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Hegelian Dialectical Analysis of U.S. Voting Laws

Charles Edward Andrew Lincoln IV

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During the spring, summer, and fall of junior-senior year in college (2012), perhaps because he felt pity for an apparently lonely and super-nerdy undergraduate who spent an inordinate amount of time in the Langdell Law Library—Akiba Covitz—former Associate Dean of Academic Affairs at Harvard Law School, took notice and spent time helping me develop my ideas on philosophy and law for my bachelor's senior thesis while explaining to me his own theory outlined in his dissertation on Plato and the U.S. Constitution. Without his inspiration and guidance, none of my research ever would have happened. Then, three years later, in my final year in law school at the Texas A&M University School of Law (2015), Deni Garcia taught a spectacular class on Jurisprudence and the philosophy of law, helping me further explore law and philosophy while supervising a final paper that was a predecessor this publication. Finally, I would like to thank Franklin G. Snyder's help guiding the final stages of this Comment and meeting me on a weekly basis for a whole semester to make sure the argument was succinct and clear.

I. INTRODUCTION

This Comment uses the dialectical paradigm of German philosopher Georg Wilhelm Friedrich Hegel (1770-1833) to analyze the progression of United States voting laws since the colonial foundations of a participatory democratic process in this country. This analysis can be used to interpret past progression of voting rights in the United States as well as a provoking way to predict future trends in United States voting rights – as an ongoing "progressive" political process or rhetorical method of erasing categories or classifications and eliminating distinctions amongst persons.

First, Hegel's dialectical method is established as a major premise. This Comment employs the language of "thesis-antithesis-synthesis" and the dialectical method as a simplified paradigm of Hegel's complex thoughts of "*aufheben*"; Michael H. Hoffheimer explains the detailed distinction between "dialectic" and "*aufheben*":

> Hegel himself does not use the terms "dialectic" or "dialectical" very often. They appear only three times in the sections on philosophy of law in the first edition of his *Encyclopedia* (1817). That text refers to the dialectical conflict among various duties -- a conflict that lacks any resolution. It refers to "true dialectic" as constituting the subject that knows its subordination under another. And it terms the "justice of the world" as the representation (*darstellt*) of the dialectic of spirits of particular peoples. None of these passages apply the term "dialectic" to the transcendental resolution of an opposition or to the move to a new phase or level of the system.
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> The term Hegel employs most frequently to denote the transcending resolution of oppositions, contradictions and conflicts, is "*aufheben*." Variously translated as "transcend," "supersede," or "sublimate," the term "*aufheben*" is best translated by the neologism "sublate." Unlike "dialectic," the term "sublation" figures prominently in important transitions in Hegel's system. It occurs twice in the first, cryptic section of Hegel's philosophy of law from 1817:
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> > Objective spirit is the unity of theoretical and practical spirit. *Free will for itself* appears in the form of free will now that the

> formalism, contingency, and subjectivity of its practical activity is sublated. Through the sublation of this mediation, spirit becomes the unmediated self-posited particularity, which in the form of *universal* is *freedom* itself.

Other passages apply the term "sublation" to express the overcoming of contradiction and to describe the resolution of a progress in a third judgment. Unlike the term "dialectic," "sublation" denotes resolution of an unmediated opposition into a higher category -- a resolution that marks the movement to a new level of the system. Thus, Hegel applies the term "sublation" in the 1817 philosophy of law to the resolution or mediation of unmediated existence and unmediated singularity. In the final appearance of the term "sublation" in the philosophy of law, a mediated relationship is itself overcome or resolved into the higher category of order based on custom.

It is thus the term "sublation," not "dialectic" or "thesis-synthesis-antithesis," that is linked most closely to distinctive, transcending features of Hegel's treatment of conflict and contradiction. Hegel did not coin the term "*aufheben*." Vernacular meanings in the eighteenth century included to pick up, to preserve, and to cancel. Commentaries always emphasize that he used the term "sublation" with the double meaning of both to cancel and to preserve, referring to the reconciliation of an opposition in a manner that somehow both cancels and preserves the opposed elements at a higher level. But the term also had technical meanings. In mathematics, it meant to reduce a fraction. In law, it meant to repeal or annul a statute. Hegel was not the first to import the term into philosophy or legal philosophy. His friend Schelling employed the term widely throughout his early writings, and notably in his *New Deduction of Natural Law* (1796), but Schelling almost always used the term "*aufheben*" in the univocal sense of "to cancel." Similarly, some of Hegel's followers returned to this more vernacular use of the term.[1]

Second, the generally accepted history of United States voting laws from the 1770s to the current day is laid out as a minor premise.

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[1] Michael H. Hoffheimer, *Hegel's First Philosophy of Law*, 62 TENN. L. REV. 823, 840–42 (1995) (footnotes omitted).

Third, the major premise of Hegel's dialectical method weaves and applies itself to the progression of United States voting laws to explain the progressive elimination of distinctions and categories. This third step of application suggests possible future scenarios.

Hegel was a philosopher in the late eighteenth and early nineteenth centuries.[2] His ideas have been applied to interpret a wide range of academia and law, including torts,[3] contracts,[4] property,[5] criminal,[6] and evidence.[7]

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[2] Professor Hoffheimer provides a comprehensive introduction to Hegel's publication history:

> Hegel's first published work was a translation and commentary on the French letters of Jean-Jacques Cart that were critical of Bern constitutional law. This work has not been translated. For a discussion, see H.S. Harris, Hegel's Development: Toward the Sunlight 1770–1801 418–34 (1972).
>
> Hegel conceived of law as part of his system from at least 1800; it is expressly included in many unpublished drafts of his system and is implicitly assumed to be part of his system in incomplete drafts of his system. For writings on law that Hegel himself did not publish and that are available in English translation, see Hegel and the Human Spirit: A Translation of the Jena Lectures on the Philosophy of Spirit (1805-6) with Commentary (Leo Rauch trans., 1983); Georg W.F. Hegel, On the Recent Domestic Affairs of Wurtemberg, Especially on the Inadequacy of the Municipal Constitution, in Hegel's Political Writings 243-245 (T.M. Knox trans., 1964); G.W.F. Hegel, System of Ethical Life (1802/3) and First Philosophy of Spirit (H.S. Harris & T.M. Knox trans., 1979) . . . (both manuscripts translated in this book treat law extensively); Georg W.F. Hegel, The German Constitution, in Hegel's Political Writings, supra, at 143-242; G.W.F. Hegel, The Philosophical Propaedeutic (Michael George & Andrew Vincent eds. & A.V. Miller trans., 1986) . . . . He also treated law in his lectures on the philosophy of history. See Georg W.F. Hegel, Lectures on the Philosophy of World History 95-101 (H.B. Nisbet trans., 1975).
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> Hegel published an article in two parts on natural law in 1802 and 1803. See G.W.F. Hegel, Natural Law (T.M. Knox trans., 1975) . . . . He included important treatments of law in 1807 in G.W.F. Hegel, Phenomenology of Spirit 290-94 (A.V. Miller trans., 1977) . . . ; G.W.F. Hegel, The Phenomenology of Mind 501-06 (J.B. Baillie trans., 1967) . . . . He published articles on contemporary politics that treat laws and legal institutions at length. See Georg W.F. Hegel, Proceedings of the Estates Assembly in Wurtemberg, 1815-16, in Hegel's Political Writings, supra, at 246-94; Georg W.F. Hegel, The English Reform Bill, in Hegel's Political Writings, supra, at 295-330.

Id. at 829 n.24.

[3] *Id.* at 826 n.8 (first citing Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994); and then citing J. Robert S. Prichard & Alan Brudner, *Tort Liability for Breach of Statute: A Natural Rights Perspective*, 2 L. & PHIL. 89 (1983), for application of Hegel's concepts in torts).

[4] *Id.* at n.9 (first citing Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077 (1989); and then citing Michael Rosenfeld, *Hegel and the Dialectics of Contract*, 10 CARDOZO L. REV. 1199 (1989), for application of Hegel's concepts in contracts).

[5] *Id.* at n.10 (first citing Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988); then citing Timothy J. Lewis, *A Hegelian Theory of Nuisance Law*, 48 TORONTO FAC. L. REV. 259 (1990); then citing Michael Salter, *Justifying Private Property Rights: A Message from Hegel's Jurisprudential Writings*, 7 J. LEGAL STUD. 245 (1987); then citing Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994); and then citing Jeanne L. Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolate Feminine Body*, 79 MINN. L. REV. 55 (1994), for application of Hegel's concepts in property law).

[6] *Id.* at n.11 (citing Alan Brudner, *Punishment and Violence*, 13 CARDOZO L. REV. 1771 (1991) for application of Hegel's concepts in criminal law).

