brien*, 130 S. CT. 2169 (2010)

Although the competition between the institutions of the judge and jury for power within the legal system is hardly new, extending back well into the hazy mist of our legal system's common law origins,[1] the Supreme Court's decision last Term in *United States v. O'Brien*[2] shows that the question of where the role of the judge ends and that of the jury begins remains controversial. At the heart of the issue in *O'Brien* was the mandatory minimum sentence, a statutory instrument favored by Congress since the mid-1980s that sets a floor under, rather than a specific value for or a ceiling on, the sentence a judge can impose on a convicted defendant.[3] For more than a decade, the Court has made clear that the requisite standard for increases in the maximum available sentence in a given case is proof to a jury beyond a reasonable doubt.[4] In *O'Brien*, the Court found that the statutory provision at issue defined a criminal element and not a sentencing factor, but upheld the notion that an increase in a defendant's mandatory minimum sentence could be ordered on the basis of sentencing factors found by a judge by evidentiary preponderance, and did not necessarily require proof to a jury beyond a reasonable doubt. In reaching this conclusion, the Court relied heavily on a test from *Castillo v. United States*[5] that should never have been promulgated in the first instance, thereby building law upon bad law. Furthermore, the Court's decision in *O'Brien* may signal a growing acceptance by the Court of the seeming incon-

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1. *See, e.g.*, 2 WILLIAM BLACKSTONE, COMMENTARIES *388–91 (discussing judges' power to review and overturn jury verdicts).

2. 130 S. Ct. 2169 (2010).

3. *See generally* Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993).

4. *See* Apprendi v. New Jersey, 530 U.S. 466, 476 (2000).

5. 530 U.S. 120 (2000).

gruity of the differential constitutional treatment of maximum sentences and mandatory minimum sentences, an issue that was highly controversial less than a decade ago.

Martin O'Brien's career as a criminal ended with a number of bangs, and perhaps a whimper as well, when he received his 102-month sentence from Judge Mark Wolf of the District of Massachusetts.[6] On June 16, 2005, O'Brien and a number of accomplices waited in a minivan for the arrival of an armored car making a scheduled cash delivery to a bank in Boston's North End. On its appearance, they sprung into action. Armed to the teeth with a Sig Sauer semi-automatic handgun, an AK-47 semi-automatic rifle, and, crucially, a fully automatic Cobray MAC-11 machine pistol,[7] O'Brien and his companions ordered the one visible guard to lie on the ground. As they were disarming him and firing warning shots into the air, a second guard ran away into a nearby restaurant. This act of defiance was enough to spook O'Brien and his band of latter-day-Dillingers, and they promptly fled the scene. The police, acting on apparently excellent intelligence, were able to find the weapons after executing a search warrant on the very night of the attempted robbery. O'Brien was arrested on June 21.[8]

A grand jury returned a multicount indictment in July 2005, which included a count charging the defendants with using, carrying, or possessing firearms in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (2006).[9] On February 21, 2007, a second superseding indictment was handed down, adding an additional count charging the defendants with having used, carried, and possessed a machinegun in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(B)(ii), a provision carrying a mandatory minimum sentence of thirty years imprisonment.[10]

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6. *O'Brien*, 130 S. Ct. at 2170.

7. *See* Brief for Petitioner at 4–5, *O'Brien*, 130 S. Ct. 2169 (No. 08-1569).

8. United States v. O'Brien, 542 F.3d 921, 922 (1st Cir. 2008); Brief for Petitioner at 4–5, *O'Brien*, 130 S. Ct. 2169 (No. 08-1569); J.M. Lawrence, *Third of 4 Suspects Nabbed in Foiled Heist*, BOS. HERALD, June 23, 2005, at 24.

9. Brief for Respondent Burgess at 3, *O'Brien*, 130 S. Ct. 2169 (No. 08-1569).

10. *Id.* at 4. The relevant statutory text of 18 U.S.C. § 924(c)(1)(B) (2006) provides that "[i]f the firearm possessed by a person convicted of a violation of [§ 924(c)(1)(A)] is a machinegun . . . the person shall be sentenced to a term of imprisonment of not less than 30 years."

