

Constitutional Law and the Legitimation of History

The Enduring Force of Roger Taney's "opinion of the court"

David Thomas Konig

ROGER TANEY was not the first judge to seek legitimacy for an opinion by drawing on the authority of the past, and his “opinion of the court” in *Dred Scott v. Sandford* only continued a long tradition of applying—some would say, manipulating—the historical method to reach desired results. Current academic criticism of the “historical method of adjudication” remains framed by a 1965 article by historian Alfred H. Kelly that stands as a classic censure of the fallacies of reasoning and decontextualized evidence that lead judges to use historical argument to reach conclusions that are wrong or historically impossible to prove. Kelly, however, was only giving voice to a long tradition of criticism and providing additional argument to strictures made that same year by legal scholar Mark DeWolfe Howe, who had observed that such corruption of the historical method had “very probably always marked the divisions within the Court.” Those who disparage the way history has been used in adjudication acknowledge, of course, that the historical recovery of the past and the judicial resolution of legal disputes can work at cross-purposes. There exists an inherent

dilemma of method and goal, what Howe called the “tension between the complexities of a confused reality and the simplicities of sure conviction.” Acknowledging the different professional imperatives of the lawyer, historian Kelly conceded that the object of the adversarial process of advocacy litigation “is, after all, not history, but the resolution of a lawsuit, and the judges are supposed to resolve opposing claims of counsel in such a way as to produce something coherent in terms of justice, legal continuity, or ascertainable law. It is not for a historian to choose.” Just as judges must choose between competing legal narratives, so too must they choose between competing historical narratives in order to arrive at the “simplicities of conviction” needed for adjudicating disputes.¹

This essay argues that the impact of rejecting a particular legal doctrine differs materially from that of rejecting a particular version of history, which ultimately poses a much greater harm in a democracy. Consigning a legal doctrine to extinction is not the same as rejecting the “the complexities of a confused reality” of the past, which may do serious harm beyond what the legal decision produces. While “bad history” can lead to bad decisions, such damage may affect only the parties to a particular case. Even if, as in the case of *Dred Scott*, its decision has an immediate impact on millions and accelerates a national crisis, its impact can be reversed by constitutional amendment. Thus, the law announced in Chief Justice Roger B. Taney’s “opinion of the court” (*his* term, anointing what was, actually, only his own opinion among a thicket of contradictory concurring and dissenting opinions)² was altered by three amendments to the Constitution, but its greater and much longer term damage lies outside the law and continues to the present day. Taney’s simplistic version of a complex past, announced and anointed as “too clear to dispute,”³ was a form of collateral damage that has outlived its primary constitutional harm by corrupting our nation’s historical memory and creating a false normative narrative of the American experience. The “opinion of the court” thus placed the imprimatur of a vastly respected institution on an interpretation of history whose fallacies continue to undermine the historical foundations of core constitutional beliefs.

Taney’s history was a classic example of how a judge uses history “not to learn about the past, but merely to support an outcome.”⁴ The purpose of his historical analysis—to which Taney devoted more space in his opinion than any other issue—was to exclude all African Americans, slave or free,

from any rights specified in the Constitution.⁵ To do so required establishing that even free blacks were not among those “who were citizens of the several States when the Constitution was adopted. And in order to do this,” he stated, “we must recur” to the political institutions of the time and “inquire who, at that time, were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms.” His denial of African American citizenship was unequivocal: “In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.”⁶

The historical account supporting this opinion was unmediated by context, nuance, or contradictory example and was marked by sweeping and global generalizations of confident correctness. Taney’s only concession to doubt was to acknowledge that “it is difficult at this day to realize the state of opinion in relation to that unfortunate race” in the past, but he quickly pointed out that “the public history of every European nation displays it in a manner too plain to be mistaken.” In terms admitting of no uncertainty, Taney maintained that Africans “had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.” Anticipating challenge to such a statement, Taney supported it as “an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute,” so universally held that “no one seems to have doubted the correctness of the prevailing opinion of the time.” As to the principle that “all men are created equal,” Taney flatly stated that “it is too clear for dispute” that no one intended it to apply either to enslaved *or free* blacks. For emphasis, Taney stated that by the “common consent” of all “civilized Governments and the family of nations” *all* Africans were “doomed to slavery.” “The unhappy black race,” he concluded, “were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property.”⁷

