

# SELECTIVE ENTRENCHMENT AGAINST STATE CONSTITUTIONAL CHANGE: SUBJECT MATTER RESTRICTIONS AND THE THREAT OF DIFFERENTIAL AMENDABILITY

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*In Wirzburger v. Galvin, Massachusetts citizens challenged the Massachusetts Constitution's Excluded Matters provision, which is a type of subject matter restriction that prohibits popularly initiated amendment of enumerated portions of the state constitution. Because plaintiffs could not show a suspect class, discriminatory intent, or a direct impact on speech, the First Circuit applied deferential forms of First Amendment and Equal Protection Clause review and the challenge failed.*

*This Note argues that the current framework used to evaluate subject matter restrictions, exemplified by Wirzburger, provides insufficient protection against the serious harms such restrictions create. Subject matter restrictions create differential amendability, which makes it harder for citizens to change some aspects of a constitution than to change others. Differential amendability is a serious harm that distorts the design of well-functioning constitutional amendment procedures and threatens longstanding principles of popular sovereignty. Furthermore, this distortion creates a significant risk that barriers to amendment are being employed, intentionally or otherwise, to entrench temporary political supermajorities against future constitutional change.*

*This Note explores these risks and the possibility of controlling them through a federal constitutional analysis that draws on history, functional considerations, and existing voting rights case law. All three factors weigh in favor of engaging in a fundamental rights inquiry into subject matter restrictions. That inquiry might invalidate most subject matter restrictions, but its most significant contribution would be the cultivation of an interinstitutional dialogue over the possibilities and dangers of substantive restrictions on constitutional change at the state level.*

## INTRODUCTION

In the summer of 1999, a group of Massachusetts citizens tried to use the state constitutional initiative process to amend the Massachusetts Constitution's Anti-Aid Amendment, which prohibits

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the state from giving public funds to private schools.<sup>1</sup> When they submitted their petition to the State Attorney General for certification for placement on the ballot,<sup>2</sup> he refused to certify it because the initiative dealt with subjects that the Massachusetts Constitution excludes from the initiative process.<sup>3</sup> Under the Massachusetts Constitution's Excluded Matters provision, the initiative process cannot be used to amend the Anti-Aid Amendment or any other provisions related to religion.<sup>4</sup>

In *Wirzburger v. Galvin*, the group challenged the restriction under the First Amendment and Equal Protection Clause.<sup>5</sup> The First Circuit found the Excluded Matters provision constitutional, and the challenge failed.<sup>6</sup> The court resolved both claims using deferential tests: symbolic speech analysis for the First Amendment claim<sup>7</sup> and rational basis review for the Equal Protection Clause claim.<sup>8</sup> In other words, the court reviewed the Excluded Matters provision using the same doctrinal tools, and with the same level of deference, as it would have used to review a First Amendment challenge to a regulation prohibiting destruction of social security cards<sup>9</sup> or a due process challenge to the regulation of milk.<sup>10</sup>

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<sup>1</sup> Brief of Plaintiffs at 3, *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005) (No. 04-1625), *cert. denied* 546 U.S. 1150, 1150 (2006) (citing MASS. CONST. amend. art. XLVIII, pt. II, § 2), *available at* <http://www.becketfund.org/litigate/WirzburgerAppealBrief.pdf>; *see also infra* Part I.A (discussing history and purpose of Massachusetts initiative process and Excluded Matters provision).

<sup>2</sup> Brief of Plaintiffs, *supra* note 1, at 3.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (citing MASS. CONST. amend. art. XLVIII, pt. II, § 2); *see also infra* Part I.A.

<sup>5</sup> *Wirzburger*, 412 F.3d at 274. While this Note focuses on these First Amendment and Equal Protection Clause claims, *Wirzburger* is also an important case for those interested in church-state issues. *See* Brief of Plaintiffs, *supra* note 1, at 5–13 (arguing that Anti-Aid Amendment originated in discrimination against Catholics). *See generally* Steven K. Green, “Bad History”: *The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1744 & n.190 (2006) (citing *Wirzburger* in discussion of whether state constitutional provisions prohibiting state funding for religious education should be viewed as unconstitutional given probable roots in anti-Catholic sentiment); Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 46 & n.148 (2006) (discussing history of anti-Catholicism as reflected in state constitutional prohibitions on state funding for religious education); Matthew Gauss, Note, *Locke v. Davey: Discretion, Discrimination, and the New Free Exercise*, 54 KAN. L. REV. 553, 582 & n.189 (2006) (noting influence of *Locke v. Davey*, 540 U.S. 712 (2004), which involved Religion Clauses, on *Wirzburger*).

<sup>6</sup> *Wirzburger*, 412 F.3d at 285 (denying relief); *see also infra* Part I.B.

<sup>7</sup> *Wirzburger*, 412 F.3d at 278–79.

<sup>8</sup> *Id.* at 285.

<sup>9</sup> *Cf.* *United States v. O'Brien*, 391 U.S. 367, 369–70 (1968) (reviewing prosecution for destruction of draft card).

<sup>10</sup> *Cf.* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 146–47, 153–54 (1938) (applying rational basis to and upholding federal regulation prohibiting shipment of filled milk in interstate commerce).

This approach is inappropriate when reviewing subject matter restrictions on state constitutional initiatives.<sup>11</sup> State constitutions—and state constitutional change—are different from other objects of regulation. From their humble beginnings as quasi-statutes only nominally different from ordinary law, state constitutions have developed into fundamental instruments of state governance.<sup>12</sup> States have long differed in how they view their constitutions: Some view their constitutions as rarely altered fundamental law, while others view them as “superstatutes” that perform both structural and legislative functions.<sup>13</sup> All states, however, share (1) a common belief that constitutions are special and (2) a common practice of treating constitutions differently in important ways.

All restrictions on state constitutional change, including many of the myriad restrictions that states impose on constitutional initiatives, implicate these values.<sup>14</sup> Subject matter restrictions, such as the

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<sup>11</sup> States are inconsistent in their use of the terminology of direct democracy. For the purposes of this Note, a constitutional initiative is an initiative that seeks to amend the state constitution, while a statutory initiative is one that seeks to put a proposed statute before the voters. Both are distinct from popular referenda. Initiative petitions are prospective and allow citizens to place a specific item (the “measure”) on the ballot by gathering a specified number of signatures. M. DANE WATERS, *INITIATIVE AND REFERENDUM ALMANAC* 11 (2003). Popular referenda, on the other hand, are essentially retrospective: A small percentage of the citizenry forces the legislature to submit an issue or already-enacted legislation to the voters. *Id.* Unlike the initiative, the referendum process requires that the legislature act as the “first mover”; the citizenry cannot act on an issue until the legislature has done so. At that point, the citizenry can force the legislature to submit already-enacted legislation to the voters.

<sup>12</sup> See *infra* Part II.A (reviewing history of state constitutional distinctiveness).

<sup>13</sup> This diversity in how states view and use their constitutions had emerged by the early years of the twentieth century. WALTER FAIRLEIGH DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS* 267–68 (1910) (noting that New England and midwestern state constitutions contained “fewer details of a legislative character,” while newer states often adopted constitutions that “cover[ed] a wide range of details not of a fundamental character”).

<sup>14</sup> For example, states require that the initiative be approved by a state official prior to circulation, WATERS, *supra* note 11, at 15; that signatures be gathered in particular ways and from a geographically representative pool of citizens, *id.* at 20–24; that the initiative, as well as arguments for and against it, be published and made available to voters, *id.* at 24; and that the initiative address only one subject matter (the “single subject rule”), *id.* at 28–29. Many of these regulations, though outside the scope of this Note, are addressed elsewhere. See generally, e.g., Rachael Downey et al., *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579 (2004) (surveying state practices with regard to single subject rule, which is designed to reduce voter confusion at ballot stage); Kurt G. Kastorf, Comment, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule*, 54 EMORY L.J. 1633 (2005) (suggesting that structural differences between direct democracy and legislative action require that courts apply single-subject rule differently in two contexts); M. Sean Radcliffe, Comment, *Pre-Election Judicial Review of Initiative Petitions: An Unreasonable Limitation on Political Speech*, 30 TULSA L.J. 425, 445 (1994) (arguing that pre-election judicial review of initiatives for facial unconstitutionality violates First Amendment).

Massachusetts Excluded Matters provision challenged in *Wirzburger*, are particularly problematic. These types of restrictions restrict, or prohibit altogether, initiatives addressing enumerated areas of law. Massachusetts is not alone in employing subject matter restrictions. For example, Illinois allows citizens to amend only one article of the state constitution by initiative: the article that establishes the state legislative process.<sup>15</sup>

By making it more difficult for citizens to change particular elements of a state constitution, subject matter restrictions create what I will refer to as differential amendability.<sup>16</sup> Differential amendability exists when a constitution contains different amendment requirements for different parts of the constitution rather than a uniform amendment procedure. This type of “superconstitutionalism”<sup>17</sup> frustrates the design of an amendment process that is both flexible enough to meet future needs and rigid enough to provide stability in government. Those favoring the subject matter restriction are able to achieve their goal of stability while ignoring the possibility that future political, social, or economic change might create a need to revise the substantive policy provision it protects. Because of this distortion, differential amendability effects the entrenchment, intentional or otherwise,<sup>18</sup> of temporary political supermajorities against future

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Scholars have also focused on the procedures in place in particular states, including Massachusetts. *See generally, e.g.*, Alexander G. Gray, Jr. & Thomas R. Kiley, *The Initiative and Referendum in Massachusetts*, 26 NEW ENG. L. REV. 27 (1991) (Massachusetts initiative and referendum process); Robert M. Norway, *Judicial Review of Initiative Petitions in Florida*, 5 FLA. COASTAL L. REV. 15 (2004) (Florida initiative process); Dina E. Conlin, Note, *The Ballot Initiative in Massachusetts: The Fallacy of Direct Democracy*, 37 SUFFOLK U. L. REV. 1087 (2004) (Massachusetts initiative process); Cody Hoesly, Comment, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191, 1196–1202 (2005) (Oregon initiative process); Owen Tipps, Comment, *Separation of Powers and the California Initiative*, 36 GOLDEN GATE U. L. REV. 185 (2006) (discussing implications of California initiative process having character of “fourth and autonomous branch of government”).

<sup>15</sup> ILL. CONST. art. XIV, § 3. For further examples of state subject matter restrictions, see WATERS, *supra* note 11, at 18.

<sup>16</sup> *See infra* Part II.B.

<sup>17</sup> By superconstitutionalism, I mean the protection of a political norm to a degree greater than the baseline for that particular political system. For example, the Federal Constitution’s special protection for equal state representation in the Senate, U.S. CONST. art. V (“[N]o state, without its Consent, shall be deprived of its equal Suffrage in the Senate.”), gives equal state representation a degree of protection that is greater than the baseline protection given to the remainder of the Constitution. Superconstitutionalism adds a new layer to the hierarchy of political norms, so that the system is now roughly structured, in ascending order of protection, as follows: statutory norms, constitutional norms, and then superconstitutional norms.

<sup>18</sup> Proving intentional superconstitutional entrenchment would be possible only in extreme cases; it is notoriously difficult to ascribe an intent to collective decisionmaking, particularly when that decisionmaking is ratified by popular vote. *See* Jane S. Schacter,

constitutional change.<sup>19</sup> Temporary supermajorities give their own policies constitutional protection against other supermajorities in the future, requiring their opponents to become even more powerful than the temporary supermajority before they can revise or modify the policy at issue. For example, a two-thirds political majority might amend the state constitution so that all future amendments relating to gun control must be passed by a unanimous popular vote.

In *Wirzburger*, both the parties and the court ignored these issues and risks; this Note seeks to fill the resulting gaps. After exploring the harms of differential amendability, I propose a new framework for evaluating subject matter restrictions. This framework draws on three sources of constitutional guidance: history, function, and precedent. The history of state constitutionalism, permeated with the common understanding that constitutions are somehow “different,” has at various times reflected deeply rooted principles of popular sovereignty. American constitutionalism, at both the federal level and in the states, embraces not only the view that legitimacy stems from the “assumption that [constitutions] speak for the people,”<sup>20</sup> but also from the belief that the people are the ultimate source of the constitution’s authority.<sup>21</sup> Popular control thus performs two functions: creation and legitimation. This history of constitutional distinctiveness, resting on a discernible core principle of popular sovereignty, can form the foundation for a federal constitutional inquiry into subject matter restrictions. The tools for that inquiry are already present in voting

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*The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 *YALE L.J.* 107, 110 (1995) (“There are reasons to suspect that a search for ‘popular intent’ will be even more problematic than the traditional search for legislative intent.”).

