

## Challenging Constitutional Authority: African American Responses to *Scott v. Sandford*

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*Through an analysis of black abolitionist responses to Scott v. Sandford, this essay demonstrates the importance of extra-legal texts in contextualizing and challenging judicial authority. By analyzing the public responses of black abolitionists such as Frederick Douglass, William C. Nell, Robert Purvis, and Charles Lenox Remond, this essay concludes that (1) legal decisions cannot be properly understood apart from the subsequent public discourse they inspire, (2) the responses to Dred Scott demonstrate how legally excluded classes may persuasively challenge constitutional authority and assert their rights, and (3) the responses to Dred Scott have profound implications in the formation of American identity. Key words: African American rhetoric; constitutive rhetoric; legal discourse; Dred Scott v. Sandford; Frederick Douglass.*

THE preamble to the United States Constitution announces that the decision to alter the confederacy was made by "We the People." Subsequently, these "people" have been the source of great controversy. In times of transition and transformation, in the face of divisive social issues, "the people" and their rights have been significantly altered by judicial decisions and social convention. Perhaps no segment of the United States's population exemplifies this more than African Americans. Their struggle to assert and control their status in antebellum America, first as persons and later as citizens, is a primary example of an excluded class attempting to redefine the Supreme Court's interpretation of "the people." This essay addresses both the efforts of African Americans to affirm their legal identity and the relationship of the Supreme Court with marginalized groups by exploring the means through which an excluded class can respond to legal rejection. My argument emerges through an analysis of a defining episode of the American antebellum experience: African American reaction to the *Dred Scott* decision and its centrality to the socio-legal construction of citizenship and the American people.

In *Scott v. Sandford* African Americans, free and slave, were told they were neither citizens nor persons as defined by the United States Constitution.<sup>1</sup> Faced with complete disenfranchisement, African Americans responded to the Court by offering alternative interpretations of "We the People." An improved understanding of the Court's relationship with the public might be attained by expanding the frame of analysis to include these responses. From such a perspective, a legal ruling is a text which constitutes one group of people by endowing them with significant rights while also excluding another set or group by denying their legal claims and standing. Those excluded, in turn, may attempt to reconstitute "the people" within their own normative world.<sup>2</sup>

By considering how extra-legal responses of excluded groups expand and complement legal decrees in the context of the resistance posed by these groups, we potentially gain a better understanding of how the Supreme Court interacts with society as well as how segments of society challenge the Court's constitutional authority. While the case of *Dred Scott*, one of the most significant chapters in United States legal history, has been given extensive attention as a legal travesty, as a cause of the Civil War, and as demonstrating the moral degeneracy of antebellum America, there has yet to be a rhetorically-based analysis that extends to the efforts of the African American commu-

nity to (re)assert their personhood. In suggesting a more complex view of legal identity and the means by which excluded classes may attempt to establish legal standing, I explore the importance and power of a legally constructed people, *Scott v. Sandford*'s exclusion of African Americans from "the people," and their efforts to reconstitute "the people."

### Rhetoric, the Court, and "the People"

The words of the Supreme Court have a profound impact upon society. Possessing the highest constitutional authority, a decision by the Court theoretically ends all debate.<sup>3</sup> Despite this suggested power, the rhetorical nature of a decision precludes such foreclosure. As James Boyd White argues, through the law's fusion with rhetoric, "community and culture are established, maintained, and transformed."<sup>4</sup> William Lewis extends the notion and argues that rhetoric not only provides the legal system with "a family of ways to conceive and practice the substance of law" but is "[in]separable from the soul or substance of a judicial decision."<sup>5</sup> Ultimately, the Court's decision results in a constructed American people who negotiate a ruling's social acceptability.

The importance of the Court's rhetoric is further located in its ability to make choices that limit "the people."<sup>6</sup> It is within the power of the law to exclude as well as include, to harm as well as help, to contour communities. As Josina Makau and David Lawrence observe, the choices made by the Court "both reflect and help create cultural norms, particularly those that govern institutional ethics."<sup>7</sup> Carl Brent Swisher argues that when a judge speaks he or she does so with an authority unparalleled in a democratic society "and his [or her] words carry a weight not derived from other positions in officialdom." Speaking specifically of *Dred Scott*, Swisher adds that when the Supreme Court "spoke in terms of the Constitution, [it] spoke also with the overtones of deity."<sup>8</sup>

While legal texts make up the formal law, law's community-building function transcends legal formalism. "The life of the law," as White argues, "is in large part a life of response to these judicial texts." While the law "invites some kinds of response" others are specifically precluded, grounding "the life and meaning of an opinion (or a set of opinions) . . . in the activities it invites or makes possible for judges, for lawyers, and for citizens."<sup>9</sup> Similarly, Lisa C. Bower argues that while "[l]aw limits the expression of individual and group aspirations and claims," it "simultaneously provides powerful resources for marginalized groups to assert their interests, to articulate their rights claims, and to refigure their identities."<sup>10</sup>

Until recently, the potentially transformative effects and importance of this interaction remained unexplored. However, as is evidenced by the increased attention to language and narrative, scholars have begun to question the autonomous authority of the law to silence the social.<sup>11</sup> Although previously rhetoric's denial was encouraged when interpreting the law, it is increasingly recognized that individuals and social groups do not remain silent, nor are they unimportant, in the assessment of legal rulings.<sup>12</sup> Rather, the affected groups creatively resist by re-appropriating legal discussions in the service of their cause.<sup>13</sup> This project of "reconstruction jurisprudence," as Angela P. Harris describes it, entails the "writing back" by marginalized groups in response to "white-dominated legal rules, reasoning, and institutions."<sup>14</sup> Richard Delgado and Jean Stefancic reinforce the point, adding that the ability to modify the guiding principles of justice and equality is only partially found in law courts and, more accurately, compromising change is a community activity involving the judge, lawyers, and those affected.<sup>15</sup>

This perspective emphasizes the law as a communicative practice, recognizing its dialogic dimensions, and, as Geoffrey Klinger encourages, makes it “more accessible to the people over whom it reigns.”<sup>16</sup> “The interpretive turn in legal studies,” Richard K. Sherwin argues, “involves the recognition of a complex interpenetration and cross-fertilization from the mainstream to the legal culture, and vice-versa.”<sup>17</sup> Such an approach answers Klinger’s call for the reinvigoration of “human agency” in the legal process as people are invited to participate in crafting solutions to pressing social problems.<sup>18</sup> Ultimately, this brief discussion highlights the need for rhetorical critics who investigate rhetoric and the law to expand from a narrow focus on legal texts to include also the diverse responses offered by “the people.” If a legal dispute is to be explored in its entirety, scholars should recognize that legal resolutions lack closure when separated from the experience that inform their meanings.<sup>19</sup> In advocating such investigation, Marouf Hasian, Jr. argues that critics “need to point out the politics and contradictory nature of Supreme Court decisions, but this is only part of the social equation. Equally important is the investigation of arguments advanced by critics and audiences not preserved in the pages of judicial archives.”<sup>20</sup>

Part of the contribution of rhetorical studies to the growing dialogue on law and extra-legal response might be found in our attention to social movements and, specifically, to a rhetorical conception of “the people.” Approaching “the people” as a simultaneously real and fictional entity constructed through discourse, Michael Calvin McGee’s perspective on the construction of “the people” provides an entry into both legal texts and legally inspired social texts. In the context of the law, the Court occupies the position of leader as champion and creates an idealized people through its rulings. In doing so, its rhetoric transforms an undifferentiated mass into a collective entity with real purpose.<sup>21</sup> The rhetoric of the law, as White clarifies, “creates a set of actors and speakers and offers them possibilities for meaningful speech and action that would not otherwise exist; in so doing it establishes and maintains a community.”<sup>22</sup> Thus while the people exist as an abstract whole prior to judicial decrees, the law enacts a more specific, more limited, people who are to act in accordance with judicially-mediated reality. In the context of *Scott v. Sandford*, the Court (re)constructed “the people” as white men, a concept it legitimated by references to the Founding Fathers’ intentions.

