WE HOLD THESE TRUTHS TO BE SELF-EVIDENT

JOHN C. CALHOUN, ROGER B. TANEY, AND THE CONSTITUTIONAL CLAIMS OF THE
ANTEBELLUM AMERICAN SOUTH

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I declare that this thesis is my own work except where indicated otherwise with proper use of quotes and references

8,068 words
“The Union. Next to our liberty, the most dear.”

- John Caldwell Calhoun

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As history is the tale of the victor, from a Northern perspective, the Old South can easily be blamed for the agitation, the collapse of the Union, and eventually Civil War over the institution of slavery. The Northern victory in the war created strong winners and losers. The South had to submit to Reconstruction through constitutional amendments, and was almost completely demolished by the war since most of the fighting and destruction took place in the Southern states. On the other hand, the “Great Emancipator” Abraham Lincoln became one of the United States’ most renowned presidents, because he defeated the slave power in the South and thus saved the Union. Lincoln’s legacy is still clearly visible when Martin Luther King held his famous “I have a Dream” speech on the steps of the Lincoln Memorial in Washington D.C. Lincoln became a symbol of moral justice for minority groups and especially African Americans. During the 2008 presidential elections Barack Obama, was also keen on using the similarities between him and Lincoln. Both men are from Illinois, have a modest background, were in law practice, and most importantly, they both called upon unity between the people.² The fact that Lincoln is used as a symbol implies that he had qualities and achievements that are still highly valued by the public. He was the President who denounced slavery officially and emancipated African Americans. However, it is questionable if the praise Lincoln gets for his deeds is completely justified. His importance for the course of history with respect to the abolishment of slavery is undeniable, but this is only a moral argument. In should be noted that the important debates during the first half of the nineteenth century were on the interpretation of the United States Constitution. Lincoln also acknowledged that at the heart of the political conflict there was a disagreement on constitutional interpretation. In his First Inaugural Address, president elect Lincoln argued that the Constitution is imperfect and he claimed that “no organic law can ever be framed with a provision specifically applicable to every question which may occur in practical

administration.” He saw that the answer to the political disagreement was to settle the issue of constitutional interpretation, but he disagreed with strict textual interpretation of Southern states. Southern spokesmen like John Caldwell Calhoun argued in favor of strict textual constitutional interpretation. When the agitation between both sides rose, Calhoun argued that their constitutional rights were violated by the North, because they interfered with state domestic affairs.

Slavery may be the key issue on which the whole secession crisis was based, but underlying was the problem of a constitutional compromise. In order to address the complexity of the sociopolitical problems in the pre-Civil War United States, slavery has to seen as one factor in a larger context of constitutional debate. The political debate should be viewed as a disagreement over the institution of slavery as a state’s right and not merely as a conflict over the morality of slavery. Secession of South Carolina in 1860 was not an event that suddenly occurred, but was rather the result of a deadlock in constitutional interpretation. When the Constitution was signed in 1787, the conditions were already shaped for the impending crisis of the nineteenth century. During the Convention the last obstruction was the issue of slavery because the North and South were at the time equally divided on the subject. Mr. Elsworth of Connecticut argued that “the morality or wisdom of slavery are considerations belonging to the States themselves.” Southern representatives had even enlarged the tensions in the debate by taking a radical position in favor of slavery. Rudledge, a Representative from South Carolina, united the three major slave states by arguing that: “If the Convention thinks that North Carolina, South Carolina and Georgia will ever agree to the plan, unless their right to import slaves be untouched, the expectation is in vain. The people of

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those States will never be such fools as to give up so important an interest.” At the time a compromise was reached by both parties that the federal government would leave slavery untouched and in return the South would not demand a two-thirds vote on commercial legislation. Slavery was thus accepted by both proponents and opponents as part of the Constitution, they created a document that did not forbid slavery nor explicitly promoted it. The slavery issue was set aside during the Convention of 1787 and it was considered an intrastate affair, but nevertheless not a century later Civil War broke out.

The war was the United States’ most significant constitutional crisis and one that would decide the fate of the Union over the question of where sovereignty was to be found. The conflict eventually resolved around the question whether sovereignty was with the people of the Union or with the people of the different states. This thesis will take two of the South’s most eloquent spokesmen and examine their rhetoric in defense of States’ Rights. In order to offer a broader perspective I will compare positions taken by John Caldwell Calhoun and Roger Brooke Taney to opinions and responses given by Presidents Andrew Jackson and Abraham Lincoln. The first part will be focused on John C. Calhoun and the constitutional validity of his political doctrine of States’ Rights. Calhoun defended state sovereignty over state domestic institutions like slavery during his life and his ideas can be legitimized by writings of Thomas Jefferson and James Madison. During Calhoun’s time in office as Vice-President he got into conflict with President Andrew Jackson over nullification of laws by individual states. The second part will be on the Dred Scott decision and Chief Justice Roger Brooke Taney’s majority opinion. Taney’s opinion led to intense conflict with Abraham Lincoln and this thesis will compare constitutional arguments made by both men. Calhoun and Taney both occupied important positions within the system of government, but were in