<sup>19</sup> See *infra* Part II.B.

<sup>20</sup> Simone Chambers, *Constitutional Referendums and Democratic Deliberation*, in *REFERENDUM DEMOCRACY: CITIZENS, ELITES AND DELIBERATION IN REFERENDUM CAMPAIGNS* 231, 237 (Matthew Mandelsohn & Andrew Parkin eds., 2001); see also CHARLES BERGEAUD, *ADOPTION AND AMENDMENT OF CONSTITUTIONS IN EUROPE AND AMERICA* 35 (Charles D. Hazen trans., Fred B. Rothman & Co. 1989) (1895) (stating that people adopting written constitution consider it as “the expression of the sovereign will” of nation’s people).

<sup>21</sup> BERGEAUD, *supra* note 20, at 7 (noting that American popular sovereignty can be seen as rooted in Puritan understanding that “[e]cclesiastical supremacy belonged to the congregation, and to the congregation alone, as Christ’s representative on earth”); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 238 (Sanford Levinson ed., 1995) (“This belief in the people as the ultimate source of power was, from the European viewpoint, a startling innovation . . . . Americans did not regard popular sovereignty as an experimental idea, but rather one that stood at the very heart of their shared political consensus.”).

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rights case law,<sup>22</sup> and functional concerns raised by subject matter restrictions make the effort worthwhile.

This Note therefore proposes that courts engage in an Equal Protection Clause fundamental rights inquiry into subject matter restrictions. To protect states from an overly aggressive federal judicial inquiry into state practices, the proposed analysis draws on First Amendment doctrine that uses a balancing test to determine the standard of review.<sup>23</sup> This framework would help mitigate the harmful effects of differential amendability by forcing states to better articulate their rationales for subject matter restrictions, thereby ensuring that differential amendability be employed only when necessary. At the very least, more searching judicial review of subject matter restrictions will lead to a more vigorous interbranch and intergovernmental dialogue about the meaning and limits of superconstitutionalism at the state level.

This Note proceeds in three parts. Part I explores the background and doctrine of *Wirzburger* before explaining how that doctrine's deferential approach fails to address the harmful effects of subject matter restrictions. Part II reviews the history of state constitutionalism and the functional distortion of state constitutions created by differential amendability. Part III lays out a possible federal constitutional framework with which courts can address challenges to subject matter restrictions.

## I

### WIRZBURGER AND THE MASSACHUSETTS EXCLUDED MATTERS PROVISION

This Part explores *Wirzburger*'s historical background and decisional doctrine. Section *A* discusses the history of the Massachusetts Excluded Matters provision, situating the *Wirzburger* challenge within the broader context of the state's scheme of constitutional initiatives. Section *B* explains the First Circuit's approach to the Excluded Matters provision in *Wirzburger* and highlights the deferential nature of the review.

#### *A. The History and Purpose of the Massachusetts Excluded Matters Provision*

Procedurally and substantively, the Massachusetts initiative process evinces a strong distrust of direct democracy and an affinity for the deliberative capacities of representative bodies. Procedural obsta-

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<sup>22</sup> See *infra* Part III.A.

<sup>23</sup> See *infra* Part III.A.

cles abound, particularly for constitutional initiatives. To place a constitutional amendment before the voters using the initiative process, citizens must not only gather a specified number of signatures,<sup>24</sup> they must also gain the support of twenty-five percent of the state legislature (the General Court) in two consecutive legislative sessions.<sup>25</sup> Even then, the initiative amendment must receive the votes of both a majority of those voting on the initiative and at least thirty percent of the total number of ballots cast.<sup>26</sup>

Nowhere is distrust for direct democracy more evident, however, than in the state's subject matter restrictions found in the Excluded Matters provision of the state constitution.<sup>27</sup> This provision has been part of the Massachusetts initiative process since 1918,<sup>28</sup> when Massachusetts adopted the constitutional initiative through a constitutional convention and popular ratification by majority vote.<sup>29</sup> Massachusetts's subject matter restrictions, which are uniquely extensive,<sup>30</sup> prohibit constitutional or statutory initiatives<sup>31</sup> involving a laundry list of subjects and issues: religious matters (Religion Exclusion); public assistance for private schools (Anti-Aid Exclusion); the appointment, removal, or compensation of judges; reversal of judicial decisions; the court system; purely local matters; specific appropriations; and any "proposition inconsistent with any one of" a specified list of rights protections.<sup>32</sup> And, of course, the entire Excluded Matters section is itself excluded, as is the provision excluding the Excluded Matters section.<sup>33</sup>

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<sup>24</sup> MASS. CONST. amend. art. XLVIII, pt. IV, § 2 (requiring signatures of at least 25,000 qualified voters).

<sup>25</sup> *Id.* amend. art. XLVIII, pt. IV, § 4 (stating that if initiative amendment receives "not less than one-fourth of all the members elected, [it] shall be referred to the next general court"); *id.* amend. art. XLVIII, pt. IV, § 5 (stating that initiative amendment shall be submitted to people if general court again votes in favor of amendment by twenty-five percent).

<sup>26</sup> *Id.* amend. art. XLVIII, pt. IV, § 5.

<sup>27</sup> *Id.* amend. art. XLVIII, pt. II, § 2.

<sup>28</sup> MASS. ANN. LAWS CONST. amend. art. XLVIII, pt. II, § 2 (LexisNexis 2007).

<sup>29</sup> Augustus Peabody Loring, *A Short Account of the Massachusetts Constitutional Convention 1917-1919*, 6 NEW ENG. Q. 1, 76 (1933). The Convention occurred after the Governor asked the state legislature to submit to the voters the question of whether to call a convention. *Id.* at 13. The legislature agreed to do so, and in 1916 people voted in favor of holding a convention. *Id.*

<sup>30</sup> Hoesly, *supra* note 14, at 1236 (noting that Massachusetts imposes more substantive restrictions on initiatives than any other state).

<sup>31</sup> See *supra* note 11 for an explanation of the difference between constitutional and statutory initiatives.

<sup>32</sup> MASS. CONST. amend. art. XLVIII, pt. II, § 2. The enumerated rights protections are as follows: compensation for takings, access to the courts, jury trial, search and seizure, free speech and freedom of the press, freedom of elections, and assembly. *Id.*

<sup>33</sup> *Id.*

These restrictions are “designed to guarantee[ ] the independence of the judiciary, the autonomy of the localities, and the rights of individuals from action by the whole people.”<sup>34</sup> When Massachusetts adopted the initiative petition process in 1918, only four states imposed substantive restrictions on the use of initiative petitions.<sup>35</sup> Despite the rarity of such restrictions at the time, delegates to the 1917 Massachusetts Constitutional Convention argued forcefully that subject matter restrictions were needed to protect inviolable and transcendent individual rights.<sup>36</sup> The Convention felt so strongly about this need that at one point, delegates decided to channel all constitutional amendments through the initiative process, but to prohibit initiatives “annulling, abrogating or repealing the provisions of the Declaration of Rights”<sup>37</sup>—thereby creating a set of superconstitutional provisions immune from any amendment whatsoever.

The Convention ultimately discarded that proposal, but it adopted the Excluded Matters restrictions instead. The eclectic composition of the list reflects how individual items were added. At times during the drafting process at the 1917 Constitutional Convention, delegates suggested that particular matters be placed off-limits. The Religion Exclusion, for example, was added after one delegate suggested that such issues were better suited for deliberative legislative action than for popular action.<sup>38</sup> Judicial matters were excluded for similar reasons.<sup>39</sup> Thus even as the framers of the Massachusetts initiative process expanded citizen control over government and the state constitution, they simultaneously identified vulnerable, quasi-permanent provisions of the state constitution in need of special protection against direct action.<sup>40</sup>

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<sup>34</sup> EARL LATHAM & GEORGE GOODWIN, JR., *MASSACHUSETTS POLITICS* 66 (1960).

<sup>35</sup> *Bulletin No. 6: The Initiative and Referendum*, in 1 COMMISSION TO COMPILE INFORMATION AND DATA FOR THE USE OF THE CONSTITUTIONAL CONVENTION, *BULLETINS FOR THE CONSTITUTIONAL CONVENTION, 1917–1918*, at 179, 192 (1918).

<sup>36</sup> 2 *DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION, 1917–1918: THE INITIATIVE AND REFERENDUM* 732 (1918); *see also id.* at 734 (statement of John M. Merriam) (“[Those rights] may have been declared by John Adams and by his associates, but they were made by the Creator of this Universe as a part of the heritage of mankind.”).

<sup>37</sup> *Id.* at 737.

<sup>38</sup> *Id.* at 768 (statement of Edwin U. Curtis).

<sup>39</sup> *Id.* at 789 (statement of John W. Cummings) (“[N]o one . . . has challenged the integrity or the competency of the courts. The reason why the initiative and referendum is urged is because the integrity and competency of another department of government are seriously questioned. . . . Our judicial system has stood the test.”).

<sup>40</sup> Members of the Committee on Referendum and Initiative who dissented from the Resolution putting forth the initiative process made this argument quite strongly:

When . . . the people of Massachusetts united to form our present government, they purposely imposed upon themselves certain permanent restrictions of their own action . . . and recognizing that wise, just and intelligent legislation

## B. Wirzburger's Deferential Review

Litigants challenged the Excluded Matters provision, specifically the Anti-Aid and Religion Exclusions, in *Wirzburger v. Galvin*.<sup>41</sup> The plaintiffs' challenge relied on both the First Amendment and the Equal Protection Clause.<sup>42</sup>

### 1. The First Amendment Challenge

First Amendment claims against subject matter restrictions rely heavily on *Meyer v. Grant*,<sup>43</sup> where "the Supreme Court unanimously struck down a Colorado law that made it a felony to pay any person to circulate an initiative petition."<sup>44</sup> *Meyer* shows that the initiative process has communicative meaning such that restrictions on the process sometimes implicate the First Amendment.<sup>45</sup> Challengers argue that subject matter restrictions are similarly problematic. The *Wirzburger* plaintiffs argued that, like restrictions on signature-gathering methods, "the Exclusions directly inhibit initiative proponents from making [their] ideas for political change . . . a matter of statewide discussion on the ballot."<sup>46</sup>

*Wirzburger* upheld the Anti-Aid and Religion Exclusions against this challenge. The First Circuit readily acknowledged that the restrictions implicated the First Amendment, noting that initiatives "provide[ ] a uniquely provocative and effective method of spurring public debate on an issue of importance."<sup>47</sup> Because of the exceptional nature of the restrictions at issue, however, the court chose to apply intermediate scrutiny rather than strict scrutiny.

As the court noted, previous cases, such as *Meyer*, applied strict scrutiny because they "involved direct regulation of the petition pro-

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for the whole people is rarely possible by direct action of a majority, . . . they established a mode of legislation by elected representatives.

*Id.* at 7.

<sup>41</sup> 412 F.3d 271 (1st Cir. 2005), *cert. denied*, 546 U.S. 1150, 1150 (2006); *see also supra* text accompanying notes 1–8 (discussing *Wirzburger* facts and Anti-Aid Exclusion, which prohibits amendment of state constitutional ban on public funding for private education).

<sup>42</sup> 412 F.3d at 274; *see also* U.S. CONST. amend. I; *id.* amend. XIV.

<sup>43</sup> 486 U.S. 414 (1988).

<sup>44</sup> *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (en banc) (citing *Meyer*, 486 U.S. at 416).

<sup>45</sup> *Meyer*, 486 U.S. at 421–22 ("The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. . . . [T]he circulation of a petition involves . . . communication concerning political change that is appropriately described as 'core political speech.'").

<sup>46</sup> Brief of Plaintiffs, *supra* note 1, at 29.

