Denver Law Review

Volume 59 | Issue 3 Article 9

February 2021

Democratic Party v. Wisconsin ex rel. LaFollette: May States Impose Open Primary Results upon Naitonal Party Conventions?

Christopher J. Martin

DEMOCRATIC PARTY V. WISCONSIN EX REL. *LAFOLLETTE*: MAY STATES IMPOSE OPEN PRIMARY RESULTS UPON NATIONAL PARTY CONVENTIONS?

INTRODUCTION

For the Democratic Party, 1980 was not a good year. At the polls, incumbent President Jimmy Carter lost to Republican Ronald Reagan; Democrats lost control of the United States Senate for the first time in many years, and saw their margin of control in the House of Representatives sliced dramatically. The Democratic Party also suffered a judicial setback when the Wisconsin Supreme Court upheld the validity of Wisconsin's open presidential primary statute. This statute directly conflicted with Democratic National Party (DNP) rules limiting participation in the National Convention delegate selection process to publicly affiliated Democrats.[1]

From a judicial perspective, 1981 was decidedly brighter for the Democrats. On February 25, 1981, the United States Supreme Court in *Democratic Party of the United States v. Wisconsin* ex rel. *LaFollette*[2] reversed the Wisconsin Supreme Court decision, holding that Wisconsin may not bind the DNP by the results of an open presidential primary if the open primary violates Party rules. While this holding represents a major victory for the DNP, its broader implications are far from obvious.

I. FACTUAL SETTING

Wisconsin adopted its open primary law in 1905, becoming the first state to require political parties to select their national convention delegates through a primary.[3] Although the statute has been modified a number of times since 1905, the primary election has always been "open." Without declaring party affiliation, a voter receives a ballot for each party participating in the election, and in the privacy of the voting booth decides which ballot to mark. It is this private declaration of party affiliation, as opposed to a publicly recorded declaration, that characterizes the Wisconsin presidential primary as open.[4] Under this system, a voter may cast a ballot for the candidates of one party only. However, it is possible for an individual to vote in any party's primary regardless of current political affiliation.

Under the Wisconsin statute, voters do not select actual delegates to the National Convention; rather, they vote for presidential candidates.[5] Dele-

1. State *ex rel.* LaFollette v. Democratic Party of the United States, 93 Wis. 2d 473, 287 N.W.2d 519 (1980), *rev'd*, 450 U.S. 107 (1981).

2. 450 U.S. 107 (1981).

3. 1905 Wis. Laws, ch. 369. Part II of the state court opinion contains a history of the Wisconsin open primary. 93 Wis. 2d at 493, 287 N.W.2d at 526. *See* CONGRESSIONAL RESEARCH SERVICE, NOMINATION AND ELECTION OF THE PRESIDENT AND VICE-PRESIDENT OF THE UNITED STATES 134 (1980).

4. 93 Wis. 2d at 485, 287 N.W.2d at 523. Wisconsin election laws are contained in WIS. STAT. ANN. §§ 5-12 (West 1967 & Supp. 1981).

5. WIS. STAT. ANN. § 5.37 (West 1967 & Supp. 1981).

gates to the Convention are selected in a separate process determined by state Party rules.[6] The Wisconsin Democratic Party permits only publicly affiliated Democrats to participate in this process.[7] These delegates, however, are bound to vote at the National Convention in accordance with the results of the open primary.[8]

In contrast to the relative antiquity of the Wisconsin open primary law, the DNP rules which led to the present conflict have their genesis in efforts to reform and strengthen the Party in the wake of the tumultuous 1968 National Convention.[9] During the course of the 1970's these efforts moved in two directions: one, to open the presidential section process to rank and file members; and two, to restrict participation to Party members only. Rule 2A, as enacted for the 1980 National Convention, required that participation in the delegate selection process be restricted to Democratic voters who had publicly declared and recorded their party preference.[10]

In May 1979, the DNP informed the Wisconsin State Democratic Party that no Wisconsin delegates to the Convention would be seated who were bound to vote according to results reached in an open primary. The Wisconsin Attorney General responded by bringing an original action on behalf of the State in the Wisconsin Supreme Court against both the State and National Parties. The Attorney General sought a declaration that the Wisconsin statute was constitutional and that the DNP could not refuse to seat the Wisconsin delegation.[11] The Wisconsin Supreme Court found the statute constitutional and declared that Wisconsin delegates could not be disqualified solely because apportioned by the results of an open primary.[12] The DNP appealed to the United States Supreme Court.[13]

---

6. WIS. STAT. ANN. § 8.12(3)(b) (West 1967 & Supp. 1981).

7. 93 Wis. 2d at 485-86, 287 N.W.2d at 524. Wisconsin Democrats select delegates through a series of caucuses.

8. WIS. STAT. ANN. § 8.12(3)(b), (c) (West 1967 & Supp. 1980). Each delegate must vote for the candidate to whom he or she is pledged on the first ballot, and every ballot thereafter until the candidate releases the delegate or receives less than one-third of the votes authorized to be cast.

The DNP pointed out that positions on the Platform, Credentials, and Rules Committees of the Convention are allocated on the basis of preconvention candidate strength. Thus primary results can affect Party policy beyond simply the presidential nomination itself. Appellant's Reply Brief at 6, 7, 450 U.S. 107 (1981).

