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HEGELIAN DIALECTICAL ANALYSIS OF UNITED STATES ELECTION LAWS

Charles Edward Andrew Lincoln IV

INTRODUCTION

This Article uses the dialectical ideas of German philosopher Georg Wilhelm Friedrich Hegel (1770-1833) in application to the progression of United States voting laws since the founding. This analysis can be used to interpret past progression of voting rights in the US as well as a provoking way to predict the future trends in US voting rights.

First, Hegel's dialectical method is established as a major premise.¹

¹ This paper employs the language of "thesis-antithesis-synthesis" and the dialectical method as a simplified paradigm of Hegel's complex thoughts of "*aufheben*." A law and Hegelian scholar, 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.

The term Hegel employs most frequently to denote the transcending resolution of oppositions, contradictions and conflicts, is "*aufheben*." Various translations 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:

Second, the general accepted history of United States voting laws from the 1770s to the current day is laid out as a minor premise. Third, the major premise of Hegel's dialectical method weaves and applies itself to the progression of United States voting laws to explain the progression. This third

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-positing 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.

step of application suggests possible future scenarios.

Hegel was a philosopher in the late 18th and early 19th century.² His ideas have been applied to interpret wide varieties of academia and law, including

² Professor Hoffheimer provides a great 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) [hereinafter Hegel, *System of Ethical Life*] (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) [hereinafter Hegel, *The Philosophical Propaedeutic*]. 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).

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) [hereinafter Hegel, *Natural Law*]. He included important treatments of law in 1807 in G.W.F. Hegel, *Phenomenology of Spirit* 290-94 (A.V. Miller trans., 1977) [hereinafter Hegel, *Phenomenology of Spirit*]; G.W.F. Hegel, *The Phenomenology of Mind* 501-06 (J.B. Baillie trans., 1967) [hereinafter Hegel, *The Phenomenology of Mind*]. 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.

(quoting Michael H. Hoffheimer, *Hegel's First Philosophy of Law*, 62 TENN. L. REV. 823, 829 n.24 (1995).)

torts,³ contracts,⁴ property,⁵ criminal law,⁶ and evidence.⁷

I. HEGELIAN DIALECTIC:

Hegel's dialectic presupposes a rational structure to history.⁸ Hegel

³ "See, e.g., Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 Vand. L. Rev. 673 (1994); J. Robert S. Prichard & Alan Brudner, *Tort Liability for Breach of Statute: A Natural Rights Perspective*, 2 L. & Phil. 89 (1983)." (quoting Michael H. Hoffheimer, *Hegel's First Philosophy of Law*, 62 TENN. L. REV. 823, 826 n.8 (1995).)

⁴ "See, e.g., Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 Cardozo L. Rev. 1077 (1989); Michael Rosenfeld, *Hegel and the Dialectics of Contract*, 10 Cardozo L. Rev. 1199 (1989)." (quoting Michael H. Hoffheimer, *Hegel's First Philosophy of Law*, 62 TENN. L. REV. 823, 826 n.9 (1995).)

⁵ "See, e.g., Justin Hughes, *The Philosophy of Intellectual Property*, 77 Geo. L.J. 287 (1988); Timothy J. Lewis, *A Hegelian Theory of Nuisance Law*, 48 Toronto Fac. L. Rev. 259 (1990); Michael Salter, *Justifying Private Property Rights: A Message from Hegel's Jurisprudential Writings*, 7 J. Legal Stud. 245 (1987); Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*: 93 Mich. L. Rev. 239 (1994); Jeanne L. Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolable Feminine Body*, 79 Minn. L. Rev. 55 (1994)." (quoting Michael H. Hoffheimer, *Hegel's First Philosophy of Law*, 62 TENN. L. REV. 823, 826 n.10 (1995).)

