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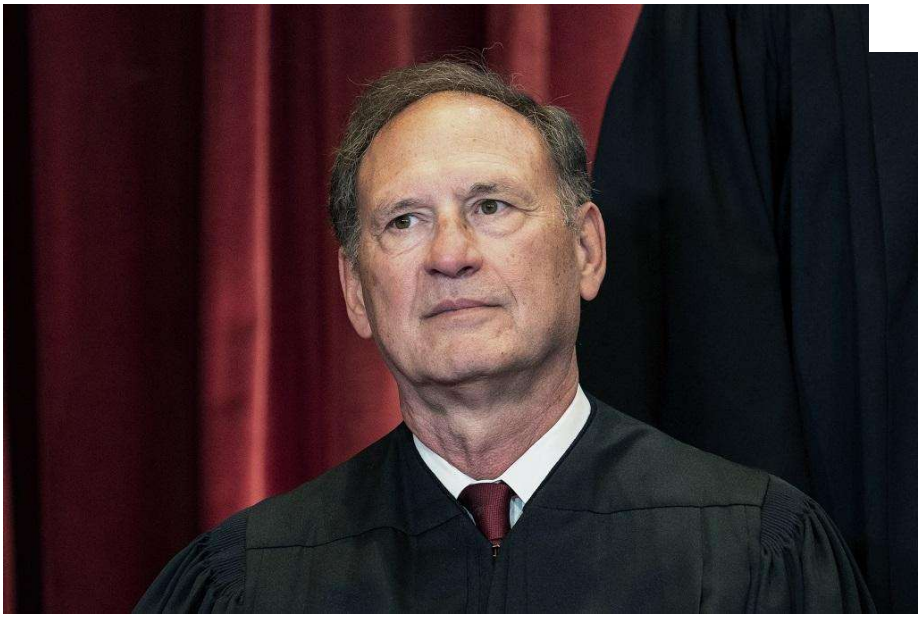
Samuel Alito: The 21st-Century Roger Taney

The author of 'Dred Scott' and the author of Dobbs v. Jackson Women's Health Organization stripped fundamental rights from Blacks and women, respectively. And sundered their nation in the process.

BY HAROLD MEYERSON JUNE 28, 2022



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Associate Justice Samuel Alito sits during a group photo at the Supreme Court, April 23, 2021.

He was confident that his sweeping opinion, backed by a majority of his Supreme Court colleagues, would decide the nation's most divisive issue once and for all, even though his position was so extreme it lacked the support of the American citizenry.

Instead, his opinion plunged the nation into crisis, not just because it denied an entire class of Americans their most basic rights, but also because it highlighted a deep and destabilizing flaw in the American system of government: that a minority could overrule a majority even on the most fundamental issues of life.

Thus, Chief Justice Roger Taney in his 1857 decision in the ***Dred Scott*** case.

Thus, Associate Justice Samuel Alito in his 2022 decision in ***Dobbs v. Jackson Women's Health Organization***.

This grim parallelism begins with these justices' affinity for overreach. The issue before the Court in the *Dred Scott* case was whether Scott, an enslaved Black man then living in the slave state of Missouri, could petition the Court for his freedom, as he had lived for years in the free state of Illinois and the free territory of Wisconsin. Rather than simply ruling on Scott's petition, Taney ruled that Scott had no standing to go to court at all, because Blacks, whether slave or free, were categorically not citizens of the United States and could never become citizens. In so doing, Taney also struck down the Missouri Compromise of 1820, which had divided the nation's territories into free and slave.

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A tendentious and interpretative originalist *avant la lettre*, Taney wrote of the Declaration of Independence's famous phrase "all men are created equal" that "it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration." Accordingly, he continued, Blacks, whether slave or free, "had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold and treated as an ordinary article of merchandise and traffic, whenever profit could be made by it."

As with Taney, so with Alito. Rejecting Chief Justice John Roberts's plea that the Court simply uphold Mississippi's law banning abortion after 15 weeks, Alito crafted a decision as sweeping as Taney's, denying the most basic of rights to a distinct category of Americans. In 1857, it was denying citizenship to an entire race; in 2022, it's denying control over one's body, one's health, and one's life to an entire gender.

Just as Taney noted that the authors of the Declaration in 1776 couldn't possibly have meant to include Blacks in their assertion of human equality, so Alito noted that the authors of the 14th Amendment in 1868 couldn't possibly have been thinking of a woman's right to choose. (Of course, neither were the authors thinking that corporations would later be reclassified as "people" by a pro-corporate Supreme Court, and thus accorded the rights that the 14th Amendment—enacted at a time when corporations were few and fledgling—had bestowed on actual people, both Black and white.)

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Taney and Alito represent the epitome of what right-wingers have long professed to detest: judicial activists. Alito in particular has a lengthy record of overturning settled law as soon as he has at least four other justices ready to side with him. He even has a record of soliciting cases that enable him to do that.

Consider, for instance, Alito's war on unions. In a 2012 decision in the *Knox* case, the Court ruled that a public employee union should not have assessed dues on nonmembers for its campaign against two referendums that were on the California ballot. In his opinion, however, Alito opined that the unanimous decision of the Court in 1977 in the *Abood* case was wrong and invited briefs asking the Court to overturn it. *Abood* had held that public employee unions could charge nonmembers, who they were required to represent in grievance procedures and collective bargaining, a portion of the regular union dues for performing those particular tasks, while exempting nonmembers from the portion of dues that went to the unions' political advocacy.