9. 450 U.S. at 115. Three different commissions studied and reported to the National Party various avenues of reforming the delegate selection process: COMMISSION ON DELEGATE SELECTION AND PARTY STRUCTURE, DEMOCRATS ALL (1973) (The Mikulski Commission); COMMISSION ON PARTY STRUCTURE AND DELEGATE SELECTION, MANDATE FOR REFORM (1970) (the McGovern/Fraser Commission); COMMISSION ON PRESIDENTIAL NOMINATION AND PARTY STRUCTURE, OPENNESS, PARTICIPATION AND PARTY BUILDING (1978) (the Winograd Commission). The Appendix to the National Party's Jurisdictional Statement, 450 U.S. 107 (1981), contains excerpts from OPENNESS, PARTICIPATION AND PARTY BUILDING, and a fuller history of the Party's reform efforts. *See also* Adamany, *Cross-Over Voting and the Democratic Party's Reform Rules*, 70 AM. POL. SCI. REV. 536 (1976); Segal, *Delegate Selection Standards: The Democratic Party's Experience*, 38 GEO. WASH. L. REV. 873 (1970).

10. 450 U.S. at 109.

11. *Id.* at 113. The State Party agreed with the state's position and cross-claimed against the National Party, seeking an order compelling the National Party to recognize the Wisconsin delegates selected according to Wisconsin law. *Id.*

12. 93 Wis. 2d at 525-26, 287 N.W.2d at 543.

13. The Supreme Court noted probable jurisdiction on July 2, 1980. 448 U.S. 909 (1980). On the same day, the Court stayed the judgment of the Wisconsin Supreme Court. The Wis-

II. LEGAL BACKGROUND

Government establishment and regulation of the electoral process are necessary if the results are to be legitimate expressions of the will of the citizenry. Yet there is an innate tension created by state regulation of elections. In an open, democratic society elections are mechanisms designed to transfer power. Despite the necessity of governmental regulation, the state must not unduly restrict opportunities for those out of power to coalesce, form new majorities, and "throw the rascals out." Legitimate interests of the state in bringing order to the electoral process have been recognized, but this power must be exercised within constitutional limits.[14] The difficult questions are which regulations "pass constitutional muster."[15]

In the early part of our nation's history there were no primary elections. Political parties selected candidates for the general elections through caucuses or conventions.[16] In the late nineteenth and early twentieth centuries, states began to require that major political parties select their candidates through state-run primaries. The primary, which takes the place of party-run selection methods, has become an integral part of the overall election process.

While possessing extensive power over primary and general elections in determining voter qualifications and the manner of elections, the government must not infringe upon constitutionally protected rights.[17] Attacks upon primary statutes typically come from individuals who assert they have been denied proper access to the primary system. However, political parties have also launched attacks, claiming infringement upon associational rights.

An explicit right to vote is not mentioned in the Constitution. Nevertheless, the Supreme Court has held that once primary or general elections are established, there is a fundamental right to vote; substantial infringements upon this right are constitutionally suspect under the equal protection clause of the fourteenth amendment.[18] The Court has also invalidated cer-

---

consin delegates were seated at the Convention despite the stay and despite their selection in a manner violative of Rule 2A, since, according to the National Party, there was no time at that late date to provide an alternate selection procedure. 450 U.S. at 114-15.

14. *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1121 (1975) [hereinafter cited as *Developments*].

15. 93 Wis. 2d at 495, 287 N.W.2d at 528.

16. *Id.* at 491, 287 N.W.2d at 526; CONGRESSIONAL RESEARCH SERVICE, *supra* note 3, at 134.

17. Bullock v. Carter, 405 U.S. 134, 141, 145 (1972). *See, e.g.*, Storer v. Brown, 415 U.S. 724 (1974); Lubin v. Panish, 415 U.S. 709 (1974); Gray v. Sanders, 372 U.S. 368 (1963); United States v. Classic, 313 U.S. 299 (1941). Administration of the electoral process is largely entrusted to the states. *See* U.S. CONST. art. I, §§ 2, 4; art. II, § 1. With respect to elections for federal office, Congress can pre-empt state regulations. Oregon v. Mitchell, 400 U.S. 112 (1970).

18. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (durational residency requirement); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (requirement that residents must own taxable real property or be parents of children enrolled in public schools in order to vote in school district elections); Moore v. Ogilvie, 394 U.S. 814 (1969) (state requirement that 200 voters from each of at least 50 counties sign petition nominating independent candidate for President; the 49 most populous of the state's 102 counties contained 93.4% of state's voters); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (payment of poll tax as precondition for voting in state elections); Gray v. Sanders, 372 U.S. 368 (1963) (state-mandated county-unit

tain requirements for potential candidates wishing to obtain a place on the primary or general ballot. Such requirements were viewed as limiting the right to vote by restricting the voters' range of choice.[19]

A different but overlapping right which may be infringed by election statutes is the first amendment right of association.[20] In this context, primary statutes that demand that a voter be affiliated with a party for a certain time before the primary election in order to vote for that party's candidates have been attacked by voters as a denial of associational rights. Thus, in *Kusper v. Pontikes*,[21] an Illinois statute which prohibited a person from voting in a party's primary election if he or she had voted in another party's primary within the previous twenty-three months was struck down as an unconstitutional abridgment of the right to associate with the political party of one's choice. The effect of the statute was to preclude a voter who had changed party affiliation from voting in any primary for almost two years.[22]

Just as individual voters have constitutionally protected associational rights, political parties and their members are beneficiaries of Supreme Court cases which have delineated associational freedom as an element of first amendment rights. Beginning with *NAACP v. Alabama* ex rel. *Patterson*,[23] the Supreme Court found in the first amendment, as applied to the States through the fourteenth amendment, a right to engage in association for the advancement of beliefs and ideas.[24] Associations themselves have standing to assert violations of associational rights,[25] and interference with the rights of the association is deemed to impinge on the members' freedom.[26]

Freedom of association is particularly valued where the association is

---

system of counting votes in statewide primary elections; system weighted rural votes more heavily than urban votes).