The Court (re)constitutes “the people” in some degree each time it adjusts the reach of a basic constitutional right.<sup>23</sup> In deciding a constitutional question, the Court reconstitutes a previous, perhaps now fictitious, people and, in turn, transforms and shapes public discourse. In *Dred Scott* the previously constituted “people” were re-invigorated while African Americans, both free and slave, were explicitly denied power. In what follows, I argue this action not only solidified “the people,” but also inspired African Americans to launch an attack on the Court’s perspective, offering counter-interpretations of “the people.”

### *Dred Scott*: Excluding African Americans from “the People”

While the decision to adopt the Constitution was theoretically endorsed by “We the people,” the nineteenth-century interpretation of the document often excluded their participation within it. As Delgado and Stefancic explain, “[b]lack, women, gays and lesbians, and others were not part of the speech community that framed the Constitution and Bill of Rights. They fell outside the original definition of ‘we the people’; they were not allowed to speak.”<sup>24</sup> For these subgroups, as well as Native Americans, a government

based upon the liberty and equality of all failed to provide sufficient rights or protection. Each of these groups, restricted by social custom and legal interpretation, was effectively excluded from civic participation and denied significant rights.

While the hardships faced by other minorities were undoubtedly of great significance, ultimately, it may be within the struggle to abolish slavery that the nature of nineteenth-century exclusionary practices was most pronounced. Abolitionists portrayed slavery as the centerpiece of American hypocrisy. According to Daniel McInerney, "abolitionists envisioned their effort, in part, as a cultural movement, hoping to establish on a firm and ennobling base the identity of the American people."<sup>25</sup> Abolitionists felt that with slavery America could not honor its stated principles and they hoped that with the abolition of slavery other reforms, such as women's suffrage, would be possible.

The maintenance of slavery rested upon two interrelated and highly speculative arguments: the nature of the Constitution and original intent. Arguments concerning the nature of the Constitution turned upon whether or not it was a pro-slavery document.<sup>26</sup> Donald Nieman locates the middle ground that gave ammunition to both sides of the controversy, arguing that while the delegates to the convention agreed on a "government that tacitly recognized slavery," it was also a malleable pact which "contained a reservoir of anti-slavery potential."<sup>27</sup> Within this reservoir space existed for the negotiation of "the people" and for a battle over slavery.

A similarly debatable foundation existed for demonstrating original intent, the primary judicial argument in pro-slavery verdicts.<sup>28</sup> Courts and litigators relied upon or, more accurately, created a fictitious group of founders who expressed their unequivocal support of slavery through "the people" of the Declaration of Independence and the Constitution. While earlier cases such as *Prigg v. Pennsylvania* (1842) and *Strader v. Graham* (1850) made implicit references to "the people" and placed limitations upon the status of African Americans, *Dred Scott* clarified the Court's conception of "the people" and removed all legal protection from African Americans.<sup>29</sup> The decision fit as part of a natural progression in judicial doctrine, with the Court this time boldly announcing what it previously had only weakly implied.<sup>30</sup>

Rather than attempting a complete review of the case, this essay addresses *Scott v. Sandford's* construction of "the people" and its explicit denial of African Americans' legal identity.<sup>31</sup> Heard in February and December 1856, the decision in *Scott v. Sandford* was finally announced March 6, 1857, two days after the inauguration of James Buchanan.<sup>32</sup> The decision has been described variously as among "the most spectacular cases in the history of public law,"<sup>33</sup> "a watershed in the history of the high bench,"<sup>34</sup> and "the most inflammatory rhetoric on slavery and black Americans ever announced by the Court."<sup>35</sup> Chief Justice Roger B. Taney's opinion for the Court (re)constituted a particular audience, those qualifying as citizens, while explicitly excluding African Americans from all legal protection, except as property.<sup>36</sup> Taney's lengthy opinion not only declared that the case was improperly before the Court, sufficient grounds to rule against Scott, but also announced that the Court had "come to the conclusion that the African race who came to this country, whether free or slave, were not intended to be included in the Constitution for the enjoyment of any personal rights or benefits."<sup>37</sup> This phrasing is important as it not only rests upon the authority of the Constitution, but also calls upon its intent. Striking a deathblow to the legal personhood of all African Americans, Taney continued by declaring that African Americans "had no rights which the white man was bound to respect . . . the negro might justly and lawfully be reduced to slavery for his

benefit."<sup>38</sup> Taney thus not only excluded African Americans from "the people," but also revoked their potential for rights of citizenship and personhood.<sup>39</sup>

To uphold these assertions and to justify and prolong present practices, the opinion constructed a supportive past.<sup>40</sup> Consistent with the dominant legal defense, Taney fixated upon the "original" meaning of the nation's founding documents, treating them as controlling. From Taney's perspective, the question of "whether the descendants of" slaves, once emancipated, "are citizens of a state, in the sense in which the word 'citizen' is used in the Constitution," required understanding what citizenship meant in 1787, not what citizenship might have evolved to by 1857.<sup>41</sup> By relying upon original intent he thus foreclosed other options as failing to uphold enlightenment notions of reason and constitutional consistency, making his decision appear pre-ordained. As White explains, this rationale "is just another way of saying that citizenship . . . is necessarily white" and "that Dred Scott must therefore lose on his claim to speak with 'us,' both as a social and as a legal matter."<sup>42</sup> By claiming control of the "facts" of the founding and relying upon the nation's binding myths, Taney looked to history not only to provide guidance on the slavery question, but also to insist upon the proper and necessary resolution.

In a manner more significant than the verdict, the scope and wrath of Taney's pronouncement motivated a strong African American response. The broadness of the ruling extended the scope of judicial review much beyond its previous boundaries, garnering intense national attention. Justice Nelson's opinion, holding that state courts had province over determining the legal status of slaves, was both narrow and consistent with the Court's unanimous ruling in *Strader v. Graham*.<sup>43</sup> A similar approach would have obscured *Scott v. Sandford* and left African American legal identity ambiguous.<sup>44</sup>

While white northern responses to *Scott v. Sandford* are readily available and have received extensive attention from scholars,<sup>45</sup> comment upon the reactions of the African American community is conspicuously limited.<sup>46</sup> Some attention has been given to African American reactions in African American histories by Herbert Aptheker, Philip S. Foner, Vincent Harding, and Benjamin Quarles, but these treatments, while important, do not explicitly address their implications for African American identity, American identity, or social protest to formal law.<sup>47</sup> To further demonstrate that African Americans have been instrumental to the building of American nationhood and the formation of an American identity, and not simply the object of legal debate, I now turn to the attempts of African American rhetors to reconstruct "the people" in response to their exclusion.<sup>48</sup>

### The Black Abolitionist Response: Reconstructing "the People"

Denied legal existence, excluded from "the people," African Americans faced a unique rhetorical problem. In challenging the decision, the voiceless used their voice; those who were told that they did not count, that they did not exist, spoke. African Americans were placed in an unresolvable bind, imprisoned within the United States while functioning as what Priscilla Wald calls "visible symbol[s] of nonpersonhood."<sup>49</sup> Placed outside the boundaries of citizenship, pushed wholly outside "the people," African Americans were forced to adopt a rhetoric that would challenge the social and legal hierarchy. A rhetoric of this magnitude not only required them to expand the truncated "people," but also to prove their value as members of the human family.<sup>50</sup>

African American responses to the decision were quite broad, ranging from urging emigration to Canada to criticizing the decision as "a palpably vain, arrogant animation,

unsustained by history, justice, reason or common sense.”<sup>51</sup> I focus here on three (semi-)distinct responses.<sup>52</sup> These reactions roughly correspond to what Robert Cover has characterized as the split between the extra-legal action of insular communities and redemptive constitutionalism.<sup>53</sup> Through insular communities and redemptive constitutionalism we discover a means by which African Americans might successfully “persuade America’s European descendants to alter the prevailing Anglo-American interpretation of the Constitution so as to produce an integrated and inclusive definition of what it meant to be an American.”<sup>54</sup> The first set of responses, those of Robert Purvis and Charles Lenox Remond, attempted to incite an insular community by uniting a limited, exclusively African American people to oppose *Dred Scott* vocally and potentially violently. The second class of response, those of William C. Nell and various African American state conventions, combined redemptive and insular strategies by promoting an inclusive definition of “the people” through a “memorialization” of the nation’s founding. Finally, Frederick Douglass offered a fully redemptive resolution that reinforced the Constitution’s promise for all people.