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7 Ibid., 165.
their eyes defending the Union against unconstitutional seizures of power by the federal
government. Both Federalists and States’ Rights advocates tried in their own way to preserve
the Union; however, it was the South’s claim of state sovereignty I will argue that was
legitimized by the text of the Constitution and the framers’ original intent.
The Constitution of the United States consists of passages that explicitly guarantee individual state sovereignty and acknowledge that states were sovereign over state domestic institutions, such as slavery. When the framers wrote the Constitution they eventually chose to make the legislature consist of two houses in order to protect the interests of individual states through the Senate. Article One, Sections Two and Three carefully outline the framework of both houses and explicitly name the various representatives the states will have. Furthermore, the fact that a Senate was created in order to guarantee the influence of individual, mostly small, states.\(^\text{10}\) Slavery should also be seen within the framework of state sovereignty as it was written into the Constitution as a state domestic state affair. Until the year 1808 the “migration and importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress.” It is important to notice that although the slave trade would be forbidden after 1808, this did not concern abolishment of slavery as a domestic institution. The Constitution still recognized that slavery was an intrastate affair and did not put further restrictions of the institution of slavery. Another instance in which the Constitution touches indirectly on the issue of slavery is in the three-fifths clause.\(^\text{11}\) This is another example of the consensus that was reached during the convention and another sign that slavery was indeed taken for granted and considered to be a part of the South, and thus of the Union. The fugitive slave clause of the Constitution in Article Four exemplifies again that slavery was embedded into the Constitution, and it was only superseded by the post Civil War Amendments. After the Civil War the Constitution was reshaped, through amendments, in such a way that slavery was excluded from it. The fact that it was amended signifies that, before those amendments were ratified, the protection of state sovereignty over state institutions, such as slavery, was embedded into the text of the

\(^{11}\) Ibid., 11.
Constitution. The framers even included a guarantee to every state to protect “each of them against Invasion; and on Application of the Legislature, or of the Executive against domestic violence.”12 The South thus had well supported constitutional grounds to claim, which should be guaranteed by the federal government, that the state domestic institution of slavery was one of their rights as sovereign individual states.

John Caldwell Calhoun is known for his dedication to the institution of slavery and his defense of States’ Rights. He graduated from Yale in 1804, and was regarded an excellent student, but also a student with different views on the principle of federalism.13 Calhoun had conflicting opinions with his teachers and “he was one of the very few... who had the firmness openly to avow and maintain the opinions of the Republican party, and, among others, that the people were the only legitimate source of political power.”14 John Calhoun thus developed strong ideas concerning sovereignty and federalism during his youth. The president of Yale at the time thought that Calhoun “had enough talent to be President of the United States, which he accompanied by a prediction that he [Calhoun] would one day attain that station.”15 During his life Calhoun held various positions in public government, serving as Representative, Senator, Secretary of War, and Vice President. During his vice-presidency Calhoun fueled the debate over States’ Rights with sharp arguments and opinions, but he was not deliberately organizing a secession crisis. In his Rock Hill Address of July 1831, Calhoun first publicly declared he was in favor of nullification to protect the interests of the states. However, in a response to the address he wrote: “I can scarcely dare hope that my friends to the North will sustain me in the positions I have taken, tho’ I have the most thorough conviction that the doctrines I advanced, must ultimately become those of the Union; or that it

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14 Republican here means Democratic Republican according to the first party system, not to be confused with Abraham Lincoln’s Republican Party of the second half of the nineteenth century; Calhoun, *Life of John C. Calhoun*, 6.
He was convinced that if the South kept insisting on her rights the people of the Union would eventually join them in defending the principles of the Constitution, because otherwise the Union would break. In 1832, Calhoun became senator for South Carolina instead of staying in the federal government, because he could no longer reconcile his beliefs with those of the federal government. He became the leader in the Senate on issues with concern to state sovereignty and the institution of slavery until the end of his life.

With agitation between the North and South rising during the late 1820’s, Vice-President Calhoun, established himself as the defender of the doctrine of law nullification. Until this moment he did not spoke of drastic solutions as nullification, but when the debate was intensified he chose to defend state sovereignty. He thought that states have the right to declare a law void when this law was in their eyes unconstitutional. Only through nullification could the rights of the individual states be protected in the eyes of Calhoun. Nullification initially became an acute political issue because of the Tariff Laws of 1828 and 1832, but it should be place into a broader perspective of constitutional interpretation. Calhoun thought the Tariff Laws to be unconstitutional, because the federal government should not interfere with state institutions, and therefore he justified nullification. Calhoun claimed that nullification by states of federal laws was constitutional on the basis of what framers Thomas Jefferson and James Madison had written in the Virginia and Kentucky Resolutions. He saw “state interposition or Veto, the high remedy pointed out in the Virginia and Kentucky Resolutions as the proper one, after all others had failed, against oppressive and dangerous

