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"It's My Party and I'll Cry If I Want To": State Intrusions upon the Associational Freedoms of Political Parties -- Democratic Party of the United States v. Wisconsin ex rel. La Follette

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"IT'S MY PARTY AND I'LL CRY IF I WANT TO": STATE INTRUSIONS UPON THE ASSOCIATIONAL FREEDOMS OF POLITICAL PARTIES—*DEMOCRATIC PARTY OF THE UNITED STATES V. WISCONSIN EX REL. LA FOLLETTE*

In 1897, shortly before he became governor of Wisconsin, Robert M. La Follette Sr. urged a University of Chicago audience to "[G]o back to the first principle of democracy. Go back to the people. Substitute for both the caucus and convention a primary election . . . where the citizen may cast his vote directly . . . and have it canvassed and returned just as he cast it."[1] As a result of La Follette's efforts, direct primary legislation was passed by the Wisconsin legislature in 1903, approved by popular referendum in 1904, and thereupon became law.[2] In 1979, Wisconsin Attorney General Bronson La Follette filed a petition on behalf of the State of Wisconsin seeking to enjoin the National Democratic Party (National Party) from taking action that he believed threatened the vitality of the direct primary law his grandfather had brought into being seventy-five years earlier. In 1981, *Democratic Party of the United States v. Wisconsin ex. rel. La Follette*[3] (*La Follette*) came before the Supreme Court of the United States.

This Note will first relate the events that led to the confrontation in *La Follette* between the State of Wisconsin and the National Party. After a discussion of the Supreme Court's opinion, *La Follette* will be compared with other cases that balanced the interests of state and party. It will be suggested, however, that evaluating *La Follette* and related cases solely in terms of a traditional balancing of interests test is of limited utility in understanding why the case was decided as it was. An alternative analytical approach will then be proposed which, in conjunction with a balancing of interests test, more satisfactorily explains the *La Follette* decision and what it portends.

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1. Milwaukee Sentinel, Feb. 23, 1897, at 2, col. 4 (reprinted in A. LOVEJOY, LA FOLLETTE AND THE ESTABLISHMENT OF THE DIRECT PRIMARY IN WISCONSIN 36 (1941)).

2. 1905 Wis. Laws ch. 369. The proposal was formally called "The Primary Election Bill of 1903," No. 97A. A. LOVEJOY, *supra* note 1, at 7. It was supported by popular referendum, 130,699 (61.9%) to 80,192 (38.1%). *Id.* at 90-91.

3. 450 U.S. 107 (1981).

I. BACKGROUND

Under Wisconsin statutes governing primary elections, voting in a particular party's primary is not limited to members of that party, but rather is open to all eligible voters regardless of party affiliation.[4] After the primary is held, delegates to the party's national convention are selected at state caucuses which are "closed", that is, composed entirely of persons publicly declaring their affiliation with the party. Wisconsin law, however, requires those delegates to pledge to vote at the convention in accord with the results of the open primary.[5]

The importance of the open primary law to the State of Wisconsin is best understood by placing its development in an historical context. At the turn of the twentieth century, the United States was amid the "progressive era". Intellectual and political thought, as well as the art and literature of the period reflect the basic themes of progressivism: dismay over the rapid expansion of big business and the resulting emergence of a powerful and privileged business elite, concern for the plight of an increasingly visible and vast urban poor, and disgust with a government perceived to be ruled by political

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4. WIS. STAT. § 5.37(4) (1979) provides in part: "Voting machines may be used at primary elections when they comply with . . . the following provisions: . . . the elector may secretly select the party for which he or she wishes to vote. . . ."

WIS. STAT. § 10.02 (1979) provides in part:

> Voting instructions shall be given as follows: (a) Upon being permitted to vote, the elector shall retire, alone to a voting booth or machine and cast his or her ballot . . . (b) At the presidential preference primary . . ., the elector shall select the party ballot of his or her choice . . . (f) After an official paper ballot is marked, it shall be folded so the inside marks do not show.

In *La Follette*, the United States Supreme Court accepted the Wisconsin Supreme Court's observation that "What characterizes the Wisconsin primary as 'open' is that the voter is not required to declare publicly a party preference or to have that preference publicly recorded. . . ." *La Follette*, 450 U.S. 107, 111 (1981), quoting from State *ex rel.* La Follette v. Democratic Party, 93 Wis. 2d 473, 485, 287 N.W.2d 519, 523 (1980).

5. WIS. STAT. § 8.12(3)(C)5 (1979) provides in part:

> 5. If the delegate or alternate is selected to represent votes cast for a specific candidate for the office of president of the United States . . . in accordance with the method of selection used by the party under par. (a), or is selected to replace such a person, a pledge in the following form:
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> "As a delegate to the 19___ national convention of the ___ party I pledge myself to support the candidacy of ___ as a candidate for the nomination for president by the ___ party; that I will, unless prevented by death of the candidate, vote for his (or her) candidacy on the first ballot; and vote for his (or her) candidacy on any additional ballot, unless released by said candidate, until said candidate fails to receive at least one-third of the votes authorized to be cast; and that, thereafter, I shall have the right to cast my convention vote according to my own judgment."

bosses and unresponsive to the needs of the American people.[6] To progressive politicians, the basic objective was to effect reform that would wrest control of the government from political bosses and the business elite, and return it permanently to the hands of the people. While the impact of progressive reform was felt in every state of the union, few states were as profoundly influenced as Wisconsin.[7]

Historians have characterized Wisconsin as the "showcase" of progressivism,[8] noting primarily the work of Robert M. La Follette, who is commonly credited with initiating progressive reform at the state level.[9] Of the many measures passed at La Follette's instigation during his three terms as governor between 1900-1906, the direct primary law was regarded by him, and is viewed by historians, as among the most significant.[10] The party caucus system of delegate selection provided no meaningful opportunity for the public to participate in deciding who would be nominated to represent the party at the general election and was, in La Follette's view, hopelessly corrupted by political bossism.[11] By contrast, a direct primary would further the progressives' goal of returning the control of the government to the electorate by assuring each voter an equal say in the selection of the party's nominee.

The direct primary procedure became law in Wisconsin in 1904; by 1917 all but four states had followed suit with similar legislation.[12] Unlike the other states, however, Wisconsin provided for an *open* direct primary.[13] The open feature of the primary law was supported on the ground that it might well be unconstitutional to disenfranchise independent voters by permitting only those with preex-

6. C. DEGLER, T. COCHRAN, V. DESANTIS, H. HAMILTON, W. HARBAUGH, A. LINK, R. NYE, D. POTTER & C. VERSTEEG, THE DEMOCRATIC EXPERIENCE 352-73 (1973); J. BLUM, B. CATTON, E. MORGAN, A. SCHLESSINGER, K. SLAMP & C.V. WOODWARD, THE NATIONAL EXPERIENCE 539-47 (1968) [hereinafter cited as J. BLUM].

7. J. BLUM, *supra* note 6, at 545-46.

8. H. MARGUILES, THE DECLINE OF THE PROGRESSIVE MOVEMENT IN WISCONSIN v (1968).

9. J. BLUM, *supra* note 6, at 545: E. GOLDMAN, RENDEZVOUS WITH DESTINY 130-31 (1956).

10. R. LA FOLLETTE, LA FOLLETTE'S AUTOBIOGRAPHY 292 (1913); A. LOVEJOY, *supra* note 1, at 8; E. GOLDMAN, *supra* note 9, at 132.

