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Elections - Constitutional Law - A State Cannot Constitutionally Compel a National Political Party to Select Its Delegates in a Manner That Violates the Party's Rules

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ELECTIONS—CONSTITUTIONAL LAW—A STATE CANNOT CONSTITUTIONALLY COMPEL A NATIONAL POLITICAL PARTY TO SELECT ITS DELEGATES IN A MANNER THAT VIOLATES THE PARTY'S RULES

The rules for the National Democratic Party's (National Party) 1980 Convention[1] limited participation in the delegate selection process to only those who were willing to publicly declare membership in the party and have their affiliation recorded.[2] Wisconsin law[3] required that delegates to the national political conventions vote for Presidential candidates according to the results of an open primary system in which voters are not required to publicly declare affiliation before voting.[4] In accordance with

1. Rule 2A of the Democratic Selection Rules for the 1980 National Convention is as follows:

> Participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded. Documentary evidence of a process which complies with this rule shall accompany all state Delegate Selection Plans upon their submission to the National Party. Such rules, when approved by the Compliance Review Commission and implemented shall constitute adequate provisions within the meaning of Section 9 of the 1972 Democratic National Convention mandate.

Democratic Party of the United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 109 n.1 (1981) (quoting Rule 2A of the Democratic Selection Rules).

2. *Id.* The purpose behind the rules was an effort by the Democratic Party following the turmoil of the 1968 Convention to broaden the opportunity for participation for those claiming a stake in the Democratic Party. *Id.* at 115-16.

3. WIS. STAT. ANN. § 5.37(4) (West Supp. 1981). This section provides that in primary elections "the elector may secretly select the party for which he or she wishes to vote. . . ." *Id.* Section 8.12(3)(a) of the Wisconsin statutes provides:

> [T]he specific candidate for president receiving a plurality in any district or in the state at large is entitled to control all the delegates representing such an area. . . . As an alternative to this procedure, the state chairperson of any political party having a presidential preference ballot may inform the board . . . that the delegates from such party are to be certified on the basis of proportional representation.

WIS. STAT. ANN. § 8.12(3)(a) (West Supp. 1981).

4. 450 U.S. at 110-11. There are three principal types of primaries — closed, open, and blanket. The most common type is the closed primary at which only those who meet specified party affiliation

National Party rules,[5] the Democratic Party of Wisconsin (State Party) submitted its delegate selection plans, which incorporated the open primary provisions of the State's election laws, to the Compliance Review Commission of the National Party.[6] Due to the conflict between Wisconsin law and the National Party's rules, the National Party indicated that delegates bound by the results of Wisconsin's open primary would not be seated at the national convention.[7] The Wisconsin Attorney General subsequently filed an action on behalf of the State in the Wisconsin Supreme Court, seeking a declaration that the Wisconsin delegate selection process was constitutional and enjoining the National Party from refusing to seat the Wisconsin delegates.[8] The Wisconsin Supreme Court entered a judgment upholding the constitutionality of Wisconsin's law and declaring it binding on the National Party.[9] The National Party appealed the decision to the United States Supreme Court,[10] contending that the Wisconsin court's order violated the first and fourteenth amendments to the United States Constitution by prohibiting the Democratic Party from allowing only Democrats to select the Party's Presidential nominee.[11] The Court noted probable jurisdiction and stayed the judgment of the Wisconsin Supreme Court.[12] The Court *held* that a state cannot constitutionally compel a political party to select its national convention delegates in a manner that violates the Party's rules.[13] *Democratic Party of the United States v. Wisconsin ex rel. LaFollette,* 450 U.S. 107 (1981).

requirements may vote. In the open primary, the voter does not disclose in which party he or she is voting, but voting is restricted to one party's candidates only. The blanket primary allows the voter to alternate votes among parties for different offices. *See* Comment, *The Constitutionality of Non-Member Voting in Political Party Primary Elections,* 14 WILLAMETTE L.J. 259, 260-62 (1978).

5. *See supra* note 1 for the relevant National Party rule.

6. 450 U.S. at 112.

7. *Id.* at 113. Wisconsin delegates to the National Convention were not selected by the Presidential preference primary, but at separate caucuses. The primary itself, therefore, did not violate the National Party's rules, but the requirement that the primary vote would determine delegate votes for Presidential candidates at the convention did. *Id.* at 120-21.

