

Charles Sumner: Conscience of a Nation

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[00:00:03.1] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. Zaakir Tameez is the author of the superb new book, *Charles Sumner: Conscience of a Nation*. It's a deeply researched biography of Senator Charles Sumner, the constitutional visionary who helped to write the post Civil War Constitution and give birth to modern civil rights law. Zaakir joins me now to discuss Charles Sumner's life and constitutional legacy. Zaakir Tameez is an emerging scholar of antitrust and constitutional law. A graduate of Yale Law School and the University of Virginia, he's published award winning scholarship and co authored amicus briefs before Texas and the US Supreme Court. He's a Fulbright Scholar and a Humanity in Action Senior Fellow from Houston, Texas. The book is out on June 3. Zaakir, it is wonderful to welcome you to We the People.

[00:01:11.9] Zaakir Tameez: Jeff, it is wonderful to be here. Thank you so much for having me.

[00:01:16.1] Jeffrey Rosen: I'm so excited to discuss the book. I read it in galleys. I heard about it from our teacher, Akhil Amar. Because you wrote this book, amazingly, as a third year student at Yale Law School. Tell us more about what led you to write this book and to resurrect the central story of Charles Sumner.

[00:01:37.0] Zaakir Tameez: The book began in Akhil Amar's class. I was looking at the brief that Thurgood Marshall and the NAACP filed in *Brown v. Board*, and what struck me about this brief is that Marshall cites Charles Sumner by name not once, not twice, but more than 40 times. Because Charles Sumner, more than 100 years earlier, before Brown, before the Freedom Riders, before Rosa Parks and Thurgood Marshall and all that, collaborated with a black attorney named Robert Morris and together they tried to integrate the schools of Boston in a case at the Massachusetts Supreme Court. And this blew my mind because of course I knew about Charles Sumner. Like all of us, as a man who had been caned on the Senate floor, as a prominent U.S. Senator, I did not know about his struggle to advance civil rights and racial equality prior to the Civil War and his collaboration on the first interracial legal team ever.

[00:02:41.8] Jeffrey Rosen: It's remarkable. And I read it with such excitement. Because you allow Sumner to speak in his own words. And by resurrecting the precision of his legal, political and moral arguments from a history where they were forgotten by his leading biographers,

including the famous Harvard scholar David Donald and others, you put Sumner front and center in Reconstruction in a way that he deserves to be for more than a century. Tell us about his upbringing. What was it about his growing up in Boston, including his experience growing up in black Boston, that shaped his empathy toward African Americans?

[00:03:24.8] Zaakir Tameez: He grew up in a series of contradictions. So the first contradiction is that his father and his grandfather before him went to Harvard. So he's a third generation Harvard child. At the same time, he grew up very poor because his father is a bastard child of a Revolutionary War hero. His father went to Harvard but did not have a successful career, didn't make much money. And so he's growing up with this aristocratic education, but not without the money and privilege that many of his classmates had. Simultaneously as you alluded to, he grows up in an ethnic enclave of Boston that had a large African American population. He has Black neighbors. He sees Black school children every day. His father treats African Americans with deep respect. And so from a young age, he is immersed in this environment that has Black writers, such as David Walker, who wrote the famous abolitionist tract. He is near a Black Masonic lodge in a Black church. But as he grows up, goes to Harvard and becomes a protege of Joseph Story, this titan of American law. He becomes a kind of young aristocrat. He is immersed in the conservative Brahmin elite of Boston. He is having a successful career as a corporate lawyer at first, yet he feels this guilt because his family still lives in this impoverished black neighborhood of Boston while he's having this successful career. And I think these contradictions and this guilt is what motivated him to get immersed in the cause of civil rights and abolition and to use his legal training towards fighting for the common good.

[00:05:18.8] Jeffrey Rosen: Remarkable. Tell us more about his intellectual influences. What did he learn from Justice Story at Harvard Law School? You describe Sumner as a constitutional nationalist in the tradition of Story and Chief Justice John Marshall, who he apparently he dined with with Story many times. And he also imbibed the constitutional nationalism of John Quincy Adams. What was this nationalist vision and how did Sumner imbibe it?

[00:05:46.4] Zaakir Tameez: That is right. Charles Sumner, as a young law student, is learning from Joseph Story. Story, among other things, helped to create the modern cold call, where he calls on students at random to speak about what they were reading. Sumner is one of the first to experience the cold call. And as he's getting his cold calls from Joseph Story, Story is writing the commentaries on the Constitution. So Sumner is engaging with Story while these great treatises are being written. He's often at Story's home. Joseph Story's son once said that Sumner was like a second son to his father. So he becomes very close to Joseph Story, and Story helps to train him, thinking that Sumner might succeed him as the Dane professor of Law at Harvard Law School. Story also relies on him for checking citations for helping edit some of his volumes. And Sumner falls in love both with Story the man, but also Story's constitutional vision. So he describes the *Commentaries* as a light law book and as one of his favorite books of all time, which is really striking because for any of us who have read it, it's a good book but I wouldn't call it what Sumner Said, which is a "light and entertaining book."

