Vote Trump or You're Fired?
An Analysis of State Regulation of Delegate Ballot Binding at National Party Conventions

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Introduction

May 3, 2016 is a night everyone might not remember. That evening concluded the Indiana Republican Presidential Primary. Although many considered the primary to be a toss-up in the days and hours preceding, Donald Trump won a decisive victory over Senator Ted Cruz, securing the 1,237 delegates required to claim the Republican Party's nomination for President of the United States.[1] Many believed if Trump had not won Indiana, the party would assemble at the 2016 Republican National Convention in Cleveland, Ohio without any candidate receiving a majority of the delegates required to win the nomination.[2] If no candidate received a majority of the delegates, a brokered convention would assemble within the party for the first time since 1952.[3] Because of the hotly contested nature of this particular primary election, some delegates hoped the idea of entering the convention without a nominee would become reality.[4] Often referred to as "Never-Trumpers," these delegates were insistent on taking the

* Antonin Scalia Law School at George Mason University, J.D., 2018; George Mason University, B.A. Government and International Politics, *summa cum laude*, 2015. I would like to thank my parents for their continued love and encouragement during this process. I would also like to thank Seth Berenzweig and John Polk for initially bringing this topic to my attention.

1 *See CNN Delegate Estimate, Republican Party*, CNN: Politics (last visited Jan. 22, 2018), https://us.cnn.com/election/2016/primaries/parties/republican; *Indiana Primary Results*, N.Y. Times (last updated Aug. 1, 2017), http://www.nytimes.com/elections/results/indiana. There are 2,472 delegates available in the Republican Presidential Primary. To be considered the presumptive nominee, a candidate must acquire fifty-one percent, or 1,237, of the available delegates.

2 G. Terry Madonna & Michael Young, *A Brokered Convention in 2016: Why It Might Happen, What It Might Mean*, Real Clear Politics (Dec. 22, 2015), http://www.realclearpolitics.com/articles/2015/12/22/a_brokered_convention_in_2016_why_it_might_happen_what_it_might_mean_129119.html.

3 *Id.*

4 Kevin Schaul & Kevin Uhrmacher, *How a Fractured Field Just Might Block Trump and Force a Brokered Convention*, Wash. Post (last updated Mar. 18, 2016), https://www.washingtonpost.com/graphics/politics/2016-election/primaries/trump-versus-the-field/.

fight for the nomination all the way to the convention floor.[5] Because Donald Trump became the presumptive nominee, acquiring more than half of the available delegates, some delegates turned to their state's election codes to determine if there were legal pathways to prevent him from becoming the Republican nominee for President.[6]

As of July 2016, only fourteen state election codes had language specifically referencing the number of ballot rounds to which a delegate should or must be bound to vote for a particular candidate at a national convention.[7] Carroll Correll, a Virginia delegate to the 2016 Republican National Convention, filed an action against the Virginia Attorney General challenging Title 24.2 Section 545(D) of the Virginia Code.[8] This section of the Code requires that "delegates and alternates shall be bound to vote on the first ballot at the national convention for the candidate receiving the most votes in the primary."[9] Although Donald Trump's margin of victory in Virginia provided him with only seventeen bound delegates—representative of his proportional share of votes—under party rules, Virginia state law required all forty-nine delegates to cast their votes for Donald Trump

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5 Philip Bump, *Will the GOP Really Keep Trying to Stop Trump For Four More Months? It'll be Tough*, WASH. POST (Mar. 19, 2015), https://www.washingtonpost.com/news/the-fix/wp/2016/03/19/will-the-gop-really-keep-trying-to-stop-trump-for-four-more-months-itll-be-tough/; Reid J. Epstein, Aaron Zitner, & Stephanie Stamm, *How Trump's Nomination Could be Stopped*, WALLSTREET JOURNAL (last updated July 15, 2016, 9:55 AM), http://graphics.wsj.com/elections/2016/last-ditch-effort-to-block-donald-trumps-nomination/.

6 Michael Warren, *Inside the Latest Effort to Stop Trump At the Convention*, THE WEEKLY STANDARD (June 27, 2016), http://www.weeklystandard.com/inside-the-latest-effort-to-stop-trump-at-the-convention/article/2003045.

7 *See* ARIZ. REV. STAT. ANN. § 16-243 (Westlaw through 2017 1st Reg. Sess.); CAL. ELEC. CODE § 6461 (West, Westlaw through 2018 Reg. Sess.); GA. CODE ANN. § 21-2-196 (West, Westlaw through 2017 legislation); IND. CODE ANN. § 3-8-3-11 (West, Westlaw through 2017 1st Reg. Sess.); KY. REV. STAT. ANN. § 118.631 (West, Westlaw through 2017 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 53, § 70I (West, Westlaw through 2017 Ch. 175 of 1st Annual Sess.); MICH. COMP. LAWS ANN. § 168.562b (West, Westlaw through P.A.2018 No. 10); NEB. REV. STAT. ANN. § 32-701 (West, Westlaw through 2017 1st Reg. Sess.); N.H. REV. STAT. ANN. § 659:93 (West 2017); N.M. STAT. ANN. § 1-15A-9 (West, Westlaw through 2018 2d Reg. Sess.); OKLA. STAT. ANN. tit. 26, § 20-104 (West, Westlaw through Nov. 17, 2017); OR. REV. STAT. ANN. § 248.315 (West, Westlaw through 2017 Reg. Sess.); TENN. CODE ANN. § 2-13-317 (West, Westlaw through 2017 1st Reg. Sess.).

8 VA. CODE ANN. § 24.2-545(D) (West, Westlaw through 2017 Reg. Sess.); Correll v. Herring, 212 F. Supp. 3d 584, 593 (E.D. Va. 2016); Philip Abbruscato & Seth Berenzweig, *Virginia State Law to GOP Delegates: "Vote Trump or You're Fired."* BERENZWEIG LEONARD: BLOGS (July 5, 2016), http://www.berenzweiglaw.com/virginia-state-law-to-gop-delegates/.

9 VA. CODE ANN. § 24.2-545(D) (West, Westlaw through 2017 Reg. Sess.).

on the first ballot at the national convention.[10] Any delegate voting for a candidate other than Trump would violate Section 545(D) and face a Class 1 misdemeanor, subjecting them to up to twelve months in prison, a fine up to $2,500, or both.[11]

Exactly one week before the start of the 2016 Republican National Convention, the U.S. District Court for the Eastern District of Virginia found that the statute violated Mr. Correll's First Amendment right to free political speech and his right to free association.[12] Although seventeen delegates from Virginia were still enough for Donald Trump to win the nomination on the first ballot, a change in the election codes of the thirteen other states prior to the convention may have resulted in a Republican National Convention with a very different outcome.[13]

This Comment, in Part I, will provide background on the Supreme Court's understanding of First Amendment rights to free political speech and association and how the Court has typically resolved conflicts between state regulation of national parties and the parties' free association rights. Next, Part I will discuss the district court's ruling in *Correll v. Herring*. Specifically, it will dissect the merits of Correll's First Amendment argument as applied to delegates and political parties. Then, Part II will analyze the language of states with ballot binding statutes to determine if, under conditions similar to the facts of *Correll*, these statutes would be upheld as constitutional. Further, it will discuss whether ballot binding measures generally exceed the power retained by states under the Constitution—an issue raised in *Correll*, but not decided on because of Mr. Correll's failure to present any evidence or arguments relating to it. Lastly, this Comment will propose the following two solutions. First, this Comment argues that states should not include language in their election codes regarding the binding of delegates at national conventions. It will further argue that these rules should be set exclusively by state parties and national parties as private entities. The substantive evidence for the district court's argument in *Correll* flows directly to this conclusion, even though the court refused to draw the connection. Second, this Comment will assert that courts should find state statutes regulating

10 *See Correll*, 212 F. Supp. 3d at 595; Abbruscato & Berenzweig, *supra* note 8.

