

Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America, by Garrett Epps

“The Constitution will hereafter be read by the light of emancipation”

Eric London
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Donald Trump’s executive order restricting birthright citizenship is an effort to repeal by executive fiat the legal foundation underlying the Fourteenth Amendment, which the ruling class today views as incompatible with oligarchic rule.

The amendment, which formally became a part of the Constitution in July 1868, was, alongside the Thirteenth Amendment freeing the slaves and the Fifteenth Amendment guaranteeing formerly enslaved men the right to vote, the crowning social-legal achievement of the American Civil War of 1861-65.

The Amendment’s first section established that “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States” and prohibited states from “mak[ing] or enforc[ing] any law which shall abridge the privileges or immunities of the United States” or “deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The fifth section gave Congress the power to enforce the amendment as a whole. The nationalization of citizenship was an express repudiation of the Supreme Court’s 1857 decision in *Dred Scott v. Sanford*, where the court held that individuals of African descent were not citizens in some states and therefore could not be citizens in any state.

As Garrett Epps puts it in *Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America*, “for the first time in American history, the [Fourteenth] amendment was writing the word *equal* into fundamental American law.” (Emphasis in the original).

Epps, an attorney and historian who teaches constitutional law at the University of Oregon, wrote *Democracy Reborn* nearly 20 years ago (in 2006). But his book is now more relevant than ever. The events of the last two weeks place the Fourteenth Amendment under threat of unconstitutional revocation (amendments can only be repealed by the amendment process).

Epps takes the reader through the process of ratification and explains how the amendment’s proponents viewed themselves as suppressing an active counterrevolution of the former slave states. Massacres of African Americans (and white Republicans) took place in Memphis and New Orleans in 1866. During this period, President Andrew Johnson vetoed civil rights legislation in an attempt to bring former slave states back into the union by “Presidential Reconstruction,” or on terms that would have protected the old southern aristocracy at the expense of the freed

population.

One could say much more about the period covered in Epps’ book. But what is most critical today are his efforts to explain that the Fourteenth Amendment was the product of a democratic revolutionary change that sought to put the Constitution on a genuine egalitarian footing.

The Constitution and slavery

Epps begins *Democracy Reborn* by reviewing the contradiction at the heart of the Constitution. The American Revolution opened a new page in human history. Its crowning achievement, the Declaration of Independence, asserted that “all men are created equal.” But the framers of the Constitution (ratified five years after the Treaty of Paris brought the revolution to a conclusion) made a compromise with the southern slave owners. The Constitution did ban the Atlantic slave trade by 1808, but its Three-Fifths Clause also granted the slavocracy an effective veto power on federal policy for nearly a century by counting slaves for purposes of congressional representation.

The leaders of the Confederacy were to claim their rebellion was justified by the Constitution’s acknowledgment of slavery. Epps notes that Northern abolitionists struggled over whether the Constitution represented a slaveholders’ charter (the position of William Lloyd Garrison and Wendell Phillips) or as containing an abolitionist essence by guaranteeing a “Republican form of government” in Article IV Section 4 (as Frederick Douglass believed). The democratic core of the young republic—the Bill of Rights—was only added after the Constitution was approved by the convention and sent to the states for ratification. The Bill of Rights came as a concession to “the people” over fears that the Constitution might augur a new, tyrannical central government.

It was only on this basis that the state conventions ultimately ratified the Constitution, making it the law of the land.

The contradiction at the heart of the Constitution was resolved not by judges in a courtroom, but by the Union army on the field of battle. In the months and years that followed General Lee’s surrender at Appomattox, a radicalized population in the North provided the Radical Republicans in the House and Senate with the power to enshrine the conquests of the Union army through the Civil War Amendments. That the Republicans

did so despite the opposition of Lincoln's reactionary usurper, Andrew Johnson, to the population's desire to politically crush the reaction once and for all, is a testament to the revolutionary mood in the Northern population. As a result of the ratification of the amendment, radical novelist Ignatius Donnelly would say, "This is a new birth of the nation. The Constitution will hereafter by the light of the rebellion; by the light of the emancipation; by the light of that tremendous uprising of the intellect of the world going on everywhere around us."