<sup>47</sup> *Wirzburger v. Galvin*, 412 F.3d 271, 276 (1st Cir. 2005), *cert. denied*, 546 U.S. 1150, 1150 (2006) (citing *Meyer*, 486 U.S. 414).

cess itself.”<sup>48</sup> From the court’s perspective, subject matter restrictions affect speech in a more indirect manner. Subject matter restrictions regulate the structure of state government by determining the role of initiatives in the process of legal change.<sup>49</sup> It is unsurprising, then, that states regulate the initiative process, like lawmaking processes in general, in a subject-specific manner.<sup>50</sup> Because the restrictions thus “constitute regulations ‘aimed at non-communicative impact’”<sup>51</sup> (i.e., the regulation of the lawmaking process itself), any effect on speech “is no more than an unintended side-effect.”<sup>52</sup> The court therefore found that the appropriate standard of review was an intermediate scrutiny application of the *O’Brien* test,<sup>53</sup> which courts use to review laws that have an incidental effect on speech.<sup>54</sup>

Applying *O’Brien*, the court found that the restrictions were designed to further the state’s “interest in maintaining the proper balance between promoting free exercise and preventing state establishment of religion,” as well as the state’s interest in “restricting the means by which these fundamental rights can be changed.”<sup>55</sup> Because these interests relate to the structure of the initiative process rather than to suppressing expression,<sup>56</sup> and because the restrictions were essential to achieving the state’s interest in limiting avenues of changing these constitutional provisions, the court found that the restrictions did not violate the First Amendment.<sup>57</sup>

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<sup>48</sup> *Id.* at 277 (emphasis removed). For example, the First Circuit had previously struck down a Puerto Rico requirement that petition signatures be notarized, *Pérez-Guzmán v. Gracia*, 346 F.3d 229, 229 (1st Cir. 2003), cited in *Wirzburger*, 412 F.3d at 276, and the Supreme Court had invalidated a Colorado prohibition on paid signature gatherers in *Meyer*, 486 U.S. at 414, cited in *Wirzburger*, 412 F.3d at 277. In both cases, the courts applied strict scrutiny because the regulation at issue applied to the petitioning process itself, rather than the role of that process in the state’s overall system of legal change.

<sup>49</sup> See *Wirzburger*, 412 F.3d at 277 (noting that subject matter restrictions “aim at preventing the act of generating laws and constitutional amendments about certain subjects by initiative”).

<sup>50</sup> See *id.* at 275 (rejecting plaintiffs’ attempt to frame restrictions as “content-based restrictions on core political speech subject to strict scrutiny”).

<sup>51</sup> *Id.* (emphasis removed) (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 790 (2d ed. 1988)).

<sup>52</sup> *Id.* at 277.

<sup>53</sup> *Id.* at 278–79 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

<sup>54</sup> *Wirzburger*, 412 F.3d at 275. The *O’Brien* test contains four elements: (1) the regulation “is within the constitutional power of the Government;” (2) “it furthers an important or substantial governmental interest;” (3) “the governmental interest is unrelated to the suppression of free expression;” and (4) “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”

*Id.* at 279 (quoting *O’Brien*, 391 U.S. at 377).

<sup>55</sup> *Wirzburger*, 412 F.3d at 279.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

Using *O'Brien* to review subject matter restrictions on state constitutional initiatives is problematic in two distinct ways: the review is overly deferential to state-level political decisionmaking, and it targets the wrong harms. The deferential nature of *O'Brien* review is well known,<sup>58</sup> and *Wirzburger* exemplifies how the nominally intermediate scrutiny of *O'Brien* can easily devolve into rational basis review in practice. When inquiring into the substantiality of the state interest, the court relied heavily on the state's broad interest in balancing free exercise and establishment concerns.<sup>59</sup> Framing the state interest so broadly, however, erodes any meaning that "substantial state interest" might otherwise have; the state is able to put forward a seemingly important interest without being forced to articulate that interest in any meaningful way.<sup>60</sup> At the tailoring stage of the analysis, however, the court focused on the state's much more specific interest in "safeguarding these fundamental freedoms in its Constitution from popular initiative."<sup>61</sup> Subject matter restrictions are precisely tailored to that interest.<sup>62</sup> Combining a broadly defined state interest at the substantiality stage and a highly specific state interest at the tailoring stage collapses the two prongs of the test into a simple substantiality inquiry in which the court essentially takes the state at its word. The review becomes one based on rational basis rather than intermediate scrutiny.<sup>63</sup>

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<sup>58</sup> See, e.g., Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 51 (1987) (characterizing *O'Brien* review as "highly deferential").

<sup>59</sup> *Wirzburger*, 412 F.3d at 279.

<sup>60</sup> As J. Morris Clark recognized almost forty years ago:

The purpose of almost any law can be traced back to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue. To measure an individual interest directly against one of these rarified values inevitably makes the individual interest appear the less significant.

J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 330–31 (1969); see also Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943) ("When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane . . . [or else] we may decide the question in advance in our very way of putting it."), quoted in *Employment Div. v. Smith*, 494 U.S. 872, 910 (1990) (Blackmun, J., dissenting); cf. *Grutter v. Bollinger*, 539 U.S. 306, 356 (2003) (Thomas, J., concurring in part and dissenting in part) (criticizing majority for defining state-run law school's interest as "diversity" rather than "interest in offering a marginally superior education while maintaining an elite institution").

<sup>61</sup> *Wirzburger*, 412 F.3d at 279.

<sup>62</sup> *Id.*

<sup>63</sup> Cf. *Grutter*, 539 U.S. at 361 (Thomas, J., concurring in part and dissenting in part) (criticizing majority's tailoring analysis because it rests on state's interest in "academic selectivity," which majority had not identified as compelling state interest).

Second, *O'Brien* review (and First Amendment review in general) of subject matter restrictions targets the wrong harms.<sup>64</sup> Subject matter restrictions prevent citizens from initiating change on certain issues. As such, the real grievance in *Wirzburger* was not an impairment of speech; instead, it was the harm of being blocked from employing a viable method of constitutional change because of the subject being addressed. *O'Brien* and other First Amendment doctrines are not designed to protect the values at stake in such situations.<sup>65</sup> As the Tenth Circuit pointed out when holding that subject matter restrictions do not implicate the First Amendment at all,<sup>66</sup> *O'Brien* “does not apply to structural principles of government making some outcomes difficult or impossible to achieve.”<sup>67</sup> That difficulty or impossibility is the primary effect of subject matter restrictions—and the very reason litigants challenge them.

## 2. *The Equal Protection Clause Challenge*

*Wirzburger* went on to address the plaintiffs’ Equal Protection Clause claim using four types of analysis: fundamental rights, suspect class, disparate impact, and *Romer v. Evans*<sup>68</sup> rational basis review.<sup>69</sup> The claim failed under all four tests.<sup>70</sup> The court’s deferential approach can be seen in its ultimate finding—with regard to the fundamental rights, suspect class, and disparate impact claims—that the challenge would be subject to rational basis review.<sup>71</sup>

The court quickly dismissed the fundamental rights claim, which rested on the fundamental right to freedom of religion.<sup>72</sup> Because the

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<sup>64</sup> The *Wirzburger* plaintiffs bore much of the responsibility for framing the issue as a First Amendment claim, see Brief of Plaintiffs, *supra* note 1, at 18–41, but in doing so they were limited by the failure of courts (and prior litigants) to craft an alternative doctrinal approach.

<sup>65</sup> The use of a First Amendment framework also affects how the reviewing court thinks about the state interest; the reviewing court is attuned to speech issues, but not to more abstract political process failures. For example, the First Circuit’s finding in *Wirzburger* that the state had a legitimate interest in imposing subject-specific restrictions on constitutional change, *Wirzburger*, 412 F.3d at 279, is understandable because the First Amendment inquiry focuses the court’s attention less on structural process issues than on individual rights-based speech issues.

<sup>66</sup> *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1102 (10th Cir. 2006) (en banc).

<sup>67</sup> *Id.*

<sup>68</sup> 517 U.S. 620 (1996).

<sup>69</sup> *Wirzburger*, 412 F.3d at 282–85. As with the First Amendment claim, the plaintiffs bear some responsibility for how the First Circuit understood the Equal Protection Clause challenge. See Brief of Plaintiffs, *supra* note 1, at 53–56 (making suspect class claims); *id.* at 61 n.31 (arguing that *Romer* rational basis analysis also defeats Religion Exclusion).

<sup>70</sup> *Wirzburger*, 412 F.3d at 282.

<sup>71</sup> *Id.* at 285.

<sup>72</sup> *Id.* at 283.

plaintiffs' separate Free Exercise claim<sup>73</sup> failed, the Equal Protection Clause fundamental rights claim based on the same facts was subject only to rational basis review, which the restrictions easily passed.<sup>74</sup> The court also quickly addressed the plaintiffs' disparate impact argument by finding that they had failed to show a discriminatory intent behind the restrictions.<sup>75</sup>

Plaintiffs' final argument in favor of strict scrutiny, based on a suspect class analysis, also failed. After assuming that religious groups constituted a suspect class, the court defined the question as whether the subject matter restrictions "impermissibly distort the political process to the disadvantage of religious individuals."<sup>76</sup> Here, the Excluded Matters provision regulated issues, rather than groups.<sup>77</sup> According to the court, unlike other cases where the Supreme Court had applied strict scrutiny to invalidate facially neutral regulations, the restrictions prohibited use of the initiative process for any religious matters by any person or group, regardless of whether the proposed initiatives would help or hurt religious persons. They therefore could not be said to have an inevitable effect on one particular group.<sup>78</sup>

The court found these potential triggers for strict scrutiny to be missing and applied rational basis review under *Romer v. Evans*.<sup>79</sup> Rational basis review requires that legislation "bear[ ] a rational relation to some legitimate end."<sup>80</sup> Applying rational basis, the court in *Wirzburger* found that the restrictions were a reasonable means to pursue the wholly legitimate state purpose of "preventing the estab-

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<sup>73</sup> *Wirzburger* is most known for the Free Exercise portion of the opinion, which is beyond the scope of this Note. See *supra* note 5.

<sup>74</sup> *Wirzburger*, 412 F.3d at 282 (noting that when Religion Clause claims fail, fundamental rights challenges based on religious freedom using same operative facts are subject only to rational basis review); *id.* at 283 (concluding that restrictions pass rational basis review).

<sup>75</sup> *Id.* at 284. Disparate impact without evidence of discriminatory intent does not trigger strict scrutiny under the Equal Protection Clause. *Washington v. Davis*, 426 U.S. 229, 242 (1976), cited in *Wirzburger*, 412 F.3d at 284.

<sup>76</sup> *Wirzburger*, 412 F.3d at 283.

<sup>77</sup> *Id.* ("On their face, the Exclusions simply carve out particular subject matters from the initiative process. They do not require different treatment of any class of people because of their religious beliefs.").

<sup>78</sup> *Id.* at 284.

<sup>79</sup> 517 U.S. 620 (1996).

<sup>80</sup> *Id.* at 631.

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ishment of religion.”<sup>81</sup> The restrictions thus satisfied the rational basis standard of review.<sup>82</sup>

Equal Protection Clause analysis in *Wirzburger* proved deferential to the state primarily because the plaintiffs had failed to make the showing required to trigger a more rigorous standard of review. Fundamental rights analysis failed because the plaintiffs had only a weak claim that the restrictions in question undermined the fundamental right to religious freedom, particularly given that the court had already found against their Free Exercise Clause claim. Suspect class arguments were also weak, as the restrictions were defined (as one would expect *subject matter* restrictions to be defined) in terms of issues, rather than groups. And given the heavy burden of the discriminatory-intent requirement of suspect class analysis, it is unsurprising that that claim failed as well. Ultimately, the Equal Protection Clause framework supported by the plaintiffs and rejected by the First Circuit does not provide challengers of subject matter restrictions with the tools they need to force courts rigorously to review these restrictions.<sup>83</sup>

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As this discussion of *Wirzburger* has shown, the existing doctrine governing subject matter restrictions is overly deferential and does not address the real harms at issue in challenges to these restrictions. As the next Part will show, the *Wirzburger* analysis neglects problems raised by differential amendability, a structure that undermines long-standing principles of citizen control over constitutional change. A new approach is needed that targets this harm and imposes a more rigorous review of the institutional elements, such as subject matter restrictions, that produce it.