[00:07:03.3] Zaakir Tameez: Now, to get to the substance of what you're saying. Story and John Marshall both championed constitutional nationalism. They championed a strong national government, and Sumner is brought up in this tradition. It's not so much we the states, it's we the

people. That we as individual citizens have a direct relationship with the national government. And this vision of America is something that Sumner is imbibed with from a young age, both at Harvard and later he goes to Washington for a couple months, and John Marshall would invite him to the Supreme Court boarding house where he would enjoy dinners with Marshall and the other justices of the Court.

[00:07:42.1] Jeffrey Rosen: Amazing. The famous boarding house where Marshall would discuss cases over hogshead of madeira and the Justices would get buzzed and all the cases were unanimous. Tell us more about Sumner's relationship with John Quincy Adams and Adams's constitutional nationalism and its relationship to abolitionism. I just keep returning to Adams's speech on the Jubilee of the Constitution. He notes that the first sentence of the Declaration of Independence talks about one people, and because it was the Declaration that created one people as sovereign, the Articles of Confederation diverged from that vision in talking about state sovereignty and the Constitution reinforced the sovereignty of we the people of the United States. That vision was crucial for Webster, for Lincoln, in resisting secession and nullification. Jackson ultimately endorsed it. How did it affect Sumner and how did it relate to Quincy Adams and Sumner's abolitionism?

[00:08:49.0] Zaakir Tameez: John Quincy Adams met Sumner while he was in his 30s, and Adams is an older man at this point and becomes another mentor figure to Charles Sumner, particularly when Sumner becomes an abolitionist. Now, he's controversial, he's on the fringes of society. Joseph Story has passed away. And in this moment, where Sumner is looking for a new mentor, Adams comes into the picture. What Adams teaches Sumner is that the Declaration of Independence, which of course Quincy Adams' father helped to write, wasn't just an empty metaphor when it said that all men are created equal. Adams considered this a promissory note. This was America's baptismal vow that America still had to fulfill. Sumner adopts this lesson from Adams, and he also begins to consider, like Adams before him, how to reconcile a Constitution that protected slavery in the states with a declaration that said all men are created equal. Adams famously introduced an amendment to the Constitution or at least introduced the idea of an amendment to the Constitution to abolish slavery. And Sumner takes this on as well. So as early as the 1840s, long before many other abolitionists are even considering this as a possibility, Sumner is publicly advocating for an abolition amendment, taking that lesson and taking that idea from his teacher, John Quincy Adams.

[00:10:21.9] Jeffrey Rosen: Remarkable. Tell us about Sumner's early efforts fighting for equality. In 1849, he was involved in the *Roberts* case involving school desegregation 100 years before *Brown v. Board of Education*. And there he laid out his core argument. The equality which was declared by our fathers in 1776 and which was made the fundamental law of Massachusetts in 1780, was equality before the law. Tell us about where he got that incredible phrase which had so much influence for the rest of American history.

[00:10:58.3] Zaakir Tameez: In his 30s, Sumner went on a trip to Europe that Joseph Story helped to finance. Story loans him some money. He goes to Europe, and in France he comes into this post revolution France, which is now back into a monarchy, but still contained many of these egalitarian ideals. He is struck seeing blacks and whites together studying at the University of Sorbonne, he is amazed to meet French intellectuals who are challenging him on slavery and are

asking him what could be so wrong about America. And he recognizes that, one, America will never be respected on a global scene until it abolishes the scourge of slavery. And two, he recognizes that equality ought to be placed into law, not just into theory. He sees this, of course, in the French Declaration of Man. And when he comes back to America, he starts to make this argument that if we are equal before God, then surely we also ought to be equal before law. He takes what Thomas Jefferson and John Adams wrote into the Declaration that all men are created equal. And he says that this phrase ought to be applied and concretized in law. And so, as you mentioned, he says that we are all equal before law.

[00:12:20.8] Zaakir Tameez: And this in fact, was the first time the phrase equality under the law was used in an American court case. And Roberts, he makes a fascinating argument that having separate schools for black Americans can never be equal, even if those schools had the same provisions. One of his analogies is the ghettos of Rome where Jewish people were kept in separate conclaves. And he says, even if the conditions there are the same, there is a stigma imposed on Jewish people if they're excluded from mainstream white society. Similarly, there would be a stigma in African Americans if they are forced to be in separate schools. He takes this argument. He also points out the psychological aspects of how it would affect an African American to be in a separate school. And then he makes democratic arguments that we cannot be equal in a society if we are not learning together at a young age. And this combination of arguments is so striking because it sounds exactly like what Thurgood Marshall and the NAACP were saying in *Brown*. And what is amazing is that Marshall, NAACP are not stealing these arguments, they are citing them point by point. Now, Marshall won his case, of course, Charles Sumner did not. The Massachusetts Supreme Court, governed by Chief Justice Shaw, rules against him. They do acknowledge, amazingly, that everyone should be equal before law, but establish a principle that separate schools can be equal. And in fact, in *Plessy v. Ferguson*, the *Roberts v. City of Boston* case is cited as a precedent.