⁶ "Alan Brudner, *Punishment and Violence*, 13 Cardozo L. Rev. 1771 (1991). Mark Tunick rejects Hegel's metaphysics but argues that "we can . . . appropriate Hegel as a theorist who can help us think clearly about our practices and about problems regarding these practices that we face every day and must resolve in some way." Tunick, *supra* note 4, at 4. Tunick attempts to apply Hegel to a number of concrete problems in contemporary criminal law. *Id.* at 110-33; *see also* Markus D. Dubber, *Rediscovering Hegel's Theory of Crime & Punishment*, 92 Mich. L. Rev. 1577 (1994) (reviewing Tunick's work)." (quoting Michael H. Hoffheimer, *Hegel's First Philosophy of Law*, 62 TENN. L. REV. 823, 826 n.11 (1995).)

⁷ "See 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); Gregory M. Klass & Gustavo Faigenbaum, *The Enlightenment of Dialectics: Strategies Involved in Burdens of Proof*, 17 Harv. J.L. & Pub. Pol'y 735-58 (1994)." (quoting Michael H. Hoffheimer, *Hegel's First Philosophy of Law*, 62 TENN. L. REV. 823, 826 n.11 (1995).)

⁸ Hegel's history is the subject of much debate, but a common formulation concludes Hegel argued a rational structure to history:

Hegel, *The Philosophy of History*, ... Hegel repeats this thesis in his conclusion. See *id.* at 412-57. See also Acton, *supra* note 47, at 443 (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 446 (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

illustrates the dialectic rule by his discussion of ruler and those who are ruled, the “populate.”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 *thesis* (the rule that the ruler’s authority is absolute) and an *antithesis* (resistance to the ruler’s authority). At first, the ruler might try simply to suppress the antithesis, as by forcibly compelling obedience. But that merely

freedom in its perfection”).

Raj Bhala, *Hegelian Reflections on Unilateral Action in the World Trading System*, 15 BERKELEY, J. INT’L L. 159, 184 n.93 (1997)

⁹ This process is often referred to as guided by the “Geist”:

“Michael A. Simon states:

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. Simon, *supra* note 68, at 847-48 (citing PHILOSOPHY OF RIGHT, *supra* note 55, 11 27, 29) (footnotes omitted).” [Michael J. Sandel, *Liberalism and the Limits of Justice* 1 (1982).]

(quoting 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).)

¹⁰ See Hegel, *The Philosophy of History*, *supra* note 62, at 111-172.

¹¹ See Hegel, *The Philosophy of History*, *supra* note 62, at 223-56

¹² See Hegel, *The Philosophy of History*, *supra* note 62, at 278-79

¹³ *Id.*

intensifies the *antithesis*, the resistance to the ruler's authority.

The ruler and the populace thus move toward a *synthesis*. The ruler seeks to bring the populace back under control - to, in Hegel's terminology, *inwardize* them - while the populace demands more control.¹⁴ The ruler thus responds with charters, rights, or laws that are seen to be granted by the ruler to the populace.¹⁵ This reaffirms the ruler's assertion that his right is total,

¹⁴ I draw this interpretation from this 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 itself. It must see how it has externalised itself in various objects, and in seeing this also cancelled the externalisation. It must see all its objective forms as itself.

G.W.F. Hegel, *Phenomenology of Spirit* (A.V. Miller trans. & John N. Findlay comm. 1977).

¹⁵ Hegel illustrates this point by stating:

Hegel argues, "[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 Rechtsgesetz 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: Dworking and Hegel on Legal Theory*, 23 GA. ST. U.L. REV. 513, 520-521 (2007).

while in fact giving the populace more power.

This *synthesis* itself lasts for a time, and becomes the new thesis.¹⁶ This, in Hegel's view, keeps going in a spiral, as each new thesis is undercut by a new *antithesis*.¹⁷ 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).¹⁸ This is ultimately the fully equal sharing of power among all.