Taney's opinion, however, did more than call on history to solidify slavery by showing it to be embedded in the American past, essential to its origins, justified by its religion, and inseparable from its present commitment to liberty. Those arguments had been made for decades, and by the 1850s there existed a widespread and deeply entrenched Southern tradition of using history to show the universality of slavery as a system and the suitability of Africans for it. Proslavery apologists, that is, already had constructed an "inescapable past" for American slavery and had used "history as moral and political instruction" to describe slavery as normal and racism natural.⁸

Such a proslavery historical narrative brought the institution to the center of the national narrative and justified it against the rising din of antislavery argument, but it did not fully answer a new challenge emerging as Dred and Harriet Scott's petition for freedom, commenced in the 1840s, moved slowly through the next decade. If history was to continue to provide the narrative basis for a jurisprudence of slavery and racial control, it had to address more than slavery and slaves: it had to respond to the historical reality of free African Americans whose past belied the conventional narrative, and whose vocal assertion of that fact contradicted the very foundations of proslavery jurisprudence. Taney had ample support for his version of the history of slavery; he had to create it for his version of free African Americans.

Taney's opinion, to be sure, expressed the widespread and prevailing historical understanding among whites of the debased and excluded position of African Americans in the nation's history. But it is vital for subsequent generations to be aware that such a view, however widely held in the nineteenth century, was nonetheless only one interpretation of that past available at the time, one that by the 1850s was coming under repeated attack as orthodoxy. It was, in fact, constructed to deny what Robert Cover, a legal scholar sensitively attuned to the humanistic dimensions of the law, has identified as the "multiplicity of the legal meanings created out of the exiled narratives and divergent social bases for their use."⁹ Indeed, Taney's history must be read as a carefully selective response to an ever louder assertion of black citizenship, which was presenting its own powerfully articulated historical counternarrative. That alternative narrative did not represent mainstream history, but neither was it obscure or inaccessible to anyone making even a half-hearted attempt to recover the

past. The seriousness with which Taney and others had to deny it, as well as the attention given it by other proslavery apologists, makes it unlikely that Taney was unaware of it.¹⁰ He had to assert a narrative that would erase African Americans from membership in the political community that had founded the republic and thus had earned the enjoyment of the rights announced in the Declaration of Independence and set out in the Constitution's creation of a "more perfect union." To understand Taney's process of historical construction, it is necessary to recover what he was responding to.

Almost as soon as the incompatibility of slavery and freedom became apparent in the 1780s there arose explanations to resolve it by denying African Americans membership in the generation that founded the republic. David Ramsay, a Pennsylvania native who married into the elite of South Carolina, had advocated arming slaves during the War for Independence—a step taken by several northern states, including his native Pennsylvania—but he gradually felt the pressure of the slaveholding society around him, abandoned the attempt, and moved steadily away from his tentative anti-slavery position. By the time he wrote his *History of the American Revolution* (1789), his muted criticism of the "evil" of slavery was largely limited to the "mischievous effects" of the institution on white society and the danger of slave insurrection. To reinforce the idea that Africans were both unwilling and unable to claim membership in a free nation, Ramsay described their military service with Lord Dunmore in Virginia as "more prejudicial to their British employers than to the provincials." Acculturated to enslavement, he wrote, they "are so well satisfied with their condition, that several have been known to reject proffered freedom . . . and emancipation does not appear to be the wish of the generality of them." The longer he lived in South Carolina, the more Ramsay absorbed the prevailing white view of slavery. Though he lamented the ill effects of the system, "necessity" compelled it, because the coastal low country "could only be cultivated by black men." With slavery assumed as a natural fact of life, his history of the Revolution removed the slave "from the realm of moral discourse," in the words of Ramsay's definitive biographer, while his 1809 *History of South Carolina*, a state whose population was more than 50 percent black, simply "ignored the African. The oversight could not have been accidental," writes Arthur Shaffer. "If he could not positively endorse slavery, he would

remain silent.”¹¹ Ramsay was helping to shape the paradigm of the African American experience in the United States: enslavement as a natural fact, debasing the African colonists to a lesser status and excluding them from the body politic.

