

4-1-1990

The Republican Revival: Revolutionary Republicanism's Relevance for Charles Summer's Theory of Equality and Reconstruction

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The Republican Revival: Revolutionary Republicanism's Relevance for Charles Sumner's Theory of Equality and Reconstruction

JANIS L. McDONALD*

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* J.S.D. Candidate, Yale Law School. I would like to thank Bruce Ackerman for his thoughtful comments and critique from the outset of the work on this article; H. Jefferson Powell, Leslie Bender, Akhil Amar, Richard Aynes and Lucinda Finley also provided inspiration or critique at various stages of its development. My thanks also to my son, Ryan, who constantly provides me with the deepest incentive to understand the past in order to hope for a better future for him.

I. INTRODUCTION

STIRRING up old troublemakers. Indeed, opening up the Pandora's Box called "Republicanism" liberates a plethora of historical rascals bent on haunting the search for a definitional framework for the current republican revival efforts of legal scholars.¹ This paper suggests that a reinterpretation of the role ascribed by historians to one of those mavericks is necessary because of the vital role "revolutionary republicanism"²

1. The republican revival and the critique it has engendered are an effort to reexamine the role "republicanism" played in our constitutional founding, and to exhume principles which may have modern currency. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L. J. 1013 (1984); Sunstein, *Interest Groups in American Public Law*, 38 STANFORD L. REV. 29 (1985); Michelman, *Politics and Values or What's Wrong with Rationality Review*, 13 CREIGHTON L. REV. 487 (1985); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Horowitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987); Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539 (1988); Michelman, *Law's Republic*, 97 YALE L. J. 1493 (1988) [hereinafter *Law's Republic*]. Ideas of public dialogue, civic participation, community responsibility, and an identification of the public good appeal to a wide range of interests and frustrations prevalent in modern society. Some suggest a normative function for republican principles emerging as a result of this reexamination—to be employed as a foundational basis for the work of judges and others. Sunstein, *supra* at 30-31. Others suggest that its role may be to help prioritize public values. Sherry, *supra* at 554. Others warn of the dangers of eroding hard-fought protections for individual rights, Bell & Bansa, *The Republican Revival and Racial Politics*, 97 YALE L. J. 1609 (1988).

In part, the revival has been a response to (as well as a bolstering of) the prominent role of originalism in the constitutional debate of recent years. It may also be viewed by some as an attack on the reign of liberalism, a shifting of the focus away from protection of individual rights and toward implementation of community responsibility and the development of community values. For the most part, legal scholars responsible for a reconsideration of republicanism have not sought to distinguish between various strands of republicanism. Sunstein, *supra* at 31. It is critical, however, at this stage of the reexamination of republicanism, to make the fine distinctions which influenced the development of American political and constitutional theory. Buried within this republican tradition is an understanding of deeply embedded notions of equality and the conditions necessary to encourage citizens to participate responsibly in the shaping and maintenance of their government. In assessing the continuing vitality of these concepts today, in order to ensure a protection of rights, and to encourage meaningful civic participation and responsibility, further detailed contextual study of the meaning of republicanism is required.

2. By "revolutionary republicanism" I mean the set of popular ideological beliefs which motivated the mass of people in the American colonies to start thinking of revolution as early as the 1760s, and to start conceiving of a new American government and society. This republicanism incorporated a cultural understanding of the unique American context with an emphasis on the social conditions necessary for an effectual republican form of government. A commitment to the fundamental principles of the "equality of rights," referred to *passim* by virtually all of the era's radical patriots deeply motivated the people themselves. From this core belief came a commitment by the general populace to economic, political and social justice, to government by consent of the governed, equal representation, and an educated citizenry committed to personal and community involvement in creating a government whose chief aim was a concern for the public welfare.

Further, the revolutionary republicans devised a new way of thinking about constitutional government. Unlike the British system, they were strongly committed to enshrining the spirit of their Constitution in a text; however, the Constitution was not viewed as a precise document spelling out

played in explaining at least one radical Republican's comprehensive plan for emancipation and post-Civil War reconstruction during that constitutional crisis. Substantive adherence to equality as a condition precedent to a meaningful republican form of government, as well as a genuine concern for implementing mechanisms to effectuate that republicanism, not only shaped a comprehensive reconstruction alternative, but also significantly influenced moderate Republicans to accept a more encompassing view of equality and reconstruction. To date, the significance of this republican revival, in the pre-Civil War and Reconstruction periods and its relevance to the modern debate on republicanism, has not been recognized.

Previous historical interpretations of the role of the radical Republicans failed to analyze the influence of revolutionary republicanism as a basis for their legal philosophy and their political action. By characterizing radical Republicans of the Civil War and Reconstruction era as vindictive, self-serving oppressors of the old South,³ as idealistic,⁴ or as

all the rules and mechanisms by which those principles underlying the Constitution would be carried out; rather, they treated the Constitution, like the Declaration of Independence, as embodying the moral mandates that guided their attempts at self-government. See *infra* text accompanying notes 18-96.

3. In the 1890s James Ford Rhodes wrote a multivolumed history of the United States labelling the Republican Reconstruction "repressive" and "uncivilized pander[ing] to the ignorant negroes, the knavish white natives and the vulturous adventurers who flocked from the North." K. Stamp, *The Tragic Legend of Reconstruction*, in RECONSTRUCTION, AN ANTHOLOGY OF REVISIONIST WRITINGS 5-6 (1969), citing J. F. RHODES, HISTORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850 (1902). John W. Burgess, professor of political science and history at Columbia, at the same time, wrote that reconstruction was "the most soul-sickening spectacle that Americans had ever been called upon to behold." *Id.*, citing J. W. BURGESS, RECONSTRUCTION AND THE CONSTITUTION 1866-1876 (1902). But the most influential scholarship condemning Republican reconstruction stemmed from the work of William A. Dunning, another Columbia professor, and a whole school of graduate students who developed a serious historical indictment of the reconstruction program and its instigators. Radical Republican legislators were labelled "Jacobins" or "Vindictives" who refused to adopt President Lincoln's magnanimous program of restoration of the South for their own economic or sordid motives, replaced Johnson's successful loyal southern governments with military governments, and gave the ballot to ignorant and irresponsible Negroes and allowed corruption full reign in the South. *Id.* at 6, citing W. A. DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION, AND RELATED TOPICS (1898) and RECONSTRUCTION, POLITICAL AND ECONOMIC 1865-1877 (1907). In the 1930s revisionist writers examined the economic incentives underlying reconstruction, but still emphasized the self-serving motives of the radical Republicans. See H. K. BEALE, THE CRITICAL YEAR: A STUDY OF ANDREW JOHNSON AND RECONSTRUCTION (1930). See M. L. BENEDICT, A COMPROMISE OF PRINCIPLE 396 n.2 (1974).

Chief among the evil players in the "Dunning School" version was Charles Sumner, the leading radical Republican in the United States Senate from 1851 until his death in 1872. His own political philosophy was not seriously explored.

4. The efforts of revisionist historians, beginning as early as the 1930s with the publication of W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA (1935) and in the reexamination in the

impractical extremists who endangered the realistic programs of their more politically astute Republican colleagues in the House of Representatives and in the Senate;⁵ subsequent historians and legal theorists of different eras ignored the role revolutionary republicanism played in shaping reconstruction policies and in reaffirming past theoretical

1960s in light of the Civil Rights Movement, most notably by L. COX & J. COX, *POLITICS, PRINCIPLE & PREJUDICE, 1865-66: DILEMMA OF RECONSTRUCTION AMERICA* (1963), tended to characterize the radical Republicans like Charles Sumner, as ones who acted from their conscience; ones who sincerely believed in the true equality of blacks in all the dimensions of social, political and legal life. While this was certainly true, there was no further exploration of the source of these hard core beliefs of the radical Republicans. Consideration of revolutionary republican theory was not a factor in the analysis.

5. In the 1970s, the focus turned to the contribution of the moderate Republicans; the view tended to diminish the role of the more radical impractical Republicans, thus avoiding an examination of the way their ideas forced the moderate Republicans to adopt their philosophies. Instead, all radical Republicans were considered to share the same idealism, the critical distinction becoming whether they were willing to compromise in order to implement policies in the legislature. David Donald, Charles Sumner's biographer, whose two volume life of Sumner focuses on the way Sumner operated in the Senate rather than on the source of his legal philosophy, categorizes Sumner as an ultra radical Republican; a man whose ideals blinded him to the pragmatism required in the delicate balancing between congressional and presidential authority in the mid to late 1860s. D. DONALD, *CHARLES SUMNER AND THE COMING OF THE CIVIL WAR* (1960) [hereinafter *SUMNER AND THE CIVIL WAR*] and *CHARLES SUMNER AND THE RIGHTS OF MAN* (1970) [hereinafter *RIGHTS OF MAN*]. He divided Republicans into "ultras," "practical radicals," "moderate radicals," and "conservative radicals." The "ultras" were "doctrinaire, impractical radicals" who often caused real problems for their more moderate counterparts who were counting votes for legislative enactments during this sensitive period. The ultra's insisted on racial equality at any cost. "Practical" radicals shared the goals of their "ultra" counterparts but were, according to Donald, willing to compromise and delay enactment of complete suffrage and equality pending further negotiation. "Moderates" acknowledged the need to protect Negroes in the South but refused to employ strong, questionable constitutional action to effectuate this protection. The "conservatives" staunchly supported President Andrew Johnson and his reinforcement of antebellum governments as the reconstituted "republican" governments in the South. See D. DONALD, *THE POLITICS OF RECONSTRUCTION 1863-1867 59-64* (1965) [hereinafter *POLITICS OF RECONSTRUCTION*]. See also H. TREFOUSSE, *THE RADICAL REPUBLICANS*, 339-40 (1968). Sumner is also discussed at length in Michael Les Benedict's treatise, *A COMPROMISE OF PRINCIPLE* (1974) whose title is taken from a Sumner quote: "A moral principle cannot be compromised." *Id.* C. Sumner, *The Equal Rights of All: The Great Guaranty and Present Necessity, For the Sake of Security, and To Maintain a Republican Government* [hereinafter *Equal Rights of All*], Speech in the Senate, on the proposed Amendment of the Constitution fixing the Basis of Representation (Feb. 5-6, 1866), 39 *CONG. GLOBE* 673 (1866), reprinted in X *THE WORKS OF CHARLES SUMNER* 119 (Lee & Shepard eds. 1870) [hereinafter *WORKS*]. Benedict essentially viewed Sumner as an impractical and ineffectual politician who refused to recognize the need for compromise and often endangered the legislative program of the moderate, practical radicals.

In one of the most recent studies of reconstruction, Eric Foner suggests that historians have continually failed to provide a "coherent account of Reconstruction" including the "centrality of the black experience." E. FONER, *RECONSTRUCTION* xxiv (1988). He asserts that "[f]rom the enforcement of the rights of citizens to the stubborn problems of economic and racial justice, the issues central to Reconstruction are as old as the American republic, and as contemporary as the inequalities that still afflict our society." *Id.* at xxvii.

grounding for the future development of civil, political and social equality. Instead of exploring the existence, of whatever significance, of a continuum of the unique American revolutionary philosophy, legal jurisprudence in the ensuing generations has treated the recognition of equality as an aberration springing newly formed from the jaws of abolition and Civil War. That philosophy, however, stretches back to the ideals and theories of radical patriots and freed Negroes in the early revolutionary era, and even to the colonial recognition of the rights of suffrage granted to freed male Negroes, males from minority religious groups and male Indians.⁶ A recognition of this continuum provides a more sophisticated understanding of the radical edges of reconstruction. In viewing it as a hard fought aberration, it is also treated as a benevolent gift, rather than a recognition of an attempt at synthesis and implementation of foundational concepts of rights and equality.

An initial foray into the political philosophy of Charles Sumner, one of the most prominent radical Republicans of the Civil War and Reconstruction era, peels back several layers of history by providing us with a mid-nineteenth century view of the relevance of revolutionary republicanism to the explosive constitutional crisis of Civil War and Reconstruction,⁷ and questions previous interpretation of his role as an

6. Suffrage for the male freed Negroes was hardly a new idea. They had been allowed to vote in almost all of the former colonies, even in the South, and in many cases were allowed to vote until very late in the pre-Civil War Era. Although property qualifications were often imposed, in Virginia, free Negroes were allowed to vote until 1723; in North Carolina, the Act of 1734 eliminated the former discrimination against Negro voters and was not reenacted until 1835; in South Carolina, male Jews and free Negro males were allowed to vote until 1716; in Georgia, they voted until 1761; in Kentucky, they were allowed to vote between 1792 and 1799. In the Southeast, Florida disfranchised Negroes in 1845; in Louisiana, they were disfranchised in 1812, Mississippi in 1817, Alabama in 1819, Missouri in 1821, Arkansas in 1836, Texas in 1845. W.E.B. DUBOIS, *supra* note 4 at 6-7.

7. The purpose of focusing on Charles Sumner, a United States Senator from 1851 until his death in 1872, is not to assert that he represented the uniform view of Republicans during this critical time, but to examine the way revolutionary republicanism was utilized as the basis for pushing more moderate Republicans toward a more expansive view of equal rights. Although Sumner was viewed as one of the most radical Republicans, many of his arguments were later accepted by more pragmatic Republicans in the face of President Andrew Johnson's recalcitrance toward any effective reconstruction. Sumner's theories were not original; although many historians assert that he borrowed wholesale from the abolitionists, it is also clear from a close examination of his own papers that he was enormously influenced by the radical patriots of the revolutionary era. *See infra* note 17, for further biographical data on Charles Sumner. Foner asserts that "Sumner's ideas aquired an increasing following in Republican circles. Sumner's uncompromising stand on black rights, a Californian wrote in 1866, had caused many Republicans to reassess their own opinions." E. FONER, *supra* note 5, at 230. W. NELSON, *THE FOURTEENTH AMENDMENT—FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 36-39 (1988) (who documents the indiscriminate intermingling of concepts of equality, higher law, citizens rights and self-rule).

extremist, an impractical idealist, and an impediment to more moderate, practical Republican politicians. Explaining his actions as the natural consequence of a consistent philosophical interpretation of revolutionary republicanism lends credence to the view of a radical Republican attempt at reconstruction, as an effort to force the synthesis of constitutional interpretation with the implementation of a republican form of government.

Invoking revolutionary republicanism, "the conservatism of 1776," Sumner resurrected the principles of early American republicanism: an emphasis on the social, legal, political and economic conditions essential to the survival of a republican form of government, and the primacy of equality of rights as the guiding principle providing the foundational context within which all other rights are embraced and protected.

Foremost is the Equality of All Men. Of course, in a declaration of rights, no such supreme folly was intended as that all men are created equal in form or capacity, bodily or mental, —but simply that they are created equal in rights. This is grandest of the self-evident truths announced, leading and governing all the rest. Life, Liberty, and the pursuit of happiness are among the inalienable rights; but they are all in subordination to that primal truth. Here is the starting-point of the whole; and the end is like the starting point. Announcing that governments derive their just powers from the consent of the governed, the Declaration repeats the same proclamation of Equal Rights. Thus is Equality the Alpha and the Omega, wherein all other rights are embraced. Men may not have a natural right to certain things, but most clearly they have a natural right to *impartial laws*, without which justice, being the end and aim of government, must fail. Equality in rights is the first of rights. Because these self-evident truths, beginning with Equality, had been set at nought by Great Britain, in her relations with our fathers, Independence was declared. To these truths, therefore, was the new Government solemnly dedicated, as it assumed its separate and equal station among the powers of the earth. Do you ask for the definition of Republic? Here it is, by patriot lexicographers, whose authority none of us can question. (emphasis in original)⁸

To Sumner, equality was the "master principle of our system."⁹

This article demonstrates the link between his theory and praxis during the crisis of Civil War and reconstruction, and provides one view

8. Equal Rights of All, *supra* note 4, at 173-74.

9. "The last shall be first; and so, in this new order, Equality, long postponed, shall become the master principle of our system and the very frontispiece of our constitution." C. Sumner, *The National Security and the National Faith: Guaranties For the National Freedman and the National Creditor*, Speech at the Republican State Convention, Worcester, Massachusetts (Sept. 14, 1865), reprinted in IX WORKS 477 [hereinafter *National Security and National Faith*]. See also W. NELSON *supra* note 7, at 9, 70 n.37.

of republicanism prevalent during the revolutionary and founding era of American constitutional history.