11 *See Correll*, 212 F. Supp. 3d at 597 (referencing VA. CODE §§ 18.2–11(a), 24.2–1011, 24.2-1017).

12 *Id.* at 614.

13 *See id.* at 595.

how delegates vote at national conventions exceeds their constitutional powers, as they do not have a legitimate state interest in the process.

I. BACKGROUND

A. *The Function of National Conventions*

America's two largest political parties, as a practical matter, control the modern presidential selection process.[14] The introduction of primaries has increased the number of people involved in the presidential nomination process.[15] As American society developed, both in size and complexity, the structure and functionality of its political process also evolved.[16] The importance of local party activities has decreased over time in exchange for national party centers, allowing political parties to send a uniform message to voters nationwide.[17] Political parties have the right under the First Amendment to "choose a candidate-selection process that will in its view produce the nominee who best represents its political platform."[18] Every four years, the Democratic Party and the Republican Party hold primaries to select their nominee for President of the United States.[19] The primary season concludes with a national convention that awards the winner of the most delegates from the primaries with the official party nomination for the general election.[20]

The modern party convention has evolved to a point where its role, as it pertains to the nominee, is little more than a formality.[21] It props up candidates that have already "secured" the nomination by winning the requisite number of delegates.[22] Even so, a specific number of delegates from each state will rally at the convention to

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14 Paul Carman, *Cousins and La Follette: An Anomaly Created by A Choice Between Freedom of Association and the Right to Vote,* 80 Nw. U. L. REV. 666, 682-83 (1985).

15 *Id.* at 683.

16 *Id.*

17 *Id.* at 683-84.

18 New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 202 (2008).

19 Jay M. Zitter, *Challenges to Exclusion of Delegates or Other Such Practices at Political Parties' National Nominating Conventions*, 17 A.L.R. 7th Art. 7 (2016).

20 *Id.*

21 *Id.*

22 *Id.*

represent their candidate.[23] The state and national parties select the method of choosing delegates.[24] The types of party primaries held for delegate selection include "winner-take-all" contests, proportional contests, and hybrid variations of the two aforementioned methods.[25] The delegates from each state are chosen by a variety of methods including "closed" primaries where only the party's members have a vote; "open" primaries where all eligible voters may participate; and variations that include elements of both methods.[26]

Although a modern delegate's role at the convention is largely ceremonial, the delegate's role becomes increasingly important in the event of a contested convention.[27] A contested convention occurs when no candidate wins a majority of the delegates through the primary process.[28] If this happens, thirteen states currently have laws that take effect and direct delegates on how they should vote on the remaining ballots.[29]

B. *History of the Freedom of Association*

Freedom of political association is a fundamental right guaranteed by the First Amendment to the United States Constitution.[30] The Supreme Court first explicitly recognized freedom of association as a fundamental right in *NAACP v. Alabama ex rel. Patterson.*[31] In *Patterson*, the Court held that the National Association for the Advancement of Colored People (NAACP) has the right to refuse to release its membership list to the state because of the "vital relationship between freedom to associate and privacy in one's associations."[32] The Court reasoned that "compell[ing] disclosure of affiliation with groups," would intrude upon the right of freedom of association.[33] The Court recognized that it is a well-settled principle that the freedom to associ-

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23 *Id.*

24 *Id.*

25 Zitter, *supra* note 19.

26 *Id.*

27 Madonna & Young, *supra* note 2.

28 Leigh Ann Caldwell, *A Contested Convention? (Almost) Everything You Need to Know*, NBC NEWS (Dec. 12, 2015, 1:49 PM), http://www.nbcnews.com/politics/2016-election/contested-convention-almost-everything-you-need-know-n478736.

29 *See infra* Part II.A.

30 U.S. CONST. amend. I; NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).

31 *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 466.

32 *Id.* at 462.

33 *Id.*

ate in the advancement of ideas and beliefs is an "inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment."[34] For such a state intrusion into the NAACP's records to be considered justified, the Court found the state must present a "compelling interest."[35]

The compelling interest rule, as it relates to freedom of association, is a barrier some states have been able to overcome. In *Roberts v. United States Jaycees*, the national Jaycees organization challenged the Minnesota Humans Rights Act (MHRA)—prohibiting sexual discrimination—claiming that it infringed on free association.[36] The Court distinguished association into two categories: the freedom to form and maintain intimate relationships, and the right to associate with the purpose of engaging in First Amendment protected activities.[37] The Court described the latter as a "correlative freedom" to other First Amendment rights, allowing people to associate to pursue a "wide variety of political, social, economic, educational, religious, and cultural ends."[38] Although the Court found the MHRA burdened the freedom to associate, the state's goal of eliminating sexual discrimination was sufficiently compelling to justify the state's action.[39] Therefore, a state may have a sufficiently compelling reason to safeguard a citizen's interest that has not been given protection under the Constitution, even if it overrides an organization's right to freedom of association.[40]

C. *State Regulations and National Party Rules*

1. Conflicts in the State Regulation of National Parties

Political parties have a constitutionally protected right "to associate with others in pursuit of . . . political . . . ends" because of their standing as private associations.[41] Although political parties are "private" entities, their unique relationship to the state provides for party specific benefits and constitutional constraints that do not typically

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34 *Id.* at 460.
35 *Id.* at 463.
36 Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984).
37 *Id.*
38 *Id.* at 622.
39 *Id.* at 623.
40 Carman, *supra* note 14, at 686.
41 *Roberts*, 468 U.S. at 622.

apply to other organizations.[42] For example, state laws may define what constitutes a political party, outline certain criteria for primary election candidacy, and also allocate funding towards and administer the actual primary election.[43] Because the benefits are granted by the state, the role the major parties play in the larger electoral system, "and the duopoly power they exercise in the political system," some scholars perceive the Democratic and Republican parties as public utilities as opposed to private associations.[44] State legislation pertaining to political parties is rarely purposed with achieving a party's substantive goals, and is instead focused on regulating party procedure and organization; the nominating activities are specific targets.[45] Because primary laws affect the political parties' organizational structure, a strict scrutiny standard is required for the law to be judged constitutional.[46]

When conflicts arise between state regulations and national party rules, it is almost always in the context of state level delegate selection for national party conventions.[47] Additionally, courts have written a wide number of opinions regarding the conduct of political parties during elections.[48] Regardless of the specific issues at play in these election law disputes, courts are forced to find a balance when deciding how much autonomy to allow a political party as it performs functions that may relate to a state government interest.[49]

a. Democratic Party of U.S. v. Wisconsin ex rel. La Follette*: State Interference with a Political Party's Substantive Goals*

In *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, the Supreme Court rejected the Wisconsin Attorney General's challenge for a declaration that the state constitutionally applied its delegate

42 Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2187 (2001).

43 *Id.*

44 *Id.*

45 *See* Arthur M. Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 S. CAL. L. REV. 213, 270-71 (1984).

46 *Id.* at 277.

47 *See* Robert C. Wigton, *American Political Parties Under the First Amendment*, 7 J.L. & POL'Y 411, 428 (1999).

48 *Id.* at 416.

