Not A Closed Case: The Wisconsin Open Presidential Primary

*By Betty Hansen Richardson**

Introduction

Much local, state, and national decisionmaking flows through political parties, yet in most activities, parties face few constitutional restraints[1] and are relatively free from statutory recognition or regulation.[2] Although a key function of a political party is to nominate candidates for political office, this function is one instance in which party activity is regulated by the states. In states where a party's nominating process is achieved by means of a primary election,[3] the state regulates the party through its primary election laws.

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1. *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976). "Partisan politics bears the imprimatur only of tradition, not the Constitution." *Id.* at 369 n.22.

2. State *ex rel.* La Follette v. Democratic Party, 93 Wis. 2d 473, 491, 287 N.W.2d 519, 526 (1980), *rev'd sub nom.* Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981). *See also* A. RANNEY, CURING THE MISCHIEF OF FACTION 13-15, 78-80 (1975); V. KEY, PARTIES, POLITICS AND PRESSURE GROUPS 687-91 (5th ed. 1964).

3. Primary elections are of three types: closed, open, and blanket. Voters in a closed primary election are required to comply with tests establishing party affiliation prior to voting. These partisan affiliation requirements are set out by state legislatures, and an individual's affiliation with a political party is a matter of public record.

Open primary systems require neither a public declaration nor a public recordation of party affiliation. In an open primary election, a voter affiliates with a political party only after he or she selects the party ballot of his or her choice in the privacy of the polling booth. In an open primary, a voter is not permitted to vote for candidates on more than one party's ballot. *See, e.g.*, WIS. STAT. ANN. § 5.37(4) (West Supp. 1980). "The major characteristic of open primaries is that any registered voter can vote in the primary of either party." R. BLANK, POLITICAL PARTIES, AN INTRODUCTION 315 (1980), *cited in* Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 111 n.4 (1981).

A blanket primary resembles an open primary in that a voter need neither publicly declare nor publicly record a party preference. Unlike the open primary system, the blanket primary permits a voter to vote for candidates from different parties in the same manner as in general elections. Under a blanket primary system, a voter is not required to affiliate with a single political party. *See generally* Comment, *The Constitutionality of Non-Member Voting in Political Party Primary Elections*, 14 WILLAMETTE L.J. 259, 261-62 (1978).

Wisconsin is one of a handful of states[4] whose legislature has adopted the "open primary."[5] An "open primary" permits registered voters to participate in the primary election without publicly announcing or recording the party in whose primary he or she will vote. As a result, individuals may cross party lines, voting for candidates affiliated with a party different from that with which the voter is perhaps publicly affiliated.

The Wisconsin open presidential primary is a public election for both Democratic and Republican candidates, resulting in the apportionment of delegates to presidential candidates. The State Democratic Party uses the primary results to apportion delegates to Democratic candidates, but the primary does not elect the *particular* state Democratic *delegates*.[6] The selection of delegates is a separate procedural step in the nominating process, and participation therein is limited to Democrats who both publicly avow and publicly record their affiliation with the Democratic Party.[7] Thus, although Wisconsin's open-primary law requires that delegates be apportioned according to the primary results,[8] the primary voters themselves *do not elect the delegates*.[9]

In 1980, the Democratic National Committee (DNC), fearing that the practice of crossover voting by independents and Republicans would distort the primary electoral process, adopted Rule 2A.[10] Bind-

4. The following states have adopted the open primary: Idaho, IDAHO CODE § 34-904 (1981); Michigan, MICH. STAT. ANN. § 6.1615 (Callaghan Supp. 1981); Minnesota, MINN. STAT. ANN. § 203A.22-.23 (West Supp. 1981); Montana, MONT. CODE ANN. § 13-10-301(2) (1981); North Dakota, N.D. CENT. CODE § 16.1-11-22 (1981); Utah, UTAH CODE ANN. § 20-3-21 (Supp. 1981); Vermont, VT. STAT. ANN. tit. 17, § 2363 (Supp. 1981); Wisconsin, WIS. STAT. ANN. § 5.37(4) (West Supp. 1980).

5. WIS. STAT. ANN. § 5.37(4) (West Supp. 1980). The statute reads in part, "The elector may secretly select the party for which he or she wishes to vote, or the independent candidates . . . ."

6. *See* WIS. STAT. ANN. §§ 5.60(8), 5.37(4), 8.12(1)-(3) (West Supp. 1980).

7. WIS. STAT. ANN. § 8.12(3)(b) (West Supp. 1980).

8. WIS. STAT. ANN. § 8.12(3)(a) (West Supp. 1980).

9. State *ex rel.* La Follette v. Democratic Party, 93 Wis. 2d 473, 287 N.W.2d 519 (1980), *rev'd sub nom.* Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981). "Delegates to the national convention are selected by the state party, not by the voters of the state." 93 Wis. 2d at 485, 287 N.W.2d at 523. No fewer than two-thirds of the delegates are selected by local congressional district party organizations, and the remaining third are selected by the state party organization. The state party limits participation in the delegates selection process to publicly declared Democrats. *Id.* at 485-86, 287 N.W.2d at 524.

10. Rule 2A of the Democratic Selection Rules for the 1980 Democratic National Convention [hereinafter cited as DNC RULE 2A], *quoted in* Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 109 n.1 (1981), reads in pertinent part: "Participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded."

ing on the state parties, Rule 2A prohibits the apportionment of delegates to presidential candidates on the basis of a system that does not require a contemporaneous publicly recorded statement of party preference. In other words, a state party would be free to use a caucus, convention,[11] or primary in its presidential nominating process, provided that the method restricted participation to individuals who publicly declared and recorded their affiliation with the Democratic Party.[12] The DNC asserted that without such a procedural safeguard, its constitutionally protected associational rights would be violated.[13] The DNC asserted that abridgement of associational rights would occur because the results of the primary would not accurately reflect the views of the party's "true" and "loyal" members, since nonadherents might have a voice in the primary electoral process.

Rule 2A and the Wisconsin statute providing for an open primary are inherently in conflict. An "open primary"[14] and a "public recorda-

11. "The term caucus is used in a number of different senses today. The nominating caucus is to be distinguished from the meetings or conferences of party members in a legislature for the purpose of deciding on committee assignments and on the party's position on public issues; the party caucuses are often referred to as the Senate Republican caucus, the House Democratic caucus, etc. Before 1830, there were at least three types of nominating caucuses—the informal type held by party leaders, the legislative caucuses composed of party members of the legislature, and mongrel or mixed caucuses in which legislators and outside representatives united to select party candidates." H. BONE, AMERICAN POLITICS AND THE PARTY SYSTEM 276 n.4 (1965).