8. State *ex rel.* LaFollette v. Democratic Party of the United States, 93 Wis. 2d 473, 287 N.W.2d 519 (1980). The named respondents to the suit were the Democratic National Party and the Democratic National Committee (National Party) and the Democratic Party of Wisconsin (State Party). *Id.* at 480, 287 N.W.2d at 521. The State Party joined the State of Wisconsin as an appellee in the United States Supreme Court case. Democratic Party of the United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. at 113.

9. 93 Wis. 2d at 482, 287 N.W.2d at 522. The Wisconsin court reasoned that the State had a compelling interest in protecting the integrity of the nominating process and providing for the privacy of voter political preferences. In contrast, the burden on the associational rights of the National Party was not unconstitutional because the delegates themselves were not selected by the open primary system. In addition, the court noted that no factual support was presented to show that the open primary differs significantly from closed primaries in terms of who participates. *Id.* at 483, 287 N.W.2d at 522.

10. Democratic Party of the United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. at 114.

11. Brief for Appellants at 2, Democratic Party of the United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107 (1981).

12. 450 U.S. at 114.

13. *Id.* at 121. There was a dissenting opinion written by Justice Powell with which Justice Blackmun and Justice Rehnquist joined. *Id.* at 126.

The United States Constitution makes no reference to political parties or to the nominating procedures for Presidential candidates. Instead, the power to choose the President and Vice President is vested in the electoral college.[14] The Constitution grants legislatures complete discretion to select the method for appointing electors.[15] While electors may be appointed directly by the legislature,[16] elected by districts,[17] or voted for on a statewide basis,[18] the latter is the method used by every state today.[19] The framers of the Constitution expected the electors to be wise and dispassionate men who would exercise independent judgment.[20] This ideal was never realized, however, because the electors quickly became little more than rubber stamps for political party decisions.[21] By 1796, political parties had formed and congressional caucuses picked the Presidential candidates.[22] The congressional caucus system continued until the 1820's, when it gave way to an era of egalitarianism that resulted in Presidential nominations by national political conventions.[23]

Until recently, the principal method for selecting candidates for office and delegates to national political conventions was

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14. *See* U.S. CONST. amend XII. This amendment reads in part as follows:

> The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the persons voted for as President, and in distinct ballots the person voted for as Vice-President. . . .

Id.

15. *See* U.S. CONST. art. II, §1, cl. 2. Clause two reads as follows:

> Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

Id.

16. W. SAYRE & J. PARRIS, VOTING FOR PRESIDENT 28 (1970). South Carolina's electors, for example, were appointed by the state legislature until 1860. *Id.*

17. McPherson v. Blacker, 146 U.S. 1, 25 (1892). The Court upheld a Michigan law providing for the election of electors by district. The Court dismissed the challenge to the legislature's authority to establish districts by noting that even though the authority to select electors had been delegated to the popular vote of the electorate, the Constitution allowed for selection of electors by any means chosen by the legislature. *Id.* at 35-36. *McPherson* contains an extensive history of the early methods used by states to choose electors. *See id.* at 25-35.

18. *Id.* at 25.

19. W. SAYRE & J. PARRIS, VOTING FOR PRESIDENT 28 (1970).

20. N. PEIRCE, THE PEOPLE'S PRESIDENT 63 (1968). *See* A. HAMILTON, J. MADISON & J. JAY, THE FEDERALIST No. 68 (New York 1788) (Alexander Hamilton's rationale for the electoral college system).

21. *See* PEIRCE, *supra* note 20, at 63.

22. *Id.* The electors were selected after the congressional caucuses chose their Presidential candidates and these electors merely ratified the earlier decision of their political party. *Id.*

23. *Id.* at 113. The impetus for this change came from the supporters of frontier democracy who succeeded in killing the caucus system by nominating Andrew Jackson for President in 1824. The first national nominating conventions were held prior to the 1832 Presidential election. *Id.*

through state party conventions.[24] In the early part of the twentieth century, however, states passed laws to regulate political parties by requiring that primaries be held[25] in a prescribed manner as a means to reform what was viewed as a corrupt convention system dominated by boss rule.[26] Several states also adopted Presidential preference primaries.[27] In the 1980 election the number of states conducting Presidential preference primaries grew to thirty-five.[28]