49 *See id.*

selection system to the National Democratic Party.[50] Although the Wisconsin state law allowed voters to participate in the Democratic Presidential primary without affiliating with the party, the national party rules provided that only voters publicly affiliated with the party could participate in delegate selection to the national convention.[51] Additionally, the party rules explicitly indicated that a state's delegates would not be seated at the upcoming convention if a state's delegate selection system violated these rules.[52] The Court found that the Democratic Party could refuse to seat Wisconsin's delegation at the party's national convention.[53] Although the Court did not explicitly state that strict scrutiny applied to the issue, it did refer to a "compelling interest," suggesting that strict scrutiny is the appropriate standard of review.[54] The Court held that a state does have a substantial interest in the overall integrity of the election process.[55] However, the Wisconsin law infringed upon the Democratic Party's First Amendment right to association in advancement of its shared beliefs and protection under the Fourteenth Amendment from overbearing state interference.[56]

b. Cousins v. Wigoda*: A Political Party's Superior Interest in the Presidential Nomination Process*

In *Cousins v. Wigoda*, the Supreme Court observed that party conventions serve a "pervasive national interest" in selecting candidates for national office and that this interest is greater still than any individual state's interest in the election process's integrity.[57] The National Democratic Party found an elected group of Illinois delegates to be in violation of party guidelines and determined that a challenging group should be seated at the convention instead.[58] The elected group secured an injunction enjoining the challenger group

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[50] *See* Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 113-26 (1981).

[51] *See id.* at 109-11.

[52] *See id.* at 112-13.

[53] *See id.*

[54] *See id.* at 124-25.

[55] *See id.* at 126.

[56] *See* Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 121-26 (1981).

[57] *See* Cousins v. Wigoda, 419 U.S. 477, 490 (1975).

[58] *Id.* at 479-80.

from acting as delegates at the Democratic National Convention.[59] Although an admitted state interest existed, the Court centered its decision upon its recognition of a legitimate national party interest.[60] The Court sought to weigh the state's interest in the election process's integrity against the national interest in the candidates selected for national office.[61] According to the majority, states "have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates" because they lack any compelling interest that would grant them the ability to abridge a party's freedom of association.[62]

The *Cousins* decision had lasting effects on the way parties organized their rules and maneuvered around state election laws.[63] For the first convention post *Cousins*, the guidelines required the party "to make 'all feasible efforts' to change conflicting state laws."[64] "A state party could not use state law as a defense to a violation of the guidelines unless that party had taken all feasible efforts to change the law and had failed."[65] However, the Democratic party recognized situations where the state law is supreme and the convention would respect it, even if the party had made all reasonable efforts to change conflicting laws.[66] The *Cousins* majority did not entirely disavow a state's ability to regulate national parties, as it left open the possibility when it declined to decide whether national political parties and party conventions can be regulated by Congress.[67] Following this decision, state governments increased their efforts to regulate parties and courts continued to expand parties' First Amendment freedom of association rights.[68] This behavior ultimately led to the present day unreconciled jurisprudence between the First Amendment boundaries of national parties and state regulations.[69]

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59 *Id.* at 480-81.

60 *See id.* at 489-90.

61 *Id.* at 489.

62 *Id.* at 489-90.

63 *See* Ronald D. Rotunda, *Constitutional and Statutory Restrictions on Political Parties in the Wake of* Cousins v. Wigoda, 53 TEX. L. REV. 935, 948 (1975).

64 *Id.* at 948.

65 *Id.* at 948-49.

66 *Id.* at 949.

67 *Id.* at 945.

68 Wigton, *supra* note 47, at 420.

69 *Id.*

One piece that *Cousins*, *La Follette*, and similarly situated cases have in common is the courts' rationale in extending deference to national party organizations.[70] At the very least, the courts operate on the notion that individual states should not hinder the functionality of these political organizations.[71] These types of cases tend to produce the peculiar result that a political party's right to freedom of association may supersede a state's regulation of actions that have been delegated by the state to the party.[72]

2. The First Amendment as Applied to National Parties

It is now a well-settled rule that state regulations of elections can impact First Amendment rights of free association.[73] However, the extent to which a state can regulate a political party's electoral activity without violating these rights remains vague.[74] When a state seeks to regulate a national party, the statute must pass two hurdles: "(1) it may not be an extraterritorial extension of the state's jurisdiction; and (2) there may not be any violation of freedom of association."[75] In examining these statutes, a court will often consider the character and magnitude of a national party's First Amendment injury before offering a remedy.[76]

In *Cousins* and *La Follette*, whether a state could control delegate selection was dependent upon the pivotal and initial assumption of which actor is entitled to control this aspect of the national party convention.[77] If, on the basis of Article II Section 1 of the Constitution, states should have broad authority over presidential elections, one could say the national party's control of the primary process should be considered a conditional delegation from the states to the parties.[78] Instead, the Supreme Court in each of these cases began with the premise that the primary itself is a national function, therefore requiring

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70 *Id.* at 429-30.

71 *Id.* at 430.

72 Carman, *supra* note 14, at 669.

73 Kusper v. Pontikes, 414 U.S. 51, 57 (1973) (citing Williams v. Rhodes, 393 U.S. 23, 30 (1968)).

74 Wigton, *supra* note 47, at 433.

75 Rotunda, *supra* note 63, at 950.

76 Brian M. Castro, *Smothering Freedom of Association: The Alaska Supreme Court Errs in Upholding the State's Blanket Primary Statute*, 14 ALASKA L. REV. 523, 530 (1997) (citing Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

77 Carman, *supra* note 14, at 693.

78 *Id.*

the states to show a compelling interest to properly regulate a section of the primary.[79]

Courts have struggled to find the balance between a state's interest as the administrator of the national election process with the First Amendment rights of free association belonging to political parties and their members. Situations where courts have struck down laws regulating electoral matters include (1) requiring parties to exclusively hold closed primaries; (2) barring voting in a primary if a voter participated in another party's primary in an immediately prior year; (3) requiring at least 25,000 signatures for new parties to get their names on the general election ballot; and (4) requiring parties to hold and fund primary elections.[80] Conversely, courts have upheld state election laws, including a one-year non-affiliation restriction on candidates intending to run as independents, requirements on ballot access, and specifications of voter qualifications.[81] Because election laws impact the association rights of parties and members by varying degrees, it is unsurprising that the courts have been unable to develop a uniform standard for these cases.[82]

It has been suggested that a party's freedom from regulation should be dependent on the type of party activity that a court takes under consideration.[83] A national political party's freedom from constitutional restraints does not mean the parties are *immune* from legislative restrictions. Rather, a state government's enactment of regulatory statutes turns on the association rights afforded to the party.[84] For example, the more "private" the party function under consideration is—such as the selection of internal leaders—the more independence the party should retain.[85] But, when the performance is more "public"—such as election campaign operations or actual state governance—the party should be held to a higher constitutional stan-

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79 *Id.*

80 Wigton, *supra* note 47, at 434 (citing Norman v. Reed, 502 U.S. 279, 295-96 (1992); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986); Kusper v. Pontikes, 414 U.S. 51 (1973); Republican Party of Ark. v. Faulkner Cty., 49 F.3d 1289 (8th Cir. 1995)).

81 *Id.* (citing McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215 (4th Cir. 1995); Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976); Colo. Libertarian Party v. Sec'y of State, 817 P.2d 998 (Colo. 1991)).

82 *Id.*

83 *Id.* at 414.

84 Castro, *supra* note 76, at 523.

85 Wigton, *supra* note 47, at 415.

dard under a finer level of judicial scrutiny.[86] The Supreme Court has avoided implementing a bright line rule in this area; and, beyond striking down laws that present a significant encroachment on associational rights or unnecessarily burdens or restricts constitutionally protected liberties, the Court has offered little judicial guidance.[87]

Therefore, in most cases, "the courts have tended to focus narrowly on the *facts* of each case . . . [to examine] the degree of infringement on First Amendment rights."[88] After examining the facts at issue, a court will then evaluate the interest put forward by a state as a justification for burdening the national political party.[89] The court must weigh the legitimacy and credence of those state interests against the burden it creates for the political party to determine if the state regulation is valid.[90] Although it is not a specific "formula," this balancing test has been the method courts have used to solve issues of state election codes infringing on political parties' association rights. This fact intensive analysis appears to be utilized under the balancing test applied to state ballot binding measures, as is demonstrated by the court in *Correll v. Herring.*

D. *Correll v. Herring*

The Virginia Republican Presidential Primary was held on March 1, 2016.[91] Republican National Committee (RNC) Rule 16(c)(2) required that any state presidential primary occurring before March 15, 2016 must "provide for the allocation of delegates on a proportional basis."[92] Therefore, the Republican Party of Virginia (RPV) implemented rules to align with the national party.[93] These rules required Virginia's delegates to vote proportionally at the convention

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[86] *Id.* at 414-15.