The caucus system, as a candidate-nominating device, died in the early 19th century. *Id.* at 278. *See also* A. RANNEY, *supra* note 2, at 15-17. It was criticized by Andrew Jackson and his supporters as being unrepresentative and susceptible to "bargains" and "deals." H. BONE, *supra*, at 276. The vacuum left by the death of caucuses was filled by nominating conventions (although primaries were also in their infancy at about the same time). The convention was the dominant method of state and congressional candidate nominating until the mid-twentieth century. Conventions were thought to be more "democratic" than caucuses; however, delegate selection to state conventions was not uniform, as it was left to the individual states to determine the method by which the delegates were to be selected. Consequently, the convention system was susceptible to as many abuses as was the caucus system. *See* H. BONE, *supra*, at 279.

Currently, "conventions perform . . . functions such as drafting the party platform . . . selecting party officers . . . and in some states choosing delegates to the national (presidential) conventions." *Id.* at 280-81.

12. DNC RULE 2A, *supra* note 10.

13. In Cousins v. Wigoda, 419 U.S. 477 (1977), the Supreme Court summarized its holdings on political parties' rights of association. The Court stated, " 'There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.' " *Id.* at 487 (citing Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973)).

Like most constitutional rights, however, the freedom to associate is not absolute. It may be limited by a state asserting a legitimate and compelling interest. Cousins v. Wigoda, 419 U.S. at 489. *See also* NAACP v. Alabama, 357 U.S. 449 (1974).

14. WIS. STAT. ANN. § 5.60(8) (West Supp. 1980).

tion of party preference"[15] cannot coexist in the same election. The State Democratic Party of Wisconsin cannot structure its delegate selection procedure to accommodate both the state's requirement that the primary be open and the party's rule demanding a publicly announced and publicly recorded party affiliation in the allocation of delegates. If the state law prevails and the open-primary results are applied to allocate delegates per candidate, then the party rules will be subrogated, as there will have been no public recordation of party preference. If the party's rule prevails, however, the results of the Wisconsin primary will be reduced to little more than a "political beauty contest"; the primary election would amount to a state-sponsored survey of the popularity of the candidates among the voters. While the voters could vote for their favorite candidate in the primary, the results would not be used in the party's apportionment of delegates to the candidates. As the delegates would then not only be selected but also apportioned by caucus, convention, or some other "closed" system, the primary voters would cast only an advisory ballot.

The tension between the state law and the party rule resulted in an actual controversy following the 1980 Wisconsin presidential primary. The DNC had made clear to the Wisconsin State Democratic Party (State Party) that compliance with DNC rules was a condition to State Party participation at the 1980 Democratic National Convention.[16] The State Party was prohibited from using the results of the Wisconsin open primary to determine how many Wisconsin delegates each presidential candidate would receive at the 1980 convention.[17] The DNC based its prohibition on the fact that participation in the Wisconsin Democratic primary had not been limited to voters who publicly declared their preference for the Democratic Party as required by DNC rules.[18]

The State of Wisconsin, seeking to enforce its open-primary law, brought an original action in the Wisconsin Supreme Court against the DNC and the Democratic Party of Wisconsin.[19] Significantly, the State Party concurred with the state's assessment that the Wisconsin open-primary law was valid and could properly be asserted against the state and national parties.[20] The State Party cross-claimed against the DNC, requesting that the Wisconsin Supreme Court order the DNC to seat its delegation as apportioned by the Wisconsin primary election.[21]

15. DNC RULE 2A, *supra* note 10.

16. Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 112 (1981).

17. *Id.* at 120 n.21.

18. *Id.*

19. *See* State *ex rel.* La Follette v. Democratic Party, 93 Wis. 2d 473, 287 N.W.2d 519 (1980), *rev'd sub nom.* Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981).

20. Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 113 (1981).

21. *Id.*

The Wisconsin Supreme Court upheld the open primary statute,[22] and the Wisconsin Democratic delegation, apportioned in accordance with the results of the open primary election, was seated at the 1980 National Democratic Convention. The court based its unanimous decision on a balancing of the need to protect partisan associational interests against the importance of preserving the state's interests in regulating the electoral process. Determining that the state had a "compelling . . . interest in not requiring that voters publicly declare their party preference and have that preference publicly recorded,"[23] the court concluded that the open primary did not impose unconstitutional burdens on either the DNC's associational rights or its right to govern its affairs through the national convention.

The DNC appealed to the United States Supreme Court, claiming that forced compliance with the Wisconsin open-primary statute violated its associational rights and those of its members under the First and Fourteenth Amendments to the United States Constitution. In *Democratic Party v. Wisconsin ex rel. La Follette*,[24] the United States Supreme Court reversed the Wisconsin Supreme Court and held that the state's interests and the national party's associational rights *could* compatibly co-exist.[25] The Court did not address the State Party's claim.

This note will examine the United States Supreme Court's reversal of the Wisconsin Supreme Court's decision in *La Follette*. In so doing, it will explore the nature of the associational rights claimed by the DNC, the extent of the state's burden on these rights, and the merits of the state's asserted compelling interest in preserving the overall integrity of the electoral process by providing for secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of the state's voters. This analysis will also distinguish *Cousins v. Wigoda*,[26] a case dealing with a purely internal party dispute, upon which the Supreme Court relied in its reversal of the Wisconsin Supreme Court decision.

Finally, this note proposes that where party associational rights have been held to take precedence over conflicting state law, the determination of those partisan associational rights *should be made at the state party level* where, as here, the activity in question is chiefly a state party function.

22. State *ex rel.* La Follette v. Democratic Party, 93 Wis. 2d at 482, 287 N.W.2d at 522.
23. *Id.* at 483, 287 N.W.2d at 522.
24. 450 U.S. 107 (1981).
25. *Id.* at 124-26.
26. 419 U.S. 477 (1975).

I. The Competing Interests

In *La Follette*, the Wisconsin Supreme Court acknowledged that a national party and its adherents have "a constitutionally protected right of political association, but a state law may circumscribe that right."[27] It explained that whether or not curtailment or abridgement of those rights offends the United States Constitution depends on "the right claimed, the nature and scope of the limitation and whether there is a sufficient state interest to justify the limitation."[28] The United States Supreme Court by relying on *Cousins v. Wigoda* purported to use the same balancing test.[29] The majority opinion, however, does not indicate that the Court examined the issue using the above analytical steps.