II. WAYS HEGEL'S DIALECTIC HAS BEEN USED BEFORE:

Hegel's dialectic has been used and disused in many ways since his writing in the early 1800s.¹⁹

¹⁶ See Richard D. Winfield, *The Method of Hegel's Science of Logic*, in *Essays on Hegel's Logic* 45, 51-52 (Georg di Giovanni ed., 1990).

¹⁷ Hegel explained:

Philosophy 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.

Hegel, *Philosophy of Right* (Nisbet), at 26 (footnote omitted).

¹⁸ An *antithesis* does not necessarily imply a negative connotation, but rather an opposite state of affairs from the *thesis*.

¹⁹

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. See, e.g., O. W. Holmes, Jr., *Possession*, 12 *American L. Rev.* 688, 702 (1878), reprinted in,

Relatively recently, Francis Fukuyama used a version of the dialectic between a liberal-capitalistic-democracy and communism; he argued in 1989 that the dialectic would resolve itself with a liberal-capitalistic-democracy.²⁰ 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."²¹ Fukuyama acknowledged that history is not a linear progression towards liberal-capitalistic-democracy, but that regressions, even long periods of

Frederic R. Kellogg, *The Formative Essays of Justice Holmes* 180 (1984). 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. *E.g.*, John M. Zane, *German Legal Philosophy*, 16 Mich. L. Rev. 287-375 (1918). Although Robert S. Summers has suggested that Lon Fuller was influenced by Hegel, *see* Roberts S. Summers, *Lon L. Fuller's Jurisprudence and the Possibility It Was Much Influenced by G.W.F.Hegel*, 10 Cornell L.F. 9-13 (1983), 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. *See* Richard Hyland, *The One and the Many*, 82 Cal. L. Rev. 401, 402-03 (1994).

Legal scholarship evincing a new interest in Hegel began appearing in the early 1980s. *See, e.g.*, Carlos R. Delgado, *Los derechos del individuo en el estado segun la filosofia del derecho de Hegel*, 49 Revista Juridica de la Universidad de Puerto Rico [Rev. Jur. U.P.R.] 373-82 (1980); H. Newcomb Morse, *A Commentary on Hegelian Philosophy and the Absolutes in Law*, 17 Akron L. Rev. 383-94 (1984); Margaret J. Radin, *Property and Personhood*, 34 Stan. L. Rev. 957-1015 (1982).

Michael H. Hoffheimer, *Hegel's First Philosophy of Law*, 62 Tenn. L. Rev. 823, 825 n.6 (1995).

²⁰ Guyora Binder, *Post-Totalitarian Politics*, 91 MICH. L. REV. 1491, 1492-1494 (1993).

²¹ Francis Fukuyama, *The End of History and the Last Man* (1992).

regressions, occur.²²

Fukuyama's interpretation of the class of the liberal-capitalistic-democratic world follows the Hegelian paradigm. Essentially, Fukuyama shows two opposite systems clashing with each other. Overtime, an ebb and flow, much like the ruler giving rights to the populace and then taking rights from the populace. Areas such as Greece, Turkey, Vietnam had stints of communism expanding, but ultimately liberal-capitalistic-democracy took over, even nominally in Russia by 1989.

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

III. HISTORY OF THE RIGHT TO VOTE IN THE US:

²² This concept is simplified 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. See Fukuyama, *The End of History* at 3-18

Ari Afilalo and Dennis Patterson, *Statecraft, Trade and the Order of States*, 6 CHI. J. INT'L L. 725, 726 n.5 (2006).

A. Introduction and Setting:

Initially, the right to vote from England and the earliest colonial days had connections with property.²³

The Kings of England permitted a certain level of self-government and voting; suffrage was limited to people with property. An early example of the property requirement originated from the Electors of Knights of the Shire Act 1432²⁴ reenacting the 1430 election act²⁵ 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 “a great, outrageous, and excessive number of people, of which the most part was people of small substance and no value ... pretended a voice equivalent 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 rise and be.”²⁶ The law limited voting those who had an annual rent of at least forty shillings.²⁷ This was the law for four hundred

²³ For purposes of United States election law history, this paper relies primarily on Daniel Hays Lowenstein & Richard L. Hasen, *Election Law: Cases and Materials* (2d ed. 2001) and Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (2000). Although there are many fine details and profound historical policy arguments for why events occurred, the following is a general accepted summation of the historical events and documents that expanded the right to vote.