19. *E.g.*, Lubin v. Panish, 415 U.S. 709 (1974) (candidate filing fees); Bullock v. Carter, 405 U.S. 134 (1972) (candidate filing fees); Williams v. Rhodes, 393 U.S. 23 (1968) (to obtain place for presidential candidates on general election ballot, state required minor parties to submit petitions signed by 15% of the number of voters in the last gubernatorial election; only new voters could sign petitions; party had to conduct a primary, organize a state central committee, and select delegates to a national convention).

20. Williams v. Rhodes, 393 U.S. 23, 30.

21. 414 U.S. 51 (1973).

22. *Cf.* Rosario v. Rockefeller, 410 U.S. 752 (1973) (upholding a New York primary statute requiring party affiliation at least 30 days prior to the general election in order to vote in the party's next primary election. The effect was to require affiliation up to 11 months prior to a primary. The Court found the statute did not "lock" a voter into party affiliation from one primary to the next).

23. 357 U.S. 449 (1958). There were hints of a constitutionally protected right of association in earlier cases. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 247-48 (1957); De Jonge v. Oregon, 299 U.S. 353 (1937), but NAACP v. Alabama stands as the landmark case in explicitly recognizing freedom of association as a right deriving from first amendment protections of speech, petition and assembly. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-23 (1978).

24. *E.g.* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Healy v. James, 408 U.S. 169 (1972); NAACP v. Button, 371 U.S. 415 (1963); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961); Bates v. Little Rock, 361 U.S. 516 (1960).

25. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

26. Sweezy v. New Hampshire, 354 U.S. 234, 250.

one with a political purpose,[27] and the right has been extended to political parties.[28] Even before freedom to associate was recognized as a discrete constitutional right, the Alabama Democratic Party in 1952 successfully resisted a challenge to a Party rule. Under this rule, primary candidates for positions as presidential electors were required to support the National Convention nominee.[29] The right to associate requires states to provide "feasible" means for parties, other than the Republican and Democratic Parties, to gain access to the general election ballot.[30] The United States Court of Appeals for the District of Columbia has held that, in accordance with the first amendment rights of association, the Republican Party can apportion National Convention delegates among the states without regard to the principle of "one person, one vote".[31]

Rights of association, like other first amendment rights and the right to vote, are not absolutes.[32] This is particularly true in the election context, where state regulation is a necessity.[33] In *Jenness v. Fortson*,[34] a Georgia ballot access statute required minor party candidates to submit petitions containing signatures equal to at least five percent of the vote cast in the last general election. This statute was sustained as protecting an important state interest in avoiding voter confusion resulting from a ballot containing large numbers of candidates with minimal public support. The Court found that the statute did not freeze the political status quo.[35] Generally, preservation of the integrity of the electoral process is seen as a valid state objective.[36] Moreover, states are not required to choose ineffectual means to that goal.[37]

---

27. NAACP v. Button, 371 U.S. 415 (1963).

28. *See, e.g.*, Cousins v. Wigoda, 419 U.S. 477 (1975); Williams v. Rhodes, 393 U.S. 23 (1968). See the discussion of *Cousins* in text accompanying notes 54 to 60 *infra*.

One article has suggested that the right to associate for political purposes should be recognized as the central right at issue in the whole area of election cases. Ahrens & Hauserman, *Fundamental Election Rights: Association, Voting and Candidacy*, 14 VAL. U.L. REV. 465 (1980).

29. Ray v. Blair, 343 U.S. 214 (1952).

30. Williams v. Rhodes, 393 U.S. 23 (1968) (striking down an Ohio statute which made it "virtually impossible" for third parties to gain a place on the general election ballot); *see* note 19 *supra*.

31. Ripon Soc'y, Inc. v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976). *Accord*, Irish v. Democratic-Farmer-Labor Party, 399 F.2d 119 (8th Cir. 1968). *Contra*, Georgia v. National Democratic Party, 447 F.2d 1271 (D.C. Cir.), *cert. denied*, 404 U.S 858 (1971); Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972). *Ripon* represents a reconsideration of *Georgia* and *Bode* in light of Cousins v. Wigoda, 419 U.S. 477 (1975).

32. Buckley v. Valeo, 424 U.S. 1, 25 (1976); United States Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548, 567 (1973).

33. In Storer v. Brown, 415 U.S. 724, 730 (1974), the Court said:

> [T]he States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualification of voters, and the selection and qualification of candidates. It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases . . . .

Id. at 730.

34. 403 U.S. 431 (1971). *But see* Williams v. Rhodes, 393 U.S. 23 (1968).

35. 403 U.S. at 439.

36. Rosario v. Rockefeller, 410 U.S. 752, 761 (1973). *See, e.g.*, Marchioro v. Chaney, 442 U.S. 191, 196 (1979); American Party v. White, 415 U.S. 767, 783 n.14 (1974); Storer v. Brown, 415 U.S. 724, 730 (1974); Bullock v. Carter, 405 U.S. 134, 145 (1972).