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18 Hatfield, *Vice Presidents of the United States*, 20.
19 Andrew Jackson, *Proclamation of Andrew Jackson, President of the United States, to the People of South Carolina*, December 10, 1832 (Harrisburg: Singerly & Myers, 1864), 3.
acts of the general government, in palpable violation of the Constitution.” In the eyes of Jefferson and Madison a law could be nullified when constitutional rights are violated. Calhoun’s defense of States’ Rights is based on ideas of those Founding Fathers, who saw danger in large federal government. Thomas Jefferson, in the Kentucky Resolutions, and James Madison, in both the Federalist Papers as well as in the Virginia Resolutions, set the outlines for the theory of nullification. Vice-President Calhoun even got into conflict with President Andrew Jackson over nullification and the conflict eventually led to the break between Jackson and Calhoun. Southerner Andrew Jackson did recognize state sovereignty, but he did not think states had power to nullify laws. Calhoun resigned from the vice-presidency was elected in the Senate for South Carolina to be able to defend States’ Rights.

Thomas Jefferson’s Kentucky Resolutions created a theoretical framework for nullification and thereby gave Calhoun the opportunity to defend the constitutionality of the states’ right of nullification. He was afraid that the federal government was taking up too much power and that in this way state and individual rights were threatened. Therefore, Jefferson argued that the Constitution should be seen as a compact between states and that “whenever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force.” Jefferson argues that when a law is against the Constitution and no modes of compromise are found, a state can decide for itself to declare it null and void. He further expands his point by stating “that, as in all other cases of compact among powers having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measures of redress.” It is essential to recognize that, in 1798, the Supreme Court case Marbury v. Madison had not yet taken place and therefore the Supreme Court had no definite power of constitutional interpretation. The common judge

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20 Calhoun, Life of John C. Calhoun, 35.
22 Ibid.
of which Jefferson speaks was thus not yet fully established until Chief Justice Marshall
named the judiciary the branch of government that should decide.\footnote{L. Eptein and T.G. Walker, Institutional Powers and Constraints: Constitutional Law for Changing America, 7th ed. (Washington: CQ Press, 2011), 70-71.} The essential point that
can be extracted from the Kentucky Resolutions is the fact that Founding Father Jefferson
firmly believed in state sovereignty and that he acknowledges a right to nullify laws they
deem unconstitutional. The influence of the ideas of state sovereignty as outlined by Jefferson
is clearly visible in Calhoun’s speeches and works on States’ Rights.

James Madison and his writings offer an even stronger constitutional argument for
nullification and thereby support Calhoun’s political thought. In \textit{Federalist} 46, Madison
argues in favor of a federal Constitution, but he does not fail to note “that the powers
proposed to be lodged in the federal government are as little formidable to those reserved to
the individual states, as they are indispensably necessary to accomplish the purposes of the
Union.”\footnote{Hamilton, et al. American State Papers, The Federalist and J.S. Mill, 153.} From \textit{Federalist} 46 it becomes clear that Madison did envision a union, but it
would be a union between the states through compact. He addresses the topic of States’
Rights again in the Virginia Resolutions in which he uses even stronger language. Madison
argues that the States “have the right and are in duty bound” to nullify laws when they are
unconstitutional and must do so in order to arrest “the progress of evil.”\footnote{James Madison, “Virginia Resolution – Alien and Sedition Acts,” (December 1798),
http://avalon.law.yale.edu/18th_century/virres.asp (accessed April 6, 2012).} The Founding
Father from Virginia saw the Constitution in ways just like Calhoun would see it a few
decades later. He saw the Constitution as a compact between the states “limited by the plain
sense and intention of the instrument constituting the compact.”\footnote{Ibid.} Any law passed, which is
not legitimized by the enumerated powers in the Constitution, is therefore an invalid display
of power. Madison thought that interposition or nullification was an absolute necessity to
protect the rights and liberties of the states and the people.\textsuperscript{27} Calhoun also thought sovereignty was principally found with the people of the states. The states were created by individuals that were united, whereas the federal government was created by compact between the states. Thus the true power in the compact is not with all the people of all the states directly, but rather with all the people of all the states through the states’ representatives.\textsuperscript{28} Calhoun based his ideas, about federal and state relations, on the theory presented by both Madison and Jefferson.

President Andrew Jackson responded to positions taken by his Vice-President Calhoun, but although he presents a convincing argument against nullification, he fails to address the framer’s intent. In his \textit{Proclamation to the People of South Carolina} (1832) Jackson directly addresses an ordinance passed by South Carolina which allowed nullification. He argues that the right of nullification that South Carolina claims is not guaranteed by the Constitution and that to allow nullification would be the same as giving “the power of resisting all [federal] laws.”\textsuperscript{29} Jackson compares nullification to the situation under the Articles of Confederation, in which federal power was too weak to preserve the confederation. When there is no enforcement of the law through the executive there is no basis for a Union that can endure.\textsuperscript{30} In his view, if nullification would become common practice it would destroy the Union, because every state could declare laws void. The President’s fear may be reasonable, but the important fact to notice is that only laws against the Constitution can be nullified and this does not strip the federal government from any power enumerated in the Constitution. He expresses his fear for a weak executive when nullification becomes legitimized, but it was the Constitutional Convention that deliberately

\textsuperscript{27} Madison, "Virginia Resolution."
\textsuperscript{29} Jackson, \textit{Proclamation of Andrew Jackson, 1832}, 4.
\textsuperscript{30} Ibid., 5.
weakened the power of executives within the system of government.  

