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Fellow Judges Criticize Alito's Application of Precedent

1. *Dia* v. *Ashcroft*, 353 F.3d 228, 251 n.22 (3d Cir. 2003) (en banc): "Judge Alito makes no reference to the need for 'substantial evidence,' but, instead, applies the 'no reasonable adjudicator' standard to restrict our review. . . . **We have not applied the statutory standard in this manner**... We suggest that to read the 'no reasonable adjudicator' standard in a way that does away with the need for 'substantial evidence' **not only guts the statutory standard, but ignores our precedent**."

2. *LePage's Incorporated* v. *3M, Inc.*, 277 F.3d 365 (3d Cir. 2002) (Sloviter, J., dissenting): "The majority has accomplished its enervation of § 2 **by relying on theories and cases inapplicable here** and by failing to consider the synergistic effect of 3M's conduct taken as a whole. In the process, **it ignores the jury verdict, the District Court's careful analysis, and this court's directly applicable precedent**. . . . But perhaps more important, the majority's imposition of a requirement that plaintiffs demonstrate that they could not compete . . . **is contrary to our precedent and that of the Supreme Court**."

3. *Riley v. Taylor*, 277 F.3d 261, 290 (3d Cir. 2001) (en banc): "**[I]n case after case**—and most particularly in capital cases—we have found that even applying the more stringent post-AEDPA standard of review (not applicable here), there are reasons not to accord the usual deference to the state courts' findings.... **The Dissent accords little weight to these authorities**."

4. *RNS Services, Inc.* v. *Secretary of Labor*, 115 F.3d 182, 186 n.2 (3d Cir. 1997): "**The dissent**, with its 'basement bin' example, **overlooks our holding (in the instant case and prior cases)** that the MSHA has jurisdiction only over locations in which, inter alia, coal undergoes processing that prepares the coal for its ultimate use."

5. *Rappa* v. *New Castle County*, 18 F.3d 1043, 1086 (3d Cir.1994) (Garth, J., dissenting): "**I know of no rule of law which countenances the majority's disposition of this case**. Certainly nothing in the jurisprudence of the Supreme Court, or in ours, suggests that a three-judge panel of a court of appeals is free to substitute its judgment for that of a four-Justice plurality opinion, let alone that of the entire Court. **The majority concedes, in a footnote, that its approach is unprecedented, but justifies its disregard of established principles of stare decisis** as an extrapolation of the general reasoning of Casey. Nothing in Casey, however, suggests that we have the power, indeed the option, to overrule a plurality opinion of the Supreme Court."

6. In *Phillips* v. *Borough of Keyport*, 107 F.3d 164, 187 (3d Cir. 1997) (en banc) (Alito, J., dissenting): "Under *Bello* and its progeny, however, mundane land-use disputes that belong in state court are transformed into substantive due process claims cognizable under § 1983. . . . **I would curtail this trend and would overrule *Bello* and the cases that followed it**."

7. *Beauty Time* v. *Vu Skin Systems*, 118 F.3d 140, 147 (3d Cir. 1997): "**The dissent in this case has misconstrued Pennsylvania's tolling principles** and would apply the fraudulent concealment doctrine in an action involving inherent fraud.... **That makes no sense**."

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8. *United Artists Theatre Circuit* v. *Warrington*, 316 F.3d 392, 404, 407 (3d Cir. 2003) (Cohen, J., dissenting): "Under both the law of the case doctrine and our own internal operating procedures, **the majority is wrong to revisit an issue that has already been decided**.... [T]he Majority opinion gives far too little weight to the fact that **this Circuit has a well-established jurisprudence** employing the improper motive test in the substantive Due Process land-use context.... I would hold fast to **the scheme that is already firmly entrenched in this Circuit**: In land use constitutional tort cases, the government's conduct may be judged under an "improper motive" framework. **The evisceration of this standard by the Majority today is a most unfortunate step backwards** in the evolution of § 1983 as the legislative guardian of bedrock constitutional rights."

9. *ACLU* v. *Schundler*, 168 F.3d 92, 113-114 (3d Cir. 1999) (Nygaard, J., dissenting): "The majority **would effectively overrule one of our own opinions**: a task reserved for the en banc Court. Although this event would be cause for alarm in any case, my dismay is heightened here where the second opinion emanates from the exact litigation as the first. In this instance, the concern for the consistency of the law and the legitimacy our jurisprudence is intensified.... **This constitutional about-face** in the same case troubles me greatly, **strikes to the core of the legitimacy of our jurisprudence, and exposes us to well-earned criticism for inconsistency and for giving insufficient respect to an earlier instruction by the Court**."

10. *Bray* v. *Marriot Hotels*, 110 F.3d 986, 991 (3d. Cir. 1997): "The dissent carefully explains each of the discrepancies in this record in isolation and concludes that none of them creates a material issue of fact. **We have previously noted that such an analysis is improper** in a discrimination case...."

11. *In re Texas Eastern PCB Contamination Ins. Coverage*, 15 F.3d 1249, 1256 n. 3 (3d Cir. 1994): "The position of the dissent, that the carriers must demonstrate that they would have entered into negotiations in order to demonstrate prejudice from late notice, does not comport with our reading of the Texas caselaw."

12. *Exxon* v. *Exxon Seaman's Union*, 11 F.3d 1189, 1196 (3d Cir. 1993) (Seitz, J., dissenting): "[T]he majority say that the quoted ruling is distinguishable, **permitting it to promulgate a different controlling legal rule**.... I submit that it is not distinguishable. If the explicit rule in that case is to be rejected, it is for an en banc court to do so. Otherwise, our Internal Operating Procedure, making reported opinions binding on subsequent panels, **will be deprived of its stabilizing value**."

13. *Rompilla* v. *Horn*, 355 F.3d 233, 281, 290 (3d Cir. 2004) (Sloviter, J., dissenting): "The Majority's attempt to reconcile its conclusion...with the conclusion in *Wiggins* that defendant's counsel were ineffective is nothing short of astonishing.... **The Supreme Court does not interpret the unreasonable application of Supreme Court precedent prong** of § 2254(d)(1) **as narrowly as does the Majority**."