²⁴ Electors of Knights of the Shire Act 1432

²⁵ (8 Hen. VI, c. 7)

²⁶ Y.B. Mich. 10 Hen. 6, c. 2 (1432).

²⁷ 1 William Blackstone. *Commentaries on the Laws of England*. Oxford: Clarendon Press. 110,154-55, 166-67 (1765-1769).

years in England until 1832.²⁸

B. Situation of Voting at Founding:

During the colonial era many colonies, including, Virginia, Maryland, Rhode Island, and South Carolina passed various voting restrictions. Virginia passed a law in 1699 restricting voting in the House of Burgesses to only those who were freeholder (property owners who had no debt on their property; “free” of any restrictions).²⁹ The South Carolina election law of 1716 stated, “It 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.”³⁰

Religious restrictions specifically also existed for a time in the colonies and had origins in Europe. Maryland passed a law in 1718 codifying practices present since the 1690s that excluded Catholics from voting.³¹

²⁸ An Act to Amend the Representation of the People in England and Wales, 1832, 2 & 3 Will. 4, c. 45 §§19-20 (Eng.)

²⁹ See An Act for Giving Certain Powers to the Governour and Council, and for Punishing Those Who Shall Oppose the Execution of the Laws, ch. 7 (1781), 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*, at 172-175, 413-14 (William Waller Hening ed., Richmond, George Cochran 1822).

³⁰ See An Act for the More Effectual Preservation of the Government of This Province (1704), reprinted in 2 Thomas Cooper, *The Statutes at Large of South Carolina*; Edited, Under Authority of the Legislature 232-35 (1837).

³¹ David William Jordan, *Foundations of Representative Government in Maryland, 1632-1715*, at 166 (1987).

Rhode Island passed a restriction on Catholics voting in 1719, but it was ultimately repealed in 1783.³² By the late 1780s, most of the religious prohibitions had been removed by the states.

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.³³ Indeed, John Locke in another passage suggests that he invented this fiction of mixing labor with earth and the ownership implied from "pushing" around parts of the earth.³⁴

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

³² Patrick Conley and Matthew Smith, *Catholicism in Rhode Island: The Formative Era 7-9* (1976).

³³ Peter Laslett, Introduction to John Locke, *Two Treatises of Government* 46-49 (Peter Laslett ed., student ed. 1988) (3d ed. 1698). Locke's book did not come under publication until after the Glorious Revolution in 1688.

³⁴ John Locke, *An Essay Concerning the True Original Extent and End of Civil Government*, reprinted in *35 Great Books of the Western World* 117, 118 (Alexander Campbell Fraser ed., Encyclopedia Britannica, Inc. 1952) (1690) (All these promises having, as I think, been clearly made out, it is impossible that the rulers now on earth should make any benefit, or derive any the least shadow of authority from that which is held to be the fountain of all power, "Adam's private dominion and paternal jurisdiction"; so that he that will not give just occasion to think that all government in the world is the product only of force and violence, and that men live together by no other rules but that of beasts, where the strongest carries it, and so lay a foundation for perpetual disorder and mischief, tumult, sedition, and rebellion (things that the followers of that hypothesis so loudly cry out against), must of necessity find out another rise of government, another original of political power, and another way of designing and knowing the persons that have it than what Sir Robert Filmer hath taught us.)

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.”³⁵

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.

C. Jeffersonian Democracy and Antebellum Period:

After the birth of the nation by the early 1790s, the primary people who could voter were white men with property. This excluded African-Americans, women, and white men without property.