## II

### THE HISTORY AND FUNCTION OF STATE CONSTITUTIONS

Part I established that the First Circuit’s review of subject matter restrictions in *Wirzburger* was highly deferential to the state and addressed the wrong harms. This Part shows that existing approaches ignore important concerns raised by subject matter restrictions.

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<sup>81</sup> *Wirzburger*, 412 F.3d at 285. The court had already found that plaintiffs failed to show any discriminatory purpose behind the restrictions. *See supra* text accompanying note 75.

<sup>82</sup> *Wirzburger*, 412 F.3d at 285.

<sup>83</sup> As shown in Part III, however, a novel Equal Protection Clause fundamental rights analysis can draw on tools that have been developed in case law under the Equal Protection Clause and the First Amendment.

Section *A* argues that the history of state constitutionalism, combined with divergent practices at the state and federal levels, has given rise to a distinctive model of American constitutionalism in which the Federal Constitution serves to protect active constitutional engagement at the state level. Section *B* then discusses the harmful effects of subject matter restrictions on constitutional function and design. When considered together, these historical and functional concerns, along with the model of federal and state constitutionalism presented in Section *A*, can provide the foundation for a federal equal protection inquiry into subject matter restrictions.

*A. State Constitutional Distinctiveness and the Emergence of Dual Constitutionalism*

For most of their history, the states have treated constitutions as distinct from ordinary statutory law. This distinctive treatment has often reflected fundamental—though often imperfectly realized—principles of popular sovereignty. At the Founding, only two states followed the now-dominant practice of submitting their constitutions to the voters for approval prior to implementation.<sup>84</sup> Even at the late-colonial stage, however, colonists were beginning to identify constitutions as special instruments that were more important than ordinary legislation.<sup>85</sup> This concept of constitutional distinctiveness informed the framing of the Federal Constitution. Even though the Framers did not seriously consider popular ratification,<sup>86</sup> they recognized that “some process of popular ratification” would give the Constitution “superior authority” as “fundamental law.”<sup>87</sup>

This argument reflected Madison’s belief that the people are “the only legitimate fountain of power, and it is from them that the constitutional charter . . . is derived.”<sup>88</sup> Prudentially and philosophically, the Framers understood the necessity of respecting states qua states in the process of nation-building,<sup>89</sup> and popular involvement therefore

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<sup>84</sup> DODD, *supra* note 13, at 62 (noting that popular ratification was used only in Massachusetts and New Hampshire prior to 1784). According to Dodd, popular ratification developed in New England because the existing town meeting system provided a “workable instrument[ ] for the expression of popular sentiment upon such a question.” *Id.* at 64.

<sup>85</sup> *See id.* at 22 (arguing that first step in development of state constitutionalism was establishment of distinction between constitutions and ordinary legislation).

<sup>86</sup> BORGEAUD, *supra* note 20, at 133.

<sup>87</sup> Jack N. Rakove, *Constitutional Problematics, Circa 1787*, in CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 41, 65 (John Ferejohn et al. eds., 2001).

<sup>88</sup> THE FEDERALIST No. 49, at 245 (James Madison) (Terence Ball ed., 2003).

<sup>89</sup> *See* BORGEAUD, *supra* note 20, at 132 (suggesting that U.S. Constitution was ratified by people acting at state level in part because notion of collective “American people” could not exist prior to adoption of national constitution).

meant using state constitutional conventions to approve the new Constitution.<sup>90</sup> The Framers also expanded the role of the people beyond ratification to amendment, believing that the amendment provision would guarantee the people “a continuing role in the social compact.”<sup>91</sup>

Concerns over constitutional amendment also arose at the state level. For example, during the Revolutionary period Pennsylvania citizens “strong[ly] protest[ed]” a provision in their colonial constitution that made it unamendable for seven years.<sup>92</sup> The fundamental importance of amendability for the colonists can be seen in the fact that many colonial constitutions did not contain any amendment provisions at all: “[I]t was assumed that the people had the inherent right to change their form of government through their elected representatives in legislature or convention.”<sup>93</sup> These amendability concerns stemmed from a shared but often unspoken understanding that constitutions are a special form of law that plays a central role in defining a political community.

After the Founding, further articulation of the distinctive nature of constitutions appeared most fully at the state level. Although colonial constitutions often did not provide for their own amendment,<sup>94</sup> these practices changed in the early years of the new Republic.<sup>95</sup> Almost every state constitution framed after the beginning of the nineteenth century provided for its own amendment.<sup>96</sup> Though the states initially debated how flexible those amendment procedures

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<sup>90</sup> See KATHLEEN O. POTTER, *The Federalist's Vision of Popular Sovereignty in the New American Republic* 55 (2002) (arguing that Madison thought of state constitutional conventions as having ability to speak for people themselves, rather than for states).

<sup>91</sup> *Id.* at 61.

<sup>92</sup> DODD, *supra* note 13, at 40.

<sup>93</sup> JAMES QUAYLE DEALEY, *GROWTH OF AMERICAN STATE CONSTITUTIONS: FROM 1776 TO THE END OF THE YEAR 1914*, at 32–33 (1915); see also James Wilford Garner, *The Amendment of State Constitutions*, 1 AM. POL. SCI. REV. 213, 215 (1907) (noting that although nine of twenty-five eighteenth-century state constitutions contained no provision for amendment, most recognized rights of citizens to “alter, amend or abolish their form of government” (internal quotation marks omitted)).

<sup>94</sup> See *supra* text accompanying note 93.

<sup>95</sup> Despite the pre-Founding experiences in Pennsylvania and elsewhere that suggest some awareness of constitutional distinctiveness, Borgeaud suggests that post-Founding developments were new, rather than a continuation of past practices: “[T]he reign of the people in constitutional legislation in America did not begin until thirty years after the close of the Revolutionary period.” BERGEAUD, *supra* note 20, at 190–91.

<sup>96</sup> *Cf. id.* at 146–51 (discussing adoption of amendability provisions in constitutions of Massachusetts, Connecticut, and New York and asserting that same served as models for entire country); Lutz, *supra* note 21, at 238 (“Americans moved quickly to the conclusion that if a constitution rested upon popular consent, then the people could also replace it with a new one.”).

should be,<sup>97</sup> flexible amendment processes had become the norm by the mid-nineteenth century.<sup>98</sup> At the same time, states began viewing popular ratification as a requirement for constitutional creation and change. Though a novel idea at the Founding,<sup>99</sup> popular ratification became the predominant practice in the states during the nineteenth century. Between 1840 and 1860, for example, popular ratification was used for the adoption of all new state constitutions.<sup>100</sup>

Congress played an important role in expanding the use of popular ratification and consequently reinforcing the relationship between the people and their constitutions. Starting with the enabling act for Minnesota in 1857, Congress required territories seeking admission as states to submit their new constitutions to a popular vote.<sup>101</sup> After the Civil War, Congress imposed a similar requirement on the southern states, forcing them to submit their postwar constitutions to popular vote as a condition of readmission to the Union.<sup>102</sup>

As James Wilford Garner, an early scholar of state constitutions, noted, these developments manifested—however imperfectly—common beliefs about the importance of state constitutions and their relationship to the people:

The right of the people . . . in conformity with the prescriptions of the existing constitution, to alter, amend, or abolish their form of government whenever they deem it necessary to their safety and happiness is, in effect, declared by practically every American bill of rights to be not only fundamental but inalienable and indefeasible.<sup>103</sup>

These evolving principles, however, should be understood in light of the increasing divergence of federal and state constitutional practices. Unlike most state constitutions, the Federal Constitution is highly rigid and difficult to amend.<sup>104</sup> In part because of this rigidity, state constitutions are now, as a practical matter, “closer and more accessible” to the people than the Federal Constitution.<sup>105</sup>

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<sup>97</sup> See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 32–41 (2006) (tracing debate over flexible versus rigid amendment processes).

<sup>98</sup> *Id.* at 41–42.

<sup>99</sup> See *supra* note 84 and accompanying text.

<sup>100</sup> DODD, *supra* note 13, at 65.

<sup>101</sup> BORGEAUD, *supra* note 20, at 177; DEALEY, *supra* note 93, at 44.

<sup>102</sup> Act of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428 (1867); BORGEAUD, *supra* note 20, at 178; DODD, *supra* note 13, at 66.

<sup>103</sup> Garner, *supra* note 93, at 213.

<sup>104</sup> See Víctor Ferreres-Comella, *A Defense of Constitutional Rigidity*, *ANALISI E DIRITTO* 2000, at 45, 46–47, available at [http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi\\_2000/ferreres.pdf](http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi_2000/ferreres.pdf) (describing rigidity of Federal Constitution).

<sup>105</sup> FRANK P. GRAD & ROBERT F. WILLIAMS, *2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMEND-*

This divergence, and the Supreme Court's use of the Federal Constitution as a source of constraints on state political processes, support a dual-systems model of American constitutionalism in which the Federal Constitution forms a rigid protective framework within which more active state constitutionalism can flourish. Like the Supreme Court cases of the 1960s that dealt with the reapportionment of legislative districts, this dual, protective model imposes federal constitutional requirements of openness on state political processes despite the imperfect realization of similar levels of openness at the federal level. In the reapportionment cases, the Supreme Court relied on the Federal Constitution to invalidate state legislative arrangements that did not apportion legislative seats based on a one-person/one-vote principle.<sup>106</sup> The Court found a federal constitutional basis for such invalidation despite "the federal analogy" of the Senate, which is apportioned by state rather than population. The Court found the analogy "inapposite and irrelevant" in *Reynolds v. Sims*:

[T]he Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted. . . .

. . . [The federal system] is one ingrained in our Constitution . . . out of compromise and concession indispensable to the establishment of our federal republic.<sup>107</sup>

Using the dual, protective model to understand federal and state constitutionalism has advantages at both levels. Dual constitution-

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MENTS 8 (2006). This accessibility stems from the ease with which most state constitutions can be amended compared with the Federal Constitution.

<sup>106</sup> See, e.g., *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 717 n.4, 739 (1964) (striking down state senate apportionment scheme organized by regional interests rather than by population); *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) ("Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."); *Baker v. Carr*, 369 U.S. 186, 188 (1962) (holding reapportionment challenge justiciable).

<sup>107</sup> *Reynolds*, 377 U.S. at 573–74. Framing the relationship of the federal and state constitutions using the dual, protective model addresses concerns that the Federal Constitution is not entirely consistent with the understanding of constitutionalism, and its underlying principle of popular sovereignty, that this Section proposes. To be consistent, the Federal Constitution might need to be amendable not only through supermajoritarian legislative processes but also through a popular vote governed by majority rule. See Sanford Levinson, *Designing an Amendment Process*, in CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE, *supra* note 87, at 271, 277–78 (summarizing argument in favor of amendability by majority vote). But under the dual model, concerns about the highly incomplete realization of popular control over constitutional processes at the federal level neglect the unique protective role of the Federal Constitution within the larger dual system as well as the continuing vitality of more open constitutional processes at the state level.

alism uses non-democratic processes at the national level to foster more vibrant democratic engagement at the state level, with national constitutional protections—strengthened by a rigid amendment process that limits popular control<sup>108</sup> and enforced by an often counter-majoritarian judiciary—serving to prevent majoritarian excess and to maintain the effective functioning of state political processes. Both levels become symbiotic components of a larger system that mediates the core tension of constitutional democracy—individual autonomy rights and majoritarian self-government—by bifurcating those interests and assigning primary responsibility for each value to the level of government (and further, to the institution within that level of government) that is uniquely suited to its protection and cultivation. The federal government, with its countermajoritarian judicial and political institutions, assumes ultimate responsibility for individual rights; the states, smaller in size, nimbler in operation, and subject to the political process requirements of federal constitutional law, emerge as the situs of majoritarian self-government and provide a sphere within which majoritarianism can be given as much free rein as is possible in a nation committed to rights-based constitutionalism.

This review shows a long history of recognition, at both the federal and state levels, that constitutions are unique. Indeed, they are not simply another element of the general political process. This history, when considered alongside divergent federal and state constitutional practices, demonstrates a specific understanding of constitutionalism: The Federal Constitution protects citizen participation in the most fundamental political act in which a group can engage—the formation and maintenance of a unifying written constitution—as a way of reinforcing the integrity of majoritarian self-government at the state level.<sup>109</sup> States lose some flexibility in arranging their own constitutional systems, but they gain a federal backstop on threats to state democratic practices. The next Section discusses how subject matter restrictions also implicate functional concerns relating to state constitutional design.

