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## Legal Solutions to a Political Party National Committee Undermining U.S. Democracy, 51 J. Marshall L. Rev. 107 (2017)

John Baglia

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# LEGAL SOLUTIONS TO A POLITICAL PARTY NATIONAL COMMITTEE UNDERMINING U.S. DEMOCRACY

JOHN BAGLIA

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## I. INTRODUCTION

“This is a silly story. He isn’t going to be president.”<sup>1</sup> Taken out of context, this statement made by Debbie Wasserman Schultz (Wasserman Schultz), former National Chairperson of the Democratic Party, seems to be an ordinary political opinion in reference to Senator Bernie Sanders (Senator Sanders). However, this statement coupled with thousands of emails<sup>2</sup> between Democratic National Committee (DNC) members during the 2016 Democratic Presidential Primary is more symbolic than everyday political banter.

The Charter of the Democratic Party of the United States prohibits members of the DNC from endorsing an individual candidate during the party’s presidential nominating process.<sup>3</sup>

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1. *Leaked E-mail, DNC Email Database*, WIKILEAKS (July 27, 2016), [wikileaks.org/dnc-emails/emailid/99999%20](http://wikileaks.org/dnc-emails/emailid/99999%20). The authenticity of the leaked emails and documents has yet to be confirmed or denied by the DNC.

2. *See Search the DNC email database*, WIKILEAKS, [wikileaks.org/dnc-emails/](http://wikileaks.org/dnc-emails/) (last visited Feb. 7, 2017) (providing a total of 19,252 emails and 8,034 attachments available to search).

3. The Charter & The Bylaws of the Democratic Party of the United States, art. V, § 4 (amended 2015), [s3.amazonaws.com/uploads.democrats.org/Download](http://s3.amazonaws.com/uploads.democrats.org/Download)

Specifically, it states:

In the conduct and management of the affairs and procedures of the Democratic National Committee, particularly as they apply to the preparation and conduct of the Presidential nomination process, the Chairpersons shall exercise impartiality and evenhandedness as between the Presidential candidates and campaigns. The Chairperson shall be responsible for ensuring that the national officers and staff of the Democratic National Committee maintain impartiality and evenhandedness during the Democratic Party Presidential nominating process.<sup>4</sup>

Many of the emails that were made public indicate the DNC's violation of this section within the Charter by taking steps to undermine Senator Sanders' campaign. The emails reveal the DNC's goal of advancing the Senator's opponent, former Secretary of State Hillary Clinton, to the general election.<sup>5</sup> This all came to light a little over two months after Wasserman Schultz herself stated that "the DNC remains neutral" with respect to the democratic primary race.<sup>6</sup>

As a result of the public's backlash, in response to the content of the emails<sup>7</sup>, Wasserman Schultz and three other high ranking officials<sup>8</sup> of the DNC resigned.<sup>9</sup> Additionally, at the start of the

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ds/DNC\_Charter\_Bylaws\_9.17.15.pdf [hereinafter The Charter of the Democratic Party].

4. *Id.*

5. See Alana Abramson, *The 4 Most Damaging Emails From the DNC Wikileaks Dump*, ABC NEWS (July 25, 2016, 11:13 AM), [abcnews.go.com/Politics/damaging-dnc-wikileaks-dump/story?id=40852448](http://abcnews.go.com/Politics/damaging-dnc-wikileaks-dump/story?id=40852448) (discussing (1) a proposal by the DNC CFO encouraging the DNC media contacts to undermine the Sanders's campaign and emphasize Sanders as "an atheist;" and (2) DNC National Secretary suggesting to DNC National Communications Director that the DNC build a narrative "that [Sanders] never had his act together, that his campaign was a mess").

6. *DNC Remains Neutral in this Primary*, (CNN television broadcast May 17, 2016), [www.youtube.com/watch?v=dJdA-rvy3tM](http://www.youtube.com/watch?v=dJdA-rvy3tM), at 0:35. Moreover, Wasserman Schultz, in a statement quoted by the Associated Press stated, "I remain, as I have been from the beginning, neutral in the presidential Democratic primary." Tribune news services, *Sanders says he is backing opponent of DNC chair Wasserman Schultz*, CHI. TRIB. (May 21, 2016), [www.chicagotribune.com/news/nationworld/politics/ct-sanders-dnc-chair-20160521-story.html](http://www.chicagotribune.com/news/nationworld/politics/ct-sanders-dnc-chair-20160521-story.html).

7. See B. Christopher Agee, *Bernie Sanders Supporters Stage DNC Walkout After Clinton Nomination*, WESTERN JOURNALISM (July 26, 2016 5:54 PM), [www.westernjournalism.com/bernie-sanders-supporters-stage-dnc-walkout-after-clinton-nomination/](http://www.westernjournalism.com/bernie-sanders-supporters-stage-dnc-walkout-after-clinton-nomination/) (reporting more than 100 attendees at the convention organized a walkout).

8. See *Heads roll at DNC: 3 top officials out after email hack*, FOX NEWS (Aug. 2, 2016), [www.foxnews.com/politics/2016/08/02/sources-ceo-at-democratic-national-committee-resigns.html](http://www.foxnews.com/politics/2016/08/02/sources-ceo-at-democratic-national-committee-resigns.html) (stating Chief Executive Officer Amy Dacey, Chief Financial Officer Brad Marshall, and Communications Director Luis Miranda left their jobs).

9. Alan Rappeport, *Debbie Wasserman Schultz to Resign DNC Post*, N.Y. TIMES (July 24, 2016), [www.nytimes.com/2016/07/25/us/politics/debbie-wasser](http://www.nytimes.com/2016/07/25/us/politics/debbie-wasser)

Democratic National Convention, the DNC issued an apology to Senator Sanders and his supporters.<sup>10</sup> Is this response sufficient to promote political parties' accountability and deter similar behavior in the future by those who play such integral roles in preserving the integrity of political elections? Did the DNC infringe on voters' rights? Or is the DNC legally permitted to behave in this manner? This begs the question which is at the center of this Comment: Can the law provide a remedy when the actions of a political party's national committee undermine the integrity of an election or is it best handled within the political arena?

Part II of this Comment will begin with a discussion on the history and development of rights afforded to political parties. It will then provide an overview of the fiduciary duties owed to the corporation's shareholders by the corporation's directors. This overview is necessary to understand the analogies presented in section III.A. Part II will then provide a brief discussion on the importance of the right to vote and examples of that right being affected in the past to set up the analogies set forth in section III.B. Lastly, part II will introduce and discuss a recently dismissed class action lawsuit against the DNC and Wasserman Schultz, specifically, the allegations brought against the defendants, their responses, and the court's position on the matter.

Part III will discuss and analogize the roles and responsibilities of party committee members to those of corporate directors. Highlighting these similarities adds weight to this Comment's first proposal, introduced in section IV.A. It will then compare the effects of a party undermining certain votes, by exemplifying the DNC's email leak, with the effects of vote dilution practices introduced therein. These comparisons provide guidance for the second proposal introduced in section IV. Part III will conclude by highlighting the flaws of the class action lawsuit that was dismissed against the DNC and Wasserman Schultz.