Jackson also states that nullification or secession is an absolute unconstitutional expression of discontent. He argues that since “the people of the United States formed the Constitution,” the states cannot nullify or secede, because “the Constitution of the United States, then, forms a government, not a league.” However, the states went to the Convention as sovereign states and they carefully crafted the Constitution in such a way that individual states are protected from aggrandizement of federal government. Calhoun’s point that the Constitution did encompass a compact between the states is supported by Kentucky and Virginia Resolutions by Jefferson and Madison and the Constitutional Convention debates. The Constitution was not a document of unity, but rather a document of compromise. The compromise was that there was a balance of power between the individual states and the federal government. The Constitution enumerated the powers of the federal government, and all other powers were reserved to the states. In case of severe unconstitutional infringement of rights, the sole judges of the compact have to be the individual states, since they are the parties that entered the compact.

After his break with Jackson, and when the debate over slavery intensified, Senator Calhoun’s language also became firmer. First he was merely in support of nullification to protect states’ rights, but from the 1830’s onwards he did not exclude secession any longer as the ultimate remedy. Calhoun’s most eloquent addresses to the Senate are his resolutions that praise the institution of slavery and denounce the aggression of abolitionists. He submitted six resolutions to the United States Senate in order to protect the rights of the states and thereby the liberty of the people. Calhoun saw the compact of the Constitution threatened by further encroachment on the institution of slavery by the Missouri Compromise of 1820 and the

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abolitionists. The first of his resolutions states that all individual states which joined the compact are entitled to protect themselves from any domestic or foreign danger. In the second and also the third resolutions Calhoun explicitly forbids the federal government to interfere with domestic institutions of the states. Any law threatening these state institutions, of which slavery is one, is “an assumption of superiority not warranted by the Constitution.” Calhoun even says that meddling with these rights reserved to the states under the Constitution would threaten the continuation of the Union. The third of the resolutions resembles much of what would later become Calhoun’s magnum opus *A Disquisition on Government* (1851). Calhoun argues that minorities within the union should be protected from the will of the majority in order to protect the liberties and rights guaranteed under the Constitution. This last view is not explicitly guaranteed under the Constitution, but it is supported by arguments made by James Madison.

In the other three resolutions, Calhoun defends slavery on constitutional grounds. Calhoun addresses the Senate with the message that it should honor its constitutional pledge to respect that same Constitution. The Union should not interfere with what he calls, states’ “domestic institutions, inherited from their ancestors, and existing at the adoption of the Constitution.” Calhoun argues that the fact that slavery was present at the time of the adoption of the Constitution is evidence that it was taken into account in the forming of government. Calhoun calls the domestic institution of slavery an “essential element in the distribution of its [the Constitution’s] powers among the states.” Calhoun’s claim is supported by the fact that slavery was one part of the great compromise of the Constitution.

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33 *The Missouri Compromise of 1820* prohibited slavery from the Louisiana Territory above the parallel 30°30’ north, except for the State of Missouri, which could enter as a slave state.
35 Ibid., 63.
38 Ibid., 63.
Calhoun does not want to make concessions on slavery, because the protection of slavery as a state institution is already a concession within the compromise established at the Constitutional Convention. The senator from South Carolina furthermore argued that trying to meddle with state institutions like slavery was the same as breaking the constitutional pledge of non-interference. The sixth of his resolutions demanded the opening of the West for slavery without restrictions, because both the North and South were to be treated equal under the Constitution. All but the last resolution were accepted by the Senate by a simple majority, which clearly shows that even in the 1850’s the Senate acknowledged the southern rights.39 His claims are legitimized by the fact that the Constitution was created by both slaveholding states as well as non-slaveholding states, and thus the fact that interests of both sides were reconciled in the document. Shortly after ratification, debates also emerged over the influence that slave states had, because of the three-fifths clause in the Constitution, which said that a slave was represented for three-fifths of a free man.40 Even states in the north considered secession during that time, when their southern countrymen had a lot of influence.41 This all reveals evidence that the Constitution was a document of concessions and agreements. The First Congress again declared that the federal government had no authority whatsoever “to interfere in the emancipation of slaves, or in the treatment of them within any of the States; it remaining with the several States alone to provide any regulations therein.”42 Many Northerners and Southerners saw the non-interference policy on the institution of slavery legitimized by the Constitution and as a plain result of the consensus reached at the constitutional convention.43

39 Calhoun, The Life of John C. Calhoun, 63-64.
The notion that should be taken from the foregoing is that, from the time of the adoption of the Constitution until the 1830’s, the Southern position of non-interference on the issue of slavery was broadly accepted. Calhoun opposed the Compromise of 1850, as designed by Henry Clay and Stephen A. Douglas, and feared the consequences of it for the equilibrium of power in the Union. Calhoun wrote one last speech against the compromise only shortly before his death. The senator was too weak to stand up and speak, because of tuberculosis. He tried to make the Senate acknowledge that rights of the states were violated and that these rights should be maintained under the Constitution. He pled for strict application of the Constitution to the situation, because there is “no compromise to offer but the Constitution, and no concessions or surrender to make.”

