

**ORIGINALISM AND CONSTITUTIONAL
CONSTRUCTION:
A *SHELBY COUNTY* CASE STUDY**

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The “construction zone” is ineliminable: the actual text of the U.S. Constitution contains general, abstract, and vague provisions that require constitutional construction for their application to concrete constitutional cases.

- Lawrence Solum, *Originalism and Constitutional Construction*.

INTRODUCTION

No comparison or discussion of constitutional interpretation theories is complete without mentioning originalism. Regardless of personal feelings about the theory’s efficacy as a valid conception of constitutional interpretation, it is now beyond dispute that the doctrine has ascended as one of the primary methods of constitutional adjudication. This is hardly surprising. While there are many groups of thought as to what originalism “really does,” its core tenets—(1) the notion of fidelity to the Constitution¹ and (2) the desire to curb judicial activism²—appeal to the most intimate democratic American sentiments. The Constitution represents both an original consensus of law by the people and a supermajority of that consent. In contrast, judicial policymaking by unelected officials is often viewed as an affront to democratic governance. It harkens back to feelings of pre-American colonialism where British magistrates and other foreign leaders imposed their will upon the majority. From this backdrop, originalism fits nicely within the traditional notion of American democracy.³

¹ Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249, 1250 (1997) (discussing judicial fidelity to the constitution in the context of different interpretive philosophies).

² Edwin Meese, *Speech Before the American Bar Association* (Jul. 9, 1985) (explaining that discovering the original intention of the Framers is required to curb judicial activism).

³ Indeed, this sentiment is one going back centuries. In this paper, I will discuss the original public meaning of enforcing provisions of the Fifteenth Amendment through “appropriate legislation.” When legislation for the enforcement of the Reconstruction Amendments was being considered, the representatives declared this sentiment as the bedrock of the nation, and used that rhetoric to buttress their understandings of what legislation would be “appropriate.” For example, Repre-

It is unclear, however, whether the originalism theory, in practice, serves as the proper conduit to execute these ideas. Often, we see Supreme Court opinions where the majority and dissent offer opposing outcomes that are still arguably in line with an originalist approach.⁴ If the original meaning of the text is the law, how can this be?

The answer to this question may be rooted in the way that judges make decisions in practice. Georgetown Law Professor Lawrence Solum⁵ provides a theory of constitutional interpretation in which constitutional decision-making is ubiquitously broken into two parts: constitutional interpretation and constitutional construction.⁶ Constitutional *interpretation* is the process by which judges determine the communicative and linguistic content of the text, while constitutional *construction* is the process by which judges take that content to construct a rule or holding. Although a judge is constrained by the original interpretation, the construction step requires a judge to use methods of interpretation beyond a discovery of the text's original linguistic meaning.

Herein lies the problem: if originalism concerns the determination of the communicative and linguistic content of the text, then a discovery of the original public meaning of a text is not sufficient to create a rule or holding, and the initial allure of the theory as one that constrains judges and keeps fidelity to the law is unfounded. Judges will still be required to use normative methods of constitutional construction to determine what the law is.⁷

Unsurprisingly, many originalist adherents disagree that constitutional interpretation is bifurcated into interpretation and construction. Indeed, in

sentative James Leach (D) of North Carolina began his soliloquy against House Bill 320 with this speech:

Mr. Speaker, the Constitution of the United States, when observed in all its provisions and administered in its integrity, is worth more to a great nation, infinitely more, than all the political parties and politicians in the world. . . . [T]he Constitution, framed as it was for all time . . . was based upon principles so just and grand, so sacred and ever-living in their character and object, as to render them indissoluble and perpetual, as they were intended to be by their illustrious founders.

Leach of North Carolina, *Globe*, 42nd Cong., 1st sess., Appendix, p. 478.

⁴ See *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013) (striking down the Voting Rights Act §4(b) as unconstitutional); see also *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (striking down a gun restriction in Washington, D.C.).

⁵ Professor Lawrence Solum is a legal theorist and the Carmack Waterhouse Professor of Law at Georgetown University. He has written extensively on the issue of constitutional interpretation and is known for the constitutional construction argument that will be expounded upon in this paper.

⁶ Lawrence Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. R.* 453, 453 (2014).

⁷ For the purposes of this paper, the term “normative methods of constitutional construction” describes whichever method of construction that a judge elects to use when constructing a rule or holding. As Professor Solum states, these methods of statutory construction are selected by each judge.

Reading Law: The Interpretation of Legal Texts, the late Justice Antonin Scalia rejects Professor Solum's construction zone theory by arguing that any post-interpretation rulemaking is severely constrained by the text's original public meaning and can be further constrained through a method of textual interpretation called the Fair Reading Method.⁸ This method invokes a combination of textual and interpretive canons in an attempt to cabin judicial discretion.

However, textualism and originalism are distinct theories of interpretation. This comment argues for the ubiquity of the construction zone when dealing with litigated constitutional questions. Justice Scalia's Fair Reading Method, while possibly a good method of construction, is merely another normative method of constitutional construction that is not actually a part of originalism as a theory. The existence of the interpretation/construction distinction is admitted once it is recognized that more work must be done to get a rule or holding after the discovery of the original meaning of the text.

Shelby County v. Holder, a 2013 Supreme Court decision, provides an interesting case study to explore the manner in which constitutional construction can lead to divergent understandings about what the law actually is. *Shelby County*, which invalidated § 4b of the Voting Rights Act of 1965, which set the criteria for state who would be required to obtain pre-clearance from the federal government before implementing changes to their voting procedures. Justice Roberts, writing for the majority, determined that the Voting Rights Act unconstitutionally infringed upon state equal sovereignty, while Justice Ginsburg's dissent argued that the Fifteenth Amendment's Appropriate Legislation Clause abrogated that sovereignty. Both Justice Roberts and Justice Ginsburg come to reasonable, opposing positions that the original understanding of "appropriate legislation" can be interpreted to both compel and deny abrogation.

Assuming that neither justice would ignore the validity of a constitutional amendment, such opposing decisions can only result if the interpretation of the Appropriate Legislation Clause produced a vague, loosely constrained understanding of the law that required further normative constitutional construction.⁹ This comment explores this idea by walking through the constitutional interpretation theory, as explained by Professor Solum, with the Appropriate Legislation Clause. If the original public meaning can produce a constraining principle without further normative construction, then Justice Scalia's rejection of the theory is well-founded.

⁸ Antonin Scalia and Bryan Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 8 (2012).

⁹ For a discussion of the problem with normative constitutional construction, see footnote 7, *supra*, and accompanying text. See also footnote 15-16, *infra*, and accompanying text.

If not, perhaps this case provides an example of a large flaw with originalism as a theory.

Section I will explain Professor Solum's constitutional interpretation theory as a two-step process and the major criticisms of that theory—namely, the rejection of the construction zone or the belief that the constraint principle provides a sufficient safeguard against judicial overreach. Section I will also explain the *Shelby County v. Holder* decision and how it serves as a good case study for the construction theory. Section II will provide a background of the Voting Rights Act and § 4(b) of the Act. Section III(a) will walk through the constitutional interpretation step with the Appropriate Legislation Clause to determine if a constraining principle can be found. Finally, Section III(b) will analyze whether originalism delivers on its two main tenets.

I. UNDERSTANDING ORIGINALISM AS A TWO-STEP PROCESS

A. *Understanding Constitutional Interpretation and Construction*

Professor Solum's article, *Originalism and Constitutional Construction*, advances a theory of constitutional interpretation that distinguishes between the actual *interpretation* of constitutional text and the *construction* of the text to determine its legal effect.¹⁰ Constitutional interpretation, in Professor Solum's view, is "the activity that discovers the communicative content or linguistic meaning of the constitutional text,"¹¹ while constitutional construction "is the activity that determines the legal effect given the text, including doctrines of constitutional law and decisions of constitutional cases or issues by judges and other officials."¹²

Constitutional interpretation is both the preliminary step in all judicial decisions and is governed by the core principles of originalism: fixation and constraint.¹³ Solum agrees with a majority of his peers that the linguistic meaning of the text is unchanging and is determined at the time of its framing and ratification. He also asserts that, once the original understanding of the word or phrase has been determined, that understanding must constrain the constitutional construction of the final legal rule.¹⁴

Constitutional construction, by contrast, is the normative process conducted by judges once a judge has discovered the constraints of the text's original understanding through interpretation.¹⁵ These theories need not

¹⁰ See Solum, *supra* note 6 at 453.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 459.