Depending on whether courts view political parties as private associations or quasi-governmental actors, part IV proposes two alternative solutions for when committee members undermine the integrity of an election. First, due to the similarities between corporate directors and party committee members, section IV.A will

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man-schultz-dnc-wikileaks-emails.html?\_r=0; Luciana Lopez & Amanda Becker, *Senior Democratic National Committee Officials Resign: DNC*, REUTERS (Aug. 2, 2016, 3:32 PM), [www.reuters.com/article/us-usa-cyber-democrats-idUSKCN10D209](http://www.reuters.com/article/us-usa-cyber-democrats-idUSKCN10D209).

10. See Will Drabold, *DNC Apologizes to Bernie Sanders and Supporters Over Leaked Emails*, TIME (July 25, 2016), [time.com/4422715/bernie-sanders-dnc-apology-leaked-emails/](http://time.com/4422715/bernie-sanders-dnc-apology-leaked-emails/) (declaring, "[o]n behalf of everyone at the DNC, we want to offer a deep and sincere apology to Senator Sanders, his supporters, and the entire Democratic party for inexcusable remarks made over email."). Political party national conventions occur every four years with the purposes of nominating a candidate for the general election and establishing a party's platform.

propose that the fiduciary duties of loyalty and care be imposed on party committee members. Second, based on the similar effects between vote dilution practices and when parties undermine their constituents' votes, a statute geared to deter and prevent said behavior will also be proposed in section IV.B. In addition, section IV.C will elaborate as to why the class action's flaws are not present in either of the solutions proposed therein.

## II. BACKGROUND

This part begins with a historical discussion on political parties and their rights. Specifically, it discusses when political parties assert rights, and when courts fail to recognize the rights due to a party's behavior. This is critical in gauging the feasibility of the two solutions proposed in part IV. In section II.A, an overview of fiduciary duties imposed on corporate directors is provided so the reader can better understand the analogies presented in section III.A. For this same reason, a discussion on the right to vote, and its significance, is provided in section II.B. To close, a brief overview of a dismissed class action lawsuit, against the DNC and Wasserman Schultz, is provided in section II.C.

### A. *The Evolution of Political Parties and Their Rights*

Political parties have been around as long as the United States itself.<sup>11</sup> However, in this nation's early years, political parties were viewed as a threat to its very existence.<sup>12</sup> Twelve years after the Declaration of Independence, James Madison referred to political parties as "mortal diseases" that cause governments to perish.<sup>13</sup> Despite this label, he conceded that it was impossible to prevent the formation of political parties because of people's tendency to form different opinions.<sup>14</sup> However, Madison argued that a democratic republic government could control the dangers of political parties.<sup>15</sup>

Since then, parties' policies, beliefs, and regional bases of support have evolved, but the two-party system has dominated the

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11. Andrew Pierce, *Regulating Our Mischievous Factions: Presidential Nominations and the Law*, 78 KY. L.J. 311, 315 (1990). Pierce provides a historical analysis of American presidential nominations to set the background for his article. *Id.* at 314-15.

12. See generally THE FEDERALIST NO. 10 (James Madison) (discussing dangers of political parties and proposing solutions to said dangers). The Federalist Papers were a series of essays, written by Alexander Hamilton, James Madison, and John Jay, promoting the ratification of the Constitution. History.com Staff, *Federalist Papers*, HISTORY.COM (2009), [www.history.com/topics/federalist-papers](http://www.history.com/topics/federalist-papers). These essays were anonymously published in 1787 and 1788. *Id.*

13. THE FEDERALIST NO. 10 (James Madison).

14. *Id.*

15. *Id.*

political arena since before the Civil War.<sup>16</sup> Ideally, these parties are composed of “like-minded individual voters”<sup>17</sup> with the goals of winning elections and shaping public policy through the leaders they elect.<sup>18</sup>

In playing such an integral role in our democratic republic<sup>19</sup>, it should come as no surprise that political parties are afforded constitutional rights.<sup>20</sup> Most notably, parties enjoy the freedom of association protected by the First and Fourteenth Amendments.<sup>21</sup> Over the years, courts have elaborated on what the right of association entails.<sup>22</sup>

The right of association includes the right to determine which messages the political parties wish to promote<sup>23</sup>, the right to conduct internal affairs free of government interference<sup>24</sup>, and the right to exclude.<sup>25</sup> Inherent in the right to exclude is the constitutional right for political parties to control their own memberships.<sup>26</sup> In doing so, parties may endorse candidates during primary elections.<sup>27</sup> The Supreme Court stated that a political

16. DANIEL P. TOKAJI, *ELECTION LAW IN A NUTSHELL* 241 (2013). Daniel P. Tokaji is a law professor at The Ohio State University Moritz College of Law and “an authority on the law of elections and democracy.” *Faculty Directory*, THE OHIO STATE UNIV., [moritzlaw.osu.edu/faculty/professor/daniel-p-tokaji/](http://moritzlaw.osu.edu/faculty/professor/daniel-p-tokaji/) (last visited Apr. 14, 2017).

17. *Morse v. Republican Party of Va.*, 517 U.S. 186, 241 (1996) (Scalia, J., dissenting).

18. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) (opining, “[t]he First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas.”).

19. TOKAJI, *supra* note 16, at 241.

20. *See* Michael R. Dimino, Sr., *It’s My Party and I’ll Do What I Want To: Political Parties, Unconstitutional Conditions, and the Freedom of Association*, 12 *FIRST AMEND. L. REV.* 65, 78 (2013) (discussing cases that established political parties’ constitutional rights).

21. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 216 (1989).

22. *See Democratic Party of U.S. v. Wis. ex rel. La Follette*, 405 U.S. 107, 126 (1981) (holding that if political party wished to run closed primary, state could not demand that delegates to party’s national convention be chosen through open primary); *see Eu*, 489 U.S. at 224-25, 229, 230-31, 233 (holding that states could not interfere with parties internal governance or prevent parties’ governing bodies from endorsing candidates in primaries); *see Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224-25 (1986) (holding that state could not force party to hold closed primary if party wished to invite independents to participate).

23. *Tashjian*, 479 U.S. at 224; *La Follette*, 405 U.S. at 123-24.

24. *Eu*, 489 U.S. at 229-33.

25. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000).

26. *See id.* at 574 (stating, “a corollary of the right to associate is the right not to associate.”).

27. *See Eu*, 489 U.S. at 216 (holding that a ban on political parties’ ability to endorse primary candidates was unconstitutional because it violated the First Amendment because “free discussion about candidates for public office is no less critical before a primary than before a general election”); *see Abrams v. Reno*, 452 F. Supp. 1166, 1167 (S.D. Fla. 1978) (striking down a state law prohibiting

party's right to exclude is most important during the nomination process.<sup>28</sup> As Justice Thurgood Marshall explained, “[b]arring political parties from endorsing and opposing candidates . . . infringes upon their freedom of association.”<sup>29</sup> In recognizing these rights, the Supreme Court has given political parties a certain degree of autonomy.<sup>30</sup> This autonomy develops parties’ identities and missions<sup>31</sup>, and has been historically safeguarded by the courts.<sup>32</sup> However, the Supreme Court has been reluctant to recognize these associational rights when they clash with restrictions on discrimination.<sup>33</sup>

Notwithstanding the two-parties’ durability mentioned above, political parties have internal conflict.<sup>34</sup> With regards to intra-party disputes, courts have frequently refused to get involved on the ground that such disputes are non-justiciable political questions.<sup>35</sup>

Historically, courts have viewed political parties as private associations.<sup>36</sup> However, some courts have labelled parties as quasi-governmental actors.<sup>37</sup> This Comment will propose two alternative remedies depending on how courts view political parties moving forward. Both proposals are geared towards preventing behavior intended to manipulate elections and promoting the integrity of our democracy.