A. The Nature of the Right Claimed: Freedom of Association

It is generally accepted that political parties enjoy associational rights that are rooted in the constitutional guarantees of the rights of petition, assembly, and free speech.[30] As important as a party's and its members' associational rights may be, however, they are not absolute.[31] A state may subordinate a party's associational rights when the justification for such subordination is based upon a "compelling" state interest.[32] In *La Follette*, while the DNC argued before the Wisconsin Supreme Court that its associational rights had been violated by the Wisconsin open-primary law, the national party presented no factual support for its contention.[33]

The importance of the primary as a *party* function was not disputed[34] and was recognized by the Wisconsin Supreme Court as such:

> [T]he primary is a step in the process of selecting a candidate who will be the Party's standard bearer; that the primary is a substitute for closed slate-making by party leaders; and that although

27. 93 Wis. 2d at 495, 287 N.W.2d at 528.

28. *Id.*

29. 450 U.S. at 120-24.

30. *See* note 13 *supra*.

31. 450 U.S. at 124.

32. Cousins v. Wigoda, 419 U.S. at 489.

33. "The National Party's own materials indicate that Wisconsin's open primary produces an electorate which is as representative (or as unrepresentative) of 'Democratic identifiers in the electorate' as is the electorate produced by closed primaries and caucuses which are acceptable to the National Party." 93 Wis. 2d at 508, 287 N.W.2d at 534 (citation omitted). The Wisconsin Supreme Court also held that the National Party's assumptions that enough voters who "do not have a commonality of interest" with the Democratic Party will raid the primary and thereby "jeopardize [its] integrity" are unsupported. *Id.* at 508, 287 N.W.2d at 533.

34. The Wisconsin Supreme Court recognized the importance of the primary as a party function as well as its significance as a state function. It stated, "Thus both the state and the party have an interest in protecting the integrity of the primary . . . as a party function." 92 Wis. 2d at 499-500, 287 N.W.2d at 530.

> the primary broadens participation in slate-making, the primary election remains to some extent a party function.[35]

The court also recognized that the primary serves a *public* function by nominating candidates for the general election. Given the primary's public and private functions, the Wisconsin Supreme Court, citing *Marchioro v. Chaney*,[36] stated that when a party rule is in conflict with a state statute, the party has the duty of persuading the court that the state statute "significantly impedes the National Party as it seeks to achieve its stated purposes and objectives."[37] If the party were not required to show such harm, it would prevail over conflicting state law whenever party leaders adjudged the state law to be incompatible with partisan interests. Associational rights should be afforded judicial protection when they are critical in enabling parties to achieve their purposes and objectives. If a state law does not impede this process, however, the party should establish that its associational rights have been significantly infringed upon before the state is required to demonstrate its compelling interest in enacting the legislation.[38] Nevertheless, the United States Supreme Court, as will be discussed below, imposed no such burden of proof on the National Party, finding its bare allegation of significantly infringed rights to be sufficient.

The Democratic National Committee's Rule 2A was ostensibly adopted to protect the integrity of the primary as a party function and to protect the party's associational interests "from intrusion by those with adverse political principles."[39] The Wisconsin Supreme Court,

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

36. 442 U.S. 191 (1979). In *Marchioro*, the United States Supreme Court upheld a Washington state statute that required each major political party to have a state committee consisting of two persons from each county in the state against a challenge by members of the Democratic Party that the statute violated their right of association as secured by the First and Fourteenth Amendments. *Id.* at 199 n.15. "The state court reasoned that although 'substantial burdens' on the right to associate for political purposes are invalid unless 'essential to serve a compelling state interest,' these appellants failed to establish that this statute had imposed any such burden on their attempts to achieve the objectives of the Democratic Party. Since this initial burden had not been met, the court upheld the constitutionality of the challenged statute." *Id.* at 195 (footnotes and citations omitted). The Court also distinguished *Marchioro* from *Cousins*. "*Cousins v. Wigoda* . . . upon which appellants place their primary reliance, does not support their claim here. In *Cousins*, unlike this case, there was a substantial burden on associational freedoms. This fact alone distinguishes the two cases, and renders *Cousins* inapposite." *Id.* at 199.

37. 93 Wis. 2d at 499, 287 N.W.2d at 530.

38. The Wisconsin Supreme Court cited Marchioro v. Chaney, 442 U.S. 191 (1979), and American Party v. White, 415 U.S. 767, 790 (1974), for the proposition that the National Party has the burden of persuading the court that the Wisconsin statute "significantly infringe[d] [on] the National Party's associational rights." 93 Wis. 2d at 499, 287 N.W.2d at 530.

39. Ray v. Blair, 343 U.S. 214, 221-22 (1952). Another view is that DNC Rule 2A was adopted to more tightly define and limit public participation in the presidential nominating process. This approach would have the advantage of assisting an incumbent Democratic

however, did not agree that a "declaration of Democratic Party preference at the time of voting"[40] would accomplish the National Party's expressed purpose:

> Defining who is and who is not a Republican or Democrat, defining the commonality of interest which binds Democrats or Republicans, or defining the Republican's or Democrat's commitment to the party are key issues which have not, as far as we can tell, been resolved by the parties. The significance of the declaration of preference is far from clear.[41]

In short, the court was acknowledging that under DNC Rule 2A, non-Democrats could still pollute the partisan process. The mere public recitation of party preference would not keep Republicans or independents from participating in the Democratic Party's primary, caucus, or convention. Anyone could assert allegiance to the Democratic Party for the purpose of participating in the nominating process. Even in a closed-primary state, nonmembers could register as Democrats and distort the process. The DNC offered no proof that a public avowal and recordation of partisan loyalty would in fact protect its associational rights to any greater degree than the open primary. Moreover, the requirement that participants in the Democratic primary state publicly and in writing their partisan affiliation could discourage many Democrats from participating in the nominating process. Although voters might consider themselves Democrats and wish to vote in the primary, they may value their anonymity or fear retributions from employers, business associates, church members, or purveyors of computerized mailing lists if forced to declare party affiliation publicly. Consequently, a forced declaration of party affiliation could deter many individuals who are true adherents of the Democratic Party from participating in the primary; DNC Rule 2A could have a more chilling effect on the exercise of associational rights by individuals than the open-primary statute could be said to have on the rights of the party.