Part one presents Charles Sumner's view of revolutionary republicanism and the social, legal, political and economic conditions necessary to effectuate that system. An examination is made of Sumner's articulation of republican theory to determine the sources relied upon by him. His emphasis on equality, and the impact of the society's definition of equality on "liberty" and the legitimate origins of government, flow directly from the political philosophy of early radical patriots. His emphasis on the mechanisms which ensure a republican form of government: education, civic participation in and connection with government, land redistribution and legal protections for social, political and economic rights echo similar concerns of primary importance to early American republicanism. His theoretical resolutions of the conflicts of power between the executive and the legislative branches of government, and his views on the importance of a strong federalism were shaped by his acceptance of the theories of early republicans.

In praxis, his efforts from 1840 to 1860 against federal support of slavery or its extension, against the Fugitive Slave Acts, against "separate but equal" education, and in favor of jury service for Negroes, as well as his work with Negro colleagues in this cause, is shown to provide early evidence of his consistent commitment to this republican theory.¹⁰

Part two discusses Sumner's integration of revolutionary republicanism with the constitutional founding. It was his conviction that the Civil War crisis represented an opportunity to resolve finally the inconsistencies exemplified by the Federalists' adoption of the revolutionary republican idiom, to mollify the people while obfuscating the language of the Constitution, to accomplish the immediate task of nation building. For Sumner, the victory over the South and the endorsement of the people in the elections of 1866 and 1868 mandated a comprehensive program ensuring true republican forms of government in all of the states and in the national government; it was a mandate to finally implement the framers' expectation that a future generation would be forced to spell out the syn-

10. No attempt is made in this piece to provide a discussion of the complete scope of "revolutionary republicanism;" the aim is to present the articulated reliance by one leading radical Republican on his perceived republican heritage, and to examine his view of the relevance of that heritage to the constitutional crisis he faced. In the process, it is hoped that enough questions will be raised to spur further debate. *See also* McDonald, *Rights, Republicanism and Equality: Placing Mercy Otis Warren in the Constitutional Debates of the Eighteenth Century* (unpublished manuscript).

thesis of the principles inherent in the Declaration of Independence and revolutionary republicanism, with the Constitution.

Part three examines Sumner's application of his theory to issues of secession, and the problems of presidential authority and reconstruction in light of revolutionary republicanism. Although Sumner recognized the conflict over reconstruction in part to stem from the issue of a struggle for power between the legislative and executive branches, republican theory mandated his course of action in that conflict. He also conceptualized this conflict as a struggle over the implementation of conditions for genuine republican government versus a veiled reempowerment of rebel sympathizers bent on thwarting any attempt to ensure republican forms of government in the South. Compromises with President Lincoln's authorization of militarily imposed "civilian governments," or with President Johnson's plans to allow pre-Civil War registered voters to create the new constitutions, represented a real threat to legitimate republican government in Sumner's view.¹¹

The intent of this work is to begin to demonstrate the continuing vitality of "revolutionary republicanism" (long after the demise of classical republicanism in the American context)¹² by illustrating the way its

11. To Sumner, only a comprehensive reconstruction plan could ensure complete social, political and legal rights, including the franchise, education, and possible land redistribution. The involvement of the Congress in ensuring that constitutional change in the states was effectuated by a truly representative majority of its citizens was consistent with his theory. The southern states who attempted to secede from the union had vacated their responsibilities to their people to ensure a republican form of government, thus mandating federal involvement according to constitutional imperatives. See *infra* text accompanying notes 95-136.

12. The examination by legal scholars has utilized the intensive work by historians such as K. POLANYI, *THE GREAT TRANSFORMATION* (1944); J. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLIC TRADITION* (1975); B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969). The debate continues over the exact nature of the demise of classical republicanism, when in fact the issues may turn on the precise nature of the survival of an American brand of revolutionary republicanism. An examination of the ideas of the common people may reveal a far different understanding of what was being ratified in the late 1780s; the extraordinary deference paid to *THE FEDERALIST* as the final word on the founders' intent needs to be reexamined.

Gordon Wood has suggested that the relevance of classical republicanism for American political theory ended with the ascendancy of the Federalist's new science of politics, represented by the ratification of the Constitution of the United States. *Id.* See also, Appleby, *Commercial Farming and the "Agrarian Myth" in the Early Republic*, 68 J. AM. HIST. 833 (1982); J. DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST AND THE FOUNDATIONS OF LIBERALISM* (1984); Kramnick, *Republican Revisionism Revisited*, 88 AM. HIST. REV. 629 (1982); Maier, *A Pearl in a Gnarled Shell: Gordon S. Wood's The Creation of the American Republic Reconsidered*, 44 WM. & MARY Q. 583 (1987); Murrin, *Gordon S. Wood and the Search for Liberal America*, 44 WM. & MARY Q. 597 (1987). Other historians disagree, claiming that the influence of classical republican-

premise was utilized to prod (with varying degrees of success) pragmatic Republicans back to "the conservatism of 1776" when equality of rights had a more encompassing possibility. Operating within the theory of revolutionary republicanism, some radical patriots continued arguments against slavery,¹³ developed republican theories against patriarchal domination (even in the home),¹⁴ argued for land reform and redistribution of

ism continued throughout the eighteenth century and early part of the nineteenth century. *See, e.g.,* L. BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* (1978); J. POCKOCK, *supra*. D. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* (1980); Ross, *The Liberal Tradition Revisited and the Republican Tradition Addressed*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY* 116-131 (1979); Bloch, *The Constitution and Culture*, 44 WM. & MARY Q. 550 (1987). Bloch deemphasized the focus on classical republicanism and points to other roots of republicanism that should be considered: liberalism, Scottish moral philosophy, Puritanism, and evangelicalism. *Id.* at 553-54.

Indeed, rather than fading into obscurity in the trail of classical republicanism, the rhetoric, ideology, and tradition of revolutionary republicanism is evidenced in varying degrees in the constitutional ratification debates of the late 1780s, in the power shift of 1800, and in the abolitionist and republican revival of the antebellum and Reconstruction periods.

13. Attacks on slavery were frequent in pamphlets of the pre-revolutionary era. BAILYN, *PAMPHLETS OF THE AMERICAN REVOLUTION 74-75* (1975); R. COVER, *JUSTICE ACCUSED, ANTISLAVERY AND THE JUDICIAL PROCESS 20* (1975). *See also* Okoye, *Chattel Slavery as the Nightmare of the American Revolutionaries 37 WM. & MARY Q. 1* (1980). *See, e.g.,* Equal Rights of All, *supra* note 5, at 164, citing J. OTIS, *RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 29* (1764).

14. *See, e.g.,* Lewis, *The Republican Wife: Virtue and Seduction in the Early Republic*, 44 WM. & MARY Q. 689 (1987). Professor Lewis describes the republican theory which utilized the concept of marriage as "a metaphor for their ideal of social and political relationships." *Id.* Citizens bound together "not by patriarchy's duty or liberalism's self-interest, but by affection." *Id.* Marriage was viewed as an institution which trained its citizens in virtue. According to Professor Lewis, "[t]he antipatriarchalism of revolutionary ideology dictated that tyranny presented the most immediate and obvious threat to American happiness, and patriarchal domination the chief obstacle to happy and virtuous marriage." *Id.* at 693. The republican solution was to value the wife's function in the marriage, thus making her an important player in the success of this political venture; however, according to Lewis, this ideal was by no means a feminist view of equality; "To the extent that the success of the republican endeavor rested upon the character of citizens, republicanism demanded virtue of women, not because it numbered them as citizens but because it recognized how intimately women, in consensual unions, were connected to men." *Id.* at 699. "Although republican characterizations of marriage echoed with the words equal, mutual, and reciprocal, and marriage was described as a friendship between equals. . . ." *Id.* at 707. "Harmony," asserts Lewis, "took precedence," therefore

the wife had to bend; Deference was the solution republicans offered for the problem of conflict in the polity. . . but the fundamental weakness in the republican system was that it had no power over those who were not or did not want to be virtuous. Even though republicanism enhanced the woman's status and legitimated improvements in her education as well as her entry into benevolent reform movements, it also placed implicit checks upon her power. The ideal of wife gave way by perhaps 1830 to that of the mother.

Id. at 721. *See also* Kerber, *The Republican Mother: Women and the Enlightenment—An American Perspective 28 AM. Q. 187* (1976); J. FLIEGELMAN, *PRODIGALS AND PILGRIMS: THE AMERICAN REVOLUTION AGAINST PATRIARCHAL AUTHORITY 1750-1800* (1982); Bloch, *American Feminine*

wealth,¹⁵ and argued against expropriation of Indian lands.¹⁶

The obfuscation of the role played by revolutionary republicanism in laying the foundations for the political and social fabric of the new American society, and its continuing relevance for constitutional interpretation, permitted mid-19th century Democrats and conservative Republicans to label as radical principles and expectations fundamental to the American founding.¹⁷ An examination of Charles Sumner's adher-

Ideals in Transition: The Rise of the Moral Mother, 1785-1815, FEMINIST STUDIES June 1978, at 101; Bloch, *The Gendered Meanings of Virtue in Revolutionary America*, 13 SIGNS 37 (1987); N. COTT, *THE BONDS OF WOMANHOOD, WOMAN'S SPHERE IN NEW ENGLAND 1780-1835* (1977).

Sumner opposed an amendment offered to strike out the word "male," thus extending suffrage to women, when considering amendments to extend suffrage without distinction of color in the District of Columbia. He indicated that extending the vote to women was "one of the great questions,—which will be easily settled, whenever the women in any considerable proportion insist that it shall be settled." C. Sumner, *Female Suffrage, and an Educational Test of Male Suffrage*, Speech in the Senate, on Amendments to the Bill Conferring Suffrage without Distinction of Color in the District of Columbia (Dec. 13, 1866), reprinted in XI WORKS 48. [hereinafter *Female Suffrage*].

15. See, e.g., Nash, *Also There at the Creation: Going Beyond Gordon S. Wood*, 44 WM. & MARY Q. 602 (1987) (who asserts, "issues related to the distribution of wealth greatly concerned laboring people, as well as a few high-placed individuals, and such concerns were voiced not just in Philadelphia but in nearly every part of the American colonies."). *Id.* at 607.

16. See, e.g., 1 M.O. WARREN, *HISTORY OF THE RISE, PROGRESS AND TERMINATION OF THE AMERICAN REVOLUTION: INTERSPERSED WITH BIOGRAPHICAL, POLITICAL AND MORAL OBSERVATIONS*, 19-20; *Id.* at vol. 2, 123; *Id.* at vol. 3, 314, 345 (1805).

17. Legal scholars, who today justifiably criticize the efforts to revive republicanism because of its exclusion of the concerns of women of all colors, minorities, and other non-mainstream groups may need to provide a more complete reexamination of the definitional framework within which the current debate on republicanism is operating, in order to recapture a tradition (of whatever scope and magnitude) of concern for the unrepresented in any generation. According to Frank Michelman, republicanism has been used in legal history as "a dissenting or minority tradition." Michelman, *The Supreme Court, 1985 Term-Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 18 (1986). See also Tushnet, *The Concepts of Tradition in Constitutional Historiography*, 29 WM. & MARY L. REV. 93, 94 (1987); S. WILENTZ, *CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS 1788-1850*, (1984); Bell & Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609 (1988); Kerber, *Useful Republicanism*, 97 YALE L.J. 1663 (1988); Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988).

At a minimum the egalitarian idiom, within which the American people debated fundamental issues of political structures and social relationships, provides substantial justification for further study of the extent to which these principles survived the Federalist science of politics, and the emerging American political philosophies. G. WOOD, *supra* note 12, suggests that the Federalists, by using the most popular and democratic rhetoric available to explain and justify their aristocratic system. . .helped to foreclose the development of an American intellectual tradition in which differing ideas of politics would be intimately and genuinely related to differing social interests. . . .By attempting to confront and retard the thrust of the Revolution the Federalists fixed the terms for future discussion of American politics. They thus brought the ideology of the Revolution to consummation and created a distinctly American political theory but only at the cost of eventually impoverishing later American political thought.

Id. at 562.

ence to this earlier political thought raises new questions about the meaning of republicanism for the revolutionary generation, its impact on reconstruction legislation, and its relevance to the modern debate on republicanism.¹⁸

Revolutionary republicanism was employed by politicians labelled the most radical of their age to insist on the broadest interpretation of equal rights for blacks. The rhetoric and the substance of Charles Sumner's actions and oratory not only echoed the voices of a people's past revolution, but foreshadowed the voices of a future Civil Rights Movement.

II. THE VOICE AND AUTHORITY OF THE PEOPLE: SUMNER'S VIEW OF REVOLUTIONARY REPUBLICANISM

A. *The Conservatism of 1776: The Primacy of Equality of Rights*

Although labelled a radical Republican by his colleagues, and by modern-historians, Charles Sumner¹⁹ thought of himself as conservative.

18. The current debate, on the relevance of previous forms of republicanism to contemporary concerns, is enhanced by efforts to examine the contextual uses of a particular republican ideology wherever possible. Although the study of one individual's theory of republicanism during any particular period cannot provide conclusive evidence of a universal theory of republicanism, it can contribute an important perspective in the quest for a better understanding of the development and praxis of republican ideology located in a precise historical context.

19. Election to the United States Senate as a Senator from the Commonwealth of Massachusetts constituted Charles Sumner's first elective office. He served from 1851 until his death on March 11, 1872. A Harvard law graduate, he came early under the influence of Justice Joseph Story (for further reference to his influence see *infra* note 59); he joined Horace Mann's fights over quality education in Massachusetts long before he himself held elective office. His arguments on behalf of equal education for blacks, as early as 1849, presaged legal battles leading to *Brown v. Board of Education*, 347 U.S. 483 (1954) over a hundred years later. See *Roberts v. City of Boston*, 59 Mass. (1 Cush.) 198 (1849); see *infra* note 69. Labelled as an ultra radical by some, he fought consistently for abolition of slavery, against the Fugitive Slave Acts, for emancipation, voting rights for blacks, jury service for blacks, equal education and access to public transportation. See *infra* text accompanying notes 121-136. He supported strong measures during reconstruction to ensure that black citizens were assimilated equally into society; he bitterly fought against President Johnson's acceptance of recalcitrant southern loyalist governments as unrepresentative of the republican governments required by the Constitution. Although he served as a front-runner in the extension of constitutional principles to the protection of equal rights for all in political, social, economic and legal matters, many of the ideas he espoused were eventually taken up by the more moderate Republicans during Reconstruction.

Numerous biographies of Sumner exist; many were written during an era when the memory of Sumner's deeds were viewed as approaching saintly acts. None, however, attempt to integrate Sumner's views on revolutionary republicanism with their explanations for his actions as a Senator. A more critical biography has been written by David Donald in his two volumes: *CHARLES SUMNER AND THE COMING OF THE CIVIL WAR* (1960) and *CHARLES SUMNER AND THE RIGHTS OF MAN* (1970). Donald focuses primarily on Charles Sumner's efforts to implement his ideals rather than his theory of republicanism, which motivated his ideals. For other treatments of Sumner, see, W.