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a state executive committee of any political party from endorsing or opposing any candidate of its political party in any primary election as unconstitutional). Although parties have the right to endorse a candidate, they explicitly limit this right in their Charter. The Charter of the Democratic Party, *supra* note 3, at art. V, § 4.

28. *Cal. Democratic Party*, 530 U.S. at 575.

29. *Eu*, 489 U.S. at 224.

30. *See Pierce*, *supra* note 11, at 319.

31. *See* Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 840-41 (2005) (stating “[a]ssociations have an intimate connection to freedom of speech values in large part because they are special sites for the generation of thoughts and ideas.”).

32. *See Eu*, 489 U.S. at 230 (striking down state restrictions limiting a political party’s discretion in how to organize itself, conduct its affairs, and select its leaders); *see Deamer v. Jones*, 42 N.J. 516, 520 (1964) (proclaiming, “[h]istorically, courts have been most reluctant to interfere in intraparty controversies in the absence of the violation of a controlling statute or the infringement of a clear legal right.”).

33. *Terry v. Adams*, 345 U.S. 461, 474-77 (1953).

34. *TOKAJI*, *supra* note 16, at 242.

35. *O’Brien v. Brown*, 409 U.S. 1, 4-5 (1972); *see also Baker v. Carr*, 369 U.S. 186, 217 (1962) (identifying six factors to help determine what questions are political in nature).

36. *Newberry v. United States*, 256 U.S. 232, 258 (1921).

37. *See Davis v. Sullivan Cty. Democratic Comm.*, 375 N.E.2d 730, 730 (N.Y. 1978) (opining that political parties “are not private associations, but associations with public and quasi-official status performing a governmental, or at least quasi-governmental, function in the electoral process”).

### B. *A Corporate Director's Fiduciary Duties*<sup>38</sup>

Beginning with the view that political parties are private associations<sup>39</sup>, a brief highlight of a corporate director's fiduciary duties is warranted to provide the basic knowledge necessary to understand the analogies presented in section III.A.

"[Someone] standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation."<sup>40</sup> A fiduciary duty is "[a] duty of utmost good faith, trust, confidence, and candor owed by a fiduciary to the beneficiary."<sup>41</sup> It often arises "if a person transacts business or manages money or property for the benefit of another."<sup>42</sup> Corporate directors manage the business for the benefit of the shareholders.<sup>43</sup> Therefore, corporate directors have been found to owe a fiduciary duty to both the corporation and its shareholders.<sup>44</sup>

"The business and affairs of a corporation are managed by or under the direction of its board of directors."<sup>45</sup> Along with these powers is a rigid fiduciary duty to preserve the corporation's interests and to act in the best interests of its shareholders.<sup>46</sup> In addition to protecting a corporation's interests, a director must avoid conduct that would, in any way, injure the corporation.<sup>47</sup> Numerous court decisions explicitly adopted the triad of fiduciary duties of care, loyalty, and good faith.<sup>48</sup> However, in 2006, Delaware's Supreme Court held that good faith is not an independent fiduciary duty.<sup>49</sup> Nonetheless, failing to act in good faith may trigger liability because the requirement to act in good faith is ancillary to the fundamental duty of loyalty.<sup>50</sup> In other

38. This comment will rely heavily on Delaware case law because it is "the most prominent corporate law jurisdiction." Lyman Johnson, *After Enron: Remembering Loyalty Discourse In Corporate Law*, 28 DEL. J. CORP. L. 27, 35 (2003)

39. *Newberry*, 256 U.S. at 258.

40. RESTATEMENT (SECOND) OF TORTS § 874 (1979).

41. *Fiduciary Duty*, BLACK'S LAW DICTIONARY (10th ed. 2014).

42. Edwin W. Hecker, Jr., *Fiduciary Duties in Business Entities Revisited*, 61 U. KAN. L. REV. 923, 925 (2013).

43. *Id.*

44. *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

45. DEL. CODE ANN. tit. 8, § 141 (West 2016).

46. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993); *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939); *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984); *Van Gorkom*, 488 A.2d at 872; *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1988).

47. *Guth*, 5 A.2d at 510.

48. *Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001); *McMullin v. Beran*, 765 A.2d 910, 917 (Del. 2000); *Emerald v. Berlin*, 726 A.2d 1215, 1221 (Del. 1999); *McCrae Assocs., LLC v. Universal Capital Mgmt., Inc.*, 746 F. Supp. 2d 389, 399 (D. Conn. 2010).

49. *Stone v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006).

50. *Id.*



words, acting in good faith is a condition of the duty of loyalty.<sup>51</sup>

Traditionally, the duty of loyalty arose in situations where a corporate director had a financial, self-dealing, conflict of interest with the corporation and/or its shareholders.<sup>52</sup> In addition, the duty of loyalty applies when a corporate director acts in bad faith.<sup>53</sup> A common example of bad faith is when a director shows “reckless indifference to or a deliberate disregard of the interests of the shareholders.”<sup>54</sup> Bad faith also includes conduct motivated by an actual intent to do harm.<sup>55</sup> Essentially, the duty of loyalty requires a director to subordinate his interests not shared by shareholders for the best interest of the corporation.<sup>56</sup>

Of equal importance to the duty of loyalty, is the duty of care.<sup>57</sup> The duty of care concerns the decision-making process of a corporate director.<sup>58</sup> The key inquiry hinges on whether a director’ made a grossly negligent decision during the decisional process.<sup>59</sup>

Due to directors’ roles within a corporation, it is no surprise that most scenarios that generate breach of fiduciary duty allegations involve director conduct.<sup>60</sup> There are two things a plaintiff must prove to prevail on a claim for breach of fiduciary duty against a corporate director.<sup>61</sup> The director must have owed the corporation a fiduciary duty<sup>62</sup> and the director must have breached that duty.<sup>63</sup>

Courts have established a doctrine known as the business judgment rule, in order to limit court interference with a

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51. *Id.*

52. *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (opining, “directors can neither appear on both sides of a transaction nor expect to derive any personal benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all [shareholders] generally.”).

53. *Stone*, 911 A.2d at 369-70.

54. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 67, n.111 (2006) (quoting *Allaun v. Consol. Oil Corp.*, 147 A 257, 261 (Del. Ch. 1929)).

55. *Id.* at 64.

56. *See* Pogostin v. Rice, 480 A.2d 619, 624 (Del. 1984) (asserting, “[d]irectorial interest exists whenever divided loyalties are present, or a director either has received . . . a personal benefit from the challenged transaction which is not equally shared by the stockholders.”).

57. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 367 (Del. 1993).

58. *In re* NCS Healthcare, Inc., S’holders Litig., 825 A.2d 240, 257 (Del. Ch. 2002).