In *Newberry v. United States*[29] the Supreme Court first considered the issue of whether primaries were elections subject to regulations by Congress.[30] The *Newberry* Court held primaries "are in no sense elections for an office, but merely methods by which party adherents agree upon candidates."[31] Twenty years later the Court reversed this position and stated in *United States v. Classic*[32] that "[w]here the state law has made the primary an integral part of the procedure of choice . . . the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, §2."[33] The Court has continued to view the party primary as "not merely an exercise or warm-up for the general election, but an integral part of the entire election process. . . ."[34] The Court also has considered state regulation of

24. Note, *The Party Affiliation Requirement: A Constitutional Inquiry,* 16 NEW ENG. L. REV. 71, 75 (1980). The state nominating convention was the principal means of selecting candidates from about 1825-1910. *Id.*

25. *Id.* The first primary was held in Pennsylvania in the 1840's and the primary is now used to nominate candidates for state office in every state. *Id.*

26. State *ex rel.* LaFollette v. Democratic Party of the United States, 93 Wis. 2d at 492, 287 N.W.2d at 527. The Wisconsin Supreme Court quoted progressive reformer Robert M. LaFollette, Sr. on the subject of primaries as follows:

> No longer . . . will there stand between the voter and the official a political machine with a complicated system of caucuses and conventions, by the easy manipulation of which it thwarts the will of the voter and rules official conduct. . . . If the voter is competent to cast his ballot at the general election for the official of his choice, he is equally competent to vote directly at the primary election for the nomination of the candidates of his party. . . .

Id.

27. *Id.* at 493, 287 N.W.2d at 527. Wisconsin, for example, amended its 1903 primary law in 1905 to make it apply to selection of national convention delegates. *Id.*

28. Council of State Governments, THE BOOK OF THE STATES, 1980-1981, at 53 (1980).

29. 256 U.S. 232 (1921).

30. Newberry v. United States, 256 U.S. at 250. The *Newberry* Court held a law limiting the amount of money that could be expended in a congressional or senatorial election to be unconstitutional as applied to a primary election because the constitutional grant of authority to Congress to regulate elections did not include primary elections. *Id.*

31. *Id.*

32. 313 U.S. 299 (1941).

33. United States v. Classic, 313 U.S. at 318. In *United States v. Classic* the issue was whether the right to vote and have one's vote counted in a primary election was a right secured by the Constitution. *Classic* involved prosecution for alleged election fraud by Louisiana election officials. *Id.* at 307-08.

34. Storer v. Brown, 415 U.S. 724, 735 (1974). In *Storer* the Court denied a constitutional challenge to a California election provision that barred candidates from filing as independents for the general election ballot if they had been affiliated with a qualified party within one year of the immediately preceding primary election. The Court said this provision was similar in purpose to the

primary elections as necessary and constitutionally permissible to protect the right to vote by ensuring fair and orderly procedures.[35]

Although states have authority to regulate elections, the Court has recognized that political parties and voters have the constitutional right of association[36] founded on the first amendment rights of free speech and assembly.[37] Thus, the Court has held restrictive ballot access statutes[38] and burdensome party affiliation statutes[39] to be unconstitutional infringements of associational rights.[40]

The conflict between a national political party's associational rights and a state's authority to protect the integrity of its elections arose in the case of *Cousins v. Wigoda.*[41] The case involved a dispute over the seating of Illinois delegates to the 1972 National Democratic Convention.[42] The Wigoda delegates, who were elected from Chicago districts at the primary election, were challenged successfully before the party's credentials committee by the Cousins delegates, who had been chosen at private caucuses.[43]

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law that prohibits defeated primary candidates from running in the general election. The Court noted that the primary serves an important function in settling intraparty feuds and winnowing out candidates. *Id.*

35. *Id.* at 730. The court stated that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.*

36. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). *Sweezy* involved the appellant's refusal to testify before a state attorney general's inquiry regarding his knowledge of members of the Progressive Party in New Hampshire. The Court held that this was an invasion of his first and fourteenth amendment liberties of free political expression. The Court stated that "[o]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and association." *Id.*

37. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958). The Court stated the following: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *Id.*

38. *See, e.g.,* Williams v. Rhodes, 393 U.S. 23 (1968). *Williams* involved a challenge to Ohio's restrictive ballot access provisions that required new parties to file petitions with signatures equal to at least 15% of the number of ballots cast in the preceding gubernatorial election. *Id.* at 25. In addition, these petitions had to be filed by February of the election year in order for a new party to get on the ballot. The Supreme Court stated: "In the present situation the state laws place burdens on two different, although overlapping, kinds of rights — the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Id.* at 30.