John Marshall, though hardly known as an advocate of the slave regime, provided constitutional and historical support for this model. His court showed “caution” in dealing with the few cases involving slavery that came before it, assuming an unaccustomed formalist style in its decision making. Throughout his public career Marshall sided with those working to preserve the institution. As a nationalist who hoped to avoid sectional conflict, he “wished that slavery would somehow go away,” and as a protector of property rights he avoided choosing between “the sacred rights of liberty and property” when in conflict. Despite his nationalism, however, Marshall believed that slavery was a matter to be left to the states, and in 1829 he agreed to serve in the Virginia constitutional convention primarily to promote a new constitution that would better protect slavery as property against the possibility of a democratic western majority that might threaten its existence.¹²

Marshall’s writing of history complemented his jurisprudence. His magnum opus, a five-volume biography of George Washington with the nation’s colonial history as backdrop, gave little attention to Africans, whether enslaved at Mount Vernon or serving with his army, despite the deep and lasting impact that African American military service had on Washington’s thinking about slavery. Their only role in the historical image Marshall constructed was as slaves or potential incendiaries. The inauguration of “commercial liberty” that followed the collapse of the Virginia Company attracted a Dutch ship that “brought into James River twenty Africans, who were immediately purchased as slaves.” No contingency, no period of unfree indenture, no discussion of economic forces diminished the naturalness of enslavement. His first volume also described the Stono Rebellion of 1739, in which self-emancipated Africans demonstrated their unfitnes for freedom with a murderous rampage of whites. “Intoxicated with ardent spirits, and with their short lived success,” Marshall continued, “they considered their work as already achieved and halted in an open field, where the time which might have been employed in increasing their numbers, and extending their devastation, was devoted to dancing and exultation.”

Surprised by armed whites, their insurrection collapsed, and their leaders were executed. Africans appear again in his second volume, once more a menace to Americans as part of Lord Dunmore's "force of the disaffected and negroes." To make clear their incapacity for membership among civilized peoples, Marshall returned to the subject in his final volume, describing the Haitian revolution as a bloody race war and "one indiscriminate massacre, from which neither age nor sex could afford an exemption."¹³

Marshall's stature conferred legitimacy on his history and had a profound impact in advancing a particular version of American history. The reading public was unaware that Marshall had done little research and was in some cases virtually quoting without attribution from others, but, observes one commentator, "It was natural to believe that a history written by the great jurist would be marked by soundness, high scholarly qualities, and reliability."¹⁴ Marshall's account of the American past helped imprint in the national mind an identity that emerged from its experience and helped justify continuity with the ideas and actions imputed to it. His writing of history also relegated the indigenous native population to a subordinate position and legitimated the assertion of legal title over their lands. In *Johnson v. M'Intosh* Marshall asserted the legality of the acquisitions by constructing a principle of "discovery" that, he insisted, had always been an acknowledged basis for "the exclusive right of the discoverer to appropriate the lands occupied by Indians." "The history of America," he wrote without fear of contradiction, "from its discovery to the present day, proves, we think, the universal recognition of these principles." The doctrine allowed Marshall to strip the Indians of their rights and degrade them to a legally insignificant status of "occupants, to be protected," rather than as owners. Indian rights were not, he insisted, "entirely disregarded; but were, to a considerable extent, impaired."¹⁵

Marshall, it has been shown, was well aware that his historical sources had serious deficiencies, just as he was aware of other sources that contradicted his version of history. But his forensic history required such an account. Even what another scholar calls his "demeaning and insulting" statements about the Indian "were not simply gratuitous insults" but were prescriptively inserted "value judgments" that served the important forensic purpose of creating a powerful metaphor with which to rationalize and justify dispossession of a people considered unworthy of land ownership.¹⁶

Marshall's use of history to label Native Americans incapable of civilized life and to reduce them to a subordinate status with rights not worthy of respect has strong parallels with the way history served to legitimate a similar, though even more extreme, treatment of African Americans. In both cases, moreover, there existed powerful alternative narratives that had to be denied. That impulse culminated in Taney's expunging of black citizenship from American history.