59. *Cede & Co.*, 634 A.2d at 366; *see also* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (adopting gross negligence standard in duty of care context); *see* Smith v. Van Gorkom, 488 A.2d 858, 874 (Del. 1985) (adopting gross negligence standard in duty of care context). Gross negligence includes “reckless indifference to or a deliberate disregard of the whole body of stockholders.” *Tomczak v. Morton Thiokol, Inc.*, No. 7861, slip op at 12 (Del. Ch. Apr. 5, 1990) (internal quotation marks omitted).

60. *See* Hecker, *supra* note 42, at 926.

61. *Beard Research, Inc. v. Kates*, 8 A.3d 573, 601 (Del. Ch. 2010).

62. *Id.*

63. *Id.*

corporation's business affairs.<sup>64 65</sup> This rule is a “presumption that in making a business decision[,] the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action was in the best interests of the company.”<sup>66</sup> However, the rule does not completely shield directors from liability.<sup>67</sup>

The business judgment rule may be rebutted only if the plaintiff can make a prima facie showing that, in making the challenged decision, the director breached the duty of loyalty or care, and/or acted in bad faith.<sup>68</sup> In this circumstance, directors may be liable for breach of fiduciary duty.<sup>69</sup>

### C. *The Importance of a Citizen's Right to Vote*

In addition to being viewed as private associations, courts sometimes label political parties as quasi-governmental actors.<sup>70</sup> When parties are viewed as quasi-governmental actors, the government is permitted to regulate them.<sup>71</sup> Beginning in the early

64. *Cede & Co.*, 634 A.2d at 360; see *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1988) (stating courts “should decline to evaluate the wisdom and merits of a business decision unless sufficient facts are alleged with particularity, or the record otherwise demonstrates, that the decision was not the product of an informed, disinterested, and independent board”); see *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (opining that if business decision has rational purpose, court will not substitute its judgment for that of the board); see *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) (stating “court will not interfere with the judgment of board of directors unless there is showing of gross and palpable overreaching”); see *A.C. Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 111 (Del. Ch. 1986) (stating court will “decline to evaluate merits or wisdom of transaction once it is shown that decision to accomplish transaction was made by directors with no financial interest in the transaction adverse to the corporation . . .”).

65. See *Gimbel v. Signal Cos.*, 316 A.2d 599, 608-09 (Del. Ch. 1974) (pointing out that the business judgment rule has been reaffirmed and broadened over past several decades).

66. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); see *Robinson v. Pittsburgh Oil Ref. Corp.*, 126 A. 46, 48 (Del. Ch. 1924) (establishing presumption that directors are motivated “by a bona fide regard for the interests of the corporation”); see *Allaun v. Consolidated Co.* 147 A. 257, 261 (Del. Ch. 1929) (finding the judgment of directors is entitled to presumption of honesty and good faith).

67. H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post Caremark Era*, 26 DEL. J. CORP. L. 1, 13 (2001).

68. *Cede & Co.*, 634 A.2d at 361.

69. Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 927 (2006). In this article, DeMott suggests that the “determining criterion [in deciding whether a fiduciary relationship is owed to a beneficiary] is whether the [beneficiary] would be justified in expecting loyal conduct on the part of an actor and whether the actor's conduct contravened that expectation.” *Id.* at 936.

70. See *Davis v. Sullivan Cty. Democratic Comm.*, 375 N.E.2d 730, 730 (N.Y. 1978)

71. See *id.* (declaring “internal affairs of political parties may be regulated

twentieth century, political party regulation started to increase, raising the question of whether parties were governed by federal law.<sup>72</sup> Initially, the answer was no.<sup>73</sup> However, a string of cases concluded that the Constitution does apply to political party primaries. For example, the Constitution protects minorities that are prohibited from participating in the primaries because of their race.<sup>74</sup> Additionally, courts will interfere if infringement of a clear legal right exists, such as the right to vote.<sup>75</sup>

Section III.B will compare the effects of a party committee undermining votes with the effects of the vote dilution practices introduced therein. Prior to discussing this comparison, a discussion on the right to vote is warranted to contextualize the severity of this type of behavior.

“No right is more precious in a free country than that of having a voice in [an] election . . . . Other rights, even the most basic, are illusory if the right to vote is *undermined*.”<sup>76</sup> This statement allows the reasonable inference that if “we the people” cannot vote, our democratic republic is nothing but a farce.<sup>77</sup> It also highlights the fact that casting a vote is not the same as casting a *meaningful* vote.<sup>78</sup>

Surprisingly, the right to vote is not explicitly guaranteed in the text of our Constitution.<sup>79</sup> However, the Supreme Court first characterized voting as a fundamental right in 1886.<sup>80</sup> The idea is that citizens vote with the goal of acquiring governmental representation.<sup>81</sup> By participating, citizens hope that, ideally, our

by the [government].”).

72. TOKAJI, *supra* note 16, at 246.

73. *Newberry v. United States*, 256 U.S. 232, 257-58 (1921) (concluding that a statute limiting campaign contributions and expenditures did not apply to U.S. Senate primary because regulation of primaries fell outside scope of federal power).

74. *See Terry v. Adams*, 345 U.S. 461, 470 (1953) (holding a political association’s exclusion of African Americans violated Fifteenth Amendment).

75. *Batko v. Sayreville Democratic Org.*, 373 N.J. Super. 93, 100 (Super. Ct. App. 2004); *Pierce*, *supra* note 11, at 342.

76. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (alteration in original) (emphasis added).

77. *See THE FEDERALIST NO. 10* (James Madison) (declaring that a democratic republic is when the government is delegated “to a small number of citizens *elected* by the rest”) (emphasis added).

78. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) (explaining that the right to vote may be affected by dilution and not just by denial of the vote).

79. *See Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (opining “the Constitution does not confer the right [to vote] upon anyone”) (quoting *Minor v. Happersett*, 88 U.S. 162, 178 (1874)).

80. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (proclaiming that “[voting] is regarded as a fundamental political right, because [it is] preservative of all rights.”).

81. TOKAJI, *supra* note 16, at 33-34.

representatives ensure that all of their interests are protected.<sup>82</sup> The primary source for a citizen's right to vote is provided in the Fourteenth Amendment.<sup>83</sup> Not surprisingly, however, the Fourteenth Amendment is not the sole constitutional amendment protecting this right.<sup>84</sup>

Despite these constitutional protections, certain election laws and practices have prevented certain people from voting while also weakening certain groups of voters.<sup>85</sup> This is commonly known as "vote dilution."<sup>86</sup> The Supreme Court has held these types of laws and practices are unconstitutional because a system that denies "equal participation by all voters" violates the Equal Protection Clause.<sup>87</sup> In invalidating these types of practices, the Supreme Court looked to promote fair political competition.<sup>88</sup>

In 1980, the Supreme Court stated that when plaintiffs brought a vote dilution claim, they were required to show discriminatory intent and effect.<sup>89</sup> This ruling produced a wave of criticism, particularly that these requirements would end vote dilution claims.<sup>90</sup> In response to this concern, Congress amended section two of the Voting Rights Act, making it easier to prove vote dilution.<sup>91</sup> Specifically, the amendment prohibits all practices that result in the "denial or abridgment" of the right to vote.<sup>92</sup> The resulting practices are determined by the totality of circumstances.<sup>93</sup> Essentially, after the amendment to section two, a

82. *Id.* at 34.