[7] *Id.* at n.12 (first citing Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511–44 (1994); and then citing Gregory M. Klass & Gustavo Faigenbaum, *The*

II. HEGELIAN DIALECTIC

Hegel's dialectic presupposes a rational structure to political history.[8] Hegel illustrates the dialectic rule by his discussion of a ruler and those who are ruled, the "populace."[9] The rule begins with assertions by the ruler of absolute power.[10] But the ruler's exercise of that power causes resentment in the populace, because the populace sees the ruler exercise freedom.[11] The ruler, sensing a threat from the populace, tries to bring them more firmly under his control.[12] This often begins with simple brutality to force obedience, but there are limits to the effectiveness of force.[13]

We have here, in Hegelian terms, a political *thesis* (the rule that the ruler's authority is absolute) and an *antithesis* (resistance to the ruler's authority).[14] At first, the ruler might try to simply suppress the antithesis by forcibly compelling obedience.[15] But, whether as a matter of egocentric psychology or political strategy, the ruler's suppression merely intensifies the popular *antithesis*, the resistance to the ruler's authority.[16]

The ruler and the populace thus move toward a *synthesis*.[17] The ruler seeks to bring the populace back under control -- in Hegel's terminology, to *inwardize* them -- while the populace demands more control.[18] The ruler thus

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Enlightenment of Dialectics: Strategies Involved in Burdens of Proof, 17 HARV. J.L. & PUB. POL'Y 735–58 (1994), for application of Hegel's concepts in the law of evidence).

[8] Raj Bhala, *Hegelian Reflections on Unilateral Action in the World Trading System*, 15 BERKLEY J. INT'L L. 159, 184 n.93 (1997) (noting that Hegel's history is the subject of much debate, but a common formulation concludes Hegel argued a rational structure to history: "Hegel repeats this thesis in his conclusion. . . . (noting that for Hegel, 'world history is not wholly an affair of chance or contingency;' rather 'the history of the world has a rational structure,' and 'this rational structure . . . is the development of freedom') and (stating that 'Hegel considered that the history of the human race is a development from less to greater freedom and from less adequate forms of freedom to freedom in its perfection'") (emphasis omitted) (citations omitted)).

[9] This process is often referred to as guided by the "Geist." Reginald Leamon Robinson, *The Impact of Hobbes's Empirical Natural Law on Title VII's Effectiveness: A Hegelian Critique*, 25 CONN. L. REV. 607, 661 n.299 (1993) (quoting Michael A. Simon: "History for Hegel is an unfolding of the Geist or spirit as it objectifies itself in the world. Spirit actualizes itself by making things happen, and is at the same time conscious of itself. . . . History is the story of the development of human freedom; it is freedom becoming objective, which means that the world is brought into conformity with the rational system of mind. The system of right--that is to say, the law--represents the rational principles that determine the constraints that operate on what free-willing existents can will at a particular moment of history" (citations omitted)).

[10] *See* GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF HISTORY 43–44 (J. Sibree trans., 1956).

[11] *Id.* at 44.

[12] *Id.* at 96.

[13] *Id.* at 96–97.

[14] Bhala, *supra* note 8, at 187–88.

[15] *Id.* at 187.

[16] *Id.*

[17] *Id.* at 173, 187–88.

[18] This personal interpretation is drawn from part of the Absolute Knowing chapter in *Phenomenology of Spirit*, section 788:

> In revealed religion self-consciousness is aware of itself in pictorial objective form, not as yet as self-consciousness. It must cancel this form and become aware of itself in all the forms it has hitherto taken up. They must not merely be forms of self-consciousness for us, the phenomenological observers, but for self-consciousness

responds with charters, rights, or laws, which he grants to the populace.[19] This reaffirms the ruler's assertion that his right is absolute, while in fact giving the populace more power.[20]

This *synthesis* itself lasts for a time, but then becomes a new thesis.[21] This, in Hegel's view, keeps going in a spiral, as each new thesis is undercut by a new *antithesis*.[22] The use of the "spiral" metaphor with Hegel is important: we are not merely going in circles; we are going in circles that bring us closer to the ultimate purpose of history, *synthesis* (what Hegel calls the "end" of history).[23] This is ultimately the fully equal sharing of power among all.

III. WAYS HEGEL'S DIALECTIC HAS BEEN USED BEFORE

Hegel's dialectic has been used and disused in many ways since his

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> itself. It must see how it has externalized itself in various objects, and in seeing this also cancelled the externalization. It must see all its objective forms as itself.

G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT § 788, at 589 (A.V. Miller trans., 1977).

[19] Hegel illustrates this point by stating:

> "[W]hat is law [Gesetz] may differ in content from what is right in itself [an sich Recht]." In his view, slavery may be legally valid and yet unjust. Law becomes more consistent with justice insofar as law is a "realization [Verwirklichung]" of "right [Recht]," that is, insofar as law embodies right. Hegel often plays upon the ambiguity of the German word for right, Recht. Recht can mean right in a legal sense, as in having the right to do something, or right as a form of justice, as in to be in the right. Recht can also refer to law, although Hegel uses the word Gesetz as well, which can be translated as "law" or "statute." He does not use the words interchangeably, instead tending to use Gesetz for positive law and Recht for a normative sense of positive law, such as justice. The two come together when Hegel says that "actual legal relationships presuppose laws founded on right [Rechtsgesetz] as something valid in and for itself." Gesetz is distinguishable from Rechtgesetz in that only the latter represents positive law fully consistent with justice. All other varieties of positive laws [Gesetze] embody lesser forms of right [Recht].

Thom Brooks, *Between Natural Law and Legal Positivism: Dworkin and Hegel on Legal Theory*, 23 GA. ST. U. L. REV. 513, 520–21 (2007).

[20] *See* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 157–58 (1992) (distinguishing a legitimate ruler from a despot in that a legitimate ruler has popular consent, which is often given by the ruler offering rights to life and self-preservation among other rights). This sentiment is also summarized in a recent law review article by Professor Bhala indicating that "[t]he extension of this law [-- egalitarian religious benefits to all people --] to both ruler and subject, namely, the idea of a constraint on a ruler other than himself, is a necessary prerequisite toward a consciousness of freedom on the part of the subject." Bhala, *supra* note 8, at 185. In other words, this aspect of an egalitarian religion conferring "rights" or religious benefits to all people is an instance of a ruler giving up a "monopoly" on religion and having to share it with his subjects. *Id.* at 185–86. This is a precursor to other rights. *Id.* at 186.

[21] Bhala, *supra* note 8, at 188.

[22] An *antithesis* does not necessarily imply a negative connotation, but rather an opposite state of affairs from the *thesis*.

[23] G.W.F. Hegel, Elements of the Philosophy of Right 26 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (explaining "[p]hilosophy forms a circle. It has an initial or immediate point – for it must begin somewhere – a point which is not demonstrated and is not a result. But the starting point of philosophy is immediately relative, for it must appear at another end-point as a result. Philosophy is a sequence which is not suspended in mid-air; it does not begin immediately, but is rounded off within itself" (footnote omitted)).

writing in the early 1800s.[24] Relatively recently, Francis Fukuyama used a version of the dialectic between a liberal-capitalistic-democracy and communism; in 1989, he argued that the dialectic would resolve itself with a liberal-capitalistic-democracy.[25] In his work, The *End of History and the Last Man*, Fukuyama even seems to be suggesting that Hegel's dialectic can apply to "universal rights."[26] Fukuyama acknowledged that history is not a linear progression towards liberal-capitalistic-democracy, but that regressions, even long periods of regressions, occur.[27]

Fukuyama's interpretation of the class of the liberal-capitalistic-democratic world follows the Hegelian paradigm.[28] Essentially, Fukuyama shows two opposite systems clashing with each other.[29] Overtime, systems ebb and flow, much like the ruler giving rights to the populace and then taking rights from the populace.[30] Areas such as stints of communism expanded, but

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[24] Hoffheimer, *supra* note 1, at 825 n.6 ("For two centuries Hegel was either ignored or vilified by Anglo-American legal scholars. Holmes read Hegel but used him as a foil against which to develop his own theories. There was a general decline of interest in European philosophy with the rise of legal positivism and realism. Moreover, conservative theorists hostile to positivism joined the attack on Hegel for nationalistic reasons in the wake of the World War I. Although Robert S. Summers has suggested that Lon Fuller was influenced by Hegel, Fuller never publicly acknowledged any such influence. Richard Hyland uses the search term 'Hegel' to demonstrate the ridiculous results of computer assisted research. Finding numerous instances where the term "Hegel" refers to an attorney, judge, or party, Hyland concludes that 'the most frequently cited passage about Hegel in American case law' is Judge Learned Hand's paraphrase of William James's comparison of the Internal Revenue Code with Hegel's prose." (citations omitted)).

[25] Guyora Binder, *Post-Totalitarian Politics*, 91 MICH. L. REV. 1491, 1493 (1993).

[26] FUKUYAMA, *supra* note 20, at 217, 243.

[27] Francis Fukuyama, *The End of History?*, NAT'L INTEREST, Summer 1989, at 7–18; *see generally* Ari Afilalo & Dennis Patterson, *Statecraft, Trade and the Order of States*, 6 CHI. J. INT'L L. 725, 726 n.5 (2006) (simplifying Fukuyama's concept in relation to political science: "According to Fukuyama, the liberal democratic model soundly beat fascism and communism because, simply put, it was a better idea. The liberal democratic model had no problem besting the fascist ideology of expansionism and racial superiority. In time, it defeated the Marxist ideology -- in part because the growth of a strong and expansive middle class, resulting from (among other factors) the welfare policies of the nation-state, had radically changed the social reality in which Marx wrote. In the end, Fukuyama argued, all good government would be organized along the lines of the liberal democratic model, which would be applied to govern an ethnic or otherwise discrete nation and would protect the rights of minorities" (citation omitted)).