Party affiliation is an intangible allegiance that, while often transitory and varying in degree, may nonetheless find effective expression in an open primary as well as in a closed primary. The DNC did not substantiate its claim that its rights are violated by the open-primary law. It was unable to prove that Rule 2A operates to preserve associational rights in a manner and to a degree not provided for by the operation of the Wisconsin statute.

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president, since the incumbent Democratic president appoints the national Democratic chairperson and the DNC becomes, in large part, a tool of the White House. The DNC machinery could be employed with greater efficiency to turn out a vote favorable to the incumbent when the incumbent, through his political operators, sets the limits as to who may and who may not vote.

40. 93 Wis. 2d at 500-01, 287 N.W.2d at 531.

41. *Id.* at 501, 287 N.W.2d at 531 (footnote omitted).

On appeal, the United States Supreme Court side-stepped the weighing and balancing approach because it did not consider to what extent the state *actually* infringed upon the national party's interest. It held that the DNC was not required to bear the burden of proving a significant infringement of its associational rights. The national party had only to *assert* such an infringement. The Court posed the issue in the following manner:

> The State argues that its law places only a minor burden on the National Party. The National Party argues that the burden is substantial, because it prevents the Party from 'screen[ing] out those whose affiliation is . . . slight, tenuous, or fleeting,' and that such screening is essential to build a more effective and responsible Party. But it is not for the courts to mediate the merits of this dispute. For even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party.[42]

In sum, the majority is content to accept the national party's claim of substantially burdened associational rights, whether or not such an assertion is grounded in fact. Under the majority analysis, the national party need only allege that a party rule protects a fundamental freedom and that a state law substantially abridges that freedom.[43] The majority view indicates that the courts need not inquire into the merits of this claim, but should accept the party's assertion on its face. The state must then show compelling state interests justifying a substantial infringement on associational rights, although the infringement itself might be very minor. By giving the national party such great license to label infringements on its associational rights as "substantial," the Court has invited a political party to challenge state laws affecting its operations whenever it chooses and regardless of whether or not the facts merit such a determination.

Given the majority's position, the issue becomes whether or not the state has such compelling interests as to justify the limitation.

B. The State's Compelling Interests

Wisconsin asserted that its open-primary statute furthered its legitimate interest in protecting the "overall integrity of the electoral pro-

42. Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. at 123-24 (footnotes omitted). In his dissent, Justice Powell responded to the majority view stating, "I am unwilling—at least in the context of a claim by one of the two major political parties—to conclude that every conflict between state law and party rules concerning participation in the nomination process creates a burden on associational rights." *Id.* at 130 (Powell, J., dissenting).

43. 450 U.S. at 123-24. "[A] state, or a court, may not constitutionally substitute its own judgment for that of the Party." *Id.*

cess."[44] The Wisconsin Supreme Court agreed, finding this interest to include: protecting the associational rights of the party; protecting the rights of the State's citizens to vote, to associate for political purposes, and not to disclose their party preference; and insuring that the primary itself and political party participation therein are conducted in a fair and orderly manner.[45]

The state's protection of the above interests was intended to prevent the resurgence of past abuses of the political process. The political history of the State of Wisconsin, with its distinct populist influence, illustrates the attempt by state government to protect the welfare of its citizens against corrupt leadership.[46] The smoke-filled rooms replete with bribes, influence peddling, and under-the-table power brokering were eschewed by the Wisconsin Progressives under the leadership of Robert M. La Follette, Jr.[47] Implementation of the open primary was one of many political reforms that offered citizens the opportunity to have significant input into the process of electing a president. By taking control over the selection of candidates away from party bosses, the open primary put the people in direct control. Since the primary was "open," employers, political machines, and others could not harass voters concerning their political affiliations.[48]

When voters are free to make a choice in the polling booth by voting on the basis of candidate merit rather than party label, they need not fear intimidation by those who might disagree with their party of choice. The state's protection of these interests works toward achieving the most desirable of democratic goals—the election to office of those individuals best qualified to serve.

Not only did the Wisconsin Court detail the *historical* significance of the open primary,[49] but as recently as 1979, the Wisconsin State Legislature indicated its overwhelming and continuing support for the

44. 93 Wis. 2d at 512, 287 N.W.2d at 536. The Wisconsin Supreme Court found that the Wisconsin open-primary law employed the least drastic means available to insure the protection of its compelling interests. *Id.* at 514, 287 N.W.2d at 537. *See* United States v. Robel, 389 U.S. 258, 267-68 (1967); Shelton v. Tucker, 364 U.S. 479, 488-90 (1960). *See also* United States v. O'Brien, 391 U.S. 367 (1968), in which the Court articulated the least drastic means test. "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

45. 93 Wis. 2d at 500, 287 N.W.2d at 530.

46. *See id.* at 492, 287 N.W.2d at 526-27.

47. The Wisconsin Supreme Court chronicled the impact of the Progressive Movement on Wisconsin state politics and concluded that the open primary not only reflected the Democratic goal of the reform era, but has endured as a significant feature of the state's political system. *See id.*

48. *See id.*

49. *Id.* at 492-95, 287 N.W.2d at 526-28.

measure.[50]

While the United States Supreme Court found that Wisconsin has a substantial interest in the manner in which its elections are conducted, the Court found that these interests are not jeopardized by the DNC's delegate selection process. Instead, the Court concluded that these asserted interests related only to the open primary:

> The state asserts a compelling interest in preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters. But all those interests go 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.[51]

The Court focused on its distinction between the administration of the primary and the selection of delegates. The real problem, however, was not the conflict between the primary and the *delegate selection process*, but the incompatability of the open primary and the *apportionment* of delegates—a process which *precedes* the selection of delegates.

It is a truism to say that every voter is entitled to a vote that counts.[52] Primary votes will not count if the delegates are not apportioned and are not bound to vote according to the primary results. In an attempt to accommodate the two interests, the Court explained that the interest of the National Party in preserving its associational rights by employing DNC Rule 2A, and the interests of the state in regulating the manner in which its elections are conducted, are not mutually exclusive. The Court reasoned that "to the limited extent [the interests] clash,"[53] both could be preserved if the state would remove the "binding" characterization of its open presidential primary on the apportionment of delegates.[54] While on its face this appears to be a feasible alternative, in reality it is not. Once the binding characterization is removed, the state interests are no longer provided for. In his dissent,

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50. On September 5, 1979, by a unanimous vote of its Senate and a 92-1 vote of its Assembly, the Wisconsin Legislature reaffirmed by joint resolution the "firm and enduring commitment of the people of Wisconsin to the open presidential preference primary law as an integral element of Wisconsin's proud tradition of direct and effective participatory democracy." Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. at 115 n.14.