11. R. LA FOLLETTE, *supra* note 10, at 195-96.

12. W. KEECH & D. MATTHEWS, THE PARTY'S CHOICE 91-92 (1976).

13. Montana was the only other state mandating an *open* direct primary. B. FORD, THE WISCONSIN PRESIDENTIAL PREFERENCE PRIMARY: OPEN OR CLOSED? WISCONSIN LEGISLATIVE REFERENCE BUREAU RESEARCH BULLETIN 75-RM-15 (1975) (on file at the Wisconsin Law Review). It is interesting to note that La Follette appeared to be relatively unconcerned about whether the primary was open or closed. He was no less enthusiastic about an earlier draft of the direct primary law that provided for a closed primary, than he was about the open primary bill ultimately adopted. *Id.* at 6.

isting party affiliations to participate; by keeping the primary "open", voter participation would be encouraged and the secrecy of the voters' choices preserved.[14]

In 1911, Wisconsin extended the application of its open direct primary procedure to the selection of presidential candidates.[15] Except for minor revisions, the law assumed its present form in 1949 when it was amended to require that party delegates pledge to vote at their conventions in accord with open primary results.[16]

The progressive origins of the open primary account for its present day significance to the State of Wisconsin. The law reflects the state's interest in protecting the primacy of the individual voter over political machines, bosses and parties.[17] As one scholar has observed:

> To many Wisconsin citizens, it would seem undemocratic to be asked to identify publicly with a party as prerequisite for primary voting, and to restrict oneself in advance to a given party's ballot would seem a foolish deprivation of the opportunity to vote for (or against) an important personality on another ticket.[18]

From 1949 to 1968, without objection from either major political party, Wisconsin sent delegates to national political party conventions bound by a pledge to vote in accord with the state's open primary results. Shortly after the National Democratic Convention of 1968, however, the National Democratic Committee established the McGovern/Fraser Commission to study and assess the Democratic Party's nominating procedure and internal structure.[19] The Commission concluded, among other things, that effective participation by Democrats in the delegate selection process was hampered to the extent non-Democrats were allowed to participate and thereby dilute the significance of the Democrats' preferences.[20] The National Democratic Committee organized a second commission in 1972, which came to a similar conclusion.[21] In 1975, a third commission echoed the findings of its two predecessors[22] and, relying in part on an independent study of crossover voting in Wisconsin's open pri-

14. *Id.* at 7; Milwaukee Sentinel, Mar. 1, 1901, at 4, col. 2.
15. 1911 Wis. Laws ch. 300.
16. 1949 Wis. Laws ch. 406.
17. S. SCHIER, THE RULES AND THE GAME 37 (1980).
18. L. EPSTEIN, POLITICS IN WISCONSIN 25 (1958).
19. *La Follette*, 450 U.S. at 116.
20. *Id.* at 116-17.
21. *Id.* at 117.
22. *Id.* at 119.

mary,[23] recommended that participation in Democratic presidential primaries be restricted to persons publicly declaring their affiliation with the Democratic Party.

As a result of its studies, the National Party added rules 2A, 2B and 2C to the selection rules for the 1980 convention. Rule 2A limited participation in presidential primary elections to Democrats who had publicly recorded their preference for the Democratic Party. Rule 2B declared that no exceptions to rule 2A would be granted. Rule 2C provided that state parties precluded by state law from complying with rule 2A would have to devise an alternate delegate selection system which would insure that all participants in the selection process were Democrats.[24]

The National Party rules required that if states chose to select or bind delegates by primary election results, such elections must be closed to all but Democrats. Wisconsin law mandated that convention delegates sign an oath of affirmation binding them to primary election results, and that the primary be open to all voters regardless of party affiliation. The Democratic Party of the State of Wisconsin (State Party) was thus faced with the unhappy choice of either abandoning the open primary in favor of some other party-run delegate selection system pursuant to National Party rule 2C, persuading the state legislature to close Wisconsin's primary, or contesting rule 2A. It chose the third alternative.

The State Party announced that delegates to the 1980 National Convention would be bound by the results of Wisconsin's open primary, consistent with Wisconsin law and contrary to rules 2A and 2C. The National Party countered by threatening that if Wisconsin delegates were so selected, they would not be seated at the National Convention.[25] In reaction to this ultimatum, Wisconsin's Attorney

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23. Adamany, *Crossover Voting and the Democratic Party's Reform Rules*, 10 AM. POL. SCI. REV. 536, 538-39 (1976).

24. Delegate Selection Rules for the 1980 Democratic National Convention, rule 2, provides:

> 2A. Participation in the delegate selection process in primaries . . . shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded.
>
> 2B. A(n) exception shall not be granted from Rule 2A requirements.
>
> 2C. A state party which is precluded by state statute from complying with this rule (2A) shall adopt and implement an alternative party-run delegate selection system which complies with this rule.

25. Rule 2A was added to the delegate selection rules for the 1976 Convention. However, at the state's request, Wisconsin was granted an exception. Shortly thereafter, the National Party made it clear that exceptions would not be made at future conventions, approved rule 2B for the 1980 Convention, *see supra* note 24, and warned the State Party that it would either have to influence Wisconsin to close its primaries, devise an alternative system of dele-

General, Bronson La Follette, joined by the State Party, petitioned the Wisconsin Supreme Court to enjoin the National Party from refusing to seat the Wisconsin delegation.

The National Party argued that any attempt to compel it to accept delegates bound by open primary results would interfere substantially with its first amendment right to associate—to define and limit its membership as it chooses.[26] This led the National Party to conclude that any interest Wisconsin might have in retaining the open primary did not justify binding delegates by open primary results.[27]

The State of Wisconsin and the State Party maintained that the open feature of Wisconsin's primary was an indispensable component of the state's electoral system, a tradition paramount in preserving the confidence of Wisconsin citizens in their elections.[28] The state contended that any burden on the National Party's first amendment freedoms flowing from a requirement that it acknowledge delegates bound by open primary results was minimal at most; National Party rule 2A accepted delegates bound by closed primary outcomes, and the Party's studies did not produce reliable evidence that the difference between open and closed primary results would be substantial.[29]

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gate selection, or not have a Wisconsin delegation seated at the 1980 Convention. J. DAVIS, PRESIDENTIAL PRIMARIES 77 n.10 (1980); XXXVII CONG. Q. WEEKLY REP'T, 1614 (Aug. 4, 1979). The State Party ignored the ultimatum, and in so doing called the National Party's bluff; on July 20, 1980, the Credentials Committee decided to seat the Wisconsin delegation at the 1980 National Convention, despite the state's failure to comply with rule 2. Because the Wisconsin Supreme Court order compelling the National Party to accept the Wisconsin delegation would apply not only to the 1980 Convention, but to future conventions as well, the United States Supreme Court concluded that the case was not moot. *La Follette*, 450 U.S. at 115. Subsequent to the Court's decision in *La Follette*, the State Party petitioned the National Party to exempt Wisconsin from rule 2A at the 1984 Convention. The petition was rejected. Milwaukee Journal, Mar. 26, 1982, at 1, col. 3.

26. Brief for Appellant Democratic Party of the United States at 23-29, Democratic Party of the United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981).

27. *Id.* at 29, 31-32.

28. Brief for Appellee, Democratic Party of Wisconsin at 35, Democratic Party of the United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981); Brief for Appellee State of Wisconsin at 18-21, 34-35, Democratic Party of the United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981).

29. Brief for Appellee Democratic Party of Wisconsin at 20-28; Brief for Appellee State of Wisconsin at 24-32. Neither Wisconsin nor the State Party, however, argued that the open primary was supported by a compelling state interest. The State of Wisconsin, while asserting a substantial state interest, emphasized that since the open primary law imposed no genuine burden on the National Party's associational freedoms, the law need only advance a legitimate state interest, and thus the question of whether Wisconsin's interest was compelling need not be reached. Brief for Appellee State of Wisconsin at 32-34. The State Party never broached the subject of the state's interest in its brief. At oral argument, the State Party acknowledged that it stopped short of claiming that the law was supported by a compelling

A unanimous Wisconsin Supreme Court held in favor of the State of Wisconsin. The issue, as characterized by the Wisconsin court, was whether the burden imposed by Wisconsin's open primary statute on the National Party's freedom to associate was substantial enough to outweigh the state's interest in preserving the open feature of its primary.[30] Concluding that studies advanced by the National Party failed to demonstrate that the open feature of Wisconsin's primary would have a significant effect on the National Party's selection of Democratic candidates, the court decided that the burden of Wisconsin's statute on the associational freedoms of the National Party was not substantial but rather was "speculative, remote and minimal."[31] The court also determined that the open primary was crucial to encouraging voter participation and to sustaining the longstanding tradition of nonpartisan primaries in Wisconsin. It therefore held that the state's compelling interest in maintaining the integrity of its electoral process by retaining the open primary outweighed whatever minimal burdens were consequently imposed upon the National Party.[32]

II. THE SUPREME COURT'S DECISION IN *LA FOLLETTE*

The United States Supreme Court reversed, holding in favor of the National Party. Justice Stewart, writing for a majority of six, characterized the issue not in terms of Wisconsin's interest in retaining its open primary, but rather in terms of Wisconsin's interest in requiring the National Party to accept delegates bound to vote in accord with the results of its open primary.[33] While Wisconsin might even have a compelling interest in retaining the open feature of its primary, the Court held that it did not have a similarly com-

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state interest. Oral Argument of Robert H. Friebert on behalf of the Appellees at 34-35, Democratic Party of the U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981).