He was synthesizing principles hammered out by the American Revolution, with constitutional interpretation—principles he believed were preserved by the founders in the spirit of the Constitution, yet corrupted by the growing influence of the “slave power” in ensuing decades. The growing crisis in the late 1850s and 1860s was not a new revolution to him, but a

[c]ontinuation of the American Revolution. It is an effort to carry into effect the principles of the Declaration of Independence, and to revive in the administration of our government the spirit of Washington, Franklin, and Jefferson,—to bring back the Constitution to the principles and practice of its early Founders,—to the end that it shall promote Freedom, and not Slavery, and shall be administered in harmony with the spirit of Freedom, and not with the spirit of Slavery. (emphasis in original)²⁰

This notion of a continuance of, rather than a break with the past empowered Sumner’s philosophy; he found strength in shoring up these fundamental principles of republicanism. Before eventually breaking with the Whig party, he urged them to preserve their past ideology:

The Whigs should be conservators of the ancestral spirit, conservators of the animating ideas in which our institutions were born. They should profess the truest and highest conservatism which watches, guards, and preserves the great principles of Truth, Right, Freedom, and Humanity. Such a conservatism is not narrow and exclusive, but broad and expansive. It is not trivial and bigoted, but manly and generous. *It is the conservatism of ‘76.* (emphasis added)²¹

WIECEK, *THE GUARANTEE CLAUSE AND THE U.S. CONSTITUTION* (1972); M.L. BENEDICT, *A COMPROMISE OF PRINCIPLE* (1974); each of these treatments of Sumner has been relied on extensively by me in forming a more thorough understanding of the era and Sumner’s participation therein. Principal reliance, however, is on Sumner’s own writings and speeches in order to piece together Sumner’s theory of republicanism. For other treatments of Sumner, see H. TREFOUSSE, *supra* note 5; *POLITICS OF RECONSTRUCTION*, *supra* note 5; M. STOREY, *CHARLES SUMNER* (1900). Wherever an independent pamphlet or original copy of a speech was available I used the original, mindful of the attempt by Sumner to change his speeches after the fact to conform to what he wished he had said; however, where this was not possible, I still believe Sumner’s views, even in 1870 to his death in 1874 while he edited his works, are relevant to his interpretation of his own philosophy and the events of the times as they related to republicanism.

20. C. Sumner, *Union Among Men of All Parties Against the Slave Power and the Extensions of Slavery*, Speech before a Mass Convention at Worcester (June 28, 1848), *reprinted in II WORKS* 85 [hereinafter *Union Against the Slave Power*].

21. C. Sumner, *Anti-Slavery Duties of the Whig Party*, Speech at the Whig State Convention of Massachusetts, in Faneuil Hall, Boston (Sept. 23, 1846), *reprinted in I WORKS* 306. His dedication to these ideas continued as the crisis grew. In his eulogy after Lincoln’s assassination, he attempted to demonstrate Lincoln’s commitment to these same ideas binding the Constitution to the Declaration of Independence:

The two wars did not differ in scale of operations and in the tramp of mustered hosts more than in ideas involved. The first was for National Independence; the second was to

The fundamental structure of Charles Sumner's republicanism rested on the primary recognition of the principle of equality and on a belief in the infinite capacity of humanity to improve its condition.²² This form of republicanism emphasized concentration on the basic conditions which needed to exist before republican structure had any meaning. Even principles of liberty, the right to self-governance and justice were defined by the primary adherence to concepts of equality and to the struggle to improve the conditions of humanity. Without basic conditions of equality, freedom itself was essentially meaningless, or distorted by a hierarchical claim to that freedom. Like the early American Republicans, Sumner addressed the substantive primary conditions of republicanism from which the republican form of government could emerge.²³

This emphasis on equality and humanity's capacity for improvement drew its strength from the initial voices of American republicanism. Sumner credits James Otis, Jr., whom he refers to as "the John the Bap-

make the Republic one and indivisible, on the indestructible foundations of Liberty and Equality. The first cut the connection with the mother country, and opened the way to the duties and advantages of Popular Government; *the second will have failed, unless it consummates all the original promises of the Declaration our fathers took upon their lips when they became a Nation.* In the relation of cause and effect the first was natural precursor and herald of the second. (emphasis in original)

C. Sumner, Promises of the Declaration of Independence, and Abraham Lincoln, Eulogy on Abraham Lincoln, Before the Municipal Authorities of the City of Boston (June 1, 1865), *reprinted in IX WORKS* 370-71 [hereinafter, Promises of the Declaration of Independence]. He emphasized Lincoln's dedication to these principles.

The inevitable topic to which he returned with most frequency, and to which he clung with all the grasp of his soul, was the practical character of the Declaration of Independence in announcing the liberty and equality of all men. No idle words were there, but substantial truth, binding on the conscience of mankind.

M. STOREY, *supra* note 19, at 292.

22. C. Sumner, The Law of Human Progress, Oration before the Phi Beta Kappa Society of Union College, Schenectady (July 25, 1848), *reprinted in II WORKS* 91 [hereinafter, Law of Human Progress]; Equal Rights of All, *supra* note 5.

23. Morton Horowitz suggests that the two republican themes requiring "equality of condition" and the need for "small societies" were integrally connected. There was an emphasis on the social conditions and the development of human and public character in order to have a stable republican government instead of the "liberal emphasis on institutional equilibrium." Horowitz, *supra* note 1, at 72. The antifederalist criticism of a large republic was interpreted by Federalists as mere local protectionism when it may in fact have been a concern for an environment wherein the requisite elements of a republic could exist. Horowitz suggests that "French and Scottish Enlightenments, not eighteenth-century English opposition thought, provided republicans with the categories for analyzing the connection between a public-spirited citizenry and a relatively equal and active citizenry." *Id.* at 73. Liberalism, he argues, in order to justify the large republic, had to "break with the classical republican analysis that closely identified the character of governmental institutions with the structure of social conditions." *Id.* at 72.

tist of the American revolution,"²⁴ as the initial enunciator of these basic principles in the colonies, igniting the opposition leading to the Revolutionary War.²⁵

It was critical for Sumner to identify the principles of the radical patriots with the principles which permeated the Revolutionary War effort and which were included in the foundations of the government created as a result of those efforts. He wanted to ground his battles for equal rights in this foundational revolutionary discourse. Otis appears to have had a profound influence on Sumner's perspective. According to Sumner, Otis, who first argued that republicanism hinged on equality

[f]irmly . . . planted himself on the Rights of Man, which he insisted were, by the everlasting Law of Nature, inherent and inalienable: and these rights, he nobly proclaimed, were common to all, without distinction of color. To suppose them surrendered in any other way than by *equal rules and general consent* was to suppose men idiot or mad, whose acts are not binding. (emphasis in original)²⁶

He cites further to Otis in support of his interpretation of the meaning of a republican form of government, referring to Otis' pamphlet, *The Rights of the British Colonies Asserted and Proved*, in 1764, as,

the most remarkable pamphlet of our country, and one of the most remarkable ever written. . . . [H]ere are not only the truths asserted by our fathers, but the unanswerable arguments by which they were vindicated. . . . [t]he character of this Defence of the American People. . . where, as in gleams, may be discerned the *Idea of a Republic*. (emphasis in original)²⁷

Otis emphasized that "the first simple principle is Equality and the Power of the Whole," and as Sumner restates it, "the Equality of All and

24. Equal Rights of All, *supra* note 5, at 164.

25. *Id.* at 165. Sumner credits Otis with inspiring the revolutionary spirit and connecting the idea of the consent of the governed and the inalienable rights of man with the revolutionary efforts. He cites John Adams, referring to Otis' speech against the Writs of Assistance, "American Independence was then and there born; the seeds of patriots and heroes was then and there sown, to defend the vigorous youth. . . . Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain." *Id.* at 160, citing John Adams, letter to William Tudor (Mar. 29, 1817). Sumner claimed that this speech "was the most important, down to that occasion, ever made on this side of the ocean." *Id.* at 158. He also cites Adams' characterization of Otis' speech and pamphlet, A VINDICATION OF THE CONDUCT OF THE HOUSE OF REPRESENTATIVES OF THE PROVINCE OF MASSACHUSETTS BAY, as continuing "in solid substance, all that is found in the Declaration of Rights and Wrongs issued by Congress in 1774, the Declaration of Independence in 1776, and the subsequent writings of those political philosophers who upheld the national cause." *Id.* at 162, citing John Adams, Letter to William Tudor (Apr. 5, 1818). See also Ferguson, *Reason in Madness: The Political Thought of James Otis*, 36 WM. & MARY Q. 194 (1974).

26. Equal Rights of All, *supra* note 5, at 159.

27. *Id.* at 163. Cf. B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 176-81, 205-08 (1967) (for a different view of the cohesiveness of Otis' theories).

the Power of All!—the two buttresses of a just government.”²⁸

Otis, too, considered slavery anathema to the idea of true republican representative government:

The colonists are by the law of nature free-born, as indeed all men are, white or black. . . Does it follow that't is right to enslave a man because he is black? Will short curled hair, like wool, instead of Christian hair, as't is called by those whose hearts are as hard as the nether millstone, help the argument? [I]n a state of Nature no man can take my property from me without my consent. *If he does he deprives me of my liberty and makes me a slave.* . . . The very act of taxing, exercised over those who are not represented, appears to me to be depriving them of one of their most essential rights as freemen, and, if continued, seems to be in effect *an entire disfranchisement of every civil right.* (emphasis added)²⁹

Revolutionary republicanism, for Sumner, depended upon this recognition of the primacy of the principle of equality of rights. Even the recognized legitimacy of the government depended upon this principle; for the consent of the governed could not be accomplished if the definition of those governed did not include all on an equal basis.³⁰ Encouragement of the development of civic virtue by educational opportunities, citizen participation in self-government by jury service, public debate and public service, depended on assumptions that equal rights had to exist first. The common good was meaningless unless all could participate, by true representation, in the deliberation of goals necessary for its achievement. A republican system built without this foundational agreement was a house of straw.

B. *Humanity's Capacity for Improvement*

Sumner's republicanism was conditioned upon humanity's infinite capacity for improvement. The "Law of Human Progress," to which he ascribed,³¹ moved individuals, societies, nations and humanity as a whole, toward a gradual improvement of conditions—economic, social, legal and moral. In Sumner's view, no universal standard discovered by "the ancients" could be cast in stone for eternity's benefit. Classical re-

28. Equal Rights of All, *supra* note 5, at 159.

29. *Id.* at 164. Sumner added the voice of Samuel Adams, who likened the taxation without legal representation to being "reduced from the character of free subjects to the miserable state of tributary slaves." *Id.* at 165. See also C. Sumner, Political Equality Without Distinction of Color, Second Speech in the Senate on the proposed Amendment of the Constitution fixing the Basis of Representation (Mar. 7, 1866), *reprinted in X WORKS* 282, 294-98.

30. Sumner exhibits some embarrassment with his own inconsistency here in his reluctance to include the cause of women's equality at this time. See *supra* note 14.

31. Law of Human Progress, *supra* note 22.

publicanism represented the infancy of the philosophy of republicanism, but hardly its pinnacle of achievement.³²

Citing Thomas Jefferson, Sumner stressed a recognition for the improvability of the mind and reformation of institutions based upon improvements in science.³³ According to Sumner, "[m]an as an individual is capable of indefinite improvement. Societies, which are but aggregations of men, and finally the Human Family, or collective Humanity, are capable of indefinite improvement and this is the destiny of man, of societies, of nations, and of the Human Family."³⁴

This belief in the inevitable progress of human development strengthened Sumner's reverence for the more recent principles of the American Revolution and the synthesis required by modern understanding; it also made him more willing to reject the hierarchical stratification of society upon which the ancient civilizations depended. He also believed as a core part of his republican ethic, that it was his duty to further the progress of human development by all available means.³⁵

C. *The Influence of Classical Republicanism*

Sumner's view of human progress and the lessons learned from each succeeding generation made him view the recent American Revolution and founding era as more relevant than the lessons of antiquity. He dis-

32. *Id.*

33. Jefferson, addressing concerns raised by John Adams, suggests that, "The enemies of reform, on the other hand, denied improvements, and advocated steady adherence to the principles, practices, and institutions of our fathers, which they represented as the consummation of wisdom, and make of excellence, beyond which the human mind could never advance." Jefferson disagreed, however, and admonished Adams for his prediction that even the freedom of inquiry "will produce nothing more worthy of transmission to posterity, than the principles, institutions, and systems of education received from their ancestors" since Adams, according to Jefferson, as a man of science, knew better of the things still unknown and unexplored. G. WILLS, *INVENTING AMERICA, JEFFERSON'S DECLARATION OF INDEPENDENCE* xxiii (1978).

34. *Law of Human Progress*, *supra* note 22, at 115. Sumner also relied on Descartes, Pascal, Fontanelle and Turgot for his own view that man possessed a capacity of indefinite improvement not only in the arts and sciences, but in moral and political development as well. *Law of Human Progress*, *supra* note 21, at 106-15, *citing* DESCARTES, *DISCOURS DE LA METHODE* Euvres, Tom I. pp. 192-193; PASCAL, *PENSEES* Part I. Art I, *DE L'AUTORITE EN MATIERE DE PHILOSOPHIE* Euvres, (ed. Bossut, 1779), Tom. II. *Id.* at 107; FONTANELLE, *DIGRESSION SUR LES ANCIENS ET LES MODERNES: Euvres*, Tom. II, p.249. *Id.* at 109. TURGOT, *PLAN DE DEUX DISCOURS SUR L'HISTOIRE UNIVERSELLE*, Euvres, Tom. II. pp.626-667. *Id.* at 111.

He cites similar support for these ideas in Italy by GIAMBATTISTA VICO, *THE PRINCIPLES OF A NEW SCIENCE CONCERNING THE COMMON NATURE OF NATIONS* (1725). *Id.* at 102. And in Germany by LEIBNITZ, *OPERA OMNIA*, (ed. Dutens), Tom. VI, p.309. *Id.* at 104. Sumner also cites Lessing, and HERDER, *PHILOSOPHY OF HISTORY*. *Id.* at 105.

35. *Law of Human Progress*, *supra* note 22, at 93-94.

couraged emphasis on antiquity's definitions of republicanism because the unique American experience required separate examination.

It was necessary for Sumner to separate out references to classical republicanism as the model for current debate, by propounding a view of American exceptionalism.³⁶ Antiquity's views of equality failed to provide answers for the crisis Sumner hoped to resolve; the unique nature of the American condition spawned a new breed of republicanism, one whose basic foundation rested on the unique conditions encouraging a recognition of equality of rights for all persons.³⁷

Sumner's revolutionary republicanism distinguished itself from classical republicanism by the uniqueness of the American experience, and the primacy of equality as a fundamental of human nature. He looked to the principles enunciated by the early patriots of the American Revolution, the heightened involvement of the citizens of the colonies, and the expectations that their principles were what the war was all about and would thus be represented in any new government created by the new country.

References to ancient republics or the experience of history outside the revolutionary American experiment aided the understanding of general aims and goals of a republic, but diverted one from a recognition of the creation of a unique form of republican government, not previously existing in the world. The mistake often made by other critics, and in this Sumner included his contemporary colleagues in the Senate, stemmed from comparisons to antiquity or more modern history for comprehensive and conclusive definitions of the American republican form of government.³⁸ He rejected the inconsistent and vague definitions of a

36. Both Bernard Bailyn and Gordon Wood have attacked the myth of American exceptionalism by contending that the influence of classical republicanism, and more directly eighteenth century radical opposition philosophy, were responsible for American republicanism. As the discussion *supra* note 11 indicates, others have attempted to demonstrate the continuing influence of classical republicanism in American political consciousness.

37. For Sumner, the need to separate out American republicanism from classical republicanism was clear:

[b]ut exalted as these productions may be, it is impossible not to perceive that something of their present importance is derived from the early period when they appeared, something from the unquestioning and high flown admiration of them transmitted through successive generations until it became a habit, and something also from the disposition, still prevalent, to elevate antiquity at the expense of subsequent ages. . . . The people were ignorant, vicious, and poor, or degraded to abject slavery—itsself the sum of all injustice and all vice.

