

JUSTICE ALITO: A JUSTICE OF FOXES AND HEDGEHOGS

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The great Oxford philosopher Isaiah Berlin once proposed that all great writers fall into one of two camps. Some are hedgehogs; some are foxes.¹ Hedgehogs “relate everything to a single central vision.”² Foxes, on the other hand, reject grand theories. They “pursue many ends, often unrelated and even contradictory.”³ While hedgehogs tend to see the world in black-and-white, foxes see it in shades of gray.

Although Berlin later downplayed this essay, I suspect that his logic also applies to an age-old legal dispute: the split between rules and standards.⁴ Those who favor rules, like Justice Scalia, encourage judges to lay down clear rules that can be applied across cases. They are the ultimate hedgehogs. Those who prefer standards, by contrast, are foxes. They take an all-things-considered approach which balances an array of factors with close attention to the particular facts of each case. Justice Breyer is a great example. As a champion of pragmatism, Justice Breyer looks to balancing tests and multi-factor standards to resolve the case before him.

So, where does Justice Alito fall? Many would no doubt say that he’s a fox, and there is some truth to that. In many contexts, Justice Alito openly acknowledges the limits of rules and the practical value of standards.⁵ Those insights reflect his reminder that “judging is not an academic pursuit” but rather a “practical activity” with often life-altering consequences for the parties before us.⁶

But I think that’s only part of the story. When it comes to the separation of powers, I submit, Justice Alito typically resembles a hedgehog. In my view, separation-of-powers cases reveal his

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¹ ISAAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY’S VIEW OF HISTORY* (1953).

² JOHN LEWIS GADDIS, *ON GRAND STRATEGY* 4 (2018).

³ *Id.*

⁴ There is a longstanding debate about whether legal doctrines should cash out as rules or standards. There are merits to both approaches in particular settings. But I should put my biases on the table. I tend to stand with Justice Scalia—a pretty good place to stand—in favoring rules. As a lower-court judge, I know firsthand that rules are usually much easier to apply than standards. Rules can also ensure that law is applied in an evenhanded and predictable manner. At the same time, however, I know that every judge, no matter where their sympathies lie, will invariably be forced to employ both rules and standards. That is our lot in life. Even Justice Scalia—never one to shy from a fight—recognized that “[w]e will have totality of the circumstances tests and balancing modes of analysis with us forever.” Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989); see Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

⁵ See Steven Menashi, *The Prudent Judge*, 2023 HARV. J.L. & PUB. POL’Y PER CURIAM 16 (2023); Andrew Oldham, *Justice Alito on Criminal Procedure*, 2023 HARV. J.L. & PUB. POL’Y PER CURIAM 19 (2023); Kate Stith, *Justice Alito on Criminal Law*, 2023 HARV. J.L. & PUB. POL’Y PER CURIAM 18 (2023).

⁶ Samuel A. Alito, Jr., Associate Justice, U.S. Sup. Ct., Manhattan Institute Walter B. Wriston Lecture: Let Judges Be Judges (Oct. 13, 2010).

instinctive preference for rules over standards. Yet this preference is overlooked for a simple reason: Justice Alito rarely writes on a blank slate. Unlike, say, Justice Thomas, Justice Alito tends to take a thicker view of *stare decisis*. So, operating within the constraints of precedent, Justice Alito routinely refines the Supreme Court's caselaw in ways that make it both more coherent and more predictable—in other words, more hospitable for hedgehogs.

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When it comes to our Constitution, structure is king. The Bill of Rights is, of course, a rich guarantee of our most basic rights. But without structural limits on governmental power, each of its cherished rights would be little more than words on a page. Our Founders understood this. They knew firsthand the abuse that flows from the unchecked consolidation of power in the hands of one actor. For that reason, they made structural limits the cornerstone of our constitutional charter.⁷ First, they divided powers between the federal government and the states. But they also divided powers *within* the federal government: the legislative power went to Congress, the executive to the President, and the judicial to the courts.

I can think of at least three reasons why rules are especially attractive for cases dealing with the separation of these powers. First, rules are more likely to restrain judicial overreach. The Founders understood that we should always expect government actors to expand their powers. And judges were no different. Indeed, for the Anti-Federalists—the leading critics of our constitutional order—the danger of *kritarchy* (rule by judges) loomed large. Brutus warned that “the supreme court under this constitution would be exalted above all other power in the government, and subject to no controul.”⁸ He reasoned that judicial review and lifetime tenure were a dangerous mix:

There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.⁹

Although much has changed since the Founding, human nature has not. So, judges would do well to remember that, like other officials, we are not “angels.”¹⁰ We must always scrutinize our decisions to ensure that we do not succumb to the temptation to wrest power from the political branches. Rules reduce that risk.¹¹

Rules also enhance the public's perception of our judicial system as impartial and incorruptible—no small matter when our decisions are backed by neither the sword nor the purse.¹² Too many Americans today think that judges act as faithful agents of one political party or the other. This skepticism would hardly be assuaged if the Court handed down a decision on Tuesday that distinguished a case decided on Monday by reasoning, “Well, Monday's case

⁷ See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (“Even a cursory examination of the Constitution reveals . . . that checks and balances were the foundation of a structure of government that would protect liberty.”).