The State Party also argued that the activity of the National Party was so related to running the government as to constitute state action, and that therefore the National Party was prohibited from infringing citizens' rights of association, privacy and voting. Brief for Appellee Democratic Party of Wisconsin at 9-14, 30-33. In Cousins v. Wigoda, 419 U.S. 477 (1974), the Court expressly reserved the question of whether state action analysis applied to national political parties. *Id.* at 483 n.4 (1975). For whatever reason, the *La Follette* Court chose not to address Wisconsin's state action claim. For a discussion of state action in the context of presidential candidate selection (by an author who subsequently wrote the state action portion of the State Party's brief in *La Follette*), see Comment, *State Action in Presidential Candidate Selection*, 1979 WIS. L. REV. 1269.

30. State *ex rel.* La Follette v. Democratic Party of the United States, 93 Wis. 2d 473, 481-82, 287 N.W.2d 519, 522 (1980), *rev'd*, 450 U.S. 107 (1981).

31. *Id.* at 511, 287 N.W.2d at 536.

32. *Id.* at 515, 287 N.W.2d at 538.

33. *La Follette*, 450 U.S. at 120.

pelling interest in demanding that the National Party accept the Wisconsin delegation.[34]

Citing the 1975 case of *Cousins v. Wigoda*[35] as controlling, the Court observed that "'[t]he National Democratic Party and its adherents enjoy a constitutionally protected right of political association.'"[36] Exercise of that right presupposes the freedom to identify members, limit membership and prevent participation in party decisionmaking by persons unaffiliated with the party.[37] The Court reasoned that, to the extent the National Party chose to disregard open primary results as reflecting, at least in part, the will of persons unaffiliated with the Party, Wisconsin's attempt to require the National Party to accept delegates sworn to vote in accord with the open primary outcome interfered with the National Party's freedom of association.[38]

Unlike the Wisconsin court, the Supreme Court declined to address the question of whether compelling the National Party to suspend rule 2A and accept delegates bound by open primary results would create a significant as opposed to a minor burden on the National Party's associational freedoms.[39] The Court maintained that rules concerning National Party acceptance or rejection of a state's delegation ought not to be established by the states or courts, but by the party—first, because the National Party's freedom to choose among various ways of limiting its membership and participation is constitutionally protected regardless of how "unwise and irrational" the choice may be,[40] and second, because it is the National Party that has studied the problem and is most competent to decide such issues.[41]

The Court acknowledged that even though requiring the National Party to modify its rules and accept the Wisconsin delegation would constitute an infringement of the National Party's freedom to associate, the right to associate is not absolute, and the state would

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34. *Id.* at 120-21, 124-25.

35. Cousins v. Wigoda, 419 U.S. 477 (1975).

36. *Id.* at 121.

37. *Id.* at 122.

38. *Id.* at 125-26.

39. The Court observed, "the state argues that its law places only a minor burden on the National Party. The National Party argues that the burden is substantial . . . But it is not for the courts to mediate the merits of this dispute." *Id.* at 123. While the Court thus refused to analyze the extent of the associational burden imposed on the Party by state law, it later concluded that "the interests advanced by the state do not justify its *substantial intrusion* into the associational freedom of members of the National Party." *Id.* at 125-26 (emphasis added) (footnotes omitted). *See infra* notes 90-93 and accompanying text.

40. *La Follette*, 450 U.S. at 124.

41. *Id.*

prevail if able to demonstrate a compelling state interest justifying the imposition of its will on the National Party.[42] Relying again on *Cousins v. Wigoda*, the Court concluded that "'[the state's] interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party convention.'"[43] While Wisconsin does have a "substantial interest in the manner in which its elections are conducted,"[44] that interest pertains solely "to the conduct of the Presidential preference primary—not to the imposition of voting requirements upon those who, in a separate process, are eventually selected as delegates."[45] Thus Wisconsin is free to retain its open primary, but the National Party is equally free to ignore it, and to deny a place to delegates bound by its results.

III. Precedent: Balancing the Interests of Party and State in Previous Cases

The rationale generally employed by courts evaluating the constitutionality of restrictions imposed by state statutes on party autonomy has involved a balancing of the state's interest in imposing the restriction against the party's interest in being free from the restriction.[46] The state certainly has an interest in promoting the welfare of its citizens by preserving the integrity of its electoral process.[47] By authorizing and enforcing measures designed to insure that elections within the state are conducted fairly, the legitimacy of the state is reaffirmed in the minds of majority and minority alike.[48] At the same time, the political party has an interest in seeing that its members are free to associate and nominate political candidates

42. *Id.*
43. *Id.* at 121.
44. *Id.* at 126.
45. *Id.* at 125.
46. Laurence Tribe has characterized the test as follows:

> Once one reaches the merits the analytic paradigm employed in determining the constitutionality of state impingements upon party autonomy is a familiar one: mild restrictions on political parties must relate rationally to some legitimate stage interest; if a state rule substantially erodes the freedom of association of party members, however, the rule will be upheld only if it is shown necessary to serve a compelling state interest.

L. Tribe, American Constitutional Law 786 (1978).

47. Marchioro v. Chaney, 442 U.S. 191, 197 (1979); Rosario v. Rockefeller, 410 U.S. 752, 761 (1973); Dunn v. Blumstein, 405 U.S. 330, 345 (1972); Bullock v. Carter, 405 U.S. 134, 145 (1972).

48. C. Friedrich, Man and His Government 258-59 (1963); V.O. Key, Politics, Parties and Pressure Groups 543-44 (1964); Note, *Developments in the Law—Elections*, 88 Harv. L. Rev. 1111, 1211 (1974).

without interference—an interest protected by the first amendment of the United States Constitution.[49] On those occasions when a dispute arises from a state's attempt to regulate its elections in a manner alleged to interfere with a political party's candidate selection process, the question for the courts becomes one of how the respective interests of party and state are to be balanced.

Freedom of association is among the fundamental liberties held applicable to the states through the fourteenth amendment of the United States Constitution.[50] For that reason, state laws imposing substantial burdens on the freedom to associate are unconstitutional unless absolutely necessary to serve a compelling state interest.[51] Even if a particular state objective is of "compelling interest," the means employed to further that objective must be carefully tailored to minimize interference with associational freedoms.[52] By contrast, state laws that impose minor restrictions on associational activities are constitutional as long as they promote a legitimate state interest.[53]

The freedom to associate for the purpose of furthering an end within the electoral process is extended not only to political parties, but to individual voters as well. The balancing process does not make the nature of the litigant asserting an abridgment of liberty a variable: a law substantially burdening associational freedoms is unconstitutional absent a showing of compelling state interest regard-

49. Cousins v. Wigoda, 419 U.S. 477, 487 (1975); Kusper v. Pontikes, 414 U.S. 51, 57 (1973).

50. Cousins v. Wigoda, 419 U.S. 477, 487 (1975); Williams v. Rhodes, 393 U.S. 23, 30-31; New York Times v. Sullivan, 376 U.S. 254, 276-77 (1964).

51. Cousins v. Wigoda, 419 U.S. 477, 489 (1975) (state interest in protecting the integrity of its electoral process is not compelling in the context of selecting delegates to national political party conventions, *see infra* notes 68-75 and accompanying text); Bates v. Little Rock, 361 U.S. 516, 524-25 (1960) (state's request for NAACP membership lists substantially encroached on NAACP's freedom to associate; the state's interest in levying occupational license taxes bore no relevant correlation to requiring the production of the lists and was therefore insufficiently compelling to justify the intrusion); NAACP v. Alabama, 357 U.S. 449, 463 (1958) (state court order for production of NAACP membership lists presented insufficiently compelling state interest to justify the deterrent effect that the order would have on the right of association).

52. Kusper v. Pontikes, 414 U.S. 51, 59 (1973); Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

53. Marchioro v. Chaney, 442 U.S. 191, 196, 199 (1979) (in the absence of a showing that the party's freedom to associate has been substantially burdened, a state may further its legitimate interest in regulating its elections by requiring that each state party maintain a representative central committee, *see infra* notes 77-78 and accompanying texts); Rosario v. Rockefeller, 410 U.S. 752, 760-62 (1973) (a party affiliation statute which inconveniences but does not prohibit voters from participating in the primary of their choice is justified by the legitimate state interest of preventing voter "raiding", *see infra* notes 56-62 and accompanying text).

less of whether the statute is challenged by a voter or a political party. Nevertheless, the identity of the litigant may affect the Court's assessment of when the state's interest in regulation is compelling or merely legitimate, and likewise whether the abridgment of freedom resulting from the law is minimal or substantial. By comparing a number of cases in which the litigant asserting a deprivation of associational freedoms is a voter with cases in which the litigant is a political party, the seemingly special status accorded the political party's freedom to function will become manifest.