### *Building African American Community*

When acting as an insular community, an excluded group responds from the margins while promoting internal cohesion. Insular arguments assert that the group’s interpretation of a custom, right, or law is of superior status to the Constitution and the Supreme Court. This stand reinforces the group’s independent normative world and allows it to renounce its constitutional obligation on behalf of a greater good.<sup>55</sup> While potentially futile, due to the strength of the legal opposition, this type of response is essential to maintaining the independence of subgroups. When a silent community passively acquiesces to a decision in conflict with its normative world, it is endorsing violence against its position while reinforcing the ruling’s social and legal legitimacy. In contrast, by challenging legal doctrine a community both denies the judge’s authority and frames its counter interpretation.<sup>56</sup>

Rather than working within the system, Robert Purvis and Charles Lenox Remond spoke to an insular community. Their responses, the most violently radical, challenged the decision by confronting the authority of the Court and the intent of the Constitution. In contrast to the largely redemptive rhetoric of Douglass and Nell, Purvis and Remond accepted the Court’s perspective of “the people” as evidence of the poisoning of the system, using it to justify separation from the Union and open rebellion.

Beginning in April 1857 and continuing through the end of the decade, Purvis and Remond rallied African Americans in the context of sharp denunciations of Taney, the Supreme Court, and the Constitution. Before a large group at Israel Church in Philadelphia, Purvis argued that the exclusion of African Americans from “the people” furnished “final confirmation of the already well known fact that under the Constitution and Government of the United States, the colored people are nothing and can be nothing but an alien, disfranchised, and degraded class.” Believing that the Constitution offered no aid for African Americans in their struggle for freedom, Purvis felt it was hopeless to defend the humanity of the Constitution and that to do so “ill becomes the man of color.”<sup>57</sup> With similar passion Remond argued that the power to deny black citizenship had always “lurked . . . in the Constitution, only waiting to be developed.”<sup>58</sup> The *Liberator* reported that Remond clearly called for disunion, proclaiming: “We owe no

allegiance to a country which grinds us under its iron hoof and treats us like dogs. The time has gone by for colored people to talk of patriotism."<sup>59</sup>

Addressing boisterously partisan audiences throughout the northeast, Purvis and Remond crafted a pragmatic message designed to inspire the African American community. By accepting the ruling as an accurate interpretation of the Constitution, they avoided the philosophical and foundational debate, leaving dissolution and rebellious action as the only alternatives. The strategy confronted the legal system's claim to authority by rejecting its power over the African American community. It reflected what Bower describes as a "(re)appropriation of legal signs" in the service of strengthening the outsider group's sense of identity and community.<sup>60</sup> In the coming months such efforts were repeatedly demonstrated by both men as they issued anti-Constitution and anti-Union messages for the betterment of African American community. Condemning "language of moderation," Purvis identified himself as belonging to a community of victims "who, every day, feel the grinding hoof of this despotism."<sup>61</sup> On the same occasion Remond delivered a message that was enthusiastically applauded in which he vowed to "trample" the *Dred Scott* decision. Such effort would not, however, be undertaken for "the people" constituted by the Court since Remond "hated" the Union and "spurned" the Constitution. Instead, Remond would act "in the name of his common humanity and manhood."<sup>62</sup> Continuing to vilify the Constitution, in June Remond argued that the decision was "in close keeping with" its "original design, spirit and purpose."<sup>63</sup> Such arguments distanced African Americans from the Union, reinforcing their bond as members of a persecuted community.

With increasing spite Remond isolated the African American community with a rhetoric of constitutional destruction. At the inaugural Crispus Attucks Day celebration of March 1858, he fervently expressed his contempt: "I spit upon that decision and defy Judge Taney and all his associates. . . . [W]e have rights in this country, in spite of slavery and negrophobia, in spite of the American Constitution. . . . The time is coming when this battle is to be fought."<sup>64</sup> Attempting further to incite the African American community, in August he announced his intention to take "a defiant position towards every living man that stood against" African Americans. It was his belief that nothing would be gained by "twaddling and temporizing" and thus "black men [must] stand up for and by themselves." This partitioning of African Americans from abolitionists in general marked a significant development in the insular response. Purvis and Remond initially accepted the legal foundations of the ruling in order to demonstrate the tyranny of the Constitution. With its oppressive nature proven, these later remarks attempt to consolidate an independent community, an African American People, who are responsible for their own future. This move is empowering for community since it rejects the Constitution's formulation of "the [white] people" and, instead, relies on extra-legal actions exclusively by African Americans.

In order to implement such action Remond called for the assembly of a committee that would write an address encouraging slaves to revolt. Despite the likely bloody outcome, Remond reasoned that to "die to-day" would be better "than to live in bondage." If they were his relatives he would prefer to "stand over their graves" than to accept "that any pale-faced scoundrel might violate his mother or his sister at pleasure." Modeling the approach upon Lucy Stone Blackwell's protests for women's suffrage, Remond was of the opinion that a message from African Americans recommending rebellion "would work greater things than we imagine."<sup>65</sup>

The responses of Purvis and Remond stand in sharp contrast to the more reserved messages offered under redemptive constitutionalism. Their passion and anger are clear in almost every remark, as is their resolve for liberation through either rebellion or revolution. By accepting the accuracy of the Court's interpretation of "the people" under the Constitution, Purvis and Remond demonstrated that African Americans had no place in the Union and that only the actions of the African American community could secure liberation.

### *Inclusive Memorializing*

In contrast to inciting an insular community, the practice of redemptive constitutionalism involves an oppositional or excluded group advocating integrated change within the confines of the system. With this strategy, the group presents a vision which may transform the status of their beliefs into an acceptable position within the recognized normative world. In making this attempt, the group offers the basis for an altered social world and provides an appeal for the conversion of the opposition.<sup>66</sup> Such a strategy is partially utilized in the responses of William C. Nell and his associates, and to a more pronounced extent by Frederick Douglass.

In the responses of Nell, Crispus Attucks Day celebrations, and black abolitionist state conventions, we find elements of both insular and redemptive strategies. These responses attempted both to "memorialize" the events of the nation's founding, thus altering the normative world upon which Judge Taney based his decision, and to retain the possibility of volatile action.<sup>67</sup> Directly challenging the discussion of citizenship in *Dred Scott*, this discourse argued that African Americans were citizens at the time of the American Revolution and thus remained citizens in 1857. The responses form a rights discourse that constructs citizenship and identity for African Americans, as well as Americans, through a history of lived performance.