¹⁴ *Id.* at 460.

¹⁵ See Lawrence Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. R.* 453, 474-75 (2014).

connect with originalism in any significant way other than an initial adherence to the constraints discovered in the interpretation process. Regardless of the normative philosophy for construction that was used to reach a decision, a particular case is appropriately decided as long as the original understanding of the text does not conflict with the decision reached by the judge.¹⁶

While Professor Solum's article attempts to resolve some tensions between originalism and its critics, it in fact exposes the theory to two glaring flaws. Originalism is championed as a bulwark against judicial overreach and traces its own origins to the works of advocates such as Robert Bork,¹⁷ William Rehnquist,¹⁸ and Edwin Meese.¹⁹ Its supporters advocate for originalism because they believe that finding the original public meaning of the text ensures that judicial decisions remain faithful to the law. If Professor Solum is correct, however, originalism can neither (1) force judicial restraint nor (2) truly maintain fidelity to the law.

If the original meaning of the text is only the first step in the process of developing a rule, then only constraints discovered during interpretation can impede or assist judges in their duties. To be sure, constitutional construction requires understanding the terms that were given to us by the Framers and allowing that understanding to require certain holdings and militate against others. However, if the plain meaning of the text is irreducibly vague, understanding the original public meaning will bring judges only nominally closer to reaching a decision in a particular case.

If the existence of the construction zone neither restrains judges nor fully leads them to create rules that are faithful to what the law really is, then for many constitutional questions, the general premises upon which the theory is purported to be the superior method of constitutional interpretation may be unfounded. This is true if construction happens in every constitutional judicial decision.²⁰ While there is clear, unambiguous language

¹⁶ When describing the construction zone, Professor Solum stipulates that constitutional construction is "essentially driven by normative concerns." He then explains his theory using two "toy" philosophies of construction—constitutional Thayerianism and the Moral Readings Theory. Both theories reach disparate results based on their normative values of decision making, and both are seen as acceptable in the construction phase. See Solum, *supra* note 6 at 472-73.

¹⁷ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) (discussing the importance of judicial adherence to the text and the history, and their fair implications).

¹⁸ William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 696-697 (1976).

¹⁹ Edwin Meese III, *Speech Before the American Bar Association, July 9, 1985*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47, 47-48 (STEVEN G. CALABRESI, ED., 2007).

²⁰ See Solum, *supra* note 6 at 495-500 (arguing that the construction zone is ubiquitous in judicial decision making). While there are many constitutional clauses that are unambiguous, much of the Constitution's language is filled with terms that create ambiguity. This ambiguity will be discussed further below in notes 19-28, *infra*.

in much of the constitution that results in a strict constructionist application of the text, those situations are far less likely to be litigated.

Take, for example, the constitutional provision that “neither shall any Person be eligible to [the President’s] Office who shall not have attained to the Age of thirty five Years.”²¹ If, in the next presidential cycle, a 32-year-old candidate attempts to run, the original meaning of the text will fully constrain any rule that a judge may create. The language is clear enough to leave no room for construction. Similarly, the Constitution also states that “[t]he Senate of the United States shall be composed of two Senators from each State.”²² If any cases arise in which three Senators are elected in Massachusetts, the construction zone is again entirely diminished, as the original meaning provides a clear interpretation of what the law should mean and precludes any further judicial interpretation.

In these scenarios, the construction of the statute’s text into a workable rule allows for nothing else. However, these cases are at the core of the text’s determinate meaning. This also means that the likelihood that these cases would go to trial at all, much less make it to the Supreme Court, is almost nonexistent.²³ Most litigated constitutional provisions do not fall into this category. Consider, for example, the wealth of case law surrounding the First Amendment’s prohibition on “abridging the freedom of speech”²⁴ or the Fourth Amendment’s language discussing “unreasonable search and seizure.”²⁵ The key distinction between these examples and the examples above are that the highly litigated text contains “vague” language, or language that is not clearly defined.²⁶

Even Professor Solum recognizes that often, the construction of constitutional text is too “vague or irreducibly ambiguous” to provide determinate answers to constitutional questions, and so judges are necessarily re-

21 U.S. CONST., art. II, § 1, cl. 5.

22 U.S. CONST., art. I, § 3, cl. 1.

23 Frederick Schauer, *Rules In Law and Elsewhere*, in THINKING LIKE A LAWYER, 13, 32-37, 152-53 (2009) (discussing the concept of “core” versus “penumbral” cases).

24 U.S. CONST., amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

25 U.S. CONST., amend. IV. (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

26 See *Vague Definition*, MERRIAM-WEBSTER DICTIONARY.COM <http://www.merriam-webster.com/dictionary/vague> (defining what vague can mean). See also Solum, *supra* note 6, at 470 (describing the possible meaning of “vague”). “Vague” language can often result in penumbral or borderline cases in which it is unclear whether certain acts or objects fall within the defined term provided by the drafters. This also leads to an increase in litigation surrounding these particular amendments and phrases. See Schauer, *supra* note 23, at 136 (examining how ambiguous language can be interpreted).

quired to construct an applicable holding or legal doctrine from tools beyond the actual plain meaning of the text.²⁷ At this point, the two great rationalizations for originalism – textual fidelity and judicial restraint – become nullified. Solum concedes that while constitutional interpretation is highly fact-driven, constitutional construction is “essentially driven by normative concerns.”²⁸ What’s more, he admits:

“[S]ome theories of constitutional construction may be driven by consideration of political morality, whereas other theories may look to norms that are internal to legal practice. *The abstract fact that construction is essentially normative does not entail any particular account of the norms that ought to govern the practice of construction.*”²⁹

Of course, many originalists believe that the construction zone, if it exists at all, is relatively minor. They argue that by implementing the terms of art or original methods that the Framers used at the time of ratification, judges can make precise determinations of vague terms.³⁰ Others argue that the creation of constitutional default rules diminishes the construction zone,³¹ and some call for deference to the political branches in situations of uncertainty.³² However, these theories conflate originalism with other distinct methods of statutory and constitutional interpretation.

The most highly debated and problematic decisions often require interpretation and construction of irreducibly vague constitutional texts. In these cases, the construction zone gives judges the freedom to select any one of several theories of construction which could each lead to a different outcome in a given case. Indeed, in Professor Solum’s explanation of the normative nature of the construction zone, two opposite theories of interpretation are utilized. Each begins with a search of the original communicative context and ultimately reaches opposite results.³³ If originalism can take judges only halfway to an answer and ultimately leaves the interpretive method to the individual judge, then the theory neither explicates the law nor cabins judicial discretion. In this light, the theory ultimately be-

27 See Solum, *supra* note 6, at 519 (recognizing the ambiguity of the language of the Constitution).

28 See Solum, *supra* note 6, at 472 (noting that Constitutional interpretation is driven by normative concerns).

29 See *id.* (emphasis added) (noting that the political morality plays into Constitutional interpretation). Essentially, this statement concedes that originalism places no other conditions on normative methods besides fixation and constraint, which allows the judge to select a method that could be best suited to his or her own ideals.

30 John O. McGinnis and Michael B. Rappaport, *Original Methods Originalist: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

31 See Gary Lawson, *Dead Document Walking*, 92 B.C.L. REV. 1225, 1226 (2012) (outlining his argument regarding the construction zone).