A. Conflicts Between State Law and Associational Freedoms of Individual Voters

A review of *Rosario v. Rockefeller*[54] and *Kusper v. Pontikes*[55] illustrates the manner in which the Court has distinguished minimal from substantial burdens on associational freedoms, and legitimate from compelling state interests in the context of voter-state conflicts. At issue in *Rosario* was a New York election law which provided that all voters must publicly declare party affiliation thirty days before the annual general election in order to be eligible to vote in a subsequent primary.[56] The law was designed to discourage voter "raiding"[57] at the primary election. The assumption was that citizens would be unlikely to profess allegiance to an opposing party for the purpose of sabotaging its primary several months away while planning to vote for the party they genuinely favor at the general election thirty days off.[58]

Pedro Rosario did not register his party affiliation in time to be eligible to vote in the 1972 presidential primary election, and was prohibited from casting a ballot. Rosario sought a declaratory judgment, arguing that the statute abridged his freedom to associate with the party of his choice. The Supreme Court rejected Rosario's claim. The Court observed that the New York election law did not prohibit anyone from voting, but only imposed a time limit on when voters could enroll. Any disenfranchisement would be caused not by the law, but by the voters' failure to take the steps necessary to render themselves eligible.[59] Because the law did not "'lock' a voter

54. 410 U.S. 752 (1973).
55. 414 U.S. 51 (1973).
56. N.Y. ELEC. LAW § 186 (Consol. 1973).
57. "Raiding" is the practice of voting in the primary of the party the voter opposes, in an effort to skew the primary results in favor of a candidate the voter perceives as most vulnerable at the general election.
58. *Rosario*, 410 U.S. at 761.
59. *Id.* at 758.

into a pre-existing party affiliation,"[60] and employed a suitable means for pursuing the legitimate state interest of preventing "raiding",[61] it did not constitute an "unconstitutionally onerous burden" on the voters' freedoms of association.[62]

Kusper v. Pontikes concerned Section 7-43(d) of the Illinois Election Code, which prohibited persons from voting in a political party's primary if they had voted in the primary of another party within the previous twenty-three months.[63] Harriet Pontikes filed a complaint for injunctive relief after being prohibited by the statute from voting in the Republican primary in February 1971, and the Democratic primary in March 1972. She, like Pedro Rosario, alleged that the statute infringed upon her freedom to associate with the political party of her choice. The United States Supreme Court held in favor of Pontikes, concluding that the statute substantially burdened voters' freedom to associate, employed an unnecessarily drastic means for pursuing the state's interest in preventing raiding and was therefore unconstitutional. The Court observed that:

> By preventing the appellee from participating at all in Democratic primary elections during the statutory period, the Illinois statute deprived her of any voice in choosing the party's candidates, and thus substantially abridged her ability to associate effectively with the party of her choice.[64]

Rosario was distinguished on the ground that the burden on Rosario was insubstantial because the statute did not prevent him from voting in the primary of his choice; any effect the statute might have in rendering citizens ineligible to vote in the primary of their choice would be entirely the result of carelessness. By contrast, the Illinois statute locked voters into preexisting party affiliations, the only means for release being not voting at all for nearly two years.[65] The Court acknowledged that Illinois' interest in preventing voter raiding was no less legitimate than that of New York.[66] It was unnecessary, however, for the Court to determine whether Illinois' interest could be classified as compelling, because regardless of how important the state's objective might be, it could be attained by "less drastic means" which would not burden the voters' freedoms of as-

60. *Id.* at 759.
61. *Id.* at 761-62.
62. *Id.* at 760.
63. ILL. REV. STAT., ch. 46, § 7-43 (1975).
64. *Kusper*, 414 U.S. at 58.
65. *Id.* at 60-61.
66. *Id.* at 59-60.

sociation so substantially.[67]

Distinguishing between minimal and substantial burdens on a voter's freedom to associate with the party of his or her choice would thus appear to depend on whether the voter is merely inconvenienced in his or her efforts to affiliate with a particular party—in which case the burden is classified as minimal—or has been completely stymied in such efforts, at which point the burden becomes substantial. Lower court decisions after *Kusper* and *Rosario* are consistent with this formulation.[68] As noted earlier, however, these cases concern the associational freedoms of individual voters, not political parties. *Cousins v. Wigoda*[69] indicates that the Court is considerably less willing to tolerate any ascertainable interference with associational rights when the rights at stake are those of a political party.

B. Conflicts Between State Law and the Associational Freedoms of Political Parties

In *Cousins v. Wigoda*, a slate of delegates (the Wigoda delegation) whose composition conformed with Illinois law was selected in a direct primary election to represent the state at the 1972 Democratic National Convention. The composition criteria established by Illinois statute differed from those of the National Democratic Party. As a consequence, the National Party selected a different delegation (the Cousins delegation), which had adhered to the Party's slatemaking criteria, to represent Illinois at the National Convention. Members of the unseated Wigoda delegation brought an action to enjoin the National Party from seating the Cousins delegation in their place.

The Illinois Court of Appeals held for the Wigoda delegation.[70]

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67. *Id.* at 61.

68. Anderson v. Celebrezze, 499 F. Supp. 121. 137-39 (S.D. Ohio 1980) (requirement that independent candidates for president file nomination papers 75 days before the primary election violates the candidate's right to equal protection and the voters' freedom to affiliate with the candidate; *Rosario* is distinguishable by the fact that the means chosen to further Ohio's interest in political stability unnecessarily and arbitrarily restrict the freedoms of candidate and voter); Young v. Gardner, 497 F. Supp. 396, 400-02 (D.N.H. 1980) (a requirement that voters register party affiliation at least 97 days before the primary does not lock voters into a preexisting party affiliation; the requirement pursues a legitimate state interest, and is therefore constitutional by the standard employed in *Rosario*); Nader v. Schaffer, 417 F. Supp. 837, 846-47 (D. Conn. 1976) (affiliation requirement, in and of itself, does not unnecessarily burden voters' freedom to associate, for while it requires a public affirmation of party loyalty, it does not present an "absolute barrier" to participation in primary elections, and it furthers the legitimate state interest of preventing raiding).

69. 419 U.S. 477 (1975).

The Supreme Court reversed.[71] Justice Brennan, writing for an eight-member majority, declared that the National Party enjoys a constitutionally protected right of association. The Court observed that inherent in that right is the National Party's freedom to define and limit membership as it chooses; a state law that acts to deny the National Party its preference as to which delegates are to represent the Party membership at the National Convention substantially burdens the National Party's freedoms of association.[72] The Court also concluded that the state's interest in the integrity of its electoral process is not compelling within the context of selecting delegates to the National Convention.[73] It firmly declared that the states have no constitutionally mandated role in the nomination process.[74] However legitimate the state's interest might be in seeing that delegates representing the state are fairly selected, the majority was satisfied that such an interest is in no way compelling because the National Party, not the individual state, is best suited to decide how the nominating convention should be run.[75] The convention is national in character; to permit each of the states to impose its own peculiar restrictions on the manner in which delegates are selected to the convention, the Court concluded, would destroy the efficiency of the nominating process.[76]

While the Court may thus be unwilling to sanction any appreciable state intrusion into political party activity, *Marchioro v. Chaney*[77] suggests that the Court still must be satisfied that some sort of intrusion has occurred. In *Marchioro*, a Washington statute provided that each major political party within the state must have a state committee composed of two representatives from each county. The Democratic Party of Washington decided to add members to the state committee in excess of those required by statute. The new members, however, were not seated by the Washington Democratic Party out of concern that doing so would violate the statute. The unseated representatives sought an injunction against the state, as-

70. Wigoda v. Cousins, 14 Ill. App. 3d 460, 302 N.E.2d 614 (1973), *rev'd*, 419 U.S. 477 (1975).

71. 419 U.S. 477.

72. *Id.* at 488. The Cousins delegates argued that barring them from participation at the National Convention constituted a "significant interference" with their associational freedoms. The Wigoda delegates' response was not that the interference was insubstantial, but that the state's interest was sufficiently compelling to justify the intrusion. *Id.* at 488-89.

73. *Id.* at 491.

74. *Id.* at 489-90.

75. *Id.*

76. *Id.* at 490.