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<sup>108</sup> The U.S. Constitution is unique in its comprehensive rigidity. Even after the flurry of amendments following the Civil War, one commentator argued that “[o]wing to the stringency of the conditions which limit the power of amendment, the Federal constitution has become practically unalterable.” Henry B. Higgins, *The Rigid Constitution*, 20 POL. SCI. Q. 203, 203 (1905).

<sup>109</sup> Cf. GRAD & WILLIAMS, *supra* note 105, at 9 (noting that reapportionment cases “reviv[ed] at least in part, the tradition of activist popular sovereignty” at state level (quoting James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 839 (1991))).

### B. *Constitutional Design and Differential Amendability*

Subject matter restrictions impose subject-specific barriers to constitutional change. As such, they create differential amendability, in which some provisions are more protected against amendment than others. Differential amendability is a notable form of the broader category of superconstitutionalism<sup>110</sup> because it constitutes the entrenchment of the interests of current, often temporary, political majorities against future constitutional change. In other words, political groups might intentionally use subject matter restrictions to manufacture for themselves supermajoritarian power beyond what they actually possess. And even if no group intentionally entrenches itself in this manner, the emergence of differential amendability signals that some group has gained such protection—perhaps accidentally or by chance—as a factual matter. The groups protected by the Massachusetts Excluded Matters restrictions, for example, may simply be unintended beneficiaries of restrictions meant to achieve more altruistic goals.

By restricting access to constitutional amendment processes, subject matter restrictions implicate one of the central challenges of constitutional design: finding an appropriate level of constitutional rigidity.<sup>111</sup> Amendment provisions seek to balance the need for flexi-

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<sup>110</sup> See *supra* note 17 (defining superconstitutionalism).

<sup>111</sup> Different nations answer this challenge in remarkably different ways. Two prominent foreign examples are Germany and India. The German Constitution is divided into amendable structural provisions and unamendable rights and federalism provisions. GRUNDGESETZ [GG] art. 79(3) (F.R.G.). For an English translation, see AXEL TSCHENTSCHER, *THE BASIC LAW (GRUNDGESETZ): THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (MAY 23RD, 1949)* (2003), available at [http://www.oefre.unibe.ch/law/lit/the\\_basic\\_law.pdf](http://www.oefre.unibe.ch/law/lit/the_basic_law.pdf). For a review of the German Constitution, as well as other unamendable provisions in national constitutions, see Sam Brooke, *Constitution-Making and Immutable Principles* 58–71 (Spring 2005) (unpublished masters thesis, Tufts University), available at <http://fletcher.tufts.edu/research/2005/Brooke3.pdf>.

India's constitution, on the other hand, contains no such limitations. As originally designed, the Indian Constitution did not limit the amendment of fundamental rights provisions. Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 268–71 (1996). When the political branches began abusing the amendment process in a way that threatened the stability of the constitutional system, however, the Indian Supreme Court announced its “basic structure” doctrine, which restricted amendment of constitutional elements that the court deemed “basic” to the system itself. *Id.* at 271–72; accord Pratap Bhanu Mehta, *The Inner Conflict of Constitutionalism: Judicial Review and the ‘Basic Structure,’ in INDIA’S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES* 179, 179 (Zoya Hasan et al. eds., 2002). The Indian Supreme Court’s decision to “freeze” pieces of the Constitution reflected the need to find some source of rigidity in the system.

The Indian example highlights the important role that constitutional rigidity can play in a tumultuous political environment. This stabilizing concern, however, has little purchase in the context of American states. Whatever instability exists (or has existed in the past or might exist in the future) is more realistically and appropriately limited by the

bility with the advantages of constitutional stability, “allow[ing] reforms that advance broad interests . . . without undermining [the constitution’s] practical value as a standing routine for advancing majority interests and protecting minorities.”<sup>112</sup>

By creating differential amendability, subject matter restrictions interfere with the ability of citizens to reach an appropriate level of constitutional rigidity. Before discussing how that interference occurs, it is necessary to consider how the drafting process *should* work. During the process of drafting and ratifying a constitution or constitutional amendment, each citizen will like some aspects of the constitution, dislike others, and be indifferent to the rest. Many citizens will not be perfectly content with every element of the overall constitutional system. For the constitution to survive ratification, however, most citizens must be content with the compromises that the constitution embodies. A uniform amendment process will likely strike an appropriate balance between stability and flexibility because it gives each citizen an equal opportunity to attempt to amend the provisions she dislikes.

The fact that each citizen likes some provisions and dislikes others is critical for the design of amendment procedures. A uniform amendment provision achieves the needed balance between flexibility and stability by forcing each voter to incorporate both concerns into her own decisionmaking. To the extent that a citizen favors elements of the constitution, she will favor stability in the form of high barriers to constitutional change. Each citizen also, however, dislikes some elements of the constitution and may want to change those elements in the future. This possibility of the future reform of offensive provi-

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Federal Constitution rather than by making state constitutional provisions unamendable. The existence of an external “backstop” to state politics—in the form of the Federal Constitution and judicial review—precludes reliance on state-level instability to justify state superconstitutionalism.

<sup>112</sup> Bjørn Erik Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, in *DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY: ANALYSIS AND EVIDENCE* 319, 323 (Roger D. Congleton & Birgitta Swedenborg eds., 2006); *see also* BERGEAUD, *supra* note 20, at 42 (“Constitutions, in order to be protective, must be stable and beyond the reach of the legislature. Further, . . . they must be capable of more or less easy modification, that thus the letter of the document may be kept in harmony with the spirit of the national institutions.”). James Wilford Garner’s description of this balance is particularly poetic:

The amending power has been aptly compared to a safety valve which ought to be so adjusted as not to discharge its peculiar function with too great facility lest it become an escape pipe for party passion and political prejudice, nor with such difficulty that the force needed to induce action will explode the machine. That is, it should be so adapted as to reconcile the requisites of safety with those of progress.

Garner, *supra* note 93, at 213–14.

sions causes the citizen to favor flexibility and lower barriers to change. Each citizen, therefore, implicitly balances the competing values of flexibility and stability and favors an amendment process that reflects both concerns. Each citizen's consideration of her own desire to change the objectionable provisions favored by others serves as a proxy for her opponents' desire to change her own favored provisions. The aggregated result of these individual assessments therefore reflects both concerns as well.

Subject matter restrictions distort this balancing process because they allow some citizens to consider only their own interests in stability without also having to weigh those interests against their desires to change provisions they dislike in the future. The balance is undone; the supermajority ignores the value of flexibility, and the minority's consideration of that value has no weight given its lack of power. With subject matter restrictions, not every voter is balancing her own likes and dislikes and proposing an amendment process that reflects both flexibility and stability concerns. For example, imagine that on a particular issue, a state's citizens are currently divided into two groups: Group *A*, which constitutes a supermajority with enough power to amend the state constitution, and Group *B*, which includes everyone else. Group *A* employs the initiative process to amend the state constitution to include a new provision that contains a policy preferred by Group *A*. The provision also protects that policy against future constitutional change by prohibiting amendment of the provision by constitutional initiative.<sup>113</sup> And, like the Massachusetts Excluded Matters restrictions, the no-amendment clause is itself unamendable by initiative. Group *A* has now designed a future in which it has full, unbridled amendment access to the provisions of the constitution that it dislikes, while Group *B* will lack such power with respect to *A*'s chosen policies. Even when *A*'s power declines and the opposition gains supermajority power, *B* will be unable to undo what *A* froze into place because all initiatives altering that provision are prohibited. *B* could only amend the provision by persuading the legislature to amend the constitution on its behalf.<sup>114</sup>

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<sup>113</sup> Alternatively, Group *A*'s favored policy might already appear in the state constitution, and thus the group might simply add a provision prohibiting amendment of that policy through initiative.

<sup>114</sup> A more concrete example might be helpful to elucidate this process. Assume that a state's constitution permits amendment through a legislative majority vote with popular ratification by a majority vote. Suppose that an anti-alcohol group currently commands fifty-one percent of the vote but realizes that its support is quickly waning. The group uses its control over the legislature and its majority among voters to pass and ratify an Anti-Alcohol Amendment that bans alcohol statewide.

In its most egregious form, differential amendability creates the risk that temporary political majorities will constitutionalize their own policies and then give those policies special protection against future majorities without having to give the same protection to the constitutional interests of others. Even when used for more noble reasons, however, such as intergroup compromise or protection of a minority group, separating one substantive policy or provision from the remainder of the constitution and then giving it special protection undermines the process of compromise and balance we would expect in the design of a constitution and its amendment procedures. Rather than the people using the amendment process to bind themselves against future undesirable temptations, what occurs is the use of the amendment process by a temporary political majority to bind the minority to the substantive status quo.<sup>115</sup>

All constitutionalism results in entrenchment; that is, to a great extent, the point.<sup>116</sup> Here, however, the entrenchment does not simply protect the policy against future majoritarian change, thereby giving it a degree of protection that is in a sense “equal” to the popular vote that produced it. Instead, the entrenchment here gives the policy a degree of protection that goes above and beyond the popular vote needed to create it—allowing a fifty-one percent majority, for example, to protect its policy against anything less than a two-thirds majority in the future. Proponents thereby manufacture for themselves supermajoritarian power beyond that which they actually possess.

This model is highly simplified. In Massachusetts, for example, the Excluded Matters provision was added to the state constitution through a constitutional convention and ratified by a majority in a popular vote.<sup>117</sup> The group favoring the 1917 amendment needed *X*

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Now suppose that the Anti-Alcohol Amendment contains an exception to the normal amendment process: Any amendment relating to alcohol must be ratified by a two-thirds majority. At that point, even when pro-alcohol groups gain a fifty-one percent majority—or a sixty percent or even sixty-five percent majority—they will be unable to reverse the prohibition by amendment. The anti-alcohol group will have successfully entrenched its political preferences without being forced to do so through the more typical and less restrictive amendment process.

<sup>115</sup> Cf. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 516–17 (1997) (describing problem of intertemporal entrenchment in context of partisan gerrymandering), cited in *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1110 (10th Cir. 2006) (en banc) (Lucero, J., dissenting).

<sup>116</sup> See generally, e.g., JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 88–174 (2000) (discussing constitutions as precommitment devices).

<sup>117</sup> See *supra* note 29 and accompanying text. Further complicating the analysis is the fact that the convention was itself called through a popular referendum submitted to the voters by the state legislature. See *supra* note 29.

amount of political power; an exact figure is impossible to calculate. After 1917, when amending a non-excluded matter, a political group would need the same amount of power ( $X$ ) or possibly even less than that amount ( $Y$ ) to amend the constitution, as the 1917 amendment expanded methods of constitutional change (by adding the initiative).

If citizens wish to amend an Excluded Matter, however, they will sometimes need an amount of power greater than  $Y$ , and possibly greater than  $X$ . Massachusetts history shows that the initiative process is sometimes the preferred method of constitutional change.<sup>118</sup> Citizens prefer the initiative process at these times because it is easier to use than the legislative amendment route; it would be highly irrational for them to choose an unnecessarily onerous method of constitutional change. Sometimes, however, when citizens want to use the initiative process, they will be blocked by the Excluded Matters provision. The group that added the Excluded Matters provision in 1917 imposed greater barriers to revision on the opposition than on themselves,<sup>119</sup> and they may also have imposed barriers to future change that were greater than the barriers they faced at the time.

This selective entrenchment distorts the functioning of state constitutionalism and undermines core principles of popular sovereignty. Judicial treatment of subject matter restrictions, however, does not recognize this threat. This failure is preventable: Established case law suggests a role for the Federal Constitution in protecting the vibrancy of state democratic practices.<sup>120</sup> The next Part argues that existing doctrine can provide the foundation for a federal constitutional inquiry in this area.