[87] Kusper v. Pontikes, 414 U.S. 51, 58 (1973) (citing Dunn v. Blumstein, 405 U.S. 330, 343 (1972)); Wigton, *supra* note 47, at 415.

[88] Wigton, *supra* note 47, at 434 (emphasis added).

[89] Castro, *supra* note 76, at 533.

[90] *Id.*

[91] *See Virginia Primary Results,* N.Y. TIMES (Sept. 28, 2016), https://www.nytimes.com/elections/2016/results/primaries/virginia.

[92] Correll v. Herring, 212 F. Supp. 3d 584, 585 (E.D. Va. 2016); RNC Rule 16(c)(2) (2012) ("Any presidential primary, caucus, convention, or other process to elect, select, allocate, or bind delegates to the national convention that occurs prior to March 15 in the year in which the national convention is held shall provide for the allocation of delegates on a proportional basis.").

[93] *See Correll*, 212 F. Supp. 3d at 584.

based upon the percentage of votes the candidates received during the primary election.[94] All Virginia delegates to the national convention were required to sign a "Declaration and Statement of Qualification" stating " . . . [if] elected, my vote on the first ballot for President at the Republican National Convention will be *bound by the results* of the March 1, 2016 Virginia Presidential Primary . . . ."[95] Donald Trump won the 2016 Virginia Republican Presidential Primary with 34.7% of the vote, earning him seventeen of the state's forty-nine bound delegates.[96] However, the RPV structured the primary to have voters directly vote for candidates rather than delegates, and thereby subjected the election to Title 24.2 Section 545(D) of the Virginia Code, requiring that "delegates and alternates shall be bound to vote on the first ballot at the national convention for the *candidate receiving the most votes* in the primary."[97]

Carroll Correll believed he was free to vote his conscience under the First Amendment.[98] Mr. Correll intended on violating Section 545(D) at the Convention by not voting for Donald Trump on the first ballot.[99] Mr. Correll believed that a regulation requiring him to vote for Trump would violate his First and Fourteenth Amendment rights of free association, and the National Republican Party rules.[100] Additionally, RNC Rule 14(c) explicitly stated that Rule 16 controls in any conflict with state laws.[101] Therefore, Mr. Correll filed his Complaint

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94 *See id.*

95 *Declaration and Statement of Qualifications*, VIRGINIA.GOP (last visited Jan. 8, 2017), http://www.virginia.gop/wp-content/uploads/National-Delegate-Pre-File-Form.pdf (emphasis added).

96 *Virginia primary results*, N.Y. TIMES (last updated Aug. 1, 2017, 11:22 AM), http://www.nytimes.com/elections/results/virginia.

97 VA. CODE ANN. § 24.2-545(D) (West, Westlaw through 2017 Reg. Sess.) (emphasis added) ("If the party has determined that its delegates and alternates will be selected pursuant to the primary, the slate of delegates and alternates of the candidate receiving the most votes in the primary shall be deemed elected by the state party unless the party has determined another method for allocation of delegates and alternates. If the party has determined to use another method for selecting delegates and alternates, those delegates and alternates shall be bound to vote on the first ballot at the national convention for the *candidate receiving the most votes* in the primary unless that candidate releases those delegates and alternates from such vote.") (emphasis added).

98 First Amended Verified Class Action Complaint for Injunctive and Declaratory Relief at ¶¶ 43-45, Correll v. Herring, 212 F. Supp. 3d 584 (E.D. Va. 2016) (No. 3:16CV467), 2016 WL 3766321 [hereinafter Amended Complaint].

99 Correll v. Herring, 212 F. Supp. 3d 584, 596 (E.D. Va. 2016).

100 *Id.* at 600.

101 *See id.* at 605 n.18; *see also* RNC Rule 14(c) (2012) ("Any state Republican Party may set the date for any primary, caucus, convention, or meeting for the purpose of voting for a

with the District Court for the Eastern District of Virginia prior to the Republican National Convention, along with a Motion for Temporary Restraining Order and Preliminary Injunction to protect his actions from the penalties imposed by Section 545(D).[102]

The Commonwealth of Virginia argued that this issue arose out of a problem with the state party, not the state law, and the RPV must abide by state law.[103] The Commonwealth's position was that Section 545(D) applies only when people vote for presidential candidates directly.[104] If the RPV held elections for delegates rather than candidates, or chose a winner-take-all contest, Correll would not be injured and there would be no clash between RNC Rule 16 and Section 545(D).[105] Furthermore, the Commonwealth asserted that when political parties elect to have a state-funded primary election, thereby requiring state and local expenditures and administrative efforts to coordinate the election, the state has an interest in the election that supersedes all conflicts that may arise with the political party or its membership.[106]

Relying on *Cousins* and *La Follette*, the district court found that the Commonwealth had not sufficiently met its burden of demonstrating a compelling state interest.[107] Mere financial and administrative expenses expended by the state for the national primary were not compelling enough to interfere with the national party's governance and operation.[108] The court interpreted *Cousins* and *La Follette* to mean whatever interest a state may have in giving effect to primary votes cannot justify placing a burden on a party's right to completely control the selection of its Presidential and Vice–Presidential nominees.[109]

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presidential candidate and/or electing, selecting, allocating, or binding delegates to the national convention subject to the scheduling provisions in Rule No. 16. To the extent a state Republican Party's rules are in conflict with its state's laws with respect to this rule, the provisions of this rule and the state Republican Party's rules shall control. To the extent the provisions of the rule are inconsistent with the provisions of Rule No. 16, the provisions of this rule shall be controlling for all purposes.").

102 *Correll*, 212 F. Supp. 3d at 592-93.

103 *See id.* at 604-05.

104 *Id.* at 604.

105 *Id.*

106 *Id.* at 613.

107 *Id.* at 614.

108 Correll v. Herring, 212 F. Supp. 3d 584, 614 (E.D. Va. 2016) (citing Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 120-22 (1981)).

109 *Id.*

The district court found the Commonwealth could not regulate the Virginia delegates' voting at the national convention.[110] Section 545 violated Correll's First Amendment speech and association rights and, specifically, his individual right to "vote for a presidential nominee at a party's nominating convention," "by stripping delegates" to the 2016 Republican National Convention "of their freedom to vote their conscience, or to vote consistent with party rules."[111] If the state interferes with the party's effort, the party is entirely free to "cancel out [the state's] effort" even though the state has expanded financial and administrative resources for the primary.[112] Because of the state's coercive power to generally regulate certain facets of parties, the state is inherently "stronger" than the party.[113] This relation therefore requires a compelling state interest for a statute that regulates a party to such a degree to survive.[114] Finding no compelling interest, the court ruled in Correll's favor.[115]

Additionally, the court granted Correll permanent injunctive relief, allowing him to attend the Republican National Convention and vote as a delegate without fear of facing criminal penalties for violating the statute.[116] The criminal sanctions far outweighed the intent of the civil statute and further convinced the district court to provide Correll with a remedy in addition to striking down the statute in its entirety.[117]

II. ANALYSIS OF STATE BALLOT BINDING STATUTES

A. *States with Ballot Binding Statutes*

The uniqueness of *Correll v. Herring* is that the court relied on precedent from other election law related cases where the state regulation and the national party rules conflicted; none of which actually pertains to state regulation of ballot binding at national conven-

110 *See id.*

111 *Id.* at 593.