Crushing the "spirit of oligarchy"

Epps brings to life the revolutionary Republican politicians who led the fight for the passage and ratification of the Fourteenth Amendment, and gave expression to the deeply democratic and essentially egalitarian character of the amendment as a whole. The statements cited by Epps in *Democracy Reborn* make clear why Trump and the contemporary oligarchy views the Fourteenth Amendment as incompatible with their dictatorial designs.

Vermont-born Michigan Senator Jacob "Honest Jake" Howard said the amendment "abolishes all class legislation and does away with the injustice of subjecting one caste of persons to a code not applicable to another," and "establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just government."

In House debates on the amendment, Thaddeus Stevens, leader of the House Radical Republicans, said the amendment was necessary to ensure the South would not be "rebuilt" through conciliation with the former slaveholding aristocracy. "In rebuilding it is necessary," Stevens said, "to clear away the rotten and defective portions of the old foundations, and to sink deep and found the repaired edifice upon the firm foundation of eternal justice."

Though Stevens believed the final language was a concession from more radically egalitarian language, Epps explains that Stevens still viewed the amendment as "the beginning of a process of rebuilding the nation around the principles of the Declaration of Independence."

Ohio Republican John Bingham, radical Presbyterian and congressional shepherd of the Fourteenth Amendment, is described by Epps as a "second founder" for his leadership in securing House passage of the amendment. Bingham had deplored slavery from the floor of the House in 1858 by declaring that the struggle for its abolition was "the high heaven of the nineteenth century. The whole heavens are filled with the light of a new and better day. Kings hold their power with a tremulous and unsteady hand. The bastilles and dungeons of tyrants, those graves of human liberty, are giving up their dead. ... the mighty heart of the world stands still, awaiting the resurrection of the nations, and that final triumph of the right, foretold in prophecy and invoked in song."

The joint House and Senate majority report advocating passage of the amendment argued it was necessary to prevent class domination: "Slavery, by building up a ruling and dominant class, had produced a spirit of oligarchy adverse to republican institutions, which finally inaugurated civil war. The tendency of continuing the domination of such a class, by leaving it in the exclusive possession of political power, would be to encourage the same spirit, and lead to a similar result." This report, Epps explains, "became an important part of the political campaign of 1866."

After Congress sent the amendment to the states for ratification, the

1866 election was essentially transformed into a referendum on its text. Carl Schurz, by then an old campaigner at age 37, traveled the country campaigning for the amendment and against President Johnson and the Democrats. Schurz told a rally in Philadelphia that the amendment stood for "a Union based upon universal liberty, impartial justice and equal rights. ... A Union without a slave and without a tyrant," while excoriating Johnson's staggering conciliation with the former slavocracy as "a Union in a part of which the rules of speech will be prescribed by the terrorism of the mob, and free thought silenced by the policeman's club and the knife of the assassin. ... a Union between the fighting traitors of the South and the scheming traitors of the North."

Trump's executive order restricting birthright citizenship

The arguments of opponents of the Fourteenth Amendment echo those made today by Trump, his aides and his lawyers. Pennsylvania Democrat Edgar Cowan (1815-1885) expressed the opposition of his party to the first section of the Fourteenth Amendment addressing birthright citizenship: "I am unwilling, on the part of my State, to give up the right that she claims ... of long expelling a certain number of people who invade her borders; who owe her no allegiance; who pretend to owe none; who recognize no authority in her government; who have a distinct, independent government of their own. ... I mean the Gypsies." Cowan's argument was rejected as supporters of the amendment declared that Gypsies and Chinese individuals born in the US would indeed be citizens.

Those who read Epps' book will be left with no doubt as to why Trump and the modern day oligarchy view the Fourteenth Amendment as a critical legal obstacle in their search for absolute executive power. Trump's executive order, "Protecting the Meaning and Value of American Citizenship," claims "the Fourteenth Amendment has never been interpreted to extend citizenship universally to everyone born within the United States," a pseudo-legal sleight of hand that manipulates the meaning of "subject to the jurisdiction thereof," which the amendment's authors intended to exclude the children of diplomats.

The birthright citizenship order was enjoined last week by a federal judge in Washington state, who asked in a hearing on the order, "There are other times in world history where we look back and people of goodwill can say, 'Where were the judges? Where were the lawyers?'" Epps' work exposes the contemporary assault on the Fourteenth Amendment and gives him the right to answer, "present!"



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