Law of Human Progress, *supra* note 22, at 116.

38. If others have thus far failed, it is because they have looked across the sea instead of at home, and have searched foreign history and example instead of simply recognizing the

republic logically flowing from classical experiences with a republic: "I put aside all illustration derived from speculations of ancient philosophers, because, on careful examination it appears that the term "Republic," as used by them, was so absolutely different from any idea among us as to exclude their definition from the debate."³⁹

Though he admired Montesquieu's definition of virtue: "a love of country, which he says is a love of equality" as the inspiring principle of a republic, Montesquieu's inclusion of an aristocracy, "where the sovereign power is in the hands of part of the people" was repugnant to American republicanism.⁴⁰

Definitions by these philosophers embraced all organized governments, including monarchies, aristocracies, democracies or some combination of all these characteristics. Nowhere did the definitions offered include a concern with the government's character or with the unique conditions of the American experience.⁴¹

D. *Turning Toward an American Creation*

Sumner believed that American revolutionary republicanism sought to incorporate all of the "virtues accorded to the ideal commonwealth."⁴² For his ideal commonwealth which he believed the revolution had mandated, Sumner extracted two principles upon which he placed enormous importance for his view of republicanism: "justice," and "the duty of seeking the general welfare." In order to obtain these goals, the implementation of underlying concepts inherent in republicanism, particularly the core principle of equality of rights, needed to be safeguarded.⁴³ "Justice" depended on a preliminary acceptance of the principle of equality; for without it, justice was meaningless. "The duty of seeking the general

history and example of their own country. They have imported inapplicable and uncertain definitions, forgetting that the Fathers, by positive conduct, by solemn utterances, by declared opinions, and by public acts, all in harmony and constituting one overwhelming testimony, exhibited their idea of a republican government in a way at once applicable and certain. They are the natural interpreters of their own constitution.

Equal Rights of All, *supra* note 22, at 152-53. Whether they drew their lineage from a devotion to English radical Whig theory or classical republicanism, a desire to implement unsullied British constitutionalism, civic humanitarianism, evangelicalism, or a blend of them all, the unique American situation, with its isolated geographical position *vis a vis* the threatening influence of European monarchies, and its experience with virtual political, social and religious autonomy, as well as its relative abundance of land and wealth, created a breed of republicanism totally American.

39. *Id.* at 144.

40. *Id.* at 149.

41. *Id.* at 144.

42. *Id.* at 145-46.

43. *Id.*

welfare" was intertwined with his strong belief in humanity's infinite capacity to improve the conditions of humanity and the resultant duties imposed thereby.

The principles at issue during the American Revolution were crystal clear to Sumner. He argued that those values, endangered by the mother country, were "self-evident" to the new American people as were the reasons for the war itself. "The first object," according to Sumner,

[w]as not independence, but the establishment of these principles; and when at last independence began, it was because these principles could be secured in no other way. Therefore, the triumph of independence was the triumph of these principles, which necessarily entered into and became the animating soul of the Republic then and there born.⁴⁴

E. *Equality and Representation*

For Sumner, the principle of equality was forever entwined with his view of representative government, whether he was dealing with a fair system of legislative apportionment,⁴⁵ the growing imbalance of slave holding states' voting strength in the United States Congress in the pre-Civil War era,⁴⁶ or multiple proposals for excluding Negro franchisement after the war.⁴⁷

Equality of representation was a core value of Sumner's republicanism. He viewed it as a unique attribute of the revolutionary American form of government, as spelled out by the early founding fathers, that could not be distorted:

[i]f this representation is equal, it is perfect; as far as it deviates from this equality, so far it is imperfect, and approaches to that state of slavery; and the want of a just weight in representation is an evil nearly akin to being totally destitute of it. An inequality of representation has been justly esteemed the cause which has in a great degree sapped the foundation of the once admired, but now tottering fabric of the British Empire; and we fear,

44. *Id.* at 154-55.

45. "But America has added to the Representative System another principle, without which it is incomplete, and which, in the course of events, is destined, I cannot doubt, to find acceptance wherever the Representative System is employed: I mean *the principle of equality*." (emphasis in original) C. Sumner, *The Representative System, and its Proper Basis*, Speech on the Proposition to Amend the Basis of the House of Representatives of Massachusetts, in the Convention to revise and amend the Constitution of that State (July 7, 1853), reprinted in III WORKS 236 [hereinafter *Representative System*].

46. C. Sumner, *Issues of the Presidential Election*, Speech before the New York Young Men's Republican Union, at Cooper Institute (Nov. 5, 1864), reprinted in IX WORKS 113.

47. See Lincoln's Proclamation of Amnesty and Reconstruction, (Dec. 8, 1863) (proposing recognition of loyal governments when 10 percent of the 1860 voters approved, thus avoiding the question of black suffrage), RIGHTS OF MAN, *supra* note 4, at 178-79.

that, if a different mode of representation from the present is not adopted in this Colony, our Constitution will not continue to that late period of time which the glowing heart of every true American now anticipates. . . .⁴⁸

According to Sumner, the radical patriots were confirmed in their outrage against Parliament's attempts to tax them by the principles of both John Locke and Algernon Sidney; he recognized Locke as the source of two fundamental truths: "that all political society stands only on the consent of the governed and that taxation without representation is an invasion of fundamental right."⁴⁹ The radical patriots, borrowing from Locke, made taxation without representation and the protection of rights their battle cry.

Resolutions by colonial governments, the Declaration of Colonial Rights and Grievances in 1765, and the acts of the Continental Congress all demonstrated to Sumner that the principles which inspired individual radical patriots to voice opposition reflected the organized voice of the American people during the Revolutionary War.⁵⁰

"Virtual representation," a defense posited by the ministers of Great Britain, flaunted basic principles of revolutionary republicanism as it was

48. Representative System, *supra* note 45, at 236. Fully ten years later he evoked these same concerns.

[A]nd you are now to decide, whether in the discharge of imperative duties under the National Constitution and bound to guaranty a republican form of government, you will disfranchise this latter mass, shutting them out from those Equal Rights promised by our fathers, and from all copartnership in the government of their country. They surpass in numbers, by at least a million, the whole population of the Colonies at the time our fathers raised the cry, "Taxation without Representation is Tyranny"; and now you are to decide whether to strip them of representation, while you subject them to grinding taxation by tariff and excise, acting directly and indirectly, dwarfing into insignificance everything attempted by the British Parliament.

Equal Rights of All, *supra* note 5, at 204-05.

49. *Id.* Sumner traces these principles even further to earlier French history for further support of these basic ideas; however, it was the wholesale adoption of these principles by the radical patriots and their translation of these into action that fascinated Sumner.

50. Resolutions introduced by Patrick Henry in Virginia emphasized that the people themselves, or "by the people chosen by themselves to represent them" are the only ones who can know what taxes they are able to bear and "must themselves be affected by every tax laid on the people. . ." *Id.* at 167. As a result of efforts made by James Otis in Massachusetts, a Congress met in New York in October, 1765 resulting in a Declaration of Colonial Rights and Grievances, declaring: "That it is inseparably essential to the freedom of a people, and the undoubted right of an Englishmen, that no taxes be imposed on them but with their own consent, given personally or by their representatives." *Id.* at 167-68. The Continental Congress immediately passed resolutions recognizing "the enjoyment of life, liberty and property, as natural rights," and that no colonists could be held to any law to "which they had not consented by representatives. . . . 'The foundation of English Liberty and of all free government. . . is a right in the people to participate in their legislative council.'" (emphasis in original) *Id.* at 170, quoting JOURNALS OF CONGRESS, Oct. 12, 1774, at 29.

being developed by the radical patriots and as it was later to be adopted by Sumner. Since all thirteen colonies were considered, in their original charters, to "hold of the manor of Greenwich in Kent" and thus be represented by the Members in Parliament from Kent County, they could be taxed since they were "virtually" represented.⁵¹ However, representative government meant direct representation and the consent of the governed, and control, by election, over those elected; the radical patriots responded with the conclusion that "where there is taxation without representation, resistance is justifiable. . . ."⁵² Sumner concluded that,

[i]ndependence was the means to an end, and that end was nothing less than a Republic, with Liberty and Equality as animating principles, where government stood on the consent of the governed, or, which is the same thing, where there should be no taxation without representation: for here was the distinctive feature of American institutions.⁵³

The vehement reaction of the radical patriots during the pre-Revolutionary War period against the concept of "virtual representation" strongly influenced Sumner's own interpretation of the nature of representation.⁵⁴ He clung to the pre-revolutionary view of "mirror image representation;" that is, that the representative should resemble his constituents and reflect their concerns as much as possible, rather than the more attenuated national representation of self-interest groups posited by Madison in *The Federalist No. 10*.⁵⁵ He was, however, a strong nationalist unlike many antifederalists who employed this view of representation during the ratification debates in the late 1780s, in an effort to defeat the strength of the national government.

Sumner described his view of the character of representation as early as 1853 when he participated in the fight over amendments to the Massachusetts Constitution to remedy unfair apportionment in the state

51. Equal Rights of All, *supra* note 5, at 171, quoting Speech on Motion for withdrawing Confidence from Ministers (Mar. 15, 1782) XXII HANSARD'S PARLIAMENTARY HISTORY 1184. See B. BAILYN, *supra* note 27, at 167-70 (for additional discussions of the concept of virtual representation as viewed by the revolutionaries).

52. Equal Rights of All, *supra* note 5, at 172.

53. *Id.*

54. *Id.*

55. See Ackerman, *supra* note 1, for Sumner's use of an appeal to the people in developing the structure of higher constitutional politics. Sumner was less willing to rely on the separation of powers as the natural check on the activities of the three branches of government that purported to represent the people; his appeals to the people, while not made for ordinary, everyday considerations, inherently recognized the inabilities of the three branches to fully represent the people. He recognized that there were extraordinary questions that ought to be appealed to the populace at large, and he, as their congressional representative, had a duty to call their attention to these questions.

legislature.⁵⁶ Typical of his strategic and philosophical perspective, he relied for support on historical justification to bolster his arguments. He quoted with favor abortive efforts, in 1777 and 1778, by Essex County, to insist on equal representation:

The rights of representation should be so equally and distributed, that the representatives should have the same views and interests with the people at large. They should think, feel and act like them, and in fine, *should be an exact miniature of their constituents*. They should be, if we may use the expression, the whole body politic, with all its property, rights and privileges reduced to smaller scale, *every part being diminished in just proportion*. (emphasis added)⁵⁷

F. Sumner's Style of Representation

Sumner's convictions were deeply populist.⁵⁸ His goal was always to expand the inclusiveness of the definition of citizen, and expand participation in government as well as in society for all persons. As an advocate for equal rights for all, he was not above shaping an interpretation of history to support his arguments; however, in examining the past, in attempting to uncover the historical justifications for equality, he tapped the roots of early American republicanism, drawing on the radical patriots to bolster the validity of his constitutional claims. Sumner did not worry about the imposition of a universal morality; to him, as to some revolutionary republicans, the nature of civic virtue was relational. The goal was not to enforce uniform private belief systems but to achieve character through participation in government aimed at the public good.

Sumner attempted to mesh his view of representation with his sup-

56. The Convention was called in Massachusetts to amend the constitution to change the basis of the scheme of representation in the legislature focusing on the problem of allowing the "towns" to send several representatives. Because of the increase in towns and an unequal distribution of population throughout the commonwealth, this method had become inequitable. Sumner was adamant in viewing the origin of the representative system in the United States as grounded firmly on equality. Representative System, *supra* note 45, at 229.

57. *Id.* at 237-38.

58. An ever expanding notion of citizenship was crucial to Sumner's theory; he believed in full participation and rejuvenation of government by its citizens in both the daily fulfillment of reciprocal obligations and in the critical stages of redefinition and constitutional change. For other discussions of the importance of citizenship see Ackerman, *supra* note 1; *Law's Republic*, *supra* note 1, at 1517-521. Foner, in comparing the two eras, states, "[l]ike the republicanism of the American Revolution, Reconstruction Radicalism was first and foremost a civic ideology, grounded in a definition of American citizenship." E. FONER, *supra* note 5, at 233. See generally discussion by G. WOOD, *supra* note 12, at 162-96, (for the importance of mirror representation). See also Ackerman, *supra* note 1, (for a view of mimetic and semiotic representation).

port for a strong national government.⁵⁹ He never advocated that the constituents could instruct their representatives in each vote and action; Massachusetts citizens had already accepted the concept of representation which deviated from direct instruction, and his view of republicanism kept him sensitive to the needs of his constituency. At times, however, his view of his constituency, as all of the advocates of liberty and full social equality for Negroes, gave him maneuvering room within his scope as a Republican senator. He operated under the strong conviction that he perfectly reflected his conception of republicanism, as well as the overwhelming sentiment of his constituency, by his views on protection of human rights, and particularly, his views on emancipation and suffrage for Negroes.

His style of operation in the Senate reflected his belief that he was "as one" with his constituency. A direct appeal to the people, over the heads of his colleagues and even his party, became his *modus operandi*. In many instances his speeches were aimed not at persuading his fellow Senators, but at informing and marshalling the public sentiment behind his cause—the cause, he believed, of his constituency.⁶⁰ He refused to compromise; he refused to participate in the ordinary wheeling and dealing of self-interested politics anticipated by *The Federalist No. 10*; he

59. Sumner was strongly influenced by the views of Justice Joseph Story, Dane Professor of Law at Harvard, who was a strong Republican and nationalist. Story justified his push for broader nationalistic powers with republicanism by arguing that states' "rights theorists were anti-majoritarian, and thus anti-republican." He viewed the majority of the people as a whole in the nation, as the true majority and not the majority of the people in any one state. Powell, *Joseph Story's Commentaries on the Constitution*, 94 YALE L.J. 1285, 1303 (1985). Professor Powell asserts that, "the Commentaries were a massive attempt to prove that the doctrines—nationalism, expansive construction of federal power, and judicial supremacy—for which Story stood and which Jefferson opposed were in fact the logical conclusions of a truly republican faith." *Id.* at 1301. Story, too, according to Powell, believed in equality as "an indispensable basis for republican government, both in order to avoid dividing the sovereign people into mutually hostile ranks or estates, and to inculcate that sense of civic pride and duty necessary to the healthy functioning of majority rule." *Id.*

60. See RIGHTS OF MAN, *supra* note 5, at 229. Sumner learned early that public opinion played an important role in acceptance of maverick principles. His first public speech on July 4, 1845, to the elders of the City of Boston involved a diatribe against war and was received by a hostile audience at the time; however, copies were circulated and reprinted in various papers and the public reaction thrust Sumner into the political limelight. He learned that the public was his audience, and he withstood the bored or hostile reactions of his colleagues in his efforts to get his message across to his constituency. C. Sumner, *The True Grandeur of Nations, An Oration Delivered Before the Authorities of the City of Boston, (July 4, 1845), reprinted in I WORKS 1*. [hereinafter *Grandeur of Nations*]. Of particular importance in evoking public response were his speeches on the barbarism of slavery, which provided the history of slavery and the principles against it. This speech was ridiculed in the Senate but had an enormous impact upon public opinion. C. Sumner, *The Barbarism of Slavery, Speech on the bill for the admission of Kansas as a Free State. (June 4, 1860), reprinted in VII WORKS 171; Equal Rights of All, supra* note 5.

read long but informative speeches in the Senate and then publicized them by private reprints throughout Massachusetts, and in some cases, throughout the country.⁶¹ Although one scholar has characterized his style as "government by exhortation,"⁶² his actions were consistent with his view of representative government; his constituency played a vital role in his view of representative government. Sumner wanted to operate on a higher plane than some of his more pragmatic colleagues; he justified his actions as spurred by moral and legal compulsion demanding total equality. For him, his situation was similar to the radical patriots with whom he so steadfastly identified—they too shunned the pragmatic in order to demand their ideals. Other Republicans operated on a more pragmatic level; while some certainly shared his ideals, they responded to a level of normal politics, to the need to be re-elected, to the need to maintain control of the Senate in the face of the threat of southern Democratic control, and the need to respond to their own party's President. Sumner accepted their operation in the same way he viewed the Federalist's compromise of the slavery question, as a response to pragmatics—postponing to a later generation the ultimate resolution of the higher moral question of constitutional guaranties of equal rights for all.