112 *Id.* at 614.

113 *Id.* at 606 (citing Engel v. Vitale, 370 U.S. 421, 430 (1962) (the "power, prestige and financial support of government" may create an "indirect coercive pressure" to conform in context of school prayer)).

114 Correll v. Herring, 212 F. Supp. 3d 584, 613 (E.D. Va. 2016).

115 *See id.*

116 *Id.* at 615-18.

117 *Id.* at 611.

tions.[118] As of 2017, thirteen states have language in their election codes that specifically references how many ballots to which a delegate must or should be bound at a national convention for a particular candidate.[119] These states range in geographic regions spanning from the Northeast, South, Midwest, and West. The list of states also includes a combination of traditionally "conservative" and "liberal" state legislatures.[120] Therefore, it can be inferred that a state legislature's adoption of a ballot binding measure against delegates to a national convention is not a geographic or ideological issue, but rather a universal tactic with the potential to appear in any state election code across the country.

None of these statutes have had their legality challenged in the same way as the Virginia statute *Correll* struck down. Nevertheless, many of the state statutes have similarities to Virginia's statute that could potentially come into conflict with party rules or a delegates' supposed voting rights, which makes them ripe for observation. Additionally, the Republican Party at the 2016 national convention once again adopted the same language of Rule 16 and Rule 14(c) in the 2016 Rules of the Republican Party, making a potential conflict among state delegates to a future national convention and the national party a probable reality.[121]

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118 *See generally* Correll v. Herring, 212 F. Supp. 3d 584 (E.D. Va. 2016).

119 *See* ARIZ. REV. STAT. ANN. § 16-243 (Westlaw through 2017 1st Reg. Sess.); CAL. ELEC. CODE § 6461 (West, Westlaw through 2018 Reg. Sess.); GA. CODE ANN. § 21-2-196 (West, Westlaw through 2017 legislation); IND. CODE ANN. § 3-8-3-11 (West, Westlaw through 2017 1st Reg. Sess.); KY. REV. STAT. ANN. § 118.631 (West, Westlaw through 2017 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 53, § 70I (West, Westlaw through 2017 Ch. 175 of 1st Annual Sess.); MICH. COMP. LAWS ANN. § 168.562b (West, Westlaw through P.A.2018 No. 10); NEB. REV. STAT. ANN. § 32-701 (West, Westlaw through 2017 1st Reg. Sess.); N.H. REV. STAT. ANN. § 659:93 (West 2017); N.M. STAT. ANN. § 1-15A-9 (West, Westlaw through 2018 2d Reg. Sess.); OKLA. STAT. ANN. tit. 26, § 20-104 (West, Westlaw through Nov. 17, 2017); OR. REV. STAT. ANN. § 248.315 (West, Westlaw through 2017 Reg. Sess.); TENN. CODE ANN. § 2-13-317 (West, Westlaw through 2017 1st Reg. Sess.). VA. CODE ANN. § 24.2-545(D) (West, Westlaw through 2017 Reg. Sess.).

120 Nolan McCarty & Boris Shor, *Updated Polarization Plot for 2015-2016*, MEASURING AMERICAN LEGISLATURES (Nov. 8, 2016), https://americanlegislatures.com/2016/11/08/updated-polarization-plot-for-2015-2016/.

121 *See* RNC Rule 16(c)(2) (2016) ("Any presidential primary, caucus, convention, or other process to elect, select, allocate, or bind delegates to the national convention that occurs prior to March 15 in the year in which the national convention is held shall provide for the allocation of delegates on a proportional basis."); RNC Rule 14(c) (2016) ("Any state Republican Party may set the date for any primary, caucus, convention, or meeting for the purpose of voting for a presidential candidate and/or electing, selecting, allocating, or binding delegates to the national convention subject to the scheduling provisions in Rule No. 16. To the extent a state Republican Party's rules are in conflict with its state's laws with respect to this rule, the provisions of this rule

Arizona, Georgia, Indiana, Kentucky, Oklahoma, Oregon, and Tennessee depict the spectrum of the thirteen states' ballot binding measures. This Part will focus on these seven state statutes and Virginia's recently invalidated statute to examine the constitutionality of ballot binding measures on a national scale.[122] The language of each state statute varies, with some statutes providing greater deference to the national political party's rules, whereas other statutes have strict and explicit rules for adherence to state mandated guidance. For instance, the statutes in Arizona and Indiana require delegates to vote on the first ballot for the candidate who received the greatest number of votes during the primary.[123] On the remaining ballots, these delegates are then allowed to vote as they please.[124] Kentucky's statute has a similar structure to Arizona and Indiana, but explicitly states that after the first ballot vote, "all responsibility under [the regulations] shall terminate and further balloting shall be the prerogative of the political parties as might be prescribed by the *rules of such political parties*."[125] On the other hand, Oklahoma requires each delegate

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and the state Republican Party's rules shall control. To the extent the provisions of the rule are inconsistent with the provisions of Rule No. 16, the provisions of this rule shall be controlling for all purposes.").

122 This is done solely for the purpose of providing a succinct analysis of the effects of state ballot binding measures, as all seven statutes cover the complete spectrum of the type of statutory language from strict adherence to the state rules to the most deference to the national party.

123 ARIZ. REV. STAT. ANN. § 16-243 (Westlaw through 2017 1st Reg. Sess.) ("At the political party national convention, each delegate to the national convention shall vote for the party's presidential nominee candidate who received the greatest number of votes in the presidential preference election until the candidate is nominated for the office of President of the United States by the convention, until the candidate releases the delegate from the delegate's obligation, until a candidate withdraws from the race or until one convention nominating ballot has been taken. After a candidate is nominated, withdraws from the race, delegates are released or one ballot is taken, each delegate is free to vote as the delegate chooses, and no rule may be adopted by a delegation requiring the delegation to vote as a body or causing the vote of any delegate to go uncounted or unreported."); IND. CODE ANN. § 3-8-3-11 (West, Westlaw through 2017 1st Reg. Sess.) ("A delegate or alternate delegate selected from a congressional district to the national convention of a political party shall, on the first ballot at the national convention, support the candidate for President of the United States who received the highest number of votes in the congressional district at the primary election if the person is in fact a candidate at the convention. A delegate-at-large or alternate delegate-at-large to the national convention is not required to support a specific candidate for President on any ballot at the convention.").

124 ARIZ. REV. STAT. ANN. § 16-243 (Westlaw through 2017 1st Reg. Sess.); IND. CODE ANN. § 3-8-3-11 (West, Westlaw through 2017 1st Reg. Sess.).

125 KY. REV. STAT. ANN. § 118.631 (West, Westlaw through 2017 Reg. Sess.) (emphasis added) ("A declaration that the results of the presidential preference primary, in accordance with the division of votes reflected by the official canvass, shall be the official vote cast by each political party at its national convention, on the first ballot only, and shall be designated by KRS

cast his vote on all ballots for the candidate that received the state's vote.[126] Georgia, Oregon, and Tennessee are unique in comparison to the other ballot binding statutes, as these statutes specifically detail how a delegate must vote at a national convention.[127] All three states require that delegates vote for a specific candidate until at least two ballots have been taken or the candidate falls below a certain percentile of the vote.[128] Additionally, Oregon requires each state delegate to sign a pledge to continue to support the candidate until any conditions are met under the statute that unbind him from his obligation.[129]

118.551 to 118.651 as an automatic vote, expressing the will of the people of the Commonwealth of Kentucky; and . . . [a]fter the vote on the first ballot by the political party at its national convention, as required by this section, all responsibility under KRS 118.551 to 118.651 shall terminate and further balloting shall be the prerogative of the political parties as might be prescribed by the *rules of such political parties*.") (emphasis added).