The right to vote in the United States started to expand in 1820s with the promise of Jacksonian democracy for universal white male suffrage regardless of property ownership.³⁶ In practice this trend continued by political parties competing for votes by extending the vote. In North Carolina and Virginia more base reasons for universal white suffrage were cited for uniting all whites against a possible slave rebellion. In 1841, one of the most

³⁵ Founding Families: Digital Editions of the Papers of the Winthrops and the Adamses, James Taylor, ed., (2007), available at <http://www.masshist.org/publications/apde2/view?id=ADMS-06-04-02-0091> (last visited April 17, 2015, 2:42 PM).

³⁶ Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 29 (2000).

radical advancement of white suffrage occurred with Thomas Wilson Dorr preparing a constitutional convention to wipe out property restrictions and only require citizenship for birth.³⁷ This event known as the Dorr Rebellion led to a new government in Rhode Island that got rid of the property requirement to vote, and sent new waves of suffrage through the country.³⁸ John Tyler's presidency supported this right as well.³⁹

By the 1850s, all the states had removed property restrictions on voting. The next decade would witness the Civil War and a greater expansion of voting rights with its aftermath.

D. Civil War and Aftermath:

As a result of the Civil War in 1870, the right to vote *de jure* was expanded all males regardless of race by the 15th Amendment.⁴⁰ Some argue many of the motivations behind Republicans giving the franchise to blacks was an attempt to gain more votes.⁴¹ This created the promise of unprecedented numbers of newly freed black men being granted the right to

³⁷ Professor Erik Chaput explains this story in Erik J. Chaput, *The People's Martyr: Thomas Wilson Dorr and His 1842 Rhode Island Rebellion* (2013).

³⁸ Bruce Ackerman, *We the People: The Civil Rights Revolution* 61,174-75 (2014)

³⁹ Oliver Perry Chitwood, *John Tyler, Champion of the Old South* 326-330 (2006).

⁴⁰ Daniel Hays Lowenstein & Richard L. Hasen, *Election Law: Cases and Materials* 19, 113 (2d ed. 2001)

⁴¹ Daniel Rodriguez & Barry Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1422 (2003).

vote.⁴²

Although by the law the right to vote had significantly expanded, movements began to curtail black involvement while simultaneously female suffrage movement gained progress.

E. Jim Crow era and Female Suffrage:

However, this expansion of the right to vote with the 15th Amendment and the activities of the Freedmen's Bureau were thwarted by former Confederate states enacted Jim Crow laws.⁴³ These laws created complex ways to make sure people of color did not vote, such as the poll tax, literacy tests, and Grandfather clauses.⁴⁴ We see that although there was an expansion of the right to vote with the 15th Amendment, there was a pull back with Jim Crow laws and vigilante squads intimidating with brutal tactics to make sure blacks did not vote.⁴⁵

In 1913 the 17th Amendment expanded the electorate to having an unrestricted right to vote for direct elections of Senators. This was the result

⁴² Douglas Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenge*, 76 CORNELL L. REV. 1, 4 (1998).

⁴³ Michael Perman, *Struggle for Mastery: Disfranchisement in the South 1888-1908* at 104 (2001).

⁴⁴ See *The United States Supreme Court: The Pursuit of Justice* app. at 195 (Christopher Tomlins ed., 2005).