[00:14:10.9] Jeffrey Rosen: Sumner then arrives at the Senate and he delivers a powerful speech against the Fugitive Slave act which articulates his constitutional theory that slavery is illegal at the federal level and the Fugitive Slave Act is unconstitutional. He cites the Declaration heavily. He asks Charles Francis Adams if there's any wisdom from John Quincy. Tell us about Sumner's speech and his arguments that the Fugitive Slave Act is unconstitutional.

[00:14:39.6] Zaakir Tameez: The speech is called "Freedom National, Slavery Sectional" where he lays out the argument that slavery has no recognition under the national American flag. It can only exist at the state level. To make this argument, he relies exclusively on historical methodology. He goes back to the Founding. So first, he writes to Charles Francis Adams and asks Charles Francis Adams for any papers from his grandfather, John Adams, from the Founding era. He then he looks at Washington, he looks at Madison, he looks at Jefferson and Hamilton. He points out, for example, that the time of the founding, only one of the 13 colonies, I believe it was South Carolina, officially banned African Americans from voting. In 12 of the other 13 colonies, Blacks were, at least on paper, permitted to vote. There probably were African Americans who participated in at least some of the constitutional conventions in 1789. In 1789, there is no slavery in any national territory. It was only after the Founding that slavery was introduced into Washington, DC. And so, Sumner makes these arguments that at the time of the Founding, the Constitution had no recognition of slavery at the national level. And he uses this to

advance his project, which is to ban slavery in federal territories and only permit it in the states. And if this sounds familiar, this is exactly the argument of the Republican party and of Abraham Lincoln come 1860.

[00:16:23.3] Jeffrey Rosen: Remarkable. Both the slogan freedom national, slavery sectional, Sumner's observation that South Carolina is an outlier at the time of the Founding. It's remarkable how South Carolina and Georgia are more responsible for entrenching slavery in the Declaration, in the Constitution and in the nullification controversy after than any other states. And his role in founding the Republican party. Well, he makes an argument about how slavery involves an oligarchy odious beyond precedent, heartless grasping and tyrannical. And then he gives a speech in response to Bleeding Kansas that leads to his own brutal caning on the floor of the Senate. Tell us about that story.

[00:17:10.3] Zaakir Tameez: Come 1856, slaveholders are so afraid of rebellion by the Southern enslaved population, which constitutes one quarter of the entire south that is enslaved by the other three quarters. Because of this fear, slaveholders are both trying to expand slavery into the west and they're also doing everything they can to suppress dissent against their rule. All this comes to for in Kansas, a territory that is going to have a vote on whether to become a slave state or a free state. One of Sumner's former colleagues, David Rice Atchison, a senator and the former president pro tempore of the Senate. Atchison goes back to Missouri, his home state, organizes an armed gang of more than a thousand people. They go into Kansas and start to take over polling locations at gunpoint and stuffing the ballots. Charles Sumner is horrified by this. You are seeing pro-slavery forces and politicians actively destroying American democracy. And what is even more striking is the relative silence from the North. Many of his colleagues are too afraid to speak out. Of course, they live in Washington D.C., a slave city. They are getting death threats already for what they're saying. Southerners often threaten them with violence. And as a result, many of his colleagues are remaining silent to the threat to American democracy.

[00:18:57.1] Zaakir Tameez: Charles Sumner decides that he is going to speak out. And he also decides that in order to wake up a public that has been asleep to the Democratic threat, he needed to speak out in an extremely brave and provocative way, he tells a friend that he is going to give the "most thorough philippic ever uttered" in a legislative body. And he does. It's called "The Crime Against Kansas." In this speech, he compares Stephen Douglas to Lucifer, he compares President Pierce to a Roman dictator, he compares Acheson to a Roman traitor, and he compares Senator Andrew Butler to Don Quixote. He alludes that all of them are engaging in sexual debauchery, he effectively calls them rapists. And he also targets Andrew Butler for his speech impediment because Butler was recovering from a stroke and he makes fun of Butler's speech impediment. Then he says that South Carolina could be blotted out of existence and civilization would look the same. So obviously, this speech does not go over well with his colleagues. They are furious with him. And then Andrew Butler's nephew, a congressman named Preston Brooks, approaches Sumner two days later with a gutta percha gold tipped cane while two other colleagues are holding watch for him in the Senate chamber and they attack.

[00:20:35.0] Zaakir Tameez: Brooks comes up to Sumner with his cane and starts to smash it over Sumner's head. Sumner falls unconscious almost immediately. After Sumner is finally able to get up, Brooks grabs him by the lapel and keeps smashing the cane into his head until the cane

shatters. Sumner has two injuries on his skull, one above his ear that is nearly an inch deep, another on his forehead that is nearly an inch wide. He is soaking in his own blood on the floor of the Senate. Brooks brags to his brother that he gave Sumner thirty first rate stripes until Sumner bellowed like a calf. And this may have been the most violent act in the history of Congress.

[00:21:22.7] Jeffrey Rosen: You note that the effect of this brutal assault may have been to galvanize Northern opinion against slavery. His speech was widely distributed and far from cowering him, it may have energized the opposition. Tell us more about the effects of the canning.