[28] *Paradigm*, THEINFOLIST.COM, http://www.theinfolist.com/php/SummaryGet.php?FindGo=Paradigm (last visited Apr. 1, 2017) ("Paradigm comes from Greek παράδειγμα (paradeigma), 'pattern, example, sample' from the verb παραδείκνυμι (paradeiknumi), 'exhibit, represent, expose' and that from παρά (para), 'beside, beyond' and δείκνυμι (deiknumi), 'to show, to point out'"). Hegelian dialectic is in every sense a Kuhnian paradigm, applicable to many fields of dynamic social interaction.

[29] Jonathan R. Macey & Geoffrey P. Miller, *The End of History and the New World Order: The Triumph of Capitalism and the Competition Between Liberalism and Democracy*, 25 CORNELL INT'L L.J. 277, 278 (1992) ("To understand what Francis Fukuyama means when he says that history has come to an end, one must first understand two things about Fukuyama. First, when Fukuyama says that history is at an end, he means history in the Hegelian or dialectic sense; that is, history as a clash of ideologies. Second, and far more importantly, Fukuyama is a Straussian in the Allan Bloom tradition. Fukuyama's understanding of Hegel (or more precisely, of Alexandre Kojéve, who presented Hegel's arguments about the end of history to the world of political science), leads him to observe that history has ended. Fukuyama's membership in the Straussian cult causes him hopelessly to mischaracterize and misinterpret how world history will unfold in the coming decades." (footnotes omitted)).

[30] Consider the Political Anthropology of "Gregory Bateson's concept of schismogenesis, which describes the self-amplifying process of divergence: I take an extreme position in reaction to your extreme position, leading you to take a more extreme position, and so on. The polarization feeds on itself as nuanced differences become disagreement, then disapproval, exasperation, and eventually hatred." Glenn Davis Stone, *Biotechnology, Schismogenesis, and the Demise of Uncertainty*, 47 Wash. U. J.L. & Pol'y 29, 30

liberal-capitalistic-democracy ultimately took over.[31]

Before turning to the application of Hegelian ideas, a brief sketch of the history of laws governing voting rights in the United States is necessary.

IV. HISTORY OF THE RIGHT TO VOTE IN THE UNITED STATES

A. Introduction and Setting:

Initially, the right to vote from England and the earliest colonial days had connections with property.[32] The Kings of England permitted a certain level of self-government and voting; suffrage was limited to people with property.[33] An early example of the property requirement originated from the Electors of Knights of the Shire Act of 1432[34]—reenacting the 1430 Election Act[35]—which declared that a resident, not specifically an enumerated citizen, of a county must have the worth of forty shillings or more to vote in that county in order to prohibit:

> great outrageous and excessive numbers of people, . . . of which the most part was people of small substance and of no value, . . . pretended a voice equivalent, as to . . . the most worthy knights and esquires . . . whereby manslaughter, riots, batteries, and divisions among the gentlemen and other people [of the counties] shall very likely arise . . . .[36]

The law limited voting to those whom had an annual rent of at least forty shillings.[37] These elements essentially remained the law for four hundred years in England until 1832.[38]

(2015); *see also* Gregory Bateson, Steps To An Ecology Of Mind: Collected Essays In Anthropology, Psychiatry, Evolution, And Epistemology 68-69 (University of Chicago Press 1972).

[31] *See* FUKUYAMA, *supra* note 20, at 289. Fukuyama's definitive thesis of his work is that the capitalist liberal democracy paradigm is the teleological last, or end form, of political economy; meaning that political economies have reached their end form–teleologically speaking. *See id.*

[32] *See* DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW: CASES AND MATERIALS 1 (2d ed. 2001); *see also* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES, at xvii (2000) (elaborating on the history of United States election law). Although there are many fine details and profound historical policy arguments for why events occurred, this section is a generally accepted summation of the historical events and documents that expanded the right to vote.

[33] *See* Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1447, 1455 n.26 (2012).

[34] 10 Hen. 6 c. 2.

[35] 8 Hen. 6 c. 7.

[36] GEORGE CRABB, A HISTORY OF ENGLISH LAW; OR AN ATTEMPT TO TRACE THE RISE, PROGRESS, AND SUCCESSIVE CHANGES, OF THE COMMON LAW; FROM THE EARLIEST PERIOD TO THE PRESENT TIME 363 (First Am. ed., 1831).

[37] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165–66 (1765).

[38] *Cf.* Act to Amend the Representation of the People in England and Wales 1832, 2 Will. 4, § 45 (UK); *see* John A. Phillips & Charles Wetherell, *The Great Reformation Act of 1832 and the Political Modernization of England*, 100 AM. HIST. REV. 411, 411–13 (1995).

B. Situation of Voting at Founding:

During the Colonial Era many colonies, including, Virginia, Maryland, Rhode Island, and South Carolina, passed various voting restrictions.[39] In the 1700s, Virginia passed various laws restricting voting in the House of Burgesses to only those who met certain property requirements.[40] The South Carolina election law of 1716 stated, "[I]t is necessary and reasonable, that none but such persons who have an interest in this Province . . . be proved to be worth thirty pounds current money of this Province, shall be deemed a person qualified to vote for . . . a member or members of . . . this Province . . . ."[41]

Religious restrictions also existed for a time in the colonies and had origins in the struggles between Catholicism and Protestantism in the Mother Country.[42] Maryland passed a law in 1718 codifying practices present since the 1690s that excluded Catholics from voting.[43] Rhode Island passed a naturalization restriction, thereby voting on Jewish adherents voting in 1719; but, after the revolution, Rhode Island repealed this ban following the creation of the United States.[44] By the late 1780s, most of the religious prohibitions

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[39] Stanley L. Engerman & Kenneth L. Sokoloff, *The Evolution of Suffrage Institutions in the New World*, 65 J. ECON. HIST. 891, 896–97 (2005); see for example EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 221 (1975), Harry H. Haden, *Equality – The Cornerstone of Democracy*, 21 ALA. L. 269, 270 (1960), Christopher J. Peters, *Outcomes, Reasons and Equality*, 80 BOS. U. L. REV. 1095, 1124 (2000), Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1334 (2005), Paul K. Longmore, *"Good English Without Idiom or Tone": The Colonial Origins of American Speech*, 37 J. OF INTERDISC. HIST. 513, 513 (2007), and V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 955 (2009), for general treatments of the history of political power and the origins and extensions of the franchise.

[40] "In Virginia, a half acre of land carried the vote until 1736, then the requirement was raised to 100 acres of wild land, twenty-five acres of improved land, or a house and lot in town. In the boroughs of Norfolk and Williamsburg, men with £50 of property could vote, as could also anyone who had served a five-year apprenticeship to a trade." Robert Brown, *Reinterpretation of the Formation of the American Constitution*, 42 B.U.L. REV. 413, 422 (1962). *See An Act for Giving Certain Powers to the Governour and Council, and for Punishing Those Who Shall Oppose the Execution of the Laws* (1781), *reprinted in* 10 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, (William Waller Hening ed., 1822).

[41] *See An Act to Keep in Violate and Preserve the Freedom of Elections, and Appoint Who Shall Be Deemed and Adjudged Capable of Choosing or Being Chosen Members of the Common House of Assembly* (1716), *reprinted in* THE STATUTES AT LARGE OF SOUTH CAROLINA, at 688 (Thomas Cooper ed., 1837).

[42] It is hardly remembered that the famous English anti-Catholic, "Anti-Papist" holiday "Guy Fawkes' Day" was once kept and celebrated all over the original thirteen Colonies. During the Revolution, when George Washington's men wanted to celebrate the Fifth of November by burning the Effigy of Guy Fawkes himself and the Pope (Fifth of November also being known as "Bonfire Day" or "Pope's Day" in England), Washington ordered to suppress the celebration on November 5, 1775, barely six months after he had taken charge of the Continental Army. *See* GEORGE WASHINGTON, *General Orders November 5, 1775*, *in* GEORGE WASHINGTON PAPERS AT THE LIBRARY OF CONGRESS, 1741–1799: SERIES 3G, VARICK TRANSCRIPTS 107, https://memory.loc.gov/cgi-bin/ampage?collId=mgw3&fileName=mgw3g/gwpage001.db& recNum=107/; *see also* Matthew Shea, *Remember, Remember*, YESTER (Nov. 5, 2013), http://yester.ly/politics/2013/11/05/guy-fawkes/ (last visited Apr. 1, 2017).

[43] DAVID W. JORDAN, FOUNDATIONS OF REPRESENTATIVE GOVERNMENT IN MARYLAND, 1632–1715, at 166 (1987).

[44] Edward A. Hoyt, *Naturalization under the American Colonies: Signs of a New Community*, 67 POL. SCI. Q. 248, 253, 258, 265 (1952).

had been removed by the states.[45]

Perhaps the most potent policies behind the property restrictions came from John Locke, who argued only property owners should be allowed to control society's governance, "*i.e.* the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them[,]" because property owners in his view had the most at stake in governance of a country.[46]

Furthermore, one of the founding fathers of the United States, John Adams, wrote in a letter to James Sullivan: "very few Men, who have no Property, have any Judgment of their own. They talk and vote as they are directed by Some Man of Property, who has attached their Minds to his Interest."[47]

Although many restrictions on voting based on property rights still existed, religious restrictions had been removed by the late 1790s, setting the path for Jeffersonian Democracy and the Antebellum Period.[48]

C. Jeffersonian Democracy and the Antebellum Period:

After the birth of the nation by the early 1790s, the primary people who could vote were white men with property.[49] This excluded African Americans, women, and white men without property.[50] The right to vote in the United States started to expand in the 1820s, with the promise of Jacksonian democracy for universal white male suffrage, regardless of property ownership.[51] In practice, this trend continued as political parties competed for votes by expanding the right to vote. In North Carolina and Virginia, more practical "Realpolitik"[52] reasons for universal white suffrage were cited for uniting all whites against slave rebellions,[53] as well as economic

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[45] *See generally* PATRICK CONLEY & MATTHEW SMITH, CATHOLICISM IN RHODE ISLAND: THE FORMATIVE ERA 9 (1976).