Beginning in 1858 black abolitionists celebrated March 5 in remembrance of the first casualty of the Boston Massacre, Crispus Attucks.<sup>68</sup> The day was symbolic of the claims by African Americans that they were not only American citizens but that an African American was the first to fall in the fight for the establishment of the nation. At the first celebration, presiding officer William C. Nell directly challenged the Court's act of exclusion, arguing that no decision could deny black Americans "equality with white Americans."<sup>69</sup> Contesting both the premise and conclusion of the Court's ruling, Nell argued "that the negro was indeed a citizen of the United States," and that he was "entitled to the same freedoms as any other Americans."<sup>70</sup> Nell urged a more redemptive and patient course, reassuring African Americans that "God is on the side of freedom; and . . . that day is not far distant when victory will perch upon her banners."<sup>71</sup>

Nell's redemptive rhetoric was balanced by the more insular messages of other Crispus Attucks Day participants. Reminiscent of Purvis and Remond, these participants were not as trusting of Nell's legalistic explanations and desired action by the African American community. Among those was Boston Doctor John S. Rock who looked to the efforts and unity of African Americans rather than argue over constitutional interpretation. Rock advocated unified resistance to "white men's" efforts to "divide" and "degrade" African Americans. Symbolic of this request, he promised that "no man shall cause me to turn my back upon my race. With it I will sink or swim."<sup>72</sup> Remond seconded the need for community action, using the occasion to advance the right of African Americans actively to pursue freedom.<sup>73</sup> While not ignoring the memorializing

or redemptive functions of the celebration completely, these messages focused on community action, adding a second dimension to resistance. In addition to challenging the Court's conception of "the people" by offering a counter-interpretation of citizenship, the more insular discourse emphasized cohesive community-based cooperation.

State conventions in Massachusetts, New York, and Ohio later that year also meshed redemptive and insular positions. While the conventions eventually endorsed a redemptive course, each possessed an undercurrent of insular rhetoric emphasizing group unity. This combination reinforces Bower's observation on the capacity of "[m]arginalized groups" to "use tactics of cultural subversion . . . that aim to appropriate and contest legal inscriptions of identity."<sup>74</sup> For instance, in presenting the resolutions of the Convention of the Colored Citizens of Massachusetts,<sup>75</sup> Nell disputed the Court's construction of "the people" by inscribing African Americans with the markings of citizenship. According to the resolutions announced by Nell, the claims of African Americans "are the claims of Americans. Their claims are founded in an original agreement of the contracting parties, and there is nothing to show that color was a consideration in the agreement." Basing equality and citizenship upon participation, the Massachusetts convention reasoned that since "colored Americans have shared the labors and braved the dangers equally with white Americans," they are deserving of the same rights and privileges. The redemptive contestations were, however, tempered by a more insular resolution which vowed to resist the enforcement of the *Dred Scott* decision and Fugitive Slave Bill "at whatever cost."<sup>76</sup>

The New York Negro Suffrage Convention and Convention of Ohio Colored Men similarly argued for the citizenship of African Americans. Speaking specifically of membership among "the people," the New York convention adopted a resolution requesting "consolidated action on the part of colored men themselves, for the securi[ng] of the rights guaranteed to them, as a part of '*the people*,' in the Constitution of the United States." Resolved that African Americans "*are citizens* of the State of New York and, consequently, of the United States," the Convention held that African Americans "should enjoy all the rights and immunities of other citizens" (emphasis in original).<sup>77</sup> The Ohio Convention reinforced the claim, holding that the "great principles of Liberty and Equality which are the boast of our nation, were intended to apply to us and our unfortunate brethren, the slaves."<sup>78</sup> Thus, instead of deflecting the issue, the New York and Ohio conventions addressed the issue of citizenship in redemptive terms that sought to integrate African American identity into the philosophy which justified *Dred Scott*. Such action challenged the legitimacy of the Supreme Court's attempt to write American history by calling its interpretation of the nation's founding ideals into question. Simultaneously, the infusion of more insular resolutions created a dilemma for constitutional interpretation. On the one hand, the conventions challenged the Court's interpretation through a redemptive rhetoric and, on the other, the insular counterweight threatened to invalidate African Americans' constitutional obligations if their claims were not addressed seriously.

Perhaps the most striking demonstration of redemptive "memorializing" is found in Nell's speech before the Committee on Federal Relations in Massachusetts in March 1859. Again basing African Americans' claim to the equal rights of citizenship on their birth and service to the United States, Nell used personal experience and history as proof for his argument. Nell's position as a free black man and public advocate demonstrated the oxymoronic nature of the Court's ruling. While free, Nell technically lacked rights or

legal recognition; in essence he was legally nonexistent. Recognizing this bind, Nell explained his plight: "I stand before you to-day the victim of the violated rights of United States citizenship. I was born on Benson Hill, within a stone's throw of the spot where I now stand: freeborn."<sup>79</sup> Nell's predicament gained force and clarity through his recalling of the words of African American Reverend Hosea Easton. In doing so, Nell was able to construct the inseparable identity of Africans in America from the idea of what it means to be American:

The colored people who are born in this country are Americans in every sense of the word—Americans by birth, genius, habits, language, & c. They are dependent on American climate, American aliment [sic], American government, and American manners, to sustain their American bodies and minds. . . . The claims of the colored people set up therefore, are the claims of Americans.<sup>80</sup>

Nell thus integrated the social nature and physical location of African Americans with the basis of white Americans' rights claims. Arguing for the irrelevance of color, Nell spoke of the needs and claims of Americans, and not on the priority of race. Much like Douglass, Nell used history as further proof for his claim of African American citizenship:

[C]olored Americans have shared the labors and braved the dangers equally with white Americans. . . . The first blow in the American Revolution was struck by a colored person—Crispus Attucks. . . . Colored soldiers were participants on the various battle-fields from these to Yorktown . . . satisfactory proof at least that they were American citizens—service which, when performed by white Americans, have [sic] been universally acknowledged as passports to perennial fame.<sup>81</sup>

Thus Nell's discourse enlisted accepted standards and qualifications for citizenship to demonstrate that African Americans could not logically be denied standing.

The rhetoric emerging from these situations signals a distinct strategy which asserts African American personhood by combining elements of both redemptive and insular strategies. Unlike Douglass, the conventions found nothing to rejoice about in the decree, but they also did not, as did Purvis and Remond, advocate leaving or destroying the Union without a final attempt to transform the foundation of legal interpretation. With these responses we find an attempt to create a public memorial to the contribution of African Americans in establishing the nation, a memorial which challenged the "facts" Judge Taney so heavily relied upon in excluding African Americans from "the people." The counter-response explains the logical placement of African Americans among the nation's citizens as well as the potential for justifiable rebellion absent such recognition.

### *Redeeming "the People"*

In his only major address on *Dred Scott*, given before the American Anti-Slavery Society on May 11, 1857, Frederick Douglass embraced an inclusive definition of equality. Douglass's view allowed him to speak of African Americans as citizens while also envisioning a day when the system would make such a concession.<sup>82</sup> While rejecting the ideology of the decision, Douglass glorified an ever-growing abolitionist movement in the face of southern opposition, refuted the radical abolitionist arguments for dissolution, and defended the nature of the Constitution and its guarantee of liberty for all people. In doing so Douglass invented a new vision of the Constitution, one that

allowed the constitutional system and African Americans to co-exist, each endowed with significant rights.