This last charge was eventually dismissed after Judge Wolf ruled that § 924(c)(1)(B)(ii), the machinegun provision, was an element of a crime to be proved beyond a reasonable doubt to the jury, and not, as the Government asserted, a mere sentencing factor to be proved by a preponderance of the evidence to the sentencing judge.[11] O'Brien and his codefendants pled guilty to the remaining robbery charges and the § 924(c) firearm charge that did not explicitly include the machinegun allegations.[12] O'Brien and one other codefendant were sentenced to less than thirty years imprisonment over the Government's renewed assertion that § 924(c)'s machinegun provision laid out a mandatory sentencing factor that was still implicated by the case, and not an element of a crime.[13]

The Government appealed the sentence to the First Circuit, which affirmed in an opinion by Judge Michael Boudin.[14] Judge Boudin noted that six circuits had already ruled in favor of the Government's interpretation of the statute, with only one circuit supporting the defendant's interpretation.[15] Still, he wrote for a unanimous panel, affirming the district court's decision on the basis that the Supreme Court's unanimous decision in *Castillo* controlled. He explained that *Castillo* was "close to binding" because it interpreted a previous version of the machinegun provision in § 924(c) as setting out an element, and that any narrow reconsideration or distinguishing of that case was the prerogative of the Supreme Court, not of the circuits.[16]

The Supreme Court predictably—given the severity of the circuit split on this issue—granted certiorari.[17] The Court af-

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11. *O'Brien*, 542 F.3d at 923.

12. *Id.*

13. *O'Brien*, 130 S. Ct. at 2173–74.

14. *O'Brien*, 542 F.3d at 922.

15. *Id.* at 923. The opinions that favored treating the machinegun provision as a sentencing factor were *United States v. Cassell*, 530 F.3d 1009, 1016–17 (D.C. Cir. 2008); *United States v. Ciszkowski*, 492 F.3d 1264, 1268 (11th Cir. 2007); *United States v. Gamboa*, 439 F.3d 796, 811 (8th Cir. 2006); *United States v. Avery*, 295 F.3d 1158, 1169–72 (10th Cir. 2002); *United States v. Harrison*, 272 F.3d 220, 224–26 (4th Cir. 2001); and *United States v. Sandoval*, 241 F.3d 549, 550 (7th Cir. 2001). The Sixth Circuit was the one outlier that had favored Judge Boudin's view. United States v. Harris, 397 F.3d 404, 406, 412–14 (6th Cir. 2005).

16. *O'Brien*, 542 F.3d at 926 ("Absent a clearer or more dramatic change in language or legislative history expressing a specific intent to assign judge or jury functions, we think that *Castillo* is close to binding.").

17. United States v. O'Brien, 130 S. Ct. 49 (2009).

firmed Judge Boudin's opinion unanimously, with Justice Kennedy writing the opinion of the Court, which seven others joined. In addition to joining Justice Kennedy's opinion, Justice Stevens wrote a separate concurrence. Justice Thomas wrote separately and concurred only in the judgment.[18]

Justice Kennedy's opinion began by discussing *Apprendi v. New Jersey*,[19] the Supreme Court's landmark 2000 decision in which it struck down a state sentencing law that allowed judges to increase the statutorily allowed maximum sentence of a given crime with a finding by a preponderance of the evidence that a defendant had acted with a purpose to intimidate.[20] In that case, the Court held that the Fourteenth Amendment's Due Process Clause required that any increase in a maximum sentence that a defendant faced had to be grounded in a factual determination made by a jury on the basis of proof beyond a reasonable doubt.[21] In addition to relying on *Apprendi*, Justice Kennedy necessarily rooted his opinion in the well-established background understanding that it is ultimately Congress's decision whether a given statutory provision sets out a sentencing factor or an element, and that Congress's intent with respect to a given provision can be found by "look[ing] to the statute's language, structure, subject matter, context, and history."[22] Having laid this groundwork, Justice Kennedy proceeded to analyze the Court's decision in *Castillo* for its relevance to the instant matter.