[46] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, *in* TWO TREATISES OF GOVERNMENT § 140, at 362 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). "The book was not published, however, until after the revolution, and it was widely read as an after-the-fact justification for the events of 1688." Sheldon Gelman, *"Life" and "Liberty": Their Original Meaning, Historical Antecedents, and Current Significance in the Debate over Abortion Rights*, 78 Minn. L. Rev. 585 (1994).

[47] JOHN ADAMS, Letter from John Adams to James Sullivan (May 26, 1776), *in* FOUNDING FAMILIES: DIGITAL EDITIONS OF THE PAPERS OF THE WINTHROPS AND THE ADAMSES (James Taylor, ed., 2007), http://www.masshist.org/publications/apde2/view?id=ADMS-06-04-02-0091 (last visited Apr. 1, 2017).

[48] *See* KEYSSAR, *supra* note 32, at 29.

[49] Engerman & Sokoloff, *supra* note 39, at 898–99; Charles A. Rees, *Remarkable Evolution: The Early Constitutional History of Maryland*, 36 U. BALT. L. REV. 217, 218 (2007).

[50] Engerman & Sokoloff, *supra* note 39, at 903; *see generally* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (discussing the role whiteness, as property, plays in legitimizing expectations of racial power and control).

[51] *See* KEYSSAR, *supra* note 32, at 29.

[52] *Realpolitik*, THE NEW OXFORD AMERICAN DICTIONARY (Book only ed. 2001) (defining "Realpolitik" as "a system of politics or principles based on practical rather than moral or ideological considerations").

[53] Although not directly addressing the issue of voting rights, there is no more relevant, eloquent exposition of the relationship between slave rebellion and expanding certain rights, specifically the right

theories – arguing that the right to vote induced more laborers to explore the United States' new territory after the Northwest Ordinance of 1787.[54] In 1841, one of the most radical advancements of white suffrage occurred with Thomas Wilson Dorr preparing a constitutional convention to wipe out property restrictions and only require citizenship from birth.[55] This event, known as the Dorr Rebellion, led to a new government in Rhode Island that eliminated the property requirement to vote, and sent new waves of suffrage throughout the country.[56] John Tyler's presidency supported this right as well.[57]

By the 1850s, all the states had removed property restrictions on

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to keep and bear arms in self-defense, (which can implicitly be analogously construed as granting other rights as well) as Justice Clarence Thomas demonstrates in his lengthy concurrence in *McDonald v. City of Chicago*:

> The Southern fear of slave rebellion was not unfounded. Although there were others, two particularly notable slave uprisings heavily influenced slaveholders in the South. In 1822, a group of free blacks and slaves led by Denmark Vesey planned a rebellion in which they would slay their masters and flee to Haiti. The plan was foiled, leading to the swift arrest of 130 blacks, and the execution of 37, including Vesey. Still, slaveowners took notice--it was reportedly feared that as many as 6,600 to 9,000 slaves and free blacks were involved in the plot. A few years later, the fear of rebellion was realized. An uprising led by Nat Turner took the lives of at least 57 whites before it was suppressed.
>
> The fear generated by these and other rebellions led Southern legislatures to take particularly vicious aim at the rights of free blacks and slaves to speak or to keep and bear arms for their defense. Teaching slaves to read (even the Bible) was a criminal offense punished severely in some States. Virginia made it a crime for a member of an "abolition" society to enter the State and argue "that the owners of slaves have no property in the same, or advocate or advise the abolition of slavery." Other States prohibited the circulation of literature denying a master's right to property in his slaves and passed laws requiring postmasters to inspect the mails in search of such material.
>
> Many legislatures amended their laws prohibiting slaves from carrying firearm[s] to apply the prohibition to free blacks as well. Florida made it the "duty" of white citizen "patrol[s] to search negro houses or other suspected places, for fire arms." If they found any firearms, the patrols were to take the offending slave or free black "to the nearest justice of the peace," whereupon he would be "sever[ely] punished" by "whipping on the bare back, not exceeding thirty-nine lashes," unless he could give a "plain and satisfactory" explanation of how he came to possess the gun.

561 U.S. 742, 844–46 (2010) (Thomas, J., concurring) (second and third alterations in original) (citations omitted).

[54] *See* JAMES SIDBURY, PLOUGHSHARES INTO SWORDS: RACE, REBELLION, AND IDENTITY IN GABRIEL'S VIRGINIA, 1730–1810, 260–61 (1997); LOWENSTEIN & HASEN, *supra* note 32, at 27; Engerman & Sokoloff, *supra* note 39, at 899–900.

[55] William T. Mayton, *Direct Democracy, Federalism & the Guarantee Clause*, 2 GREEN BAG 269, 275 (1999); *see generally* ERIK J. CHAPUT, THE PEOPLE'S MARTYR: THOMAS WILSON DORR AND HIS 1842 RHODE ISLAND REBELLION (2013) (explaining the story of Thomas Wilson Dorr's preparation of the aforementioned constitutional convention).

[56] *See* Luther v. Borden, 48 U.S. 1, 13–14 (1849). However, there did seem to be "irregularities in voting" surrounding the "Dorrite" constitution. *Id.* at 60; *see generally* 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 174–75 (2014) (conjecturing that with the "Dorrite" rebellion—and temporary government—although Rhode Island relinquished the property restrictions, it was unclear how steadfastly held these new rights were).

[57] OLIVER PERRY CHITWOOD, JOHN TYLER: CHAMPION OF THE OLD SOUTH 326–28 (1939).

voting.[58] The next decade would witness the Civil War and a greater expansion of voting rights in its aftermath.

D. Civil War and Aftermath:

As a result of the Civil War, in 1870, the Fifteenth Amendment extended the right to vote *de jure* to all males, regardless of race.[59] This created the *de jure* promise of unprecedented numbers of newly freed black men being granted the right to vote.[60]

Although the law expanded the right to vote, there was a juxtaposition in participation among certain demographics: black involvement curtailed, while the female suffrage movement simultaneously progressed.[61].

E. Jim Crow Era and Female Suffrage:

However, the expansion of the right to vote, with the Fifteenth Amendment and the activities of the Freedmen's Bureau, was thwarted by the former Confederate states that enacted Jim Crow laws.[62] These laws, such as the poll tax, literacy tests, and Grandfather clauses, created complex ways to ensure that people of color did not vote.[63] Thus, although there was an expansion of the right to vote with the Fifteenth Amendment, there was a push back with Jim Crow laws and intimidating tactics to ensure blacks did not vote.[64]

In 1913, the Seventeenth Amendment was sold to the electorate as an expansion of the people's power, but in fact it merely altered the method of selecting senators, without expanding the electorate at all.[65] Scholars have argued that the Seventeenth Amendment a triumph for democracy in terms of the states maintaining their sovereignty; and, thereby a defeat for the original

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[58] Engerman & Sokoloff, *supra* note 39, at 898. But, some states retained property ownership requirements well until the second half of the twentieth century for certain "tax districts." *Id.* at 896–99; *see, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 631–32 (1969) (illustrating where property requirements, regarding school district elections, were stricken as failing the strict scrutiny test for failure to show a compelling objective and a tight, means-end fit).

[59] LOWENSTEIN & HASEN, *supra* note 32, at 115.

[60] *Id.*

[61] *See* Marcia L. McCormick, *The Equality Paradise: Paradoxes of the Law's Power to Advance Equality*, 13 TEX. WESLEYAN L. REV. 515, 526–33 (2007).

[62] *See* MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908, at 245–60 (2001); *see also* MICHAEL PERMAN, PURSUIT OF UNITY: A POLITICAL HISTORY OF THE AMERICAN SOUTH 169–76 (2009); *see generally* MICHAEL PERMAN, THE SOUTHERN POLITICAL TRADITION (2012).

[63] *See* William E. Forbath, *The White Court (1910–1921): A Progressive Court?*, *in* THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 195 (Christopher Tomlins ed., 2005).

[64] *See* DESMOND KING, SEPARATE AND UNEQUAL: BLACK AMERICANS AND THE US FEDERAL GOVERNMENT 3–21 (1995).