51. *Id.* at 124-25 (footnotes omitted).

52. *See* Reynolds v. Sims, 377 U.S. 533 (1964), in which Chief Justice Warren observed, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Id.* at 555. *See also* United States v. Classic, 313 U.S. 299, 315 (1941).

53. 450 U.S. at 126.

54. "The National Party rules do not forbid Wisconsin from conducting an open primary. But if Wisconsin does open its primary, it cannot require that Wisconsin delegates to the National Party Convention vote there in accordance with the primary results, if to do so would violate Party rules." 450 U.S. at 126. *See also id.* at 134 (Powell, J., dissenting).

Justice Powell recognized the unreasonableness of the majority's solution:

> The Court does not dispute that the State serves important interests by its open primary plan. Instead the Court argues that these interests are irrelevant because they do not support a requirement that the outcome of the primary be binding on delegates chosen for the convention. *This argument, however, is premised on the unstated assumption that a non-binding primary would be an adequate mechanism for pursuing the state interests involved. This assumption is unsupportable because the very purpose of a Presidential primary, as enunciated as early as 1903 when Wisconsin passed its first primary law, was to give control over the nomination process to individual voters. Wisconsin cannot do this, and still pursue the interests underlying an open primary, without making the open primary binding.*[55]

In a time when many voters stay away from the polls because of the belief that their single vote will not make a difference in the political process, the Court has effectively chosen to reinforce that belief. Following the Court's reasoning, the rank and file could support one candidate, but the state party professionals could ignore the primary results and instead rely on the results of a separate and unrelated process of caucuses or conventions that could produce a totally different distribution of delegates per candidate. In such an instance, the voters would merely be participating in a charade of representative government with the actual decisionmaking once again taking place in the confines of the "smoke-filled room." The Court should not attempt to dismiss the profound effects of its decision with the unsupportable disclaimer that both Wisconsin state and national party interests can simultaneously be preserved. An open primary that has no binding effect on the allocation of delegates to candidates has no impact on the political process and is a futile electoral gesture. The asserted interests of the state cannot be served by a nonbinding primary. It is the *binding* nature of the Wisconsin open presidential primary that preserves those state interests of protecting the integrity of the electoral process and the sanctity of the individual's vote.[56]

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55. 450 U.S. at 134 (Powell, J., dissenting) (emphasis added) (footnotes omitted).

56. "We must consider, finally, whether the State has compelling interests that justify the imposition of its will upon the appellants. . . . The State asserts a compelling interest in preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters. But all those interests go 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. Therefore, the interests advanced by the State do not justify its substantial intrusion into the associational freedom of members of the National Party." 450 U.S. at 124-26 (footnotes omitted).

Evidence of further error in the Court's reasoning is given by the majority's use of *Cousins v. Wigoda* to avoid analysis of the competing associational rights and state interests.[57]

II. The Court's Reliance on *Cousins v. Wigoda*

The intraparty dispute giving rise to the cause of action in *Cousins v. Wigoda*[58] arose in the context of the 1972 campaign for the Democratic presidential nomination. The battle lines were drawn between the old-line party machine, led by Mayor Richard Daley of Chicago, and Illinois Democrats opposed to Daley, who had advocated electoral reform of the State and National Parties' presidential nominating processes.

Wigoda and other Daley supporters had been elected delegates to the 1972 Democratic National Convention in the March 1972 Illinois primary according to Illinois state law. Cousins and other Democrats, in an attempt to replace the Wigoda delegates with an alternate slate, challenged the seating of the Wigoda delegates at the national convention. The challengers asserted that the Wigoda delegates had been elected in violation of the National Party's delegate selection rules.[59] Supporting the Cousins challenge, the DNC's Credentials Committee[60]

57. *Id.* at 121 (citing Cousins v. Wigoda, 419 U.S. 477, 483, 491 (1975)).

58. 419 U.S. 477 (1975).

59. The Illinois election law provided that voters select particular slates of delegates. ILL. ANN. STAT. ch. 46, §§ 7-1 to -65 (Smith-Hurd 1965). The DNC, however, narrowly circumscribed the conditions under which slate-making was permitted. The 1972 DNC Guideline C-6 reads as follows:

"In mandating a full and meaningful opportunity to participate in the delegate selection process, the 1968 Convention meant to prohibit any practice in the process of selection which made it difficult for Democrats to participate. Since the process by which individuals are nominated for delegate positions and slates of potential delegates are formed is an integral and crucial part of the process by which delegates are actually selected, the Commission requires State Parties to extend to the nominating process all guarantees of full and meaningful opportunity to participate. . . .

"[T]he Commission requires State Parties to adopt procedures which assure that:

"1. the bodies making up the slates have been elected, assembled, or appointed for the slate-making task with adequate public notice that they would perform such task;

"2. those persons making up each slate have adopted procedures that will facilitate widespread participation in the slate-making process, with the proviso that any slate presented in the name of a presidential candidate in a primary State be assembled with due consultation with the presidential candidate or his representative.

"3. adequate procedural safeguards are provided to assure that the right to challenge the presented slate is more than perfunctory and places no undue burden on the challengers.

"When State law controls, the Commission requires State Parties to make all feasible efforts to repeal, amend or otherwise modify such laws to accomplish the stated purpose." DNC GUIDELINE C-6 (1972), *quoted in* Cousins v. Wigoda, 419 U.S. at 479-80 n.1.

60. The role of the Credentials Committee is illustrated by the following: "Normally, the party's National Committee issues a Call to the National Convention to the official state party organization in each state. In accordance with state election law and state party proce-

concluded that the Wigoda delegates had been elected through procedures that, while in compliance with Illinois state law, did not conform to the DNC's delegate selection requirements.

An injunction issued by the Circuit Court of Cook County and affirmed by the Illinois Appellate Court prohibited each of the Cousins delegates " 'from acting or purporting to act as a delegate to the Democratic National Convention . . . .' "[61] Nevertheless, the Credentials Committee recommended to the full convention that the Wigoda delegates be unseated and that the alternate slate of Cousins delegates be seated in their place. The Democratic National Convention adopted the Credentials Committee's report, and the Cousins delegates participated fully in all subsequent convention proceedings,[62] in violation of the injunction issued by the Illinois court.