Castillo was a case involving Branch Davidians who had been involved in the famous standoff with federal agents outside of Waco, Texas, in 1993. Castillo and his codefendants were accused of conspiring to murder federal officers. Their indictment included a § 924(c) charge that accused them of having used a machinegun within the meaning of that statute.[23] Section 924(c)(1) at that time read, in relevant part: "Whoever, during and in relation to any crime of violence . . . uses or carries a firearm, shall, in addition to the punishment provided for such

18. *O'Brien*, 130 S. Ct. at 2172.

19. Apprendi v. New Jersey, 530 U.S. 466 (2000).

20. *Id.* at 471–74.

21. *Id.* at 490–92.

22. *O'Brien*, 130 S. Ct. at 2175 (citing Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998)).

23. Castillo v. United States, 530 U.S. 120, 122 (2000).

crime of violence . . . be sentenced to imprisonment for five years . . . and if the firearm is a machinegun . . . to imprisonment for thirty years."[24] The issue in *Castillo* was the same as that in *O'Brien*: Did Congress intend the statutory language setting out an additional penalty in § 924(c) cases involving the machinegun provision to define a separate crime, or just a sentencing factor?

Justice Breyer, in his near-unanimous opinion for the Court in *Castillo*,[25] set out a five-factor interpretive test, considering: (1) the language and structure of the statute; (2) tradition; (3) the relative risk of unfairness from the alternate statutory readings; (4) legislative history; and (5) the length and severity of the sentence provided by the statute.[26] Finding the actual text unhelpful, he placed a great deal of emphasis on the structure of the statute, which he argued placed the machinegun provision parallel to the initial element of using or carrying a firearm, and not to later passages setting out provisions clearly related to sentencing, such as a recidivism enhancement, concurrent sentence procedure, and parole matters.[27] Justice Breyer also found it telling that "[t]raditional sentencing factors often involve either characteristics of the offender, such as recidivism, or special features of the manner in which a basic crime was carried out."[28] In the case of § 924(c), he argued that carrying the gun was itself the substantive crime, and not a mere manner of carrying out its predicate crime of violence, and "the difference between . . . a pistol and . . . a machinegun . . . is great" with respect to the "nature of the element lying closest to the heart of the crime."[29] Moving on to risk for unfairness, Justice Breyer saw no problem in presenting the machinegun

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24. 18 U.S.C. § 924(c)(1) (Supp. V 1993). Note that this earlier version of the statute included the machinegun provision as part of one uninterrupted paragraph beginning with the basic firearm offense, and that it set out defined sentences, while the version used in charging O'Brien and his codefendants included the machinegun provision as a subparagraph, and set out mandatory minimum sentences. *Compare id. with* 18 U.S.C. § 924(c)(1) (2006) (including the amendments to the statute passed Nov. 13, 1998).

25. Justice Breyer was joined by all of the Court except for Justice Scalia, who joined except with respect to the subpart discussing legislative history as a factor. *Castillo*, 530 U.S. at 120.

26. *Id.* at 123–31.

27. *Id.* at 124–25.

28. *Id.* at 126.

29. *Id.* at 126–27.

issue to a jury—he compared this situation favorably to that in *Almendarez-Torres v. United States*, where the Court found that trying recidivism to the jury as an element instead of considering it as a sentencing factor would have a high potential for unfairness and prejudicial effect.[30] He similarly found nothing in the legislative history of the statute to indicate with any degree of certainty that Congress had intended the machinegun provision to operate as a sentencing factor.[31] Finally, Justice Breyer brought up the rule of lenity, and noted that given the great length of the prison term required by the machinegun provision, "if after considering traditional interpretive factors, we were left genuinely uncertain as to Congress' intent in this regard, we would assume a preference for traditional jury determination of so important a factual matter."[32]