39. *See, e.g.,* Kusper v. Pontikes, 414 U.S. 51 (1973). In *Kusper* the Court held that an Illinois statute that prohibited appellee from voting in a party primary because she had voted in another party's primary during the preceding 23 months unconstitutionally abridged her freedom of association. *Id.* at 53. *But see* Rosario v. Rockefeller, 410 U.S. 752 (1973). In *Rosario* the Court upheld a New York law that required enrollment in a party 11 months before a primary. *Id.* at 758.

40. *See, e.g.,* Williams v. Rhodes, 393 U.S. at 30. The Court in *Williams* stated the following: "We have repeatedly held that freedom of association is protected by the First Amendment." *Id.; see also* Kusper v. Pontikes, 414 U.S. at 56-57. In *Kusper* the Court stated that "[t]here can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is . . . protected by the First and Fourteenth Amendments." *Id.*

41. 419 U.S. 477 (1975).

42. Cousins v. Wigoda, 419 U.S. 477, 479-80 (1975).

43. *Id.* The credentials committee determined that the Wigoda delegates had been chosen in violation of party guidelines relating to participation by minorities, youth, and women; public notice requirements; and slate-making procedures. *Id.* at 479 n.1.

Despite an Illinois Circuit Court order enjoining the Cousins group from serving as delegates, they were seated by the Convention and later charged with criminal contempt.[44] The United States Supreme Court reversed the Illinois Appellate Court, which upheld the injunction and gave primacy to state law over the party's rules.[45] The Court held that the State did not show a compelling interest sufficient to justify infringement of the associational rights of the delegates and the National Party.[46] The Court minimized the State's interest in the integrity of the electoral process by noting that the election was a primary to elect delegates to a national political convention rather than a general election.[47] In light of the important functions of delegates, including the selection of a Presidential and Vice Presidential candidate, the Court reasoned that state regulation would undercut this vital process.[48] The concurrence by Justice Rehnquist stressed that the injunction "was as direct and severe an infringement of the right of association as can be conceived."[49]

The Court in *Cousins* made it clear that a national political party's right of association in the delegate selection process could not be abridged without a showing of a compelling state interest.[50] Nevertheless, the extent to which national political parties were exempt from state election laws was not clearly defined.[51] The

44. *Id.* at 480-81. The criminal contempt charges were stayed pending the United States Supreme Court decision. *Id.* at 481.

45. *Id.* at 483. The Illinois Appellate Court stated that "[t]he law of the state is supreme and party rules to the contrary are of no effect. . . ." Wigoda v. Cousins, 14 Ill. App. 3d 460, 475, 302 N.E.2d 614, 627 (1973).

46. 419 U.S. at 491. In *Cousins* the Court said that it was intimating no views on whether a national political party's decisions constitute state action. The Court further stated that it was expressing no view on whether national political parties are subject to one person-one vote requirements of the reapportionment decisions, or whether national political parties and conventions are regulable by Congress. *Id.* at 483-84 n.4.

47. *Id.* at 489.

48. *Id.* The Court viewed the delegates' task of nominating the Presidential and Vice-Presidential candidates as one of "supreme importance." *Id.* at 489. The Court stated: "The States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates." *Id.* at 489-90.

49. *Id.* at 491 (Rehnquist, J., concurring). Justice Rehnquist was joined in his concurrence by Chief Justice Burger and Justice Stewart. *Id.* The concurrence expressed concern about the broad language used in the Court's opinion. *Id.* at 492. For example, the concurrence took issue with the majority's contention that the states play no constitutional role in the Presidential selection process. *Id.* at 489-90. Justice Powell agreed that Illinois could not compel the National Democratic Party to seat the respondents as delegates, but said the state "has a legitimate interest in protecting its citizens from being *represented* by delegates who have been rejected by these citizens in a democratic election." *Id.* at 497 (Powell, J., concurring and dissenting) (emphasis in original).

50. *Id.* at 489.