⁸ Brutus, XV, in 2 THE COMPLETE ANTI-FEDERALIST 437–38 (Herbert J. Storing ed., 1981).

⁹ *Id.* at 438.

¹⁰ THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

¹¹ See John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747 (2017).

¹² THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

featured four factors while today's involves four factors plus one." By contrast, it's hard to think of a better advertisement for the rule of law than the Court's articulation of a clear rule in one case that it sticks to in subsequent cases—no matter the parties or issues before them.

And there's another reason bright-line rules are valuable in the separation-of-powers context. Judicial decisions in this arena tend to have lasting consequences. Whether we are resolving disputes between dueling sovereigns or between coordinate branches of the federal government, we are deciding how our government operates. Too often, this truth is forgotten. Journalists and court-watchers scour Supreme Court opinions like box scores, trying to figure out who's up and who's down. But that's not the role of a judge. And rules remind us to think not just about the case before us today, but the cases that'll come down years from now, when the facts might be different and the shoe on the other foot.

Justice Alito put this point nicely in a recent case. In *Trump v. Vance*, an elected state prosecutor in New York launched a criminal investigation of the sitting President.¹³ As part of this investigation, the prosecutor sought to subpoena the President's private records.¹⁴ This was unprecedented. As Justice Alito lamented at the outset of his powerful dissent, the Court's decision was "almost certain to be portrayed as a case about the current President and the current political situation."¹⁵ And true enough, that is how the media characterized it. But most people didn't fully appreciate that the Court's decision was not a ticket good for one ride only. As Justice Alito noted, *Vance's* holding "will also affect all future Presidents—which is to say, it will affect the Presidency, and that is a matter of great and lasting importance to the Nation."¹⁶

Insights like these pervade Justice Alito's jurisprudence. And once we see things through this lens, we better understand his leading opinions on the separation of powers.

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Justice Alito's separation-of-powers jurisprudence rests on a recognition that the judge's role is a limited one. His majority opinion in *Hernandez v. Mesa* embodies this judicial humility.¹⁷ *Hernandez* also demonstrates his skill in disciplining doctrines that previously relied on nebulous standards.

To illustrate this point, however, it's important to take a few steps back. Start with hornbook law. Federal courts "are not roving commissions"¹⁸ tasked with writing and updating our laws; that is Congress's job. With few exceptions, Congress must give plaintiffs the authority to come to court.¹⁹ In the language of law, that means a plaintiff must have a cause of action.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, however, the Supreme Court broke new ground.²⁰ There, the Burger Court found for the first time that the Fourth Amendment supplied a cause of action for money damages when federal agents allegedly violate

¹³ 140 S. Ct. 2412, 2420 (2020).

¹⁴ *Id.* at 2429.

¹⁵ *Id.* at 2439 (Alito, J., dissenting).

¹⁶ *Id.*

¹⁷ 140 S. Ct. 735 (2020).

¹⁸ *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973).

¹⁹ See, e.g., *Davis v. Passman*, 442 U.S. 228, 239 (1979); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014).

²⁰ 403 U.S. 388 (1971).

the Amendment.²¹ The Burger Court then stretched *Bivens*'s logic, expanding its reach to cover violations of the Fifth Amendment's Due Process Clause and the Eighth Amendment's bar on cruel and unusual punishment.²² At the time, it appeared the Court would continue expanding *Bivens* until *Bivens* "became the substantial equivalent of 42 U.S.C. § 1983."²³

But allowing courts to find implied causes of action shifts significant power to the federal judiciary—power that the Founders intended would rest in the elected branches.²⁴ Co-opting this power created problems. After all, any "decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide."²⁵ So any attempt at crafting the optimal liability regime must reckon with "a number of economic and governmental concerns" that are not easy to discern.²⁶ For instance, if an alleged constitutional violation flows from a complex law enforcement operation, which officers should bear the brunt of the liability? What mens rea standard should attach? And how will the projected costs and consequences of litigation be scored against their benefits? These are hard questions that can be answered only after balancing multiple factors against each other. And it is imperative that courts making these judgment calls get the balance exactly right. Unlike garden-variety state tort damages, the availability of a federal constitutional remedy can't be undone by legislation. Once the courts have extended *Bivens*, we all must live with it.

In *Hernandez*, the Court was invited to expand *Bivens* once more, and the facts of that case made the invitation all the more alluring.²⁷ Sergio Adrián Hernández Güereca, a fifteen-year-old boy in Mexico, was playing with his friends near the border.²⁸ While they were playing, Jesus Mesa, Jr., a border patrol officer on American soil, shot and killed Hernández.²⁹ Citing *Bivens*, Hernández's parents brought a damages suit alleging that Mesa had violated their son's Fourth and Fifth Amendment rights.