83. *See, e.g.*, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding that right to vote is fundamental interest under Equal Protection Clause).

84. *See* U.S. CONST. amend. XV, § 1 (prohibiting denial or abridgment of citizen's right to vote on account of race); U.S. CONST. amend. XIX (prohibiting denial or abridgment of citizen's right to vote due to sex); U.S. CONST. amend. XXIV, § 1 (prohibiting denial or abridgment of citizen's right to vote for failing to pay any poll tax or other tax); U.S. CONST. amend. XXVI, § 1 (prohibiting denial or abridgment of citizen's right to vote on account of age to citizens 18 and older).

85. *See* *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45 (1959) (holding that literacy tests were constitutional if used in race-neutral fashion); *see* *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (striking down city boundaries that had been redrawn so as to prevent African Americans from voting in city elections); *see* *Harper*, 383 U.S. 663 (1966) (striking down poll tax in state elections under Equal Protections Clause of Fourteenth Amendment); *See* *Carrington v. Rash*, 380 U.S. 89 (1965) (striking down prohibition on voting by those believed to lack sufficient interest).

86. TOKAJI, *supra* note 16, at 93.

87. *See* *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964) (declaring "each and every citizen has an inalienable right to full and effective participation in the political process. . .").

88. *Id.*

89. *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980).

90. TOKAJI, *supra* note 16, at 116.

91. 52 U.S.C. § 10301 (2016).

92. 52 U.S.C. § 10301(a) (2016).

93. 52 U.S.C. § 10301(b) (2016).

showing of discriminatory results, not intent, is required for a vote dilution claim.<sup>94</sup>

The information above is necessary for two reasons. First, it provides the reader with a general history and understanding of the significance of a citizen's right to vote. Building off the general history, the comparisons presented in section III.B give weight and provide guidance to the solution ultimately proposed in section IV.

#### *D. Wilding v. DNC Services Corp.*

The DNC's behavior during the primaries upset many voters. Some of these voters sought to rectify their alleged injustice by filing a class action lawsuit in July 2016 against the DNC and Wasserman Schultz in the Southern District of Florida.<sup>95</sup> The complaint proposed three classes consisting of: (1) anyone who donated to the DNC since the start of 2015, (2) anyone who donated to Sanders' campaign since 2015, and (3) all registered voters of the Democratic Party.<sup>96</sup> The complaint alleged six counts against the defendants, including breach of fiduciary duty and fraud.<sup>97</sup> At the core of the plaintiffs' allegations was the defendants' failure to remain impartial throughout the presidential primary process.<sup>98</sup> The plaintiffs prayed for, amongst other things, compensatory damages, "declaratory and injunctive relief declaring illegal and enjoining . . . defendant's violation and failure to follow the Charter and Bylaws of the Democratic Party," as well as punitive damages "in an amount sufficient to deter and to make an example of defendants."<sup>99</sup>

In response, the defendants filed a motion to dismiss for lack of standing pursuant to Article 3 of the Constitution and the complaint's failure to meet pleading requirements set forth by the Federal Rules of Civil Procedure.<sup>100</sup> Defendants' standing argument began with the contention that the plaintiffs failed to allege a "cognizable injury-in fact."<sup>101</sup> Specifically, defendants argued that merely donating money to the DNC did not give plaintiffs an

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94. TOKAJI, *supra* note 16, at 118.

95. First Amended Complaint, *Wilding v. DNC Services Corp.*, No. 0-16-cv-61511-WJZ (11th Cir. July 13, 2016), ECF No. 8 [hereinafter *Wilding Complaint*].

96. *Wilding Complaint*, *supra* note 95, at 29.

97. *Wilding Complaint*, *supra* note 95, at 31-32, 35.

98. *Wilding Complaint*, *supra* note 95, at 21-28.

99. *Wilding Complaint*, *supra* note 95, at 38.

100. Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint and Memorandum of Law in Support, *Wilding v. DNC Services Corp.*, No. 0-16-cv-61511-WJZ (11th Cir. Sept. 21, 2016), ECF No. 44 [hereinafter *DNC Motion to Dismiss*]. Defendants argue that the plaintiffs' complaint fails to meet the basic pleading requirements set forth in rules 8,9, and 12(b)(6) of the Federal Rules of Civil Procedure.

101. *DNC Motion to Dismiss*, *supra* note 100, at 5.

interest in the DNC's operations.<sup>102</sup> Additionally, the defendants contended that "any bias" by defendants could not be found to "diminish plaintiffs' influence as voters."<sup>103</sup> The defendants also stated that there was no causal link between the plaintiffs' alleged injuries and the defendants' alleged actions.<sup>104</sup> Moreover, defendants stated that the injuries were not redressable and an attempt by the court to give the requested relief would infringe on the defendants' rights of association.<sup>105</sup> Ultimately, the court dismissed the lawsuit due to the plaintiff's lack of standing.<sup>106</sup> Some flaws of this class-action are discussed in section III.C.

### III. ANALYSIS

This section begins by highlighting the key similarities between a corporate director's duties and the duties of a political party's committee members. The section then explains the similar effects of a party undermining certain voters to trigger classic vote dilution tactics, elaborated herein. Lastly, this section discusses the flaws of *Wilding*, leading to the two solutions proposed in part IV.

#### A. *Party Committee Members Parallel Corporate Directors*

Fiduciary duties arise if "a person(s) transacts business or manages money or property . . . for the benefit of another."<sup>107</sup> The national committees of political parties transact business on behalf of their voters by coordinating and assisting in elections.<sup>108</sup> They also manage their voters' money by fundraising during elections.<sup>109</sup>

The fiduciary duties of loyalty and care are founded on the reality that corporate directors are obligated to the actual owners of corporations, the shareholders.<sup>110</sup> Similarly, one could argue that political party committee members are obligated to the actual "owners" of our country, the people.<sup>111</sup> This idea is not novel, but an

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102. *Id.*

103. DNC Motion to Dismiss, *supra* note 100, at 7.

104. DNC Motion to Dismiss, *supra* note 100, at 8-9.

105. DNC Motion to Dismiss, *supra* note 100, at 9-10.

106. David Weigel, *Florida Judge Dismisses Fraud Lawsuit Against DNC*, THE WASH. POST (Aug. 25, 2017), [www.washingtonpost.com/news/powerpost/wp/2017/08/25/florida-judge-dismisses-fraud-lawsuit-against-dnc/?utm\\_term=.30dc15f4b660](http://www.washingtonpost.com/news/powerpost/wp/2017/08/25/florida-judge-dismisses-fraud-lawsuit-against-dnc/?utm_term=.30dc15f4b660).

107. Edwin W. Hecker, Jr., *Fiduciary Duties in Business Entities Revisited*, 61 U. KAN. L. REV. 923, 925 (2013).

108. The Charter of the Democratic Party, *supra* note 3, at art. I, §§ 1, 3.

109. The Charter of the Democratic Party, *supra* note 3, at art. I, § 5.

110. 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, BLAKE ROHRBACHER, CONTRIBUTOR, DUTY OF LOYALTY § 4.16 (3d ed. 2016).