37. Storer v. Brown, 415 U.S. at 736; Rosario v. Rockefeller, 410 U.S. 752, 762 n.10 (1973).

A puzzling feature of the election cases is the standard of review which the courts apply in balancing state interests against alleged burdens on constitutionally protected rights. In non-election freedom of association cases the Supreme Court has typically held that the subordinating state interest must be "compelling"[38] and that the statute cannot survive when a more narrowly drawn alternative would be effective.[39] This standard of strict scrutiny has also been applied in right-to-vote cases where the franchise has been totally denied.[40] But the Supreme Court has not been consistent in applying the strict scrutiny standard to alleged violations of associational or voting rights in election cases. Even when the compelling interest standard is purportedly applied, the state election statute is not automatically struck down. Thus state statutes which have restricted either the ability to vote or the ability of candidates to obtain ballot positions have been upheld on the basis of state interests characterized as "legitimate,"[41] "important,"[42] and "compelling."[43] As the Court pointed out in *Storer v. Brown*, given the practical necessity for regulation of elections, there is no rule which automatically invalidates every substantial restriction of the right to vote or associate.[44] The decision in these cases is a matter of degree, and results are difficult to predict with any great assurance.[45]

A final complicating factor is that while political parties enjoy protection from undue state intrustions into their associational rights, the parties themselves may be deemed to be engaging in state action, and thereby subject to constitutional restraints, when their rules or actions are an integral part of the election process.[46] This is particularly true of the two major parties. Political parties have a hybrid nature. They are voluntary associations, but unlike other private associations, they have an ongoing, statutorily rec-

38. NAACP v. Button, 371 U.S. 415 (1963); Bates v. Little Rock, 361 U.S. 516 (1960).

39. Shelton v. Tucker, 364 U.S. 479 (1960).

40. Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969).

41. Rosario v. Rockefeller, 410 U.S. 752, 761-62 (1973). *Cf.* Kusper v. Pontikes, 414 U.S. 51 (1973): "[A] significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest." *Id.* at 58.

42. Jenness v. Fortson, 403 U.S. at 442.

43. Storer v. Brown, 415 U.S. 724, 736 (1974). American Party v. White, 415 U.S. 767, 782 n.14 (1974). *See generally* Note, *Primary Elections: The Real Party in Interest*, 27 RUTGERS L. REV. 298 (1974) [hereinafter cited as *Primary Elections*]; Comment, *The Constitutionality of Non-Member Voting in Political Party Primary Elections*, 14 WILLAMETTE L.J. 259 (1978) [hereinafter cited as *Non-Member Voting*].

44. 415 U.S. 724, 729, 730.

45. *Id.* at 730.

> The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a "matter of degree," very much a matter of consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.

Id. (citations omitted).

Tribe concludes that mild restrictions on parties need only rationally relate to legitimate state interests, whereas substantial erosions of associational freedom must serve a compelling state interest. L. TRIBE, *supra* note 23, § 13-22.

46. Detailed discussion of state action doctrines is beyond the scope of this paper. On state action problems in the election law context, *see generally* Kester, *Constitutional Restrictions on Political Parties*, 60 VA. L. REV. 735 (1974); L. TRIBE, *supra* note 23, at §§ 13-23 to 13-25; *Developments*, *supra* note 14, at 1155-1163.

ognized role in the election of public officials. When political parties select candidates, and particularly when those selections are incorporated by the state (such as by preferred ballot access), it has been argued that the parties themselves are acting as quasi-governmental entities.[47] In the so-called White Primary cases the Supreme Court struck down, as violative of the fourteenth and fifteenth amendments, a series of attempts by the Texas Democratic Party to exclude blacks from Democratic primary elections.[48]

Lower courts have sustained state action challenges to party rules not alleged to be racially discriminatory.[49] However, the Supreme Court has not reached the merits in any case invalidating party actions for constitutional violations not racially based. *O'Brien v. Brown*[50] concerned a due process challenge by delegates from California threatened with denial of seating by the 1972 Democratic National Convention. In this case, the Court indicated grave doubts about courts injecting themselves into party disputes, specifically noting that no claims had been made of racial discrimination.[51]

Assuming party action in some contexts does amount to state action,[52] there is a potential conflict between constitutional rights. To the extent party actions are invalidated, the associational rights of the party and of the members who support its actions have been infringed; to the extent the party actions are upheld, the voting or associational rights of the plaintiffs may have been infringed. At least two lower courts have suggested that a more lenient standard of scrutiny is appropriate when reviewing a party's candidate selection processes alleged to violate constitutional rights. This lower standard of scrutiny would arguably account for the constitutional rights of the party and its supporting members.[53]

An examination of one further case, *Cousins v. Wigoda*,[54] is necessary to

47. L. TRIBE, *supra* note 23, § 13-23; *Developments*, *supra* note 14, at 1161; *Non-Member Voting*, *supra* note 43, at 292-93; *Primary Elections*, *supra* note 43, at 304.

48. Terry v. Adams, 345 U.S. 461 (1953) (fifteenth amendment); Smith v. Allright, 321 U.S. 649 (1944) (fifteenth amendment); Nixon v. Condon, 286 U.S. 73 (1932) (fourteenth amendment). *Terry* represents the farthest reach of the state action doctrine in the election context, since the exclusion was from a "voluntary" club of Democrats, the Jaybird Association, which conducted pre-primary elections. The Jaybird candidates invariably won the Democratic primaries and general elections. The *Terry* decision, in which there was no majority opinion, has been explained only as a "response to the peculiar history of state attempts to foster and shield racial discrimination." *Developments*, *supra* note 14, at 1163. *See also* Kester, *supra* note 46, at 758, suggesting *Terry* went "too far."

49. *See* cases cited in note 31 *supra*, and cases cited in Comment, Cousins v. Wigoda: *Primary Elections, Delegate Selection, and the National Political Convention*, 70 NW. U.L. REV. 699, 717 n.83 (1976) [hereinafter cited as *Delegate Selection*].

50. 409 U.S. 1 (1972).

51. *Id.* at 4-5.

52. The most conceptually perplexing question in state action theory is when, and why, private entities should be held to constitutional standards originally adopted as restrictions on governmental power. As previously indicated, this question is beyond the scope of this paper.