Writing for the majority, Justice Alito declined the plaintiffs' invitations to extend *Bivens*. In reaching this conclusion, Justice Alito did not merely rely on the judiciary's institutional limitations—though those considerations are an important part of the opinion. Instead, he began with the basics. While the Court had previously recognized implied causes of action, Justice Alito declared that those decisions did not adequately consider "the tension between this practice and the Constitution's separation of legislative and judicial power."³⁰ Put aside whether judges would be good at figuring out the appropriate liability regime. For Justice Alito, the Constitution answered this question. Our constitutional charter channels the legislative power to Congress

²¹ *Id.* at 389.

²² *See, e.g., Davis*, 442 U.S. at 228 (holding that Fifth Amendment violations confer a cause of action and money damages); *Carlson v. Green*, 446 U.S. 14 (1980) (holding that *Bivens* does not foreclose actions for money damages under the Eighth Amendment).

²³ Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123, 1139 (2014).

²⁴ *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (citation omitted).

²⁵ *Id.* at 1858.

²⁶ *Id.* at 1856.

²⁷ *See Hernandez v. Mesa*, 140 S. Ct. 735, 740 (2020).

²⁸ *Id.* at 740.

²⁹ *Id.*

³⁰ *Id.* at 741.

while “this Court and the lower federal courts . . . have only ‘judicial Power.’”³¹ And the essence of lawmaking entails “balancing interests and often demands compromise.”³² We risk upsetting these delicate balances when we infer a cause of action from statutory silence. And worst of all, we’d be straying out of our lane. As Justice Alito notes, in the post-*Erie* world, “a federal court’s authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress[.]”³³ In other words, unless and until Congress creates a federal-officer analog for § 1983, we should handle *Bivens* claims with “caution.”³⁴

These first-order principles also explain the Court’s exacting test for expanding *Bivens*. In *Hernandez*, Justice Alito signaled in no uncertain terms that lower courts should rarely, if ever, find the expansion of *Bivens* justified. Under *Bivens*, judges must ask two questions when deciding whether a cause of action exists. First, we ask whether the claim arises in a new context.³⁵ It’s not enough that the plaintiff points to the same constitutional provisions as those that have already grounded prior *Bivens* claims. Instead, we must ask whether this case is “meaningfully different.”³⁶ In finding that the facts of *Hernandez* arose in a new context, Justice Alito made it clear that the context is new if it differs in virtually any way from the Court’s previous *Bivens* decisions.

Then, we move to the second step—where the bulk of the analytical work is done. There, we “ask whether there are factors that counsel hesitation” before we engage in the “‘disfavored’ judicial activity” of extending *Bivens*.³⁷ And the reasons are many. In *Hernandez*, Justice Alito offered three such factors. First, judges must be doubly cautious before creating a *Bivens* remedy that intrudes on the political branches’ primacy in the realm of foreign affairs.³⁸ Second, Hernández’s claims implicated national security issues because border patrol agents defend our Nation against illegal immigration and trafficking.³⁹ Last, Justice Alito pointed to multiple statutes where “Congress has repeatedly declined to authorize the award of damages for injury inflicted outside our borders.”⁴⁰ Congress’s general pattern of limiting damages actions for injury inflicted abroad by government officials gave Justice Alito “further reason to hesitate about extending *Bivens*.”⁴¹

While *Hernandez* featured an array of factors that cut against recognizing a *Bivens* action, they all derived from a recognition of the judge’s modest role. Indeed, perhaps the entire second step of the *Bivens* inquiry can be reduced to a single question: “[W]ho should decide’ whether to

³¹ *Id.* (quoting U.S. CONST. art. III, § 1).

³² *Id.* at 742.

³³ *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020).

³⁴ *Id.* One other option, of course, was to go all the way and overturn *Bivens*. And that’s what Justice Thomas called for in a concurrence joined by Justice Gorsuch. *Id.* at 750 (Thomas, J., concurring). But in writing for the majority, Justice Alito limited *Bivens*’s reach while providing judicially manageable instructions for lower courts and litigants.

³⁵ *Id.* at 743.

³⁶ *Id.* at 743–44.

³⁷ *Id.* at 742–44 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017)).

³⁸ *Id.* at 744.

³⁹ *Hernandez v. Mesa*, 140 S. Ct. 735, 746 (2020).

⁴⁰ *Id.* at 747.

⁴¹ *Id.* at 749.

provide for a damages remedy, Congress or the courts?"⁴² And by Justice Alito's lights, it's hard to ever see when the answer would not be Congress.

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Justice Alito's opinion for the Court in *Murphy v. NCAA* also reveals his preference for bright-line rules.⁴³ This time, however, these principles cashed out in favor of the states rather than Congress. *Murphy* is also noteworthy because it shows how bright-line rules can be more administrable while also resolving doctrinal confusion.