111. See U.S. Const. pmb. (reading "[w]e the People . . . do ordain and establish . . .").

extension of ones proposed in the past.<sup>112</sup> Moreover, constitutional history and political theory support the view that politicians stand in fiduciary relationships with those they represent.<sup>113</sup> For example, John Locke argued that government must act on behalf of the citizens and not in its own interest.<sup>114</sup> This is similar to the fiduciary duty of loyalty found in the corporate context.<sup>115</sup> It has also been argued that the Constitution is appropriately understood as a corporate charter delegating power to agents and specifying rules of governance.<sup>116</sup> This perspective is based on a contractual theory of government, with the terms of the contract involving the appointment of power from the people to the government.<sup>117</sup>

Assuming government officials owe fiduciary duties to those they represent, those in charge of running the process in which these officials are elected too should undoubtedly owe the same duties. If political parties owe fiduciary duties to their voters, a breach of these duties would presumably arise when a party committee's actions, damage the party's general interests as well as when a party fails to act in its voters' best interests.<sup>118</sup> More in

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112. See generally D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 (2013) (discussing constitutional history and political theories that support view that politicians should owe fiduciary duties). Rave suggests that to control incumbent self-dealing in redistricting, political representatives should be treated as fiduciaries. *Id.* at 677. While acknowledging that the Framers designed the Constitution to impose fiduciary duties on government officials, Rave states that “scholarship has largely ignored the area of law where the fiduciary model would . . . have its most natural application—the field of election law.” *Id.* at 677-78. The issues surrounding the 2016 presidential primaries provide more incentive for the courts to agree with Rave, as well as with the proposal presented in IV.A of this comment.

113. *Id.* at 679.

114. See Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1117 (2004) (stating, “[a]ccording to Locke, public officials should not engage in self-dealing . . .”).

115. See *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (declaring, “the rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest”).

116. Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, 79 GEO. WASH. L. REV. 1, 3 (2010). Miller provides legitimate reasons to support the assertion that “[t]he Constitution . . . is a corporate charter.” *Id.* For instance, “[the Constitution] sets forth powers of the institution and establishes limits on the exercise of those powers.” *Id.* Miller goes on to analogize these functions with those found in corporate charters in the eighteenth and nineteenth centuries. *Id.* at 4; see Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional Government*, 6 WASH. U. J. L. & POLY 1, 16 (2001) (quoting jurist Francis Lieber, “[a]ll the American governments are corporations created by charters, viz. their constitutions . . .”).

117. See Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121-22 (1998) (proclaiming that the “Constitution was designed and approved like a contract” and part of a contract is surrendering power to representatives).

118. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993); *Pogostin v. Rice*, 480 A.2d 619, 624 (Del. 1984); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del.

depth analyses of the duties of loyalty and care are found in the two ensuing sections.

### 1. *Duty of Loyalty*

The duty of loyalty includes situations where “the fiduciary fails to act in good faith.”<sup>119</sup> This can occur “where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation . . . or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.”<sup>120</sup> If a director breaches her duty of loyalty, she may be liable for monetary damages.<sup>121</sup>

An example of a self-interested director can be found in *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963 (Del. Ch. 2000).<sup>122</sup> This case concerned a merger plan allegedly structured to maximize a director’s personal benefit at the expense of the shareholders through “side-deals.”<sup>123</sup> The allegations in the complaint suggested the directors breached their duties of loyalty, and although two directors did not receive personal benefits, they acquiesced in the self-interested negotiations and approved the merger at an unfair price.<sup>124</sup> The court stated this revealed the directors failed to place the corporation’s interests above their own, evincing a clear lack of concern for their duty of loyalty.<sup>125</sup>

Similarly, the presidential primaries are in a sense “business transactions.”<sup>126</sup> Political parties can be equated to corporations<sup>127</sup>,

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1984).

119. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

120. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (2006)

121. *See* 8 Del. C. § 102(b)(7) (stating provisions in certificate of corporation may eliminate director’s personal liability for monetary damages but shall not eliminate liability for a director’s breach of duty of loyalty to shareholders or corporation).

122. *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963 (Del. Ch. 2000).

123. *Id.* at 970. These “side-deals” gave the director, amongst other things, a substantial equity interest in the surviving entity, tax advantages not offered to other shareholders, and a position on the surviving entity’s board of directors. *Id.*

124. *Id.* at 982.

125. *Id.* at 981.

126. *See* The Charter of the Democratic Party, *supra* note 3, at art. I, § 1 (stating party will assist in elections); *see id.*, *supra* note 3, at art. I, § 5 (stating party will handle money for “successful operation” of party).

127. *See Corporation*, BLACK’S LAW DICTIONARY (4th pocket ed. 2011) (defining corporation as “[a]n entity having authority under law to act as a



with the constituents holding similar roles to shareholders, and their votes being the “shares.”<sup>128</sup> Using the DNC email leak as an example, many have argued that the committee members’ actions eroded the fairness of the 2016 primary.<sup>129</sup> For example, by backing one candidate a party directly undermines the campaign of another.<sup>130</sup> Therefore, by failing to advance the best interests of the entire party and all of the voters, the committee members involved should be found to have breached the duty of loyalty.<sup>131</sup>

In addition to self-interest, directors breach the duty of loyalty when they show a conscious disregard for a known duty to act.<sup>132</sup> “Only if [directors] knowingly and completely failed to undertake their responsibilities would they breach their duty of loyalty.”<sup>133</sup> For instance, a court refused to find a breach of the duty of loyalty in a case where corporate directors: (1) were aware of their company’s value, (2) listened to their financial and legal advisors, (3) tried to get a better offer, and (4) approved the merger because it was “too good not to pass along [to the stockholders] for their consideration.”<sup>134</sup> In this case, the directors had a duty to strive to secure the best sale price.<sup>135</sup> The court noted the immense distinction between an insufficient attempt to perform fiduciary duties and a conscious disregard for those duties, in reaching its decision.<sup>136</sup> Unlike the directors in *Lyondell*, the DNC showed a conscious disregard, as evinced by the leaked emails, for their duty to remain impartial and evenhanded.<sup>137</sup>

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single person distinct from the shareholders who own it . . .”).

128. See *Shareholder*, BLACK’S LAW DICTIONARY (4th pocket ed. 2011) (defining shareholder as “[o]ne who owns or holds a share in a company, esp. a corporation).

129. See H.A. Goodman, *Wikileaks Emails Show DNC Favored Hillary Clinton Over Bernie Sanders During The Democratic Primary*, HUFFINGTON POST (July 23, 2016 2:39 AM), [www.huffingtonpost.com/entry/wikileaks-emails-show-dnc-favored-hillary-clinton-over\\_us\\_57930be0e4b0e002a3134b05](http://www.huffingtonpost.com/entry/wikileaks-emails-show-dnc-favored-hillary-clinton-over_us_57930be0e4b0e002a3134b05)

(proclaiming if emails are legitimate then “we know Bernie Sanders was never given a fair and equal opportunity to win the nomination.”). *But see* Allen Clifton, *For the Last Time: Here’s Proof the Democratic Primary Wasn’t Rigged Against Bernie Sanders*, FORWARD PROGRESSIVES (July 25, 2016), [www.forwardprogressives.com/for-the-last-time-heres-proof-the-democratic-primary-wasnt-rigged-against-bernie-sanders/](http://www.forwardprogressives.com/for-the-last-time-heres-proof-the-democratic-primary-wasnt-rigged-against-bernie-sanders/) (arguing “only 6 or 7 emails . . . were deemed to be remotely ‘anti-Bernie.’”).