[00:21:44.2] Zaakir Tameez: Like many pro-slavery politicians before him, Preston Brooks thought that by attacking Sumner in this brutal way that he would help to crush abolitionist dissent, that the "vulgar abolitionists" could be "lashed into submission" as one newspaper from the south put it. They were egregiously wrong. Brooks's attack backfired completely, rather than making the North too afraid to speak out, instead, the North was so outraged and galvanized that many people became abolitionists overnight. Across the north, tens of thousands of Northerners gathered in what they called indignation meetings, which were essentially grassroots programs to both lament over Sumner's injuries and to strategize political responses. Horace Greeley, a newspaperman out of New York, prints as many as three million copies of Charles Sumner's speech, "The Crime Against Kansas." The Republican National Convention in 1856, which is the first national convention of the party, is chanting Charles Sumner by name even though he's not there. Sumner is suffering while all this is going on. He struggles to recover. He spends years recovering. He has PTSD, but even so, at the opportunities he did have to speak about his injuries, he would often say that what he had suffered is nothing like what the poor slave had suffered.

[00:23:22.6] Zaakir Tameez: And so he is connecting his injuries at the hands of a slaveholder, Preston Brooks, to the injuries that slaves across the south were, of course, experiencing daily. And what is so striking about this is that African Americans began to consider Charles Sumner as one of them, so to speak, because he too, had suffered the blows of slavery. And white people across the North are energized because they are seeing a white man being brutalized by slaveholder, as if to say that now not even white people are free from the scourge of slavery.

[00:24:01.4] Jeffrey Rosen: You note that in his speech, Sumner alleged that the enslavers engaged in sexual debauchery and Sumner's sexuality was also contested. You talk about his close friendship, which you say may have been romantic, with Samuel Gridley Howe. Tell us about that remarkable relationship.

[00:24:25.2] Zaakir Tameez: Charles Sumner spent his entire life looking for love, and he never seemed able to find it. He is one of the most dashing men in Boston, and he is searching and without any luck, until he meets Samuel Gridley Howe, an older man who had previously served in the Greek and Polish armies of Europe in the revolutions against the Ottoman Empire. Samuel Gridley Howe is from Boston, he's the founder of the Perkins School of the Blind. Howe and Sumner become very close very quickly. They used to go on carriage rides together, looking for women to love. They used to go on horseback ride and come back, order strawberries and cream from a pub, then go to Howe's home to retire for the evening, where they would often talk

for hours, commiserating over their bachelor condition. Later on, Howe fondly recalled Sumner with his waist straps unbuttoned, with a glass of Orvieto in his hand and the sweet smile on Sumner's lips. Howe ultimately does get married to Julia Ward, who becomes the author of the famous "Battle Hymn of the Republic." When Howe and Julia get married, both men have two very distinct reactions. Sumner is heartbroken, and he goes into a depressive mood for months.

[00:25:42.9] Zaakir Tameez: He is struggling to cope with the fact that he feels that he has somehow lost his best friend. His best friend, Samuel Howe feels terribly guilty. Howe says that he felt like he went to heaven with Julia and left Sumner outside. He spends all of his honeymoon with Julia writing letters to Charles Sumner, so much so that Julia becomes jealous and says that Sumner ought to have been a woman and you to have married him. Julia later on writes a novel that's never published and not discovered until only a few decades ago, called *The Hermaphrodite*. Where she talks about an intersex man who goes back and forth between loving men and loving women. It was probably an analysis of her own husband's sexuality. Sumner, meanwhile, does get married eventually, decades later. It's a disaster of a marriage. His wife leaves him after only a few months and starts to spread rumors that he is impotent. And Sumner is suffering both because of the divorce, because of his inability to find love but also because of the stigma that comes with being a bachelor in the 1850s and 1860s, in America. Bachelorhood is treated as a kind of suspicious state.

[00:27:08.1] Zaakir Tameez: Victorians in England and then in America suspect bachelors of being sexual perverts or of being somehow degenerate, because otherwise why would they not be married? Sumner is characterized particularly by Southerners who wish to mock him as "eunuch Sumner" as "an unsexed creature" as "a pedophile whose weakness is for young Negroes." Forgive the language. And worst of all, Senator Andrew Butler, who we talked about earlier as a man that Sumner insults in "The Crime Against Kansas," in 1854, Butler gives a drunken speech where he makes fun of Charles Sumner and suggests that Sumner should marry an African princess with kinky hair and black skin. And it's an extremely racist, ugly speech. And the Senate is full of hooters and hollers making fun of Sumner, who is one of the only bachelors in the room. So you can imagine how much he suffered for his stigma as a bachelor, for his inability to understand his sexuality. He didn't know he was gay. That kind of concept didn't really exist at the time. But what he did know is that he couldn't find someone to love, that he was very confused about his own sexuality and that he was suffering the stigma as a result of it.

[00:28:38.7] Jeffrey Rosen: It's an incredibly poignant story. The Julia Ward Howe piece is remarkable. "The Battle Hymn of the Republic" must be the greatest American battle song. Third verse: "I've read, a fiery gospel writ in burnished rose of steel as ye deal with my contemners, so with you my grace shall deal. Let the hero born of woman crush the serpent with his heel since God is marching on." That's Julia Ward Howe, and I now can't hear it without thinking of her novel and the difficult position that she was in. Did this, the fact that he may have been gay, affect his politics, induce him to take positions on social justice? You say he denounced the war in Mexico while he may have been seeing Samuel Howe. What was the effect on his politics?