[65] *See* ANDREW P. NAPOLITANO, THEODORE AND WOODROW: HOW TWO AMERICAN PRESIDENTS DESTROYED CONSTITUTIONAL FREEDOMS 75–85 (2012).

constitutional design of a federal republic.[66] The Seventeenth Amendment was pushed by the same "Hamiltonian" (strong central government, anti-states' rights) groups responsible for the Sixteenth Amendment and the Federal Reserve (all authorized in 1913).[67] But it would be anomalous to say that the franchise was expanded by extending the right to vote for senators to persons outside the state legislatures – those who could not otherwise vote were not granted the right to vote.[68]

The Seventeenth Amendment abandoned both the plan and rationale of Federalist Nos. 62–66, especially Federalist No. 62: II–III, not merely to allow but to mandate direct election of Senators, rather than through state legislature elections.[69] The "sales pitch" here for ratification was that the Seventeenth Amendment would provide greater power to the people, and thus more power to each individual vote, per vote, but only because it provides for popular vote.[70] But today many conservative scholars debate whether the Seventeenth Amendment actually expanded the electorate, and many scholars want to return to the era when state legislatures voted in senators for the United States Congress.[71]

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[66] *See* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 Nw. U. L. Rev. 500, 536-37 (1997) ("Senators similarly were concerned with enacting laws benefitting their constituents and getting re-elected. Politics, like nature, abhorred a vacuum, so senators felt the pressure to do something, namely enact laws.231 Once senators were no longer accountable to and constrained by state legislatures, the maximizing function for senators was unrestrained; senators almost always found it in their own interest to procure federal legislation, even to the detriment of state control of traditional state functions."); *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); THOMAS J. DILORENZO, HAMILTON'S CURSE: HOW JEFFERSON'S ARCHENEMY BETRAYED THE AMERICAN REVOLUTION — AND WHAT IT MEANS FOR AMERICANS TODAY 159 (2008).

[67] *See* Sanford Levinson, *Political Party and Senatorial Succession: A Response to Vikram Amar on How Best to Interpret the Seventeenth Amendment*, 35 HASTINGS CONST. L.Q. 713, 721 (2008).

[68] Zachary D. Clopton & Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 NW. U. L. REV. 1181, 1185 (2013); Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 547–49 (1997); *see* WALLACE W. HALL, THE HISTORY AND EFFECT OF THE SEVENTEENTH AMENDMENT (1936); GEORGE H. HAYNES, THE ELECTION OF SENATORS 267 (1906).

[69] *But see* THE FEDERALIST NO. 62 (James Madison). Publius was particularly overthrown by the Seventeenth Amendment:

> II. It is equally unnecessary to dilate on the appointment of senators by the State legislatures. Among the various modes which might have been devised for constituting this branch of the government, that which has been proposed by the convention is probably the most congenial with the public opinion. It is recommended by the double advantage of favoring a select appointment, and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems.

THE FEDERALIST NO. 62 (James Madison).

[70] Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1010 (1994) (emphasis omitted) ("Ratification of the Seventeenth Amendment marked the end of an intense decades-long struggle. Contemporaries hailed it as a hard-earned and much-needed triumph of 'the people' over special interests. One observer exclaimed, 'We shall find [the Seventeenth Amendment] in complete harmony with the direction now finally taken in modern political experience by those forces which are swiftly bringing the true sovereign elements in every constitutional organization into a position of deserved control.'" (alteration in original)).

[71] *See* Clopton & Art, *supra* note 68, at 1189–94.

By contrast, since the passage of the Fourteenth Amendment, the Nineteenth Amendment was truly the culmination of the women suffrage movements.[72] In 1920, two-thirds of the state legislatures passed the Nineteenth Amendment, allowing women to vote.[73] Although there have not been many mass movements to exclude women from voting, inequalities in the turnout of women voters still exist today, as well as social constructs placing women as a secondary person of the household.[74]

F. Modern Era of Voting Rights:

In 1924, Congress granted Native Americans the right to vote.[75] Again there has not been a national curtailment of this right; Native Americans have had conflicts with federal agents, such as the Wounded Knee incident in 1973.[76] Some argue that the 1924 Indian Citizenship Rights Act only allowed Congress to legitimize the treatment of Indian tribes, and many tribes oppose the Act itself.[77]

In 1961, the Twenty-third Amendment allowed citizens in the District of Columbia to vote for the President and to have three electors in the Electoral College, equivalent to any of the smallest states.[78] This was a step forward for the District of Columbia, but the citizens of the District of Columbia still do not have any competent voting representation in the House or Senate.[79] The residents of the national seat of government provide a singular and unique example of a group of people, specifically the District of Columbia, who were governed and had no say in the way they were governed,

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[72] *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 968–69, 1045 (2002).

[73] John R. Cosgrove, *Four New Arguments Against the Constitutionality of Felony Disenfranchisement*, 26 T. JEFFERSON L. REV. 157, at 190, 201 (2004) ("The Nineteenth Amendment adopted in 1920 prohibits denial or abridgment of the right to vote on account of sex.").

[74] *See* U.S. WOMEN IN STRUGGLE: A FEMINIST STUDIES ANTHOLOGY 42–43 (Claire Goldberg Moses & Heidi Hartmann eds., 1995).

[75] *See* 8 U.S.C. § 1401(b) (2016).

[76] ROBERT BURNETTE & JOHN KOSTER, THE ROAD TO WOUNDED KNEE 220–28 (1974).

[77] Michael D. Oeser, *Tribal Citizen Participation in State and National Politics: Welcome Wagon or Trojan Horse?*, 36 WM. MITCHELL L. REV. 793, 805 n.46 (2010) (quoting Chief Irving Powless of the Onodaga Nation, who further explained this opposition: "[The Iroquois Confederacy] have never accepted this law. We do not consider ourselves as citizens of the United States. This law is a violation of the treaties that we signed that prove that we are sovereign. Because we are a sovereign people, the United States cannot make us citizens of their nation against our will. . . . I have never voted in any election of the United States, and I do not intend to vote in any coming elections. Most of our people have never voted in your elections" (alteration in original) (citations omitted)).

[78] Lynne H. Rambo, *The Lawyers' Role in Selecting the President: A Complete Legal History of the 2000 Election*, 8 TEX. WESLEYAN L. REV. 105, 126 n.121 (2002) ("The Twenty-Third Amendment provides that the District of Columbia is allotted a number of electors equal to the number of senators and representatives it would have if it were a state, 'but in no event more than the least populous state.' U.S. Const. amend. XXIII, [§] 1, cl. 1-2."); *see* José R. Coleman Tió, Comment, *Six Puerto Rican Congressmen Go to Washington*, 116 YALE L.J. 1389, 1397 (2007).

[79] Johnny Barnes, *Towards Equal Footing: Responding to the Perceived Constitutional, Legal and Practical Impediments to Statehood for the District of Columbia*, 13 D.C. L. Rev. 1, 2 (2010).

but then being granted a voice – through vote – in how they were governed.[80]

In 1964, the Twenty-fourth Amendment prohibited poll tax in federal elections; this was an extremely important step allowing poor people to vote.[81] However, this often excluded racial minorities, even in antebellum times, as well as the poor in general. [82] Thus, removing the poll tax facilitated and accelerated the enfranchisement of racial minorities (especially the expressly disenfranchised Southern blacks) and of the entire lower economic strata of poor people to vote without major limitation.[83]

The Voting Rights Act of 1965 prohibited discrimination against racial minorities to prevent them from voting and set up elaborate federal supervisory standards, permitting reviewing courts to inquire into the implicit purposes and resultant effects (whether intended or not).[84] This step forward

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[80] *See id.* at 3 n.11 (2010) ("U.S. Const. amend. XIV provides that, 'no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.' Known as the 'Equal Protection Clause,' this provision of the Constitution makes clear and true America's promise that 'all men [and women] are created equal.' The protections of the Fourteenth Amendment were extended to the people of Washington, D.C. in Bolling v. Sharpe, 347 U.S. 497 (1954), a companion case to the landmark school desegregation case, Brown v. Board of Education, 347 U.S. 483 (1954). The Court in Sharpe relied on the Fifth Amendment in reaching its decision regarding the District of Columbia. *Sharpe*, 347 U.S. at 497 (1954).").

[81] United Press International, *24th Amendment, Banning Poll Tax, Has Been Ratified*, N.Y. TIMES, (Jan. 24, 1964), http://www.nytimes.com/1964/01/24/24th-amendment-banning-poll-tax-has-been-ratified.html?_r=1 (last visited Apr. 1, 2017).

[82] As Chief Justice Earl Warren, writing for the U.S. Supreme Court, summarized in *Harman v. Forssenius:*

> The Virginia poll tax was born of a desire to disenfranchise the Negro. At the Virginia Constitutional Convention of 1902, the sponsor of the suffrage plan of which the poll tax was an integral part frankly expressed the purpose of the suffrage proposal:
>
> > Discrimination! Why, that is precisely what we propose; that, exactly, is what this Convention was elected for -- to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate.
>
> The poll tax was later characterized by the Virginia Supreme Court of Appeals as a device limiting "the right of suffrage to those who took sufficient interest in the affairs of the State to qualify themselves to vote." Campbell v. Goode, 172 Va. 463, 466, 2 S.E.2d 456, 457. Whether, as the State contends, the payment of the poll tax is also a reliable indicium of continuing residence need not be decided, for even if the poll tax has served such an evidentiary function, the confrontation of the federal voter with a requirement that he either continue to pay the customary poll tax or file a certificate of residence could not be sustained. For federal elections the poll tax, regardless of the services it performs, was abolished by the Twenty-fourth Amendment. That Amendment was also designed to absolve all requirements impairing the right to vote in federal elections by reason of failure to pay the poll tax. Section 24-17.2 of the Virginia Code falls within this proscription.