In *O'Brien*, Justice Kennedy adopted this test whole-cloth, and proceeded to apply it mechanically to the amended text of § 924(c)[33] before him.[34] He found that Justice Breyer's statutory structure argument for *Castillo*'s first factor was no longer valid because of structural changes to § 924(c).[35] Other than that, however, he found the legal landscape coloring interpretation of the machinegun provision unchanged, and rejected each of the Government's arguments to the contrary.[36] Justice Kennedy then turned back to analyzing the structure of § 924(c) as amended. Although he found some evidence that Congress had intended the machinegun provision to create a sentencing factor,[37] he found equally or more convincing evidence to the

30. *See id*. at 127 (citing Almendarez-Torres v. United States, 523 U.S. 224, 234–35 (1998)).

31. *Id.* at 129–30.

32. *Id.* at 131 (citing Staples v. United States, 511 U.S. 600, 619 n.17 (1994)).

33. Apprendi v. New Jersey, 530 U.S. 466, 471–74 (2000).

34. Justice Kennedy did change the numbering of the factors in the *Castillo* test. He placed legislative history fifth, and sentence severity fourth, whereas in *Castillo* their order was reversed. United States v. O'Brien, 130 S. Ct. 2169, 2175 (2010). I have retained Justice Breyer's numbering from *Castillo* for the sake of simplicity, even though the *O'Brien* opinion refers to, for example, sentence severity as "[t]he fourth *Castillo* factor." *Id.* at 2177.

35. *See O'Brien*, 130 S. Ct. at 2175–76.

36. *See, e.g.*, *id.* at 2176 (tradition); *id.* at 2177 (unfairness); *id.* (sentencing severity).

37. *Id.* at 2179–80 (noting the placement of the machinegun provision in a subsection, and not in the principal paragraph outlining offense elements).

contrary.[38] In the end, he concluded that nothing in the new structure of § 924(c) was sufficient to "overcome . . . the substantial weight of the other *Castillo* factors and the principle that Congress would not enact so significant a change without a clear indication of its purpose to do so."[39]

Justice Stevens wrote separately to reemphasize his objection to the Court's sentencing factor jurisprudence in cases involving mandatory minimum sentencing regimes. This is a fight that he has consistently waged in dissents and concurrences,[40] and consistently lost since his dissent in *McMillan v. Pennsylvania*,[41] the Court's first case upholding the use of sentencing factors as an upward ratchet in the context of a mandatory minimum regime. In his *O'Brien* concurrence, Justice Stevens argued that to impose a mandatory minimum sentence for a given factual finding, the finding must have been proven to a jury beyond a reasonable doubt, and not merely found by a judge at sentencing on a preponderance basis.[42] He took particular note of the apparent incongruity between *Apprendi* and its progeny and *McMillan* and its progeny—the former holding that the Constitution requires that any element increasing maximum sentences must be proven to a jury, and the latter holding that sentencing factors increasing mandatory minimum sentences may be found by a judge.[43] He stated his proposed alternate rule thusly: "any fact mandating the imposition of a sentence more severe than a judge would otherwise have discretion to impose should be treated as an element of the offense."[44] In closing, Justice Stevens noted, with perhaps a sur-

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38. *Id.* at 2180 (noting the failure of Congress to place the machinegun provision in the subsection that contained what were unquestionably sentencing factors).

39. *Id.*

40. *See* Jones v. United States, 526 U.S. 227, 252 (1999) (Stevens, J., concurring); Monge v. California, 524 U.S. 721, 737 n.8 (1998) (Stevens, J., dissenting) ("It is not, however, California that has taken 'the first steps' down the [sinister] road the Court follows today. It was the Court's decision in *McMillan*[]."); United States v. Watts, 519 U.S. 148, 159 (1997) (Stevens, J., dissenting); Witte v. United States, 515 U.S. 389, 413 (1995) (Stevens, J., concurring in part and dissenting in part) ("I believed at the time and continue to believe that *McMillan* was wrongly decided."); Walton v. Arizona, 497 U.S. 639, 708 (1990) (Stevens, J., dissenting).