51. *Id.* In *Cousins* the Court found that the state's interests did not justify issuing an injunction prohibiting the National Party from seating any of the Cousins delegates. The Court noted also that the injunction would not effectuate the state interest of ensuring that the primary winners, the Wigoda delegates, would be seated. *Id.* at 488. One court interpreting the holding in *Cousins* viewed the severity of the injunction as important in determining how broadly to read the decision. *See* Fallon v. State Bd. of Elections of State of New York, 408 F. Supp. 636, 638 (S.D.N.Y. 1976). In *Fallon* the court stated that under the most liberal reading, *Cousins* "held no more than that the policy of a national political party in setting qualifications for delegates to its convention may, in some circumstances, prevail over contrary state law." *Id.*

Court was given another opportunity to clarify the balancing of associational rights with state interests in fair election procedures in *Democratic Party of the United States v. Wisconsin ex rel. LaFollette.*[52] In *LaFollette* the State of Wisconsin argued that its interests in conducting an open primary were compelling, that its regulations were closely drawn, and that the law did not unduly burden the National Party's associational rights.[53] The Court rejected these contentions, holding that a state cannot constitutionally compel a national political party to select its delegates in a manner that violates the party's rules.[54]

The Court in *LaFollette* began its analysis by reviewing the conflict between the National Party rules and Wisconsin state law.[55] Even though delegates were not elected at Wisconsin's open primary, the Court determined that the Wisconsin law binding the delegates to vote in accordance with the Presidential preferences of primary voters conflicted with the "delegate selection process" as defined by National Party rules.[56] The Court proceeded to consider at length the origin and purpose behind the National Party rules limiting participation in the delegate selection process to publicly declared Democrats only.[57] The National Party's concern with participation in the delegate selection process stemmed from the underrepresentation of rank and file party members at the 1968 Democratic National Convention.[58]

The *LaFollette* Court determined that the Wisconsin Supreme Court had incorrectly construed the issue to be whether the Wisconsin open primary law was constitutional by serving a compelling interest in encouraging voter participation.[59] The

52. 450 U.S. 107 (1981).

53. Brief for Appellee State of Wisconsin at 5-8, Democratic Party of the United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107 (1981).

54. 450 U.S. at 121.

55. *Id.* at 109-12. *See supra* notes 1-3 and accompanying text.

56. *Id.* at 109-10. The Court stated that according to National Party rules, "the 'delegate selection process' includes any procedure by which delegates to the Convention are bound to vote for the nomination of particular candidates." *Id.* at 110.

57. *Id.* at 115-20. Between 1968 and 1975 the National Democratic Party directed three separate commissions to study the problem of participation in the Presidential selection process. *Id.* at 116-19.

58. *Id.* at 155. Following the 1968 Convention, the National Party organized a Committee on Party Structure and Delegate Selection (McGovern/Frazer Commission) to study how to make the Presidential nominating process more open and representative of rank and file Democrats. *Id.* The study concluded that the procedures must be open to all Democrats but cautioned that their participation would be diluted if members of other parties also were allowed to participate. *Id.* The guidelines developed by the McGovern/Frazer Commission were followed by recommendations of two other commissions organized by the National Party that led to adoption of the rule restricting participation in delegate selection to publicly declared Democrats only. *Id.* at 117.

59. *Id.* at 120-21. After balancing the associational rights of the National Party and its adherents against the State's interest in the integrity of the nominating process, the Wisconsin Supreme Court concluded: "We determine that Wisconsin has a compelling state interest in having a primary and in not requiring that voters publicly declare their party preference and have that preference publicly

Court in *LaFollette* said it need not address this issue because the National Party rules did not challenge a state's authority to conduct an open primary, so long as the results of the primary were not binding on delegates to the national convention.[60] Therefore, the *LaFollette* Court viewed the issue to be "whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party,"[61] an issue the Court said was resolved by *Cousins v. Wigoda*.[62]

The *LaFollette* Court reaffirmed that the National Party and its members have a right of political association protected from state infringement by the first and fourteenth amendments.[63] The Court also noted that the right of association includes the right to identify members and limit the association accordingly.[64] The Court cited *Rosario v. Rockefeller*,[65] a case in which the Court upheld a party enrollment requirement, as an example of the Court's recognition that a political party's decisions could be seriously distorted if not protected from the influence of unaffiliated persons.[66] The *LaFollette* Court rejected the State's contention that the burden on the National Party was only minor by noting "a State, or a court may not constitutionally substitute its judgment for that of the Party."[67]

In considering whether the State had demonstrated a compelling interest, the Court said the State's identified interests[68]

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recorded." State *ex rel.* Lafollette v. Democratic Party of the United States, 93 Wis. 2d at 483, 287 N.W.2d at 522.