The narrow question addressed by the United States Supreme Court in *Cousins* was "whether the Appellate Court was correct in according primacy to state law[63] over the National Political Party's rules in the determination of the qualifications and eligibility of delegates to the Party's National Convention."[64] The Court held that the lower court was not.

Justice Brennan, writing for the Court, explained that while there may be a legitimate state interest, the "subordinating interest of the State must be *compelling* . . . to justify the injunction's abridgment of the exercise by petitioners and the National Democratic Party of their constitutionally protected rights of association."[65]

Although Justice Brennan concluded that the National Party's rights to association should prevail over the state's expressed interest, Justices Rehnquist and Stewart and Chief Justice Burger, who all concurred in the result, cautioned against too broad an application of *Cousins*. They noted that the *Cousins* holding should be read narrowly so as not to "foreshadow results in cases not before us."[66]

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dures, a delegation is selected to represent the state party at the national convention. If a question develops as to how delegates are to be selected or which delegates in fact are selected, this issue is normally resolved according to state law and state party practices." J. JAMES, AMERICAN POLITICAL PARTIES IN TRANSITION 115 (1974). When the state party cannot decide, the Credentials Committee of the National Party will resolve the issue of contested delegates. J. PARRIS, THE CONVENTION PROBLEM 62-68 (1972).

61. 14 Ill. App. 3d 460, 302 N.E.2d 614 (1973), *quoted in Cousins*, 419 U.S. at 480.

62. 419 U.S. at 481.

63. The state law in question was ILL. ANN. STAT. ch. 46, §§ 7-1 to -65 (Smith-Hurd 1965). *See also* Wigoda v. Cousins 14 Ill. App. 3d 460, 302 N.E.2d 614, 626-31 (1973).

64. 419 U.S. at 483.

65. *Id.* at 489 (emphasis added) (quoting NAACP v. Alabama, 357 U.S. 449, 463 (1958)).

66. 419 U.S. at 494 (Rehnquist, J., concurring). The argument can be made that the facts of *La Follette* fall outside the narrow *Cousins* holding. Chief Justice Burger and Justice Stewart, however, voted with the majority in *La Follette*. A possible explanation for these

The majority in *La Follette* chose to blur the factual distinctions between the 1980 Wisconsin controversy and the 1972 Illinois party fight, and relied on *Cousins* for the proposition that any state interference with the National Party's delegate selection process impermissibly impedes the exercise of constitutionally protected associational rights.[67] *Cousins* should be applied only to strictly internal party disputes. For example, while the holding may cover the actual process of selecting delegates, it does not control issues concerning the significance of state legislation directing the time, place, and manner of conducting a primary as part of the presidential nominating process.

The factual distinctions between *La Follette* and *Cousins* fortify the inapplicability of *Cousins*. Whereas in *Cousins*, the votes cast in the primary election were applied directly to the election of individual delegates to the 1972 National Party Convention, in *La Follette*, the votes cast in the primary did not elect delegates to the national convention. In *La Follette*, the delegates were selected in a separate procedural step by publicly declared Democrats. The primary vote determined only the allocation of delegates per candidate; it did not determine who the delegates would be.

Furthermore, the controversy in *La Follette* was not the result of a mere intraparty dispute, rather it arose because of the direct conflict between a state law and a national party rule that applies not to the election of delegates to the national convention but to the apportionment of delegates to candidates. Apportionment, in contrast to selection, is more than an internal partisan matter. The facts of *La Follette* differed from those in *Cousins*, since in the latter case the Illinois state law did not conflict with the national party rules. As the Wisconsin Supreme Court observed:

> In *Cousins* . . . Illinois' sole interest was to protect the result of its primary. . . . Unlike *Cousins*, the State Party [in *La Follette*] cannot comply with both the statute and the National Party Rules. Unlike Illinois, Wisconsin's interest is not merely to protect the results of the primary. Wisconsin has a compelling state interest in maintaining the special feature of its electoral law—a primary which permits private declaration of party preference.[68]

Cousins does not stand for the sweeping proposition that every conflict between state and party must be resolved in favor of the party.

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votes can be made out, not by closely scrutinizing the legal text, but by evaluating the practical political climate in which the case arose. In the aftermath of Buckley v. Valeo, 424 U.S. 1 (1976), political action committees flourished, while the expansion of political parties was limited by strict regulation of candidate contributions. Perhaps these justices ignored their own cautionary note in *Cousins* in order that they might give a legal transfusion to national political parties, which had grown anemic following the *Buckley* decision.

67. *See generally* 450 U.S. at 121. *See also id.* at 128-29 (Powell, J., dissenting).

68. 93 Wis. 2d at 521, 287 N.W.2d at 541.

Indeed, *Cousins* held that when a political party's associational rights conflict with a state law, the proper analytical approach is the one applied by the Wisconsin Supreme Court: an examination of the nature and extent of the intrusion in light of the state's compelling interests to determine whether or not there has been an actual and unjustifiable limitation on First Amendment freedoms.[69] Although the United States Supreme Court mentioned this approach in *La Follette*, it did not make a determination that the party's associational freedoms actually had been burdened by the state primary law. Moreover, the Court did not address the extent of the alleged burden; therefore, it was unable to balance the burden effectively against the state's interests. By skipping this important analytical step, the United States Supreme Court merely cited *Cousins*; it did not rely on the *Cousins* test.

Had the Court made a complete examination of the infringement of associational rights, it would have considered the extent to which the State Party's associational rights were involved. Since the State Party articulated its associational interests as being compatible with state election law, the issue raised is: When both a state party and a national party assert that a determination of their respective associational rights is central to the resolution of a legal dispute, and the nature and scope of those rights are not similarly defined, whose associational rights view prevails—that of the national party or of the state party?

III. Who Defines Partisan Associational Rights?

The United States Supreme Court did not discuss one important aspect of the *La Follette* case—the position taken by the State Party. In contrast to the DNC, the State Party indicated that the Wisconsin open primary served both the state and the national parties' associational interests better than other means approved by the DNC, including closed primaries, caucuses, and conventions.[70] This view reflected the

69. In *Wigoda*, the Court explained, "The National Democratic Party and its adherents enjoy a constitutionally protected right of political association. 'There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom. . . . [A]nd of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the states.' " 419 U.S. at 487 (citations omitted).

The next step in the Court's analysis provided, "We proceed, however, to considering whether the asserted state interest justifies the injunction. Even though legitimate, the 'subordinating interest of the State must be compelling . . .' to justify the injunction's abridgment of the exercise by petitioners and the National Democratic Party of their constitutionally protected rights of association." 419 U.S. at 489 (citations omitted).