41. McMillan v. Pennsylvania, 477 U.S. 79, 95 (1986) (Stevens, J., dissenting).

42. *O'Brien*, 130 S. Ct. at 2181–83 (Stevens, J., concurring).

43. *Id.* at 2181–83 (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); *McMillan*, 477 U.S. at 87–89).

44. *Id.* at 2183.

feit of optimism, that "[t]he unanimity of our decision today does not imply that *McMillan* is safe from a direct challenge to its foundation."[45]

Justice Thomas's concurrence in the judgment was based on similar reasoning, citing extensively to his own dissent in *Harris v. United States*,[46] one of *McMillan*'s progeny involving the sentencing enhancement in § 924(c) for "brandish[ing]," as opposed to merely using or culpably possessing, a weapon.[47] In *Harris*, the Court held that a mandatory minimum sentence could be imposed on the basis of judge-found sentencing factors, and not only on the basis of elements proven to the jury, despite the Court's previous holding in *Apprendi* that any increase to the maximum sentence in a given case could only be on the basis of jury-decided elements.[48] Justice Thomas dissented in *Harris* on the ground that this holding was flagrantly in conflict with "the principles that animated the decision in *Apprendi*."[49] In his concurrence in *O'Brien*, Justice Thomas made a point of reiterating his denunciation of the Court's approach to the issue, stating that "it [does not] make a difference . . . which direction the . . . factors in the Court's five-factor test may tilt."[50] Justice Thomas, like Justice Stevens, would have held that "[i]f a sentencing fact either raises the floor or raises the ceiling of the range of punishments to which a defendant is exposed, it is, by definition, an element" requiring proof beyond a reasonable doubt to a jury.[51]

Without speaking to the correctness of these two concurrences, there are unquestionably serious issues with Justice Kennedy's majority opinion and the basis on which it is built—most notably, Justice Breyer's opinion in *Castillo*. Put simply, Justice Breyer should never have formulated his five-part test because the doctrine of constitutional avoidance should have controlled the result in that case. Thus, the only issue in *O'Brien* should have been the assessment of whether Congress intended its 1998 amendments to § 924(c) to overturn *Castillo*.

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45. *Id.*
46. Harris v. United States, 536 U.S. 545, 572 (2002) (Thomas, J., dissenting).
47. 18 U.S.C. § 924(c)(1)(A)(ii) (2006).
48. *Harris*, 536 U.S. at 563 (Kennedy, J., plurality opinion).
49. *Id.* at 579 (Thomas, J., dissenting).
50. *O'Brien*, 130 S. Ct. at 2184 (Thomas, J., concurring).
51. *Id.* (internal quotation marks and citations omitted).

Given the lack of any evidence to that end, *O'Brien* could have been resolved easily without recourse to a complicated and vague multiprong test that now will form the hazy basis for a significant body of criminal law jurisprudence.

The statutory text at issue in *Castillo* was the unamended, pre-1998 version of § 924(c).[52] Among other differences from the modern version of that statute, the pre-1998 § 924(c) laid out mandatory sentences, as opposed to mandatory minimum sentences.[53] *Castillo* preceded *Apprendi*,[54] albeit by less than a month. Had *Apprendi* been handed down first, its holding would have precluded the Government's desired outcome in *Castillo*, as a finding that the machinegun provision was a sentencing factor and not an element would have rendered that part of § 924(c) unconstitutional, because it increased the maximum-allowed sentence based on judicial fact-finding only.[55]

Even without the explicit doctrinal pronouncement of *Apprendi*, the Court in *Castillo* was still bound by precedent that indicated constitutional issues sufficient to trigger the avoidance canon. *Jones v. United States* was decided by the Court over a year before *Castillo*.[56] In *Jones*, the Court interpreted the federal carjacking statute, 18 U.S.C. § 2119.[57] The issue at bar was whether that statute lay out three separate offenses—carjacking, carjacking resulting in serious bodily injury, and carjacking resulting in death—with varying gradations of punishment, or a single offense, with sentencing factors enhancing the maximum allowable punishment in appropriate cases.[58]

Justice Souter wrote the Court's opinion in *Jones*, joined by Justices Stevens, Scalia, Thomas, and Ginsburg. Justices Stevens and Scalia wrote separate concurrences as well.[59] Justice Souter first argued that § 2119 lay out three separate offenses, which the Court found to be the more likely interpretation.[60] After making his best case along these lines, which included a searching re-

52. *See* Castillo v. United States, 530 U.S. 120, 122 (2000).