African American participation in the achievement of nationhood and in sharing the rights of citizenship were facts that in the 1840s and 1850s black abolitionists were ever more insistently presenting to the American public, laying claim to the legal rights they were entitled to by virtue of that historical experience. Such claims emerged more vocally in the 1840s, as many free blacks rejected colonization and demanded citizenship rights in the land of their birth. Meeting in convention, they urged emancipation of the enslaved and equal rights for those African Americans who already had their freedom. Although the conventions had little political impact, their "addresses" and "memorials" nevertheless had a significant effect in altering the discourse over rights. Directed at the white public and legislators, these manifestos made claim to full membership as citizens and supported their claim with historical evidence of black participation in the Revolution.¹⁷ "*We are Americans*," asserted the New York State Convention of Colored Citizens in 1840, arguing that "the right of our birthdom, our service in behalf of the country," justified "the claims and rights of a disfranchised people." Clearly stating a point that Taney would have to refute, it declared, "We can find no nation that has the temerity to insult the common sense of mankind" by basing rights on skin color or body shape. Though the legal position of blacks had suffered badly since the Revolution, it called upon the people of New York to "restore the fountains of political justice in this State to their pristine purity. . . . We call upon you to return to the pure faith of your republican fathers."¹⁸

The Ohio convention of 1851 drew on statements by major white figures to make the same plea to that state's constitutional convention. It included Roger Sherman Baldwin's speech on the Senate floor in which he pointed out that "colored men voted" in most states in 1789. "All free people then stood upon the same platform in regard to their political rights," he argued, "and were so recognized in most of the States of the Union." Even

Andrew Jackson provided support, as the convention cited his addressing free black soldiers before the Battle of New Orleans as “Sons of Freedom” and as “Americans.” He assured them that “through a *mistaken policy* they had been deprived of a participation in the glorious struggle for national rights, in which our country was engaged,” and that the policy was now ended.¹⁹

Among the most active black abolitionists keeping this narrative before the public at large was William Cooper Nell, a Bostonian who worked for Frederick Douglass’s *Northern Star* and William Lloyd Garrison’s *Liberator*. Nell had also been among the founders of the short-lived “American Reform Board of Disfranchised Commissioners,” but his most lasting achievement was the publication of two books that presented example after example of black participation in the founding of the nation. Nell’s books, written with the support of Frederick Douglass, explicitly associated such a history with entitlement to citizenship, and it is no coincidence that such claims came in the wake of the passage of the Fugitive Slave Act, whose provisions denied alleged fugitives of their most basic due process rights, including the Constitutional guarantee of habeas corpus. His *Service of Colored Americans in the Wars of 1776 and 1812* began with the shooting of Crispus Attucks at the Boston Massacre, an event whose importance went beyond the personal martyrdom or heroism it was commonly cited for. Instead, Nell makes it clear “that the colored man, Attucks, was *of and with* the people, and was never regarded otherwise.” He noted, too, that “the Colored Soldiers called the ‘Bucks of America’” had served in the war, and that John Hancock had presented them with a silk banner “as a tribute to their courage and devotion to the cause of American Liberty, through a protracted and bloody struggle.”²⁰

Nell was aware of the power of corroboration by eminent whites, and when he continued his project four years later with *The Colored Patriots of the American Revolution* he included remarks by Harriet Beecher Stowe, Wendell Phillips, and John Greenleaf Whittier. In his “Author’s Preface,” Nell quoted from an Independence Day speech made in 1847 by the Garrisonian Whittier, who had pointed out the historical injustice of “a whole nation doing honor to the memories of one class of its defenders, to the total neglect of another class, who had the misfortune to be of darker complexion.” Whittier then took satisfaction in “inviting notice to certain

historical facts, which, for the last half century, have been quietly elbowed aside.” “They have no historian,” Whittier lamented, but “enough is known to show that the free colored men of the United States bore their full proportion of the sacrifices and trials of the Revolutionary War.” Stowe understood the power of collective memory in recognizing the “record of worth in this oppressed and despised race,” because it would reverse the “cruel and unjust public sentiment, which has so long proscribed them.” Philips, too, saw the need to redirect public memory toward an inclusive narrative, which would “stem the tide of prejudice against the colored race.”²¹