While many scholars have labeled him as "unpragmatic," "extremist," "doctrinaire," and totally unrealistic in the performance of his senatorial duties—a burden to the pragmatic, moderate republicans who faced the political realities of the day⁶³—he is also credited with playing a key role in raising public support for emancipation and reconstruction.

61. According to Donald, over 20,000 copies of his Worcester Convention address on September 14, 1865 were published, but Sumner was not content with this circulation of his protests of President Johnson's policies; he assembled a collection of his past speeches and resolutions and published a pamphlet entitled *SECURITY AND RECONCILIATION FOR THE FUTURE* and extensively circulated it throughout the country. *RIGHTS OF MAN*, *supra* note 5, at 228.

62. F. BRODIE, *THADDEUS STEVENS, SCOURGE OF THE SOUTH* 120 (1959).

63. *POLITICS OF RECONSTRUCTION*, *supra* note 5, at 59-64; M.L. BENEDICT, *supra* note 3; *see* *RIGHTS OF MAN*, *supra* note 4; H. L. TREFOUSSE *supra* note 5, at 339-40. Benedict differentiates between political and legislative radicalism noting Sumner's inability or refusal to engage in the political give and take required. M. L. BENEDICT, *supra* note 3, at 59. Benedict described the role of the pragmatist Republicans who were essentially interested in protecting the economic interests of northerners and freedmen from a hostile restored South rather than in restructuring the political, social, and economic structure of the South during reconstruction. Their main method of implementing this goal, therefore, was to obtain a constitutional amendment to change the basis of representation in Congress making representation consistent with the number of voters in the South. *Id.* at 136. This policy was anathema to Sumner's views on representative republicanism requiring him to squarely confront this vehicle of implementation of the pragmatists' goals. The proposed amendments would recognize the right of the South to disfranchise substantial portions of its population, and would be repugnant therefore, to Sumner's representative republicanism. *See infra* text accompanying notes 95-136.

In fact, his efforts were enormously important in achieving strong public support at critical junctures, in raising public support for the new Republican party culminating in the significant election of Lincoln in 1860,⁶⁴ and in marshalling the public behind the Republicans in the key election of 1866 when faced with the Johnsonian program of reconstruction and a Republican party reluctant to overstep Johnson's initiatives.⁶⁵

III. THE DECLARATION OF INDEPENDENCE AND THE CONSTITUTION

Sumner viewed the Declaration of Independence as a culmination of the enunciation of the principles of revolutionary patriots who led the American people to adopt these principles as the *cause celebre* of the revolution; he viewed that same Declaration as the architect's plans for the future government:

[i]n declaring Independence they continued loyal to their constant vows. The natural rights of all men, and the consent of the people as the only just foundation of government, which James Otis first announced, which Samuel Adams maintained with severe simplicity, which Patrick Henry vindicated even against the cry of "treason," and which had been affirmed by legislative bodies and public meetings, were embodied in the opening words of the Declaration. There they stand, like a sublime overture to the new Republic, interpreting, inspiring, and filling it with transforming power.⁶⁶

From the Declaration of Independence, Sumner derived that equality was the guiding principle within which all of the other rights were embraced and protected.⁶⁷

The overarching principle of equality was evident in the Preamble to

64. The success of Lincoln's election in 1860 must be attributed, in part at least, to the work of those who earlier left the Whig party to form, first the Free-Soil and then the Republican party. See C. Sumner, *The Party of Freedom: Its Necessity and Practicability*, Speech at the State Convention of the Free-Soil Party of Massachusetts, Held at Lowell (Sept. 15, 1852), reprinted in III WORKS 199. Sumner viewed the Free-Soil party as an effort to reestablish the principles of human rights evident in the Declaration of Independence and intended to be built into the foundations of the Constitution by the framers. *Id.* at 204-05. C. Sumner, *Duties of Massachusetts at the Present Crisis: Formation of the Republican Party*, Speech before the Republican State Convention at Worcester (Sept. 7, 1854), reprinted in III WORKS 451. See also E. FONER, *supra* note 5, at 230.

65. *Equal Rights of All*, *supra* note 5, at 115. M. Les Benedict however emphasizes the efforts of most other Republicans in the election of 1866 to diminish the brand of radicalism and to appeal to conservatives who might be swayed by Johnson; this included disavowing the imposition of black suffrage. M. L. BENEDICT *supra* note 3, at 197-202.

66. *Id.* at 173.

67. *Promises of the Declaration of Independence*, *supra* note 21, at 367. See also M. WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION: THE INTELLECTUAL BACKGROUND OF THE DECLARATION OF INDEPENDENCE* (1978); G. WILLS, *supra* note 33.

the Constitution, and according to Sumner provided further evidence of the effort to solidly continue the principles of the revolutionary effort within the framework of the Constitution. He analyzed the Preamble:

[t]hus was the National Constitution ordained, not to create an oligarchy or aristocracy, not to exclude certain persons from the pale of its privileges, not to organize *inequality of rights* in any form, but to "establish justice," which is Equality,—to "insure domestic tranquillity," which is vain without justice,—to "provide for the common defence," which is the defence of all,—to "promote the general welfare," which is the welfare of all,—and to "secure the blessings of liberty" to all the people and their posterity, which is giving to all the complete enjoyment of rights central among which is Equality. Here, then is another authoritative definition. (emphasis in original) ⁶⁸

Sumner assumed an integration of the principles identified during the Revolutionary War and enshrined within the Declaration of Independence, as the common understanding of basic principles upon which the Constitution relied. The action of subsequent generations in distorting these underlying precepts of constitutional interpretation required a formalization of this integration in order to restore basic republican principles to their proper role as the foundation of the Constitution itself.

A. *Integrating the Framers with Revolutionary Republicanism*

Reversion to the principles enunciated in 1776 did not imply a rejection, on Sumner's part, of the importance of the Constitution and the federal system created by that document. Sumner wholeheartedly adopted the Constitution as an embodiment of the republican principles he cherished.⁶⁹

He sought to integrate the thoughts, words and acts of the framers of the Constitution with the principles identified with the development of revolutionary republicanism emerging victorious from the war, and surviving the Confederation period. His evidence persuaded him that the framers were continuing to imbue the constitutional structure of the new government with previously identified principles.

68. Equal Rights of All, *supra* note 5, at 176.

69. Unlike other radical Republicans, he never suggested a course of action in defiance of the Constitution, at least from his view of constitutionalism. See F. BRODIE *supra* note 62, at 120 (for Thaddeus Stevens' anti-constitutional proposals). Sumner could never understand Stevens' support, in 1866, of the proposed constitutional amendment that would provide for representative apportionment according to population, excluding Indians not taxed, and further providing that whenever the elective franchise be denied or abridged in any state on account of race or color, all persons excluded would not be counted in the basis of representation. See M. STOREY *supra* note 19, at 311; Equal Rights of All, *supra* note 5, at 119.

James Madison, upon the conclusion of the war, drafted the "Address to the States for the Continental Congress," "supplying," in Sumner's view, "another definition of the new government":

Let it be remembered that it has ever been the pride and boast of America, *that the rights for which she contended were the rights of human nature*. By the blessing of the Author of those rights on the means exerted for their defence, they have prevailed against all opposition, and *form the basis of thirteen independent States*. No instance has heretofore occurred, nor can any instance be expected hereafter to occur, in which the *unadulterated forms of Republican Government* can pretend to so fair an opportunity of justifying themselves by their fruits. In this view, the citizens of the United States are responsible for the greatest trust ever confided to a political society. (emphasis in original)⁷⁰

And in the debates at the Philadelphia Convention, Madison recognized the right of suffrage as "one of the fundamental articles of republican government" warning that, "a gradual abridgment of this right has been the mode in which *aristocracies* have been built on the ruins of popular forms."⁷¹ It was significant to Sumner that Madison also depended upon the consent of the governed as the basis of representative government.⁷²

Sumner characterized *The Federalist No. 39* as "one of the most remarkable chapters of the federalist" where Madison provides a definition of a republic.

If we resort for a criterion to the different principles on which different forms of government are established, we may define a Republic to be, or at least may bestow that name on, *a government which derives all its powers directly or indirectly from the great body of the people*, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. *It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion*, or a favored class of it: otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of Republic. (emphasis in original)⁷³

He drew support for his emphasis on equal representation, the vote, and

70. *Id.* at 174, citing JOURNAL OF CONGRESS, Apr. 26, 1783 at 201.

71. *Id.* at 180, citing III MADISON PAPERS 1253 (Aug. 7, 1787) (debates in the federal convention).

72. According to Madison, "it seems indispensable that the mass of citizens should not be without a voice in making the laws which they are to obey, and in choosing the magistrates who are to administer them." *Id.*

73. *Id.* at 181, citing THE FEDERALIST NO. 39 (J. Madison).

civil rights from the pens of other founding fathers.⁷⁴ Even the “compromises” made by the framers of the Constitution were intended to be strict limitations upon the growth of slavery and anticipated its early demise. Nowhere in the Constitution was slavery acknowledged or sanctioned by the national government.⁷⁵ The insidious growth of the “slave power” in the United States far exceeded any scrap of support gleaned from compromises made during the framing of the Constitution. Many expected that slavery would never be extended to new states admitted to the union in the future, as with the Northwest Ordinance, slavery was forever excluded from the region.⁷⁶

74. From Benjamin Franklin he drew support for his emphasis on equal representation, upon which liberty depended:

[t]hat they who have no voice nor vote in the electing of representatives *do not enjoy liberty, but are also absolutely enslaved to those who have votes, and to their representatives*: for to be enslaved is to have governors whom *other men have set over us*, and be subject to laws *made by representatives of others*, without having had representatives of our own to give consent in *our* behalf. (emphasis in original)

Id. at 177, citing SOME GOOD WHIG PRINCIPLES 372-73.

Jefferson continued the principles of revolutionary republicanism, which he helped to establish by his frequent enunciation of the principles of a republic:

[t]he first principle of Republicanism is, that the *lex majoris partis* is the fundamental law of every society of individuals of *equal rights*. To consider the will of the society enounced by the majority of a single vote as sacred as if unanimous is the first of all lessons in importance, yet the last which is thoroughly learnt. This law once disregarded, no other remains but that of force, which ends necessarily in military despotism. (emphasis in original)

Id. at 178, citing VII WRITINGS 75.

Hamilton too, according to Sumner, in THE FEDERALIST NO. 54, which he attributed to him, contributed to the linkage to revolutionary principles:

It is only under the pretext that the laws have transformed the negroes into subjects of property, that a place is denied to them in the computation of numbers; AND IT IS ADMITTED, THAT, IF THE LAWS WERE TO RESTORE THE RIGHTS WHICH HAVE BEEN TAKEN AWAY, THE NEGROES COULD NO LONGER BE REFUSED AN EQUAL SHARE OF REPRESENTATION WITH THE OTHER INHABITANTS. (emphasis in original)

Id. at 184, citing THE FEDERALIST NO. 54 (A. Hamilton).

75. In 1847, Sumner was not yet willing to admit that the national government had any power to interfere with the state government's recognition of slavery within their own state; however, he was adamant about obliterating the federal government's support of slavery in any form:

It is not proposed to interfere with Slavery in any constitutional stronghold, or to touch any so-called compromise of the Constitution. Adopting the principle, so often declared by our Southern friends, that Slavery is a local institution, drawing its vitality from the municipal laws of the states in which it exists, we solemnly assert that the power of the Nation, of Congress, of the North as well as the South, shall not be employed for its extension, and that this curse shall not be planted in any territory hereafter acquired.

C. Sumner, Necessity of Political Action Against the Slave Power and the Extension of Slavery, Speech in the Whig State Convention of Massachusetts, Springfield (Sept. 29, 1847), *reprinted in II WORKS* at 56-7 [hereinafter Political Action Against the Slave Power].

76. “The early conduct of our fathers, at the formation of the Constitution,” according to Sum-

The rising influence of this distortion of what the framers of the Constitution had intended enraged Sumner.

With every new extension of Slavery, fresh strength is imparted to that political influence, monstrous offspring of Slavery, known as Slave Power. This influence, beyond any other under our government has deranged our institutions. To it the greater evils which have afflicted the country, the different perils to the Constitution, may all be traced. The Missouri Compromise, the annexation of Texas, the war with Mexico, are only specimens of trouble from the Slave Power. . . . *The Slave Power is the imprisoned giant of our Constitution. It is there confined and bound.* But its constant and strenuous struggles have caused, and ever will cause, eruptions of evil, in comparison with which flames, red-hot cinders, and fiery lava are trivial and transitory. (emphasis added)⁷⁷

When compromises were suggested to ward off armed conflict between the rebel governments and the union, Sumner adamantly fought potential amendments which would have recognized slave holding interests.⁷⁸ He continually emphasized the limitations which were intended by the framers despite any compromises they may have made. While the framers grudgingly permitted slavery to exist by not expressly forbidding it, and by other compromises made in the Constitution, it was always with a view toward eventual abolition of slavery, never with a view toward its extension. The Constitution, therefore, was imbued with an inherent commitment toward constraining slavery, and as early as possible, eliminating all vestiges of its existence. While the founding fathers controlled the future of the country, this constitutional view held firm; however, after their influence waned, others attempted, according to Sumner, to corrupt this constitutional premise with efforts to extend the government's involvement and approval of slavery and the interests of slave power. This was a direct affront to the interpretation of the Constitution held by the framers and legitimized by the principles of the Declaration of Independence and revolutionary republicanism. Thus, Sumner viewed the Missouri Compromise, the annexation of Texas, the war with Mexico, and the Fugitive Slave Acts, and other acts, as efforts to extend this corruption of constitutional interpretation precipitating the crisis which necessitated formalization of the synthesis between revolutionary republicanism, including principles of the Declaration of Independence, and

ner, "should be our guide now." *Id.* at 58. "On the original suggestion of Jefferson, subsequently sustained and modified by others, a clause was introduced into the fundamental law of the Northwest Territory by which slavery has been forever excluded from that extensive region." *Id.*

77. *Id.* at 59-60.

78. He asserted that, "[i]gnoble will it be in us to concede beyond the Constitution, which embodies all that our fathers would concede." *See* RIGHTS OF MAN, *supra* note 5, at 375.

the Constitution.⁷⁹

The acute task facing Republicans at the close of the Civil War, in Sumner's opinion, was to seize the moment to resolve the inconsistencies and unfinished work of the founders. The ratification of the Constitution did not complete the business of shaping its parameters or "creating a nation."⁸⁰ The pragmatic necessity of creating a union led them to stave off divisive issues for resolution by future generations working within the spirit of the Constitution. For Sumner, the failure of the founding framers to resolve finally the issue of slavery did not represent a "question of intellectual discontinuity"⁸¹ between the framers' Constitution and the Declaration of Independence, but merely temporary resort to pragmatism. Just as he rejected the politician's inherent bent toward political survival as a legitimate inhibitor of the moral compulsion to provide full social, political and economic equality for black citizens as part of his reconstruction proposals, he refused to recognize any pragmatic compromise made during the constitutional founding as annihilating the underlying constitutional commitment to equality of rights.⁸² The crisis represented by the war demanded a resolution of those constitutional ambiguities with respect to underlying principles; Sumner sought to resolve those ambiguities not with radical new proposals, but with solid applications from principles of the past.