126 OKLA. STAT. ANN. tit. 26, § 20-104 (West, Westlaw through Nov. 17, 2017) ("Each delegate or alternate delegate to the national convention of his political party shall cast their vote on all ballots for the candidate who received this state's vote. If that candidate is for any reason no longer a candidate, the votes of the Oklahoma delegation shall be cast for any candidate of their choice.").

127 *See* GA. CODE ANN. § 21-2-196 (West, Westlaw through 2017 1st Reg. Sess.) ("The oath shall state that the delegate or delegate alternate affirms to support such candidate until the candidate is either nominated by such convention or receives less than 35 percent of the votes for nomination by such convention during any balloting, or until the candidate releases the delegates from such pledge. No delegate shall be required to vote for such candidate after two convention nominating ballots have been completed."); OR. REV. STAT. ANN. § 248.315 (West, Westlaw through 2017 Reg. Sess.) ("Delegates to the national convention of the party shall be selected so that the number of delegates who favor a certain candidate shall represent the proportion of votes received by the candidate in relation to the other candidates of that party at the presidential preference primary election. Each person selected as a delegate shall sign a pledge that the person will continue to support at the national convention the candidate for President of the United States the person is selected as favoring until (a) The candidate is nominated at the convention; (b) The candidate receives less than 35 percent of the votes for nomination at the convention; (c) The candidate releases the delegate from the pledge; or (d) Two convention nominating ballots have been taken."); TENN. CODE ANN. § 2-13-317 (West, Westlaw through 2017 1st Reg. Sess.) ("The results of the preferential presidential primary shall be binding on the delegates to the national conventions as provided in this section. The delegates to the national conventions shall be bound by the results of the preferential presidential primary for the first two (2) ballots and shall vote for the candidate to whom they are pledged as provided in § 2-13-307. The delegates shall thereafter be bound to support such candidate so long as the candidate, not to exceed two (2) ballots, has twenty percent (20%) of the total convention vote or until such time the candidate of their party releases them from the results of the presidential preference primary.").

128 *See* GA. CODE ANN. § 21-2-196 (West, Westlaw through 2017 legislation); OR. REV. STAT. ANN. § 248.315 (West, Westlaw through 2017 Reg. Sess.); TENN. CODE ANN. § 2-13-317 (West, Westlaw through 2017 1st Reg. Sess.).

129 OR. REV. STAT. ANN. § 248.315 (West, Westlaw through 2017 Reg. Sess.).

B. *Potential Conflicts Between Ballot Binding Statutes and Party Rules*

As previously stated, courts must sufficiently focus on the facts at issue when examining a state's interest in regulating political party actions; this includes ballot binding measures.[130] To determine whether the seven state statutes could have a *Correll*-type conflict in a future national convention, one could test each ballot binding statute against Rule 16 of the current Republican Convention Rules. Hypothetically, if any of the seven states were to hold a statewide presidential primary prior to March 15, the Republican Parties of each state would be required to allocate awarded delegates to presidential candidates on a proportional basis for the nomination.[131] However, the seven state election statutes would likely find fault in this, as they each have specific and clear methods of allocating bound delegates to candidates.[132] The Republican National Convention Rules would respond with Rule 14(c), stating that, in the event of a conflict, these seven state statutes are inferior to the party rules, and Rule 16 is controlling.[133] Of the seven states, Kentucky likely provides the most deference to the rules of political parties because it specifically states that after the first ballot, the rules of the political party should control how the delegates vote next.[134] However, because states like Arizona, Indiana, Oklahoma, and Kentucky require the delegates to vote uniformly on the first ballot, not proportionally through Rule 16, a conflict like the one that arose in Virginia could arise in these four states, too.

The text of the ballot binding statutes of Georgia, Oregon, and Tennessee provide more specificity within their statutory schemes as to how a delegate must vote at a national convention than Arizona,

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130 *See supra* notes 88-89 and accompanying text.

131 RNC Rule 16(c) (2016).

132 *See* ARIZ. REV. STAT. ANN. § 16-243 (Westlaw through 2017 1st Reg. Sess.); GA. CODE ANN. § 21-2-196 (West, Westlaw through 2017 legislation); IND. CODE ANN. § 3-8-3-11 (West, Westlaw through 2017 1st Reg. Sess.); KY. REV. STAT. ANN. § 118.631 (West, Westlaw through 2017 Reg. Sess.); OKLA. STAT. ANN. tit. 26, § 20-104 (West, Westlaw through 2017 1st Reg. Sess.); OR. REV. STAT. ANN. § 248.315 (West, Westlaw through 2017 Reg. Sess.); TENN. CODE ANN. § 2-13-317 (West, Westlaw through 2017 1st Reg. Sess.).

133 RNC Rule 14(c) (2016).

134 KY. REV. STAT. ANN. § 118.631 (West, Westlaw through 2017 Reg. Sess.).

Indiana, Kentucky, and Oklahoma.[135] Interestingly, despite their more narrowly written form, these statutes do not provide that delegates must be uniformly provided to the candidate who wins the majority of votes.[136] Each of the ballot binding measures emphasize the "form" in which the delegate must function after being selected to represent a candidate. These specificities include how many ballots delegates must vote the same way on, what percentage of votes they are bound to for every ballot voted, and so forth.[137] Only the Oregon statute specifically mentions how the delegates must be initially divided, but even then the statute reads that delegates "shall represent the *proportion* of votes received by the candidate in relation to other candidates of the party at the presidential preference primary election."[138] Therefore, Georgia, Oregon, and Tennessee would likely not be in conflict with Rule 16 if the Republican state parties chose to conduct a presidential primary before March 15. This is because these three statutes allow for the delegates to be allocated proportionally, either by explicitly stating this in the statute or through the statute's silence on the matter.[139]

Despite the lack of direct conflict Georgia, Oregon, and Tennessee have with Rule 16 in its current form, none of these statutes are entirely immune from potential conflicts with party rules in the future. For example, both the Republican and Democratic National Committee rules could be amended before the next Presidential cycle in a way that creates a conflict. Hypothetically, the RNC rules could be changed to state that not only must every presidential primary held

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135 *Compare* GA. CODE ANN. § 21-2-196 (West, Westlaw through 2017 legislation), OR. REV. STAT. ANN. § 248.315 (West, Westlaw through 2017 Reg. Sess.), *and* TENN. CODE ANN. § 2-13-317 (West, Westlaw through 2017 1st Reg. Sess.), *with* ARIZ. REV. STAT. ANN. § 16-243 (Westlaw through 2017 1st Reg. Sess.), IND. CODE ANN. § 3-8-3-11 (West, Westlaw through 2017 legislation), KY. REV. STAT. ANN. § 118.631 (West, Westlaw through 2017 Reg. Sess.), *and* OKLA. STAT. ANN. tit. 26, § 20-104 (West, Westlaw through Nov. 17, 2017).

136 GA. CODE ANN. § 21-2-196 (West, Westlaw through 2017 legislation); OR. REV. STAT. ANN. § 248.315 (West, Westlaw through 2017 Reg. Sess.); TENN. CODE ANN. § 2-13-317 (West, Westlaw through 2017 1st Reg. Sess.).

137 GA. CODE ANN. § 21-2-196 (West, Westlaw through 2017 legislation); OR. REV. STAT. ANN. § 248.315 (West, Westlaw through 2017 Reg. Sess.); TENN. CODE ANN. § 2-13-317 (West, Westlaw through 2017 1st Reg. Sess.).