32 See Solum, *supra* note 6 at 514-520 (discussing Michael Paulsen’s argument that a version of Thayeriansim can shrink, but not destroy, the construction zone). The three main arguments asserted here are beyond the scope of this paper. For an explanation and rebuttal of these positions, see *id.* at 503-520 (examining Thayeriansim and the construction zone).

33 See *id.* at 472-73 (describing the role of normativity in the construction zone).

comes unhelpful, at least in the constitutional context where so many clauses contain irreducibly ambiguous and vague language.

B. Challenging the Ubiquity of the Construction Zone

Unsurprisingly, many scholars have an alternate view of originalism and its role in constitutional interpretation. In his book, *Reading Law: The Interpretation of Legal Texts*, Justice Scalia and his co-author, Bryan Garner, champion originalism as a way to provide a “generally agreed-on approach to the interpretation of legal texts.”³⁴ The authors declare originalism to be “the soundest, most principled one that exists”³⁵ as it “instructs interpreters to ‘look for meaning in the governing text, ascribe to that text the meaning that is borne from its inception, and reject judicial speculation about both the drafters’ extra-textually derived purposes and the desirability of the fair reading’s anticipated consequences.”³⁶ In short, Justice Scalia champions originalism for the virtues that the construction principle calls into question.

Consequently, the late Justice Scalia had no patience for the construction zone theory. In his book, he dismisses the theory as illegitimate, claiming that the distinction is irrelevant and has never been used among actual practitioners.³⁷ However, it is unclear whether Justice Scalia’s views on legal decision-making greatly differ in practice. In *Reading Law’s* introduction, Justice Scalia describes his philosophy of interpretation and champions textualism as the proper method of construction.³⁸ Throughout his explanation, it becomes clear that the justice’s views on construction fit squarely within the interpretation/construction distinction.

His explanation begins by stating that “exclusive reliance on the text...elicits both better drafting and decision-making.”³⁹ It is also well documented that for Justice Scalia, any textual investigation is defined by its probing inquiry into the original public meaning of that text while rejecting extra-textual intents and purposes.⁴⁰ This understanding perfectly aligns with the interpretation step as described by Professor Solum. Both authors agree that the first step in the judicial decision-making process is to

34 Scalia, *supra* note 8 at xxvii.

35 *See id.* (describing the need for a unifying way of interpreting the law).

36 Mitchell Berman, *Judge Posner’s Simple Law*, 113 Mich. L. Rev. 777, 782 (2015).

37 *See* Scalia, *supra* note 8 at 14-15 (discussing the falseness of the distinction between interpretation and construction).

38 *See id.* at 15-36 (advancing a textual approach to legal interpretation and describing a general overview of the theory in practice).

39 *See id.* at 16.

40 *See* Berman, *supra* note 36 at 782-83; *see also* Scalia, *supra* note 8, at 15-17 (describing textualism), and ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) at 27.

look to the text for its original meaning and constrain any decision to that understanding.⁴¹

However, *Reading Law* also discusses the concept of “permissible meanings.”⁴² It recognizes that words can be both ambiguous – having two or more meanings – and vague – having an uncertain application to an unquestioned meaning.⁴³ While *Reading Law* argues that this concept is not distinct from constitutional interpretation, it admits that there are occasions when the original understanding of the text’s communicative content has taken the judge as far as it can. This admission is fatal to a denial of the construction zone.

This definition of vagueness is precisely what Professor Solum argues creates the construction zone.⁴⁴ By admitting that vagueness exists, Justice Scalia acknowledged that something more than mere interpretation of a text’s communicative content is required. In fact, when describing the Fair Reading Method, which the Justice determined to be the best method for staying true to the true textual understanding,⁴⁵ He incorporated the “permissible meanings” concept, which grants that certain words and phrases in a statute can be reasonably read to mean more than one thing. The method aids judges in choosing between these permissible meanings.

While Justice Scalia placed this method within the interpretation step, constitutional *interpretation* is the process of understanding the original public meaning of the words themselves. In contrast, *construction* is the process by which that meaning is transformed into a rule. The original meaning of the text can be discovered and the language can still be ambiguous or vague—have more than one permissible meaning. The construction zone is where judges take the understood original public meaning and determine the words’ application through other means of statutory construction.

Essentially, the Fair Reading Method is a strictly textual constructional approach to determining the law. However, this is merely another normative method of construction. Once Justice Scalia conceded that the text’s communicative content provides more than one permissible meaning, he moved beyond constitutional interpretation and into the construction zone. What’s more, by recognizing that vague language is a recurring phenomenon which necessitates further construction, the justice added credence to the assertion that construction is present in most litigated cases.

41 See text accompanying notes 14-16, *supra*; see also, Scalia, *supra* note 8, at 31 (“A fundamental rule of textual interpretation is that neither a word nor a sentence may be given a meaning that it cannot bear.”)

42 See Scalia, *supra* note 33, at 31.

43 See *id.* at 32; see also note 26 *supra* and the discussion of vague terms in the accompanying text.

44 See Solum, *supra* note 6, at 469-70.

45 See Scalia, *supra* note 8, at 33.

C. *Shelby County v. Holder* – A Case Study

Shelby County v. Holder, which overturned portions of the Voting Rights Act as unconstitutional, provides an interesting practical example of the construction/interpretation distinction. In the opinion, the majority and dissent base their holdings on interpretations of the Tenth and Fifteenth Amendments. The majority held that portions of the Voting Rights Act impermissibly abrogated state equal sovereignty under the Tenth Amendment,⁴⁶ while the dissent argued that the original public understanding of the Fifteenth Amendment’s “appropriate legislation” provision empowered Congress to do so.⁴⁷

In his majority opinion, Justice Roberts pays short shrift to Justice Ginsburg’s “appropriate legislation” argument, dismissing it as less pressing than Tenth Amendment concerns of state equal sovereignty.⁴⁸ However, the opinion was unclear about why state equal sovereignty is more important than the Fifteenth Amendment’s grant to Congress. Article V of the Constitution describes the amendment process by which a previous portion of the Constitution can be superseded.⁴⁹ When an Amendment is passed, the new Amendment supersedes the original language inasmuch as that language conflicts with the original text. If the Fifteenth Amendment’s “appropriate legislation” language conflicted with the idea of state equal sovereignty, the Tenth Amendment would seem to be abrogated to the extent that there was a conflict.

While Justice Roberts’ actual reasoning and justifications are unknowable, general knowledge of the amendment process would imply that the chief justice did not merely ignore the Appropriate Legislation Clause, but rather had a different understanding of its meaning and application. Accordingly, this situation creates a perfect hypothetical to test the interpretation/construction distinction theory.

Shelby County highlights the ease with which two judges can stay faithful to the original public meaning of constitutional text and reach opposing decisions regarding whether a statute comports with the Constitution. The remainder of this comment investigates the original understanding of the Appropriate Legislation Clause to determine if reliance upon the natural and reasonable meaning of that clause can provide a constraining principle to the question in *Shelby County*. If such a principle cannot be found, the determination of a rational method to choose between options would neces-

⁴⁶ See *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2623-24 (2013).

⁴⁷ See *id.* at 2648-50 (Ginsberg, J., dissenting).

⁴⁸ State equal sovereignty is the idea that all states have a right to be as equally free from federal interference as other states. In *Shelby County*, Alabama qualified under Section 4(b) and argued that the legislation subjected them to federal preclearance for voting changes while other states were not, thereby making the states who did qualify less sovereign than their counterparts.

⁴⁹ U.S. CONST. art. V.

sarily be a normative method of construction, and perhaps give credence to the idea of a ubiquitous construction zone.