### III

#### A DOCTRINAL FRAMEWORK: THE POSSIBILITY OF A JUSTICIABLE CLAIM

As shown in Part II, the state constitution is a political structure that has long been considered unique. Because state and federal constitutional practices have diverged, we should view the Federal Constitution as establishing a protective framework within which state constitutional practices can flourish. Subject matter restrictions threaten those practices by upsetting the balance of flexibility and

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<sup>118</sup> See *infra* notes 174–78 and accompanying text (describing history of constitutional amendment in Massachusetts since adoption of initiative process).

<sup>119</sup> The group applied some barriers to itself, such as the signature requirements that apply to all constitutional initiatives. See *supra* text accompanying notes 24–26.

<sup>120</sup> See *supra* notes 104–09 and accompanying text (discussing role of Federal Constitution in supporting citizen participation at state level in context of reapportionment cases of 1960s and 1970s).

rigidity that is so crucial to constitutional design. Federal constitutional scrutiny is therefore normatively desirable and, as shown in this Part, constitutionally justified.

This Part proposes scrutinizing subject matter restrictions through an Equal Protection Clause fundamental rights analysis. Section *A* lays out the doctrinal framework that courts should apply. Section *B* then addresses two counterarguments to this framework: first, that the political question doctrine should block judicial review; and second, that federalism concerns require a less intrusive approach. Section *C* provides a preliminary application of the Equal Protection framework to the restrictions at issue in *Wirzburger*.

#### *A. Foundations and Contours of an Equal Protection Inquiry*

Fundamental rights analysis under the Equal Protection Clause allows for a high level of judicial scrutiny of certain legal classifications that do not involve a suspect class.<sup>121</sup> The reviewing court first asks whether the classification at issue implicates a right that it considers “fundamental”; if so, the court reviews that classification using strict scrutiny rather than rational basis review.<sup>122</sup> Such review is appropriate here: Subject matter restrictions implicate state citizens’ fundamental right of control over mechanisms of state constitutional change.

Several factors justify treating citizen control over state constitutional change as a fundamental right: the long history of constitutional distinctiveness and expanding citizen control over state constitutions;<sup>123</sup> the functional concerns raised by subject matter restrictions;<sup>124</sup> and the normative vision of American constitutionalism that relies on the rigid stability of the Federal Constitution to serve as a backstop for more active and engaged state constitutional

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<sup>121</sup> This Note argues for a fundamental rights approach, rather than a suspect class or animus test under the Equal Protection Clause because the difficulty of proving the needed discriminatory intent or animus in those scenarios would prevent almost all claims from succeeding. This difficulty is prominent in *Wirzburger* itself. *See supra* notes 69–83 and accompanying text. There is also no reason to limit review to those situations where the subject matter restrictions reflect a malicious intent; those favoring entrenchment may have altruistic motives and may not realize the harm they are causing to the state’s overall constitutional design.

<sup>122</sup> *See, e.g.*, *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (“We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (applying strict scrutiny to state’s use of sterilization as form of criminal punishment because “one of the basic civil rights of man” was involved).

<sup>123</sup> *See supra* Part II.A (reviewing history of state constitutionalism).

<sup>124</sup> *See supra* Part II.B (discussing differential amendability concerns).

practices.<sup>125</sup> Voting rights case law provides additional support for this conclusion. The right to vote has long been considered a fundamental right,<sup>126</sup> and the political process concerns that underlie voting rights<sup>127</sup> apply equally—if not more fully—in the context of constitutional processes.

A fundamental rights analysis of subject matter restrictions, however, raises the question of whether strict scrutiny, still conventionally viewed as “strict in theory and fatal in fact,”<sup>128</sup> might be too searching in some circumstances. To address the fact- and state-specific nature of state constitutional processes, courts would likely need a standard of review that reflects the unique importance of state constitutional change but respects the autonomy of state political processes.

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<sup>125</sup> See *supra* notes 104–09 and accompanying text (discussing role of Federal Constitution in supporting citizen participation at state level in context of reapportionment cases of 1960s and 1970s).

<sup>126</sup> E.g., *Bush v. Gore*, 531 U.S. 98, 104 (2000) (“When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental . . . .”); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969) (“[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.”); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (“[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. . . . Those principles apply here.”); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (“We deal here with matters close to the core of our constitutional system. ‘The right . . . to choose,’ . . . means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State.”) (citation omitted); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (“Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections.”); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (characterizing franchise as “a fundamental political right,” despite its status as a “privilege” rather than natural right, because it is “preservative of all rights”). As Samuel Issacharoff has noted, *Bush v. Gore*’s reliance on the Equal Protection Clause for its holding “revived the fundamental rights line of cases from the 1960s, most notably *Reynolds* and *Harper v. Virginia Board of Elections*, that had essentially collapsed of its own weight decades ago.” Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 648 (2001) (footnote omitted).

<sup>127</sup> Political process considerations are well established and draw on the powerful insight of Footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), that “more exacting judicial scrutiny” might be necessary when courts review challenges to “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.” *Id.* at 152 n.4.

<sup>128</sup> E.g., Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). A recent study argues that strict scrutiny is not actually quite so fatal in fact; the challenged state action survives the review in almost one out of every three strict scrutiny cases. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006). Even those numbers show that strict scrutiny usually defeats the challenged state action, however, and it remains unclear whether successes reflect satisfaction of strict scrutiny requirements or erosion of the strict scrutiny standard itself.

Courts have encountered a similar challenge in the First Amendment context when resolving challenges to state regulation of elections. As shown in *Burdick v. Takushi*,<sup>129</sup> the Supreme Court has overcome that challenge through the use of a balancing test.<sup>130</sup> The *Burdick* plaintiff challenged Hawaii's prohibition of write-in voting as a violation of the First Amendment.<sup>131</sup> In upholding the prohibition, the Court noted that laws burdening "the right to vote" are not necessarily subject to strict scrutiny.<sup>132</sup> Instead, the Court applies "a more flexible standard" in which "the rigorousness of [its] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."<sup>133</sup> This approach takes into account the reality that, "as a practical matter," elections must be regulated "if they are to be fair

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<sup>129</sup> 504 U.S. 428 (1992).

<sup>130</sup> The Court's use of a balancing test when reviewing election regulations is consistent with its review of other content-neutral regulations. Content-neutral regulations, including most election regulations, "limit expression without regard to the content or communicative impact of the message conveyed." Stone, *supra* note 58, at 48. Some content-neutral regulations do not demand strict scrutiny, *e.g.*, *Kovacs v. Cooper*, 336 U.S. 77, 87–89 (1949) (upholding use of sound trucks on public streets), but others impose so high a burden on speech that stronger review is needed, *see, e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 526–28 (1981) (Brennan, J., concurring) (finding ban on most billboards to be unconstitutional content-neutral regulation). The Court has dealt with this disparity by employing a balancing test. Stone, *supra* note 58, at 58 ("[T]he greater the interference with the marketplace of ideas, the greater the burden on government to justify the restriction."). Pegging the level of review to the regulation's impact on speech allows courts to give appropriately rigorous scrutiny to regulations that pose the risk of "suppress[ing] too much speech," *see City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (noting that content-neutral regulation that "foreclos[es] entire media" might "suppress too much speech"), without giving similarly searching review to less problematic regulations.

<sup>131</sup> *Burdick*, 504 U.S. at 430.

<sup>132</sup> *Id.* at 432.

<sup>133</sup> *Id.* at 434. *Burdick* was not the first case to use a balancing approach in determining the standard of review. *E.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (rejecting "litmus-paper test" approach to election law challenges and instead reviewing state filing deadline for independent presidential candidates by balancing "the character and magnitude of the asserted injury to [constitutional] rights" against state's justification); *Bullock v. Carter*, 405 U.S. 134, 142 (1972) ("The threshold question to be resolved is whether the filing-fee system should be sustained if it can be shown to have some rational basis, or whether it must withstand a more rigid standard of review." (footnote omitted)). Since *Burdick*, the Court has continued to apply a balancing test in election-related cases. *See, e.g.*, *Clingman v. Beaver*, 544 U.S. 581, 586–87 (2005) (noting that while "[r]egulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest," regulations that "impose lesser burdens" are valid if state has "important regulatory interests" and restrictions are "reasonable" and "nondiscriminatory" (citation omitted) (internal quotation marks omitted)); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (weighing burden of state's rule on First and Fourteenth Amendment associational rights against state interest and necessity of burden (citing *Burdick*, 504 U.S. at 434)).

and honest.”<sup>134</sup> These regulations “invariably impose some burden”<sup>135</sup> on voters and “inevitably affect[ ] . . . the individual’s right to vote and his right to associate with others.”<sup>136</sup> Applying strict scrutiny to all election regulations “would tie the hands of States” in regulating the process.<sup>137</sup>

A similar balancing approach should be used to evaluate state constitutional processes. Courts would be able to aggressively review regulations, such as subject matter restrictions, that severely infringe on state constitutional amendability and raise serious functional concerns. At the same time, however, courts would retain the flexibility they need to avoid becoming entangled in state constitutional and administrative matters that do not raise serious historical or functional concerns.

Balancing tests are often criticized,<sup>138</sup> and the arguments against them have by now become familiar. According to critics, balancing tests fail to restrain biased judicial decisionmaking, ensure consistency in application of legal rules, guide private actors by providing predictable rules, and restrain politicized decisionmaking.<sup>139</sup> Despite such concerns, however, balancing tests remain in use in the election law context and in First Amendment jurisprudence more generally. This continuing use reflects the advantages of a context-sensitive review that closely tracks the values and needs involved in each particular case.<sup>140</sup> Whether a more categorical doctrinal test for state democratic practices might be less vulnerable to the weaknesses of balancing tests merits further study. Until commentators or courts develop such a test, however, there is little reason to refrain from employing an approach that applies in other areas, voting rights and election law cases, that share so many of the interests and challenges involved in reviewing state constitutional processes.

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<sup>134</sup> *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)) (internal quotation marks omitted).

<sup>135</sup> *Id.* at 433.

<sup>136</sup> *Id.* (quoting *Anderson*, 460 U.S. at 788) (internal quotation marks omitted).

<sup>137</sup> *Id.*

<sup>138</sup> See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943, 944–45 (1987) (arguing for reinvigorating of debate over appropriateness of balancing tests).

<sup>139</sup> Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 *IOWA L. REV.* 261, 266–67 (1995) (discussing arguments made by advocates of constitutional rules as opposed to standards).

<sup>140</sup> *Cf. id.* at 266 (describing advantages of standard-based decisionmaking).

### B. *The Political Question of State Autonomy*

This fundamental rights inquiry raises two immediate and important concerns. First, federalism principles might counsel against a federal constitutional inquiry into state constitutional structures. Second, if challenges to subject matter restrictions are viewed as claims under the Republican Guarantee Clause,<sup>141</sup> they may be nonjusticiable because of the political question doctrine.

#### 1. *The Federalism Implications of a Federal Constitutional Inquiry*

My proposal for federal judicial review may raise serious federalism concerns. State constitutions are important not only as the expression of popular sovereignty at the state level but also as the embodiment of the sovereignty of states themselves.<sup>142</sup> In the absence of animus then,<sup>143</sup> why not allow states to design their constitutions as they wish and rely solely on the political process to remedy any problems?

The answer is that the choice is not between a federal and a state remedy, but instead between a federal remedy and no remedy whatsoever. It is unrealistic to expect states to police their own constitutional practices, particularly once the subject matter restrictions are in place. Subject matter restrictions constitute “political lockups” in the market for political control.<sup>144</sup> The very essence of subject matter restrictions is their “anti-competitive” nature:<sup>145</sup> They raise a barrier to those wishing to enter the constitutional sphere. State citizens cannot redress these restrictions on their own without surmounting the very barrier the restrictions impose. State judicial review cannot circumvent this barrier, as most state judges are elected and thus accountable to the very forces likely to engage in anti-competitive political behavior.<sup>146</sup> Legislative avenues of redress are also likely to be

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<sup>141</sup> U.S. CONST. art. IV, § 4.

<sup>142</sup> Cf. *supra* text accompanying notes 93–100 (describing emergence of constitutional distinctiveness at state level).

<sup>143</sup> Cf. *Romer v. Evans*, 517 U.S. 620, 635 (1996) (invalidating state constitutional provision because it could not reflect anything other than animus toward targeted group).

<sup>144</sup> See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 651 (1998) (defining one type of political lockup as “a precommitment pact among existing elites that frustrates easy penetration by outsiders”).

