

# How Maine did — then didn’t — play role in 14th Amendment

BY PATRICK RAE  
SPECIAL TO THE BDN

One hundred fifty years ago this spring, Congress passed what some call the most important modification to the U.S. Constitution ever. The 14th Amendment fixed problems left over from the Civil War, a task that proved to be surprisingly difficult. The amendment’s ambivalent legacy has rendered it a vital piece of our constitution, with on-going relevance to today’s contentious policy debates.

The 14th Amendment solved two critical problems. First, it addressed the status of newly freed slaves, declaring them citizens by virtue of their birth on American soil. Second, the amendment protected the rights of citizenship when states violated them. After slavery ended in 1865, the states of the former Confederacy began targeting African Americans with prejudicial laws designed to keep them economically and civically inferior. “Black codes” passed by state governments restricted the freed peoples’ economic options and criminalized their impoverishment, making them an exploited labor class that was “free” only in name. The federal government stepped in.

Many considered this revolutionary. Up to then, constitutional theory held that liberty was safest when protected by the states, far away from the kind of powerful central government

the American colonies had rebelled against. But Reconstruction demonstrated that the states themselves could also undermine liberty. By compelling the federal government to act against state discrimination, the 14th Amendment made it the ultimate guarantor of citizens’ rights.

Those rights were specified in the amendment itself, which stated that all citizens were entitled to equal protection and due process of the law. The privileges and immunities that went with citizenship were specified in the Civil Rights Act, a momentous piece of legislation Congress also passed in 1866. These included the right to access the legal system, as well as basic rights of personal security. Finally, the framers of the amendment viewed it as encompassing the liberties set forth in the Bill of Rights.

While the 14th Amendment and Civil Rights Act worked together to give meaning and security to American citizenship, both faced uphill political battles getting passed. Of course, southern conservatives opposed efforts to protect the rights of freed slaves, but since Congress had refused to seat representatives from former Confederate states, they had little say.

The real trouble came from the Republicans who had proposed the amendment in the first place. Critics complained that it fundamentally re-crafted the relations between the feder-

al government, which existed only to represent the interests of the states internationally, and the state governments, which regulated affairs between individuals and government. Robert Hale of New York declared the amendment “an utter departure from every principle ever dreamed of by the men who framed our Constitution,” amounting to “a grant of the fullest and most ample power to Congress” to pass laws as states did. Others worried that the amendment’s champions were “introducing a power never before intended to be conferred upon Congress,” or that “it takes away from these States the right to determine for themselves what their institutions shall be.”

The amendment’s defenders countered that federal power would be triggered only when states violated the rights naturally due all free people. All the states needed to do to avoid it was to cease discriminating.

“If the States would all observe the rights of our citizens, there would be no need of this bill,” declared Massachusetts Senator Henry Wilson. “The practice of the States leaves us no avenue of escape, and we must do our duty by supplying the protection which the States deny.”

While proponents won the day, it was not an easy fight. Maine’s own senator during Reconstruction, William Pitt Fessenden, illustrated the era’s ambiva-

lence over federal power. Fessenden supported the 14th Amendment, and even the vote for African Americans, declaring to the southern states that “until you ratify an amendment to the Federal Constitution providing for equal civil and political rights ... you must remain unrepresented in Congress.” But when southern states balked at accepting it, he advised that Congress “had better leave the matter where it was” rather than compel their submission.

When the recalcitrant President Andrew Johnson vetoed the amendment, Fessenden refused to side with the radical wing of his party, and voted against Johnson’s impeachment. He found the whole crisis trying; “treachery on the one hand and folly on the other have almost disheartened me,” he lamented.

In the short term, proponents of the amendment won the day. But older views of federal power persisted beyond Reconstruction, severely limiting the amendment’s ability to guarantee the rights it was designed to secure. Justices raised on the antebellum logic of states’ rights federalism circumscribed the amendment in the post-war years, limiting its applicability to instances of state rather than private discrimination, and of violations of civil rather than political rights.