⁴⁵ Desmond King, *Separate and Unequal: Black Americans and the US Federal Government* 3-21 (1995).

of a culmination of woman suffrage movements since the 1800s.⁴⁶ But even existing today many scholars debate whether Amendment actually expands the electorate, and many scholars want to return to the era when state legislatures voted in senators for the United States Congress.⁴⁷

The main policy behind the 17th Amendment was to ensure direct election of Senators, rather than through state legislature elections, would provide more equality per vote, because it provides for popular vote.⁴⁸

In 1920 two-thirds of the state legislatures passed the 19th Amendment allowing women to vote. Although there have not been large mass movements to exclude women from voting, inequalities in women voters turning out still exist today as well as social constructs often placing women as a secondary person of the household.⁴⁹

F. Modern Era of Voting Rights:

In 1924 Congress granted Native Americans the right to vote.⁵⁰ Again there has not been a national curtailment of this right; Native Americans have

⁴⁶ Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

⁴⁷ See Sanford Levinson, *Political Party and Senatorial Succession: A Response to Vikram Amar on how Best to Interpret the Seventeenth Amendment*, 35 HASTINGS L.Q. 713, 721 (2008).

⁴⁸ Zachary D. Clopton and Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*. 107 NW. U.L. REV. 1181 (2013).

⁴⁹ U.S. Women in Struggle: A Feminist Studies Anthology, Claire Goldberg Moses and Heidi Hartmann (eds.), *Feminist Economics*, Fall 1997, pp. xx-xxi

⁵⁰ USC, Title 8, Sec. 1401(b)

had conflicts with federal agents, such as the Wounded Knee incident in 1890.⁵¹ 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.⁵²

In 1961, the 23rd Amendment allowed citizens in the District of Columbia to vote for the President. This was a step forward for the District of Columbia, but many citizens of the District of Columbia still do not have direct access to federal elections. This is a great example of a group of people, specifically the District of Columbia, who were governed and had no say in the way they were governed, but then gaining a voice through vote in how they were governed.⁵³

⁵¹ Robert Burnette & John Koster, *The Road to Wounded Knee* 83 (1974).

⁵² A deeper analysis of this opposition is explained by Chief Irving Powless of the Onodaga Nation:

See Chief Irving Powless, Jr., *Speech to the University of Buffalo Law School* (Mar. 21, 1998), reprinted in *The Haudenosaunee, Yesterday and Today*, 46 *Buff. L. Rev.* 1081, 1083 (1998): [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). See also Porter, *The Demise*, *supra* note 13, at 126-28, 159-60. 805

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⁵³ 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." *Id.* 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

In 1964, the 24th Amendment prohibited poll tax in federal elections.⁵⁴ This was an extremely important step allowing poor people to vote. The poll tax was placed on people as a tax to vote even in the late 1790s, especially as a way to replace the property requirements. However, this often excluded racial minorities, even in pre-antebellum times, as well as the poor in general. Thus, removing the poll tax allowed for racial minorities and the entire class of poor people to vote more effectively.⁵⁵

The Voting Rights Act of 1965 prohibited discrimination on racial minorities from voting. This step forward has had a lasting impact, especially for providing firm grounds for voting rights violation litigation grounds.⁵⁶ *Harper v. Virginia Board of Elections*,⁵⁷ prohibited poll tax on all US elections.⁵⁸ Much like the 24th Amendment this expanded the right to vote, continued resistance to the Voting Rights Act continues.⁵⁹

In 1971 the 26th Amendment gave the right to vote for individuals

(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). From Johnny Barnes, *Towards Equal Footing: Responding the Perceived Constitutional, Legal and Practical Impediments to Statehood for the District of Columbia*, 13 D.C. L. Rev. 1, 3 n.11 (2010)

⁵⁴ *24th Amendment, Banning Poll Tax, Has Been Ratified; Vote in South Dakota Senate Completes the Process of Adding to Constitution; 24th Amendment is Now Ratified*, N.Y. TIMES, Jan. 24, 1964, at A1.

⁵⁵ Steven F. Lawson, *Black Ballots: Voting Rights in the South, 1944-1969* 57-68, 131 (1976).

⁵⁶ Samuel Issacharoff, *Polarized Voting and the Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1836 (1992).

⁵⁷ 383 U.S. 663 (1966)

⁵⁸ Michael Halley, *Freedom and Equality on the Instalment Plan*, 108 Mich. L. Rev. *First Impressions*, 76, 80 (2010).