53. Ripon Soc'y, Inc. v. National Republican Party, 525 F.2d 567, 588 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976) (challenge to apportionment of delegates among the states to the Republican National Convention); Nader v. Schaffer, 417 F. Supp. 837, 845 (D. Conn. 1976) (three-judge court), *aff'd mem.*, 429 U.S. 989 (1976) (suit against a state and both major parties asserting non-affiliated voters should be allowed to vote in party primaries; relief denied).

54. 419 U.S. 477 (1975). *See generally* Rotunda, *Constitutional and Statutory Restrictions on Political Parties in the Wake of* Cousins v. Wigoda, 53 TEX. L. REV. 935 (1975); *Delegate Selection*, *supra* note 9.

an understanding of *Democratic Party of the United States v. LaFollette*. Like *O'Brien*, *Cousins* arose over conflicts between rival groups of delegates to the 1972 Democratic National Convention. One group of delegates, Wigoda, had been duly elected in a primary election conducted under Illinois election statutes. The other group, Cousins, had been selected at private caucuses. The Convention Credentials Committee, and ultimately the Convention itself, found that the composition of the Wigoda delegation violated Party rules concerning slate-making and affirmative action, and decided to seat the Cousins delegates. An Illinois appellate court affirmed an injunction prohibiting the Cousins group from serving as delegates.[55] The United States Supreme Court granted certiorari to decide whether the Illinois court was correct in granting primacy of state law over DNP rules on delegate qualifications and eligibility.

In reversing the lower court decision, the Supreme Court placed primary importance upon the constitutionally protected right of political association enjoyed by the DNP and its adherents.[56] The Court applied the strict scrutiny standard and found Illinois' interests in the integrity of its electoral process and the right of its citizens to effective suffrage not compelling in the context of selecting delegates to the National Party Convention. The Court emphasized the national scope of the task—selection of presidential and vice-presidential nominees—performed by delegates to National Conventions. The Court noted that if each state were allowed to establish delegate qualifications without regard to Party policy, the result would be intolerable. Therefore, the national interest served by the Convention was greater than "any interest of an individual State."[57]

Two further points should be made about *Cousins*. First, while some of the Justices differed in their analyses of the case, they agreed unanimously that Illinois could not force the National Convention to seat the Wigoda delegates.[58] Second, the Court stated it was expressing no view as to whether national party decisions on delegate selection constitute state action.[59] In the last sentence of the opinion, however, the Court pointed out no claim had been raised that the DNP was operating outside the confines of the Constitution[60]—thereby intimating the result might be different where such claims are raised.

55. Wigoda v. Cousins, 14 Ill. App. 3d 460, 302 N.E.2d 614 (1973). The Cousins delegates took their seats at the Convention despite the injunction. Criminal contempt charges in Illinois were held in abeyance pending the Supreme Court's decision. 419 U.S. at 481.

56. 419 U.S. at 487.

57. *Id.* at 490-91.

58. *Id.* at 488, 492 (Rehnquist, J., concurring), 496 (Powell, J., concurring in part and dissenting in part).

59. 419 U.S. at 483 n.4.

60. The last sentence concluded with a quote from *O'Brien* to the effect that the convention was the proper forum for resolving the dispute. Justice Rehnquist stated that much of the majority's language was too broad and argued that this last sentence virtually turned *O'Brien* on its head since in *O'Brien* claims were made that Party delegate selection procedures violated the Constitution. 419 U.S. at 492, 494 (Rehnquist, J., joined by Burger, C.J., & Stewart, J., concurring in the result). The Court may technically be correct that the Wigoda delegates filed no claim in this action alleging the DNP was operating outside the Constitution. Much of the lower court opinion, however, focused on the question of whether the constitutional rights of the Wigoda delegates and Illinois voters were violated when the Wigoda group was rejected and the

III. *DEMOCRATIC PARTY OF THE UNITED STATES v. LAFOLLETTE*

According to the Supreme Court, the issue in *LaFollette* was not whether Wisconsin could conduct an open primary or whether the DNP could impose its rules upon Wisconsin by requiring Wisconsin to limit voting in the Democratic primary to publicly declared Democrats.[61] Instead, the issue was whether Wisconsin could force the DNP to honor open primary results that were reached in a process violative of DNP rules.[62] Despite strenuous arguments to the contrary,[63] the Court saw *LaFollette* as a delegate selection case in its totality, since the delegates, who were admittedly selected in a separate process that complied with DNP rules, were statutorily bound in their convention votes by the results of the open primary.[64] As such, the Court found that *Cousins* controlled the outcome of the *LaFollette* case.[65]

The majority reiterated the principle that the DNP and its adherents enjoy a constitutionally protected right of political association.[66] In applying this principle to *LaFollette*, the Court held that freedom to associate for political goals necessarily presupposes the freedom to identify the members of the association, to limit the membership to those persons,[67] and to protect the group from intrusions by those with adverse political interests.[68]

While the state argued that the burden on associational freedoms was minimal, the DNP claimed that such burdens were substantial. The majority refused to decide this issue,[69] stating that neither the courts nor the states should substitute their judgments for the association's on the wisdom of otherwise constitutional membership requirements.[70] Although refusing explicitly to address this question, later in the opinion the Court did refer to the state's "substantial" intrusion into the Party's associational freedom.[71]

In evaluating the state's interests, the Court applied the "compelling interests" test, again citing *Cousins*. The Court recognized the state's substantial interest in regulating primaries,[72] and that associational freedoms are not absolute.[73] But, executing a fancy sidestep, the Court found the

---

Cousins group seated. The Illinois court answered in the affirmative. *See* Wigoda v. Cousins, 14 Ill. App. 3d at 471-80, 302 N.E.2d at 624-31.