79. Union Against the Slave Power, *supra* note 20, at 79. To Sumner the framers' intentions were clear:

It is plain that our Constitution was formed by lovers of Human Freedom,—that it was animated by their divine spirit,—that Slavery was regarded by them with aversion, so that, if covertly alluded to, it was not named in the instrument,—and that they all looked forward to an early day when this evil and shame would be obliterated from the land. Surely, then, it is right to say that the combination which seeks to perpetuate and extend Slavery is unknown to the Constitution,—that it exists in defiance of that instrument, and also of the recorded opinions uttered constantly by its founders.

Id. at 79. See generally C. Sumner, The Wrong of Slavery, Speech at a Public Meeting in Faneuil Hall, Boston, against the Admission of Texas as a Slave State (Nov. 4, 1846), reprinted in I WORKS 149-60; Wrongful Declaration of War Against Mexico, Letter to Hon. Robert C. Winthrop, Representative in Congress from Boston (Oct. 25, 1846), reprinted in I WORKS 317-30; C. Sumner, Slavery and the Mexican War, Speech at a Public Meeting in the Tremont Temple, Boston (Nov. 5, 1846), reprinted in I WORKS 333-51; Political Action Against the Slave Power, *supra* note 75, at 55.

80. STORING, WHAT THE ANTIFEDERALISTS WERE FOR 6 (1981).

81. M. WHITE, PHILOSOPHY, THE FEDERALIST AND THE CONSTITUTION (1987). White sees philosophical similarities between the two documents. He specifically rejects Gordon Wood's view that "the whole intellectual world of 1776 had become unravelled by 1787." *Id.* at 208.

82. William Nelson suggests that the "framing generation understood constitutional politics as a rhetorical venture designed to persuade people to do good, rather than a bureaucratic venture intended to establish precise legal rules and enforcement mechanisms." W. NELSON, *supra* note 7, at 9.

B. *The Constitution as an Embodiment of the Spirit of Republicanism*

Revolutionary republicans viewed constitution making as an attempt to capture the spirit of purpose for which the government was created. Although they wanted protections delineated wherever possible, and were among later antifederalists who fought vehemently for a bill of rights, they realized that no document could capture the precise definition of all rights and responsibilities encompassed in a republican society. While they recoiled from the idea of mimicking the British constitutional system, their expectation of the force of a written document incorporated the surrounding ideals and rights which emerged from their view of society. The Constitution was a tool toward achieving the articulated virtue of the society; the very nature of what they believed a society should be was woven into the fabric of their expectation of a constitution.⁸³

Sumner adopted their view of a constitution; it spurred his conviction that the principles of the Declaration of Independence and his understanding of the principles of a republican society were embedded in any interpretation of the Constitution.⁸⁴

83. In a recent article, Paul Kahn argues that methods of constitutional interpretation were transformed by ensuing generations. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L. J. 449 (1989). The founding generation, according to Kahn, based their constitutional interpretations on "reason," which included reference to political science and theory. *Id.* Later generations relied not on reason but on an understanding that the Constitution was created as an act of "will," thus requiring reference to the intent of the constitutional creators. *Id.* While he does not separate out early Republicans from early pluralists, his observations help to explain the willingness of early Republicans to expect a more comprehensive interpretation of their future Constitution.

The late Robert Cover's discussion of the role of natural law in the interpretation of a written constitution is also illuminating; many of the revolutionary republicans (James Otis, for example), imposed natural law readings upon positive law itself. However, according to Cover, as the Republicans moved farther away from an acceptance of natural law principles as a common source for constitutional principle, they continued to believe in "a natural law generated by the United States Constitution." R. COVER, *supra* note 13.

See also Ackerman, *supra* note 1, for a discussion of the importance of a written constitution and the implications of the British tradition on the American experience. M. WHITE, *supra* note 67, also emphasizes the importance of the American view of inherent assumptions about the protection of natural rights embedded within the people's understanding of their new constitution. See also Tushnet, *infra* note 90. Sumner believed that the framers' included within the Constitution's message inherent boundaries limiting the extension of slavery, providing the seeds of its elimination; any extension of slavery, conflicted with the moral framework of constitutional foundations. Equal Rights of All, *supra* note 5, at 59-60.

84. Equal Rights of All, *supra* note 5, at 194-95. According to Sumner:

[w]e have seen these principles adopted as the very frontlet of the Republic, when it assumed its place in the family of nations, and then again when it ordained its Constitution; we have seen them avowed and illustrated in memorable words by the greatest authorities of our history; lastly, we have seen them embodied in public acts of the States collectively and individually; and now, out of this concurring, cumulative, and unimpeachable testimony, constituting a speaking aggregation absolutely without precedent, I

C. *Implementing Republicanism Prior to the Civil War*

Sumner's commitment to federalism surfaced repeatedly prior to the onset of the Civil War in his reluctance to assert congressional power over the internal affairs of a state. All of his energies focused on the necessity for abolishing any support for slavery by the national government, and on launching a vehement campaign against the admission of new slave states. Sumner believed that the admission of new slave states contributed to the insidious growth of the distortion of representation in the United States Congress in favor of the slave power and against the very limitations imposed by the framers in the Constitution, as evidenced by their other public and private actions.

Sumner argued that the only conceivable support for slavery was through "*positive law*" within the states.⁸⁵ Nothing in the Constitution or structure of the federal government supported slavery, so that encroachments on this notion leading toward an interpretation of the Constitution as a source of support of slavery, represented a dangerous distortion of the Constitution itself, the intent of the framers and the principles of republicanism. The Missouri Compromise, the annexation of Texas, the war with Mexico, which he claimed was begun by "the slave power interests," and the Fugitive Slave Laws, represented a growing crisis in the interpretation of the Constitution.

True representative government, mandated by the incorporation of principles of revolutionary republicanism, depended upon the establishment of liberty, equality and the consent of the governed. In the name of "liberty," prior to the outbreak of Civil War, he advocated the disavowment of federal government support of slavery in any form; he protested vehemently against the Fugitive Slave Laws, he protested the admission of additional slave states, and he supported emancipation in the territories and the District of Columbia. After the outbreak of war, he advo-

offer you the American definition of a Republican form of government. . .the early and constant postulates of the Fathers, the corporate declarations of the Fathers, the avowed opinions of the Fathers, and the public acts of the Fathers,. . .all with one voice proclaiming, first, that all men are equal in rights, and, secondly, that government derives its just powers from the consent of the governed; and here is the American idea of a Republic, which must be adopted in the interpretation of the National Constitution. You cannot reject it.

Id. at 195-96.

85. See discussion of Robert Cover for one view of the role of positive law and slavery in pre-revolutionary America. R. COVER, *supra* note 13, at 25-28. C. Sumner, Freedom National, Slavery Sectional, Speech in the Senate, on a Motion to Repeal the Fugitive Slave Act (Aug. 26, 1852), reprinted in III WORKS 105. [hereinafter Freedom National].

cated the emancipation of slaves everywhere.⁸⁶

In the name of "equality" he argued vociferously in Massachusetts for admission of colored students to white schools, for participation of blacks as witnesses and jurors, against segregation on public transportation in the District of Columbia, for equal representation in state legislative apportionment, and against admission of slave holding states in the distortion of equal representation of citizens.⁸⁷ His strong support for the Constitution and for federalism explained his initial focus on attacking slavery where it was supported by the national government; he recognized the inability of Congress to legislate over the internal affairs of the slave holding states.

In his first major speech as a Senator, "Freedom National, Slavery Sectional," he protested the enactment of the Fugitive Slave Laws of 1793 and 1850, since the institution of slavery was not supported by the Constitution and could only be supported by positive law in the state itself.⁸⁸ Involvement of the federal government in the enforcement of fugitive slave laws contorted constitutional principles to favor slavery when the principle founders were anti-slavery and had no intention of preserv-

86. C. Sumner, *Rights of Sovereignty and Rights of War: Two Sources of Power Against the Rebellion*, Speech in the Senate, on his Bill for the Confiscation of Property and the Liberation of Slaves Belonging to the Rebels (May 19, 1862), *reprinted in VII WORKS* 1. [hereinafter *Rights of Sovereignty*].

87. In December, 1865, for example, Sumner introduced resolutions calling for equal suffrage in the District of Columbia, allowance for the presence of Negro jurors where the rights of Negroes were involved. *See, e.g.*, C. Sumner, *Opening of the United States Courts to Colored Witnesses*, Speech in the Senate on an Amendment to the Civil Appropriation Bill (June 25, 1864), *reprinted in IX WORKS* 39; C. Sumner, *Admission of a Colored Lawyer to the Bar of the Supreme Court of the United States*, Motion in the Supreme Court (Feb. 1, 1865), *reprinted in IX WORKS* 229; C. Sumner, *No Reconstruction Without the Votes of Blacks*, Remarks in the Senate, on the Resolution Recognizing the New State Government of Louisiana (Feb. 24, 25, & 27, 1865), *reprinted in IX WORKS* 311; *Impartial Jurors for Colored Persons*, Bill in the Senate (Dec. 4, 1865), *reprinted in X WORKS* 10; *Colored Suffrage in the District of Columbia*, Bill in the Senate (Dec. 4, 1865), *reprinted in X WORKS* 5; C. Sumner, *Free Schools and Free Books*, Remarks in the Senate, on an Amendment to the Internal Revenue Act, Making Books free (Feb. 27, 1865), *reprinted in IX WORKS* 336; C. Sumner, *Equal Rights of Colored Persons to be Protected by the National Courts*, Bill in the Senate, to enforce the Constitutional Amendment abolishing Slavery (Dec. 4, 1865), *reprinted in X WORKS* 16; C. Sumner, *Political Equality Without Distinction of Color, No Compromise of Human Rights*, Second Speech in the Senate on the proposed Amendment of the Constitution fixing the Basis of Representation (Mar. 7, 1866), *reprinted in X WORKS* 282; C. Sumner, *Equal Rights a Condition of Reconstruction*, Amendment in the Senate to a Reconstruction Bill (May 29, 1866), *reprinted in X WORKS* 464; C. Sumner, *No More States with the Word "White" in the Constitution*, Speeches in the Senate on the Admission of Nebraska as a State (July 27, Dec. 14, 19, 1866–Jan. 8, 1867), *reprinted in X WORKS* 504.

88. *Freedom National*, *supra* note 85, at 105.

ing it in the Constitution.⁸⁹

D. *Equality of Education*

Sumner oriented himself within the tradition of revolutionary republicanism as it evolved from the colonial experience of community and independence, to the radical patriots.⁹⁰ He not only borrowed the ideas espoused by individual radical patriots, he attempted to infuse his world view with a revolutionary republican orientation.

It is no accident that he was drawn early in his career to fight for equal public education for all. While the liberal Lockean influence pervaded the relations between individual and government in the world surrounding Sumner, the republican emphasis on the importance of education in the creation of civic virtue permeated the blossoming institution of public education.⁹¹

89. *Id.* at 105-118.

90. *See*, Tushnet, *supra* note 17 (questioning whether many people after the foundation viewed themselves as orienting themselves to republicanism as a tradition). He defines tradition as "different from a complex of ideas that can be precisely identified as being in existence during any particular period." He suggests,

that traditions consist of the relations among complexes of ideas. That is, at one point people characterize their beliefs—the complex of ideas they hold—as a coherent whole. When those beliefs become a tradition, the coherence of the whole may dissolve. Successors orient themselves to the tradition by identifying some elements in their predecessors' thought to which they continue to adhere and disregarding or explaining away other elements in that thought which they feel compelled to reject.

Id. at 93-4. Certainly Sumner attempted to locate himself within this tradition as he defined it.

91. *See* Baker, *From Belief into Culture: Republicanism in the Antebellum North* 37 AM. Q. 532 (1985) (emphasizing the importance of republicanism in the institution of public schools and political parties). Baker states:

[t]hus while the spirit of Locke was transforming individual Americans into incipient entrepreneurs, the alternative faith, the republican sense of civic virtue and community—fostered what soon became the most important public institution for training Americans. Schooling emerged as the taproot of a uniform republican culture, and the felt need for civic instruction sparked an enduring national commitment to education, not for its liberating benefits or as economic training within a modernizing economy, but as a political tool training Americans in the eighteenth century understanding of civic virtue.

Id. at 539-40. Late in his career, Sumner was still advocating the importance of education for republican institutions:

In a republic education is indispensable. A republic without education is like the creature of imagination, a human being without a soul, living and moving blindly, with no just sense of the present or the future. It is a monster. Such have been the Rebel States,—for years nothing less than political monsters. But such they must be no longer.

C. Sumner, *Reconstruction Again, The Ballot and Public Schools Open to All, Speeches in the Senate on the Supplementary Reconstruction Bill (Mar. 15-16, 1867)*, reprinted in XI WORKS 156 [hereinafter *Reconstruction Again*]. And again, in seeking guaranties for the success of reconstruction:

Early in his career, in 1849, Sumner argued for equal education rights for colored persons in Massachusetts.⁹² Education was a key element in providing for equality as well as for meaningful participation in government. Sumner's views on the need for education to ensure proper virtues could have been lifted straight from the pens of earlier revolutionary patriots:

[w]ithout knowledge there can be no sure Progress. Vice and barbarism are the inseparable companions of ignorance. Nor is it too much to say, that, except in rare instances, the highest virtue is attained only through intelligence. This is natural, for to do right, we must first understand what is right.⁹³

Sumner emphasized the classroom as a microcosm stimulating the growth of future citizens, imparting essential values for good government; he insisted that separate but equal schools could not accomplish this goal:

[t]he school is the little world where the child is trained for the larger world of life. It is the microcosm preparatory to the macrocosm, and therefore it must cherish and develop the virtues and the sympathies needed in the larger world. And since, according to our institutions, all classes, without distinction of color, meet in the performance of civil duties, so should they all, without distinction of color, meet in the school, beginning there those relations of Equality which the Constitution [of Massachusetts] and Laws promise to all.

As the State derives strength from the unity and solidarity of its citizens without distinction of class, so the school derives strength from the unity and solidarity of all classes beneath its roof.⁹⁴

Sixteen years later, in a speech on reconstruction, Sumner elaborated on the importance of education:

[t]hen, again, education: who can doubt? Certainly not my friend from Oregon: he will not doubt the importance of education as a corner-stone of Reconstruction. It is a golden moment. We have the power. Let us not fail to exercise it. Exercising it now, we can shape the destinies of that people for the future.

C. Sumner, *Further Guaranties in Reconstruction: Loyalty, Education, and a Homestead for Freedmen; Measures of Reconstruction Not a Burden or Penalty, Resolutions and Speeches in the Senate* (Mar. 7, 11, 1867), *reprinted in XI WORKS* 130.

92. C. Sumner, *Equality Before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts, Argument before the Supreme Court of Massachusetts in the case of Sarah C. Roberts vs. City of Boston* (Dec. 4, 1849), *reprinted in II WORKS* 327 [hereinafter *Equality Before the Law*]. For a brief discussion of this case see, Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 *AMER. J.L. HIST.* 325 (1988).

93. *Law of Human Progress*, *supra* note 22, at 117; C. Sumner, *Equal Rights to the Lecture-Room, Letter to the Committee of the New Bedford Lyceum* (Nov. 29, 1845), *reprinted in I WORKS* 160.

94. *Equality Before the Law*, *supra* note 92, at 371-72.