Calhoun based his ideas on works by Thomas Jefferson, James Madison and above all the text of the Constitution. Throughout his life he defended the rights of the states as the Constitution gave him the opportunity. The claims that he made may not be considered morally right in modern times, but it is clear that from a constitutional perspective he had presented a convincing argument. Just before he died Calhoun put it in words that grasp the seriousness of the situation: “The agitation of the slavery question has snapped some of the most important [chords], and has greatly weakened all others.”

By the mid 1850’s sectional debate over the issue of slavery had come to such a point that it was almost impossible for the United States Supreme Court not to take up a case concerning the institution of slavery and rule. Since the Missouri Compromise of 1820, the slavery issue had not been properly addressed and neither the Compromise of 1850 nor the

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44 The Compromise of 1850 admitted California as a free state, Texas as a slave state, made slavery possible in the New Mexico and Utah territories, prohibited slave trade in District Columbia and created a stronger Fugitive Slave Act.
45 John C. Calhoun, Address of the Honorable John C. Calhoun, in the Senate of the United States, on the subject of Slavery (Washington, March 4, 1850), 12.
46 Ibid., 6.
Kansas-Nebraska Act of 1854 resolved the deepening crisis. Pressure on the judges of the Supreme Court was rising, because the nation’s politicians did not seem to be able to find a solution to the problems between the North and South. As a response to the Kansas-Nebraska Act in Kansas both proponents and opponents of slavery came to the territory in order to seize it by popular sovereignty for their side. The result was what became known as Bleeding Kansas, a civil war of murder and slaughter that lasted for years. Earlier in 1851 the Supreme Court had to decide over the role of the federal government with respect to slavery in the territories. In *Strader v. Graham*, Chief Justice Taney ruled that even when slaves have been in a free state that did not make them free, but he did extend his opinion as far as he would do in the Dred Scott case. Taney stated that “the appropriate legal authority for the status of the slaves resided in the individual states.” The Supreme Court won support from various political factions and was urged to decide definitely on the issue of slavery in the territories. Northern Whig Henry Clay even claimed that the slavery question could only be decided “by the only competent authority, that can definitely settle it forever, the authority of the Supreme Court of the United States.” As the most important member of the Supreme Court, Chief Justice Roger B. Taney had strict convictions with respect to interpretation of the Constitution. Taney had freed his own slaves and was of the conviction that slavery should eventually perish from the world, but being a strict interpreter of the Constitution, he also believed that the institution of slavery was protected by the document. Eventually, Dred Scott would become the case in which the Supreme Court would finally rule on the issue of

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47 *The Kansas-Nebraska Act of 1854* effectively withdrew the Missouri Compromise giving the people of the territories the power to decide if they would enter either as a slave or as a free state. It was based on Stephen A. Douglas’ principle of popular sovereignty.
slavery in a broad sense. The outcome shaped the course of the nation in a way that is to be expected when Taney’s interpretation of constitutional law is taken into account.

The Dred Scott case had been on the Supreme Court’s agenda for more than a year when the judges started to hear oral argument on February 11, 1856. “Bleeding Kansas” was at the height of its controversy and President Franklin Pierce had given a strong opinion on the conflict in his annual address to Congress. The President called upon the Northern States to cease their criticism of Southern institutions like slavery. Furthermore, Pierce deemed the Missouri Compromise to be “null from the beginning” thereby giving “a presidential opinion on the central constitutional issue of the Dred Scott case.” The Supreme Court found itself in a precarious situation with a heavily divided country that was pressuring them to settle the constitutional interpretation controversy. The Supreme Court was composed of nine relatively moderate judges from both the South as well as the North. The judges distinguished themselves, because they dared to step over controversial issues and decided on constitutional interpretation rather than on the basis of their heritage and ancestry. Justices Campbell and Wayne, both from the South, defended the ban on the importation of slaves and Northerners Curtis, Grier and Nelson defended acts to recapture fugitive slaves. The Supreme Court thus cannot be viewed as an extremely radical institution at that time. In a climate in which the country was heavily divided, the most politically extremist judges were not appointed to the Supreme Court. In the 1840’s there were three candidate judges who were rejected by the Senate because of doubts on the candidate’s political views or partisan politics.