138 OR. REV. STAT. ANN. § 248.315 (West, Westlaw through 2017 Reg. Sess.) (emphasis added).

139 *See* GA. CODE ANN. § 21-2-196 (West, Westlaw through 2017 legislation); OR. REV. STAT. ANN. § 248.315 (West, Westlaw through 2017 Reg. Sess.); TENN. CODE ANN. § 2-13-317 (West, Westlaw through 2017 1st Reg. Sess.).

before March 15 divide delegates proportionally, but all delegates must also vote for the candidate they represent on the first ten ballots, even if the candidate releases them from their obligation. Although it is unlikely such a rule would ever exist, all thirteen states' ballot binding statutes would conflict with this rule if it did.[140] This illustration is simply made to say, although thirty-seven states currently can conform to any rule that a national political party creates for ballot binding, thirteen states have the potential for conflict, both currently and in the future.

Mr. Correll risked criminal prosecution if he voted in accordance with the Republican National Convention rules and did not follow the state statute, which further convinced the district court that Section 545 placed an insurmountable burden on delegates like Mr. Correll.[141] The threat of criminal prosecution in the Virginia statute is important to note because, of the fourteen states that had ballot binding measures at the time of this case, only Virginia's statute had criminal sanctions attached to it for failure to comply.[142] Although this may have been a sufficient reason for the district court to strike the statute, it was by no means necessary for the court to reach its conclusion.[143] Therefore, despite this discrepancy in penalties between Virginia and

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140 *See* ARIZ. REV. STAT. ANN. § 16-243 (Westlaw through 2017 1st Reg. Sess.); CAL. ELEC. CODE § 6461 (West, Westlaw through 2018 Reg. Sess.); GA. CODE ANN. § 21-2-196 (West, Westlaw through 2017 legislation); IND. CODE ANN. § 3-8-3-11 (West, Westlaw through 2017 1st Reg. Sess.); KY. REV. STAT. ANN. § 118.631 (West, Westlaw through 2017 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 53, § 70I (West, Westlaw through 2017 Ch. 175 of 1st Annual Sess.); MICH. COMP. LAWS ANN. § 168.562b (West, Westlaw through P.A.2018 No. 10); NEB. REV. STAT. § 32-701 (West, Westlaw through 2017 1st Reg. Sess.); N.H. REV. STAT. ANN. § 659:93 (West 2017); N.M. STAT. ANN. § 1-15A-9 (West, Westlaw through 2018 1st Reg. Sess.); OKLA. STAT. ANN. tit. 26, § 20-104 (West, Westlaw through Nov. 17, 2017); OR. REV. STAT. ANN. § 248.315 (West, Westlaw through 2017 1st Reg. Sess.); TENN. CODE ANN. § 2-13-317 (West, Westlaw through 2017 1st Reg. Sess.).

141 Correll v. Herring, 212 F. Supp. 3d 584, 608 (E.D. Va. 2016).

142 *Compare* VA. CODE ANN. § 24.2-545 (West, Westlaw through 2017 Reg. Sess.), *with* ARIZ. REV. STAT. ANN. § 16-243 (Westlaw through 2017 1st Reg. Sess.), CAL. ELEC. CODE § 6461 (West, Westlaw through 2018 Reg. Sess.), GA. CODE ANN. § 21-2-196 (West, Westlaw through 2017 legislation), IND. CODE ANN. § 3-8-3-11 (West, Westlaw through 2017 1st Reg. Sess.), KY. REV. STAT. ANN. § 118.631 (West, Westlaw 2017 Reg. Sess.), MASS. GEN. LAWS ANN. ch. 53, § 70I (West, Westlaw through 2017 Ch. 175 of 1st Annual Sess.), MICH. COMP. LAWS ANN. § 168.562b (West, Westlaw through P.A.2018 No. 10), NEB. REV. STAT. § 32-701 (West, Westlaw through 2017 1st Reg. Sess.), N.H. REV. STAT. ANN. § 659:93 (West 2017), N.M. STAT. ANN. § 1-15A-9 (West, Westlaw through 2018 2d Reg. Sess.), OKLA. STAT. ANN. tit. 26, § 20-104 (West, Westlaw through Nov. 17, 2017), OR. REV. STAT. ANN. § 248.315 (West, Westlaw through 2017 1st Reg. Sess.), *and* Tenn. Code Ann. § 2-13-317 (West, Westlaw through 2017 Reg. Sess.).

143 *See Correll*, 212 F. Supp. 3d at 608-09.

other ballot binding states, the argument against Virginia's statute in *Correll* can be applied to the idea that all ballot binding statutes are outside the realm of a state's power and unconstitutional because of their conflict between individuals, the parties, and the First Amendment.

C. *The Unconstitutional Nature of Ballot Binding Statutes*

The Tenth Amendment to the Constitution states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[144] Although *Correll* did not specifically cite the Tenth Amendment, it is a pivotal cornerstone to the discussion of ballot binding procedures and if the states have a reserved right in manipulating how, and to what extent, delegates to a national convention of a political party should be bound to vote. As the Supreme Court noted in *Cousins*, states have no constitutional mandate over the selection of Presidential and Vice-Presidential candidates and cannot interfere with a political party's First Amendment freedom of association.[145] Through this First Amendment protection, a political party gets to choose how it selects its candidates without fear of state interference because states do not have a compelling interest to interfere.[146] Therefore, how ballot binding is characterized as a practice—as in, the extent to which this particular nominating procedure falls within a political party's First Amendment protections—is important for determining if states may have an interest in participating in this practice through their own statutory schemes. With this concept of reserved power in the background of the analytical determination of ballot binding statutes, it is important to next examine the balance between such statutes' alleged burden of the First Amendment rights of delegates and parties with potential compelling interests purported by states.

The First Amendment forbids the creation of any "law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a

144 U.S. CONST. amend. X.

145 Cousins v. Wigoda, 419 U.S. 477, 489-90 (1975).

146 *Id.* at 490.

redress of grievances."[147] Although the district court in *Correll* refused to outright explore whether ballot binding measures were within the state's power, it did find that the Virginia statute imposed an unconstitutional burden on the state's delegates' First Amendment right to free speech and free association.[148] This burden on the First Amendment rights of delegates and parties should be considered sufficient for a court to determine that ballot binding statutes generally should not be permissible because the statutes exceed state powers.

If a state passes a law or statute that allegedly burdens a person's right to vote, it will only be upheld if the state can show that it has a compelling interest in imposing the burden and does so by the least restrictive means.[149] A state burden imposed on a delegate's right to vote is held to the same standard, as was applied by the district court in *Correll* to find the Virginia statute unconstitutional.[150] Regardless of how broad or narrow the language of a ballot binding statute is, and regardless of whether it imposes criminal sanctions for disobedience, these statutes should be found impermissible because they place restrictions as to *how* a delegate must cast his vote. This is distinguishable from the more common disputes over voting laws where states place burdens on the requirements a voter must meet to vote, such as Voter ID laws, because of the impact that ballot binding has on an individual delegate's voting action for candidates and the political party's nomination procedures. Unlike most state laws that are directed at a party's process and organization, ballot binding statutes interfere with the party's substantive goals of selecting a candidate for President. This particular impact on substantive goals should categorize the ballot binding practice as more of a "private" party function rather than a "public" function, meaning that courts should err on the side of party independence as a precursor to analyzing ballot binding conflicts that arise between the party and the state.[151]

Supreme Court precedent allows one to draw the conclusion that ballot binding statutes impose an unjustified burden on individual delegates and their parties, even if the state statute does not impose crim-

147 U.S. CONST. amend. I.

148 *Correll*, 212 F. Supp. 3d at 614 (dismissing Count III which alleged "Section 545(D) exceeds the powers retained by the Commonwealth of Virginia under the Constitution of the United States" because Correll put forth no evidence and did not argue it).