The first part of the address responded uniquely to the problem of exclusion by extolling the virtues and persistence of the abolitionist movement in the face of slaveholders' increasingly desperate resistance. Finding the decision a natural occasion to evaluate the struggle over slavery,<sup>83</sup> Douglass encouraged abolitionists to adopt a positive outlook, to consider "if there are not some things to cheer our heart and nerve us up anew in the good work of emancipation." In this most optimistic fashion Douglass redeemed the "vile and shocking" decision, paradoxically casting the perceived strength of pro-slavery forces as a weakness, since accompanying each gain they faced a strengthened and expanded anti-slavery opposition. He supported his argument by recalling that politicians, ministers, and presses which once protected slavery now vocally opposed it.<sup>84</sup> And in the process he built an alternative history which contradicted Taney's construction and argued that the issue of slavery always resisted a final resolution. Further, he reminded his audience that despite their efforts to end slavery, "Clay, Calhoun, and Webster each . . . went to their graves disappointed and defeated." Douglass further argued that while the issue was repeatedly "settled forever," it failed to ever disappear and, instead, "the more the question has been settled, the more it has needed settling."<sup>85</sup>

Douglass's use of the decision as a sign of slavery's impending doom is not an indication that he failed to grasp the implications of the ruling. Douglass clearly expressed his understanding of the theoretical importance of the decision's exclusion of African Americans from "the people" when he summarized "the Taney settlement" as telling African Americans the struggle had concluded, that they "might as well give up" since the Supreme Court had spoken.<sup>86</sup> Despite being addressed as "property in the same sense that horses, sheep, and swine are property,"<sup>87</sup> Douglass rested his hopes in a people who would refuse to accept or validate the Court's constitutive rhetoric:

You will readily ask me how I am affected by this devilish decision—this judicial incarnation of wolfishness? My answer is, and no thanks to the slaveholding wing of the Supreme Court, my hopes were never brighter than now.

I have no fear the National Conscience will be put to sleep by such an open, glaring, and scandalous tissue of lies as that decision is, and has been, over and over, shown to be.<sup>88</sup>

It was faith in the abolitionist movement as well as his expanded construction of "the people" that allowed him to remain confident. Douglass believed "the people," even as constituted by the Court, would defend the rights of African Americans, as he argued: "If it were at all likely that the people of these free states would tamely submit to this demonical judgment, I might feel gloomy and sad over it. . . . But as the case stands, we have nothing to fear."<sup>89</sup>

Douglass's belief that African Americans needed to confront *Dred Scott* as a preliminary to the defeat of slavery presented him with the dilemma of how to delegitimize the decision without defacing American constitutionalism. To achieve this feat Douglass called upon the higher law of God. As Sean O'Rourke argues, this was an important theme in early constitutional law, but *Scott v. Sandford* signaled a final rejection of higher authority.<sup>90</sup> Douglass, as advocates before the Court commonly did, appealed to "Justice," "Nature" and "God" to trump the Supreme Court and the Constitution. In utilizing an appeal the Court previously had found persuasive, Douglass argued that the decision against *Dred Scott* "is an open rebellion against God's government" and that

“such a decision cannot stand” the scrutiny of “common sense and common humanity.”<sup>91</sup> With the support of God, Douglass rationalized the decision to fit within his worldview, as “a means of keeping the nation awake on the subject” of slavery until such time as its “certain overthrow” could be executed.<sup>92</sup>

Having assured his audience of victory, Douglass directly confronted the call for dissolution, the primary argument of Purvis and Remond, in an effort to reconstitute the nation. Here a critical distinction is observed between Douglass’s redemptive response and those of other black abolitionists. Rather than to use the “lying Court” as evidence for the failure of American democracy, Douglass constructed an argument that preserved the theory of the Constitution while rejecting its present practice. This allowed him to reject “the people” as constituted by the Court by reconstituting them under the Constitution. For Douglass it was the performance of the document, rather than the document’s nature, that perpetuated slavery. Thus Douglass argued that calls for dissolution and succession were born of “extravagance and nonsense.”<sup>93</sup> Reasoning that disunion would void the Constitution and perhaps result in a document which provided a philosophical basis for slavery, Douglass insisted there is no “plan less likely to abolish slavery than the dissolution of the Union” since it is only “within the Union that we [abolitionists] have a firm basis of anti-slavery operation.”<sup>94</sup>

Having explained his defense of constitutional principle while rejecting its practice, Douglass directly confronted the Court’s interpretation of “the people.” In undermining the basis of legal exclusion, Douglass countered with an all inclusive meaning for “We, the people”:

“We, the people,” not we, the, white people—not we, the citizens, or the legal voters—not we, the privileged class, and excluding all other classes but we, the people; Not we, the horses and cattle, but we the people—the men and women, the human inhabitants of the United States.<sup>95</sup>

Douglass’s construction of “the people” was much more inclusive than any that the Supreme Court would articulate for nearly another century. It was both astute and powerful, skillfully exploiting the favoritism granted the privileged and strategically juxtaposing the treatment of African Americans to that of animals. His construction did not exclusively serve African Americans, but extended to *all human inhabitants*, offering a complete American people. Near the conclusion of his address Douglass delivered his inclusive conception of American identity and effectively refuted the Court’s limited construction:

The Constitution knows all the human inhabitants of the country as “the people.” It makes, as I have said before, no discrimination in favor of, or against, any class of the people, but is fitted to protect and preserve the rights of all, without reference to color, size, or any physical peculiarities.<sup>96</sup>

He succinctly expressed a desire for a completely inclusive definition of “the people,” eliminating the possibility of legal exclusion. This was a redemptive move which only needed to be activated, as his conclusion requested: “[L]et me say, all I ask of the American people is, that they live up to the Constitution, adopt its principles, imbibe its spirit, and enforce its provisions.”<sup>97</sup>

Douglass’s address brought a fresh meaning and importance to *Dred Scott* for the whole American community. Finding “cheer” and “hope” in the least likely of places—within a Court decree that declared, as a matter of law, that he was not even a person—Douglass

articulated a vision of equality that, even now, the United States has yet to achieve fully. His approach to law embraced constitutional theory and African American freedom while offering systemic, rather than revolutionary, change.<sup>98</sup> Douglass transformed the meaning of *Dred Scott* from an assault on African Americans into a blemish on American identity. His reconstruction of the Constitution articulated a more inclusive and humanitarian definition of "the people" and a more humane and comprehensive reading of the document than had ever before been offered by the high Court.

Together, these three responses by African Americans to *Scott v. Sandford* reveal the range of rhetorical strategies utilized in the public negotiation of black America's powerful voice. The tension among these differing strategies underscores the complexities of (re)constructing national identity. This tension may have found resolution, however temporary, in the efforts to rhetorically reinscribe the past through memorializing; efforts which recognized both the extreme hardships of antebellum blacks and the potential for achieving African American freedom within a more inclusive definition of the American people.

### Conclusions

African American responses to the *Dred Scott* decision show us that legal control does neither always nor absolutely translate into social control. While the language of the Court was instrumental to the legacy of *Dred Scott*, it did not accurately reflect the legal and social conflict engendered by Chief Justice Taney's opinion. Thus while Charles Miller is correct in arguing, as many legal scholars do, that it is "[t]hrough the language of constitutional interpretation [that] the Court can exercise the prerogative of molding values . . . well beyond the specific legal holdings," he overlooks the reciprocity that accounts for the responses of "the people."<sup>99</sup> The molding of values is a mutual transaction. Not only does the Court mold "the people," but "the people" respond, validate, or in this case, challenge the Court's construction of society.

Unfortunately much legal scholarship, as recent legal movements have noted, fails to extend beyond the judicial opinion and thus excludes the views of minorities and women. This "traditional" approach is oblivious to what Cover calls "[t]he stories the resisters tell." We often remain unaware of "the lives they live" and the efforts they make, efforts which "may force the judges, too, to face the commitments entailed in their judicial office and their law."<sup>100</sup> Such scholarship ignores the people who count most, those directly implicated, and the type of organized resistance that is so important to a democratic society. Thus this analysis has attempted to demonstrate that the voices of the excluded are instrumental to understanding a controversy. While the decision represents the rule of law, beyond the opinion we find much of the situation's social significance. A narrow, opinion-oriented focus misleads us into the belief that the Court was not only "correct," but that its rhetoric uneventfully made its way into practice. Instead, as this case study demonstrates, the Court's ruling may inspire discussion and dispute; it may provoke dissent rather than silencing it.