[a]s the *education of the people* is essential to the national welfare, and especially to the development of those principles of justice and morality which constitutes the only sure foundation of a Republican Government and as, according to the Census, an immense population of the People of the Rebel States, without distinction of color, cannot read or write, it is obvious that public schools must be established for the equal good of all. The example of Massachusetts must be followed, which, after declaring in its Constitution that "wisdom and knowledge as well as virtue, diffused generally among the body of the people, are necessary for the preservation of their rights and liberties," proceeds to direct the Legislature and magistrates, in all future periods, "to cherish the interests of literature and the sciences," and especially "public and grammar schools in the towns." All this must enter our work of reconstruction, and become one of our guaranties. (emphasis in original)⁹⁵

By 1867 when the Senate was reluctantly supporting universal suffrage in the reconstruction bills, Sumner argued that the measures were "horribly defective,' because they made no provision for education in the south and set up no agency by which 'the freedmen can be secured a freehold for themselves and their families.'"⁹⁶

IV. REVOLUTIONARY REPUBLICANISM AS THE ANIMATING FORCE BEHIND SUMNER'S PLANS FOR RECONSTRUCTION

Although Sumner recognized the conflict over reconstruction in part to stem from the struggle for power between the executive and legislative branches of government, and between the state and federal governments, he also conceptualized it as a struggle over the implementation of genuine republican conditions in the South. Republicanism fueled the debate for all three struggles. Sumner's adherence to his theory of republicanism made it impossible for him to compromise his position because each of these battles dealt with substantive issues essential to the survival of republican government as he understood it.

Sumner's theory of vacated governments made it possible for him to mesh his strong belief in federalism with the right of the national government, and in particular the Congress, to impose conditions which would allow the full citizenry of each southern state to participate in creating a legitimate republican form of government. His fear of the military and his belief in the consent of the governed as the only legitimate origin of government forced him to oppose presidential reconstruction plans where the source of the new governments flowed from military imposi-

95. National Security and National Faith, *supra* note 9, at 460.

96. See RIGHTS OF MAN, *supra* note 4, at 287.

tion of civilian government. His substantive understanding of the conditions essential to a true republican form of government forced him to hold out against compromises proposed by others in Congress where such compromises failed to give a voice to the newly freed citizens in reconstituting their governments, and where such proposals failed to provide the mechanisms to make the franchise and participation in government meaningful.

A. *Justifying Federal Intervention*

Although southerners, particularly in the early antebellum period, used republican arguments to justify slavery, emphasizing the importance of local control and fear of governmental interference with the Jeffersonian ideal of the yeoman farmer, the emphasis shifted to liberalist arguments by the 1850s.⁹⁷

Once the southern states attempted to secede from the union, Sumner adopted the stance that governments loyal to the union, government officials who had sworn to uphold the Constitution had "vacated" their offices, abandoned their laws, leaving a void for Congress to fill.⁹⁸ The people, according to Sumner's view of republicanism, were entitled to a loyal government chosen by those to be governed. When the existing governmental officials chose to ignore their responsibilities to their oath to support the Constitution, they reneged on their commitment to the people; once slaves were liberated by emancipation, Sumner was also faced with a huge unrepresented population not previously recognized within the state and now entitled to choose their representative government.

In 1862 Sumner suggested that under the rights of sovereignty, the national government was obligated to act to protect the loyal citizens of the southern states and to restore republican government against either "criminals" or "enemies of the national government":

The old State Governments, solemnly bound by the oaths of their functionaries to support the National Constitution, have vanished; and in their place appear pretended Governments, which adopting the further pretension of a Confederacy, have proceeded to issue letters of marque and to levy war against the United States. . . . In point of fact, throughout this territory the National Government is ousted, while the old State Governments have

97. See, e.g., Maltz, *supra* note 92; Oakes, *From Republicanism to Liberalism: Ideological Change and the Crisis of the Old South* 37 AM. Q. 551 (1985). Oakes indicates, however, that these ideas gave way by the 1850's to a Madisonian "proto-liberalism" which would shape the ideology of the slave holding class in the antebellum south." *Id.* at 554.

98. C. Sumner, *State Rebellion, State Suicide: Emancipation and Reconstruction*, Resolution in the Senate (Feb. 11, 1862), *reprinted in* VI WORKS 301.

ceased to exist, lifeless now from Rebel hands. Call it suicide, if you will, or suspended animation or abeyance,—they have practically ceased to exist.⁹⁹

To Sumner, what served as justification for the federal government to legislate, once the existing government was abandoned, was the need for the creation of conditions where the people could begin to create their representative government.

The “state” still existed, secession being impossible in Sumner’s view; however,

it became the duty of the national authority to set up loyal governments, and at the same time to say that they were republican in form,—which must mean at least that they are governments of the majority, and not of the minority; and I think I cannot err, if I add, that, according to the fundamental principles of the Declaration of Independence, they must be founded on the equal rights of all men and “the consent of the governed.”¹⁰⁰

Four alternative constitutional sources were suggested by Sumner as authority for the Federal government to oversee reconstruction of the southern state governments after the war: military authority under article two of the Constitution until security was restored after the war; congressional authority under the Guarantee Clause of the Constitution, federal authority under the Territories Clause; and authority under the Declaration of Independence after the Civil War, since the integration of the Declaration of Independence with the Constitution had been formalized in the North’s victory.¹⁰¹

99. Rights of Sovereignty, *supra* note 86, at 14.

100. National Security and National Faith, *supra* note 95, at 463-64.

101. *Id.* at 464-65. See W. WIECEK, *supra* note 18 (for a discussion of President Johnson’s use of the Guarantee Clause in his proclamations appointing the provisional governors for the occupied states). Wiecek asserts that Johnson’s theory was that the President could enforce the Guarantee Clause without congressional authorization. “[I]t operated automatically once the states had presented republican constitutions; and the federal government was obliged to render the guarantee. Johnson’s assumptions not only clashed head on with the republicans, but also swept under the rug all important questions implicit in the clause.” *Id.* at 189-90. According to Wiecek, “Sumner took out the most radical part of the territoriality theory—which was that the states were out of the union. His argument appealed to other proponents of the guaranty clause because they could now plausibly argue that states were in the union.” *Id.* at 176. Because of this theory, Sumner submitted a resolution during the first session, on February 18, 1865, which omitted the ‘seceded states’ from the count when determining the number of states necessary for ratification of the Thirteenth Amendment to the Constitution. C. Sumner, Participation of Rebel States Not Necessary in Ratification of Constitutional Amendments, Declaratory Resolutions in the Senate (Feb. 4, 1865), *reprinted in IX WORKS* 233.

B. *The Origin of Newly Constituted Governments*

Sumner's theories rationalizing future reconstruction efforts by Congress were inextricably intertwined with a deep commitment to his form of republicanism. Fear of the encroachment of military power upon the consent of the governed for the type of representative government created, equality of representation, equality of civil, political and social rights, in the context of a strong federal government operating within the boundaries of the Constitution and the Declaration of Independence, often forced Sumner to publicly attack both Lincoln's and Johnson's reconstruction plans as well as oppose his Senate colleagues in the measures they chose for reconstruction.

Military occupation after the war received almost unanimous support from the Republicans in Congress. Sumner recognized the necessity for security purposes, to "hold military possession of the rebel states for as long as required for security,—whether months, or years." The national government also retained the power to set the terms of peace and restoration.¹⁰²

This power justified the President's action in placing military governors in charge of the southern states after the war; thus, Sumner had no difficulty with President Lincoln's initial plans for reconstruction. When, however, Lincoln went beyond merely "securing the territory," by allowing the military governor to recognize a completely disloyal government, which failed to provide proper representation for its newly freed slaves, Sumner insisted the President had overstepped his constitutional authority. Similarly, when Johnson appointed civilian governors, or commissioners, Sumner viewed him as exceeding his powers as commander-in-chief and attempting to usurp legislative functions.¹⁰³

Sumner saw the exercise of presidential power in early reconstruction as military in character, and thus, dangerous and temporary in nature. Certainly the military government was limited in its ability to restructure republican governments. No true republican government could be military in its origins.¹⁰⁴ "Clearly," he admonished his col-

102. The National Security and the National Faith, *supra* note 95.

103. C. Sumner, *The One Man Power vs. Congress*, *The Present Situation*, Address at the Opening of the Annual Lectures of the Parker Fraternity at the Music Hall, Boston (Oct. 2, 1866), reprinted in XI WORKS 3 [hereinafter *One Man Power vs. Congress*]; C. Sumner, *Protection Against the President*, Speeches in the Senate, on an Amendment to the Tenure of Office Bill (Jan. 15, 17, 18, 1867), reprinted in XI WORKS 59.

104. *Reconstruction Again*, *supra* note 91, at 162-63. Sumner added that, [i]mbued with this principle, I hoped that Congress would see the way to establish at once civil governments in all those States, and not subject them to military power, except

leagues in the Senate, "it is according to the genius of republican institutions that the military should be subordinate to the civil. *Cedant arma togae* is an approved maxim, not to be disregarded with impunity."¹⁰⁵ No military government could create the consent of the governed necessary for a true republican government. Its usefulness immediately after the war and during the recalcitrant bloodletting of the postwar era was to provide protection to the loyal citizens within the southern states. Conditions would then become favorable for citizens to convene their own conventions where the majority of loyal citizens of all races could create their own civil government. But, warned Sumner, "it is one thing to govern a state temporarily by military power, and quite another to create a constitution for a State which shall continue *when the military power has expired*. (emphasis in original)¹⁰⁶

In response to Lincoln's extension of presidential authority beyond occupation, to establishing the civilian government without prior congressional approval, Sumner asserted his conviction, rooted in revolutionary republicanism, that the origin of government could not derive from military occupation. Lincoln recognized the dangers to unstable provincial governments in the critical aftermath of Civil War; he acted to protect the fragile efforts at reconstructing the southern governments by bolstering their stability with military support, noting that, "we shall sooner have the fowl by hatching the egg than by smashing it." Sumner replied, however, "[t]he eggs of the crocodiles can produce only crocodiles; and it is not easy to see how eggs laid by military power can be hatched in an American state."¹⁰⁷ Allowing the military to create the source of government would defeat every notion of republicanism Sumner so vigorously supported.

When the Committee on the Judiciary introduced a resolution on February 18, 1865 recognizing the reconstituted antebellum government of Louisiana, set in place after the internal struggle resulting in the ouster

so far as needed for purposes of protection. This is the true object of the army. It is to protect the country,—not to make constitutions, or to superintend the making of constitutions. At least, so I have read the history of republican institutions, and such are the aspirations that I presume to express for my country.

Id. For a republican view of the role of the military, see Cress, *Republican Liberty and National Security: American Military Policy as an Ideological Problem 1783-1784*, 38 WM. & MARY Q. 73 (1981).

105. *Id.* at 146-47.

106. One Man Power vs. Congress, *supra* note 103, at 10.

107. RIGHTS OF MAN, *supra* note 5, at 206-07, citing VIII LINCOLN'S WORKS 604; C. Sumner, The Late Senator Collamer, Speech in the Senate, on his Death (Dec. 14, 1865), *reprinted in X WORKS* 44.

of Lincoln's military governor General Banks in favor of antebellum government sympathizers, Sumner vigorously opposed the resolution, claiming that the government was "not republican in origin or form" and provided "no security for the rights of colored persons."¹⁰⁸ A substitute was proposed on February 23, which declared that:

neither the people nor the legislature of any seceded state¹⁰⁹ should elect Senators or Representatives in Congress, until the President should declare by proclamation that armed hostility to government has ceased therein, nor until people had adopted a constitution in harmony with the Constitution and laws of the United States, and Congress had by law declared the state entitled to representation.¹¹⁰

And Sumner offered his own amendment which provided that the recognition should not take effect "except upon the fundamental condition that within the state there shall be no denial of the electoral franchise or any other rights, on account of color or race, but all persons shall be equal before the law."¹¹¹ Both substitute and amendment were defeated.¹¹² In the same session, Sumner introduced a resolution recognizing the obligation of the federal government:

[t]o reestablish republican governments in states whose governments had been vacated, that governments to be republican, must rest on the consent of the governed and that all persons must be equal before the law; that no government founded on military power or having its origin in military orders could be republican.¹¹³

Sumner's deep anti-militarism and concerns for the origin of government were also integral to his theory of republicanism. He noted repeatedly the dangers of military power in a republic, citing the founding patriots. His own career had commenced with a sensational speech against wars and the dangers of militarism to republican governments.¹¹⁴

If Lincoln's plan had employed military powers in an effort to ensure that the majority of all the people of the state were able to participate in reconstructing their constitution and government, Sumner would

108. C. Sumner, Guaranty of Republican Governments in the Rebel States, Resolutions in the Senate (Feb. 25, 1865), reprinted in IX WORKS 329-332.

109. Although Sumner referred to the "seceded states" he used this as a matter of convenience; he never recognized the right of the states to secede and usually meant an attempt to secede when he referred to the seceded states. See discussion *infra* at 501.

110. 38 CONG. GLOBE 1011 (1865) (special session) This occurred at a special session of the Congress which commenced immediately following the conclusion of the second session.

111. *Id.* at 1099.

112. *Id.* at 1011.

113. *Id.* at 1091.

114. Grandeur of Nations, *supra* note 60.

have enthusiastically supported the President (as he had done when the President first announced his plan in December, 1863).¹¹⁵ However, use of the military to obstruct the power of the majority of the people to reconstitute their government, and the refusal to create an environment where the newly freed slaves could receive information, government participation and the vote, created just the type of structure the founders had feared—an aristocratic elite, shored by military power. This truly could not be recognized as achieving the consent of the governed under any definition Sumner could abide.

David Donald suggests that Sumner, influenced by “the broadly nationalistic school of Joseph Story and John Quincy Adams. . . did not specially venerate the principle of separation of powers. What he wanted was results.”¹¹⁶ Although he did not venerate separation of powers as anything more than a vehicle for implementing the foundational principles of republicanism—here he could accept presidential authority to act in the South under military powers if the actions were geared toward creating an environment where the consent of the governed could be achieved, rather than the military government becoming the source of the civilian government. It was a critical distinction for Sumner, providing justification for his later acceptance of the military reconstruction acts, as a vehicle toward accomplishing that goal.¹¹⁷

Conservative Republicans could only justify reconstruction programs if they believed that the normal federal relations had resumed between the southern states and the national government; they were reluctant to abandon support for President Johnson’s reconstruction

115. See RIGHTS OF MAN, *supra* note 5, at 152. According to one scholar, Lincoln’s version of republicanism was really liberalism based on Locke’s “abstract conception of a state of nature where men retained, after their needful creation of government, certain rights and privileges.” This was bolstered by a Jeffersonian conviction that “citizens must be freed from governmental intrusions and favoritism to elites for equal opportunities in the marketplace and at the polling place.” Baker, *supra* note 91. Baker asserts that,

[n]ever did his [Lincoln’s] version of life, liberty and happiness include the equality of making “black women our wives” (as he put it), nor did he intend to abolish slavery where it existed. Lincoln meant only to end slavery someday, somehow, and to keep the peculiar institution out of any new territories. . . . Here, rewritten for his generation was the Jeffersonian vision of a society of independent white men prospering without the intrusion of the government-protected institution of slavery. . . . Thus nearly a century after the American Revolution the propulsive logic of natural rights individualism had produced Lincoln’s theoretical anti-slaveryism. . . .

Id. at 533.

116. RIGHTS OF MAN, *supra* note 5, at 62. See *supra* note 59, for further discussion of the influence of Justice Joseph Story.

117. 39 CONG. GLOBE 1976 (1867).

plans pursuant to his authority as commander-in-chief; the closer the proximity to a "state of war" justification for extraordinary action, the more comfortable their support. However, when it became apparent that Johnson's plan meant virtual restoration of pre-Civil War governments (by his veto of the Freedmen's Bureau Bill and the Civil Rights Act), the conservatives moved closer to Sumner's theories.¹¹⁸ Once superficial stages of reconstruction were initiated, and after the passage of the Fourteenth Amendment, these conservatives again became uneasy about the constitutional justifications as federal-state relations became, on the surface, at least, more normal.¹¹⁹ This conservatism would push them to support reconstruction proposals, as late as 1867, to require that 50 percent of the registered voters participate in the elections which ratified the new state constitutions, before the state could be recognized, an effort to delay the resumption of normal federal state relations. Sumner, by contrast, driven by his view of republicanism, aimed at achieving the consent of the governed, and searched for an assurance that a minority of the voters did not control the ratification of their constitution.¹²⁰

C. *The True Conditions of Equality*

Sumner's inability to support Lincoln's plan stemmed from his revolutionary view of equality—which meant more than mere freedom—and required full integration of citizens into the rights and responsibilities of that citizenship. All of his actions aimed at accomplishing the full meaning of republican citizenship for all members of the community. Whereas Lincoln, and even more flagrantly, Johnson,¹²¹ never shared his view of republican citizenship applying to the newly freed slaves: the politics and

118. *Id.* at 915-17; *Id.* at 1785.