In *Murphy*, the Court confronted the constitutionality of the Professional and Amateur Sports Protection Act (PASPA). PASPA made it unlawful for a state "to sponsor, operate, advertise, promote, license, or authorize by law" a sports-gambling scheme.⁴⁴

New Jersey took issue with this and passed a law authorizing sports gambling in the Garden State. Neither the NCAA nor various professional sports leagues were happy with this. So, they sued to enjoin New Jersey's law.⁴⁵

The dispute invoked two constitutional doctrines. The first was preemption. Under the Supremacy Clause, federal law is superior to state law. Preemption simply requires state and federal judges to apply federal law rather than state law when the two conflict. The second was the anticommandeering doctrine. Though it sounds in deep-rooted principles of federalism, the doctrine emerged with *New York v. United States* and *Printz v. United States*, a pair of prominent Rehnquist Court decisions.⁴⁶ In *New York*, the Court struck down a federal law that required the states to either regulate the disposal of nuclear waste in line with federal standards or "take title" themselves.⁴⁷ Likewise, in *Printz*, the Court encountered a congressional statute requiring state and local law enforcement officials to perform background checks for prospective gun sales.⁴⁸ In striking down the law, the Court held that the federal government could not command the state's officers to administer or enforce a federal regulatory program.⁴⁹ Taken together, these cases stand for the simple principle that states set state policy while the federal government sets federal policy.

Yet in the years leading up to *Murphy*, the two doctrines—preemption and anticommandeering—did not coexist easily.⁵⁰ Each threatened to swallow the other.⁵¹ Many prominent scholars, however, reconciled these doctrines by taking a dim view of the anticommandeering doctrine.⁵² On their view, the anticommandeering doctrine applies when

⁴² *Id.* at 750 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017)).

⁴³ 138 S. Ct. 1461 (2018).

⁴⁴ *Id.* at 1470 (quoting 28 U.S.C. § 3702(1) (2012)).

⁴⁵ *Id.* at 1471.

⁴⁶ *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

⁴⁷ 505 U.S. at 153.

⁴⁸ 521 U.S. at 902.

⁴⁹ *Id.* at 925–26.

⁵⁰ See generally Edward A. Hartnett, *Distinguishing Permissible Preemption from Unconstitutional Commandeering*, 96 NOTRE DAME L. REV. 351 (2020).

⁵¹ See *id.* at 356.

⁵² See Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 SUP. CT. REV. 71, 89–94 (1999); Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11, 27–28 (2000); see also *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999).

Congress commands the states to affirmatively do something. By contrast, Congress's preemption authority controls when it prohibits the states from doing something. As fans of federal supremacy, these scholars championed the affirmative-negative distinction on the ground that preemption would be a dead letter if the Constitution barred Congress from telling the states what they couldn't do.

The NCAA's two arguments in *Murphy* reflected this conventional wisdom. First, they defended PASPA as a preemption provision grounded in the Supremacy Clause. And second, they noted that PASPA did not require the states to lift a finger. In this regard, PASPA was unlike the statutes at issue in *Printz* and *New York*. Simply put, the case boiled down to a referendum on the affirmative/negative distinction for anticommandeering purposes. To be sure, this distinction promised simplicity at first glance. And it seemed like a bright-line rule. But writing for the Court, Justice Alito rejected this distinction.⁵³

Why? Because a positive command can easily be rewritten in negative form. For instance, the affirmative command, "Do not repeal," can be readily repackaged as a prohibition: "Repeal is prohibited."⁵⁴ It was a mere "happenstance that the laws challenged in *New York* and *Printz* commanded 'affirmative' action as opposed to imposing a prohibition."⁵⁵ Any test that would allow Congress to sidestep the Constitution's prohibition against commandeering was no workable test at all. In two short lines describing PASPA, Justice Alito cut to the heart of why the affirmative-negative distinction cannot work: "It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine."⁵⁶

Justice Alito found a brighter, more workable rule. And just like in *Hernandez*, Justice Alito reasoned from constitutional text and history. Under our Constitution, Congress's legislative powers are limited. Thus, Congress can only exercise legislative power after it identifies the constitutional source of its authority. PASPA ran into the shoals for two related reasons. First, as Justice Alito noted, the Supremacy Clause is not an independent fount of legislative power for Congress. It is instead only a "rule of decision" for courts to apply after encountering conflicting state and federal laws.⁵⁷ And second, the Constitution only "confers upon Congress the power to regulate individuals, not States."⁵⁸ Putting these steps together, Justice Alito announced that the appropriate distinction is between federal laws that regulate the people directly and federal laws that regulate the state's regulation of the people. The former can constitutionally preempt state law while the latter is unconstitutional.

Justice Alito's new test squared preemption with anticommandeering. The opinion also displays a keen appreciation for how the law interacts with real-world incentives. More specifically, Justice Alito makes two points in favor of a robust anticommandeering doctrine. First, the doctrine furthers political accountability.⁵⁹ When Congress directly regulates an area, it

⁵³ *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018).

⁵⁴ *Id.* at 1472.

⁵⁵ *Id.* at 1478.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1479 (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015)).