<sup>145</sup> *Id.* at 646 (“[P]olitics shares with all markets a vulnerability to anticompetitive behavior.”).

<sup>146</sup> See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1128 (1977) (arguing that election of state judges makes them less likely than federal judges to resist majoritarian pressures when deciding cases). An additional barrier to state judicial review of subject matter restrictions would be identifying an authority, other than the Federal Constitution, that would justify a state judicial override of a state constitutional provision.

unhelpful in precisely those situations when they are needed, i.e., when state citizens choose to amend the state constitution through initiative rather than legislative means. A federal inquiry is therefore needed “to ensure an appropriately competitive [political market].”<sup>147</sup> That federal inquiry would bring into the realm of actualized constitutional decision rules the dual model of state and federal constitutionalism outlined in Part II.A<sup>148</sup> (the equivalent, in this case, of what Mitchell Berman has termed “constitutional operative propositions”<sup>149</sup>).

## 2. *Political Question Constraints*

Even if differential amendability must be remedied at the federal level, a critical question is whether that federal remedy should be judicial or political. One might argue in favor of a political remedy by claiming that judicial challenges against subject matter restrictions are actually Republican Guarantee Clause claims in disguise.<sup>150</sup> If the challenges are understood as Guarantee Clause claims, they are barred by the political question doctrine. This comparison with Guarantee Clause claims would be logical. The problem with subject matter restrictions is that they interfere with the proper functioning of state constitutional systems on a structural level by creating a system that is unevenly amendable. Claims brought against subject matter restrictions thus rest on concerns about the structure of state government rather than on substantive legal concerns.<sup>151</sup>

A consistent series of Supreme Court cases finding the Guarantee Clause nonjusticiable evidences the Court’s wariness of inquiring into such structural matters. The Court first recognized the problematic nature of federal constitutional inquiries into state government structures in *Luther v. Borden*.<sup>152</sup> There, Luther sued state officials for entering his home during an anti-rebellion campaign.<sup>153</sup> When the officials raised a sovereign immunity defense, Luther argued that the

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<sup>147</sup> Issacharoff & Pildes, *supra* note 144, at 648.

<sup>148</sup> See *supra* text accompanying notes 104–09.

<sup>149</sup> Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 51 (2004) (defining constitutional operative propositions as “judge-interpreted constitutional meaning”).

<sup>150</sup> See U.S. CONST. art. IV, § 4.

<sup>151</sup> Litigants will often challenge subject matter restrictions because those restrictions interfere with their substantive goals, but in bringing the challenge they are attacking the structure itself rather than the substantive law they wish to change. Substantive challenges are also possible, see Brief of Plaintiffs, *supra* note 1, at 41–49 (arguing that Massachusetts Religion Exclusion violates Free Exercise Clause), but they are separate from the categorical challenge to subject matter restrictions proposed in this Note.

<sup>152</sup> 48 U.S. (7 How.) 1 (1849).

<sup>153</sup> *Id.* at 34.

Rhode Island chartist government, which was governed by Rhode Island's colonial charter, was non-republican and thus could not lawfully authorize the officials' actions.<sup>154</sup> Without state authorization, the officials could not invoke sovereign immunity. To resolve the case, the Court would have had to decide which of two competing governments was the legitimate government of Rhode Island at the time of the incident.

In the face of this challenge, the Court established the nonjusticiability of the Republican Guarantee Clause, holding that federal courts do not have "the power [to] determin[e] that a State government has been lawfully established."<sup>155</sup> This conclusion rested on two primary arguments, one prudential and one constitutional.<sup>156</sup> From a prudential perspective, the Court lacked any standards for resolving the claim.<sup>157</sup> The Court also argued that the Constitution committed the decision of such "political" claims to the political branches and to Congress in particular.<sup>158</sup>

*Luther*, which remains controlling law, was reinforced by later cases such as *Pacific States Telephone & Telegraph Co. v. Oregon*,<sup>159</sup> where the Court upheld Oregon's adoption of the initiative and referendum against a Guarantee Clause challenge.<sup>160</sup> Subject matter restriction challenges raise the same difficulty as both *Luther* and *Pacific States*: a lack of clear standards for determining when a state's governmental structure is "republican."<sup>161</sup>

Despite these legitimate concerns, the political question doctrine does not prevent federal courts from engaging in the equal protection inquiry presented in Part III.A. As in the voting rights context, where the Supreme Court is willing to enforce federal constitutional limita-

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<sup>154</sup> *Id.* at 37–38.

<sup>155</sup> *Id.* at 40.

<sup>156</sup> The conceptual division between prudential and constitutional justifications for the political question doctrine came long after *Luther*. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 246–63 (2002) (describing early adoption of "classical" political question doctrine, which is "constitutionally based," and later emergence of prudential political question doctrine, which "is not anchored in an interpretation of the Constitution itself, but is instead a judge-made overlay"). I borrow the division here to simplify the analysis.

<sup>157</sup> *Luther*, 48 U.S. at 41.

<sup>158</sup> *Id.* at 42.

<sup>159</sup> 223 U.S. 118 (1912).

<sup>160</sup> *Id.* at 148–51. *Luther* was again reaffirmed (though limited in important ways, see *infra* text accompanying notes 162–66) in *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>161</sup> In the context of state constitutional change, this difficulty is compounded by the threat that the federal inquiry itself poses to state popular sovereignty. An overly aggressive jurisprudence in this area would independently implicate and infringe upon the power of state citizens to make their own decisions about state government. This threat is addressed in Part III.B.1, *supra*.

tions on state government structures, an equal protection framework protects important federal rights while preventing a standardless foray into state practices.

A prominent example is *Baker v. Carr*,<sup>162</sup> where Tennessee voters challenged the State's failure to reapportion the state legislature despite demographic changes in the state.<sup>163</sup> The Court reaffirmed that the challenge could not be addressed under the Republican Guarantee Clause, given the many cases holding that claims brought under the Clause were nonjusticiable.<sup>164</sup> Still, the Court found that the challenge was justiciable under the Equal Protection Clause.<sup>165</sup> Political question concerns did not preclude the Equal Protection claim: "[T]he nonjusticiability of claims resting on the Guaranty Clause, which arises from their embodiment of questions that were thought 'political,' can have no bearing upon the justiciability of the equal protection claim presented in this case."<sup>166</sup> *Baker* thus established that federal courts may inquire into state political structures when the challenge proceeds under the Equal Protection Clause, leaving *Luther* as a warning not against any judicial inquiry but rather against a judicial inquiry that is unconstrained in its operation.

Equal protection analysis, though still raising serious and ongoing concerns about the contours of any judicial inquiry, cabins judicial review in an important way. The use of the Equal Protection Clause limits the universe of possible cases by focusing the inquiry on the one subset of state restrictions where there is most to fear: areas of differentiation. Subject matter restrictions are problematic precisely because of their differentiation among groups.<sup>167</sup> They constitute

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<sup>162</sup> 369 U.S. 186 (1962).

<sup>163</sup> *Id.* at 187–93.

<sup>164</sup> *Id.* at 223–24. The Court refused to rely on the Republican Guarantee Clause when addressing the constitutionality of a state's apportionment because of the *Luther* holding that "the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government." *Id.* at 223.

<sup>165</sup> *Id.* at 226.

<sup>166</sup> *Id.* at 228.

<sup>167</sup> Although viewing subject matter restrictions as targeting groups rather than issues might seem a stretch, the decision in *Romer v. Evans*, 517 U.S. 620 (1996), suggests that the Supreme Court might be willing to do so. In *Romer*, the Court viewed a restriction on legislation concerning a specific subject—antidiscrimination protection for gays and lesbians—as a restriction of the rights of a specific group (homosexuals) rather than as a neutral restriction on all voters. *See id.* at 633 ("A law declaring that in general it shall be more difficult for *one group of citizens* than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." (emphasis added)). That view of the restriction may indicate a willingness to step outside of formalistic categorization and acknowledge that "subject-based" restrictions on access to the political process often target groups rather than issues.

selective entrenchment, or the use of barriers to constitutional change by one political group against its opponents.<sup>168</sup>

Once again, voting rights doctrine provides evidence of the important limiting function this approach can serve. Because voting rights cases are adjudicated under the Equal Protection Clause, a court need not inquire into the first-order question of whether or not the state must provide voting rights. As the Supreme Court has noted, “the right to vote in state elections is nowhere expressly mentioned.”<sup>169</sup> Whether or not there is a federally protected right to vote in state elections, however, “once the franchise is granted to the electorate,” barriers to voting are subject to review under the Equal Protection Clause.<sup>170</sup> Using the Equal Protection Clause as the foundation for analyzing voting rights claims allows courts to avoid inherently open-ended questions about when a state’s failure to extend voting power to the entire electorate constitutes an unconstitutional deprivation.

An equal protection approach achieves similar results here. While subject matter restrictions, which impose differentiated restrictions, would come within the zone of judicial cognizance, generalized structural claims (such as a challenge to a state constitution’s general amendment provision) would not. The distinction drawn here between generalized inquiries and inquiries into areas of differentiation may not be justifiable as a matter of constitutional theory. Because federal judicial inquiries into state political practices are admittedly problematic, however, the federal system benefits from cabining the sphere of possible inquiries. Restricting the sphere of cases is one way to do so, and focusing resources on areas of differentiation makes some sense given the stronger possibility of a political (rather than judicial) remedy in those situations where the policy at issue affects all citizens rather than one category alone.

### C. *Reviewing the Massachusetts Restrictions*

When applied to subject matter restrictions, the equal protection analysis outlined in Part III.A proceeds in two steps. First, the court must determine the appropriate level of scrutiny by asking how severely the subject matter restriction creates inequality in citizen control over state constitutional change. Second, the court must look to whether the state interest involved justifies the restriction and whether the restriction is sufficiently related to achieving that interest.

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<sup>168</sup> See *supra* Part II.B.

<sup>169</sup> *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966).

<sup>170</sup> *Id.*

Depending on the answer at step one, the court will require one of three showings by the state: an articulable reason and plausible connection (rational basis review), an important state interest and substantially related means (intermediate scrutiny), or a compelling state interest and narrow tailoring (strict scrutiny).

*1. Step One: Standard of Review*

The first question is how much inequality the subject matter restriction creates in the area of citizen control over state constitutional change. In answering this question, the court should consider the nature of the restriction and the landscape of constitutional change in that state. The nature of the restriction appears directly on its face. For example, the Massachusetts Excluded Matters provision entirely prohibits use of the initiative to amend specific substantive areas of the Massachusetts Constitution. The provision thus does not simply create an additional burden to popularly initiated change on these subjects, but instead prohibits it altogether.

The impact of this restriction, and whether it creates cognizable inequality, can only be considered in the context of the state's larger landscape of constitutional change. The court must determine whether the subject matter restriction takes away what would otherwise be a meaningful way to effect change for certain issues, thereby creating differential amendability. If constitutional initiatives must go through the same legislative process as other constitutional amendments, for example, the constitutional initiative may not be a meaningful mechanism of constitutional change. If the constitutional initiative is the only method of constitutional change, on the other hand, it would be a highly important mechanism of constitutional change. In that case, subject matter restrictions would create differential amendability—a paradigmatic form of inequality in the market for citizen control. Again, the question is not whether state citizens retain any other method through which they can change the state constitution, but instead whether the subject matter restriction and the broader amendment environment combine to create differential amendability on a specific subject.