[00:29:28.5] Zaakir Tameez: Samuel Howe helped to inspire Sumner's moral courage. Howe was frustrated with Sumner when they first met because Sumner at the time is a corporate

lawyer. And Howe sees Sumner's heart and recognizes that Sumner can do much more than that, that Sumner has this deep passion for abolition, for racial justice, and at the time was not doing anything with his life in that direction. And so Howe helps to inspire that moral courage and that new direction in Sumner's life. But Sumner, of course, is not perfect. Samuel Howe is very controlling husband to Julia. He's opposed to Julia's literary career. And Sumner helps to facilitate that and encourage Samuel to kind of suppress Julia's career, which is so tragic because, as you know, Julia wrote "The Battle Hymn of the Republic" one of those beautiful battle songs in American history. And what more could she have written if she didn't have these controlling men around her? So Sumner goes on and becomes this great voice for African Americans, great voice, this great patriot who fights to amend the Constitution. He is never, though, a champion of women's rights, which is something that comes to the fore during Reconstruction.

[00:30:46.5] Jeffrey Rosen: That is hugely significant. And it reminds us that although Frederick Douglass said of Sumner's caning that no one act did more to rouse the North, Douglass, of course, went on to champion women's rights as well as rights for African Americans and that was not something that Sumner did. Tell us about his activities on behalf of equal rights during the Civil War and crucially, during Reconstruction. Was it over the 13th Amendment that he first resolved to inscribe into the Constitution the promise of equality before the law?

[00:31:24.1] Zaakir Tameez: Sumner believed in a very expansive 13th Amendment, from the day that amendment was introduced to the day it was ratified. He especially paid attention to the Section 2 of the 13th Amendment, the Enforcement Clause. The Enforcement Clause is the first constitutional provision since the Founding that expanded national power rather than contract it. The Enforcement Clause authorizes Congress to pass legislation that is appropriate to enforcing the abolition of slavery. That language has its echoes in *McCulloch v. Maryland* by Chief Justice John Marshall, who, of course, Sumner knew very well. And so Sumner believes that the 13th Amendment not only abolished slavery but authorized Congress to legislate for human rights. He believed that slavery was not fully abolished until, for example, African Americans had land ownership, until they had equal rights, whether that's in the steam car or the railroad or the hotel. And he believed that the 13th Amendment gave Congress to pass all of that legislation. In fact, he was initially reluctant about the 14th Amendment and about the 15th Amendment because he believed the goals of equal protection, of birthright citizenship, of black male suffrage, could all be achieved by legislation because the 13th Amendment authorized Congress to do so in his mind.

[00:32:59.0] Jeffrey Rosen: Wow. How was he persuaded to support the 14th and 15th amendment? And what was his contribution to the debate over the 14th Amendment?

[00:33:09.7] Zaakir Tameez: When the 14th Amendment was being debated, the debates primarily centered not on section one, which is what the amendment is famous for today, but one of the other sections which dealt with something called apportionment. The amendment specified that if a state restricted suffrage, then it would have less seats in the House of Representatives. The thinking was that this apportionment clause would incentivize states to enfranchise black Americans. And Thaddeus Stevens, among others, is the architect of apportionment. Sumner thought correctly, in retrospect, that apportionment was too complicated to ever be put into

practice, which has been proven true. He gives this speech called the Equal Rights of All, where he champions suffrage for all men, regardless of race. And he argues that that should be the center of the 14th Amendment if there was going to be an amendment at all. And in the speech, he also tries to chart out what it means for America to be a republic. He goes back to Europe initially, and he looks at all the writings from Plato to Montesquieu to John Locke and everybody in between on how they defined a republic. And what is striking is that they all defined a republic differently.

[00:34:40.2] Zaakir Tameez: There was no clear definition of a republic from Europe. John Adams had once tried to figure it out himself and came to a similar conclusion. And then Sumner says that, you know what? We as Americans should not look to Europe and should not look to European philosophy to decide what a republic is. Instead, we, we should look at American institutions at the time of the Founding, and at the time of the Founding, the two principles of republican government are, one, consent of the governed and, two, equality in rights. And he takes these two principles to advocate for an expansive constitutional transformation that would guarantee suffrage to all in order to fulfill the founding aspirations of creating an American republic.

[00:35:33.0] Jeffrey Rosen: That speech is so crucially important. As you note, Sumner uses the phrase American idea. He argued that the "American idea of a republic, which must be adopted in the interpretation of the national Constitution, rests," as you say, on two principles, "First, that all men are equal in rights, and secondly, that government derives its just powers from the consent of the governed." Is there any significance in the evolution of his initial formulation in the *Roberts* case of equality before the law and this phrase now, "that all men are equal in rights." And what is the constitutional significance of that phrase, "equal rights of all"?