II. THE VOTING RIGHTS ACT AND THE APPROPRIATE LEGISLATION CLAUSE

Fifty years ago, Congress passed the Voting Rights Act of 1965, which has since played an instrumental role in securing the minority franchise in America.⁵⁰ One of the driving forces behind the Act's potency is Section 5, which declares that before enacting any change in a voting "qualification, standard, practice, or procedure:"

any State or political subdivision with respect to the prohibitions set forth in section 4(a)...may institute an action...for declaratory judgment that such qualification... does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless . . . the court enters such judgment[,] no person shall be denied the right to vote for failure to comply with such qualification...or procedure.⁵¹

States subject to preclearance are defined in Section 4(b) as jurisdictions that (1) maintained "any test or device" designed to abrogate the minority vote, and (2) in 1964, had less than half of eligible voters participate in the year preceding the Act's passage.⁵² The original requirements set in place under Section 4 were set to expire after five years.⁵³ However, Congress continually returned to the issue of voting rights throughout the intervening decades and investigations before the Act's reauthorization in 1970, 1975, 1982, and 2006 led Congress to determine that voter discrimination continued to be a pervasive evil in society.⁵⁴

Three years ago, *Shelby County v. Holder* struck down § 4(b) of the Voting Rights Act as an unconstitutional infringement upon state equal sovereignty. The 5-4 decision featured Chief Justice Roberts' majority opinion, which held that the Act's requirement that some, but not all, states would be subjected to preclearance was unconstitutional under the Tenth Amendment, and Justice Ginsburg's dissent, which championed the Act as both a necessary and constitutional buttress against minority voter suppression under the Fifteenth Amendment's Appropriate Legislation Clause.

⁵⁰ See *Shelby Cnty.*, 133 S. Ct. at 2628.

⁵¹ Voting Rights Act of 1965, 79 Stat. 438 § 5 (2012).

⁵² Voting Rights Act of 1965, 79 Stat. 438 § 4(b) (2012).

⁵³ See Voting Rights Act of 1965, 79 Stat. 438 § 4(a) (2012).

⁵⁴ See *Shelby Cnty.*, 133 S.Ct. at 2620-21 (2013), and *id.* at 2635-36, 2640-43 (Ginsburg, J., dissenting).

III. INTERPRETING AND CONSTRUCTING *SHELBY COUNTY v. HOLDER*

As previously discussed, some scholars object to the ubiquity of the construction zone, claiming that it either (1) does not exist, or (2) is sufficiently governed by fixation and constraint to alleviate concerns of judicial overreach or deviation from the law's true meaning. This section endeavors to discover the communicative content of the Appropriate Legislation Clause to determine if such a constraining framework exists. It looks to the semantic and contextual understanding of the word "appropriate" at the time the Fifteenth Amendment was ratified, the definitional understanding of the word, its usage at the time, and its meaning in context with the Reconstruction Amendments and the Constitution as a whole. It also looks to contemporary enforcement legislation and the original understanding of the Framers.

A. *Constitutional Interpretation*

The search for a constraining principle begins with the "interpretation" step, as defined by Professor Solum. Following the interpretation/construction distinction, a judge's initial responsibility when determining whether the Fifteenth Amendment abrogated the idea of state equal sovereignty is to find the communicative content of the words "appropriate legislation" by looking at both the semantic and contextual understanding of the phrase⁵⁵ using linguistic facts, history, and original intent to aid in that determination.⁵⁶

The language of the Fifteenth Amendment states that:

SECTION 1: [t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

SECTION 2: The Congress shall have power to enforce this article by appropriate legislation.⁵⁷

No definition of "appropriate legislation" is contained in the above text, which has often been explained as the drafters' intent for the meaning of the phrase to be determined by Congress.⁵⁸ This omission immediately telegraphs that the "original public meaning" of "appropriate legislation" is likely to ultimately fall within both Justice Scalia and Professor Solum's

⁵⁵ See Solum, *supra* note 6, at 459.

⁵⁶ See *id.* at 481, Fig. 3.

⁵⁷ U.S. Const., amend. XV, §§ 1-2. [emphasis added].

⁵⁸ See, e.g., CONG. GLOBE, 40th Cong., 3D SESS., app., p. 163 (1869) (statement of Sen. Willard Saulsbury). In relevant part, Mr. Saulsbury states that "appropriate legislation" is "a word not defined in the instrument, but leaving its legitimate and proper meaning to be determined by each particular head in this Senate Chamber and in the House of Representatives"

understanding of “irreducibly vague.”⁵⁹ Such a conclusion, however, would be premature at this stage. First, a judge would need to look to other sources for the semantic and contextual meaning of the phrase.

1. *Semantic Content of “Appropriate Legislation”*

The semantic meaning can be found by looking to contemporary dictionaries at the time of framing and by looking at the syntax of the phrase or group of phrases surrounding it.⁶⁰ Technically, the entire phrase “The Congress shall have power to enforce this article by appropriate legislation” could be subject to scrutiny. However, as there was no tension in the *Shelby County* decision regarding the actual meaning of most of the sentence, focus should be placed on the word “appropriate.” Where the tension between the majority and dissenting opinions lies.

The word “appropriate” can be used as either a verb or an adjective. The word’s positioning in Section 2, however, is being used to modify the word “legislation,” describing the type of legislation that Congress can use as a vehicle to enforce the provisions of Section 1. Words that are used to describe the surrounding nouns, as opposed to defining the action or state of being of the noun, are adjectives.⁶¹ Thus, in this context, “appropriate” is being employed as an adjective.

There were at least two main American dictionaries in circulation at the time of ratification. The most prominent dictionary in circulation contemporaneously with the passage of the Fifteenth Amendment was *The American Dictionary of the English Language Second Edition*,⁶² which in later editions would come to be known as Webster’s Dictionary. *The American Dictionary* defines the adjective “appropriate” as follows:

1. Belonging peculiarly; peculiar; set apart for a particular use or person; as, religious worship is an appropriate duty to the Creator.
2. Most suitable, fit or proper; as, to use appropriate words in pleading.⁶³

The *Dictionary of English Language*, published in 1860, offers a similar definition: “consigned to some particular person or use; peculiar; fit; adapted; suitable.”⁶⁴ From these definitions, we can determine that “appro-

⁵⁹ See Scalia, *supra* note 8, at 15; see also Solum, *supra* note 6, at 458.

⁶⁰ See Solum, *supra* note 6-12 and accompanying text; see also Solum, *supra* note 6 at 459.

⁶¹ *Adjective*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/adjective>; see also, *Verb*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/verb>.

⁶² Noah Webster, THE AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, (2d ed. 1828), available at <http://1828.mshaffer.com/d/word/appropriate>.

⁶³ *Id.*

⁶⁴ Joseph A. Worcester, A DICTIONARY OF THE ENGLISH LANGUAGE 72 (Hickling, Swan, and Brewer, eds. 1860), available at <https://ia600409.us.archive.org/14/items/cu31924027443393/cu31924027443393.pdf>.

priate legislation” either means “very particular or specific types of legislation,” or “through the most suitable or proper legislation.”

Only one understanding seems correct in the context of the entire Constitution. The Thirteenth and Fourteenth Amendments each contain an identical section in their texts. These amendments were ratified in 1865 and 1868, respectively. Subsequent legislation passed as a direct result of these amendments were not of a particular or specific type, other than the fact that they related to the subject matter of their respective amendments. Moreover, if “appropriate” were used as “particular” in this framework to mean “related to the subject-matter of the Amendment,” it would nullify the significance of the word. All federal laws must be grounded in a Constitutional power, and so any law based on a particular amendment would necessarily be related to the subject matter.

It appears, then, that when Congress and the States ratified that “[t]he Congress shall have power to enforce this article by appropriate legislation,” it granted Congress the power to enact “the most suitable, fit or proper” legislation. Of course, this new definition begs the question: “what is the most suitable, fit, or proper legislation?” This definition seems just as, if not more, vague than the initial word “appropriate,” as it simply adds more indeterminate words.