Chief Justice Taney wrote the majority opinion, the official opinion of the Court, and his words would only further deepen the impending crisis. Although Taney wrote the majority

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53 Fehrenbacher, The Dred Scott Case, 194.
54 James D. Richardson, ed., Messages and Papers of the Presidents (Washington D.C., 1913), IV, 2877-2883; Fehrenbacher, The Dred Scott Case, 195.
opinion for the seven to two majority vote, all the judges wrote individual dissenting and concurring opinions. Dred Scott was a slave born in Virginia, but he moved with his owner to St. Louis, Missouri in 1827. After his owner died in 1833 he was sold again and was taken into the free state of Illinois and into the Wisconsin territory. He even married another slave during his stay in the Wisconsin territory and had two daughters. When Scott returned to Missouri his owner died shortly after and he was not of much use to the widow. In 1846 a son of Scott’s original owner filed suit in the Missouri state courts in order to gain Scott’s freedom. At first, the lower courts agreed with Scott’s petition that he had lived on free soil and that he had become a free man because of this fact. The Missouri Supreme Court struck the decision of the lower courts down, but by selling Scott to John Sanford in New York the issue had become a federal case “under diversity of citizenship jurisdiction.”

Since the case became an interstate affair, Scott had the opportunity to take his case to the United States Supreme Court. In the opinion of the Court, Chief Justice Taney decided against Scott and denied him any kind of citizenship. Taney writes in his opinion that the African race cannot be “intended to be included, under the word ‘citizens’ in the Constitution” The Chief Justice notes that at the time the Constitution was created, the African race was “a subordinate and inferior class of beings…whether emancipated or not.” He puts much emphasis on the question of the framers’ original intent. Throughout his opinion the Chief of the Supreme Court refers back to the days of the framing of the Constitution. Taney explains that a state may always give privileges or citizenship to a person, but that does not imply that this person is then also a citizen of the United States. He writes a narrative on the history of the African race in the colonies and the United States to show, what Mark Graber named, “constitutional evil” was in place during the time of the Declaration of

58 Ibid., 340; Note that Taney therefore also rejected Scott’s standing to file a suit in federal courts.
59 Ibid., 340.
Independence and the Constitution. Taney acknowledges that it is hard to realize and accept that the authors of such enlightened and civilized documents had still created an inferior race of people. However, he stresses that “it is not the province of the court to decide upon the justice or injustice, the policy or impolicy of these laws.” The majority opinion calls for a strict interpretation of the Constitution even if this would lead to laws or government that would be considered immoral.

The pivotal point, then, is how Taney defends the constitutionality of his argument. Taney uses two specific clauses in the Constitution that support his claim that the framers did not consider African Americans as citizens. The first is found in Article I Section IX of the original Constitution which says that the right of States to import any person shall not be denied up until the year 1808. Taney concludes from this section that persons are to be treated as property in certain cases and the African American race fell most certainly in this category. The Chief Justice notes that during the time of the framers a slave “was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.” This assumption may not be completely true for the Northern states, since they had no large slave trade at any time, but it was most definitely true for all the southern states. The Virginia Declaration of Rights is famous for the passage that “all men are by nature created equally free and independent,” but as Virginia had a stake in slavery the text was followed by a notion that persons of color were explicitly excluded from this passage on equality. All these arguments show that at the time of the framing of the Constitution slavery was not by all the framers considered to be an unconstitutional institution. The Second Continental Congress even took out passages which denounce slavery from Thomas

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Jefferson’s Declaration of Independence. When Taney’s opinion in the Dred Scott case is taken and compared to both the actions of the Second Continental Congress as well as the people of Virginia, it is clear that the Chief Justice had a well supported argument. Today we may hold the Declaration of Independence as a document that should protect any persons’ “unalienable rights,” but at the time women were not seen as equals to men and so were people of color not seen as equals of white Americans.

Taney had made his case for the constitutional inferiority of the African American race and the fact that they were seen as property. Once African American slaves are to be considered property they are also protected under the property clauses of the Constitution. Dred Scott therefore was in the eyes of the Chief Justice not a citizen under the United States Constitution and therefore had no right to sue in a Federal Court. The case could have been closed with this statement, but Taney pressured by the difficult political situation took an even broader view. The Missouri Compromise played pivotal role in the debate over the expansion of slavery to the West. It set parameters for the expansion of both the North and South, but over time it became more and more criticized by the South. Since it was under heavy criticism, the compromise was repealed by Congress in 1854 and replaced by a statement that declared Congress’ neutrality on the expansion of slavery. Even after it was repealed the Missouri Compromise was declared unconstitutional in the opinion of the Court, and the Congress found to have taken too much discretionary power in passing it. The unconstitutionality of the Missouri Compromise stems from the fact that Congress has no right to legislate in the territories acquired by the United States. Taney writes that “the powers of the Government and the rights and privileges of the citizens are regulated and plainly defined by the Constitution itself,” and any other legislation not explicitly mentioned in the

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66 Hamilton et al., American State Papers, The Federalist and J.S. Mill, 1; Women had no voting rights until ratification of the nineteenth Amendment to the United States constitution in 1920.
Constitution passed to regulate a territory is therefore unconstitutional. The regulation of slavery in the Missouri Compromise thus is unconstitutional, because it infringes on the property rights of the citizens protected under the Constitution.

There are two major counter arguments against Taney’s reasoning. First, Congress has been given the right to regulate the territories of the United States under Article Four of the Constitution. Taney in his opinion acknowledges the right of Congress to regulate the territories, but he stresses that this is mere regulation of the strict provisions of the Constitution and does not extend to further legislation. Taney uses the example of the First and Second Amendments, found in the Bill of Rights, to show that Congress should guard these constitutional provisions in the territories, but could by no means use any other discretionray power to legislate. A ban on slavery by Congress would deprive a citizen of property and liberty, and would rather violate Congress’ obligation to protect these rights.