[00:36:16.7] Zaakir Tameez: The phrase "equal rights of all" is fascinating because here Sumner is combining two very distinct principles, equality and liberty. By using the phrase equal in rights, he is capturing both ideals in the same principle. And he says that liberty and equality are the two ideas that form the circle of American citizenship. He also says that you cannot have true liberty without equality. You cannot have true equality without liberty. Now, at the same time as the 14th Amendment is being debated, Sumner reprints his argument in *Roberts v. City of Boston* and has that passed out again, because that argument in *Roberts* establishes this principle of equality. He also talks about birthright citizenship in the *Roberts* case and he articulates that equality before the law requires us to be in the same schools. And this is amazing because now to connect it back to *Brown v. Board*, Thurgood Marshall crafts an originalist argument in defense of school integration based on Charles Sumner's argument in *Roberts*. And Marshall points out that Sumner's argument in *Roberts* is being distributed to the public at the time of the 14th Amendment debates, and that therefore the Equal Protection Clause of the 14th Amendment can be traced to Sumner's argument in *Roberts*, such that equal protection requires the integration of schools.

[00:38:00.3] Jeffrey Rosen: It's remarkable. As you note, Sumner rejects the legalistic distinctions between social, political and civil rights that some of the other more moderate reconstruction Republicans embraced. Did he believe that the Equal Protection Clause of the

14th Amendment constitutionalized his broad vision of equality for all? And did he say, after the 14th amendment was passed, that he thought that separate schools were unconstitutional?

[00:38:32.9] Zaakir Tameez: He drew his constitutional understanding in Reconstruction from the 14th Amendment and from the 15th Amendment and from the 13th Amendment and from the Civil War itself. This was a broad understanding of how that era transformed constitutional law. Of course, today scholars like Eric Foner and Akhil Amar describe Reconstruction as America's second founding. And I think Sumner, probably more than anyone else in the Senate at the time of the second founding, really grasped the enormity of what they were doing. So, for example, come in the early 1870s, Charles Sumner introduces an act to integrate schools and to create a right of public accommodation so that anyone can enter a restaurant, a hotel, a bus, regardless of race, and if they were blocked from entering, would have a right to sue. This is known as a Civil Rights Bill. A watered down version becomes a Civil Rights Act of 1875. And the first two provisions of that ultimately are readopted by Congress in the Civil Rights act in 1964, much of which came verbatim from Sumner's draft nearly 100 years earlier. Now, when he introduces this bill, it's super controversial. A lot of his colleagues, even many abolitionists, are opposed to it.

[00:40:02.1] Zaakir Tameez: Yes, they supported the abolition of slavery, but they couldn't imagine African American schoolchildren in the same schools as white children or being at the same restaurant, this, that and the other. And many of his colleagues used the argument of state rights to combat this bill. One of his colleagues, Lot Morrill, says that the bill would infringe on state rights. Sumner responds by saying that Morrill was referring to the old method of constitutional interpretation. Then Sumner says "a new method of interpretation was conquered at Appomattox." Appomattox being the last battle of the Civil War. He says that under the new interpretation, every clause and every line and every word of the Constitution must be interpreted uniformly for human rights. Later on, he says that the Civil War inaugurated, that the grandest victory of the Civil War was that the Constitution should now be interpreted by the Declaration of Independence. Him seeing, of course, a connection between human rights and the Declaration of Independence. Under his view, after the Civil War, antebellum federalism had been obliterated, and now human rights should prevail.

[00:41:27.0] Jeffrey Rosen: Extraordinary. Synthesizing of the ideals of the Declaration and the Constitution, of course, around the same time, Lincoln is imagining a similar synthesis. In the "Gettysburg Address" Lincoln transformatively calls for a new birth of freedom that will reaffirm the principles of the Declaration to ensure, with language he borrows from John Marshall and Daniel Webster, that government of the people, by the people, for the people shall not perish by the earth. Lincoln's new birth of freedom is designed to inscribe an explicit guarantee of what Lincoln calls liberty to all. I wonder, is there any significance and the difference between Lincoln's formulation, liberty to all, and Sumner's vision of the equal rights of all? And Lincoln, who also sees the Declaration as the apple of gold at the core of the Constitution's frame of silver, wants the Constitution to be interpreted in light of the Declaration. Discuss similarities and differences between Sumner and Lincoln's constitutionalism.

[00:42:31.7] Zaakir Tameez: After the "Gettysburg Address" Sumner very presciently declares that Lincoln's speech was more important than the Battle of Gettysburg itself. He goes on, and he would describe the "Gettysburg Address" as a legal precedent. He used the word precedent to

refer to the "Gettysburg Address" as if that speech itself had transformed constitutional law. Now, Sumner and Lincoln do not necessarily see eye to eye. After the Civil War, Lincoln is contemplating some kind of limited suffrage for Black men, maybe for Black veterans, maybe in certain states. But he is also very open to admitting states without Black suffrage. Sumner, of course, thinks that Black suffrage is necessary before any state in the South can be re-inaugurated into the Union. Despite their disagreement, in one of Lincoln's first speeches on the subject of Reconstruction, Lincoln proposes that no state should be readmitted until they have a republican form of government. Though Lincoln may have understood that phrase differently, Sumner latches on to Lincoln's language to argue that the republican form of government, alluding to the Republican Guarantee clause of the Constitution, which says that the United States shall guarantee to every state a republican form of government, Sumner takes that phrase and says, okay, what is a republican form of government?