Nell had enlisted such support to “rescue many gallant names from oblivion” in one battle of what had become an escalating “history war.” In his description of the Battle of Cowpens, for example, John Marshall had made specific reference that “a waiter, too small to wield a sword,” saved a patriot officer by shooting a British officer about to kill him. When William Ranney painted the scene in 1845, he showed the young black man who had wielded the pistol. Black participation at Bunker Hill, by contrast, was effaced. John Trumbull’s painting of *The Battle of Bunker Hill* shows a black soldier (Peter Salem, a free man) holding a musket next to Lieutenant Thomas Grosvenor, as does a 1798 engraving made from it. But, as Nell pointed out in 1855, later engravings removed Salem. So, too, a petition to the Massachusetts legislature to appropriate \$1,500 for a statue in memory of Crispus Attucks, “the first martyr in the Boston Massacre,” was rejected, on the grounds that “a boy, Christopher Snyder, was previously killed.”²²

Commemorating Crispus Attucks became a central issue in the demand for black citizenship, and it intensified in the wake of Taney’s opinion. The next year, Nell and other black abolitionists celebrated the first annual “Crispus Attucks Day” in Boston, for which they assembled numerous reminders of the Revolution, including an engraving of Emmanuel Leutze’s painting *Washington Crossing the Delaware* (1851), which featured Prince Whipple, a black man, among the oarsmen.²³ The speed with which Taney’s narrative was countered attests to the active and ongoing efforts already in place promoting a counternarrative. It did not require mobilization of new efforts or the search for new data, that is, but rather could count on an existing fund of knowledge well known in black and abolitionist circles.

But it was not abolitionists alone who were offended by Taney’s manipulation of history, for abolitionism constituted only part of the opposition

to slavery. Free-soil whites who had little interest in the rights of African Americans also challenged what Taney claimed “no one seems to have doubted” at the founding of the republic. Angrily replying to Taney, former U.S. Senator Thomas Hart Benton emphatically disagreed in a manner befitting a man who shot Andrew Jackson in a brawl. Despite apologies that he “was breaking down under the approaches of a terrible attack, while he was still writing it, and was prostrate before it was finished,” Benton managed to produce a robust (and repetitive) *Historical and Legal Examination of That Part of the Decision of the Supreme Court of the United States in the Dred Scott Case, Which Declares the Unconstitutionality of the Missouri Compromise Act, and the Self-Extension of the Constitution to Territories, Carrying Slavery along With It*. Steadfastly affirming the constitutionality of the Missouri Compromise, Benton asserted that he would “limit myself, as the Court did, to the strict legal inquiry which the subject exacts,” but, like Taney, he roamed freely into historical argument. Any inquiry into “the origin and design” of the background of the case, he insisted, “belongs to history, veracious [*sic*] and fearless.” But it was to history that he returned in his reproach of the Court, claiming that he was expressing “the history of the times” on congressional authority and revealing the “daily current knowledge” of the Philadelphia Convention, explaining the “history, and the obvious meaning of language,” in the text. He also produced the “record[ed] history of the day” concerning the Compromise, and when a Northern senator asserted his state’s importance in passing the Northwest Ordinance Benton dismissed it as “a prominence excusable in oratory, but not justified in history.”²⁴

Benton’s attack on Taney’s version of history, though it did not address the rights of African Americans, contained within it more subtle points worth emphasizing today. A Democrat who believed in the sovereignty of the people as expressed at the ballot box, he assailed the inherent “evil” of politicizing the courts by “bringing the federal judiciary into the vortex of federal politics.” His belief in the sovereignty of the people also led him to a much more profound matter. In challenging Taney’s interpretation of the Missouri Compromise, Benton noted that because the Compromise was “an event long since passed, and its history inaccessible to the community, many are persuaded to believe in the fable” spun by Taney and widely believed by the public.²⁵