119. M. L. BENEDICT *supra* note 3, at 315-16.

120. This was consistent with his belief that the federal government, by Congress, had the power to determine who should participate and fix the suffrage in adopting a new state constitution. *See id.* at 32.

121. Sumner commented on Andrew Johnson's early views on equality; when speaking in the Senate he quotes the Declaration of Independence and then states:

[i]s there an intelligent man throughout the whole country. . . is there a Senator, when he stripped himself of all party prejudice, who will come forward and say that he believes that Mr. Jefferson, when he penned that paragraph of the Declaration of Independence, intended it to embrace the African population? Is there a gentleman in the Senate who believes such a thing? . . . There is not a man of respectable intelligence who will hazard his reputation upon such an assertion.

Equality Before the Law, *supra* note 92, at 332, *citing* 36 CONG. GLOBE 100 (Dec. 12, 1859) It is clear that Johnson feared the Negro vote. He worried that late slaveholders would control Negroes granted suffrage and use that vote against the poorer whites in the south. L. COX & J. COX, *supra* note 4, at 154.

the economics militated against their embracement of a truly republican approach to the problem. Johnson claimed that allowing the white voters the right to decide whether Negroes could vote was demanded by the concept of "the right of the people to govern themselves."¹²²

Concern for equality of representation and against "virtual representation" were exacerbated by the distortion of representation proposed by the newly reconstituted state plans receiving presidential approval after the war. Sumner, in his "Equal Rights for All" speech in the Senate in 1865, introduced lengthy population tables based on the 1860 census to demonstrate to his colleagues, but more importantly to the public, the impossibility of truly representative government where in some cases, over half of the population consisted of unrepresented freedmen.¹²³ "A republic," he argued, "is a pyramid standing on the broad mass of the people as a base; but here is a pyramid balanced on its apex."¹²⁴ He concluded that, "To call such a government "republican" is a mockery of sense and decency. A monarch "surrounded by republican institutions," as at one time was the boast of France, would be less offensive to correct principles, and give more security to Human Rights."¹²⁵

Although Sumner advocated enfranchisement of all men in every state, he argued that the conditions in the South, where a huge population of newly freed men were unrepresented, mandated a finding that there was no republican form of government existing in the state. The fact that a tiny minority of the population in some northern states were disfranchised was immoral, offensive to his principles of republicanism, but not as egregious as the conditions in the South which required governmental action.¹²⁶

From Sumner's perspective, Andrew Johnson veered even further away from the limits of Article II powers with respect to reconstruction, than Lincoln. He could not conceivably go along with Johnson's drive to accept states as reconstituted when they failed to meet minimum representative standards as defined by Sumner's views of republicanism. John-

122. *Id.* at 162.

123. The 1860 census, according to Sumner's speech, demonstrated that there were "5,447,220 whites to 3,656,112 colored persons" in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia. *Equal Rights of All*, *supra* note 4, at 204. "There is Mississippi, which disfranchises 437,406 citizens, being much more than one half of its whole 'people'. And there is South Carolina, which disfranchises 412,408 citizens, being nearly three fifths of its whole people." *Id.* at 207.

124. *Id.*

125. *Id.*

126. *Id.* at 213-14.

son represented a threat to the accomplishment of the synthesis between the principles of the Declaration of Independence, revolutionary republicanism and the Constitution. A synthesis which Sumner believed had occurred as a result of the Civil War.

After Johnson's veto of the Freedmen's Bureau Bill and the Civil Rights Act in 1865, many of the moderate Republicans began to accept that a republican form of government might not "require the enfranchisement of all Negroes everywhere, but it forbade their wholesale proscription where they were numerous."¹²⁷

Moderate Republicans began to realize, that if reconstruction was to mean anything more than emancipation, a confrontation with their own President was inevitable. Reports from Louisiana at the same time made it impossible for them to believe that the provisional government there, supported by the President, intended to deviate at all from antebellum policies against Negroes and other unionists.¹²⁸

Reluctant to join Sumner in an attack on Lincoln's early reconstruction plans, moderate Republicans now joined other radical Republicans in confronting the presidential authority to oversee reconstruction. The Majority Report of the Joint Committee on Reconstruction, issued at the end of the 38th session of Congress, directly attacked the presidential power to implement reconstruction outside of the limited powers of Article II. The report claimed for Congress the power to review and pass judgment upon the forms of government established in the reconstituted states, before their readmission to Congress.¹²⁹

In September, 1865, Sumner again challenged the Presidential authority to appoint officers in the states "not known to the Constitution or

127. W. WIECEK, *supra* note 19, at 200.

128. See discussion of the situation in Louisiana by M. L. BENEDICT, *supra* note 3, at 115-22. Benedict views Louisiana as providing "the link between wartime and peacetime Reconstruction." *Id.* at 118.

129. W. WIECEK, *supra* note 19, at 201-02. Wiecek views the Majority Report as "the precipitant" for consensus among the Republicans (excluding Sumner who was still insisting upon an endorsement of voting rights for Negroes) and regards this report as the "high water mark of republican development of the guaranty clause in the first session." He views the second session as evidence of the implementation of "the theoretical consensus embodied in the report." *Id.* at 203. While the report reflects a general and vague consensus, the Republicans had already faced the stark realities of the events in Louisiana where the intransigent provisional government deluded no one as to the antebellum sentiments of the presidentially supported officials. The President's veto of critical reconstruction legislation as well as the growing evidence of similar conditions in other southern states forced many moderate Republicans to conclude that they could not shirk their own commitments to these ideals in favor of pragmatic political alliances with the president. The refusal of Congress, in 1865, to recognize the reconstituted governments of these southern states occurred before they knew or were confident of the results of the upcoming year's congressional elections.

laws. . . . The Act of Congress," he pointed out, "authorizing their appointment [provisional governors] failed to become a law; so that no such office is 'established by law,' according to the requirements of the Constitution."¹³⁰

For Sumner this was nothing new; he had been specifically advocating congressional responsibility under the Guaranty Clause at least since 1852, and with even more conviction in 1863.¹³¹

In 1866, Sumner again challenged the admission of Tennessee because the new constitution still disfranchised over one quarter of its population; again he reminded the members of the Senate that a republican government, if anything, "is a government founded on the people and the consent of the governed."¹³²

According to Sumner, after the surrender at Appomattox, the rebels were ready for any terms as long as they could escape with their lives. They would have agreed to Negro suffrage and provided homesteads for each newly freed man.¹³³ An opportunity was lost to fully effectuate the gains for freedmen won by the war. "Had the national government taken advantage of this plastic condition, it might have stamped Equal Rights upon the whole people, as upon molten wax, while it fixed the immutable conditions of a permanent peace. The question of Reconstruction would have been settled before it arose."¹³⁴

While moderate Republicans grew anxious to recognize the southern states as legitimate after adoption of the Fourteenth Amendment, Sumner realized that further steps were necessary to provide the conditions that would effectuate the meaning and power of the Amendment. He urged his colleagues to provide for impartial suffrage, for a homestead

130. National Security and National Faith, *supra* note 9, at 465-66. It was the duty of Congress to create the conditions under which the people of the southern governments could create their own republican form of government. *Id.*

131. Sumner's utilization of the Guaranty Clause of Article IV of the Constitution is discussed extensively in W. WIECEK, *supra* note 19.

132. C. Sumner, Tennessee Not Sufficiently Reconstructed, Speech in the Senate, on a Joint Resolution Declaring Tennessee again entitled to Senators and Representatives in Congress (July 21, 1866), *reprinted in X WORKS* 492. As he had done previously with the question of readmission of Louisiana and admission of Colorado, he introduced a proviso which stated, "[T]he Act should not take effect except upon the fundamental condition that within the State there shall be no denial of the electoral franchise, or of any other rights, on account of race or color, but all persons shall be equal before the law." *Id.* at 493. At one time Sumner had supported the idea of representation based upon the number of registered voters in each state, but he quickly withdrew this proposal as violative of his basic principles of republicanism.

133. One Man Power vs. Congress, *supra* note 103, at 7.

134. *Id.*

to every freedman, and for full educational opportunities.¹³⁵ As he described it, full republicanism could not be meaningfully reconstituted in the South without "The Four E's,—standing for Emancipation, Enfranchisement, Equality, and Education."¹³⁶

V. CONCLUSION

It is curious that Charles Sumner has been branded by history as such an extremist, albeit a hero to many. There is no doubt that he was treated as both by different segments of the population during his lifetime. Legal historians, among others, have attributed Sumner's constitutional arguments to manifestations of his idealism with little basis in real constitutional theory. Lauding his moral convictions on the equality of man, they suggest that he stretched constitutional argument beyond plausible reach while endangering federalism by his expansive use of the Guaranty Clause, interfering with the effectiveness of more practical moderates who were intent on getting the job done as well as politically possible.

While Sumner's more moderate colleagues in Congress fought to superimpose recognizable republican forms of government on a shaky, if not corrupt foundation, Sumner argued to take reconstruction to the roots of republicanism and restructure the foundations required for any lasting adherence to the real meaning of republicanism.

In one sense, the battle over reconstruction in the south resembled the earlier threats to republicanism represented by the Federalists' new constitutional theory in 1787. In part, antifederalist insistence on small republics reflected traditional republican emphasis on the initial conditions necessary for a republican form of government. While the argument may have been portrayed as mere local self-protectionism, the broad outline of the concern falls within the ambit of republican theoretical reliance on basic preliminary conditions essential for its survival.

And yet, after the bitter dust of the Reconstruction Era settled, it was Sumner's theory, rooted in revolutionary republicanism, that articulated a basis for congressional assertion of authority over efforts for reconstruction. It was Sumner's theory, rooted in revolutionary republicanism, that presented the most plausible justification for the view that the ratification of both the Thirteenth and Fourteenth Amendments to the Constitution were legitimate despite Congress' refusal to admit the

135. *Id.* at 29.

136. *Id.*

representatives of the presidentially approved reconstituted governments of the southern states. It was Sumner's theory of vacated government offices, rooted in revolutionary republicanism, that spurned acceptance of rights of secession, yet allowed for congressional involvement in restructuring southern state governments. It was Sumner's theory of representative government and the consent of the governed, rooted in revolutionary republicanism, that repudiated the proposed amendment to allow proportional representation tied to numbers of voters. It was Sumner's theory of republican government, rooted in revolutionary republicanism, that provided a way to reject the continuance of the black laws, denial of educational and other social and political rights, as part of newly reconstituted southern republican governments. It was Sumner's direct appeal to the people, rooted in revolutionary republicanism, arming them with information and statistics and constitutional theory, that helped to mobilize support for the critical elections of 1860 and 1866. It was Sumner's attack on the military origin of governments, rooted in revolutionary republicanism, that addressed the problems of continued sanction of presidentially controlled reconstruction after armed insurrection had been quelled. It was Sumner's theory of synthesis of the Declaration of Independence and the Constitution, rooted in revolutionary republicanism, that attempted to provide a cohesive theory for resolving constitutional ambiguities. His theories were grounded in the foundations of the past, yet were treated as aspirations for the future. His reliance on the "conservatism of 1776" motivated his conservatism of the mid-nineteenth century.

Both Bernard Bailyn, in his seminal work, *The Ideological Origins of the American Revolution*, and Gordon Wood, in the much acclaimed *Creation of the American Republic*, pay initial respect to the dominance of the foundational belief by the American people, from the colonial period through the constitutional founding, in the principle of the equality of rights.¹³⁷ Neither, however, places much emphasis on an analysis of

137. B. BAILYN, *supra* note 26, at 232-246 where the discussion is focused on the strong beliefs against slavery. *Id.* at 307, 317-18; G. WOOD *supra* note 11, at vii, 70-75, 83, 495; *Id.* at 572-74; *Id.* at 607 (for John Adams' view on equality). Wood, in his preface, reports that, "In the final analysis. . . it was the Americans' habit of thinking 'that all men are created equal in their rights' which had created their revolution and sustained their freedom." *Id.* at vii, *citing* J. BARLOW, *ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE* (1792). He cites one historian, David Ramsay: "Henceforth their society would be governed, as it had not been in the past, by the principle of equality—a principle central to republican thinking, the very 'life and soul. . .'" *Id.* at 70. However he concludes that "By republicanism the Americans meant only to change the origin of social and political pre-eminence not to do away with such preeminence altogether." *Id.* at 71. "Because the Federalists," according to Gordon Wood, "were fearful that republican equality was be-

the way this belief molded strains of republicanism in the key social, political, and economic contexts of the eras with which they dealt.

Efforts by some legal scholars to reconsider the relevance of republicanism rely significantly upon the work of Bailyn, Wood and other historians of the *genre* in seeking a working definition of republicanism. Concern is voiced by other legal scholars who focus on the exclusion of women of all colors, all minorities, and other non-mainstream groups from traditional precepts of republicanism; what relevance can such a philosophy have for modern political theory other than ultra-reactionary attacks on individual rights or liberalism? The abandonment of certain strains of historical work, of certain strains of republican thought in various historical contexts, impoverishes the debate and encourages a view of the expansion of the protection of individual rights as a perversion of the past.

Other historians have suggested that equality of rights played a more significant role in American republicanism than reflected in current legal scholarship.¹³⁸ Whether this emphasis on equality of rights is ultimately viewed to be part of a very early strain of revolutionary republicanism—later rejected by the Federalists, and the people during the ratification process, or whether, as Charles Sumner, James Otis, Mercy Otis Warren, and others believed—it represented a core part of our constitutional principles—the role these ideas played in the founding era and in later periods of social, political, economic and constitutional crisis are well worth our consideration.

Elucidating the strands of republican theory critical to Sumner's comprehensive program of reconstruction emphasizes both a tragic lost opportunity and an inherited tradition. A lost opportunity because Sumner's entire program of reconstruction, had it been adopted, might have provided new citizens of all races a very different basis for opportunity and interaction within a reconstituted society. An inherited tradition because insights are gleaned from the way Sumner's republican theories, rooted in earlier American republican traditions, incrementally moved more "moderate" Republicans to accept his philosophy. Questions are legitimately asked regarding the weight this republican tradition may be

coming 'that perfect equality which deadens the motives of industry, and places Demerit on a Footing with Virtue,' they were obsessed with the need to ensure that the proper amount of inequality and natural distinctions be recognized." G. WOOD, *supra* note 12, at 495.

138. See *supra* note 17. This study has not meant to diminish the role of other radical republicans who espoused egalitarian theory during the Reconstruction era. The focus has been necessarily on one individual's theory of republicanism.

accorded in interpretations of this legislative history of the Republican Congress of the Reconstruction era.

It is no wonder that Sumner's theory of republicanism was ignored, misunderstood, or mislabelled as extreme idealism. So much of what he argued for depended upon an understanding of the conditions under which republican forms of government thrive. His emphasis on the connection between the people and their government mirrored earlier revolutionary concern for the same necessary conditions of republican government. His interest was not merely in accomplishing token acquiescence with general principles of republican idealism, but in providing the machinery necessary for a republican form of government to survive in the reconstituted south. An early champion for securing suffrage for all men, he recognized that the franchise itself could be rendered ineffectual if citizens were not also provided opportunities for education, opportunities for economic equality by virtue of land ownership, as well as full protections ensuring equality of rights in the social, political and legal spheres of their new society.