2. Contextual Enrichment of “Appropriate Legislation”

The initial inquiry into the semantic meaning of “appropriate” legislation seems to have yielded no definitive result. However, a word or phrase that continues to be ambiguous or vague after a semantic investigation is not yet necessarily “irreducibly ambiguous or vague.” Constitutional interpretation allows for an investigation into the context in which a word or phrase was written.⁶⁵ As discussed above, this is done by looking into both the history and original intent of the drafters.⁶⁶ Therefore, investigation into the contextual content of Section 2 is required.

a. Constitutional Context

When looking at the context of a word or phrase, the inquiry should begin with the surrounding text. Both the explicit language of the Constitution and precedent surrounding the understanding of “appropriate legislation” at the time of the Fifteenth Amendment’s drafting could provide insight into the contemporary public meaning of the provision. At the time of framing, the phrase “appropriate legislation” had been used in only two other constitutional clauses: the enforcement sections of the Thirteenth and

⁶⁵ See Solum, *supra* note 6 at 481, Fig. 3.

⁶⁶ *Id.*

Fourteenth Amendments. Additionally, in *Shelby County*, Justice Ginsburg provides a strong argument that the understanding of the Necessary and Proper Clause enabled Congress to enact legislation like section 4(b), which can be corroborated by statements from contemporary legislators.

When the Fifteenth Amendment was drafted, the language “appropriate legislation” could be found in Section 2 of the Thirteenth Amendment⁶⁷ and Section 5 of the Fourteenth Amendment.⁶⁸ Ratification of those amendments occurred years before ratification of the Fifteenth Amendment, and so legislation or judicial decisions that surrounded enforcement legislation of the first Reconstruction Amendments colored the understanding of “appropriate legislation” here.

Unfortunately for the purpose of context, Congress did not pass a swath of legislation following the ratification of these Amendments. Indeed, Congress passed only one major bill following each: The Freedman’s Bureau Act of 1865 and The Civil Rights Act of 1866. While these bills certainly show that Congress, the Court, and the Nation were not of one mind regarding the extent of “appropriate legislation,” neither directly dealt with the idea of state equal sovereignty. The Freedman’s Bureau “empowered bureau agents both to assume jurisdiction of cases involving blacks and to punish state officials who denied the civil rights white persons possessed.”⁶⁹ The Civil Rights Act guaranteed the rights of all citizens regardless of race and color and equal protection under the law.⁷⁰ It also empowered federal agents to prosecute violations of the law in federal court, including violations under state law.⁷¹

Both laws created federal supremacy when enforcing laws relating these amendments in the states, and both laws used the courts as their primary vehicle for doing so. Both laws were also ultimately abandoned, either due to intense political opposition or by decree of the Supreme Court. However, these short-lived laws do not provide significant insight into the understanding of what “appropriate legislation” could mean in this context because neither act applied different standards to different states. From the contextual usage of “appropriate legislation” alone, we can garner no clear understanding of whether Congress, or the nation as a whole, contemplated an abrogation of state equal sovereignty.

Next, we turn to Justice Ginsburg’s precedential argument in *Shelby County*, which also attempts to provide evidence of the phrase’s contextual meaning. Her dissent argued that the specific language of “appropriate leg-

67 U.S. CONST., amend. XIII, § 2.

68 U.S. CONST., amend. XIV, § 5.

69 Frank J. Scaturro, *THE SUPREME COURT’S RETREAT FROM RECONSTRUCTION* 8 (Greenwood Press, eds. 2000).

70 *Id.*

71 *Id.*

isolation” meant that the Framers of the Fifteenth Amendment intended to incorporate the scope of congressional power under the Necessary and Proper Clause, as described in *McCulloch v. Maryland*.⁷² While Framers’ intent does not equate to contextual meaning, Justice Ginsburg argued that *McCulloch*’s language can provide color to the word as it is used in the Fifteenth Amendment.

The dissent quoted portions of *McCulloch* that describe congressional authority and paralleled the use of “appropriate” as it is used to delineate power under the Necessary and Proper Clause with the enforcement provision of the Fifteenth Amendment. In *McCulloch*, Justice Marshall writes: “let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution.”⁷³ The dissent then uses this language to argue that “[i]t cannot tenably be maintained that the [Voting Rights Act], an Act of Congress adopted to shield the right to vote from racial discrimination, is inconsistent with the letter or spirit of the Fifteenth Amendment.”⁷⁴ Because the Framers of the Fifteenth Amendment were aware of *McCulloch* during the ratification of all the Reconstruction Amendments, Justice Ginsburg argues, the specific phrasing of Justice Marshall’s famous quote is more likely to have been the original source of this language not previously used in the Constitution.

The dissent further argues that the word “appropriate” implied statutes that were “consistent with the letter and spirit of the Fifteenth Amendment.” From this, Justice Ginsburg concluded that the Fifteenth Amendment’s “transformative” effect on congressional powers “to enact ‘appropriate’ legislation targeting state abuses” allows § 4(b) to continue to be an appropriate use of legislation.⁷⁵

However, while this precedential argument could strengthen the argument for the constitutionality of § 4(b), the totality of the evidence surrounding the provision’s constitutional context is, at best, inconclusive because *McCulloch* did not deal with the issue of state equal sovereignty. In her dissent, Justice Ginsburg took the vague understanding from *McCulloch* and used other tools of construction to properly apply *McCulloch*’s understanding to the issue in *Shelby County*. Her conclusion is not based solely upon the semantic and communicative content of the text, and so it is

⁷² See *Shelby County v. Holder*, 133 S.Ct. 2612, 2636-38 (2013) (discussing scope of Necessary Proper Clause).

⁷³ *Id.* at 2637 (quoting *McCulloch v. Maryland*, 17 U.S. 316 (1819)). It should also be noted that *McCulloch*, decided several decades prior, can be viewed as either (1) canonical law which all lawyers at the time would be aware of, or (2) a decades-old case not considered in the fall-out of the most devastating war on U.S. soil. Both are reasonable arguments and increase the ambiguity and uncertainty of its application to the Fifteenth Amendment.

⁷⁴ *Id.*

⁷⁵ *Id.*

still acceptable for Justice Roberts to assert that abrogating state equal sovereignty is not an appropriate method to effectuate the right of individuals to vote regardless of race or class. Justice Ginsburg's argument, while well-reasoned, cannot *militate against* Justice Roberts' reasoning because it is not wholly based upon a constraining principle in the interpretation phase. Without contemporary legislation or judicial decisions that deal specifically with the states' equal sovereignty, we cannot be sure of the Fifteenth Amendment framers' intent for "appropriate."

b. Congressional and State Sentiment Regarding Section 2

While the communicative content can garner no constraining principle, a judge still has other avenues to explore before determining a text to be irreducibly vague. For many contemporary originalists, any legitimate constraining principle would require that § 4(b) of the Voting Rights Act be determined constitutional because the original public meaning of "appropriate legislation" was understood to empower Congress to enact laws that are reasonably necessary to promote substantively equal rights. Of course, this is a difficult task, and often the only available documentation that illustrates the understanding of legislation is through the perspective of the legislators themselves. However, while these documents are an imperfect standard upon which to base the public's ultimate understanding of the text, they can be a good starting point.

It is difficult to discern which contemporary statements accurately portray the polity's understanding of a specific piece of legislation, as no one statement can encapsulate the diverse opinions of the entire nation. We can hope, however, that statements made by political actors on the House and Senate floors are at least somewhat representative of a general sentiment, as those actors are held accountable by their constituents. Congressional session documents during the Amendment's ratification seem to imply that there was consensus among supporters and detractors that the Appropriate Legislation Clause would revolutionize the balance between state and federal sovereignty in the context of election law,⁷⁶ but there is no clear consensus about what form that revolution would take.