380 U.S. 528, 543–44 (1965) (footnotes omitted).

[83] STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, at 57–60, 67, 131 (1976).

[84] South Carolina v. Katzenbach, 383 U.S. 301, 323, 334 (1966); Shelby Cty. v. Holder, 133 S. Ct. 2612, 2628–29 (2013) (noting the changed "status quo" and new "current" circumstances and stating "But history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the 'current need[]' for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act,

has had a lasting impact, especially for providing firm grounds for voting rights violation litigation grounds.[85] For example, *Harper v. Virginia Board of Elections* prohibited poll tax in all U.S. elections.[86] Much like the Twenty-fourth Amendment, *Harper* expanded the right to vote, but resistance to the Voting Rights Act continues.[87]

In 1971, the Twenty-sixth Amendment gave individuals between eighteen and twenty-one years of age the right to vote.[88] The public demand, or perceived need, for this amendment originated in the socio-cultural transformations and turmoil associated with the 1960s cultural revolution and the Vietnam War; if soldiers were young enough to die for the country, they should be able to vote.[89] Surprisingly, unlike most former situations, this has not had much backlash yet, and many elections sway on the number of young people voting.[90]

In 1973, Congress enacted the District of Columbia's Home Rule Act of 1973 to provide for local elections and self-governance.[91] In 1986, the

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voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African–Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs. The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future. See Rice v. Cayetano, 528 U.S. 495, 512 (2000) ('Consistent with the design of the Constitution, the [Fifteenth] Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment.'). To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. We made that clear in Northwest Austin, and we make it clear again today"); *see also* Beer v. United States, 425 U.S. 130, 133, 141 (1976) (upholding *Katzenbach* and incorporating a continuity rule consistent with *Katzenbach*).

[85] Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1836 (1992).

[86] 383 U.S. 663, 670 (1966); *see* Michael Halley, *Freedom and Equality on the Installment Plan*, 108 MICH. L. REV. FIRST IMPRESSIONS 76, 80 (2010).

[87] *See generally* COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 4 (2005), http://www.eac.gov/assets /1/AssetManager/Exhibit%20M. PDF (outlining steps recommended to fully implement and enforce the Voting Rights Act, Recommendation 1.1.2).

[88] Johnson v. Governor of the State of Fla., 405 F.3d 1214, 1231 (11th Cir. 2005). For the immediate historical backdrop and legal antecedents to the Twenty-sixth Amendment, concerning the U.S. Congress' immediate intent to amend the Voting Rights Act to allow eighteen-year-olds to vote without a constitutional amendment, see Justice Hugo Black's opinion in *Oregon v. Mitchell*, 400 U.S. 112 (1970).

[89] *See* Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 197–98 (1998) (discussing how widespread outrage over the war ignited public and political participation amongst millions of Americans).

[90] *See* WENDELL W. CULTICE, YOUTH'S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA 174 (1992).

[91] *See* Council of the D.C. v. Gray, 42 F. Supp. 3d 134, 139–40 (D.D.C. 2014) ("This continued until 1973, when Congress enacted the District of Columbia Self–Government and Governmental Reorganization Act, Pub.L. No. 93–198, 87 Stat. 774 (1973) (codified as amended at D.C. Off.Code § 1–201.01 et seq.), now known as the 'Home Rule Act.' Pl.'s MSJ at 4. The Home Rule Act was a compromise, granting 'the people of the District of Columbia an opportunity in exercising their rights once more and yet with adequate safeguards for the Federal interest component.' Home Rule for the District Columbia, 1973–1974: Background and Legislative History of H.R. 9056, H.R. 9682, and Related Bills Culminating in the District of Columbia Self–Government and Governmental Reorganization Act, at 2106 (1974). Nevertheless, with the Home Rule Act, Congress expressed the intent to relieve itself to 'the greatest extent

Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), as amended by the Military and Overseas Voter Empowerment Act (MOVE Act), allowed members of the military outside of the United States or on military bases to vote.[92] .

Unlike the Jim Crow laws and the Virginia Constitutional Convention of 1902, all recent enactments—including the abolition of the poll tax, abolition of literacy requirements, the District of Columbia's Home Rule Act, the enfranchisement of the age group eighteen to twenty-one year olds, and the rules requiring special accommodations for overseas military personnel voters—are designed (i.e. they have the primary "thesis") to ensure greater participation. So, who exactly would be the group to formulate and then fight for an "Antithesis" (other than, perhaps, reactionaries who think only wealthy, literate people with some "stake" in the system should be allowed to vote)?

The primary current restrictions on election laws include the nation's non-uniform counting standards, as partially examined in the case *Bush v. Gore*,[93] the Electoral College,[94] and voter ID laws.[95] The future of the Hegelian dialectical process of give-and-take could have implications for the Electoral College.

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possible, . . . of the burden of legislating upon essentially local District matters.' D.C. Off.Code § 1–201.02(a). The grant of legislative authority to the District in the Home Rule Act is broad, id. § 1–203.02, but Congress included several restrictions to that authority in Sections 601, 602, and 603."). Curiously, it appears that the District of Columbia Home Rule Act has never been codified even on a preliminary basis, so it lacks a U.S. Code Title number, and floats alone in the uncodified sea of laws even more aimlessly than Title 26, the collection of statutes relating to internal revenue, which has never been "internally" codified or rendered into what is sometimes called "positive law." *See* Jackson v. D.C. Bd. of Elections and Ethics, 999 A.2d 89, 100, 113–14 (D.C. 2010).

[92] 52 U.S.C. § 20302(a) (2016).

[93] 531 U.S. 98, 106 (2000).

[94] Ever since *Bush v. Gore*, there has been a large question of whether or not to keep the Electoral College, despite its allowance of non-uniform systems of elections. David Gringer, Note, *Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College*, 108 COLUM. L. REV. 182, 187 (2008). For arguments against the Electoral College, see Rhonda D. Hooks, Comment, *Has the Electoral College Outlived Its' Stay?*, 26 T. MARSHALL L. REV. 205, 205 (2001); see also R. George Wright, *Electoral Lies and the Broader Problems of Strict Scrutiny*, 64 FLA. L. REV. 759, 763 (2012); Stephen M. Sheppard, *A Case for the Electoral College and for its Faithless Elector*, 2015 WIS. L. REV. ONLINE 1, 5 (2015). Jim King, professor of political science at the University of Wyoming, advises that:

> For elaboration on the arguments favoring the electoral college, see Robert M. Hardaway, The Electoral College and the Constitution: The Case for Preserving Federalism (1994); and Gary L. Gregg II, Securing Democracy: Why We Have an Electoral College (2001). The best recent critiques are: George C. Edwards, Why the Electoral College is Bad for America (2004); and Lawrence D. Longley and Neal R. Peirce, The Electoral College Primer 2000 (1999).

Jim King, *Presidential Selection*, 34-FEB WYO. LAW. 26, 30 (2011).

[95] *See* Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL'Y REV. 185, 185–86 (2009) ("Proponents argue that ID laws are necessary to prevent voter fraud and restore public confidence in elections. Opponents answer that these laws disenfranchise the poor, minorities, and the elderly and are unnecessary because voter impersonation fraud is rare." (footnotes omitted)); *see also* Abigail A. Howell, *An Examination of* Crawford v. Marion County Election Board*: Photo Identification Requirements Make the Fundamental Right to Vote Far From "Picture Perfect"*, 55 S.D. L. REV. 325, 326 (2010).

One current issue is many state legislatures voting in voter ID laws.[96]

G. Promises at the Same Time:

The American Revolution itself was merely a political separation, rather than a social revolution (compared, say, with France, Russia, or the events in the United States beginning in 1861-1877), and did nothing immediate to change the breadth or structure of the franchise, so that voting restrictions remained essentially unchanged from 1776 into the 1790s.[97] The several states' voting restrictions, inherited from colonial times, slowly gave way, starting with unique or anomalous steps such as all white males being allowed to vote from 1791 in Vermont, and all inhabitants (including women) for a few years under New Jersey's first constitution, to something approaching universal suffrage through most of the next century and a half.[98]

Simultaneous to the voting law restrictions existed promises of equality, as laid out in the Declaration of Independence, and the country's goal for all men to be created equal with "inalienable" rights.[99] Indeed, each step forward met resistance, but overall there has been a significant progression from merely white men with property voting to, in theory, all U.S. citizens having the right to vote. Assuming voting rights is an expression of equality, as each ballot is worth one vote, then manifesting that right establishes one's equality.

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[96] Indiana's Voter ID law was approved in *Crawford v. Marion County Election Board*. 553 U.S. 181, 204 (2008). But, Texas' law faces a much more uncertain fate having been stricken down in District Court. Veasey v. Perry, 71 F. Supp. 3d 627, 707 (S.D. Tex. 2014), *aff'd* in part *vacated* in part, 796 F.3d 487 (5th Cir. 2015). In 2008, the Supreme Court found in *Crawford* that the State of Indiana's "'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious and satisfy [equal protection] . . . . " 553 U.S. at 189–90. Interest in voter integrity was both related to voter qualifications and substantial, or actually "sufficiently weighty to justify the limitation." *Id.* at 190. Where exactly "sufficiently weighty" fits on the scale of rational basis, intermediate, and strict scrutiny review is not clear, although "sufficiently weighty" sounds like "intermediate" scrutiny. The Texas litigation in *Veasey*, by contrast, saw a new angle of attack, characterizing the requirement of obtaining a voter ID card as a new and hence "unconstitutional poll tax." 71 F. Supp. 3d at 633.