61. 450 U.S. at 120.

62. *Id.*

63. Brief for Appellee, State of Wisconsin, at 7, 11-12. *See* text accompanying notes 85-87 *infra*.

64. 450 U.S. at 123 n.24, 125 n.30. As the National Party stated: "If the rules controlled nothing more than the selection of delegates bound to cast votes predetermined by another process, they would hardly be worth litigating." Brief for Appellant at 21.

65. 450 U.S. at 121.

66. *Id.* at 121-22 (citing Kusper v. Pontikes, 414 U.S. 51 (1973); Williams v. Rhodes, 393 U.S. 23 (1968); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

67. 450 U.S. at 121-22.

68. *Id.* at 122 (citing Ray v. Blair, 343 U.S. 214 (1952)).

69. *Id.* at 123-24.

70. *Id.* at 123 n.25.

71. *Id.* at 125-26.

72. *Id.* at 124 n.28 (citing Bullock v. Carter, 405 U.S. 134 (1972); United States v. Classic, 313 U.S. 299 (1941)).

73. 450 U.S. at 124 (citing United States Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548 (1973)).

state's asserted interests—integrity of the electoral process, secrecy of the ballot, increased voter participation, preventing harassment of voters—all irrelevant. The majority's rationale was that such interests went to the conduct of the primary, not to the imposition of the primary results on delegates selected in a separate process.[74] The state interests might be compelling as related to the primary itself, but they did not justify intrusions into the associational freedom of the National Party and its members.[75]

In conclusion, the Court held that Wisconsin could conduct an open primary. The state, however, could not bind Wisconsin delegates to the National Convention to vote in accordance with the open primary results if doing so would violate DNP rules.[76]

IV. ANALYSIS AND IMPLICATIONS OF *LAFOLLETTE*

The decision in *LaFollette* rests firmly on its own foundation and is further buttressed by the precedent of *Cousins*. The broad holding in *Cousins* apparently would find no compelling state interests in regulating Party procedures for National Convention delegate selection. The burden placed upon the DNP in *LaFollette* is substantially more severe than the burden placed upon it in *Cousins*. Nevertheless, the Wisconsin Supreme Court considered the burden minimal since declaration of party affiliation while voting, which would satisfy DNP rules, was not shown to be more effective than the Wisconsin open primary statute in protecting the Party from adverse influences.[77] Essentially the Wisconsin court found a "closed" primary conducted under Party rules to be only slightly more closed than the "open" primary.[78] Justice Powell, in his dissent, found the burden minimal because the DNP is such an amorphous non-ideological creature that it has nothing to fear from an open primary.[79] Both the Wisconsin court and Justice Powell missed the point. As an association, the DNP 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. What meaning does freedom of association have if the association has no control over who can participate in its decision-making?

Further, while in *Cousins* the Illinois Court decision prevented certain persons from taking part in the Convention, the Wisconsin court decision would have compelled the Convention to accept delegates whose votes were determined through a process that violated DNP rules. In *Cousins* the Court unanimously agreed that a state could not force a Convention to accept dele-

74. 450 U.S. at 125.

75. *Id.* at 125-26.

76. *Id.* at 126. In a dissent joined by Justices Blackmun and Rehnquist, Justice Powell found no substantial burden on the Party, given its nonideological orientation, and found arguably compelling state interests in support of the statute. *Id.* at 126-38 (Powell, J., dissenting).

77. 93 Wis. 2d at 499-510, 287 N.W.2d at 530-35.

78. *Id.* at 510, 287 N.W.2d at 535. The Court quoted from A. RANNEY, CURING THE MISCHIEFS OF FACTION 166-67 (1975): "[T]he so-called 'closed' primaries are just a hair more closed than the so-called 'open' primaries."

79. 450 U.S. at 131-32 (Powell, J., dissenting).

gates, yet this is what the Wisconsin order would have done. There are several factors which weigh against a finding that Wisconsin had any compelling interests that would sustain its law. As previously noted, the Wisconsin order did create a substantial burden. Also, the *Cousins* precedent failed to recognize such compelling state interests. Furthermore, only Michigan and Wisconsin mandate open, binding presidential preference primaries.[80]

Despite the correctness of the *LaFollette* result, the opinion must have seemed particularly hollow from Wisconsin's perspective. The Court essentially said that the state and the Wisconsin Supreme Court had completely misperceived the issues. The compelling interests the state asserted in support of its open primary were held to be irrelevant to the real issue—whether the state could bind the DNP on delegate selection procedures. Thus, the Court found that Wisconsin could conduct an open primary, but could not bind the DNP with its results. To conduct a non-binding primary, however, would seem an exercise in futility, a totally unsatisfactory option for a state attempting to ensure a fair and orderly candidate selection process.[81] A state is not required to utilize ineffectual means to achieve its aims.[82]

States may attempt to circumvent the *LaFollette* decision; however, the results would be unchanged. Wisconsin could pass a statute requiring National Convention delegates to be actually selected in an "open" primary, based on the argument that *LaFollette* is not controlling; in the *LaFollette* opinion, the state's interests in regulating the candidate selection process were not weighed against the Party's associational rights. The real issue presented in *LaFollette* was whether the asserted state interest in an open selection process was compelling in the context of selecting delegates to a National Party Convention. While the Supreme Court resolved the immediate controversy, it side-stepped this balancing issue, and supplied minimal guidance for the future.