70. Brief of the Democratic Party of Wisconsin, Respondent and Cross-Claimant at 13-14, State *ex rel.* La Follette v. Democratic Party, 93 Wis. 2d 473, 287 N.W.2d 579 (1980).

State Party's concern that the primary should aid the democratic goals of the nation's electoral process by promoting the widest possible primary participation by all those who considered themselves Democrats.[71]

The Court has recognized that the adherents of both national and state parties possess associational rights. In *La Follette*, however, the Court ignored the question of whose concept of associational rights—the State Party's or the DNC's—should determine the method by which to apportion state delegates to presidential candidates. There is a strong argument to be made that the State Party's associational rights dominate. Whereas the staging of the national convention is a national party function,[72] the process of allocating state party delegates to candidates and deciding who may participate in the voting process resulting in that allocation is a state party function.[73] As the Supreme Court noted in *Cousins*, the state parties are " 'affiliated with a national party through acceptance of the national call to send *state* delegates to the national convention.' "[74] In Wisconsin, the State Party considers its adherents to be all those who affiliate, albeit privately, with the party in the sanctity of the polling booth. What right, then, does the DNC have to circumscribe that decision narrowly and to undermine the State

"Significantly, none of the procedures which are acceptable to the Democratic Party of the United States for apportioning delegates among various candidates produces participants which come close to fairly reflecting the statistical makeup of 'Democratic identifiers in the electorate.' Indeed, the Wisconsin Open Primary might be the procedure which most accurately reflects the beliefs of all Democratic identifiers in the general electorate. In any event, there is no factual basis for concluding that the Wisconsin Open Primary materially interferes with the associational goals of the Democratic Party of the United States." *Id.*

71. The respondents argued that "[t]he Wisconsin Open Primary provides the only vehicle whereby all of the voters of all political persuasions can cast their vote for the person they believe to be the best qualified for the office of President of the United States. Thus, rather than hindering the associational objectives of the Democratic Party of the United States, the Wisconsin Open Primary actually assists the Democratic Party of the United States in identifying the person with the greatest appeal among all of the voters who are involved in the election in November." *Id.* at 12.

The brief went on to conclude, "Thus, Wisconsin's Open Primary has been singled out as demonstrative of a primary electorate which comes close to the Democratic general electorate in November. Such a result is hardly adverse to the interests of the Democratic Party." *Id.* at 15.

72. C. COTTER & B. HENNESSY, POLITICS WITHOUT POWER, THE NATIONAL PARTY COMMITTEES 61 (1964).

73. For a discussion of state procedures for presidential nominations, see M. JEWELL & D. OLSON, AMERICAN STATE POLITICAL PARTIES AND ELECTIONS 278-83 (1978). Note, however, that the process of delegate selection is determined at the state level, but recent trends, especially in the Democratic Party, have limited that role somewhat. *See id.* at 278. *See also* J. PARRIS, *supra* note 60, at 52. Other than the three varieties of primaries already mentioned (open, closed, and blanket), there are two other methods of delegate selection—appointment by party leaders and caucuses/conventions.

74. 419 U.S. at 489 (quoting Ray v. Blair, 343 U.S. 214, 225 (1952)) (emphasis added).

Party choice as to the appropriate means by which to determine who is and who is not a *Wisconsin* Democrat?

The political party system reflects two fundamental concepts of the American system of government: federalism[75] and the right of the governors to rule stemming from the consent of the governed. Both concepts relate to the division of responsibility between national and state party levels. Decentralization of power is a significant characteristic of American national party organizations and reflects the effect of federalism on the development of American parties. Although it is not surprising that the media promote the national party *conventions*, it is a mistake to assume that a national *party* is much more than an "umbilical cord between national conventions."[76] Moreover, the state parties have political identities apart from their affiliation with the national parties. The several thousand county committees, wards, precincts, and state parties bear most of the responsibility for carrying on the day-by-day political work. On a practical level, this activity includes, among other things, candidate recruitment, image building, fund raising, maintaining office space and staff, acting as a liaison between local, state and national officials, staffing precinct positions, canvassing voters, and providing services to voters with problems and complaints.[77]

Just as the fifty states bear the main responsibility for regulating and administering elections in the United States,[78] it is appropriate that

75. *See generally* T. DYE, POLITICS IN STATE AND COMMUNITIES (1969). As Dye explained the relationship, "Federalism has had a profound effect on the organization of American parties. Decentralization of power is the most important characteristic of American Party organizations." *Id.* at 92. Judson James, in *American Political Parties in Transition*, expressed a similar view:

"The American interpretation of democratic theory, expressed in the dominant institutions of American government, de-emphasizes majority rule to protect minority rights. Americans emphasize and celebrate decentralization and checks and balances. The federal system, the separation of the executive from the legislative, written constitutions, and judicial review all reflect the desire to insure individual freedom by limiting government. These limitations operate by setting parts of the government against the other parts. Diffusion of authority creates a great number of centers of power, each with considerable capacity to veto the initiatives and programs of the others. Negatively inclined government (federalism) is therefore explicit in the design and impact of the government structure; the American government is deliberately decentralized and limited. . . .

"Therefore, the relation of political parties to the structure of government (federalism) is twofold. Because governmental authority is widely distributed, competition for this authority creates multiple centers of influence within the party reflecting the different basis of influence achieved or sought. . . . [P]arties also provide informal coordination of the dispersed formal governmental structure." J. JAMES, *supra* note 60, at 9-10.

76. C. COTTER & B. HENNESSY, *supra* note 72, at vi.

77. *See generally id.* at 10; T. DYE, *supra* note 75, at 92-94; R. HUCKSHORN, PARTY LEADERSHIP IN THE UNITED STATES (1976); J. JAMES, *supra* note 60, at 81-89; V. KEY, *supra* note 2; A. SINDLER, POLITICAL PARTIES IN THE UNITED STATES 73-74 (1966).