Armed with this narrow view, the Supreme Court ultimately decided in the case



HUMAN RIGHTS CAMPAIGN  
The Human Rights Campaign equal sign logo, used to push for same-sex marriage rights.

of Plessy v. Ferguson (1896) that Jim Crow laws segregating the races did not violate the 14th Amendment’s guarantees of equal protection — a clear departure from the framers’ original intent.

Thankfully, much has changed over the last 120 years. But debates over the meaning and purpose of the 14th Amendment continue to animate important discussions in public policy — about how far the benefits of American citizenship should extend, and about the nature of those benefits.

Some wish to repeal the principle of birthright citizenship while others have sought to extend 14th Amendment protection to questions of marriage equality.

Clearly, our view of federal power has changed. Americans now encounter the federal government every day: in the form of the paper money we spend, the regulations that keep us safe, the taxes we pay, and

the representatives we elect. Whether we favor or oppose this ubiquity, history reminds us that this was not always so.

Only one thing is sure. As its framers intended, the 14th Amendment will continue to shape the ways we think about liberty in a dynamic and ever-changing country. As one of its framers declared in 1866, the 14th Amendment sought nothing more than “the care of the Republic, not only for the present, but for all the hereafter.”

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A door at the Portland nightclub Styxx commemorates the victims of the shooting in Orlando.

## Orlando

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and I mean terror in the literal, not political, sense — there is a broader community that is in favor of and advocating for the exact opposite.

Touching stories in the aftermath abound, from these instances locally to communities coming together for victims’ families in and around Orlando to hearing some politicians begin to admit that their anti-gay stances contributed to the dehumanization of these communities.

When I say it’s a time to prioritize listening, particularly for those looking to be supportive, I mean the best way to be available is to hear the needs of the communities affected.

A friend of mine recently shared her reflections:

“The queer community is exhausted, fatigued. I cannot go more than a few minutes without seeing another friend being attacked by well-meaning ‘one love’ activists. This is where your voice, the voices of allies and loved ones can make a difference [in the lives of people under threat.] There is a deafening silence from some of our nonqueer friends, and it is painful.”

And so I want to underscore that listening does not mean silence but considering the needs of others and turning that into action. She offers several suggestions:

“Step in and do some of the educating, deflect some of the attacks, tell someone to shut up.”

This was valuable and important feedback, which was especially helpful to me in understanding how I could best be supportive. Others shared articles about how to be an ally.

It’s easy to offer pleasant thoughts or prayers or good intentions, but those actions alone don’t necessarily take into consideration how we can be more proactive in change. Better understanding the needs of our friends and fellow humans who feel under attack because they *are* under attack and delivering on those needs is the logical and actually proactive thing to do.

We can’t do that exclusively by projecting our thoughts, ideas and insights. We do that by listening, hearing, putting defensiveness aside and directing our actions accordingly.

When we focus on responding or proposing our own solutions or arguing about what we think the real problem is, we — inadvertently and with every good intention — make tragedies about ourselves and not those who feel the impact.

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## Economy

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### Curse of natural resources

In spite of this downward trend plaguing Maine’s natural resource economy, LePage has taken few steps to transition the state toward an economy less dependent on extracting natural resources.

In the eyes of some Mainers, a proposal to create a national monument in the Katahdin region is what the interior of the state needs to reduce its dependence on the forest product industries while capitalizing on the state’s growing tourism industry.

LePage is among the monument’s most vocal opponents, arguing it will harm the state’s forest products industry. A monument designation in the Katahdin region is “a growing threat to Maine workers” who work within the state’s natural resources economy, LePage wrote in a letter to Maine’s congressional delegation last August.

“A National Monument designation makes Maine timber off limits to the forest products industry,” he wrote.

But there’s no evidence that suggests a national monument would harm the state’s forest products industry, and there’s no indication that Elliottsville Plantation Inc., which is not cutting trees on the land, ever plans to turn the land into a working forest — even if it remains the owner in the absence of a monument designation. And research suggests a national monument and tourism can exist alongside the forest product industries.