[97] *See, e.g.*, Constitutional Rights Foundation, *Who Voted in Early America?*, 8 BILL OF RIGHTS IN ACTION (1991), http://www.crf-usa.org/bill-of-rights-in-action/bria-8-1-b-who-voted-in-early-america (last visited Apr. 1, 2017); Polk County Auditor, *History of Voting in the US*, POLK COUNTY IOWA, http://auditor.co.polk.ia.us/pdf/election/ voting_history.pdf (last visited Apr. 1, 2017; Ed Crews, *Voting in Early America*, COLONIAL WILLIAMSBURG J. (2007), http://www.history.org/foundation/journal/spring07/elections.cfm (last visited Apr. 1, 2017); Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787–1828*, 33 J. EARLY REPUBLIC 219, 231 (2013), http://jer.pennpress.org/media/26167/sampleArt22.pdf (last visited Apr. 1, 2017).

[98] *See* sources cited *supra* note 96.

[99] The right to vote appears never to have been included among the "inalienable" rights. *See* Robert John Araujo, *What is Equality? Arguing the Reality and Dispelling the Myth: An Inquiry in a Legal Definition for the American Context*, 27 QUINNIPIAC L. REV. 113, 114–15 (2009). For a more radical perspective, see TOMISLAV SUNIC, AGAINST DEMOCRACY AND EQUALITY: THE EUROPEAN NEW RIGHT (3d ed. 2012); ALAIN DE BENOIST, BEYOND HUMAN RIGHTS: DEFENDING FREEDOMS 46 (2011); JULIUS EVOLA, REVOLT AGAINST THE MODERN WORLD 24 (Inner Traditions International trans. 1995) (1969).

V. ANALYSIS

A. Summary of Argument:

Here, Hegel's dialectical method can be used to interpret the progression of U.S. voting rights from exclusive to inclusive. The ruler is analogous to the powers that have the right to vote, and the populace is the people without the right to vote. These roles shift over time and are not the same set of people.

The thesis is white men with property exercising the right to vote. The *antithesis* is the movement of the populace, other than white men with property, to gain the right to vote. Finally, the *synthesis* is not yet attained. The *de jure* expansion of rights to all people with the 1964 Civil Rights Act and the 1965 Voting Rights Act were steps forward, granting grounds for litigation on civil rights or voting rights violations. But the *synthesis* of equal exercise of voting rights to be attained by all humans subject to the laws of the country is not yet met.

B. Situation of Voting at Founding Analyzed through Hegelian Dialectic:

The underlying policy behind the original *thesis* was that only property owners had a stake in what policies were enacted. A version of this stake in the governance can be seen in James Otis' famous, "taxation without representation is tyranny."[100] This meant that the colonists felt they needed adequate representation, or at least a voice that might be heard, in the English Parliament, as a precondition to taxation.[101] Likewise, the property owners felt they were the only ones who needed representation, because they were taxed on property and had much to lose, in that "[a]n unlimited power to tax involves, necessarily, a power to destroy . . . ."[102]

Alternatively, the policy for expanding the right to vote was another version of "no taxation without representation." The white men without property, women, and African Americans felt they had a stake in the governance because they were subject to the laws of the land. Given that they were subject to the laws enacted by elected officials, they should have had the

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[100] J. L. Bell, *No Taxation without Representation (Part 1)*, J. AM. REVOLUTION (May 21, 2013), http://allthingsliberty.com/2013/05/no-taxation-without-representation-part-1/ (last visited Apr. 1, 2017).

[101] *Cf.* Campbell v. Hilton Head No. 1 Pub. Serv. Dist., 580 S.E.2d 137, 140 (2003) ("In language of majestic simplicity, our Constitution provides that 'The United States shall guarantee to every State in this Union a Republican Form of Government....' U.S. CONST. art. IV, §4. A 'republican' form of government, as Madison suggested in Number Ten of the Federalist Papers, is 'a Government in which the scheme of *representation* takes place.' In few (if any) areas of government is Madison's 'scheme of representation' more important than it is in the area of government finance and taxation. A principal cause of our Revolutionary War, after all, was the imposition of taxes without representation. The concept that 'taxation without representation is tyranny' was one for which a number of the Framers had put their very lives on the line. Our Constitution was not adopted to perpetuate the evil that led us to break our ties with the British Crown." (citation omitted)).

[102] McCulloch v. Maryland, 1819 U.S. LEXIS 320, at *1, *17, *159.

right to vote.

In concordance with the dialectic, the ruler starts off with the birth of the nation as the white men with property, and the rest of the population is the ruled person, which includes slaves, women, and white men without property.

In a sense, one might well say, as this Comment proposes for purposes of Hegelian analysis, that white men with property had an absolute monopoly on political power in the newborn country known as the United States of America in the 1780s. At the beginning of this Comment, Hegel's example of the ruler vs. the populace was observed.[103] The monarchy had been dissolved on the western shores of the Atlantic into the hands and minds of many, but the unified "sovereignty" of King George III (albeit acting only by and through the power of Parliament) had been passed only to those who could vote and so determine, form, and shape the future path of the thirteen, at first merely, "Confederated" states. Thus, England's "ruler" passed his power to America's "rulers," but the "rulers" were still a minority (varying regionally 6-20% of the total population) when compared to the "ruled population." Hegelian dialect thus, from the beginning, sets itself up as a framework or paradigm for sociopolitical change, at the very least, and revolution.

The exercise of this power causes resentment in the populace, because those without the right to vote see the freedoms exercised with those who have the right to vote. The non-voters most closely associated with white men with property are white men without property. Other reasons exist, such as the politicians wishing to gain the votes of newly enfranchised people by giving them the vote.

C. Jeffersonian Democracy and Antebellum Period Analyzed through Hegelian Dialectic:

The first steps changing the voting rights dialectic occurred with white men without property gaining the right to vote. This can be explained by the white men with property sensing a threat from the white male populace, trying to bring the former under more control. Initially, this began with simple brutality to force obedience, such as Shay's Rebellion in 1786 and 1787 and the Whiskey Rebellion from 1791 to 1794; but, as Hegelian dialectic predicts, a ruler's use of force has limited effects.[104]

The *thesis* existed in the 1790s, and the time prior to Jacksonian-democracy and universal white male suffrage, even though the wheels of change were in motion. The *thesis* was white men with property. The beginning of the *synthesis* in the United States was the movement for

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[103] *See* discussion *supra* Section.II.

[104] *See* CHARLENE FORTSCH, DANIEL: UNDERSTANDING THE DREAMS AND VISIONS 189 (2006).

universal white male suffrage, based on ideas of equality for all people.

The ruler and the populace begin their movements as a *synthesis*. The white men with property sought to bring the populace under control by *inwardizing* them. This can also be interpreted as the white men with property wanting to secure their power by giving the franchise to white men without property to gain the latest vote. The rulers began by expanding the right to vote throughout the nation, primarily by repealing property restrictions on voting.[105]

D. Civil War and Aftermath Analyzed through Hegelian Dialectic:

At this point, all white males, regardless of property, are the new rulers. However, abolitionist movements and the strategy of both the Lincoln Administration during the Civil War and the Radical Republican Congress afterwards lead the nation to outlaw slavery, first in the Emancipation Proclamation of January 1, 1863, and later in the Thirteenth Amendment (ratified December, 1865).

Although the most powerful reasons for eliminating slavery were moral and philosophical, the motivating factor for at least some politicians, especially those operating in the South, may likely have been to gain the votes of enfranchised African Americans. And this rush to transform society fueled the fire at the heart of all conflicts during Reconstruction in the South: was it appropriate to enfranchise illiterate slaves and make them politically equal to whites? Almost immediately after the Civil War, the Radical Republicans, the Freedmens' Bureau, and the military commands granted all men of color the right to vote.

The conservative "gradualist" would say that this "Radical Republican" program was irresponsible and led to corruption and unjust oppression and that sudden and poorly planned enfranchisement of the former slaves in the South was no better than the early nineteenth century chaotic and corrupt New Jersey experiment in the enfranchisement of women described above.[106]

E. Jim Crow Era and Female Suffrage Analyzed through Hegelian Dialectic:

By this time in the 1870s, history witnessed a regression in voting

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[105] In this sense, the extension of the voting franchise is a classic "race to the bottom" situation characterized by a progressive lowering or deterioration of standards, especially (in business contexts) as a result of the pressure of competition. Referring to competition between states to attract the most business, without regard to quality, "[t]he race was one not of diligence but of laxity[,]" as Justice Louis Brandeis wrote in *Louis K. Liggett Co. v. Lee.* 288 U.S. 517, 559 (1933).