⁵⁸ *Id.* (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

⁵⁹ *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018).

bears total responsibility for the regulation's benefits and burdens. That enables voters to know who to blame (or praise) for the regulation's consequences. By contrast, if a State imposes a regulation only under Congress's command, then "responsibility is blurred."⁶⁰ A confused voter might understandably, yet unfairly, hold his state representatives accountable for policies that Congress concocted. And savvy politicians would surely exploit such ambiguities.⁶¹ Second, the anticommandeering doctrine prevents federal overreach. When Congress directly implements a policy, it must tally its benefits against the costs of enforcement and administration. And the prospect of these costs constrains Congress. But absent an anticommandeering doctrine, Congress could skip past this limit by enlisting the states to administer and enforce a law in place of the federal government.⁶² Indeed, Justice Alito found it "revealing that the Congressional Budget Office estimated that PASPA would impose 'no cost' on the Federal Government."⁶³ In other words, without the separation of powers, Congress could run up the tab on today's fashionable policy proposals while requiring the states to pay the bill tomorrow.

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In most separation-of-powers cases, the Justices do not approach the issue in a vacuum. Instead, they inherit precedent. In that sense, *Ortiz v. United States* was a rare exception.⁶⁴ So I don't think it's a coincidence that *Ortiz* also offers one of the most vivid examples of Justice Alito's preference for rules over standards in structural cases.

Like many defendants each year, Keanu Ortiz was convicted for possessing and distributing child pornography.⁶⁵ But here there was a twist: Ortiz's trial didn't take place in a federal civilian court. Instead, until he reached the Supreme Court, Ortiz's case was tried by a court-martial. A panel of the Air Force Court of Criminal Appeals affirmed his conviction and so did the Court of Appeals for the Armed Forces (CAAF).⁶⁶ Across these proceedings, Ortiz brought several statutory and constitutional challenges to his conviction that are not relevant here.

Instead, when Ortiz's appeal reached the Supreme Court, Justice Alito homed in on a more fundamental question. Did the Supreme Court even have *jurisdiction* to hear Ortiz's appeal? And that question—first raised by Professor Aditya Bamzai in a brilliant amicus brief—was a "new one" for the Justices.⁶⁷ The Court had "previously reviewed nine CAAF decisions without anyone objecting that [it] lacked the power to do so."⁶⁸

To understand the problem, let's start with the basics. There are two paths to the Supreme Court. First, a small set of cases qualify under the Court's original jurisdiction. Every other case must invoke the Court's appellate jurisdiction. And under Supreme Court precedent, Article III's grant of appellate jurisdiction only empowers the Court to hear appeals from a tribunal that exercises the "judicial power." All agreed on this point. But which entities exercise judicial

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1484.

⁶⁴ 138 S. Ct. 2165 (2018).

⁶⁵ *Id.* at 2167.

⁶⁶ *Id.* at 2171–72.

⁶⁷ *Id.* at 2173.

⁶⁸ *Id.*

power? Some examples readily come to mind. When the Sixth Circuit decides a case, for example, the Court has appellate jurisdiction to review our decision. That's true for state courts too.⁶⁹ In *Ortiz*, the Court had to decide whether the same holds true for the military-tribunal system.

The majority found jurisdiction after considering “the judicial character and constitutional pedigree of the court-martial system.”⁷⁰ The Court took a functionalist path to reaching this conclusion. In particular, the Court noted the similarities between the federal courts and the military justice system. Governed by the same body of federal law, the military tribunals already afforded service members “virtually the same” procedural protections as those that defendants typically enjoy in federal and state courts.⁷¹ For those reasons, the Court has long held that the “valid, final judgments of military courts, like those of any court of competent jurisdiction[,] have res judicata effect and preclude further litigation of the merits.”⁷² Indeed, “the jurisdiction of [military] tribunals overlaps significantly with the criminal jurisdiction of federal and state courts.”⁷³ And the comparisons between the military courts and their civilian counterparts extend to sentence ranges and multiple layers of appellate review.

The Court's logic seems reasonable. After all, if you “see a bird that walks, swims, and quacks like a duck, you call that bird a duck.”⁷⁴ Surely the same rationale can apply to determining what entities wield the judicial power. But Justice Alito didn't agree. Instead, he relied on the Constitution's text and structure. Since the Founding, military tribunals “have always been understood to be Executive Branch entities that help the President.”⁷⁵ But if the military courts are part of the Executive Branch—a point no one disputed—then how could they exercise the judicial power? After all, “Article III of the Constitution vests ‘[t]he judicial Power of the United States’—*every single drop of it*—in ‘one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.’”⁷⁶ And for Justice Alito, the federal judicial power can be exercised only by “tribunals whose judges have life tenure and salary protection.”⁷⁷

This categorical rule has obvious merits. For starters, it's easily administrable. The majority's test, by contrast, invites difficult line-drawing questions. For instance, could Congress provide for direct Supreme Court review of garden-variety administrative agency decisions from, say, the Social Security Agency? Would that depend on the panoply of procedural rights available to parties in the administrative hearing? And if that's true, couldn't Congress overwhelm the Supreme Court by requiring the Justices hear every single appeal that arises from the constellation of non-Article III tribunals that already exist?

Besides workability, Justice Alito's argument also sounds in the internal logic of separation of powers. As judges, we do not, of course, have the purse or the sword at our disposal. But the

⁶⁹ See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

⁷⁰ *Ortiz v. United States*, 138 S. Ct. 2165, 2173 (2018).