Benton, therefore, was making common—if highly ironic—cause with Nell and the black abolitionists who also recognized the power of public memory as a force in law and politics. They both appreciated that popular historical consciousness expounded by judges has more than judicial impact. Endorsed by the prestige of the court, it elevates one interpretation above others in a culture in which historical knowledge is deeply contested and its messages up for grabs. In a volume that grew out of an effort to answer the question “How do Americans understand their past?” two distinguished historians came to the conclusion that “the real issue was not as the pundits were declaring, what Americans did not know about the past, but what they *did* know and think”—that is, that the nation’s “historical consciousness” or “historical memory” consisted of discordant and often wildly incorrect accounts of the past. The result is that the historical past becomes a tool with which to advance a “heritage.” Defining “heritage,” David Lowenthal comes close to describing forensic history and the historical process as evident in Taney’s “opinion of the court”: “not an effort to know what actually happened but a profession of faith in a past tailored to present-day purposes.”²⁶

Judicially endorsed versions of the past can spread widely into the political culture, flowing back into the courthouse and legislature to exert enormous extrajudicial pressure on our legal and political systems. The use of historical materials by a judiciary in a liberal democracy therefore has often served, as it did for Taney, to justify law’s authority as a “modality of rule” by invoking what it anoints as the normative experience of the people.²⁷

This process has had especially damaging effects in shaping the collective memory of the nation’s racialized past. One effect is the widespread denial “that slavery was a major cause of the Civil War.” A proper encounter with the past requires engaging its contradictions and complexities, but, as another study of public memory concludes, historians and museum interpreters “encounter a public often unwilling to hear a story that calls into question comfortable assumptions about the nation’s past.”²⁸ Taney’s historical “opinion of the court” endorsed and solidified an enduring stigma that has normalized racial hierarchy and impeded the struggle for equality long after ratification of the Fourteenth Amendment. Norman Spaulding expresses this general process well: “In liberal democracies, where sovereign power operates on the principle of consent, public accountability, and

constitutional restraint, national narratives also confer political legitimacy—they define the discursive space for the negotiation and justification of political power by regulating the collective memory of a nation’s fundamental commitments.”²⁹ In a democracy where popularly held notions of what relations “ought” to be and how law “ought” to formalize norms, judges’ forensic history simplifies the complexities of the past and announces a definitive interpretation that takes on the quality of an “official” history. So great is the prestige of the judicial role that its pronouncements on history are assumed to be based on the very ideal of objectivity that the historian follows only in the breach. Historian Peter Novick, in explaining how American historians seek an unachievable goal of “objectivity,” contrasts them unfavorably with judges, who, he maintains, more self-consciously embody that unmet ideal: “The historian’s conclusions are expected to display the standard judicial qualities of balance and evenhandedness,” Novick writes. “As with the judiciary, these qualities are guarded by the insulation of the historical profession from social pressures or political influence, and by the individual historian avoiding partisanship or bias—not having any investment in arriving at one conclusion rather than another.”³⁰

Constitutional litigation in the years since Kelly wrote has drawn historical argument more fully into legal debate, making necessary a heightened level of scrutiny. The growth of an intellectually vigorous and diverse academy has brought new disciplinary perspectives into legal argument and presented the courts with innovative challenges drawing heavily on material not found in “authoritative legal materials” and “emphasizing abstract theory at the expense of practical scholarship.”³¹ History, when simplified and stripped of complexity for the purpose of adjudication, can provide precisely the kind of “practical scholarship” that judges prefer when they look to it for its familiarity as a traditional source of authority, its relative accessibility to nonspecialists, and its avowed commitment to the recovery and interpretation of “fact.” But in deceiving the public about the past, such history deceives us about the present.

Notes

1. *Dred Scott v. John F. A. Sandford*, 60 U.S. (19 How.) 393 (1857) (Taney’s “opinion of the court” is at 399–529, and dissents by John McLean and Benjamin R. Curtis are at 529–633); Alfred H. Kelly, “Clio and the Court: An Illicit Love Affair,”

Supreme Court Review 1965 (1965): 119 (citing Howe), 156. Kelly was expanding on Mark DeWolfe Howe, "Split Decisions," *New York Review of Books*, July 1, 1965. John Phillip Reid, "Law and History," *Loyola of Los Angeles Law Review* 27, no. 1 (1998–99): 201nn35–36, provides pertinent citations to the academic faultfinding. The protracted historical debate between Sir Edward Coke and his opponents in the constitutional disputes of the seventeenth century is the subject of J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1957).