Neither the Court nor black abolitionists could have created the intense debate and re-evaluation of legal and social practices without the aid of the other. For decades abolitionists had argued that all African Americans should be free citizens of the United States, but with Taney's inflammatory rhetoric these words gained new salience and meaning. Today it is easy to recognize that the decision was a legal travesty that insulted the meaning of the Constitution. Yet if we attend only to the decision, we cannot

understand fully what it meant to African Americans or abolitionists, thereby reinforcing the “dominant historiography” that African Americans have fought to overcome. Typically this historiography, as Aptheker argues, “either omits the Negro people or presents them as a people without a past, as a people who have been docile, passive, parasitic, imitative.” The responses to *Scott v. Sandford* again prove that African Americans “have been militant, active, creative, and productive” while telling the story of America and sharpening the identity of her citizens.<sup>101</sup> The narratives reveal an intricate and intimate involvement of African Americans in the political and social philosophy of the United States. Through the struggle for inclusion the nation began a transformation from merely promising equality to actively seeking it. As a whole, the responses began to crystallize an American psyche rooted in the will to be free, the spirit of survival, and an unshakable belief in liberty. The fiery prose of Robert Purvis and Charles Lenox Remond responded to the need for subversive tactics and demonstrated black abolitionist commitment to Patrick Henry’s call for liberty or death. William C. Nell added a work ethic in which Americans were identified by their participation in matters of national importance. Finally, the redemptive words of Frederick Douglass reflected the spirit of equality and the belief that all men, and women, are equal.

The importance of these messages did not end with emancipation or the Fourteenth Amendment’s reversal of *Dred Scott*. The success of Douglass, Nell, Purvis, and Remond, although not quantifiable in terms of immediate effect, might be observed through generational influences, influences spanning from Susan B. Anthony’s civil disobedience in the 1872 presidential election to 1995’s Million Man March. In a nation in which racial and gender inequality remain important issues, these responses offer African Americans, as well as the whole of “the people,” a range of options for confronting legal exclusion. This can be a valuable resource since, as Ernest Bormann has argued, “[w]henever a movement deals with race relations in the United States, the historical rhetoric continues to intrude into the contemporary campaign.”<sup>102</sup>

As American society debates affirmative action, bias in the legal system, civil rights, and other issues intimately linked to race, the messages and strategies addressed in this essay have continued relevance. We would do well to remember, as Nell did, that this nation was born through an emphasis on a common resolve, not difference. We would do even better to take the constitutional system at its word, as Douglass did, and finally and fully to embrace inclusive equality. Such a perspective might capitalize on the intersection of community and identity, effectively strengthening the clarity and power of both. In the end, reduced to its barest facts and expanded to its most important calling, the lesson of *Dred Scott* is not located in legal doctrine or the loss of sovereignty in one part of the nation, but in the story of the defense of a people and the building of a national identity.

## Notes

Todd F. McDorman is a doctoral candidate in Speech Communication at Indiana University. An earlier version of this essay was presented at the 1995 CSSA convention in Indianapolis. The author wishes to thank John Louis Lucaites, Robert L. Ivie, and participants in the 1995 summer writing group for their many helpful comments.

<sup>1</sup>*Dred Scott v. Sandford* 60 U.S. (19 How.) 393 (1857). The defendant was John A. Sanford but his name was misspelled as “Sandford” in the official Court records.

<sup>2</sup>The act of constituting an audience bears great similarity to Edwin Black’s implied auditor. Edwin Black, “The Second Persona,” *Quarterly Journal of Speech* 56 (1970): 109–19; The process by which marginalized groups rationalize legal decisions to fit within their normative world is explored by Robert Cover, “Nomos and Narrative,” *Narrative*,

*Violence & the Law: The Essays of Robert Cover*, ed. Martha Minow, Michael Ryan, & Austin Sarat (Ann Arbor: U of Michigan P, 1992) 95–172.

<sup>3</sup>Susan R. Burgess, *Contest for Constitutional Authority* (Lawrence: UP of Kansas, 1992) ix.

<sup>4</sup>James Boyd White, “Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life,” *University of Chicago Law Review* 52 (1985): 684.

<sup>5</sup>William Lewis, “Of Innocence, Exclusion, and the Burning of Flags: The Romantic Realism of the Law,” *Southern Communication Journal* 60 (1994): 8.

<sup>6</sup>Thomas Ross, “Metaphor and Paradox,” *Georgia Law Review* 23 (1989): 1084.

<sup>7</sup>Josina M. Makau and David Lawrence, “Administrative Judicial Rhetoric: The Supreme Court’s New Thesis of Political Morality,” *Argumentation and Advocacy* 30 (1994): 191.

<sup>8</sup>Carl Brent Swisher, “Dred Scott One Hundred Years After,” *Journal of Politics* 19 (1957): 168.

<sup>9</sup>James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: U of Chicago P, 1990) 102.

<sup>10</sup>Lisa C. Bower, “Queer Acts and the Politics of ‘Direct Address’: Rethinking Law, Culture, and Community,” *Law & Society Review* 28 (1994): 1009.

<sup>11</sup>See for example, Linz Audain, “Critical Legal Studies, Feminism, Law and Economics, and the Veil of Intellectual Tolerance: A Tentative Case for Cross-Jurisprudential Dialogue,” *Hofstra Law Review* 20 (1992): 1017–1104; Michael A. Coffino, “Genre, Narrative and Judgment: Legal and Protest Song Stories in Two Criminal Cases,” *Wisconsin Law Review* 1994: 679–718; and Richard K. Sherwin, “A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling,” *Michigan Law Review* 87 (1988): 543–612.

<sup>12</sup>Richard K. Sherwin, “The Narrative Construction of Legal Reality,” *Vermont Law Review* 18 (1994): 680. See also Marouf Hasian, Jr., Celeste Michelle Condit, and John Louis Lucaites, “The Rhetorical Boundaries of the Law: A Consideration of the Rhetorical Culture of Legal Practice and the Case of the ‘Separate But Equal’ Doctrine,” *Quarterly Journal of Speech* 82 (1996): 323–42.

<sup>13</sup>Bower 1010.

<sup>14</sup>Angela P. Harris, “Foreword: The Jurisprudence of Reconstruction,” *California Law Review* 82 (1994): 765.

<sup>15</sup>Richard Delgado and Jean Stefancic, “Hateful Speech, Loving Communities: Why Our Notion of ‘A Just Balance’ Changes so Slowly,” *California Law Review* 82 (1994): 861.

<sup>16</sup>Geoffrey D. Klinger, “Law as *Communicative Praxis*: Toward a Rhetorical Jurisprudence,” *Argumentation and Advocacy* 30 (1994): 246.

<sup>17</sup>Sherwin, “Narrative Construction” 688.

<sup>18</sup>Klinger 246.

<sup>19</sup>Cover, “Nomos and Narrative” 95–96.

<sup>20</sup>Marouf Hasian, Jr., “Critical Legal Rhetorics: The Theory and Practice of Law in a Postmodern World,” *Southern Communication Journal* 60 (1994): 54.

<sup>21</sup>Michael Calvin McGee, “In Search of ‘the People’: A Rhetorical Alternative,” *Quarterly Journal of Speech* 61 (1975): 235–49.

<sup>22</sup>White, *Justice* xiv.