Second, the framers did pass the Northwest Ordinance that forbade slavery anywhere North and West of the Ohio River and East of the Mississippi River. However, there is no specific regulation made for any new acquired territory of the United States and at the time the framers did not anticipate on expansion. Thomas Jefferson even admitted that “the Constitution has made no provision for our holding foreign territory” and he declared that his purchase of the Louisiana Territory was “an act beyond the Constitution” and should have been ratified by a constitutional amendment. Until the decision of the Supreme Court in the Dred Scott case there was no specific doctrine with concern to acquired territories. The Northwest Ordinance in retrospect should be seen as unconstitutional as well, because it falls in the same category as the Missouri Compromise. It bans slavery in a territory of the United

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70 Epstein, Institutional Powers and Constraints, 342-343.
71 Graber, The Problem of Constitutional Evil, 73.
States whereas Congress has no authority to do so under the Constitution except by a constitutional amendment. The framers did not agree on any sort of constitutional rule for acquired territory and therefore Roger Taney did what he was constitutionally obliged to do and that was to look strictly at the text of the Constitution.\textsuperscript{73} Since the text did not give Congress the right to legislate on slavery in the territories the Missouri Compromise was in fact unconstitutional.

President Abraham Lincoln responded to the Supreme Court’s decision with strong words that would denounce the decision in \textit{Scott v. Sandford} and carefully question the integrity of the Court. Lincoln the “Great Democrat” argued in his First Inaugural Address that the people should not let their sovereignty be overtaken by such a small group of people, because otherwise “the people will have ceased to be their own rulers.”\textsuperscript{74} Lincoln created a threat of a Court, which would display so much power that it would overtake republican government. However, this is speculation and an assumption, because it was not the Supreme Court that was deliberately displaying power in order to be able to decide on the issue. As mentioned before, notable politicians like Henry Clay had urged the Supreme Court to decide on the question of the institution of slavery. Lincoln also responded directly to the Dred Scott decision on June 26, 1857 in Springfield Illinois. He again acknowledged the constitutional position of the Supreme Court and even says that denying her decisions would be equal to revolution. Lincoln started arguing that the court’s interpretation of historical fact was erroneous and he referred to the dissenting opinion by Associate Justice Curtis. In this dissenting opinion Curtis refers to the fact that in five of the initial thirteen states African Americans had the vote in proportion to their numbers when the Constitution was ratified. Lincoln then carefully cited a small section of Taney’s opinion in which the Chief Justice says

\textsuperscript{73} Graber, \textit{The Problem of Constitutional Evil}, 74.
that at the time of the adoption of the Constitution African Americans had no rights. It is seems to be contradictory that some states gave the vote to African Americans, but that the Chief Justice argues they had no rights at all.

Although brilliantly written by Lincoln, it is a view that is too narrow to fully grasp the political situation at the time. In his response to Scott v. Sandford, it seems that Lincoln thinks of the Constitution as a document that was established by a unified body of men, but in fact the Constitution was a document of compromise. Representatives of the thirteen states had compromised on various issues once the Constitution was sent to ratifying convention in the states. Charles Cotesworth Pickney told the South Carolina ratifying convention that “we have a security that the general government can never emancipate them…for no such authority is vested.” James Madison said, in a letter to Thomas Jefferson, that the position of South Carolina and Georgia was not going to change on the subject of slavery. The assumption that they all agreed on all the clauses in the Constitution is thus not valid. Lincoln rightfully claimed that in various states African Americans had voting rights, but Taney in his opinion never denied individual states the right to give privileges to African Americans. Lincoln, “the Great Democrat” was right when he said that the Supreme Court is a small group of people with great power, and “the Great Emancipator” was right when he said that slavery is morally wrong. However, these two arguments do not hold ground when put into constitutional perspective of that period in time. Slavery was a part of the compromise of the Constitution and the Supreme Court was appointed to decide on the constitutionality of laws.

A House Divided, Lincoln’s most famous speech, only matched by the Gettysburg Address, is also a firm attack of the Supreme Court and especially the integrity of Chief

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Justice Taney as well as Senator Douglas and Presidents Pierce and Buchanan. Lincoln argued that the current situation in the Union cannot last, because “a house divided against itself cannot stand. I believe this government cannot endure, permanently half slave and half free.” The quality of the rhetoric is again high and the eventual outcome of the Civil War makes it a true statement, but there are some assumptions or arguments that Lincoln made that are to say unconstitutional. As mentioned before, the carefully negotiated balance between the first thirteen states was based on consensus and the Constitution created was a document of negotiation and concessions. Therefore Senator Douglas’ claim that Washington, Madison and Jefferson did envision an enduring half slave and half free Union is more likely to be valid. All three of them were no fanatical proponents of slavery and on some occasions denounced it, but they all participated as presidents in the great compromise that is called the United States Constitution or the Union.