There is some contemporary evidence of legislators' understandings of "appropriate legislation" as it pertained to the Fifteenth Amendment. For example, in May 1870, the House considered a bill entitled "An act to enforce the rights of citizens to vote in the United States and the several

⁷⁶ See generally John Mabry Matthews, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 20-37 (2001) (discussing the formation of the Amendment and its improvements upon past legislative failures to impose federal guidelines upon individual states).

States of this Union, and for other purposes.”⁷⁷ The Act reaffirmed the right to vote granted by Section 1 of the Fifteenth Amendment, banned voting prerequisites enacted by states, and created punishments for official and other persons who tried to limit a person’s right to vote through threats or intimidation.⁷⁸ During the session, Representative John Stiles (PA) and Michael Kerr (IN), who opposed the Act, contended that all but the first portion of the bill, which reaffirmed the rights of all individuals to vote, was unconstitutional.⁷⁹ In response, Representative Noah Davis of New York, one of the Act’s supporters, responded with an argument similar to Justice Ginsburg’s argument in *Shelby County*:

“Appropriate” means that which is necessary and proper to accomplish the end. Congress, then, is clothed with so much power as is necessary and proper to enforce the two amendments⁸⁰ to the Constitution, and is to judge from the exigencies of the case what is necessary and proper.⁸¹

From this, Representative Davis argued that the entire Act was constitutional. With this understanding, the bill passed with a majority vote.

Of course, these statements alone cannot show either general legislative intent or public meaning. Representatives Johnson and Kerr could not have believed that “appropriate legislation” granted all powers “necessary and proper to enforce the Fifteenth Amendment” if they rejected the bill for being unconstitutional. Indeed, Representative Davis made his remarks in response to Representative Johnson, who asserted before the House that while the Fifteenth Amendment was the supreme law of the land, the Act itself was an unconstitutional and “fatal blow at State rights.”⁸² They could not have believed that the Fifteenth Amendment’s “appropriate legislation” clause granted necessary and proper powers to abridge state sovereignty if they simultaneously (1) rejected the bill as unconstitutional but (2) accepted the legitimacy of the Amendment upon which the bill stood.

Beyond this, there is conflicting evidence regarding the autonomy of the branches to determine what constitutes “appropriate legislation.” For example, Republican Representative Jeremiah Wilson of Indiana discussed the understanding of “appropriate legislation” before the Congress in April 1871, after the Fifteenth Amendment had been ratified. He argued, “Con-

77 Enforcement Act of 1870, c. 114, 16 Stat. 141. The bill’s name was referenced in the Congressional Debate of Representative Stiles of Pennsylvania, Cong. Globe, 41st Cong., 2nd sess., p. 3881.

78 *Id.*

79 CONG. GLOBE, 41st Cong. 2nd Sess. 3877, 3880-81 (1870). In his speech, Rep. Davis references Rep. Michael Kerr (IN) as ultimately finding the bill unconstitutional. However, Rep. Davis had yielded his time to Rep. Johnson, who made the statements referenced above.

80 Here, Rep. Davis is referring to Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, which are the enforcement provisions of both.

81 CONG. GLOBE, 41st Cong. 2nd Sess. 3882 (1870).

82 Stiles of Pennsylvania, Cong. Record, 42nd Cong., 2nd sess., p. 3881.

gress is not only the exclusive judge of necessity for the application of remedies, but also the *exclusive judge of what the remedies shall be*.⁸³ This statement implies that the Amendment empowered Congress to determine the extent to which the Tenth Amendment would be abrogated, which could make Justice Roberts' argument unfounded.

However, we can also see from the full context of Representative Wilson's remarks that his interpretation was vehemently opposed. Senator William Hamilton of Maryland, for example, was among a group of strict constructionists who believed that Section 2 conferred Congress with no affirmative power of legislation, but rather empowered the courts to enforce the Constitution.⁸⁴ In fact, Senator Hamilton goes on to assert that any such legislation by Congress would be immediately declared unconstitutional by the Courts,⁸⁵ directly contradicting Representative Wilson's implied assertion.

Other early attempts to give universal suffrage to African American voters during the Reconstruction Era were also hotly contested in both Northern and Southern states. The Amendment, which was first presented in late 1866, was feared to abridge state sovereignty of loyal states⁸⁶ as well as to subject Southern states to intense federal control.⁸⁷ Many statements by congressional representatives at the time that expressly stated that Sec-

83 Wilson of Indiana, Cong. Record, 42d Cong., 1st sess., p. 482 -83.

WILSON: And now sir, who is to judge as to the necessity for congressional intervention? Congress must be the exclusive judge. It is for Congress to look to the question whether or not the State affords that protection the Constitution requires, and if it does not, then to provide the proper remedies. And under this section Congress is not only the exclusive judge of the necessity for the application of remedies, but is also the exclusive judge of what the remedies shall be What is "appropriate legislation?" It is legislation adequate to meet the difficulties to be encountered, to suppress the wrongs existing, to furnish remedies and [to] inflict penalties adequate to the suppression of all infractions of the rights of citizens. And of what is necessary to this end Congress alone must be the judge

This portion of the Representative's speech, discussing "House Bill 320 – to enforce the provisions of the fourteenth amendment," offers a unique insight into the Congressional understanding of "appropriate legislation" because it directly discusses the judicial discretion/ judicial supremacy divide. Representative Wilson's remarks are in response to the "gentleman from Kentucky" (Representative James Beck) who had previously asserted that section 4 of the fourteenth amendment – which is identical to section 2 of the fifteenth amendment – allowed only for remedy in Court.

84 See Matthews, *supra* note 76 (describing the general understanding of the enforcement legislation that Congress believed it had under the Fifteenth Amendment).

85 Hamilton of Maryland, Globe, 41st Cong., 2d sess., Appendix, p. 354. In full, he states:

The amendment is negative upon the power of Congress and is complete in itself. The exercise of any such power thus prohibited by congressional legislation is simply unconstitutional and void, and would be so declared by the appropriate tribunals upon appeal by the aggrieved to them.

86 See Matthews, *supra* note 76, at 12-13. Northern states recognized that a form of abrogation of state autonomy would necessarily take place when passing a law requiring suffrage, and therefore resisted any bills targeted at any state. The states that resisted surrendering power included New York, Connecticut, Ohio, Wisconsin, Minnesota, and Kansas. *Id.* at 13.

87 See generally *Id.* at 20-37 (discussing the general formation of the Fifteenth Amendment).

tion 2 required substantial congressional interference to enforce the primary provision of the Fifteenth Amendment were vehemently opposed.⁸⁸

For example, Senator Doolittle of Wisconsin, a visceral opponent of the Amendment, believed that it would allow Congress to “appoint judges at the election-polls; to send officers to attend the elections to secure order; to count the votes and secure the votes of colored men in determining the result—in short, to control the elections.”⁸⁹ Senator Doolittle also discussed how even the Amendment’s proponents recognized that it would abrogate state sovereignty.⁹⁰ The Hon. H. Wilson, a supporter of the Amendment, conceded as much in his impassioned speech before the Assembly in rebuttal to Congressman Doolittle’s speech.⁹¹

Not all contemporary voices believed that Section 2 would abrogate state sovereignty, however. In fact, many contemporaries understood Section 2 to be a merely declaratory resolution whose power could not be wielded in reality.⁹² These critics maintained that, like Section 5 of the Fourteenth Amendment, implementing any such legislation would be both inefficient and difficult to execute.⁹³ Other congressional representatives similarly thought that Section 2 would remain dormant only until a particular state or collection of states refused to enact appropriate legislation on its own, thus conferring a type of concurrent authority between the Congress and the States.⁹⁴

State political figures appeared no more united on the effect of the Fifteenth Amendment than did their federal counterparts. Many states ratified

88 See *Id.* at 48 (discussing the particular manner in which Congress debated taking control of the vote).

89 Doolittle of Wisconsin, *Globe*, 40th Cong., 3d sess., Appendix, at 151. See also Matthews, *supra* note 76 at 49 (“Under it Congress might send ‘satraps’ into every election district in the country, and relieve the States from all further attention to the subject.”).