53. *Id.* at 131–32.

54. *Castillo* was decided on June 5, 2000. *Id.* at 120. *Apprendi* was decided on June 26, 2000. Apprendi v. New Jersey, 530 U.S. 466, 466 (2000).

55. *See Apprendi*, 530 U.S. at 490.

56. Jones v. United States, 526 U.S. 227, 227 (1999) (decided March 24, 1999).

57. 18 U.S.C. § 2119 (Supp. V 1993).

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

59. *Id.*

60. *Id.* at 232–39.

view of comparable federal and state statutes to contextualize the formatting of § 2119,[61] Justice Souter conceded that his efforts were inconclusive: "While we think the fairest reading of § 2119 treats the fact of serious bodily harm as an element, not a mere enhancement, we recognize the possibility of the other view."[62] *Jones*'s holding, therefore, cannot rest on the statutory interpretation that preceded this admission.

Justice Souter then argued that, in light of this background of doubt as to the correct statutory meaning, his view should trump the other on the basis of the constitutional avoidance doctrine.[63] Constitutional avoidance is a canon of construction that requires that, where a statute is amenable to different readings, a reading that would create doubt as to the constitutionality of the statute should be rejected in favor of one that does not.[64] This canon is perhaps as well established as such a concept can be in the Supreme Court's statutory interpretation jurisprudence. Justice Story stated it thusly in 1830 in *Parsons v. Bedford*: "No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the [C]onstitution."[65] The canon is ultimately rooted in respect for Congress, "which we assume legislates in the light of constitutional limitations."[66] The canon "has for so long been applied by th[e] Court that it is beyond debate."[67] After a lengthy review of holdings with respect to the constitutionality of a number of analogous provisions, Justice Souter concluded that the Government's view of the statute "would raise serious constitutional questions . . . . Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions."[68]

Jones should have controlled *Castillo*. Justice Breyer certainly was not ignorant of the nature of the majority opinion in *Jones*,

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61. *Id.* at 235–37.

62. *Id.* at 239.

63. *Id.* at 239–40.

64. *See, e.g.*, United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 407–08 (1909).

65. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448–49 (1830).

66. *Jones*, 526 U.S. at 239–40 (quoting Rust v. Sullivan, 500 U.S. 173, 191 (1991)).

67. *Id.* at 240 (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

68. *Id.* at 251.

as he cited that case five times in his *Castillo* opinion.[69] *Jones* held that statutory language setting out higher maximum sentences for variations of an offense should be read as elements, and not sentencing factors, because of the constitutional avoidance doctrine.[70] For all intents and purposes, the same issue was presented in *Castillo*, yet Justice Breyer waved aside *Jones*'s constitutional avoidance approach in favor of creating his own multiprong element-versus-sentencing-factor test.[71] The only mention that Justice Breyer gave to constitutional avoidance was in dismissing its importance. In introducing his test, Justice Breyer mentioned that *Jones* dealt with constitutional avoidance issues, without noting that *Jones* was decided explicitly on that basis.[72] He then moved on to setting out and analyzing his various factors, without so much as another nod to constitutional avoidance.[73]