2. On the lack of a single, coherent "opinion" in *Dred Scott*, see Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978), 305–404.

3. Scott, 60 U.S. at 410.

4. Reid, "Law and History," 203.

5. Fehrenbacher points out that Taney devoted twenty-four pages (or 44 percent) of the fifty-five pages of his opinion to this point (*Dred Scott Case*, 337). Of the more than two hours it took to read the opinion, this section probably consumed more than an hour.

6. Scott, 60 U.S. at 407.

7. *Ibid.* at 407–10.

8. Elizabeth Fox-Genovese and Eugene D. Genovese, *The Mind of the Master Class: History and Faith in the Southern Slaveholders' Worldview* (New York: Cambridge University Press, 2005), esp. pt. 2, "The Inescapable Past," 125–246. The literature of proslavery thought is vast, and its impact enormous. For other studies, see also Winthrop D. Jordan, *White over Black: American Attitudes toward the Negro, 1550–1812* (Chapel Hill: University of North Carolina Press, 1968), and George M. Fredrickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817–1914* (New York: Harper and Row, 1971).

9. Robert M. Cover, "Nomos and Narrative," in *Narrative, Violence, and the Law: The Essays of Robert Cover*, ed. Martha Minow, Michael Ryan, and Austin Sarat (Ann Arbor: University of Michigan Press, 1993), 113.

10. Not coincidentally, T. R. R. Cobb chose to preface *An Inquiry into the Law of Negro Slavery in the United States of America* (Philadelphia: T. and J. W. Johnson, 1858; repr., ed. Paul Finkelman, Athens: University of Georgia Press, 1999) with "An Historical Sketch of Slavery" that included descriptions of how emancipated blacks had shown themselves unfit for citizenship (ccii–ccv).

11. David Ramsay, *The History of the American Revolution* (Philadelphia: R. Aitken and Son, 1789; repr., ed. Lester H. Cohen, Indianapolis: Liberty Classics, 1990), 14, 496, 229, 20–25; Arthur H. Shaffer, *To Be an American: David Ramsay and the Making of the American Consciousness* (Columbia: University of South Carolina Press, 1991), 176, 187.

12. Donald M. Roper, "In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery," *Stanford Law Review* 21, no. 3 (1969): 533, 535,

quoting his opinion in *The Antelope*, 23 U.S. (10 Wheat.) 66, 114 (1825); R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University Press, 2001), 330, 389–91.

13. John Marshall, *The Life of George Washington, Commander in Chief of the American Forces, during the War Which Established the Independence of His Country, and First President of the United States*, 5 vols. (Philadelphia: C. P. Wayne, 1804–7), 1:63, 330–32, 2:372, 5:368. On the regard in which Washington held his black soldiers and their entitlement to freedom, see Henry Wienczek, *An Imperfect God: George Washington, His Slaves, and the Creation of America* (New York: Farrar, Straus and Giroux, 2003).

14. William A. Foran, “John Marshall as Historian,” *American Historical Review* 43, no. 1 (1937): 51.

15. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 573–74, 584 (1823). On Marshall’s manipulation of history, see Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005).

16. Robertson, *Conquest by Law*, 103; Philip J. Prygoski, “War as Metaphor in Federal Indian Law Jurisprudence: An Exercise in Judicial Activism,” *Thomas M. Cooley Law Review* 14, no. 3 (1997): 501.

17. Philip S. Foner and George E. Walker, eds., *Proceedings of the Black State Conventions, 1840–1865* (Philadelphia: Temple University Press, 1979), xii–xvi. See also Howard Holman Bell, ed., *Minutes of the Proceedings of the National Negro Conventions, 1830–1865* (New York: Arno Press, 1969); and Bell’s *A Survey of the Negro Convention Movement, 1830–1861* (New York: Arno Press, 1969).

18. “Address of the New York State Convention of Colored Citizens, to the People of New York,” in *Proceedings*, 21, 23.