The "hard judgments,"[83] which take place privately in chambers, are not reflected in the *LaFollette* opinion. The Supreme Court has the admittedly difficult challenge of articulating decisions that provide guidance in the future beyond the immediate facts of the case[84] and yet avoiding an advisory opinion. Once one begins to look at the implications behind the hard judgments required in balancing the various interests in this case it is

80. *See* note 101 *infra*.

81. Justice Powell, who saw the inadequacy of the Court's analysis of the state interest, claimed the majority's argument on this point was "premised on the unstated assumption that a nonbinding primary would be an adequate mechanism for pursuing the state interests involved. This assumption is unsupportable because the very purpose of a presidential primary . . . was to give control over the nomination process to individual voters." 450 U.S. at 134 (Powell, J., dissenting).

82. *See* Storer v. Brown, 415 U.S. at 736; Rosario v. Rockefeller, 410 U.S. 752, 762 n.10 (1973).

83. Storer v. Brown, 415 U.S. at 730 (1974). *See* note 45 *supra*.

84. Address by Chief Justice Vinson, American Bar Association Banquet (Sept. 7, 1949). Chief Justice Vinson was candid on this point: "[T]he Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."

understandable, if not applaudable, that the Court preferred to save specific pronouncements on them for another day.

Given that the defendant was the DNP, that it was involved in selecting its candidate for president, that its selection would obtain an automatic ballot position, and that its choice would become one of only two persons in the country who had a chance to win, a strong argument can be made that voting rights of Wisconsin citizens were at least implicated in this case. The state claimed that this was a voting rights case;[85] an *amicus curiae* brief was submitted arguing the rights of independent voters;[86] and the Wisconsin Supreme Court expressly acknowledged that voting rights were involved.[87]

Consideration of the possibility that the Party is violating voting rights presupposes that the Party action amounts to state action. The Supreme Court seemed to accept this presuppostion when it noted that Party membership requirements had to be consitutionally permissible. However, the Court did not even discuss the voting rights of independents which the state and *amici curiae* asserted.

One implication is that challenges by independent voters to Party or state imposed requirements that non-affiliated voters not be allowed in primaries are doomed to failure. Such challenges have been denied in lower courts,[88] and the result is undoubtedly correct. Independent voters have no stake in the Party nor any desire to join. Therefore, the situation of independent voters is not analogous to the black voter in the White Primary cases who deisred to join and met all of the qualifications except skin color.[89] Nor can the independent be compared to the voter in *Kusper v. Pontikes*,[90] who was prevented by the state from affiliating with the party of her choice for twenty-three months. Whatever voting rights non-party adherents have in party primaries are far outweighed by the associational rights of the party and its members.[91] This is true whether the primary is for National Convention delegates, federal offices, or state offices, since the relative weights of these rights are not affected by the level of the office.

Another implication of the Court's refusal to discuss voting rights concerns the future of the state action doctrine. In *O'Brien*, *Cousins*, and *LaFollette*,[92] questions were presented concerning the constitutionality of national

85. Brief for Appellee at 7, 17.

86. *Amicus Curiae* Brief (submitted by two independent voters from Wisconsin).

87. 93 Wis. 2d at 481, 287 N.W.2d at 522.

88. Young v. Gardner, 497 F. Supp. 396 (D.N.H. 1980); Nader v. Schaffer, 417 F. Supp. 837 (D. Conn.), *aff'd mem.*, 429 U.S. 989 (1976); Smith v. Penta, 81 N.J. 65, 405 A.2d 350, *appeal dismissed for want of substantial federal question*, 444 U.S. 986 (1979). The *Young* Court said: independents "cannot expect they will have or are entitled to have the same rights of choosing the candidate who is to run under a given party's banner as do the party faithful." 497 F. Supp. at 402.

89. *See* Nader v. Schaffer, 417 F. Supp. 837, 842 n.4 (D. Conn.), *aff'd mem.*, 429 U.S. 989 (1976).

90. 414 U.S. 51 (1973).

91. *Accord*, *Primary Elections*, *supra* note 43. *Contra*, Note, *The Party Affiliation Requirement: A Constitutional Inquiry*, 16 NEW ENG. L. REV. 71 (1980); *Non-Member Voting*, *supra* note 43. The author of *Primary Elections*, *supra* note 43, at 308-11, points out that the voting rights of party members are also impinged upon when the votes of outsiders with no collective stake in the association are allowed to dilute the results of the party primary.

92. 450 U.S. at 124 n.26 (The Court favorably cited Ripon Soc'y, Inc. v. National Republi-

party action. From these cases it is increasingly apparent that the Court will not find a national party's actions unconstitutional unless there is gross abuse. This is consistent with the general reluctance of the Burger Court to find state action on the part of private entities.[93] The tenor of the above mentioned opinions was to place emphasis on the associational rights of political parties, and to deprecate or disregard both state regulatory interests and asserted constitutional rights of party members or voters. This suggests that the present Court views political parties more as private voluntary associations than as public quasi-governmental entities. It would appear that, unless invidious race or sex[94] discrimination were found, the Court would be unwilling to declare any party candidate selection procedures unconstitutional.

Cousins was absolutist about the state's interest in fair and orderly elections, and held that no individual state interest could be compelling in the national context of presidential candidate selection. *LaFollette* did not reiterate this extremely broad finding. The Court admitted that states have "important" interests in regulating primary elections, and then refused to consider Wisconsin's interests. This was unfortunate; since the Court refused to weigh the state interests, it remains unclear to what extent, if any, the *LaFollette* Court was retreating from the *Cousins* decision.