<sup>23</sup>This process can be envisioned as working similarly to Charland’s treatment of “the people” as both a rhetorically constructed entity and as a collectivity with a prior existence. Maurice Charland, “Constitutive Rhetoric: The Case of the *Peuple Québécois*,” *Quarterly Journal of Speech* 73 (1987): 133–50.

<sup>24</sup>Delgado & Stefancic 862.

<sup>25</sup>Daniel J. McInerney, *The Fortunate Heirs of Freedom: Abolition and Republican Thought* (Lincoln: U of Nebraska P, 1994) 128.

<sup>26</sup>For a sampling of the African American perspective of this debate see Charles Lenox Remond, “The Constitution: A Covenant With Death and An Agreement With Hell,” *The Black Abolitionist Papers*, ed. Peter C. Ripley, vol. 3 (Chapel Hill: U of North Carolina P, 1991) 442–45; and “Resolved, That The Constitution of the US, In Letter, Spirit, and Design is Essentially Antislavery,” *The Frederick Douglass Papers, Series One: Speeches, Debates, and Interviews. Volume 2: 1847–1854*, ed. John W. Blasinghame (New Haven: Yale UP, 1982) 193–97.

<sup>27</sup>Donald G. Nieman, *Promises to Keep: African-Americans and the Constitutional Order, 1776 to the Present* (New York: Oxford UP, 1991) 12–13.

<sup>28</sup>White, *Justice* 113.

<sup>29</sup>*Prigg v. Pennsylvania* 41 U.S. (16 Pet.) 539 (1842) addressed the constitutionality of a Pennsylvania statute limiting the ability of slave owners to reclaim runaway slaves. Justice Story’s strongly pro-slavery opinion created an “affirmative right in every slaveholder to recapture, with force if necessary, the owner’s runaway slave in any state of the Union” (White, *Justice* 118). *Strader v. Graham* 51 (10 How.) 83 (1850).

<sup>30</sup>William M. Wiecek, "Slavery and Abolition Before the United States Supreme Court, 1820–1860," *Law, the Constitution, and Slavery*, ed. Paul Finkelman, vol. 11 (New York: Garland, 1989) 544–69.

<sup>31</sup>A great deal has been written about the actual decision, but two investigations of note are those of Fehrenbacher and Potter. Fehrenbacher provides an extensive and careful exploration of the case, from its origin in April 1846 through an analysis of the 1857 Supreme Court decree. Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford UP, 1978). Those interested in a less extensive but equally compelling account of *Dred Scott* should consult David M. Potter, *Impending Crisis, 1848–1861* (New York: Harper & Row, 1976) 267–96.

<sup>32</sup>According to Charles Morrow Wilson, *The Dred Scott Decision* (Philadelphia: Auerbach, 1973), after first hearing the case the Court was deadlocked with Justice Nelson undecided (42). The delay and timing of the announcement have been used as fuel for many conspiracy theories. While Fehrenbacher feels that evidence for a conspiracy is sparse (275–76), others such as Potter claim that Buchanan "committed a breach of propriety" (287) in his correspondence with Justices Catron and Grier prior to the decision. For an extensive account of the correspondence between the President elect and the Justices see Philip D. Auchampugh, "James Buchanan, the Court, and the Dred Scott Case," *Tennessee Historical Magazine* 9 (1926): 231–40. It was during the course of this correspondence that the content of the decision changed drastically.

<sup>33</sup>Charles Grove Haines and Foster H. Sherwood, *The Role of the Supreme Court in American Government and Politics 1835–1864* (Berkeley: U of California P, 1957) 393.

<sup>34</sup>Martin Siegel, *The Supreme Court in American Life*, vol. 3 (New York: Associated Faculty Press, 1987) 205.

<sup>35</sup>Charles A. Miller, "Constitutional Law and the Rhetoric of Race," *African Americans and the LAW*, ed. Paul Finkelman, vol. 1 (New York: Garland, 1992) 385.

<sup>36</sup>This opinion, for reasons that have never been fully adduced, was substantially broader than the majority had initially agreed upon. Not only was the opinion expanded, but it was decided that Taney would author the opinion rather than Justice Nelson. One explanation for this shift is that the dissents of Justices Curtis and McLean argued that Scott should be free based upon the constitutional Missouri Compromise and, not wishing to appear evasive, the majority felt compelled to issue a broad ruling answering all of their potential objections (Potter 274–75).

<sup>37</sup>"Decision of the U.S. Supreme Court in the Case of Dred Scott," *Liberator* 20 Mar. 1857.

<sup>38</sup>*Dred Scott v. Sandford* at 701.

<sup>39</sup>In a more thoroughly postmodern reading Wald has suggested that the Court's dismissal of Native Americans and African Americans in *Cherokee Nation v. Georgia* 30 U.S. (5 Pet.) 1 (1831) and *Dred Scott* represented complete legal erasure. Priscilla Wald, "Terms of Assimilation: Legislating Subjectivity in the Emerging Nation," *boundary 2* 19 (1992): 77–104.

<sup>40</sup>For a discussion of presentist history see Robert J. Cox, "Cultural Memory and Public Moral Argument," *The Van Zelst Lecture in Communication* (Evanston: Northwestern Univ, 1987); Joyce Appleby, Lynn Hunt & Margaret Jacob, *Telling the Truth about History* (New York: W.W. Norton, 1994).

<sup>41</sup>*Dred Scott v. Sandford* at 700.

<sup>42</sup>White, *Justice* 129.

<sup>43</sup>Siegel points out that "[s]even years earlier, in *Strader v. Graham*, facing almost the exact same issue, . . . [the Court] refused jurisdiction and returned the matter to the state courts" (205). Also see Haines & Sherwood 423.

<sup>44</sup>In disagreeing with such criticism a minority has defended the scope of the decision. Edwin S. Corwin, for example, argues that Taney had "an undeniable right to canvass [sic] the question of Scott's servitude in support of his decision that Scott was not a citizen of the United States, and he had the same right to canvass [sic] the question of the constitutionality of the Missouri Compromise" (58). Edwin S. Corwin, "The Dred Scott Decision, in the Light of Contemporary Legal Doctrines," *American Historical Review* 17.4 (1911): 52–69.

<sup>45</sup>For an account of the Northern response see Stanley I. Kutler, *The Dred Scott Decision: Law or Politics?* (Boston: Houghton Mifflin, 1967) 47–55; Vincent C. Hopkins, *Dred Scott's Case* (New York: Fordham UP, 1951) 47–55; Charles Warren, "The Dred Scott Case," *The Supreme Court in United States History, 1836–1918* rev. ed., vol II (1922; Boston: Little, Brown, and Co, 1937) 309–15; and Fehrenbacher 417–23. See also "The Supreme Court of the United States," *Liberator* 20 Mar. 1857; "A Revolutionary Decree," *Liberator* 27 Mar. 1857; "The Dred Scott Case," *Chicago Tribune* 12 Mar. 1857: 2.

<sup>46</sup>The only treatment, however brief, is a single paragraph from Fehrenbacher 429.

<sup>47</sup>Herbert Aptheker, ed., *A Documentary History of the Negro People in the United States*, vol. 1 (1951; New York: Citadel, 1969). Aptheker reprints several African American responses to the decision, including some of those utilized in this analysis. Philip S. Foner, *History of Black Americans*, vol. 3 (Westport: Greenwood, 1983) 224–29. Foner devotes a chapter to the decision and its implications. Vincent Harding, *There is a River: The Black Struggle for Freedom in America* (New York: Harcourt Brace Jovanovich, 1981) 201–18; Harding devotes a partial chapter to the views of selected African Americans on *Dred Scott*. Benjamin Quarles, *Black Abolitionists* (New York: Oxford UP, 1969) 230–34; Quarles' analysis persuasively portrays the anger of Remond and the origins of Crispus Attucks Day.