90 *Id.*

91 Hon. H. Wilson, *Globe*, 40th Cong., 3d ses., Appendix at 154. The relevant portions of the speech are as follows.

“[The Honorable Senators] tell us we were pledged by our national convention of 1868; that we were committed to the doctrine that the right to regulate the suffrage properly belonged to the loyal States. So the earlier Republican national conventions proclaimed that slavery in the States was a local institution, for which the people of each State only were responsible. But that declaration did not stand in the way of the proclamation did not stand in the way of the proclamation of emancipation, did not stand in the way of the thirteenth article of the amendments of the Constitution . . . The declaration that the suffrage in the loyal States properly belonged to the people of those States meant this, no more, no less: that under the Constitution *it belonged to the people of each of the loyal States* to regulate suffrage therein.” (emphasis added).

This final sentence directly implies that the States were never the sole proprietors of election administration, but rather the people who were eligible to participate in the vote. This statement can be interpreted to either abrogate state sovereignty through the ratification of the Fifteenth Amendment or suggest that States were never endowed with such sovereignty.

92 See Matthews, *supra* note 76, at 49.

93 See *id.*

94 Axtell of California, *Globe*, 41st Cong., 2d Sess., p. 258.

the Amendment without incident,⁹⁵ which gives little indication as to whether those state legislators agreed with their colleagues in Congress about the Amendment's effects. Florida and Michigan, however, provide some insight into the view of Amendment-friendly states. For example, the Florida governor championed the resolution as a homogenization of the states. From this, one could argue that state equal sovereignty was left intact, especially when one recognizes that while some states would be more affected than others during the transition, no individual state was held to a different standard than any other state.

However, the Florida Assembly minority party raised the familiar adverse argument that "suffrage was properly a local matter, to be regulated by each State for itself," and that the Constitution did not justify "one or many states from prescribing suffrage regulations for another."⁹⁶ Similarly, the Committee on Federal Relations in the Michigan House issued a report, stating that "[t]he proposed Amendment is an encroachment upon the rights of the States . . . and tends to weaken and destroy the checks and balances wisely framed by the fathers of the Republic."⁹⁷ These remarks from the Amendment's detractors could be seen as evidence that the Amendment was indeed believed to abrogate states' equal sovereignty.

The mixed messages issued by members of opposite parties make it impossible to determine the final consensus of the Amendment, if one ever existed. What we know is that the Amendment passed the House and the Senate with a two-thirds majority in the House and the Senate in February 1869⁹⁸ and was ratified by three-fourths of the states in February 1870.⁹⁹ This does not mean, however, that the debates created an understanding amongst the polity that the Amendment abrogated state equal sovereignty, or that it was passed over the objections of the minority. It could mean that the majority, recognizing that the vote and ratification would be incredibly close, conceded the idea of abrogation to secure ratification. What is more likely, however, is that the idea of state equal sovereignty was not considered by either the Framers or the ratifying states. In either event, we cannot know from the constitutional context, legislation, or the debates themselves. There is simply no consensus from the legislators to make an adequate determination of what was considered "appropriate."

There are many similar floor debates surrounding the understanding of "appropriate." This cycle of investigation and comparison could continue

⁹⁵ See Matthews, *supra* note 76, at 58-62.

⁹⁶ See *Id.* at 64.

⁹⁷ See MATTHEWS, *supra* note 76 at 58.

⁹⁸ *African Americans and the Fifteenth Amendment*, CONSTITUTIONAL RIGHTS FOUNDATION, available at <http://www.crf-usa.org/black-history-month/african-americans-and-the-15th-amendment>. [hereinafter "African Americans"].

⁹⁹ See *id.*

for much longer than this comment will allow, and the results would likely resemble the parry and riposte that is seen above. A legal rule cannot be created solely from the communicative content of these discussions.

c. Contemporary Legislation

Clearly, no consensus existed on the congressional floor concerning the parameters of Section 2 such that one can discern a constraining principle. As a final avenue of investigation, one must look to contemporary legislation that was proposed and passed under the Fifteenth Amendment to enforce the provisions of Section 1.

As previously discussed, the only contemporary law designed specifically to enforce the Fifteenth Amendment was the Enforcement Act of 1870.¹⁰⁰ While floor debates proved unhelpful, this section looks to the effects of the legislation on states' obligations. This bill was relatively tame in comparison to the grand rhetoric of the Republican Party, as it did not infringe upon the States' ability to regulate their own elections.¹⁰¹ To be sure, the bill was decried on both sides as either a usurpation of Congressional authority or "an excellent recipe for pretending to do something without accomplishing anything."¹⁰² However, as the bill was the single contemporary bill to reach beyond the congressional floor into the President's office for signing, it is strong evidence that this bill was the congressional consensus on the extent of "appropriate legislation." While the Act brought all states under the enforcement of the federal government, it did so equally to each. From the bill's language, it appears that Congress did not intend to abrogate state equal sovereignty.

It is also worth noting that a preliminary bill came before the House floor that could not be passed. H.R. 1815, a precursor to the Enforcement Act, was brought before the House of Representatives on April 18, 1870.¹⁰³ The bill reiterated the first section of the Fifteenth Amendment, assessed potential fines and imprisonment of state officials who contravened the bill, afforded methods of recourse for false claims, and granted a private right of action for persons deprived of their office under the Act.¹⁰⁴ Generally, the text of the bill gave Courts the power to adjudicate any voting deprivations, after the fact, while withholding executive authority to take affirmative

¹⁰⁰ See MATTHEWS, *supra* note 76 at 79.

¹⁰¹ See MATTHEWS, *supra* note 76 at 79-81. The bill as a whole made a declaratory statement that reiterated the goals of the Fifteenth Amendment's first section, levied fines and imprisonment upon public officials who denied or abridged the right to vote, banned the use of discrimination by the assessors of taxes in states where such measures are used to enfranchise citizens, and banned judges or inspectors of elections from doing the same. *Id.*

¹⁰² See MATTHEWS, *supra* note 76 at 81.

¹⁰³ H.R. 1815, 41st Cong., 2d. sess., U.S. CONGRESSIONAL DOCUMENTS AND DEBATES, 1774-1875.

¹⁰⁴ See *id.*

acts. This original language also strongly favors an argument that the Fifteenth Amendment was never intended to abrogate state equal sovereignty.

The Senate's sister bill provides more insight and adds credence to this view. The Senate Judiciary Committee rejected the House Bill in its entirety, and proposed legislation that would reach all methods of white interference with the minority, including more invasive restrictions by Congress.¹⁰⁵ This re-writing, and subsequent failure of the new bill, could imply a general consensus that greater invasions upon states' ability to regulate themselves were not "appropriate" to secure voting rights.

Beyond specific enforcement, Congress also enacted H.R. 1305, which was entitled "a bill to remove political disabilities in States ratifying and conforming their constitutions and laws to the provisions of the Fifteenth Amendment . . ." ¹⁰⁶ As its title suggests, the bill allowed states that ratified the Fifteenth Amendment to be removed from their reconstruction disabilities under the Fourteenth Amendment.¹⁰⁷ This ratification prerequisite could be seen as an abrogation of equal sovereignty. However, it could also be argued that the southern states were no longer functioning in their capacities as "states" during this reconstruction period.¹⁰⁸ On the other hand, the bill's text explicitly mentions "the legislature of any *State* of the United States," rather than as a territory. The southern states that had been readmitted to the Union were given varying degrees of sovereignty regarding their right to hold office in Congress. Because this bill regarding acceptance of the Fifteenth Amendment codified the acceptability of this disparate treatment, it could be argued that there was a general understanding that Congress already had the ability to abrogate equal sovereignty in the voting context.

Of course, approximately a quarter of the states were in no position to vote on the bill, as their admittance back into Congress had not yet taken place. Moreover, this bill was not specifically enacted through the "appro-

¹⁰⁵ See MATTHEWS, *supra* note 76 at 82-83.