By refusing to draw lines through a process of balancing the various state, voter, and Party interests present in *LaFollette*, the Court has created the potential for some interesting situations. For example, in *Rosario v. Rockefeller*[95] an affiliation statute was upheld against attack from individual voters. Conceivably this statute is now vulnerable to attack by the National Party. The state statute struck down in *Kusper*, which prevented voting in a party's primary for twenty-three months after voting in another party's primary, could presumably be adopted as a party rule and withstand attack from the same voter. Such contradictory results would be intolerable. Hypothetically, a national party could decide that the candidate selection process will be restricted to precinct chairpersons, or state committee members, or impose party dues of $5.00 or $1000.00 per year,[96] or impose not just affiliation requirements, but loyalty oaths.[97] These are unlikely possiblities. One of the main goals of political parties is to attract voters in order to elect party candidates. This goal should work as as self-correcting mechanism encouraging parties to be open and fair.

The point is that primary election cases involve overlapping, sometimes

---

can Party, 525 F.2d 588 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976) to the effect that a party's choice among the various ways of advancing its interests deserves the protection of the Constitution).

93. *See, e.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

94. *See* U.S. CONST. amend. XIX.

95. 410 U.S. 752 (1973).

96. *Cf.* U.S. CONST. amend. XXIV (prohibiting denial of the vote in federal elections, including presidential primaries, for failure to pay a poll tax).

97. *Cf.* Clark v. Meyland, 261 N.C. 140, 134 S.E.2d 168 (1964) (holding unconstitutional a state statute requiring persons wishing to change party affiliation and vote in the new party's primary to pledge in writing to vote for the new party's candidates in the general election).

conflicting, sometimes complementary, interests of the state, the party, its members, and non-members. These interests cannot always be reconciled, but sensitive judicial pronouncements should take them into account with an awareness that decisions in these cases are "very much a matter of degree."[98] Opinions that sweep too broadly—*Cousins*—or side-step the hard choices—*LaFollette*—fail, not necessarily in their results, but in their rejection of the opportunities presented by the facts for movement towards ultimately workable resolutions of these bristly problems.

The immediate impact of *LaFollette* outside Wisconsin will be negligible. No other state conducts an open presidential preference primary, binding on political parties.[99] A number of states, however, conduct open primaries for state and federal offices.[100] Should state parties decide to challenge these statutes, *LaFollette* will certainly provide strong arguments.[101] At the least, *LaFollette* holds that a party's right to keep non-affiliated persons out of a state party's candidate selection process is protected by the first amendment. Only a compelling state interest will overcome that right. But *LaFollette* is not dispositive. *LaFollette* arose in the context of presidential candidate selection and is based on *Cousins*, which relied on the national scope of the party's interest. At the state level the state's interest in the legitimacy of its own government and representatives amounts to a more powerful interest than that present in the National Convention context.[102] The result should depend on the balancing the court undertakes.

CONCLUSION

LaFollette marks another step in ensuring that national political parties have sufficient freedom to make the changes they feel necessary to retain

98. Storer v. Brown, 415 U.S. at 730. *See* note 45 *supra*. *Cf. Primary Elections*, *supra* note 43, at 322 (suggesting that party interests in associational freedom should be considered when courts review voter challenges to durational affiliation requirements contained in primary election voter eligibility statutes).

99. Brief for Appellee, State of Wisconsin, at 37 n.41. *See also* CONGRESSIONAL RESEARCH SERVICE, *supra* note 3, outlining 1980 delegate selection procedures for all the states.

Michigan also had an open, binding presidential primary. When the Michigan Democratic Party informed the Secretary of State that the state Party intended not to participate in the primary, because it would violate National Party rules, a Michigan voter brought suit against the Secretary of State, seeking to compel him to enforce the statute against the state Party. The federal district court dismissed the suit, since it found the statute unconstitutional as applied to the State Democratic Party, basing its decision on *Cousins*. Ferency v. Austin, 493 F. Supp. 683 (W.D. Mich. 1980).

100. *See Non-Member Voting*, *supra* note 43, at 262.

101. Before the present case was decided, in 1980, the Washington State Democratic Party challenged the Washingon "blanket" primary statute under which the names of all parties' candidates are printed on a single ballot, and voters can vote for candidates of different parties in the same primary, though not for the same office. Washington does not have a presidential primary. The Washington Supreme Court rejected the challenge, holding no substantial burden had been shown and finding compelling state interests in some of the same interests asserted by Wisconsin in *LaFollette*—secrecy of party identification and broad participation in primaries. Heavey v. Chapman, 93 Wash. 2d 700, 611 P.2d 1256 (1980). Should this statute be challenged again, the Washington Court would obviously have to consider *LaFollette* in analyzing both the burden and the state interests, which were keyed essentially to voter rights. A concurring opinion specifically indicated it was following the reasoning adopted by the Wisconsin Supreme Court in *LaFollette*. 93 Wash. 2d at 706, 611 P.2d at 1259 (Horowitz, J., concurring).

102. *See Developments*, *supra* note 14, at 1210.

their vitality. The message seems to be: leave the national parties alone, let them make their own rules and resolve their own disputes. This, however, will not make the disputes go away. By hinting at a retrenchment from the broadest statements in *Cousins*, and by avoiding an explicit evaluation of the proffered state interests, the Court has kept its options open for inevitable future disputes. The cost of this approach is uncertainty. *LaFollette* can support virtually unlimited party leeway in determining its internal affairs, and yet loopholes remain. The open binding presidential primary is now possible only with a national party's acquiescence, but at the state level, predictions of the imminent demise of state imposed open primaries is premature.

As for the Democrats, it remains to be seen whether they have the wisdom to use their freedom to complete the reversal of 1980's setbacks.

Christopher J. Martin