77. 442 U.S. 191 (1979).

serting that their freedom to associate had been substantially burdened. The Supreme Court rejected this claim. Justice Stevens, writing for a unanimous Court, observed that:

> Instead of persuading us that this is a case in which a state statute has imposed substantial burdens on the party's right to govern its affairs, appellants' own statement of the facts establishes that it is the party's exercise of that very right that is the source of whatever burdens they suffer.[78]

Between the years that *Cousins* and *La Follette* were decided, virtually no opportunities arose for the courts to resolve party-state conflicts. In those instances in which the matter was touched upon in dicta, the courts tended toward an interpretation of *Cousins* typified by Judge Wilkey's observation in a concurring opinion in *Ripon Society, Inc. v. National Republican Party*:[79] "The Supreme Court in *Cousins v. Wigoda* made it abundantly clear that the individual states are powerless to impose their will on a national party nominating convention in any manner that would interfere with the almost unfettered discretion of the parties in naming candidates."[80] One case in which a court was called upon to clarify the rights and responsibilities of party and state in the nominating process, was *Ferency v. Austin*.[81] In *Ferency*, the Michigan District Court was presented with a fact pattern very similar to that in *La Follette*. The National Democratic Party had adopted rule 2A, calling for an end to reliance upon open primary elections. The Michigan Democratic Party decided to abandon the state's open primary in favor of a state party caucus. The plaintiff, a private citizen, sought to compel

78. *Id.* at 199. The *Marchioro* Court distinguished *Cousins* on the ground that in *Marchioro*, the associational burden was insubstantial. *Id.* at 199 n.4. There is, however, a second associational difference: *Marchioro* involved the rights of a state rather than a national political party. The relevance of such a difference is discussed *infra* Section VI.

79. Ripon Soc'y, Inc. v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975).

80. *Id.* at 608 (Wilkey, J., concurring) (assuming, without deciding, that the equal protection clause applies to political parties, the voters' interest in a roughly representative distribution of delegates among the states is inferior to the party's freedom from interference in the delegate selection process); American Independent Party v. Austin, 420 F. Supp. 670, 673 (E.D. Mich. 1976) (holding that the national convention, not the general election, is the proper forum for deciding which of two slates of candidates is ultimately to represent the party; the state may properly refuse the party's request that alternative slates of candidates be listed on the general election ballot; "The National AIP party convention . . . is a proper forum for resolving intraparty disputes . . . and there are pervasive national interests in leaving the selection of candidates for national office to the national party conventions, rather than to the states."). *But see* Fallon v. State Bd. of Elections of New York, 408 F. Supp. 636, 638 n.3 (S.D.N.Y. 1976) ("Whether the *Cousins* decision can thus be read to hold that any national party rule overrules a contrary state election requirement is at best questionable.").

81. 493 F. Supp. 683 (W.D. Mich. 1980).

the state to require the National Party to abide by Michigan's open primary statute. The district court dismissed the complaint. Citing *Cousins* as controlling, the court held that the state's interest in keeping its primary open was insufficiently compelling to justify an abridgment of the National Party's freedom to limit participation in its candidate selection process to Democrats only—"an interest which goes to the very heart of the Party's associational rights."[82]

IV. Limitations of the Constitutional Balancing Test as Applied in *La Follette*

Commentators have observed that the Court's decision to apply a compelling state interest test in a given case all but guarantees that the legislation under consideration will be held unconstitutional.[83] The real question, then, is not whether the particular statute can survive the exacting scrutiny of a compelling state interest test, but rather whether the circumstances of the case warrant the Court's application of the tougher standard in the first place. A comparison of the factual settings of *La Follette* and its controlling case, *Cousins*, reveals significant differences that would seem to militate against the application in *La Follette* of scrutiny as exacting as that applied in *Cousins*.[84]

The statute at issue in *Cousins* directly affected the composition of the Illinois delegation at the National Convention, whereas the impact of the Wisconsin statute on its delegation was indirect. Justice Powell observed in his dissent[85] that *Cousins* involved an attempt to replace a delegation favored by the National Party with one selected in accord with Illinois' primary results. Illinois' preference would alter the actual composition of the Democratic Convention membership. By contrast, the Wisconsin law did not affect the composition of the state's delegation, but only how the members must, within limits, cast their ballots at the National Convention. In this respect, Wisconsin's law burdened the National Party's freedom to associate and limit membership to a lesser degree than did the Illinois statute in *Cousins*, and *Cousins* is inapplicable to state regulations that do not substantially burden the Party's freedom to

82. *Id.* at 693-94.

83. L. Tribe, *supra* note 46, at 1000-01; Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

84. This is true only to the extent that these cases are evaluated solely in terms of a balancing of constitutional interests. *See infra* Section V.

85. *La Follette*, 450 U.S. at 128-29 (Powell, J., dissenting).

associate.[86]

At the same time, the state interest advanced in *La Follette* may be stronger than that in *Cousins*. In *Cousins*, the Wigoda delegates objected to their being unseated in favor of the Cousins delegation on the ground that the State of Illinois had a compelling interest in protecting open primary results as a means of preserving the integrity of its electoral process; since the Wigoda delegation won the direct primary, it should be the delegation seated at the Convention. The state's interest related to preserving the direct primary outcome, not the direct primary itself, i.e., the National Party disregarded direct primary results favoring the Wigoda delegation not because of the Party's objection to the state's direct primary, but because of the Wigoda delegation's failure to abide by the Party's slatemaking procedure prior to the election, when the delegation was assembled.[87]

In *La Follette*, on the other hand, the Democratic Party's refusal to seat delegates bound by open primary results threatened Wisconsin's interest in preserving not only its open primary results, but also the open primary itself. The *La Follette* Court emphasized that the National Party's decision not to accept delegates bound by open primary outcomes in no way prohibited the state from conducting an open primary—as long as it was willing to incur the cost of being denied a voice at the National Convention.[88] As a practical matter, however, this cost would inevitably outweigh any benefits to keeping the primary open, since if the voters' choice is ignored, there is little consolation in knowing that the privacy of the voters' party preferences is preserved. Thus, the rejection of delegates bound by open primary results is tantamount to a prohibition of open primaries. In both *Cousins* and *La Follette*, the state asserted an interest in preserving the integrity of its electoral process by protecting primary results. In *La Follette*, however, the state's interest went beyond protecting the people's choice in a particular primary election to preserving the vitality of an institution that had been part of the state's electoral process for seventy-five years.[89]

Despite these apparent differences, the *La Follette* Court found the case before it indistinguishable from *Cousins* in any meaningful respect. The Court's rationale is, as in related cases, framed in terms of the balancing test. In striking the balance, the majority con-

86. *See Marchioro*, 442 U.S. at 199 n.4 (1979).
87. *Cousins*, 419 U.S. at 478-80.
88. *La Follette*, 450 U.S. at 126.
89. *See supra* notes 6-18 and accompanying text.

cluded that Wisconsin's open primary law imposed a substantial burden on the Democratic Party's freedom to function and failed to further a compelling state interest. In certain respects, the Court's characterization of the statute is peculiarly strained.

A. The Extent of the Burden on Association

At the close of the majority opinion, the Court concluded that Wisconsin's statute created a "substantial intrusion [upon] the associational freedom of the members of the National Party."[90] Earlier on, however, the Court declined to assess whether Wisconsin's law placed a minor or substantial burden on the National Party, concluding that such questions were for the Party, not the courts, to answer.[91]

The rationale advancing the first of these two seemingly contradictory conclusions, that Wisconsin's law imposed a substantial burden on the National Party, is somewhat circular. Wisconsin law required that delegates cast their ballots in accord with the results of the open primary. In support of its determination that the resulting burden was substantial, the Court reiterated that Wisconsin law compelled delegates to abide by the results of the open primary, and cast their votes accordingly.[92] This explanation begs the essential question of what it is about the open primary law that substantially intruded into the associational freedoms of the Party. National Party rules permit the states to bind delegates to vote in accord with closed, but not open primary results. Are open primary results sufficiently different from those of closed primaries that compelling the National Party to accept delegates bound by them would constitute a substantial burden on its associational freedoms? The Wisconsin Supreme Court, and Justices Powell, Rehnquist and Blackmun in dissent, answered this question in the negative.[93]

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90. *La Follette*, 450 U.S. at 125-26.

91. *See supra* note 39 and accompanying text.

92.

> [T]he Wisconsin Supreme Court apparently deduced that the effects of the open primary on the nominating process were minimal. But the Court ignored the fact—the crucial fact in the case—that under Wisconsin law state delegates are bound to cast their votes at the National Convention in accord with the open primary outcomes.

