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The Supreme Court Doesn't Own the Constitution

di Jamelle Bouie

It is the job of the judiciary, as Chief Justice John Marshall famously wrote, to say what the law is.

Often, this is taken to mean a duty to interpret the Constitution and fix its meaning in place. But to say what the law is and to say what the Constitution means are two different tasks. The law concerns cases and controversies — the application of past precedent and broad principles to present circumstances.

Constitutional meaning is more abstract. It deals with the shape and structure of our political community. And as much as courts help build our collective constitutional understanding, the question of meaning is as much the purview of the public as it is the job of a jurist.

It is only in the last half-century, in fact, that we have fully conflated legal decision-making with the production of constitutional meaning. The result, as the legal historians Nikolas Bowie and Daphna Renan [have written in these pages](#), is a strong form of judicial supremacy, where the meaning of the Constitution and therefore the structure of our political community are fixed in place by the decisions of a small, cloistered and often self-interested tribunal.

In past eras of American politics, the people, through their representatives in Congress, have shaped and settled constitutional meaning, rebuking the court when it overstepped its role as a legitimate actor. The paradigmatic example is the reaction to the Supreme Court's decision in *Dred Scott v. Sandford* in 1857, when the Republican Party organized itself around opposition to that decision and fought to invalidate and overturn it through legislation and constitutional reform. "Members of an ascendant Republican Party decried a court 'inflated with supremacy' and declared that whenever a decision is, 'in the judgment of Congress, subversive of the rights and

liberties of the people,' it is the 'solemn duty of Congress' to override it," Bowie and Renan observe.

But there are other sources of constitutional meaning beyond legislatures and electoral politics. It is worth remembering that the Constitution was neither ratified by the Confederation Congress nor state legislatures nor the secretive committee that drafted it in Philadelphia. It was ratified by state conventions assembled from a broad part of the public — or at least as broad as they could imagine in 1787 — that were meant, as much as was possible, to instantiate the people as a sovereign whole.

The Constitution was not written as a democratic document. But the Revolution unleashed a spirit of democracy that structured the way Americans understood the document before them and shaped its implementation at the hands of their elected representatives.

This public exercise in constitution making, which is to say the making of constitutional meaning, did not end with ratification in 1788. Nor did it end with the passage of the Bill of Rights in 1791. In addition to the constitutional debate and disagreement that marked the practical politics of the first decades of the American Republic, there was the convention as a political institution, which survived as a vehicle for constitutional argument and for shaping the larger constitutional landscape. The most consequential of these conventions linger in our historical memory: the secession conventions where slaveholders debated the meaning of the Union and the decision to separate, and the Seneca Falls Convention, where delegates resolved to integrate a vision of women's equality into the constitutional order.

But some of the most influential conventions in American history are well off the public radar. These are the Colored Conventions — gatherings of Black Americans held throughout the 19th century, beginning in the 1830s and ending in the 1890s. It was in these conventions that Black Americans, either born free or formerly enslaved, articulated a constitutional vision of their own. That vision would go on to play a critical role in the constitution-making of the Civil War and Reconstruction.

To read the minutes and resolutions of these conventions is, in fact, to see these Black Americans articulate a broad-minded and ambitious democratic egalitarianism.

“Resolved,” reads the “Declaration of Sentiments” of [the 1848 Colored National Convention in Cleveland](#) — Frederick Douglass served as its presiding officer — “That we shall forever oppose every action, emanating from what source it may, whether civil, political, social or religious, in any manner derogatory to the universal equality of man.” They committed themselves to the immediate end of slavery, which they described as “the greatest curse ever inflicted on man, being of hellish origin, the legitimate offspring of the Devil.” The delegates also declared their belief in the “equality of the sexes” and resolved to “invite females hereafter to take part in our deliberations.”

Ten years later, at [the Suffrage Convention of the Colored Citizens of New York](#), in Troy, delegates condemned the Dred Scott decision as “an impudent and atrocious attempt to extend and perpetuate the blasting curse of human bondage,” declared that slavery is “the common enemy of man” and that all who “subscribe to the theory of human rights set forth in the Declaration of Independence ought to trample, in self-defense, the dicta of Judge Taney beneath their feet as of no binding authority.”

In a forthcoming article, the legal scholar David H. Gans [examines](#) the Black conventions of the 1860s in particular as an especially heightened moment of constitutional politics, where Black Americans “repeatedly pressed white Americans to make the United States into a multiracial democracy that guaranteed fundamental rights, protection and equal citizenship as an American birthright.” The 13th, 14th and 15th Amendments that followed would, in Gans’s telling, bear “the imprint of this constitutional activism.”

It is striking to read the demands of these Americans. “We want the elective franchise in all the states now in the Union, and the same in all such states as may come into the Union hereafter,” reads the official address of [the 1864 National Convention of Colored Men](#) to the “people of the United States.”

“The possession of that right,” it says, “is the keystone to the arch of human liberty: and, without that, the whole may at any moment fall to the ground; while, with it, that liberty may stand forever.”

At [the Colored People's Convention of South Carolina](#) of 1865 — held in Charleston, the heart of the secession movement — delegates cloaked themselves in the words of the Declaration of Independence and called on their white fellow citizens to recognize “the truth that ‘all men are endowed by their creator with inalienable rights,’ and that on the American continent this is the right of all, whether he come from east, west, north or south; and, although complexions may differ, a man’s a man for a’ that.”

And at the Alabama Colored Convention of 1867, delegates condemned racial prejudice and demanded equal enjoyment of political and social rights: “Color can no longer be pleaded for the purpose of curtailing privileges, and every public right, privilege and immunity is enjoyable by every member of the public.”

Gans shows that the work of these conventions was known to Republican lawmakers. He writes that in “the period Congress was considering making far-reaching changes to the Constitution to ensure freedom and equal citizenship for Black Americans, Republican senators, usually [Senator Sumner](#), introduced into the congressional record petitions from the Alabama Colored Convention of 1865, the Mississippi Colored Convention of 1865, the Florida Colored Convention of 1865, the National Equal Rights League Convention of Colored Men of 1867, the Kentucky Colored Convention of 1866, the Georgia Colored Convention of 1868, along with countless petitions from groups of Black citizens.”

These petitions deeply influenced the work of the Reconstruction Congress, as Black ideas about the meaning of the Declaration and the Constitution made their way into both the Reconstruction and legislation like the Civil Rights Acts of 1866 and 1875. It almost goes without saying that the organized political activity of Black Americans in the South played a critical role in ratifying those amendments as well.

To look at the long history of the Colored Conventions is to see a potent example of the power of ordinary Americans to interpret, shape and change the Constitution for themselves. The work of these men and women — some famous, others far less so — is a reminder that we need not wait for politicians and judges to build a new

constitutional world. We can articulate our vision of the political community and work to make it a reality using whatever means are at our disposal.

Americans have lost the habit of constitutional thinking. The muscle is weak — degraded from decades of neglect. The convention movement, and especially that of the Colored Conventions, is a model for how Americans might start to work themselves back into shape, and prepare for the moment when the possibility of constitutional change moves from idle fantasy to concrete reality.

Put another way, we tend to relate to our politics the way we relate to everything else in this country: as consumers who pick from a set of predetermined choices. But if we hope to recover and revitalize our democracy, we must start to think as *citizens* with duties, obligations and the sovereign power to make our world anew.