Had Justice Breyer grounded his interpretation of § 924(c) in *Castillo* in constitutional avoidance, the issue in *O'Brien* would have been far simpler. The Court would not have had to repeat Justice Breyer's multipart test, which reassesses the relative argumentative weight that each side could bring to bear on each factor of the test. Instead, the Court in *O'Brien* would have had to determine only the relatively simpler question of whether Congress's amendment to § 924(c) explicitly evinced a desire to change specifically the point that the machinegun provision should be read as an element and not as a sentencing factor. As Justice Kennedy's *O'Brien* opinion in fact noted, it is a general guiding principle of statutory interpretation that "Congress does not enact substantive changes *sub silentio*."[74] Because Justice Kennedy's opinion in this case is based on Justice Breyer's poorly-constructed opinion in *Castillo*, it too is needlessly complicated and drawn out, when in reality both cases presented relatively simple issues. Continued use of the Breyer-Kennedy test in future cases should be reconsidered because it is not

69. Castillo v. United States, 530 U.S. 120, 121, 124–26, 131 (2000).

70. *Jones*, 526 U.S. at 251–52.

71. *Castillo*, 520 U.S. at 124–31.

72. *See id.* at 124.

73. *Id.* at 124–31.

74. United States v. O'Brien, 130 S. Ct. 2169, 2178 (2010) (citing Dir. of Revenue of Mo. v. CoBank ACB, 531 U.S. 316, 323 (2001)).

only overcomplicated but also fundamentally superfluous to the holdings in *Castillo* and *O'Brien*.

As a final matter, although this Comment avoids an assessment of the merits of the concurring opinions in *O'Brien*, there is a point to be made about the future of the complaint made therein. Both Justices Stevens and Thomas argued for essentially the same thing—an expansion of the *Apprendi* principle to cover statutory sentencing minimums as well as maximums—and they have been doing so for quite some time. Regardless of the merits of their argument, the vote in *O'Brien* indicates that Justices Stevens and Thomas are losing ground on the Court for their view, Justice Stevens's pronouncement on the insecurity of the *McMillan* precedent notwithstanding.[75]

In 1986 in *McMillan*, Justice Stevens's dissent met with the approval of Justices Marshall, Brennan and Blackmun.[76] In 2002 in *Harris*, Justice Thomas's dissent was joined by Justices Stevens, Souter, and Ginsburg. It contained a clear and detailed articulation of the idea that *McMillan* was inconsistent with *Apprendi*.[77] Viewed in light of these two prior dissents, the fact that Justices Stevens and Thomas could not get a single other Justice to sign on to their concurrences in *O'Brien* speaks to the changing nature of the Court, and perhaps hints that this issue has changed from a live one producing consistently close margins to something of a dead horse.

Justice Souter's resignation takes center-stage on this point. While Justice Souter had been at the heart of this issue, dissenting with Justice Thomas in *Harris*[78] and writing the majority opinion in *Jones*.[79] Justice Sotomayor, his replacement, cannot be assumed to share his concerns, as evidenced by her signing on to the majority opinion in *O'Brien* and not either of the two concurrences.[80] Similarly, Justice Stevens's resignation and replacement by Justice Kagan after *O'Brien* casts further doubt on the viability of the *McMillan* dissent block. Although she did

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75. *See id*. at 2183 (Stevens, J., concurring).

76. McMillan v. Pennsylvania, 477 U.S. 79, 93–95 (1986) (Marshall, J., dissenting) (noting his agreement with Justice Stevens on the key principle at stake, but differing on a number of marginal issues).

77. Harris v. United States, 536 U.S. 545, 572–83 (2002) (Thomas, J., dissenting).

78. *Id.* at 572.

79. Jones v. United States, 526 U.S. 227, 229 (1999).

80. *O'Brien*, 130 S. Ct. at 2172.

not argue the case, Justice Kagan signed onto the Government's brief in *O'Brien* in her capacity as Solicitor General,[81] so she was presumably comfortable with the Government's arguments. It is difficult to imagine her taking up the helm of Justice Stevens in cases relating to the *McMillan-Apprendi* divide. Thus, *O'Brien* may in fact mark the end of organized opposition to *McMillan*—it only took twenty-four years.

William O. Scharf

81. Brief for Petitioner, *O'Brien*, 130 S. Ct. 2169 (No. 08-1569).