La Follette, 450 U.S. at 126 n.32.

93. *La Follette*, 93 Wis. 2d at 511, 287 N.W.2d at 535; *La Follette*, 450 U.S. at 134 (Powell, J., dissenting). One commentator has contended that:

> Both the Wisconsin court and Justice Powell missed the point. As an association, the DNP (Democratic National Party) may wish to strengthen or change itself. The Wisconsin Law could prevent the DNP from implementing any of its own judgments about who should participate in its most critical function—candidate selection.

The majority, by contrast, declined to answer altogether. Its other conclusion, that the party, not the courts, should assess the extent to which the state's law burdens party functioning, thus leaves relatively impenetrable its subsequent determination that the state's intrusion into the party's freedom was sufficiently substantial to render the statute unconstitutional absent a showing of compelling state interest.

B. The Extent of the State's Interest

The Wisconsin Supreme Court had concluded that the open primary served a compelling state interest by "encouraging increased voter participation in the political process . . . thereby assuring that the primary itself and the political party's participation in the primary are conducted in a fair and orderly manner."[94] The United States Supreme Court agreed that "[u]pon this issue, the Wisconsin Supreme Court may well be correct."[95] Yet while Wisconsin may have a compelling interest in retaining its primary, the Court concluded that it had no similarly compelling interest in ensuring that the National Party accept its results.[96]

The state's interest in preserving the open primary cannot easily be separated from its interest in requiring the National Party to accept delegates bound by its outcome. Voters disinclined to align themselves publicly with a particular political party may be unwilling to participate in closed primaries. By not requiring public declarations of party affiliation, the open primary encourages voter participation and thereby furthers the state's interest. If, however, the voter is aware that his or her open primary ballot would be tabulated by the state and reported to the state party, only to be ignored

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> What meaning can freedom of association have if the association has no control over who can participate in its decision making?

Note, *Democratic Party v. Wisconsin ex rel. La Follette: May States Impose Open Primary Results Upon National Party Conventions?*, 59 DEN. L.J. 611, 620 (1982).

The Wisconsin law, however, did not strip the National Party of *all* control over the candidate selection process. The National Party retained complete control over the composition of the delegation participating at the national convention (*see supra* note 86 and accompanying text); the Wisconsin law simply assured that the ballots cast by those delegates would be responsive to the state's open primary results. The question that remains is whether the state's interference, while less than complete, is nonetheless substantial. This in turn would seem to mandate an inquiry into the extent to which the open primary law restricted the National Party's freedom to define and limit its membership. Section V, *infra*, proffers a possible explanation of why the Supreme Court declined to embark on such an inquiry.

94. *La Follette*, 93 Wis. 2d at 512, 287 N.W.2d at 536 (1980).

95. La Follette, 450 U.S. at 121.

96. *Id.* at 125-26.

by the delegates responsible for selecting the presidential nominee at the national convention, in what way could the open primary elicit any, let alone encourage, voter participation? For Wisconsin to preserve the integrity of its open primary and thereby further its interest in encouraging voter participation, it would appear essential that the state have the authority to ensure that open primary results are meaningful. If the state's interest in retaining the open primary is compelling, its interest in binding national convention delegates to vote in accord with open primary outcomes would seem equally compelling. The Court's conclusion that Wisconsin's interest in preserving its open primary is substantial, yet not incompatible with the National Party's freedom to disregard the open primary results, would seem inconsistent with the notion that the state has a valid interest in preserving a fair and meaningful electoral process.

Confining one's analysis of *La Follette* to the four corners of the balancing test yields a rather unsettling result. The burden upon the associational freedoms of the National Party is labeled "substantial" without meaningful explanation, and the characterization of the state's interest neglects to include the vitality of Wisconsin's open primary as among the interests at stake should the statute be struck down. In short, the outcome of a straightforward balancing of constitutional interests would appear to favor the State of Wisconsin. Still, given the Court's hesitation to sanction any appreciable interference with political party decisionmaking in *Cousins v. Wigoda* and subsequent cases, it comes as no great surprise that the party prevailed in *La Follette*. By itself, the balancing test does not provide a coherent explanation for why the associational freedoms of political parties are treated with deference—a deference that has not been extended, for example, to the first amendment freedoms of individual voters. The explanation—and for that matter the justification—for the Court's decision in *La Follette*, lies in the outcome, not of a balancing of interests, but rather of a comparison of institutional decisionmakers.

V. RECONSIDERATION OF *LA FOLLETTE* IN TERMS OF A COMPARISON ON INSTITUTIONAL DECISIONMAKERS[97]

It is instructive to set the balancing test aside momentarily,

97. For an elaboration on a comparative institutional approach to law, see Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350 (1981).

and to consider separately the problem of identifying the decisionmaker best able to resolve disputes of the sort that arose in *La Follette*. There are three alternatives. First, the courts could themselves assess the permissibility of particular state intrusions upon associational freedoms, basing their decisions upon careful scrutiny of data substantiating the extent to which a contested statute would burden the party or further the state's interest. Second, the courts could defer to the state legislatures on the issue of what sort of election regulations are reasonably necessary to further the state's interests. Third, the courts could refuse to permit state interference with political party activities, thereby leaving it for the party to decide whether a particular restriction is overly burdensome. The courts consistently have chosen the third alternative; the question is, why?

The Court declined to assign itself the role of decisionmaker in *La Follette*, on the ground that the courts may not interfere with a party's expression of its first amendment freedoms, regardless of whether a particular expression of those freedoms is regarded by the Court as unwise.[98] In the note accompanying this declaration, the Court instructed the State of Wisconsin to direct its arguments concerning the lack of a need for a closed primary "to the National Party—which has studied the need for something like Rule 2A for 12 years . . . and not to the judiciary."[99] Thus it would appear that the Court's reluctance to impose its judgment in cases affecting political party functioning derived from its belief that the Court is not as competent as the party to decide such matters. This attitude, while somewhat latent in *La Follette*, was plainly manifested in a 1972 case, *O'Brien v. Brown*.[100]

In *O'Brien*, the Democratic National Convention Credentials Committee had decided to unseat one hundred fifty-one California delegates bound to vote for George McGovern in accord with the state's winner-take-all primary law. Three days before the Convention opened, the Court was called upon to consider whether the decision of the Credentials Committee violated the delegates' constitutional due process rights.

The Court declined to address the merits of the dispute and granted a stay of the judgment of the court of appeals (which had held in favor of the unseated delegates),[101] thereby permitting the decision of the credentials committee to stand. The Court justified

98. *La Follette*, 450 U.S. at 124.
99. *Id.* at 124 n.27.
100. 409 U.S. 1 (1972).
101. Brown v. O'Brien, 469 F.2d 563 (D.C. Cir. 1972).

its decision on three grounds: (1) the queston presented may well have been political and therefore nonjusticiable; (2) there was insufficient time for the Court to resolve the dispute adequately; and (3) the Convention was an available and appropriate forum to review the decision of the Credentials Committee.[102]

Technically, the Court did not resolve the issue of whether the Credentials Committee decision presented a nonjusticiable political question.[103] As a practical matter, however, *O'Brien* has been read to stand for the proposition that the Court will be hesitant to resolve delegate selection disputes because it regards them as political problems best left for resolution at the convention, not in the courtroom.[104] The political question analysis in *O'Brien* was abandoned in *Cousins* to the extent that in *Cousins* the Court reached the merits. Nevertheless, the Court's disinclination to become involved in political party disputes remained.[105] Subsequent interpretations of *Cousins* and *O'Brien* are in general agreement that the two cases stand for the proposition that the courts should not actively involve themselves in political party disputes for the simple reason that they are not in as effective a position as the political parties to resolve them.[106]

Just as the *La Follette* Court was loathe to permit the courts to second guess the decisions of political parties, it was equally unwilling to allow the state legislature to substitute its judgment for that

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102. *O'Brien*, 409 U.S. at 3-4.

103. Commentators have observed that the Court did not hold, but rather merely intimated that the merits of *O'Brien* were nonjusticiable. L. TRIBE, *supra* note 46, at 785; Note, *The Supreme Court and the Credentials Challenge Cases: Ask a Political Question, you get a Political Answer*, 62 CALIF. L. REV. 1344, 1349-51 (1974).