⁵⁹ Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 18,19 (2005)

between 18 and 21 years of age. This rule originated from the problems associated with the Vietnam War: if soldiers were young enough to die for the country, they should be able to vote.⁶⁰ Surprisingly unlike most former situations this has not had much backlash yet, and many elections sway on the number of young people voting.⁶¹

In 1973, Congress re-established the D.C. home rule for local elections. In 1986 the Uniformed and Overseas Citizens Absentee Voting Act allowed members of the military outside of the US or on military basis to vote. These rules too have not had much reversal compared with the Jim Crow laws of the 1870s-1900s.

Primary current restrictions on election laws include the non-uniform standard of elections throughout the nation for counting as partially examined in the case *Bush v. Gore*,⁶² the electoral college, and voter ID laws.

Current issues include many state legislatures have voted in voter ID laws. Indeed, many argue that the voter ID law is to protect voter integrity and is not a step backward; it still has the effect of restricting some people who would otherwise be qualified to vote as citizens from voting.

⁶⁰ Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 81. (1998).

⁶¹ Wendell W. Cultice, *Youth's Battle for the Ballot: A History of Voting Age in America*. (New York: Greenwood Press, 1992), 172.

⁶² 531 U.S. 98 (2000)

G. Promises at the same time:

Although voting restrictions existed in the 1790s; the voting restrictions were slowly chipped away at through the next century and a half.

Simultaneous to all these voting law restrictions were promises of equality as laid out in the Declaration of Independence and the goal of the country for all men to be created equal with equal rights. The progression of getting rid of these restrictions can be seen as the attempt to reach the goal of the Declaration's statement "all men are created equal" to including all humans. Giving people the right to vote seemed to be one of the cornerstones for achieving "equality."

Indeed, each step forward had its steps backwards, but overall there has been a significant progression from merely white men with property voting to, in theory, all US citizens.

Assuming voting rights is an expression of equality, as each ballot is worth one vote, then manifesting that right establishes one's equality.

ANALYSIS:

A. Summary of Argument:

Here, Hegel's dialectical method can be used to interpret the

progression of US 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 yet to be 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 Patrick Henry's famous, "no taxation without representation," phrase. This meant that the colonists felt they needed adequate representation in the English Parliament to be taxed. Likewise the property owners felt they were the only ones who needed representation, because they were taxed on property and had much to lose.

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 the 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, white men with property can be said to have had the absolute power in the country in the 1780s. 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 voting franchise.

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

The first changing steps in 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 other white male populace and thereby trying to bring the others 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 in 1791-1794, but the force could only be so effective.

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 United States was the movement for universal white male suffrage, based in 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 begin by expanding the right to vote throughout the nation, primarily by repealing property restrictions on voting.

D. Civil War and Aftermath Analyzed through Hegelian Dialectic:

The universal white male suffrage leads to a newly defined set for

who the ruler is. At this point all white males, regardless of property, are the new rulers. However, abolitionist movements and the Civil War lead the nation to abolish slavery. Although the most powerful reasons for eliminating slavery were moral and philosophical, but the motivating factor for politicians may likely have been to gain their vote if enfranchised. Almost simultaneously afterwards, all men of color were granted the right to vote.

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

By this time in the 1870s, history witnessed a regression in voting rights. 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 laws to prohibit former slaves and racial minorities from voting.

This shows that the Hegelian dialectic did not have a linear progression from exclusive to inclusive, because of the backlash of the 1870s prohibiting racial minorities from voting with Jim Crow laws. 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. This is analogous to one of the main reasons so many Southerners opposed blacks from voting was perhaps because of the threat it posed to white Southerners

as being in control of the former Confederate states.⁶³

Unfortunately, this regression was reaffirmed by many state laws and the abhorrent *Plessy v. Ferguson* Supreme Court results driven case deciding “separate but equal” was allowed and Constitutional.⁶⁴ This did not resolve in law until the 1950s and 1960s.