<sup>48</sup>Nieman viii.

<sup>49</sup>Wald 98, 100.

<sup>50</sup>Celeste Michelle Condit and John Louis Lucaites, *Crafting Equality: America's Anglo-American Word* (Chicago: U of Chicago P, 1993) 62.

<sup>51</sup>Resolution adopted by mass meeting of New Bedford African Americans, qtd. in Foner 226.

<sup>52</sup>In selecting these three discourses I have attempted to provide a representative account of the responses made in the aftermath of *Dred Scott*. This is, however, difficult to insure by any specific means. While the controversy occurred near the peak of abolitionist fervor, it was also the time of William Lloyd Garrison, Wendell Phillips, and Gerritt Smith. Anti-slavery publications regularly provided complete coverage for speeches made by these figures, but reports on the efforts of black abolitionists were often limited to summaries and occasional quotations, thus making the location of appropriate artifacts more problematic.

<sup>53</sup>Although I have divided the responses into semi-discrete categories, there is a degree of fluidity which defies absolute separation. I feel that such an effort would be both misleading and counterproductive, suggesting that there is a precise formula that can be applied in producing criticism.

<sup>54</sup>Condit & Lucaites 69.

<sup>55</sup>Cover, "Nomos and Narrative" 128. As Cover argues, this is essentially the strategy used by radical Garrisonian abolitionists in resisting the Constitution and fighting slavery (133-35).

<sup>56</sup>Cover, "Nomos and Narrative" 155.

<sup>57</sup>"Spirited Meeting of the Colored Citizens of Philadelphia," *Liberator* 10 Apr. 1857.

<sup>58</sup>"Public Meeting in Philadelphia," *National Anti-Slavery Standard* 11 Apr. 1857.

<sup>59</sup>"Spirited Meeting."

<sup>60</sup>Bower 1018-19.

<sup>61</sup>"American Anti-Slavery Society. Twenty-Fourth Anniversary. Speech of Robert Purvis," *National Anti-Slavery Standard* 23 May 1857.

<sup>62</sup>"American Anti-Slavery Society. Twenty-Fourth Anniversary. Speech of Mr. Remond," *National Anti-Slavery Standard* 23 May 1857.

<sup>63</sup>"Speech of Charles L. Remond," *National Anti-Slavery Standard* 20 June 1857. Also see "Anti-slavery Celebration of Independence Day: Speech of Charles Remond," *Liberator* 10 July 1857.

<sup>64</sup>"The Boston Massacre, March 5, 1770: Speech of C.L. Remond," *Liberator* 12 Mar. 1858.

<sup>65</sup>"Anniversary of British West India Emancipation," *Liberator* 13 Aug. 1858. Purvis also continued to speak against *Dred Scott*, arguing in May of 1860 that the decision was "a fair example of the cowardly and malignant spirit that pervades the entire policy of the country." Accordingly, he said he could "have no feeling but of *contempt, loathing, and unutterable abhorrence!*" "Speech of Robert Purvis' at the 27th Anniversary of the American Anti-Slavery Society," *Liberator* 18 May 1860.

<sup>66</sup>As Cover explains it, "[r]edemption takes place within an eschatological schema that postulates: (1) the unredeemed character of reality as we know it, (2) the fundamentally different reality that should take its place, and (3) the replacement of the one with the other. The term 'redemptive' also has the connotation of saving or freeing *persons*, not only 'worlds' or understandings" ("Nomos and Narrative" 132).

<sup>67</sup>I am using history and public memory in a manner largely consistent with the wealth of recent scholarship on the issue. See Cox; Appleby, Hunt & Jacob; Allan Megill & Donald M. McCloskey, "The Rhetoric of History," *The Rhetoric of the Human Sciences*, ed. John S. Nelson, Allan Megill, & Donald M. McCloskey (Madison: U of Wisconsin P, 1987) 223.

<sup>68</sup>Quarles 233. William C. Nell provided the historical context in his opening address: "Eighty-eight years ago, this day, CRISPUS ATTUCKS, a colored man, led a company of patriots from Dock square into State Street, and in resisting the British forces, received two balls—one in each breast—and fell; he being the first to attack, and himself the first martyr on the day which history has selected as the dawn of the American Revolution." "Address of William C. Nell," *Liberator* 12 Mar. 1858.

<sup>69</sup>Nell qtd. in Foner 226.

<sup>70</sup>Nell qtd. in Foner 227.

<sup>71</sup>"Address of William C. Nell."

<sup>72</sup>"Speech of Dr. Rock," *Liberator* 12 Mar. 1858.

<sup>73</sup>"The Boston Massacre, March 5, 1770: Speech of C.L. Remond."

<sup>74</sup>Bower 1013.

<sup>75</sup>It was at this convention that Remond called for a committee of five to encourage an insurrection of slaves in the South.

<sup>76</sup>"Anniversary of British West India Emancipation," *Liberator* 13 Aug. 1858.

<sup>77</sup>"A Suffrage Convention," *Liberator* 1 Oct. 1858. This was an argument which Taney directly addressed and rejected in his *Dred Scott* opinion.

<sup>78</sup>“Ohio Negroes Speak Their Minds, 1858,” *A Documentary History of the Negro People in the United States*, ed. Herbert Aptheker, vol. 1 (1951; New York: Citadel, 1969) 412. This convention also offered an insular threat, arguing “[t]hat if the Dred Scott dictum be [a] true exposition of the law of the land, then are the founders of the American Republic convicted by their descendants of base hypocrisy, and colored men absolved from all allegiance to a government which withdraws all protection.”

<sup>79</sup>“Remarks of William C. Nell before the Committee on Federal Relations,” *Liberator* 1 April 1859.

<sup>80</sup>“Remarks of William C. Nell.” This passage was also offered as part of the resolutions at the Convention of the Colored Citizens of Massachusetts celebration of the anniversary of British West India emancipation. See *Liberator* 13 Aug. 1858.

<sup>81</sup>“Remarks of William C. Nell.”

<sup>82</sup>Frederick Douglass, “The Dred Scott Decision, speech delivered before American Anti-Slavery Society, New York, May 11, 1857,” *The Life and Writings of Frederick Douglass*, ed. Philip S. Foner, vol. 2 (New York: International Publishers, 1950): 407–24.

<sup>83</sup>Douglass 407.

<sup>84</sup>Douglass 409.

<sup>85</sup>Douglass 410.

<sup>86</sup>Douglass 410.

<sup>87</sup>Douglass 411.

<sup>88</sup>Douglass 411.

<sup>89</sup>Douglass 412.

<sup>90</sup>Sean O’Rourke, “Cultivating the ‘Higher Law’ in American Jurisprudence: John Quincy Adams, Neo-Classical Rhetoric and the *Amistad* Case,” *Southern Communication Journal* 60 (1994): 34. The use of natural law in defense of anti-slavery objectives is investigated in considerable detail by Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale UP, 1975).

<sup>91</sup>Douglass 411–12.

<sup>92</sup>Douglass 412, 414.

<sup>93</sup>Douglass 415.

<sup>94</sup>Douglass 416.

<sup>95</sup>Douglass 419.

<sup>96</sup>Douglass 424.

<sup>97</sup>Douglass 424.

<sup>98</sup>Cover, “Nomos and Narrative” 136–37.

<sup>99</sup>Miller 419.

<sup>100</sup>Cover, “Nomos and Narrative” 172.

<sup>101</sup>Aptheker “Introduction.”

<sup>102</sup>Ernest Bormann, *Forerunners of Black Power: The Rhetoric of Abolition* (Englewood: Prentice-Hall, 1971) 241.