130. See *supra* note 5 and accompanying text.

131. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (finding directors breached duty of loyalty when entering into agreement “at the expense of the shareholders”).

132. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (2006).

133. *Lyondell Chemical Co. v. Ryan*, 970 A.2d 235, 243-44 (Del. 2009).

134. *Id.* at 244.

135. *Id.*

136. *Id.* at 243.

137. The Charter of the Democratic, *supra* note 3, at art. V, § 4.

## 2. *Duty of Care*

Corporate directors must exercise due care in the decision-making process. Gross negligence must be proven to demonstrate a breach of due care.<sup>138</sup> Deciding if directors have exercised due care when making a decision demands a consideration of whether the directors educated themselves “of all material information reasonably available to them.”<sup>139</sup> Because corporate directors are duty bound to preserve the corporation’s and its shareholder’s economic interests, they must evaluate information with a “critical eye.”<sup>140</sup>

A classic example of directors breaching their duties of care is found in *Smith v. Van Gorkom*.<sup>141</sup> Here, a corporation’s CEO chose to pursue a merger, and without informing anybody, proposed an amount per share which reciprocated with a time-constrained offer.<sup>142</sup> One day before the “deadline,” the board of directors met and were informed of the proposal.<sup>143</sup> However, the CEO failed to inform the board on the reasons or basis of the proposed price per share.<sup>144</sup> Delaware courts have stated that acting in a hurry calls for problems.<sup>145</sup> Nonetheless, the meeting lasted two hours and the merger agreement was approved.<sup>146</sup> The court stated the directors were, “at a minimum grossly negligent.”<sup>147</sup>

Like corporate directors, political parties’ committees must make decisions for the benefit of the party, and all of its members, through their respective platforms.<sup>148</sup> Although these decisions are not the same as those commonly made by directors, i.e., agreeing to

138. See *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006) (discussing “conduct giving rise to a violation of duty of care (i.e., gross negligence”).

139. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

140. *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

141. *Id.* at 881 (Del. 1985).

142. *Id.* at 866-67.

143. *Id.* at 867.

144. *Id.* at 868.

145. See *McMullin v. Beran*, 765 A.2d 910, 922 (Del. 2000) (stating “[t]he imposition of time constraints on a board’s decision-making process may compromise the integrity of its deliberative process. History has demonstrated boards ‘that have failed to exercise due care are frequently boards that have been rushed.’”) (quoting *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 67 (Del. 1989)).

146. *Smith*, 488 A.2d at 869.

147. *Id.* at 874.

148. See Republican Platform 2016, pmbl., prod-cdn-static.gop.com/media/documents/DRAFT\_12\_FINAL[1]-ben\_1468872234.pdf [hereinafter Republican Platform] (stating “[w]ith this platform, we the Republican party reaffirm the principles that unite us in a common purpose”); see also 2016 Democratic Party Platform, pmbl. (July 21, 2016), www.demconvention.com/wp-content/uploads/2016/07/Democratic-Party-Platform-7.21.16-no-lines.pdf [hereinafter Democratic Platform] (stating “Democrats meet . . . with the same basic belief that animated the Continental Congress when they gathered here 240 years ago: Out of many, we are one.”).

a merger agreement, they are for the benefit of the party – ultimately to appeal to voters for support by highlighting policy ideologies that the public is passionate about.<sup>149</sup> Committees create themselves and purport to represent the entire party while remaining impartial.<sup>150</sup> This creates a duty of care.<sup>151</sup> As such, committee members should consider the *entire* party, and make decisions that do not disregard any voters.<sup>152</sup>

### B. Comparing Vote Dilution to When a Party Committee Undermines Votes

This section will compare the effects of classic vote dilution to the effects of a party undermining certain votes to support the ultimate conclusion that this behavior needs to be prevented in a similar fashion. The Constitution restricts party primaries when citizens are excluded from the primaries on account of their race.<sup>153</sup> Besides race-based exclusions, however, parties' actions have rarely been found to be unconstitutional.<sup>154</sup> This Comment is not concerned with vote denial, but rather, situations in which a party committee's actions undermine, or "dilute," its constituents' voting rights.

Traditionally, vote dilution occurs when state governments or their political subdivisions enact an election law or practice weakening the votes of minority group members, which decreases the groups' opportunities for *meaningful* participation in said election.<sup>155</sup> Vote dilution can occur in numerous scenarios including, but not limited to, malapportionment, at-large elections and gerrymandering, detailed below.<sup>156</sup>

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149. See Republican Platform, *supra* note 146, at pml. (highlighting economic policies, including "rebuilding the economy"); see also Democratic Platform, *supra* note 146, at pml. (stating party will work on "raising workers' wages," and focus on social policies such as "bringing Americans together" and "defend[ing] religious beliefs").

150. The Charter of the Democratic Party, *supra* note 3, at art. V, § 4.

151. *Id.*

152. See, e.g., *id.* at art. I, § 4 (declaring the Democratic Party "shall establish standard and rules of procedure that afford *all* members of the Democratic Party full, timely and equal opportunities to participate in decisions concerning the selection of candidates . . . and the conduct of other Party affairs . . .").

153. TOKAJI, *supra* note 16, at 250.

154. *Id.*

155. See *Gray v. Sanders*, 372 U.S. 368, 370 (1963) (challenging the constitutionality of a state statute); *Reynolds v. Sims*, 377 U.S. 533, 537 (1964) (suing various state and political party officials in their representative capacity); *Gomillion v. Lightfoot*, 364 U.S. 340 (1960) (challenging the validity of a local act passed by state legislature).

156. 29 C.J.S. *Elections* § 27 (2016) (emphasis added).

### 1. *Malapportionment*

Malapportionment occurs when voting districts with varying amounts of citizens have identical government representation.<sup>157</sup> Preventing malapportionment rests on the idea first expressed in *Gray v. Sanders*, that the “conception of political equality . . . can mean only one thing – one person, one vote.”<sup>158</sup> In *Gray*, a Georgia voter challenged a “county unit” system for counting votes in primaries where candidates for statewide office competed on a county-by-county basis.<sup>159</sup> This was troublesome because the candidate who won most of the counties would win the election, regardless of whether that candidate received less total statewide votes.<sup>160</sup> The Court held that this “county unit” system violated the Equal Protection Clause.<sup>161</sup>

The Supreme Court went on to use the idea of “one person, one vote” in a string of subsequent cases to strike down other state election practices.<sup>162</sup> For instance, in *Reynolds*, there were large population disparities in the Alabama state house and state senate, giving citizens in underpopulated areas greater government representation than those in more populous areas.<sup>163</sup> The Supreme Court stated that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in elections.<sup>164</sup> Therefore, Alabama’s malapportionment of state legislative bodies violated the Equal Protection Clause.<sup>165</sup> Chief Justice Warren focused on the principle of “fair and effective representation” for all citizens in elections.<sup>166</sup> It is fairly easy to quantify the way malapportionment weakens some citizens’ influence in government.<sup>167</sup> Gerrymandering and the dilution of a minority group’s voting strength is more difficult.<sup>168</sup>

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157. TOKAJI, *supra* note 16, at 45. Malapportionment effectively causes people in large districts, usually those in urban areas, to be underrepresented. *Id.*

158. *Gray*, 372 U.S. at 381.