60. Democratic Party of the United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. at 120 n. 21. The Court stated:

> The National Party nowhere indicated that the Wisconsin primary cannot be open; it averred only that any process adopted by the State that *binds* the National Party must comply with Party rules. . . . The National Party said only that if Wisconsin does not change its primary laws by requiring public party declaration consistent with Party rules, it would be satisfied with some other, Party-run, delegate selection system that did comply with Party rules.

Id. (emphasis in original).

61. *Id.* at 121.

62. *Id.* (citing 419 U.S. 477 (1975)). The dissent in *LaFollette* viewed the facts in the case, however, to be substantially different from those in *Cousins*. Justice Powell stated: "In contrast with the direct state regulation of the delegate-selection process at issue in *Cousins*, this case involves a state statutory scheme that regulates delegate *selection* only indirectly." 450 U.S. at 129 (Powell, J., dissenting) (emphasis in original).

63. *Id.* at 121-22. *See supra* notes 35-39 and accompanying text.

64. *Id.* at 122. The Court noted a commentator's discussion of the freedom of association: "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *Id.* at 122 n. 22 (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW 791 (1978)) (footnote omitted).

65. 410 U.S. 752 (1973).

66. 450 U.S. at 122.

67. *Id.* at 123-24. The Court stated that the State Party's contentions that empirical data did not demonstrate the need for the National Party's rule requiring public declaration should be directed to the national party rather than the courts. *Id.* at 124 n. 27.

68. *Id.* at 124-25. The Court summarized the interests of the state as identified by the Wisconsin Supreme Court as follows: "The State asserts a compelling interest in preserving the overall integrity

related to the conduct of the Presidential preference primary[69] and not to binding the votes of delegates selected in a separate process.[70] The Court also summarily dismissed the State's claim to authority to regulate Presidential preference choices under the constitutional power of states to choose Presidential electors[71] by calling it too remote.[72] The Court concluded by indicating that both the State and the National Party had substantial interests that could be preserved by allowing Wisconsin to continue its open primary, but not require Wisconsin delegates to national political conventions to be bound by the results.[73]

Like the decision in *Cousins,* the *LaFollette* holding is limited to the context of a state's attempted regulation of the delegate selection process of a national party. The implication of the decision, however, is that state laws regulating national and state political parties and members will be subject to increasing constitutional attack as infringing on important associational rights. The *LaFollette* decision makes it clear that the Court fully intends to protect the broad right of association articulated in *Cousins.*[74] Although state regulation of state party affairs[75] would likely be viewed as more compelling and less burdensome than regulation of a national party's activities,[76] courts will be faced with

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of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters." *Id.* (footnote omitted).

69. *Id.* at 125. The Court acknowledged by citing United States v. Classic, 313 U.S. 299 (1941), that a state has important interests in regulating primary elections. 450 U.S. at 124 n. 28.

70. *Id.* at 125. The dissent maintained that by removing the nonbinding character of the Presidential preference primary, the state's very purpose in giving control of the nominating process to individual voters was destroyed. *Id.* at 134 (Powell, J., dissenting).

71. *See supra* notes 15-19 and accompanying text.

72. 450 U.S. at 125 n. 31. The Court stated: "Any connection between the process of selecting electors and the means by which political party members in a State associate to elect delegates to party nominating conventions is so remote and tenuous as to be wholly without constitutional significance." *Id.*

73. *Id.* at 126. After recognizing the substantial interests of both the State of Wisconsin and the National Party, the Court stated:

> But these interests are not incompatible, and to the extent they clash in this case, both interests can be preserved. The National Party rules do not forbid Wisconsin from conducting an open primary. But if Wisconsin does open its primary, it cannot require that Wisconsin delegates to the National Party convention vote there in accordance with the primary results, if to do so would violate Party rules.

Id.

74. *See* 419 U.S. at 489-90. The *Cousins* Court described the functions performed by national convention delegates to be "of supreme importance to every citizen of the Nation regardless of their State of residence." *Id.* at 489.