In the second part of the House Divided speech, Lincoln charged Chief Justice Taney with participating in a conspiracy. Lincoln feared the Slave Power, influential and rich proslavery politicians from the South that were suspected of plotting a plan to nationalize slavery. This charge of conspiracy had no standing in court, and was used for political gain, but it signifies Lincoln’s position towards the Supreme Court. He did not truly recognize the decision in the Dred Scott decision and the reason he had was that the Court should have followed the legislative and executive branches of government. He warned his audience that “we shall lie down pleasantly dreaming that the people of Missouri are on the verge of making their State free; and we shall awake to the reality, instead, that the Supreme Court has

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79 Simon, Lincoln and Chief Justice Taney, 143.
80 Abraham Lincoln, The Gettysburg Address: Four Score and Seven Years ago our Fathers brought forth on this Continent, a New Nation, conceived in Liberty, and dedicated to the Proposition that All Men are Created Equal (London: Penguin Books, 2009), 59. (Transcript of the House Divided Speech).
81 Simon, Lincoln and Chief Justice Taney, 149.
82 Ibid., 143.
83 Ibid., 143-144.
made Illinois a slave state." This statement shows that Lincoln thought the Taney Court displayed powers beyond her constitutional authority, thereby denying the people the power to choose their rulers and laws. However, in *Marbury v. Madison*, Chief Justice John Marshall declared that the Constitution is “the fundamental and paramount law of the nation,” and that “it is emphatically the province and duty of the judicial department to say what the law is.”

Marshall created the outlines of constitutional law and gave the judicial branch the power to decide on constitutional disputes. He called this power “the very essence of judicial duty,” thereby giving the Supreme Court power only overridden by constitutional amendment. Chief Justice Roger Taney in *Scott v. Sandford* merely used the power vested in the Supreme Court by John Marshall more than fifty years before.

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85 Epstein, *Institutional Powers and Constraints*, 70. (Transcript of *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803)).
86 Ibid., 71.
John C. Calhoun and Roger B. Taney both tried to defend the plain text of the Constitution within the system of government. Both men did not explicitly want to dissolve the Union, but they acknowledged a right of nullification or secession once the North did not any longer respect the domestic institutions of states, safeguarded by the Constitution. Slavery in the twenty-first century is considered morally wrong in most parts of the world, and this may also have been true for parts of the American North in the antebellum era. However, the framers did acknowledge the right of Southerners when they wanted to include slavery in the Constitution. Through a process of debate and concession, a careful equilibrium was reached and this made slavery part of the Union. One of the results of the compromise was that States were sovereign over their own domestic institutions under the provisions of the Constitution. The federal government only got her powers from and was limited by the enumerated powers in the Constitution. The Tenth Amendment in the Bill of Rights even further acknowledged this by saying that “powers not delegated by to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Chief Justice John Marshall even further acknowledged this in *Marbury v. Madison* by saying that the Constitution is the ultimate law of the Union. He demanded compliance with the Constitution from both the federal government as well as the States. Neither the legislative branch of government, nor the executive can make any law or provision that supersedes the Constitution. Calhoun had a strong constitutional argument when he demanded a stop to the agitation against the domestic institutions in the South and any legislation made on the point of slavery in the states. He wanted strict constitutional interpretation and asked for “justice, simple justice.”

Calhoun’s justice was a call to the North, asking them to meet their constitutional obligations. Slavery was the pivotal point and the direct reason for Civil War.

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88 Calhoun, *Address in the Senate on the subject of Slavery*, 12.
but at the heart of the conflict stood the Constitution and how it should be interpreted. The cause for the Civil War thus was not only slavery, but the Constitution in its broadest sense.

Roger B. Taney decided in the *Scott v. Sandford* in favor of States’ Rights and was despised by men like Abraham Lincoln for it. However, the Chief Justice demanded strict constitutional interpretation with concern to the slavery issue. The Supreme Court had been under pressure by politicians for years and had been asked to decide on the case, even by men like Henry Clay. The arguments used in the majority opinion in the case are legitimized by the text of the Constitution and the framers’ original intent. Perhaps some of the framers were not in favor of slavery, but most certainly the institution of slavery had found its way into the text of the Constitution. When Chief Justice Roger Taney and his court decided on the case, they did not try to break up the Union, but rather tried to preserve it. The Court was high in esteem with a lot of politicians from the north and south, was not very radical and so there was good reason to presume that they could have settled the issue of the institution of slavery. The course of history shows that the case did not have the effect that many had hoped and the United States eventually found itself in a Civil War. The South lost the constitutional disagreement on the battlefield, whereas it could have been settled in Congress or the Supreme Court. The consensus was lost in the nineteenth century, and the differences could not any longer be reconciled in the Constitution. However, it was the North that broke the constitutional compromise, and not the South, when it comes to the protection of domestic institutions, the limits of federal government and the rights of the states. It proved to be a false prediction when, after the Dred Scott case, Chief Justice Roger Taney said that he had “an abiding confidence that this act of my judicial life will stand the test of time and the sober judgment of the country.”

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