⁷¹ *Id.* at 2174 (quoting 1 DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* §§ 1–7, at 50 (LexisNexis, 9th ed. 2015)).

⁷² *Id.* (alteration in original) (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 746 (1975)).

⁷³ *Id.* at 2174–75.

⁷⁴ *Ortiz v. United States*, 132 HARV. L. REV. 317, 317 (2018).

⁷⁵ *Ortiz*, 138 S. Ct. at 2190 (Alito, J., dissenting).

⁷⁶ *Ortiz v. United States*, 138 S. Ct. 2165, 2190 (2018) (quoting U.S. CONST. art. III, § 1).

⁷⁷ *Id.*

Constitution does impose one requirement and two privileges on the judicial branch. We can only be appointed after both presidential nomination and Senate confirmation. In return, we are granted life tenure and salary protections. We should not underestimate the importance of these designs. The Founders expected them to ensure judicial independence and impartiality. Thus, it would make sense if federal judges were the only federal officials tasked with exercising the judicial power to say what the law is. Or as Professor David Currie put it, “The tenure and salary provisions of Article III can accomplish their evident purpose only if they are read to forbid the vesting of the functions within its purview in persons not enjoying those protections.”⁷⁸

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Consider another example. In recent years, few areas of law have seen as much renewed focus as the unitary executive theory of presidential power.⁷⁹ The idea is simple. As then-Judge Alito explained it, the unitary executive theory posits “that all federal executive power is vested by the Constitution in the President.”⁸⁰ And like other defenders of the theory, then-Judge Alito argued that the unitary executive model “best captures the meaning of the Constitution’s text and structure.”⁸¹

Indeed, the words of Article II alone seem all but dispositive. The Vesting Clause makes clear that “[t]he executive [p]ower shall be vested in a President of the United States.”⁸² Meanwhile, the Take Care Clause entrusts the President with the duty to “take [c]are that the [l]aws be faithfully executed.”⁸³ Taken together, this language tells us that the President is ultimately responsible for everything that takes place within the Executive Branch. To be sure, as Justice Alito explained in his confirmation hearings, the unitary executive theory does not scope the metes and bounds of executive power. But it does tell us that any power which falls within the executive’s prerogative must be under the Commander-in-Chief’s control.

This has important implications in the officer-removal context in particular. Advocates of the unitary executive theory have long bristled at *Humphrey’s Executor v. United States*.⁸⁴ In *Humphrey’s Executor*, the Court blessed Congress’s ability to impose statutory restrictions on the President’s power to remove policymakers at the helm of so-called independent agencies. For many unitary executive theorists, this doctrine represents a “serious, ongoing threat” that “subverts political accountability and threatens individual liberty.”⁸⁵

In a series of cases, the Court has pared back Congress’s ability to insulate executive officers from presidential removal. In both *Free Enterprise* and *Seila Law*, Justice Alito joined the majority in refusing to extend *Humphrey’s Executor* to new contexts.⁸⁶ In *Collins v. Yellen*, the latest in this

⁷⁸ DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 121 (1985).

⁷⁹ See, e.g., *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

⁸⁰ John Harrison, *The Unitary Executive and the Scope of Executive Power*, 126 YALE L.J.F. 374, 374 n.1 (2017).

⁸¹ *Id.*

⁸² U.S. CONST. art. II, § 1, cl. 1.

⁸³ *Id.* § 3.

⁸⁴ 295 U.S. 602 (1935).

⁸⁵ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2219 (2020) (Thomas, J., concurring in part and dissenting in part).

⁸⁶ See *id.* at 2183; *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

series, Justice Alito wrote the majority.⁸⁷ And the shift from *Seila Law* to *Collins* illuminates Justice Alito's ability to discipline doctrine by minimizing ambiguities.

In *Seila Law*, the Court invalidated a law limiting the President's authority to remove the director of the Consumer Financial Protection Bureau (CFPB). The CFPB emerged from the Great Recession with the mandate to combat "unfair, deceptive, or abusive" acts and practices in consumer finance.⁸⁸ Congress intended the CFPB to operate as an independent agency like the agencies the Court blessed in *Humphrey's Executor*. But the CFPB differed from the agencies at issue in *Humphrey's Executor* in one important respect. While most independent agencies are led by multimember commissions or boards, the CFPB was headed by a single official. Appointed by the President and confirmed by the Senate, that official serves a five-year term. Congress also ensured that the CFPB would be provided with an independent source of funding that circumvented the typical appropriations process.⁸⁹ In short, "Congress deviated from the structure of nearly every other independent administrative agency" in the nation's history.⁹⁰

The *Seila Law* Court recognized "[t]he entire 'executive Power' belongs to the President alone."⁹¹ And the President's removal power flows from Article II's text. If it is the President who ultimately bears responsibility to enforce the laws, then surely the President must have the power to remove executive officials that do not represent him. Anything else would allow executive officials to flout the President's wishes. That could cripple the Presidency. "Without [removal] power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."⁹²

Though the Court embraced the unitary executive theory in *Seila Law*, the decision was narrow. Rather than strike down *Humphrey's Executor*, the Court only declined to extend it to reach the "new situation" of "an independent agency led by a single Director and vested with significant executive power."⁹³ In other words, there was a "standing athwart history, yelling [s]top" element to the decision. It also raised the question of when an agency wields "significant executive power." In some instances, like the CFPB, the answer is self-evident. But one can imagine the difficulties lower courts would have in figuring out which agencies only exert "insignificant" executive power.