149 Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

150 *See Correll*, 212 F. Supp. 3d at 615.

151 *See generally supra* notes 84-86.

inal sanctions on the delegate for noncompliance. Kentucky, the state whose ballot binding statute provides the most deference to political parties, would likely be unable to survive the rationale the court in *Correll* used to find that no state interest existed in burdening how delegates vote. The standard imposed by the court in *Correll* would likely find the Kentucky statute equally burdensome to delegates if applied under similar factual conditions. The district court in *Correll* correctly draws a parallel to the statute at issue in *La Follette* to demonstrate the intrusive nature of the Virginia statute, a case where the Supreme Court set a particularly high bar for states to meet when attempting to prevail against a conflicting party rule.[152] By applying *La Follette*'s standard to state ballot binding statutes, it is difficult to come to any conclusion other than that the statutes are unconstitutional. *La Follette* reiterated the *Cousins* ruling that delegate selection rules are protected by the right of free association under the First Amendment.[153] All thirteen ballot binding statutes attempt to govern these delegate selection rules with state interference as to the allocation and binding of delegates at national conventions.[154] The rationale naturally follows from *La Follette* that ballot binding statutes generally impose too strict of a burden on how a delegate votes at a convention, greatly interfering with political party rules.

The burden that ballot binding statutes place on an individual's right as to how to vote should be convincing enough for courts to strike these measures, yet they also hinder the operation of political parties which further supports this notion that national party conventions do not exist separately from their delegates and members.[155]

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152 *See Correll*, 212 F. Supp. 3d at 614.

153 *See id.*

154 *See* ARIZ. REV. STAT. ANN. § 16-243 (Westlaw through 2017 1st Reg. Sess.); CAL. ELEC. CODE § 6461 (West, Westlaw through 2018 Reg. Sess.); GA. CODE ANN. § 21-2-196 (West, Westlaw through 2017 legislation); IND. CODE ANN. § 3-8-3-11 (West, Westlaw through 1st Reg. Sess.); KY. REV. STAT. ANN. § 118.631 (West, Westlaw through 2017 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 53, § 70I (West, Westlaw through 2017 Ch. 175 of 1st Annual Sess.); MICH. COMP. LAWS ANN. § 168.562b (West, Westlaw through P.A.2018 No. 10); NEB. REV. STAT. § 32-701 (West, Westlaw through 2017 1st Reg. Sess.); N.H. REV. STAT. ANN. § 659:93 (West 2017); N.M. STAT. ANN. § 1-15A-9 (West, Westlaw through 2018 2d Reg. Sess.); OKLA. STAT. ANN. tit. 26, § 20-104 (West, Westlaw through Nov. 17, 2017); OR. REV. STAT. ANN. § 248.315 (West, Westlaw through 2017 Reg. Sess.); TENN. CODE ANN. § 2-13-317 (West, Westlaw through 2017 1st Reg. Sess.).

155 *Correll*, 212 F. Supp. 3d at 611 (citing Bachur v. Democratic National Party, 836 F.2d 837, 841-42 (1987) ("Delegates for practical purposes constitute the National Party—they make its rules, adopt its platform, provide for its governance, as well as nominate candidates.")).

State interference or restriction of the freedom of a political party also interferes with the freedom of its adherents.[156]

State ballot binding measures impose a burden on a political party's right to manage its candidate selection process. As explained by the Supreme Court in *Cousins*, a national or state political party is often able to overcome conflicting state statutes to compel compliance with their own party rules.[157] Although this rule is not unlimited, deference is generally provided to the political party when it conflicts with a state.[158] Even though *Correll* found only Virginia's statute unconstitutional, the argument provided by the court is sufficient for finding that the *practice* of ballot binding generally exceeds the power retained by states under the Constitution.[159]

Traditionally, a political party determines the means by which the candidate is selected through rules voted on by the members of the party at the national convention as to how to select the candidate.[160] The Supreme Court has found that political parties have the right to determine their own rules of governance.[161] *Correll* sets the groundwork for holding the ballot binding statutes unconstitutional by applying the Supreme Court's holding in *La Follette* as its justification for finding no state interest in Virginia's statute.[162] By beginning with the presumption that ballot binding is a part of a political party's substantive goal of selecting a presidential candidate, and thereby a more private than public party function, *La Follette*'s holding demonstrates that a party may cancel out any interfering state ballot binding effort.[163] If one were to begin with this same presumption and apply it

156 Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("[A]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.").

157 *See* Cousins v. Wigoda, 419 U.S. 477, 491 (1975).

158 Eu v. San Francisco Cty. Democratic Cent. Comm. 489 U.S. 214, 224 (1989) ("[A] state may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest . . . [and] impose restrictions that promote the integrity of primary elections.").

159 Correll v. Herring, 212 F. Supp. 3d 584, 612 (E.D. Va. 2016).

160 *See id.*

161 *See* New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 202 (2008) ("[A] political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform.").

162 *Correll*, 212 F. Supp. 3d at 612 (referencing Democratic Party of U. S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981)).

163 *See id.*

to the obscure hypothetical presented earlier in this Comment,[164] where a national party changed its rules to bind delegates to ten ballot rounds, it would follow under *La Follette*'s holding that the ballot binding statutes of all thirteen states would be cancelled out by the party's rule.[165] *Correll* relies on *Cousins* and *La Follette* to reach the conclusion that any "fractional interest" a state has in the primary votes cannot justify the burden over the party's control of the nomination process, which includes both the ability to determine voting rules and the allocation of delegates.[166] Allowing a state to have any control over ballot binding measures, traditionally an area governed by political parties, strips the party of its absolute power over the selection of its nominees. Therefore, it follows that states do not have a constitutional right to enact ballot binding statutes because they do not have a compelling state interest sufficient to overcome the First Amendment burden imposed.

CONCLUSION

If the RNC wanted the Virginia delegates to all attend the 2016 national convention and vote uniformly, it could have simply required them to do so. Instead, the convention rules wanted the Virginia delegates to vote proportionally. The measures taken by states perpetuate an unconstitutional burden both on the voting rights of delegates and the rights of political parties to dictate their own candidate selection process. Although conflicts are not necessarily inevitable based on the language of the current ballot binding statutes and the rules of both major national parties, they are inherently probable.

There is no state interest in telling a delegate how he must vote, even if there are no criminal penalties attached for his actions. Voters participate in primaries and expect delegates to attend their party's convention representing their state's results. Ballot binding statutes interfere with this process, disallowing voters to have their expectations for delegates met from the state to national level. *Correll*'s holding should be universally applied to the general practice of ballot binding statutes. All thirteen states that have ballot binding measures face the potential for the same sort of predicament as the Common-

164 *See supra* Part II.B.

165 *See Correll*, 212 F. Supp. 3d at 613.

166 *Id.* at 614.

wealth of Virginia. The variances in the characteristics of the specific statutes do not make a universal rule on ballot binding unfeasible or inapplicable. Moreover, *Correll*'s holding should be used as a legal precedent against all forms of ballot binding in state election statutes. This would then render the variance in degrees and stages of binding delegates before a national convention moot, finding the practice of ballot binding to be an unconstitutional violation of the First Amendment rights of delegates.

Because ballot binding is part of a party's function to internally select a candidate for President of the United States, it is more a private action than a public action. Additionally, because it is more of a private action, deference should be given to the parties when there is conflicting language between a party rule and a state statute that attempts to interfere with party governance. A severe burden is imposed by ballot binding statutes on delegates and their respective parties, requiring a compelling state interest to be present for the state to overcome this burden. Because of the nature of ballot binding as party function, no state interest exists that could allow for these rules to persist. Therefore, courts should find that ballot binding measures in each state's election code are unconstitutional and should be stricken, and it should be left up to the parties to decide how they wish to allocate delegates.