The Massachusetts example is instructive in this regard. The Massachusetts Constitution provides two avenues for constitutional change: (1) a constitutional initiative, which requires the initiative petition, a twenty-five percent vote of the state legislature in two consecutive legislative sessions, and then a majority popular vote;<sup>171</sup> and (2) the legislative amendment, whereby the state legislature may pro-

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<sup>171</sup> See *supra* text accompanying notes 24–26.

pose its own amendment to the state constitution by passing the amendment with a simple majority in two consecutive legislative sessions, which amendment is then presented to the voters for ratification by majority vote.<sup>172</sup> Both avenues impose heavy burdens on any attempt at constitutional change, but only the constitutional initiative route is subject to the Excluded Matters provision.<sup>173</sup>

Citizens and lawmakers alike have been able to navigate this process and initiate constitutional change despite these burdens. Between 1919 and 2004, citizens voted on sixty-six proposed amendments.<sup>174</sup> Fifty-five passed.<sup>175</sup> Of the proposed amendments, sixty-three were legislative amendments, proposed by the state legislature, and only three were initiative amendments and thus affected by the Excluded Matters provision.<sup>176</sup> Of the ratified amendments, fifty-three were legislative amendments and two were initiative amendments.<sup>177</sup>

Thus, although the Massachusetts constitutional initiative is rarely used, it is a viable mechanism of constitutional change that is sometimes preferable to the legislative amendment process.<sup>178</sup> That Massachusetts offers a method of popular initiatives indicates an understanding that legislative amendments alone are inadequate to provide all channels of constitutional change. Blocking use of the constitutional initiative for a long list of substantive areas undermines that policy. In such a context, the Excluded Matters provision, which constitutes a total ban on constitutional initiatives dealing with certain subjects, creates differential amendability by making it harder, under some circumstances, to amend certain provisions of the state constitu-

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<sup>172</sup> MASS. CONST. amend. art. XLVIII, pt. IV.

<sup>173</sup> See *supra* text accompanying notes 27–33.

<sup>174</sup> ELECTIONS DIV., OFFICE OF THE SEC'Y OF THE COMMONWEALTH, AN OVERVIEW OF THE MASSACHUSETTS STATEWIDE BALLOT MEASURES: 1919–2004, at 1, <http://www.sec.state.ma.us/ele/elebalm/balmpdf/balmttype.pdf> (last visited June 18, 2007). This figure does not include the recent attempt to amend the Massachusetts Constitution to prohibit same-sex marriage, see generally [VoteOnMarriage.org](http://VoteOnMarriage.org), <http://voteonmarriage.org> (last visited June 18, 2007) (website of official sponsoring organization of failed Massachusetts Protection of Marriage Amendment), which failed in June 2007 when amendment supporters were unable to gain the votes of twenty-five percent of the state legislature in two successive sessions. Maria Sacchetti, *Gay-Union Foes Vow to Target Legislators*, BOSTON GLOBE, July 24, 2007, at B1.

<sup>175</sup> ELECTIONS DIV., *supra* note 174, at 1.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> It is impossible to predict, of course, whether state citizens would have employed the initiative process more often if that process were not limited by the Excluded Matters provision. The small number of instances in which citizens engaged the initiative process may then reflect obstacles created by the subject matter restriction, rather than the general relevance of this initiative process.

tion.<sup>179</sup> Strict scrutiny would be appropriate here because of the restriction on citizen control over constitutional change being considered—the subject matter restrictions on constitutional initiatives. The existence of another avenue of constitutional change (the legislative amendment) does not change this conclusion. Because the inquiry is based on an equal protection analysis, the triggering harm is the differentiation, not the burden on citizen control in absolute terms. An inquiry into how the regulation burdens citizen control in absolute terms would be more appropriately framed as a Due Process Clause question.<sup>180</sup> Thus, a regulation banning any amendment of a state constitution would not violate the Equal Protection Clause under the terms of the doctrinal framework proposed in this Note, but it might violate a conceivable Due Process Clause norm because of its severe restriction on citizen control over constitutional change. Conversely, the reduction of the burden on the fundamental right, in the form of legislative amendments, might weigh against strict scrutiny in a Due Process test, but it does not have a similar effect in an Equal Protection environment that focuses on differentiation rather than absolute burden.

## 2. *Step Two: The State Interest*

As a preliminary matter, a state interest in preventing constitutional change is insufficient. This rule is contrary to the approach in *Wirzburger*, where the First Circuit explicitly found that the Anti-Aid and Religion Exclusions were designed to meet a valid state interest in restricting amendment of the state constitution.<sup>181</sup> The proposed Equal Protection analysis in this Note takes a different approach by scrutinizing restrictions on citizen control over state constitutional change in terms of whether they satisfy an independent state objective. States must do more than blindly assert an interest in constitutional stasis.<sup>182</sup>

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<sup>179</sup> This situation would arise, for example, where popularly initiated change would be preferable to legislatively initiated change, but where the change being sought relates to one of the prohibited subjects.

<sup>180</sup> A Due Process analysis could proceed either through a fundamental rights framework or possibly as an inquiry into whether the regulation infringes on rights inherent in the concept of “ordered liberty.”

<sup>181</sup> *Wirzburger v. Galvin*, 412 F.3d 271, 279 (1st Cir. 2005), *cert. denied* 546 U.S. 1150, 1150 (2006).

<sup>182</sup> A claimed interest in constitutional stasis is insufficient because it does not explain why the state is engaging in differential amendability rather than imposing heightened barriers to amendments of all sorts. Rejecting constitutional stasis at the interests stage is not necessary; the court simply could dismiss it at the tailoring stage. Subject matter restrictions are poorly tailored to achieving comprehensive constitutional stasis and a total ban on amendment would be far more effective. The obviousness of this mismatch between

Beyond that preliminary matter, the question remains what type of state interest can justify subject matter restrictions such as the Massachusetts Excluded Matters provision. Though subject matter restrictions that function as complete bans on a meaningful mechanism of constitutional change may be simply indefensible, this Section suggests one state interest that might, under some unique circumstances, justify subject matter restrictions: an interest in protecting the openness of the state's political process. The more important point, however, is that this is the question that should be at the core of the debate. Federal courts, state governments, and state citizens have not yet engaged in a serious dialogue about when subject matter restrictions and the differential amendability they create are acceptable despite their functional implications and conflict with important principles of popular sovereignty. The judicial inquiry envisioned by this Note will force this issue to the surface and cultivate a dialogue about the nature of constitutional change at the state level.<sup>183</sup>

Although conclusions are thus premature, one state interest that might justify subject matter restrictions is an interest in maintaining an open (or "competitive") political process.<sup>184</sup> For example, suppose that a state, like Massachusetts, offers both a legislative amendment process and an initiative amendment process. Furthermore, this state imposes a subject matter restriction. Unlike the Excluded Matters provision, however, the restriction applies only to constitutional amendments initiated by the legislature: The restriction prohibits legislative amendments that limit the constitutional initiative process.

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interest and tailoring makes it appropriate to inquire beyond status at the state interest stage because what the state is really claiming is an interest in selective constitutional provisions. Such status is, of course, exactly what the state has achieved in adopting a subject matter restriction, but the interests question is meant to get at why the state is acting in this way, not just at whether the state is aware of the nature of its own conduct. The superficiality of a status response at the interests stage justifies the demand that the state proffer a meaningful state interest rather than provide sterile answers that go toward answering the question of "what" the state is doing rather than "why" it is doing so.

<sup>183</sup> As Alexander Bickel famously pointed out almost a half century ago:

The Court often provokes consideration of the most intricate issues of principle by the other branches . . . and there are times also when the conversation starts at the other end and is perhaps less polite. Our government consists of discrete institutions, but the effectiveness of the whole depends on their involvement with one another, on their intimacy, even if it often is the sweaty intimacy of creatures locked in combat.

ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 261 (2d ed. 1986).

<sup>184</sup> As John Hart Ely noted, "ensuring broad participation in the processes and distributions of government" is a core commitment of the U.S. Constitution. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87 (1980).

This restriction would create differential amendability by making it harder, at least in some situations, to amend the constitutional initiative process. Yet it might be desirable to allow such restrictions to further a compelling state interest in an open political process, as reflected in, for example, a subject matter restriction heightening the requirements for amending the initiative process itself. If this interest were defined in a sufficiently narrow way, courts might be able to consider it when evaluating challenges to subject matter restrictions of this type.

This suggestion—that an open political process might constitute a compelling state interest—is highly tentative. If not bounded, it conceivably could expand to defeat the entire Equal Protection inquiry. For example, Massachusetts might defend the Excluded Matters provision that prohibits initiatives changing core constitutional rights<sup>185</sup> by arguing that the prohibition protects the vitality of the political process. This argument is easily articulated for speech rights<sup>186</sup> and other rights.<sup>187</sup> Even so, courts may find workable boundaries that would allow invocation of this type of state interest. If not, no state interest would justify subject matter restrictions like the Massachusetts Excluded Matters provision.

Even if a limited political process interest were to succeed, the Massachusetts provisions at issue in *Wirzburger* would not fall within its boundaries. While the Religion and Anti-Aid Exclusions arguably seek to maintain a high wall between church and state, litigants cannot colorably claim that the exclusions are designed to maintain an open political process. The separation of church and state fulfills several important goals—among them, protecting individual religious lib-

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<sup>185</sup> The Massachusetts Constitution prohibits initiatives addressing any of several enumerated “rights of the individual,” including takings rights, access to the courts, jury trial rights, search and seizure protection, free speech and freedom of the press, freedom of elections, and the right of assembly. MASS. CONST. amend. art. XLVIII, pt. II, § 2.

<sup>186</sup> *E.g.*, ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (2d ed. 2002) (arguing that First Amendment protects self-government by ensuring ability of citizens to engage in civic dialogue).

<sup>187</sup> For example, political philosophers and constitutional scholars often argue that private property is a necessary component of democracy, *e.g.*, James W. Ely Jr., “*Poor Relation*” *Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2004–2005 CATO SUP. CT. REV. 39, 40 (“The conviction that private property was essential for self-government and political liberty was long a central tenet of Anglo-American constitutionalism.”), and the Massachusetts Constitution’s guarantee of an effective judicial remedy for private and public wrongs can be framed as protecting the institution charged with maintaining the integrity of democratic political process, *cf.* ELY, *supra* note 184, at 101–04 (arguing that courts should use judicial review to maintain functioning and open system of popular self-government).

erty,<sup>188</sup> preventing religious persecution,<sup>189</sup> and protecting both the state and religion against the disruptive effects of the other<sup>190</sup>—but it is not primarily designed to protect the vitality of the political process.<sup>191</sup> The Massachusetts provisions at issue in *Wirzburger* would thus fail the proposed test, as would, quite possibly, all similar subject matter restrictions.

#### CONCLUSION

Historical practices and evolving voting rights doctrine have combined to create a dual model of American constitutionalism. In this model, the rigid Federal Constitution protects the vitality of more active constitutional practices at the state level. Like all democratic processes, of course, constitutional processes are subject to a variety of restrictions, including subject matter restrictions on constitutional initiatives. Subject matter restrictions, however, threaten to distort the design of a constitutional system. When citizens challenged such a restriction in *Wirzburger v. Galvin*, both the litigants and the First Circuit applied an overly deferential form of review that is unlikely to capture the unique harms caused by subject matter restrictions.

The *Wirzburger* court missed a valuable opportunity to strengthen state constitutional practices through a protective framework of federal constitutional law. Addressing these challenges judicially would be difficult, but not impossible—the seeds of true federal

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<sup>188</sup> *E.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

<sup>189</sup> *E.g.*, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (arguing that “it was ‘historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause’” (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986))).

<sup>190</sup> *E.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 717 (2002) (Breyer, J., dissenting) (arguing that Establishment Clause is meant to “protect[] the Nation’s social fabric from religious conflict”); *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (“Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.”).

<sup>191</sup> Philosophically, of course, freedom of religion reflects and reinforces individual autonomy and in that respect may be said to further the goals of self-government. *See, e.g.*, JOSEPH PRIESTLEY, AN ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT; AND ON THE NATURE OF POLITICAL, CIVIL, AND RELIGIOUS LIBERTY 110 (London, 1768) (“[R]eligious motives may still operate in favour of the civil laws, without such a connection as has been formed between them in ecclesiastical establishments; and, I think, this end would be answered even better without that connection.”), available at <http://socserv.mcmaster.ca/econ/ugcm/3ll3/priestley/EssayFirstPrinciples.pdf>. Importing this philosophical understanding into doctrine, however, would lead to the aforementioned problem: The expansive understanding of the compelling state interest in an open political process would swallow the entire proposed test.

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protection of state constitutional practices are already present in case law under the First Amendment and Equal Protection Clause. This inquiry might invalidate all subject matter restrictions; at the very least, it would cultivate a dialogue around the question of when and why differential amendability, as well as other types of restrictions on state constitutional change, might be desirable. This dialogue is necessary if the Federal Constitution is to fulfill its function as the protector of the integrity and chaotic vitality of state democratic practices.