¹⁰⁶ H.R. 1305, 41st Cong., 2d sess., U.S. CONGRESSIONAL DOCUMENTS AND DEBATES, 1774-1875.

¹⁰⁷ Section 3 of the Fourteenth Amendment states:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability. U.S. Const. am. XIV.

¹⁰⁸ The former Confederate States were readmitted to the Union from 1865-1870, with Georgia being the final state to rejoin in July 1870. Several states – including South Carolina, Florida, Georgia, Mississippi, Arkansas, North Carolina, and Tennessee – had been readmitted when this bill was proposed to the House in February 1870. See *Reconstruction: The Second Civil War*, pbs.org, available at http://www.pbs.org/wgbh/amex/reconstruction/states/sf_timeline2.html (outlining the timeline of Reconstruction in America from 1861-1877).

priate legislation” provision of the Fifteenth Amendment at all, but rather through both the Fifteenth Amendment and Congress’ Article IV powers.¹⁰⁹ In light of this, using this bill to prove that Section 2 was understood to abrogate equal sovereignty becomes tenuous. Contemporary congressional legislation, it appears, was not actively concerned with the idea of equal sovereignty, and so a restraining principle remains elusive.

As it remains unclear whether abrogation of state equal sovereignty is “appropriate legislation” to guarantee the voting rights of citizens, there is no way to eradicate the vagueness of the phrase in such a way that a constraining principle can be created and applied to the facts of *Shelby County*. The original understanding of “appropriate legislation,” while constraining any final legal rule, is sufficiently vague to warrant further constitutional construction for a judge deciding this case.

B. Constitutional Construction and Original Utility

The search to find a constraining principle in the communicative content of the phrase “appropriate legislation” has failed. Armed with the vague and loosely constraining framework that Congress may enforce the Amendment by the most suitable, fit, or proper legislation, any judge would now be required to construct, not interpret, an actual rule from which to decide this case. To do so, he or she has the ability to select a normative theory of construction.

As discussed in Section IA, the selection of a normative theory would not conflict with the rules of fixation and restraint if the text is sufficiently vague. Thus, neither Justices Roberts’ nor Justice Ginsburg’s interpretive approaches in *Shelby County* contravene originalist doctrine, as neither the majority nor the dissent argued that the words “appropriate legislation” definitively precluded or militated a certain conclusion. Rather, Justice Ginsburg argued that in the presence of a vague proposition, the Court should defer to Congress¹¹⁰ and Justice Roberts instead championed the continued importance of state equal sovereignty.¹¹¹

Both approaches are normative theories of constitutional construction. Justice Ginsburg employed a Thayerian constitutional deference ap-

109 U.S. Const., art. IV, § 3. Under Section 3, “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.” *Id.*

110 *See Shelby County v. Holder*, 133 S.Ct. 2612, 2637-38 (2013) (Ginsurg, J., dissenting) (arguing that in cases involving “appropriate legislation” enacted by Congress to enforce the Fifteenth Amendment, the Court should defer to Congressional findings).

111 *See id.* at 2644 (describing Chief Justice Roberts’ explanation of how equal sovereignty can only be abrogated in specific circumstances).

proach¹¹² and Justice Roberts employed a theory that gave deference to federalism and states' equal sovereignty.¹¹³ Both justices interpreted the text in a way that did not contradict the natural or reasonable meaning of the language, which is as far as constitutional interpretation purports to go, whether the understanding of "original interpretation" is from Justice Scalia or Professor Solum. It seems, then, that originalism leaves the work only half finished.

It is the responsibility of judges and justices to not only determine what text means, but to decide cases. There must be a process by which the text's communicative content is applied to the facts of the case. While Justice Scalia argued in *Reading Law* that the Fair Readings Method continues this process without allowing judges to stray into their own predilections,¹¹⁴ this textual interpretation is no longer originalism, but rather another normative theory of construction.

While both Chief Justice Roberts and Justice Ginsburg – admittedly in deed more than word – adhered to the originalist tenets of fixation and constraint, the reasonable meaning of "appropriate language" was ultimately irreducibly vague and unhelpful as a constraining principle. The two justices then reached opposing positions, which can always result when interpreting intentionally vague propositions.

The term "appropriate legislation" is vague and was likely intended to be so. Constitutional provisions are added only after intense debate and nationwide political upset. Political parties, and personal opinions, are likely to be disparate. In order to come to some form of consensus, constitutional language that goes beyond a discrete, specific rule must be vague in order to accommodate and overshadow the ultimate lack of consensus by the polity. This vagueness precludes the opportunity for most constitutional decisions to rely solely on the text of the document. Other forms of constitutional interpretation are required in order to create an actual rule and holding for a particular case. However, if other normative forms of constitutional decision-making are required to reach an ultimate adjudication, then originalism neither constrains judges nor facilitates a definitive conclusion of what the law is.

Unfortunately for originalists who uphold the tenets of judicial constraint and fidelity to the law, construction opens the door to judicial discre-

112 For a greater explanation of Thayerianism, see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140-44 (1893). See also Solum, *supra* note 6 at 516-17 (describing, in greater detail, the modern version of Thayerian constitutional deference).

113 This is also known as the federalism canon, which instructs that ambiguities in federal statutes should be construed not to interfere with traditional state functions. Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 755 WM. & MARY L. REV. 753, 763 (2013).

114 See notes 33-45, *supra*, and accompanying text.

tion almost as much as if an investigation of the original meaning had never been done. Whether a judge follows Justice Scalia's Fair Reading Method, Justice Ginsburg's congressional deference approach, or another theory of constitutional interpretation, the judge will be choosing between one or another normative interpretive theory.

If this is true, then perhaps it is strange that originalism is so championed. It does not appear to bring us closer to a definitive answer of the law in situations where it would be most needed. *Shelby County* is just one example of the result of a probing analysis into the original public meaning of a constitutional phrase, which produced, at best, a nominally constraining principle. Perhaps this means that originalism cannot constrain judges. Constitutional construction requires normative, subjective theories. Even if a judge looked first at the original public meaning of a text, she could still choose between several normative theories that will get her to the conclusion that she finds most desirable. The problem with a judge cloaking herself in "originalism" is that she can then argue that she is being entirely rational and disinterested, when in fact she is deciding cases that best fit with her ideological views.

Why, then, should we require judges first to look to the consensus of the polity in the late 1860s when no true consensus can be found? In light of the philosophy's ineffectiveness, the exercise begins to look like an appeal to our storied forefathers to reach a desired outcome. If we must appeal to the understanding of a particular divided group, why not look to the understanding of those currently alive? Current citizens have an understanding of what those words mean in our contemporary context that more readily applies to any facts with which a judge will be presented. Perhaps their understanding should bear more weight, if no prior consensus can ever be found.

CONCLUSION

In many situations, of which *Shelby County* is one, originalism neither constrains judges nor discovers the law, and so perhaps academic scholarship should stop pretending that it does. Professor Solum has presented a theory distinguishing between constitutional interpretation and constitutional construction during judicial decision-making, and general originalism philosophy falls squarely within the constitutional interpretation step. While the theory can be a helpful starting point in this role, it often ultimately fails to live up to its espoused tenets of judicial constraint and fidelity to the law. This comment provided a hypothetical study into the ultimate decisions of the *Shelby County v. Holder* decision to examine one instance of this. The Appropriate Legislation Clause is sufficiently vague that it is possible for two judges following the tenets of fixation and constraint to still construct two diametrically opposed holdings because a thor-

ough and probing view into the original public meaning provided an ambiguous definition of the word “appropriate” and no truly constraining principle could be found. In light of this, originalism seems to lose its import. If the philosophy cannot deliver on its two most important tenets, then perhaps we should stop elevating it as the philosophy of the rational and impartial judge.