104. This was Justice Rehnquist's interpretation of *O'Brien* in Republican St. Cent. Comm. v. Ripon Soc'y Inc., 409 U.S. 1222, 1225-66 (1972) (Rehnquist, J., as Circuit Justice). *See also* Raymar, *Judicial Review of Credentials Contests: The Experience of the 1972 Democratic National Convention*, 42 GEO. WASH. L. REV. 1, 15-18 (1973); Note, *Mandates of the National Political Party Clash with Interests of the Individual States as the Party Executes its Policy by Abolition of State Delegate Selection Results: Legal Issues of the 1972 Democratic Convention and Beyond*, 4 LOY. CHI. L.J. 137, 150-54 (1973); Note, *Political Parties, Courts and the Political Question Doctrine: New Developments*, 52 OR. L. REV. 269, 279-82 (1973).

105. In *Cousins*, the Court concluded, citing *O'Brien*, that "this is a case where 'the convention itself is the proper forum for determining intra-party disputes as to which delegates should be seated.'" *Cousins*, 419 U.S. at 491.

106. Buckley v. Valeo, 424 U.S. 1, 250 (1975) (Burger, J., concurring) (citing *Cousins* and *O'Brien* for the proposition that the courts have refrained from becoming involved in disputes concerning the seating of delegates because management of the Convention is better left in the hands of the party, not "Government inspectors"); McMenamin v. Philadelphia County Democratic Executive Comm., 405 F. Supp. 998, 1002 (E.D. Pa. 1975) (*O'Brien* and *Cousins* "counsel restraint when courts are tempted to interject themselves in intra-party political disputes"); E. CORWIN, H. CHASE, & C. DUCAT, THE CONSTITUTION AND WHAT IT MEANS TODAY 455 (1978).

of the party. The Court acknowledged that the legislature has a substantial interest in regulating presidential primaries conducted within its borders. It concluded, however, that this interest did not extend to regulating the response of the National Democratic Convention, composed of representatives duly selected from forty-nine other states, to the results of Wisconsin's primary.[107] In other words, the Wisconsin legislature is well suited to make policy determinations that burden or benefit citizens within the State of Wisconsin, since the decisions of the legislature reflect, at least in theory, the preferences of the citizens who elected the legislators into office. For that same reason, the Wisconsin legislature is ill equipped to decide matters of nationwide policy, because the views of citizens in all states but Wisconsin would be unrepresented in the decisions made. Wisconsin's effort to force the Democratic Party to accept delegates bound by open primary outcomes can be seen as an attempt by an individual state to impose its preferred policy upon a national population diametrically opposed to such policy.[108] In *Cousins v. Wigoda*, the Court observed that "[i]f the qualifications and eligibility of delegates to the national political party conventions were left to state law, 'each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result.'"[109] "Party policy" embodies the reasoned judgment of the National Party heirarchy, which in turn represents the interests of Democrats across the nation. While the political party is by no means perfectly representative, it is certainly in a better position to address the needs of party members nationwide, and to devise a plan to meet those needs, than is the legislature of any single state.

Decisions affecting the manner in which national conventions

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107. *La Follette*, 450 U.S. at 126.

108. Questions asked of Wisconsin Attorney General Bronson La Follette at oral argument reflect the Court's concern on this point:

> Mr. La Follette: Your Honor, the record which has been stipulated here contains all of the relevant studies and scholarly articles . . . and they all conclude that there is no evidence of raiding in this case. . . .
>
> Question: But what you're saying then, is that the Democratic National Convention meeting off in Memphis, Tennessee or in New York cannot have a different view of the matter?
>
> Mr. La Follette: Not when important constitutional concerns are properly arrested for the authority of the state [sic]. . . .
>
> Question: Mr. Attorney General, isn't the real problem here that Wisconsin is extending its long-arm into the convention in another state?

Oral argument of Bronson C. La Follette on behalf of the appellees at 24-25, Democratic Party of the United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981).

109. *Cousins*, 419 U.S. at 490.

are run are thus best left in the hands of the national political parties. A national party is more capable and competent than the courts to resolve such matters, and provides a more efficient forum for decisionmaking than the state legislatures. The apparent problems of the *La Follette* Court's analysis that result from evaluating the case solely in terms of a constitutional balancing of interests are largely resolved when one steps back and reexamines the decision as an effort, at least in part, to assign the task of dispute resolution to the most efficient decisionmaker.

The Court's refusal to assess the extent to which Wisconsin's open primary statute actually burdened the National Party, and the Court's failure to include the survival of the open primary as an integral part of the state's interest, are not readily explicable in the context of a constitutional balancing of interests, but can be understood as the consequence of a determination that party-state conflicts are best left for the party to resolve. The Court refused to second guess the National Party's conclusion that the open primary statute is unduly burdensome, because the National Party, not the Court, is more competent to make such a decision. At the same time, the Court declined to consider the state's arguments challenging the accuracy of the National Party's conclusion that the statute is overly burdensome. Regardless of whether the state's assessment of the situation happened to be correct in this particular instance, that delegates bound by the results of Wisconsin's open primary did not substantially interfere with the nomination process, the National Party, not the state, is in a better position to decide such questions. Similarly, it may be true that the open primary is of great importance to Wisconsin and cannot be preserved if the state is without the power to compel the National Party to accept delegates bound by primary results. However, to the extent that it is more appropriate for the Party, rather than the states, to determine national nominating procedures, Wisconsin is without authority to interfere, regardless of the magnitude of its interest is in preserving the open feature of its primary.

The difference in the Court's treatment of the associational freedoms of national political parties on the one hand, and individual voters on the other, may likewise be understood in terms of a comparison of decisionmaking institutions. Unlike a political party, the individual voter has no special competence or expertise warranting the Court's deference. If anything, the Court's previous experience with similar cases puts it in a considerably better position to appraise the reasonableness of a particular state's restriction. Unlike state regulation of national parties, state registration and voting re-

quirements impact only on residents of the state—legislators responsible for unpopular restrictions may be voted out of office. Whereas the courts have reason to be particularly wary of state laws that affect nonresidents, e.g., the national membership of a political party, who are unrepresented in the decisionmaking process, the cause for concern is not as great in cases involving state residents. The state's interest in voter affiliation cases is thus reasonably accorded greater weight than in cases where national political parties are involved and, as a consequence, voting restrictions such as those in *Rosario* have been upheld.[110]

While the state legislature may generally be the institution best able to oversee the orderly registration of voters within the state, it is far from perfect. The legislature may be able to represent effectively the interests of the majority in many circumstances, but what of the minority? There are occasions such as in *Kusper*, when the will of the legislature, as reflected in the contested statute, fails to account adequately for the interests of the minority of voters and so severely restricts their associational freedoms that the Court will deem itself better able to protect the neglected interest and intervene on behalf of the minority.[111]

VI. The Future

The *La Follette* Court extended considerable deference to the National Party's decision to disregard Wisconsin's open primary statute. After *La Follette*, what if any role is left for the courts and state legislatures in resolving party-state conflicts?

It remains the duty of the courts to make threshold determinations of whether a party's associational freedoms have been burdened. While a court may lack the expertise necessary to measure the extent to which a statute intrudes upon a political party's rights of association, a court is a more disinterested and therefore more appropriate body than a political party to make the determination of whether any intrusion upon rights of association has occurred in the first place. A political party may be inclined out of self interest to characterize as unconstitutional any state legislation causing even minimal inconvenience to the party. The *Marchioro* decision indicates that the Court will not simply accept a party's word that its rights are being violated, but rather will carefully scrutinize the matter to discern for itself whether there has been an abridgment of

110. *See supra* notes 56-62 and accompanying text.
111. *See supra* notes 63-64 and accompanying text.

first amendment rights.[112] If a court is satisfied that the state law in question exerts an ascertainable burden on a party's freedom to conduct its affairs as the party deems best, the party will be left to decide whether the burden is intolerable.

On the other hand, if the Court concludes, as it did in *Marchioro*, that the law does not interfere with the party's associational rights, it remains the exclusive province of the state to regulate elections held within its borders. Even when the law does in some measure inconvenience the exercise of first amendment freedoms, the Court may nevertheless be willing to side with the state if the statute does not tamper with national party policy. State laws affecting the manner in which ballots are cast by the delegation of the enacting state may alter the candidate selection decision. Such a decision is national in character and should not be left to the judgment of the individual states. By contrast, when a state election statute is restricted in impact to its residents, the legislators, as representatives of the citizens within the state, have operated within their sphere of competence. In such a case, it is appropriate for the courts to defer to the judgment of the legislatures and leave disgruntled citizens with recourse to the polls to express dissatisfaction and implement desired change.[113]

The battle lines in future cases will be drawn along the question of whether state laws constitute permissible regulation or exert ascertainable and therefore impermissible intrusions upon associational freedoms. Between *Marchioro*, which held that a state law exerting no more than an imaginary associational burden is constitutional, and *La Follette*, which held that a state law controlling how party delegates vote at national conventions is unconstitutional, lies a somewhat murky, gray area. In an effort to sort through the varying shades of gray, it is helpful to single out for discussion some of the factors on which courts may rely, expressly or otherwise, in resolving future party-state conflicts.