Fortunately, Justice Alito clarified the doctrine a year later. In *Collins*, the question was whether the Director of the Federal Housing Finance Agency (FHFA) could only be removed by the President for cause. The Court-appointed amicus sought to distinguish *Seila Law* by, among other things, contending that the FHFA's authority was more circumscribed than the CFPB's. More specifically, the amicus pointed out that the FHFA administers only one statute while the CFPB administered nineteen. Similarly, the CFPB directly regulates millions of individuals and businesses while the FHFA regulates a small number of government-sponsored enterprises.⁹⁴

⁸⁷ See 141 S. Ct. 1761 (2021).

⁸⁸ *Seila Law LLC*, 140 S. Ct. at 2193 (quoting 12 U.S.C. § 5536(a)(1)(B) (2018)).

⁸⁹ See *id.* at 2191–94.

⁹⁰ *Id.* at 2191.

⁹¹ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (quoting U.S. CONST. art. II, § 1, cl. 1).

⁹² *Id.* at 2191 (quoting *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 514 (2010)).

⁹³ *Id.* at 2201 (quoting *Free Enter. Fund*, 561 U.S. at 483).

⁹⁴ *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021).

But Justice Alito discarded the “significance” inquiry. Writing for the majority, he noted that the President’s removal power is not a sliding scale that adjusts with the “the nature and breadth of an agency’s authority.”⁹⁵ Congress acts unconstitutionally when it insulates an agency head from the President’s control irrespective of the agency’s size or functions. The Constitution does not countenance structural violations simply because they could have been worse. Moreover, he highlighted the “severe practical problems” that would arise from requiring courts to discern which agencies are important and which agencies can fall by the constitutional wayside.⁹⁶ The FHFA’s comparison with the CFPB is illustrative. While the amicus made credible arguments that the CFPB is more influential, Justice Alito identified several arguments that cut in the other direction.⁹⁷

Once again, Justice Alito justified his favored rule by recognizing its accountability benefits. Justice Alito emphasized that the President, unlike agency officials, is elected.⁹⁸ This point might seem obvious. But it has important implications. Without presidential control, the executive branch bureaucracy could run amok with minimal oversight from anyone accountable to the voters.

Put these cases together and we see that Justice Alito clarifies every area of the law that reaches his desk. We also see his penchant for rules over standards most clearly when he writes separately or in dissent. Of course, Justice Alito does not devise these rules in a vacuum. Nor do they flow from his policy views. Instead, he is a methodological pluralist. He begins with the Constitution’s text, history, and structure. And he stops there too when the answer is definite. But he is also able to weave these first principles with the precedent he inherits.

* * *

Justice Alito’s favor for rules is not absolute. Ever the humble Justice, he recognizes that sometimes the law forces courts to reject bright-line rule. That’s particularly true when the proposed rule would transfer power from properly accountable bodies to the federal courts. For example, *Brnovich v. DNC*, featured a challenge to two neutral Arizona laws—(1) the out-of-precinct policy and (2) a prohibition on third-party ballot collection.⁹⁹ Along with a host of constitutional claims, the plaintiffs alleged that the laws’ disparate impact on minority voters violated section 2 of the Voting Rights Act (VRA). *Brnovich* marked the first guidance that the Court had issued on how we should assess the incidental burdens of facially neutral time, place, or manner voting regulations under section 2 of the VRA.

Section 2(a) of the VRA, as amended in 1982, prohibits states from passing laws “in a manner which results in a denial or abridgment of the right . . . to vote on account of race or color.”¹⁰⁰ And its neighboring provision tells us what must be shown to prove a violation. It requires consideration of “the totality of circumstances” in each case and demands proof that the State’s political processes are not equally open to participation by members of a protected class.¹⁰¹

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 1784–85.

⁹⁸ *Id.* at 1784.

⁹⁹ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

¹⁰⁰ 52 U.S.C. § 10301(a) (2018).

¹⁰¹ *Id.* § 10301(b).

This provision has been the source of endless confusion and litigation in voter-dilution cases. Indeed, in *Thornburg v. Gingles*, the leading case, the Court threw out at least nine famously open-ended factors for judges and litigants to squabble over.¹⁰²

But Justice Alito did not blindly follow the approach set out in *Gingles*. Instead, he began at the ground floor by asking what the text meant at the time of the statute's enactment. *Brnovich* is an excellent example of what Professor John McGinnis calls "a statutory analogue to originalism."¹⁰³ Along with employing the traditional tools of textualism, Justice Alito keyed in on the VRA's statutory history, historical context, and expected applications to ascertain Section 2's meaning.