78. "[T]he states have reached a variety of decisions on such questions as who can vote, when they can vote, whether primaries are open or closed, how long officials can serve,

state political parties be in charge of defining their associational rights as they assist the states in conducting primary elections. To forbid a state party from writing its own electoral agenda based on *its* perception of the associational rights of *its* members would be to require it to become but a "miniature of the national party, something which it clearly is not."[79] "[Although] the national party organization is most developed . . . in presidential election years. . . . [its] primary focus on the nomination, campaign, and election of a president underscores the sporadic and discontinuous character of its efforts, and its sharing of power with local parties suggests the limits of its authority."[80]

If it is a "commonality of interest"[81] that the courts are seeking to protect by underlining the importance of partisan associational rights, it is important to recognize that "at election time in the United States groups and individuals come together in association almost as accidentally and irrationally as molecules of gas come together in a chamber."[82] Political writers generally acknowledge that the architects of party policy—the drafters of the party platforms—try to impress all while offending none to make the structure under which their "adherents" rest as broad as is politically possible.[83] Consequently, the "commonality of interest" approach at the national political level becomes

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which candidates are chosen on a partisan ballot, how many elected officials there are, and what kinds of issues are submitted to the voters for a decision. Although many of these political ground rules take the form of statutes rather than constitutional provisions, they are not frequently changed. Although the national government (usually through the judiciary) has imposed certain standards—generally to broaden participation and prevent discrimination—there are many areas in which the states are free to make their own choices. Even when there has been a strong national trend to adopt legislation, such as the direct primary movement early in the 20th century, the states have usually responded to the trend in somewhat different ways. The constitutional and statutory ground rules have the effect of perpetuating a certain kind of political system in each state. Although they result from political traditions and practices, they have a continuing impact on the political system and the culture within which it operates." M. JEWELL & D. OLSON, *supra* note 73, at 3.

79. C. COTTER & B. HENNESSY, *supra* note 72, at 10. "Just as the national committees do not comprise single and simple national headquarters, so, too, the national committees may not be the headquarters for parties that are national. This is a way of pointing out that a total of over six thousand county committees, together with more than one hundred states and territorial committees (and a few active congressional district committees), share with the national committees the responsibility of winning elections." *Id.*

80. A. SINDLER, *supra* note 77, at 73.

81. State *ex rel.* La Follette v. Democratic Party, 93 Wis. 2d at 499-508, 287 N.W.2d at 530-33.

82. C. COTTER & H. HENNESSY, *supra* note 72, at 8.

83. The platform is generally viewed as a coalition building document. One authority views the platform as "a device to build interest group support. The value of the national party convention platform in recognizing a variety of claimants as important participants in a political party is that each group that is satisfied by the pledges is given reasons to feel part of the party and to support it. Group leaders who lose out in the Presidential and Vice-Presidential nomination still have reason to feel welcome and have a symbol of success (a platform plank) to display to their membership." J. JAMES, *supra* note 60, at 114.

something of a joke as both parties attempt to have everything in common with everybody.

Since state parties are not mere clones of their national parent, they promote a system of government in which those who govern are most responsive to the wishes of those they govern. State parties, composed of a myriad of local units, are closer to the rank and file than is the national party. The constituency orientation of American politics results in state parties being "more inclined to fit their programs to popular demands within their states . . . . In short, parties in each state tailor their policies to local conditions."[84] This observation is evidenced by the Wisconsin State Democratic Party's embracing the political traditions of the state in which it operates and by its support of legislation popular with the Wisconsin electorate—the open primary.

The composition of state parties varies widely from state to state, and Democrats from different geographical regions may not share common ideological bonds.[85] The most they may be said to have in common is a party label. The national party, by superimposing its view of associational rights on the state parties, undermines the integrity and individuality of the state parties by forcing an artificial uniformity upon them.[86] The Court, by failing to address the question of whether or not a state party's claim should control the question of associational rights, has indicated its approval of the national party's indifference to state parties' rights. By permitting the national party to impose a limiting and ineffective rule on the state parties' assertion of associational rights, the Court has not furthered the rights of political association but has impaired them.

Conclusion

Because of the judicial confusion regarding the proper application of *Cousins*, states and political parties have found themselves in a legal twilight zone when their rights and interests have been found to conflict. Certainly, from a practical standpoint, it is of small value to adjudicate the questions posed by such state-party conflicts long after the dust has settled following an election.[87] Of course, the judicial determi-

84. T. DYE, *supra* note 75, at 94.

85. Indeed, Ranney pointed out that our political system provides for "almost boundaryless conceptions and permissive legal definitions of party membership." A. RANNEY, *supra* note 2, at 193. The American political party "is less an organization able to define even minimal conditions for those who seek to enter it than an open forum within which persons participate when and if such participation makes sense to them." M. JEWELL & D. OLSON, *supra* note 73, at 53.

86. *See generally* R. HUCKSHORN, *supra* note 77, at 265.

87. In *La Follette*, the Court stated, "This case is not moot. The Wisconsin Supreme Court's order is not explicitly limited to the 1980 Convention. The effect of the order 'remains and controls future elections.' Moore v. Ogilvie, 394 U.S. 814, 816. In any event,

nations will apply to future elections, but the damage resulting from a post-election adjudication of rights cannot be reversed in an opinion. In *La Follette*, the Court's response to this muddled legal quagmire was a poorly reasoned application of *Cousins* to an inapposite factual situation, with no consideration of whether a determination of partisan affiliation for the purpose of participating in a state primary should be made at the state or national party level.

Since *La Follette* indicates that the Court is not likely to uphold state laws challenged on the ground of violating partisan associational rights, a state's strongest argument might depend on the defense of its statutes by state parties. After all, state parties and their adherents also enjoy associational rights. When national party rules may violate these rights, the Court should first resolve the question of whether the function performed by the party is a state or national party activity. When, as with the Wisconsin open primary, the activity is at the state level, the state party, not the national party, should provide the definitional yardstick by which associational rights are measured. Moreover, that the national-state party dispute could be construed as an intraparty fight should not lead the Court to dismiss the controversy as nonjusticiable. The question of whose associational rights controls is but a threshold problem. When the political process results in a stalemate where neither the state party nor the national party is willing to concede that the other's associational rights should prevail, the judiciary should resolve the issue. Only then can the larger question of partisan associational rights and asserted state governmental interests be clearly focused and resolved.

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even if the order were clearly limited to the 1980 election year, the controversy would be properly before us as one 'capable of repetition, yet evading review.'" 450 U.S. at 115 n.13 (citation omitted).

The experience of history demonstrates that each election is not a separate isolated event but is instead a part of a continuing chain of events. When the Court fails to adjudicate properly the respective rights of the parties, as in *La Follette*, the damage extends not only to the 1980 election but has future consequences as well. The results of the 1980 election may foreshadow our political future for years to come. In short, once the candidates are nominated and the elections are held, no judicial determination can return the parties or the country to the status quo.