[106] Jan Ellen Lewis, *Rethinking Women's Suffrage in New Jersey, 1776–1807*, 63 RUTGERS L. REV. 1017, 1017 (2011).

rights.[107] Although by law the right to vote had expanded to all male citizens, regardless of race, Jim Crow laws and racist activity, specifically in the former Confederate states, created complicated or expressly discriminatory laws – designed either to inhibit or to prohibit former slaves and racial minorities from voting.[108]

In line with this Comment's argument, these historical events show that the Hegelian dialectic did not have a linear progression from exclusive to inclusive. Indeed, Hegel's theory predicts that a backlash will occur from the rulers thinking that the newly gained rights of the populace threaten the rulers. One of the main reasons so many Southerners opposed blacks from voting was the threat it posed to white Southerners exercising control in the former Confederate states.[109]

Unfortunately, as cited throughout this paper, this reactionary regression was reaffirmed by many state laws and the *Plessy v. Ferguson* Supreme Court results-driven case, deciding that "separate but equal" was constitutional.[110] In effect, a "Second American Civil War" (not as bloody as the first) was necessary after 1954, with more-or-less constant skirmishes continuing over "bussing," as a means to integration until 1974 to "perfect" the results of the first war and reconstruction.[111]

In the meantime, the Nineteenth Amendment granted women the right to vote in 1920, further expanding the Hegelian voting rights dialectic for another group, which happens to constitute not in any sense a minority, but on average over 50% of the population.[112] Native Americans were given the right to vote in 1924, further expanding the voting rights dialectic for a certain group of people, at least *de jure*.[113]

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[107] New Orleans and Grant County, Louisiana, were the sites of some of the most dramatic conflict over the corruption that arose during the Reconstruction Era – in relation to black enfranchisement. *See generally* NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR (2007); PERMAN, STRUGGLE FOR MASTERY, *supra* note 62. The "Battle of Liberty Place" was nothing less than a counter-revolution to remove black, carpetbagger, and scalawag Republicans from power on September 14, 1874, following earlier skirmishes in the countryside known as the Colfax Massacre on Easter Sunday, April 13, 1873. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 550 (First Perennial Classics ed. 2002) (1988); *see generally* LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION (2008).

[108] Harman v. Forssenius, 380 U.S. 528, 529 (1965) (deciding whether the 1902 Virginia Constitutional Convention poll tax to inhibit votes was constitutional).

[109] McCormick, *supra*, note 61, at 526–33.

[110] 163 U.S. 537, 552 (1896).

[111] *See generally* LLOYD ROHLER, GEORGE WALLACE: CONSERVATIVE POPULIST (2004).

[112] *Population Distribution by Gender*, THE HENRY J. KAISER FAMILY FOUND., http://kff.org/other/state-indicator/distribution-by-gender/ (last visited Apr. 1, 2017).

[113] Native Americans clearly constitute one of those "insular" and politically powerless groups in need of special protection under the logic of *United States v. Carolene Products Co.* 304 U.S. 144, 152 n.4 (1938). See KENNETH R. PHILIP, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM 1920–1954, at 113–18, 159, 164 (1977), for details on the Indian Bill of Rights, the Indian New Deal, and John Collier's role in the Indian Reorganization Act of 1934 (25 U.S.C. § 5101 (2016)).

F. Modern Era Voting Rights Disputes as Hegelian Dialectic:

Over a period of struggle, the antithesis of no *de jure* restrictions on voting rights seemed to be achieved with *Brown v. Board of Education*, reversing the Plessy "separate but equal" decision, and the 1965 Voting Rights Act, which guaranteed voting rights for all people.[114]

The Supreme Court decisions and legislation of the 1960s were only parts of the "spiral" metaphor. We have not yet reached the pinnacle of voting rights, because many restrictions still exist. Although current U.S. law is more favorable for equal voting rights than in 1790, there is still potential for progress.

The spiral of Hegel's dialectic occurred when a new level of *thesis* arose, such as the Fifteenth Amendment, but then a reversal *antithesis* drew back upon it with Jim Crow laws. Almost all of the voting rights' expansions had some initial pullback, even if only initially.

The "spiral" metaphor with Hegel informs us that voting rights do not merely become more or less restrictive, as if we were going in circles, but that the spiral brings us higher to the ultimate purpose of history. Hegel calls this the "end" of history.[115] This is ultimately the full, equal sharing of power among all people. One key marker of equality is voting rights.

The total progression of U.S. voting rights dialectic is analogous to Francis Fukuyama's dialectic for the dialectic between a liberal-capitalistic-democracy and communism. Here, the liberal-capitalistic-democracy is the promise of equality and the right to vote, while communism represents the few rulers controlling the citizens without the right to vote.

G. Reasons for Hegelian Dialectic U.S. Voting Rights Expansion:

Although many reasons may have existed for each expansion of voting rights, the reasons people fought for the franchise and the reasons those gave the franchise may have been different. The politicians may have been giving the franchise to gain more political support for the favor of granting the right to vote. This is what the rulers in Hegel's *Philosophy of History* did.[116]

On the other hand, those fighting for the right to vote arguably were not trying to support the current politicians expanding the right to vote, but

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[114] Hegelian Dialectic has almost, but not quite, achieved a world where the franchise extends to "all inhabitants," as envisioned by the New Jersey Constitution of 1776. *See* N.J. CONST. of 1776, art. IV. But, children, incarcerated prisoners, mentally incompetent people, and illegal aliens (in most states), are still denied the right to vote. The results of most elections would seem to call into question whether the ban on mentally incompetent voters has any positive effect or not, but that is, perhaps, a subject for a different article.

[115] *See* discussion *supra* Section.II.

[116] *See* discussion *supra* Section.II.

rather were trying to gain equal footing in having a say in the laws they were subject to under the elected officials.

The people originally subject to these voting restrictions over time realized the externality of a promise of equality. This promise of equality, as exhibited by the ability to vote, becomes more apparent as each step of voting occurs.

In the 1820s, when all white men – regardless of property – could vote, it became more apparent to women and African Americans (especially freed slaves) the magnitude of this right. The people and citizens of the U.S. desired to *inwardize*, in Hegelian terms, these promises of equality as exhibited by voting rights.

VI. PREDICTIONS FOR THE FUTURE

The Hegelian dialectic can be used to explain the progression of United States' voting rights from exclusive to more inclusive. Ultimately, the dialectic sits in the larger dialectic of history, rationally moving towards a more democratic system of government.

Several points can be predicted for the future. First, given that history has moved towards a more democratic and equal society over time, it likely will continue to strive towards more equality in regards to voting rights and expanding the electorate. As a counter argument, it would seem that just because events have always gone a certain way, does not mean they will continue to do so.[117]

Indeed, to support this counter argument, a speech by Abraham Lincoln in 1858, where he suggests slavery would have died out had the cotton gin not been invented.[118] Lincoln says that some people in the 1850s were saying "all men are created equal," and, at the time, it was interpreted as just white men.[119] Lincoln points out that the economic progress due to the cotton gin made slavery more profitable than ever; thus, more people in the 1850s likely interpreted "all men are created equal" to mean just white men than those in the 1770s – among them, the founding fathers.[120] However, to distinguish this counter argument, the dialectic does not describe a linear progression in history, but rather incorporates backward and forward movements, hence the spiral metaphor.

Second, the voting rights dialectic examined in this Article is likely

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[117] *See generally* 1 DAVID HUME, A TREATISE OF HUMAN NATURE: BEING AN ATTEMPT TO INTRODUCE THE EXPERIMENTAL METHOD OF REASONING INTO MORAL SUBJECTS 423–38 (Longmans, Green, and Co. ed. 1878) (1739–1740).

[118] *See* Abraham Lincoln, *"House Divided" Speech at Springfield, Illinois*, *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858, at 426–27 (Don E. Fehrenbacher ed., 1989).

[119] *Id.*

[120] *Id.*

part of a greater dialectic, not merely starting in 1776, and is analogous to Francis Fukuyama's dialectic comparing liberal-democratic-economic systems to communist systems.

Third, it would seem that the dialectical method can be applied to many scenarios and Hegel's method can be applied to a wide variety of areas of law. Indeed, since the 1980s, there has been a surge of Hegelian analysis applied to areas, from criminal, property, torts, employment, evidence, and contracts.[121]

Problems in the voting system still need to be resolved, such as deciding what a uniform election in concordance with the equal protection clause is, as brought up in *Bush v. Gore*.[122] Additionally, courts will likely have to firmly decide whether the Electoral College system is consistent with the guarantees of the Equal Protection Clause.[123]

VII. CONCLUSION

Hegelian analysis of the laws governing the right to vote in the United States suggests greater inclusivity of voters within election law. If Hegel's premises are accepted as true, then it is reasonable to assume that this inclusivity will continue.

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[121] Hoffheimer, *supra* note 1, at 825–27 (explaining the various applications of Hegelian analysis: "Perhaps overcompensating for years of neglect, the past decade has witnessed an outpouring of legal scholarship on Hegel. Hegel's ideas and methods have been applied to contemporary issues in torts, contracts, property, criminal law, evidence, and employment law. His ideas have influenced new theoretical approaches to law, and scholars have offered Hegelian explanations of historical problems like the origins and nature of slavery" (footnotes omitted)).

[122] 531 U.S. 98, 104–05 (2000) (discussing the uniformity of elections in regards to the equal protection clause as follows: "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. See, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665, 16 L. Ed. 2d 169, 86 S. Ct. 1079 (1966) ('Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment'). It must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.' Reynolds v. Sims, 377 U.S. 533, 555, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964)").

[123] *Id.* at 104. (explaining the system of state legislatures setting up an Electoral College is overall different in each state: "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, § 1. This is the source for the statement in McPherson v. Blacker, 146 U.S. 1, 35, 36 L. Ed. 869, 13 S. Ct. 3 (1892), that the State legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution" (citation omitted)).