[00:44:10.0] Zaakir Tameez: It is based on equality of rights. And Lincoln does not contradict him, at least publicly. Lincoln does not give a definition of republican form of government, while Sumner does supply a definition. And after Lincoln dies, Sumner can just run with it and argue that he is really trying to fulfill Lincoln's true vision, which is multiracial, egalitarian democracy. Was that Lincoln's true vision or was Lincoln going to fall short of what our national standards are today? We'll never know because Lincoln passed away. But because Lincoln died, Sumner was able to take Lincoln's memory and try to fulfill what he believed were Lincoln's highest aspirations.

[00:44:53.2] Jeffrey Rosen: It is so interesting that both Lincoln and Sumner view the definition of a republican form of government being one that guarantees a form of equality for all or liberty to all. And in 1864, Lincoln says, "The war is being fought to preserve this free government and a fair chance for your industry, enterprise and intelligence, that you may all have equal privileges in the race of life with all its desirable human aspirations." Tell us about how Sumner's civil rights bill in 1875 was designed to make real the promise of a republican form of government and equal rights for all. In particular, the fight over guaranteeing equal access to schools. When Sumner dies in 1875, the school's provision is still in the bill, although it comes out later. To what degree did Sumner view equal access to schools as being central to the meaning of republican government?

[00:45:59.1] Zaakir Tameez: On the day that the 15th Amendment is ratified by enough states so that President Grant recognizes it now as being part of the Constitution, there is a parade in Washington celebrating this momentous occasion. And these Black celebrants stop by Charles Sumner's home. Someone calls him to come outside to join the party. Charles Sumner steps out of his house and he is grumpy and he is not in the mood to celebrate. And he points out to these Black celebrants, and I'm paraphrasing here, that you're still shut out of the common school, so how can you celebrate? He later argues that unless young Americans are learning together in school, they will not be able to live together as adults. That democracy requires integrated schools. He is drawing this both from his knowledge and his expertise, but also from what he is learning from the Black activists around him. One of his closest friends is a man named John Mercer Langston. Langston is one of the first Black office holders in America. He was a town clerk in Ohio. He's a graduate of Oberlin College. He's a lawyer. And Langston becomes the first dean of Howard Law School, the first law school in America open to blacks and to women.

[00:47:33.4] Zaakir Tameez: Sumner becomes a mentor to Langston. He gifts him a few trees to put in his front yard when Langston moves to Washington. Langston comes to Sumner's home frequently. And when Sumner wants to write a bill that would create a right of public accommodation and integrate schools, he turns to Langston to draft it. He writes to Langston specifying what he wants to see in the bill and asks Langston to write the first draft. And what is so striking is that Langston has never received the credit he deserves for being the architect of the Civil rights bill that becomes the blueprint for the Civil Rights act of 1964. That this visionary bill that would have integrated all of America was drafted by a black lawyer in conversation with Charles Sumner.

[00:48:27.3] Jeffrey Rosen: Extraordinary. Sumner dies whispering an injunction, "My bill. My bill. Don't let them forget my bill." He expires, and next comes brutal redemption, and the combination of racist violence and an intransigent Supreme Court strikes down the pillars of Reconstruction, in particular the Civil Rights Act of 1875, with the notorious Joseph Bradley resurrecting many of the arguments about state action that Sumner had rejected. Tell us why the decision striking down the Civil Rights Act over the sole objection of Justice John Marshall Harlan is so inconsistent with Sumner's vision and arguably with the original understanding of the Civil War amendments.

[00:49:17.1] Zaakir Tameez: Right. Let me connect the civil rights cases back to this debate that took place between Charles Sumner and Lot Morrill, which I describe in the book because Morrill, who himself was once a Radical Republican, during the peak of Radical Reconstruction, was accused of being a revolutionary. And Morrill responded and said, yes, I am a revolutionary, and what we are doing is having a revolution. Morrill goes on and starts to act as if the revolution never took place. Morrill, in fact, argues with Sumner that the 14th Amendment, in pretty much every clause of Section 1, had done nothing to change the constitutional order. And Morrill is not alone, many other Republicans, probably looking at the political winds, recognizing that white voters are tired of the Reconstruction project, are moderating their stances that had once championed liberty and equality for all. Sumner is so disturbed by this and troubled by this because he remembered that revolution and thought that that revolution needed to be fully secured. And what we saw, I think, is an immense historical amnesia from Republicans themselves about what took place during Reconstruction by the late 1870s and then, of course, by the 1880s and 1890s.

[00:50:43.1] Jeffrey Rosen: Historical amnesia is such a good phrase. Talk about that abandonment by liberal Republicans of the cause of black civil rights. It's remarkable that after the election of 1876, liberal Republicans, including Charles Francis Adams and Horace Greeley, entirely sell out Black civil rights. They devote themselves to civil service reform. Many are openly racist. And their brief embrace of civil rights proved to be opportunistic. To what degree did that affect Sumner's historical reputation? He really was an outlier in continuing to embrace Black civil rights after they'd been abandoned by other Northern allies. And what was the consequence of that Compromise of 1876 on Sumner's legacy?