Knox had been decided along the lines of *Abood*. But Alito, in his opinion, nonetheless suggested that *Abood*, which governed *Knox*, had been decided in error, even though *Abood* had not been before the Court, and neither side had opined about it in its arguments. At the time, Associate Justice Elena Kagan noted that it was not the justices' business, nor good judicial practice, to opine on matters not actually before the Court. But Alito saw it as precisely his business, signaling to the nation's union-busters that they'd have an open door to reverse *Abood* if they took him up on his invitation.

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In 2015, the union-busters brought just such a case to the Court, but Associate Justice Antonin Scalia's death (and Mitch McConnell's refusal to let President Obama appoint a justice to replace him) left the Court deadlocked. In 2017, once President Trump had put Neil Gorsuch on the Court, Alito got his way in the *Janus* case.

So *Roe*, a decision supported by seven of the nine justices in 1973, isn't the first instance of settled law that Alito overturned the moment he had the votes. *Abood* was a unanimous decision—supported not just by Thurgood Marshall and William Brennan, but also by William Rehnquist and Lewis Powell—that also fell to the Alito axe. What had changed wasn't the legal legitimacy of requiring workers to pay unions a fee for the raises that unions won for them. It was the animus in which Republican justices like Alito held unions.

Taney's and Alito's inflammatory activism shocked Americans, precisely at the two times in our history when the nation was already dangerously divided. Just as today's Fox News viewers inhabit a separate "reality" that precludes actual information about the goings-on of the nation and the world, so the antebellum South blocked the dissemination of Northern publications unless they were pro-slavery. In the 1850s, both sides of the question became more militant and polarized. The end of the Missouri Compromise's guarantee that Northern states would remain free from slavery, the Fugitive Slave Act's expansion of slave-hunting to the North, and the *Dred Scott* ruling had the boomerang effect of boosting support for the fledgling Republican Party, just as today's Democrats hope that the revocation of *Roe* will swell the turnout of pro-choice voters in November's election. For their part, those who rejoiced at Taney's ruling wanted to push further—splitting the

Democratic Party into a merely pro-slavery wing and an expand-slavery-everywhere wing at its 1860 convention (the party fielded two presidential nominees that year, one from each of those wings). Today, similarly, the anti-choice zealots want to outlaw abortion nationally, or at least enable states to prosecute those who go out of state for abortions, and those who help them, too—like the Fugitive Slave Act, a way to impose the laws of some states upon states that have no such laws. The zealots also would like to go after such other established rights as gay marriage.

Then as now, with the polarization came violence. Low-level warfare broke out in Kansas as pro-slavery settlers attacked slavery's opponents, and the opponents retaliated. The anti-slavery Massachusetts Sen. Charles Sumner was brutally caned on the floor of the Senate by a South Carolina congressman. The growing hold that the South had over national policy also drove some abolitionists to desperate measures, like John Brown's raid on Harpers Ferry. Our current decade, though still young, already rivals and in some ways exceeds the 1850s for the flourishing of extremism and the growth of sectarian violence.

On the Court, Clarence Thomas has become the champion of pushing social reaction to ever more outrageous legal extremes; he's reliably the Court's right-wing id. Make no mistake, though: This is Samuel Alito's Court. He lines up cases that will push the nation rightward when the moment is ripe, and eschews judicial incrementalism, much less any interest in *stare decisis*, when he has the votes.

His business, like Roger Taney's, is nation-making as he would have it, even when majority support on the business at hand is nowhere to be found. What Taney irrefutably demonstrated to the America of 1857 was the growing rule of what many Northerners termed the

growing rule of what many Northerners termed the "slaveocracy"—the ability of Southern slaveholding interests to control the nation though they never had a national majority behind them. Through their overrepresentation in the House of Representatives and the Electoral College (their representation augmented by apportionments required to add to their populations three-fifths of their slave populations), their overrepresentation in the Senate (where population didn't matter at all), and their control of the courts, they were able to override the North's free-state status, through the Fugitive Slave Law (which required Northerners to return escaped slaves) and *Dred Scott*'s overriding the Missouri Compromise's guarantee of a free-state North. Taney's ruling hugely increased the slaveocracy's sway not only in the South, then, but in the anti-slavery North—exactly as Taney intended. Of course, it had that perfectly boomerang effect, so widening the gap and intensifying the anger between the two regions of the country that civil war soon followed.

We don't have a slaveocracy today, but we do have a Republican Party as, if not more, adept at winning and holding power through minority rule. We don't have the three-fifths rule empowering it, but we do have gerrymandered and gerrymandering legislatures giving Republicans disproportionate power in the House. We still have the Senate, which gives small rural states the same representation as large urban ones. We have the Electoral College, structured to give small states added clout in selecting our presidents. And we have a Court happy to overturn consensual legislation (like the Voting Rights Act) and very established law and custom (like *Roe* and *Abood*) when such revocations benefit the Republican minority.

I'm not predicting that civil war will be Alito's legacy, as it surely was Taney's. But if Lincoln is still right that a

it surely was Taney's. But if Lincoln is still right that a house divided against itself cannot stand, Alito will be remembered as one of the wreckers who pulled it down.

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