75. *See* Marchioro v. Chaney, 442 U.S. 191 (1979). The *Marchioro* Court upheld a Washington statute that requires political parties to have a State Committee composed of two persons from each county in the state. The Court found no substantial burden on associational rights because the State Convention rather than the State Committee is the governing body of the party. *Id.* at 193.

76. *See* 419 U.S. at 490. In *Cousins* the Court placed emphasis on the "pervasive national interest" served by the delegates to a national convention and indicated that it would be too burdensome on a national party to have the eligibility of delegates determined by each of the fifty states. *Id.*

difficult problems of determining when regulation of a state party infringes the associational rights of a national party.

The holding in *LaFollette* directly conflicts with the state open Presidential preference primary law of North Dakota.[77] The effect of the *LaFollette* Court's holding is to render North Dakota's Presidential preference primary, which was to be used for the first time in the 1984 election,[78] nonbinding on the state's national political convention delegates.[79] Therefore, the North Dakota Legislature has at least four options available. First, the legislature can proceed to hold the Presidential preference primary with the open statewide primary, provided the results are not binding on national political convention delegates.[80] Several states conducted such "beauty contests" in 1980.[81] Second, the legislature can hold the Presidential preference primary in conjunction with the statewide primary, but require voters to publicly declare party affiliation as a prerequisite. This would comply with National Party rules,[82] but the change might be viewed as unacceptable by many North Dakota voters who prefer to keep their party preference a secret. Third, the legislature can authorize a Presidential preference primary separate from the open statewide primary, requiring voters in the Presidential preference primary to publicly declare their party affiliation. This option would satisfy the

77. *See* N.D. CENT. CODE § 16.1-11-04 (1981). Section 16.1-11-04 of the North Dakota Century Code specifies that the Presidential preference primary held in conjunction with the open statement primary shall bind the votes of delegates to the national party conventions. *Id.* Section 16.1-11-04 reads in part:

> The delegates selected by political parties shall be bound to cast their first ballots at the party national convention in such a manner that each candidate at the party's presidential preference primary receives a proportion of the total votes cast by the delegates equal to the proportion received by that candidate of the total votes cast for all candidates for president of that party at the primary.

Id.

78. 1979 N.D. Sess. Laws ch. 276. The law establishing the Presidential preference primary also changed the date of the statewide primary election from the first Tuesday in September to the second Tuesday in June. *Id.* N.D. CENT. CODE §16.1-11-01 (1981).

79. *See supra* notes 60-61 and accompanying text. The decision to move North Dakota's statewide primary from September back to June was based, in part, on the interest in holding a Presidential preference primary before the national political conventions. This point was made by the sponsor of the legislation, State Senator Raymon Holmberg, who stated in testimony before the North Dakota Senate Judiciary Committee that a Presidential preference primary is worthless without an early date. *Hearings on Senate Bill 2340 Before the North Dakota Senate Committee on Judiciary,* 46th Legislative Assembly (Jan. 31, 1979).

80. *See* MONT. CODE ANN. §13-10-407 (1981) (example of a statute that provides for a nonbinding Presidential preference primary). Section 13-10-407 reads as follows: "The method of selection of delegates to national presidential nominating conventions is to be set by party rules. The use of the results of the presidential preference primary election by the political parties in their delegation selection systems is discretionary and is to be determined by party rules. *Id.*"

81. 23 STATE GOV'T NEWS 18 (1980). The states holding nonbinding Presidential preference primaries were Idaho, Michigan, and Vermont. *Id.*

82. *See* Democratic Party of the United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. 133 (Powell, J., dissenting). Justice Powell pointed out that an immediate public declaration before voting, which some states permit, would satisfy the National Party rules. *Id.*

National Party rules and retain the traditional open statewide primary. It would add another costly election, however, and still require North Dakota voters to publicly declare party preference in order to vote in a primary election. Finally, the legislature can choose to repeal the Presidential preference primary entirely. This alternative would allow retention of the open statewide primary and create the least potential for conflict with the rules of the national political parties.

In deciding ways election laws should be amended to conform to the associational rights of the national parties, states will have to be cognizant that the rules of the national parties may conflict and be subject to change. Therefore, the holding in *LaFollette* implies that states should keep their involvement in the affairs of a national political party to a minimum.

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