[00:51:32.7] Zaakir Tameez: So the Compromise of 1876, according to some historians, was negotiated by a group of Republican and Democrat lawmakers. And the deal essentially was that

Republicans would get the presidency in exchange for withdrawing troops from the South. Of course, this is in the wake of a contested presidential election. What is amazing is that this deal allegedly took place in the Wormley Hotel, which is a Black-owned hotel next to Charles Sumner's house. Wormley was one of Charles Sumner's best friends. Wormley also purchased all of Sumner's furniture after Sumner's death and puts it in a parlor in the hotel called the Sumner Parlor. So we don't know, but it's entirely possible that the Compromise of 1876 to terminate reconstruction was negotiated in the Sumner Parlor on Sumner's furniture in Wormley's Hotel. That's the scale of the betrayal that took place in America after Reconstruction. And as part of that betrayal, America also turned its back on Charles Sumner. So if you fast forward to 1911, this is the hundredth year anniversary of Charles Sumner's birth. Schools for African Americans in Washington and in Boston are all closed. Black school children are out celebrating Charles Sumner's life in various parades and in meetings to discuss Sumner's life.

[00:53:13.7] Zaakir Tameez: W.E.B. Du Bois and the NAACP organizer Sumner centennial events. And what is striking is that very few white people showed up to these. The Governor of Massachusetts and the two Senators of Massachusetts, I think only one of them showed up, the other sent their apologies and even the one who showed up gives a speech where he points out Sumner's flaws almost as much as he pointed out Sumner's virtues. And they emphasize Sumner as an egotist, as an agitator, as someone who had the right ideas but was impractical and did not consider the reality of how slow America needed to progress. I think this characterization of Charles Sumner has helped to minimize his reputation in the decades following. So, for example, you mentioned in the beginning the last major scholarly biography of Charles Sumner by the historian David Donald. This is at the beginning of David Donald's career. At the time, this is back in the 1960s, David Donald described Sumner's activism as inflexible zeal and "moral terrorism." Donald, I think, probably would not have said the same in late life, but in early life, this is how he characterized Sumner's project. And I think that's part of what necessitated this project today, to bring Sumner's true moral virtues back to light without ignoring his flaws, of course, but recognizing how great and prescient he was in his struggle for racial justice, equal rights, and for constitutional democracy.

[00:54:59.6] Jeffrey Rosen: It's a noble act of resurrection and redemption that your biography achieves. Donald's verdict is indefensible today. And his dismissal of Sumner's so called egotism, framing him as a lawless and ineffective agitator, ignoring his relationship with black civic leaders, perhaps is explained by the fact that he himself was born in Mississippi and he may have shared some of the perspectives of that region but it's just a remarkable fact that for more than a century after Reconstruction, Sumner's legacy was ignored and you have helped to resurrect it. What, as we sum up, can we learn from Sumner's legacy today? If you were arguing to the current Supreme Court about the original understanding of Reconstruction and the principle of equality for all that Sumner argued for, what are its consequences and what would you say?

[00:56:09.2] Zaakir Tameez: I wrote this book as a historian and a biographer telling Sumner's story, but I also wrote the book while in law school, thinking about the big legal questions that we are contemplating in this moment. And what struck me so much about Sumner's legal ideas is how different they are than our ideas today. As you mentioned, Sumner believed that antebellum federalism had been completely transformed and that now he said that "There can be no state

rights against human rights." He also had these views on judicial review, that Supreme Court should defer to Congress on any legislation that arose from the enforcement clauses, even if the Court disagreed with that interpretation. He, of course, would have considered the equal protection clause as requiring the integration of schools on an originalist basis. He believed that liberty and equality were the twin jewels of the Constitution and had this visionary, progressive, human rights oriented understanding of what the Constitution was and he thought that new model was conquered at Appomattox. And so, in the book I try to lay out his legal ideas and I'm not saying that those ideas must be how we practice law today, but I am saying that we ought to take his ideas seriously because he is at the center of America's second founding. His ideas have been ignored for far too long and I think it is time that we reconsider Charles Sumner as one of the legal progenitors of modern American law.

[00:57:57.0] Jeffrey Rosen: Zaakir Tameez for resurrecting the inspiring vision of Charles Sumner and his devotion to equality for all. Thank you so much.

[00:58:08.2] Zaakir Tameez: Thank you very much, Jeff. A pleasure to be on the show.

[00:58:14.4] Jeffrey Rosen: This episode was produced by Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Samson Mostashari. Please recommend the show to friends, colleagues, or anyone anywhere who is eager for a weekly dose of constitutional debate. Please check out the new Constitution 101 course that we launched in partnership with Khan Academy this fall. Sign up for the newsletter at constitutioncenter.org/connect and always remember that the National Constitution center is a private nonprofit. It would be so wonderful if you considered a donation of \$5, \$10 or of course, more to support this podcast and all our work. You can do that at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.