Maine faces a dilemma com-

mon among economies long based on extracting natural resources. A 1997 Harvard University study found that countries with abundant natural resources experienced more sluggish economic growth than those with fewer natural resources to exploit between 1970 and 1990. Researchers have called this “the curse of natural resources.” Among the explanations for this was that in economies with “easy riches” there was less incentive for workers to seek education to develop skills transferable to other industries.

“We kept trying to get the resource-based industries back into play, which isn’t going to happen. We’re not going to get new paper mills,” Colgan said. “Yet, our picture of the Maine economy among many if not most Mainers is still tied up in the natural resources sector.”

### Make Maine competitive

LePage’s economic growth efforts haven’t been limited to propping up forest products and mining. In 2014, he offered a legislative proposal to create Open for Business zones in an effort to entice larger manufacturers from out of state to set up shop in Maine.

Under the proposal, businesses that locate in these zones, hire 1,500 workers and invest \$50 million within two years would have no state income tax obligation for 10 years and a reduced rate for the next 10 years, among other perks. LePage also pitched that these zones would be covered by a right-to-work law, under which workers who don’t belong to a union would not be required to pay fees for union representation in collective bargaining.

“It’s an economic vision firmly grounded in the way we

thought about regional economic development 60 years ago,” Colgan said.

The evidence on whether these “enterprise zones” spur job creation is mixed, according to a 2015 paper published by the Federal Reserve Bank of San Francisco.

A 2011 Brookings Institution report found that 95 percent of all job growth comes from businesses already within the state expanding and entrepreneurs launching new businesses, not luring businesses from out of state.

The public sector can support economic economic growth through investment in research and development. But Maine lags behind the rest of New England in R&D investments, which totaled 1 percent of the state’s GDP in 2011 compared with the regional average of 4.4 percent, according to Maine Economic Growth Council’s latest “Measures of Growth” report.

Investment in R&D yields a high return on investment and can contribute significantly to long-term economic growth, according to the report.

LePage, though, has a mixed track record on support for R&D investments. In 2012, he vetoed a \$20 million bond that would have funded R&D investments in technologies developed by growing Maine companies through the Maine Technology Institute. In April, however, he signed a bill for a \$50 million bond for R&D that will go before voters in June 2017.

“Get behind innovators, entrepreneurs, small startups all across the state in all sectors. Build the capacity to help the little guys grow,” Caron of Envision Maine said. “We will get more jobs by doing that than by trying to prop up old industries.”

## Guns

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you are selling at a gun show or in your dooryard. Should we crack down on those who are actually dealers flouting existing law by claiming they only conduct private sales? Of course. But inventing and repeating inaccurate terms such as “gun show loophole” helps no one.

Or we see cries to bring back the Federal Assault Weapons Ban. How did that law define an “assault weapon?” It had to have detachable magazines and two other items, such as bayonet or grenade launcher mounts, flash suppressors or telescoping stocks — none of which have had anything to do with recent mass shootings.

This illiteracy is one reason why debates about guns go nowhere quickly. Those who do not understand firearms make pro-

nouncements that do not reflect reality. This causes those who know guns to roll their eyes. It is like taking your truck into the shop and telling the mechanic your flux capacitor is acting up; he probably won’t take you seriously.

There are, of course, many individuals with significant knowledge about weapons who advocate for further regulations on guns. But if the continually called-for “national conversation” about firearms is to occur, we need to begin with a common vocabulary across the board — not nonsense about “semi-automatic AR-14s.” From that starting point we can then debate things such as assault weapons bans, magazine sizes and background checks and how they interact with things such as constitutional rights and the ability to defend yourself, your home and your loved ones.

That debate can take us to interesting places. For example, imagine a world where Donald

Trump becomes president and proposes a law that prohibits American Muslims from owning firearms without the pre-approval of his administration. Good or bad idea?

Does your opinion change if it only applies to those the FBI believes might be terrorists? And what if it wasn’t owning guns but instead publishing a book praising the Islamic philosophy of ISIS? After all, guns and bombs may be the instruments of chaos used by terrorists, but it is ideas that motivate the act.

You can see where this is going. These aren’t simple or easy issues, and there will be areas where people legitimately, honestly disagree; that’s healthy.

But, please, let’s at least speak the same language.

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