A. Presence of Issues Affecting Rights of Association

As a starting point, it is helpful to determine whether there is any reasonable basis for contending that the contested state law

112. *See supra* notes 77-78 and accompanying text.

113. This is not to suggest that courts will permit a state to run roughshod over the first amendment freedoms of its residents. Rather, when the impact of a statute does not extend beyond the borders of the state, one might anticipate that the court will engage in a balancing of interests similar to that in *Rosario* and *Kusper*, in which the first amendment interests at issue are accorded less deference. *See supra* text accompanying note 110.

triggers a concern for the party's "associational rights," as that term has been defined and limited by case law. The Court has extended to political parties the freedom to define and limit their membership and to select whomever they wish to run for public office. If the impact of the law on the party's freedom to conduct its affairs is purely speculative, as in *Marchioro*, concern for the party's rights of association is premature, and the Court will likely defer to the judgment of the state legislature and uphold the statute. On the other hand, if the state has sought to regulate a practice impacting on the party's candidate or membership selection procedures, further analysis is necessary.

B. The Impact of the Law on Persons Outside the State

Assuming some sort of nexus between the state law and the party's associational rights is established, the question then becomes whether the burden exerted by the statute on those rights is sufficient to render the law unconstitutional. While rights-of-association cases arising in other contexts, e.g., voter-state conflicts discussed in Section III above, have been resolved through a careful balancing of associational burdens and state interests, in party-state conflicts the Court has tipped the balance heavily in favor of the political parties. In assessing likely results in future cases, it is important to determine whether those policies underlying the Court's favoring protection of parties apply with equal force to the case then being considered.

One of the factors favoring protection of the party is the impact of the state law on nonresident party members. The Court has looked with extreme disfavor on laws that regulate matters affecting a national party's selection procedures, since the effect of such laws may be to impose the judgment of a single state legislature on individuals nationwide. The Court should be less concerned about laws that exercise an impact exclusively on residents of the state responsible for the law. The Court may thus be more willing to engage in a traditional balancing of interests if the law at issue regulates conduct principally within the state, e.g., statutes controlling the time, place and manner in which primary elections are to be conducted, as opposed to out of state, e.g., statutes affecting the conduct or composition of delegates to the national conventions, where no appreciable interference will be tolerated.[114]

114. One commentator has concluded in a similar vein, that:

C. The Competence of the Court

Whenever a political party asserts that its constitutional rights of association have been abridged by a state law, courts will be attentive to the special competence of the party to determine what is in its best interest. If a state law prohibits or restricts activity the party deems essential to its candidate or membership selection process, the courts will be disinclined to second guess the party's conclusion. While courts may generally be willing to acknowledge their relative lack of expertise or competence, and defer in some measure to the party's judgment, this will not be the case in all situations. The United States Court of Appeals for the Second Circuit observed in *Mrazek v. Suffolk County Bd. of Elections*,[115] that "[t]he parties are best situated to define the proper constituencies of their nominating delegates, and these determinations should not be invalidated unless such definitions are used to exclude or disadvantage discrete groups or minorities."[116] Thus, where the Court has reason to suspect that a party's position vis-a-vis a state law is based on a discriminatory intent, deference to the party ceases to be appropriate, and an outcome favorable to the state becomes likely.[117]

> On the one hand, when the matter is of general importance to all states—such as the time and place of the national convention—the need for uniformity may be so great that it overrides the potential interests of any one state. In matters of concern to only one state, on the other hand, the preference for uniformity should not automatically render illegitimate the assertion of state interests.

The Supreme Court, 1980 Term, 95 HARV. L. REV. 17, 250 (1981).

Professor Tribe concedes that the *Cousins* Court expressly limited its holding to state laws affecting *national* party rights, but concludes that the holding would logically apply with equal force to state parties—regardless of whether the party is state or national in character, an intrusion upon associational freedoms is an intrusion as such. L. TRIBE, *supra* note 46, at 787. The balancing of interests test, however, does not accommodate the Court's concern that, unlike state regulation of state parties, regulation of national parties may result in the infliction of state policy on individuals who had no input in the formation of such policy. It would thus be quite reasonable for the Court not to apply the full force of *Cousins* to laws affecting state parties.

115. Mrazek v. Suffolk County Bd. of Elections, 630 F.2d 890 (2d Cir. 1980).

116. *Id.* at 896 n.11. In support of this proposition, the court cited City of Mobile v. Bolden, 446 U.S. 55, 66 (1980).

117. This raises perplexing state action questions. If the indicia of state action inhere in political party activity to a degree sufficient to require that the party not infringe upon rights of due process and equal protection, one could argue that the party also is prohibited from abridging first amendment freedoms. If so, the action taken by the Democratic Party in *La Follette* might be unconstitutional, since the National Party in effect denied Wisconsin residents the opportunity to affiliate privately with the candidate of their choice. While the state interest justifying voter affiliation requirements in *Kusper* and *Rosario* was to prevent voter raiding, the National Party in *La Follette* conceded that there was no evidence of voter raiding in the Wisconsin primary. Consequently, the "state interest" of the National Party is arguably slim. In its briefs, the State Party did present a state action argument of this sort, but the argument was not addressed in the decision. See *supra* note 29.

Where the legislature has not overextended its reach, or where the court has reason to suspect that the party's objections to a state law are a product of prejudice rather than expert judgment, the Court will be inclined to approve the state law. As the reach of state laws regulating the electoral process extends to matters of national concern, however, the Court will become increasingly reluctant to rely on the state's assessment of what is necessary and proper, and will place greater confidence in the competence of the party to decide such matters. Similarly, where the Court perceives party decisions as being motivated not by discrimination but by a healthy concern for the party's well being, judicial deference to political party expertise is more probable.

CONCLUSION

The courts have traditionally resolved conflicts between the state's regulatory interests, and the individual's or group's freedom to associate, by a balancing process: A substantial intrusion upon associational rights is unconstitutional absent a showing of compelling state interest, while an insubstantial intrusion need only be justified by a legitimate state interest to pass muster. The Supreme Court employed the balancing test in *La Follette*: the Wisconsin statute requiring the National Party to accept delegates bound by open primary outcomes effected a "substantial intrusion" upon the Party's freedom to associate, was not supported by a compelling state interest to the extent that the contested restriction impacted upon national nominating procedures, and was therefore unconstitutional. Yet, given the Court's refusal to evaluate the nature and extent to which the statute burdened the National Party's associational freedoms, and its failure to consider certain seemingly vital aspects of the state's interest, the balancing test is of limited usefulness to understanding why the Court held as it did.

La Follette may be better understood in the context of a comparison of institutional decisionmakers. The Court is reluctant to immerse itself in national political party disputes which the Court has neither the capacity nor competence to decide. The Court is likewise hesitant to defer to the state legislature, which has the incentive and expertise to protect the efficiency of the electoral process only on the state, not the national level. The remaining alternative is for the Court to defer to the judgment of the political party once the Court is satisfied that an ascertainable burden on the party's freedom has been demonstrated. By virtue of its expertise and experience, the party is more competent than the courts to decide if a particular state regulation unduly interferes with the nomination of a presiden-

tial candidate. As a national organization with a vested interest in pleasing a majority of voters across the country, it is better able than the state legislatures to represent the nationwide interest in preserving the efficiency of the candidate selection process. In this light, the Court's predisposition to label as "substantial" any measurable interference with political party functioning, and its corresponding disinclination to classify the state's interest in perpetuating the interference as "compelling", is understandable.

Looking toward the future, one can anticipate that the Court will continue to look with disfavor upon state statutes that interfere to any ascertainable degree with the freedom of national political parties to formulate national policy objectives and implement plans designed to achieve those objectives. The same may not necessarily be true, however, of statutes affecting exclusively state parties, state residents, or state policy objectives. Further clarification of the proper role of state legislatures and courts vis-a-vis political parties must now await the disposition of cases that will inevitably arise out of the elections of 1984 and 1988.

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