In the meantime, the 19th Amendment granted women the right to vote in 1920 further expanding the Hegelian voting rights dialectic for another group of people.

Native Americans were given the right to vote in 1924, furthering expanding the voting rights dialectic for a certain group of people at least *de jure*.

F. Modern Era Analyzed through 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*, 347 U.S. 483 (1954) reversing the *Plessy* “separate but equal” decision, and 1965 Voting Rights Act guaranteeing voting for all people.

The Supreme Court decisions and legislation of the 1960s were only

⁶³ See *Africana: The Encyclopedia of the African and African American Experience* 1211 (Kwame Anthony Appiah & Henry Louis Gates, Jr. eds., 1999).

⁶⁴ 163 U.S. 537 (1896)

parts of the “spiral” metaphor. We have not yet reached the pinnacle of the voting rights, because many restrictions still exist. Although United States law is more favorable for equal voting rights than in 1790, progress still has potential.

The spiral of Hegel’s dialectic occurred when a new level of *thesis* arose, such as the 15th Amendment, but then a reversal *antithesis* drew back upon it with Jim Crow Laws. Almost all of the voting rights expansions had some pull back, even if just 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. This is ultimately the fully equal sharing of power among all people. One key marker of equality is voting rights.

The total progression of US voting rights dialectic is analogous to Francis Fukuyama’s dialectic for the dialectic between a liberal-capitalistic-democracy and communism. Here, the liberal-capitalist-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.

Reasons for Hegelian Dialectic US Voting Rights Expansion:

Although many reasons may have existed for each expansion of voting rights, the reasons for the people fighting for the franchise and those giving 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.

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 rather trying to gain equal footing and 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 US desired to *inwardize*, in Hegelian terms, these promises of equality as exhibited by voting rights.

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.⁶⁵

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. He says that some people in the 1850s were saying "all men are created equal" at the time was interpreted as all men but back in the 1770s it really was interpreted as just white men so we should be closer to the founding fathers time and keep slavery, but Lincoln points out that actually the economic progress due to the cotton gin made slavery more profitable than it was at the founding probably more people in their own time in the 1850s interpret "all men are created equal" to mean just white men more than

⁶⁵ David Hume, *A Treatise of Human Nature: Being an Attempt to Introduce the Experimental Method of Reasoning into Moral Subjects* 195 (T.H. Green & T.H. Grose eds., Longmans, Green, & Co. 1882) (1739-40).

it used to be in the 1770s.⁶⁶ However, to distinguish this counterargument, the dialectic does not describe a linear progression in history, but rather incorporates backwards and forward movements, hence the spiral metaphor.

Second, the voting rights dialectic examined in this Article is likely part of a greater dialectic, not merely starting in 1776, and is analogous to Francis Fukuyama's dialectic between liberal-democratic-economic systems compared 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 law areas. Indeed, since the 1980s there has been a surge of Hegelian analysis applied to areas from criminal, property, torts, employment law, evidence and contracts.⁶⁷

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

⁶⁶Abraham Lincoln, "House Divided" Speech at Springfield, Illinois (June 16, 1858), in Abraham Lincoln, *Speeches and Writings 1832-1858*.

⁶⁷ Michael Hoffheimer lists articles using 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).

Michael H. Hoffheimer, *Hegel's First Philosophy of Law*, 62 TENN. L. REV. 823, 825-827 (1995).

brought up in *Bush v. Gore*.⁶⁸ Additionally, courts will likely have to firmly decide whether the Electoral College system is consistent with the guarantees of the equal protection clause.⁶⁹

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 continuing inclusivity will continue.

⁶⁸ The uniformity of elections in regards to the equal protection clause discussed in the case is 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).

Bush v. Gore, 531 U.S. 98, 104-105 (2000).

⁶⁹ 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.

Id. at 104.