19. “Hear Us for Our Cause,” *ibid.*, 271.

20. William C. Nell, *Services of Colored Americans in the Wars of 1776 and 1812* (Boston: Prentiss and Sawyer, 1851; repr., New York: AMS Press, 1976), 5, 9. For more on Nell, who is considered among the first African American historians, see Earl Smith, “William Cooper Nell on the Fugitive Slave Act,” *Journal of Negro History* 66, no. 1 (1981): 37–40. For an appreciation of Nell’s significance and that of other black abolitionists in redirecting the dialogue on freedom, see Scott Hancock, “‘Tradition Informs Us’: African Americans’ Construction of Memory in the Antebellum North,” in *Slavery, Resistance, Freedom*, ed. Gabor S. Boritt and Scott Hancock (New York: Oxford University Press, 2007), 51–56; and David W. Blight, “They Knew What Time It Was: African-Americans and the Coming of the Civil War,” in *Why the Civil War Came*, ed. Gabor S. Boritt (New York: Oxford University Press, 1996), 51–77. On the “Bucks of America,” see Sidney Kaplan and Emma Nogrady Kaplan, *The Black Presence in the Era of the American Revolution*, rev. ed. (Amherst: University of Massachusetts Press, 1989), 65–66.

21. William Cooper Nell, *The Colored Patriots of the American Revolution* (Boston: Robert F. Wallcut, 1855; repr., New York: Arno Press, 1968), 9 (Nell), 6 (Stowe), 9 (Whittier).

22. Nell, *Services of Colored Americans*, 12, 5; *Colored Patriots of the American Revolution*, 21. For an extensive and illuminating study of the erasure of the black presence, see Kaplan and Kaplan, *Black Presence in the Era of the American Revolution*, esp. 21–23.
23. Kaplan and Kaplan, *Black Presence in the Era of the American Revolution*, 10, 49–50.
24. Thomas Hart Benton, *Historical and Legal Examination of That Part of the Decision of the Supreme Court of the United States in the Dred Scott Case, which Declares the Unconstitutionality of the Missouri Compromise Act, and the Self-Extension of the Constitution to Territories, Carrying Slavery along With It* (New York: D. Appleton, 1857), 3, 11, 51, 54, 94, 44.
25. *Ibid.*, 130, 103.
26. Roy Rosenzweig and David P. Thelen, *The Presence of the Past: Popular Uses of History in American Life* (New York: Columbia University Press, 1998), 1–3; David Lowenthal, *The Heritage Crusade and the Spoils of History* (New York: Cambridge University Press, 1998), x.
27. Christopher L. Tomlins describes how, historically, interdisciplinarity in legal scholarship reflects law’s “disciplinary insufficiency as a modality of explanation and legitimation of the results in its interactions with audiences it must convince,” and he argues forcefully that when law intersects with other disciplines, “Mostly . . . law wins.” “Framing the Field of Law’s Encounters: A Historical Narrative,” *Law and Society Review* 34, no. 4 (2000): 911, 967.
28. Editors’ introduction, *Slavery and Public History: The Tough Stuff of American Memory*, ed. James Oliver Horton and Lois E. Horton (New York: New Press, 2006), xi.
29. Norman W. Spaulding, “Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory,” *Columbia Law Review* 103, no. 8 (2003): 1998–99.
30. Peter Novick, *That Noble Dream: The “Objectivity Question” and the American Historical Profession* (New York: Cambridge University Press, 1988), 2.
31. For judicial critique and a call for “more practical scholarship,” see Harry T. Edwards, “The Growing Disjunction between Legal Education and the Legal Profession,” *Michigan Law Review* 91, no. 1 (1992): 47, 34. For a survey of how the newer trends in historical inquiry have influenced other disciplines, see Terrence J. McDonald, ed., *The Historic Turn in the Human Sciences* (Ann Arbor: University of Michigan Press, 1999), especially Robert W. Gordon, “The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument,” 339–78. For a warning that such a direction in the writing of history threatens to alienate its users and become irrelevant, see Gordon S. Wood, *The Purpose of the Past: Reflections on the Uses of History* (New York: Penguin Press, 2008).