After tilling these fields, Justice Alito concluded that the statute aimed at ensuring that a state's political processes must be "equally open to minority and non-minority groups alike."¹⁰⁴ But Justice Alito did not create a bright-line rule for courts to use in determining when a facially neutral election regulation remains "equally open" for all Americans.¹⁰⁵ He made that clear at the outset after disclosing that the Court had received at least ten proposed tests for how to implement section 2's imprecise language from the parties and amici.¹⁰⁶

Instead, to inform future cases, Justice Alito announced a standard employing five guideposts—each of which "stem[med] from the statutory text"¹⁰⁷: (1) the size of the burden on voters beyond mere inconvenience; (2) the law's departure from "standard practice when the statute was amended in 1982"; (3) the size of the disparity; (4) the alternative means of voting other than the one burdened by the challenged policy; and (5) the State's interest in promulgating the challenged policy.¹⁰⁸

Three insights from *Brnovich* are worth singling out. First, this is an example of how Justice Alito does not blindly pursue rules for their own sake. If the Court was looking for a bright-line rule to adopt in *Brnovich*, there were plenty to choose from. Indeed, as he noted, the various parties and amici had proposed no fewer than ten tests for resolving such cases. But Justice Alito declined to choose a winner among them as this case was the Court's "first foray into the area."¹⁰⁹ This prudence is understandable. The stakes for picking the right rule in this domain were extraordinarily high. One notable test, for example, would have required the State to run the gauntlet of strict scrutiny for every neutral voting regulation that imposes a disparate burden on certain voting populations. Its adoption would likely have led to the invalidation of hundreds of state laws that would have been considered noncontroversial the day the 1982 amendment to the VRA had been passed. What's more, the statute expressly calls on courts to consider the "totality of circumstances."¹¹⁰ That language directs courts to make holistic calls that turn on multiple

¹⁰² 478 U.S. 30, 36–37 (1986).

¹⁰³ John McGinnis, *The Contextual Textualism of Justice Alito*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 14, *2 (2023).

¹⁰⁴ *Brnovich*, 141 S. Ct. at 2337 (quoting § 10301(b)).

¹⁰⁵ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337 (2021) (quoting § 10301(b)).

¹⁰⁶ *Id.* at 2336.

¹⁰⁷ *Id.* at 2342.

¹⁰⁸ *Id.* at 2338–40.

¹⁰⁹ *Id.* at 2336.

¹¹⁰ 52 U.S.C. § 10301(b) (2018).

considerations — that is, it calls for a standard rather than a rule. Justice Alito heeded that statutory instruction.

Second, Justice Alito looks to historical context and common sense as backstops to discipline his textual analysis. The portion of the VRA at issue in *Brnovich* is not a model of legislative clarity. And reasonable minds can read its provisions broadly. But when analyzing today's regulations, we would be wise to compare them to the standard practices in 1982 when Congress made the relevant amendments to the VRA. After all, it's unlikely that "Congress intended to uproot facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States."¹¹¹ This logic is a bedrock principle of statutory interpretation and the separation of powers. We respect Congress when we assume that it does not intend to upend existing regulatory schemes using only vague terms. In other words, we don't expect Congress to hide elephants in mouseholes.

Third, *Brnovich* is a model of judicial humility in our federalist system. Election regulation is one of the State's core prerogatives.¹¹² Federal judges must be cautious before we wrest this power from state officials through hawkish oversight, especially where Congress has not clearly instructed that we do so. That does not mean we should grant the states knee-jerk deference, of course. But it does mean taking the State's interests seriously. Justice Alito did just that in *Brnovich*. In defending its laws, Arizona invoked its interest in preventing electoral fraud and preserving the perceived legitimacy of its elections. These are entirely legitimate interests. Indeed, given that elections are the lifeblood of a democracy, those interests may be among the State's most important. The Ninth Circuit thought otherwise "in large part because there was no evidence that fraud in connection with early ballots had occurred in Arizona."¹¹³ But election fraud has a storied history in American political life. So, as Justice Alito recognized, every State has a right to learn from history and take necessary prophylactic steps. And those State interests rightly fall within the "totality of circumstances" to be considered under section 2 of the VRA.

* * *

Yale historian John Lewis Gaddis, a keen student of grand strategy, suggests that great statesmen couple the hedgehog's sense of direction with the fox's sensitivity to surroundings.¹¹⁴ Justice Alito's greatness as a jurist could be described in similar terms. And this blend is often on show when Justice Alito writes in a separation-of-powers case. The Constitution's text, history, and structure are his touchstones. But Justice Alito's mastery of doctrine and keen sensitivity for how the law operates on the ground allows him to repair one area of neglected doctrine after another. Hedgehogs and foxes alike have much to learn from his opinions.

And for all this and much more, we are his beneficiaries.

¹¹¹ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2339 (2021).

¹¹² Michael T. Morley, *The Independent State Legislature Doctrine*, 90 *FORDHAM L. REV.* 501 *passim* (2021).

¹¹³ *Brnovich*, 141 S. Ct. at 2348.

¹¹⁴ GADDIS, *supra* note 2.