159. *Id.* at 370.

160. *Id.* at 371.

161. *Id.* at 379-80.

162. *See* *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (ruling that malapportionment of congressional districts within a state violated the Constitution); *see Reynolds*, 377 U.S. at 568 (holding that malapportionment of state legislative bodies violated the Equal Protection Clause); *see Lucas v. 44th Gen. Assembly of Colo.*, 377 U.S. 713 (1964) (striking down Colorado’s malapportioned state senate districts).

163. *See Reynolds*, 377 U.S. at 545-47 (highlighting population discrepancy of up to about 41-to-1 in Senate and up to about 16-to-1 in House).

164. *Id.* at 566.

165. *Id.*

166. *Id.* at 565-66.

167. TOKAJI, *supra* note 16, at 69.

168. *Id.*

## 2. Gerrymandering and At-large Elections

Gerrymandering refers to the practice of drawing electoral districts or other boundaries with the intent to give an advantage to one group of voters while disadvantaging another, typically on account of party affiliation or race.<sup>169</sup> For example, in 1957, Alabama's legislature transformed the shape of the city of Tuskegee from a square to a twenty-eight sided figure.<sup>170</sup> The plaintiffs alleged that the boundaries were redrawn with the intent to deny them their right to vote.<sup>171</sup> The evidence indicated that the new city boundaries removed all but four or five of its 400 African American voters, while simultaneously failing to remove any of its white voters.<sup>172</sup> The Court stated that if proven, these allegations would establish a violation of the Fifteenth Amendment's prohibition on racial discrimination in voting.<sup>173</sup>

In addition to gerrymandering, other practices were used to diminish the strength of minorities' votes, such as at-large elections.<sup>174</sup> At-large elections occur when representatives are elected from the entire political unit rather than from particular districts.<sup>175</sup> Due to the high degree of prejudice at the time, legislatures employed these methods to inevitably deny minorities representation because the majority would effectively be able to drown out the minorities' votes.<sup>176</sup>

To counter these types of practices, Congress enacted the Voting Rights Act.<sup>177</sup> This Act prohibits all voting practices resulting in the "denial or abridgement" of the right to vote on account of race.<sup>178</sup> Today, in order to bring a vote dilution claim under the Voting Rights Act, a plaintiff must demonstrate three preconditions.<sup>179</sup>

First, the affected minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in single-member district . . . Second, [the affected minority group] must be able to show that it is politically cohesive . . . Third, the minority must be able to demonstrate that the white majority

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169. *Id.* at 77.

170. *Gomillion v. Lightfoot*, 364 U.S. 340 (1960)

171. *Id.*

172. *Id.* at 341.

173. *Id.* at 341, 346-47.

174. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 548-549 (1969) (questioning the validity of a statute that amended a district voting system to an at-large voting system).

175. Tim A. Thomas, Annotation, "*At large*" elections as violation of § 2 of Voting Rights Act of 1965, 92 A.L.R. FED. 824 n.1 (1989).

176. TOKAJI, *supra* note 16, at 96.

177. Voting Rights Act, 52 U.S.C. §§ 10301-10314, 10501-10508, 10701, 10702 (2016).

178. 52 U.S.C. § 10301 (2016).

179. *See Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) (articulating three "preconditions" that must be satisfied in a vote dilution case).

votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate.<sup>180</sup>

A court must decide based on the totality of the circumstances, whether a violation has occurred, once these preconditions are satisfied.<sup>181</sup>

If a general principle arises out of the practices and the government's response to said practices above, it is that each person's vote is worth as much as that of others, regardless of ethnicity, race, or political affiliation.<sup>182</sup> With that being said, it is clear that the preconditions to state a traditional vote dilution claim present problems when a party committee undermines its own constituents' votes.<sup>183</sup> Nevertheless, the effects of such behavior mirrors the effects discussed above and cannot be ignored.

Voters have an expectation that elections are fair and unimpeded from outside influences, especially from their own political party.<sup>184</sup> For example, secretly promoting stories to the media or highlighting specific facts about a certain candidate with the implicit intent of dissuading voters from electing said candidate is not a party's responsibility.<sup>185</sup> These types of actions cause the opposed candidates to lose potential votes, votes that – in addition with votes already received – may have won them the nomination. Simply put, it is a voter's own actions coupled with the supplemented political processes and the media should provide voters with the facts and opinions necessary in deciding who to elect. It should not be the behind-the-scenes actions of self-interested politicians.<sup>186</sup> In addition, the fact that a party places a

180. *Id.* at 50-51. These preconditions are known as “compactness,” “political cohesiveness,” and “majority bloc voting,” respectively. TOKAJI, *supra* note 16, at 123.

181. *See Johnson v. De Grandy*, 512 U.S. 997, 1011-12 (1994) (holding that satisfaction of three preconditions was necessary to prevail on vote dilution claim, but not sufficient; stating ultimate inquiry is whether, based on totality of circumstances, minorities have no ability to effectively participate in political process and elect representatives of choice).

182. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

183. *See Thornburg*, 478 U.S. at 50 (finding *minority group* must demonstrate three preconditions) (emphasis added).

184. *See Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (declaring “the right to elect [representatives] in a free and unimpaired fashion is a bedrock of our political system”); *see The Charter of the Democratic Party*, *supra* note 3, at art. IX, § 8 (“Assur[ing] that the Democratic nominee for the office of President of the United States is selected by a fair and equitable process . . .”).

185. *See Leaked E-mail, DNC Email Database*, WIKILEAKS (July 27, 2016), [wikileaks.org/dnc-emails/emailid/7643](http://wikileaks.org/dnc-emails/emailid/7643) (highlighting certain fact about Senator Sanders and stating, “[t]his could make several points difference with my peeps . . .”).

186. *See Thomas M. Holbrook*, *Political Learning From Presidential Debates*, 21 *POLITICAL BEHAVIOR*, 67, 67 (1999) (finding “campaigns influence public opinion”); Gerber, Alan S., Dean Karlan, and Daniel Bergan, *Does the Media Matter? A Field Experiment Measuring the Effect of Newspapers on Voting Behavior and Political Opinions*, *AMERICAN ECONOMIC JOURNAL*:

restriction against its own committee members from favoring one candidate over another in a presidential primary allows the inference that the possible consequences of behavior are the type committee members wish to avoid (i.e., impropriety, collusion, and corruption) because these actions chip away at the integrity still present in politics.<sup>187</sup> The idea that voters expect fair and unimpeded elections is given additional weight by the fact the pending class action against the DNC and Wasserman Schultz was filed by members of the Democratic party. However, for the reasons immediately discussed below, this is not the best solution to this problem.

### C. *Issues in Wilding*

The court granted the DNC's motion to dismiss due to the plaintiff's lack of standing.<sup>188</sup> Aside from this obvious issue, the length of time it took to get a ruling on the motion, as well as the uncertainty as to whether the defendants will be reprimanded for their wrongful behavior, are obvious flaws of the class action approach.<sup>189</sup> Moreover, the lawsuit failed to deter current members of both party's committees from behaving in a similar fashion.<sup>190</sup>

As pointed out in the defendants' motion to dismiss, there are clear deficiencies with the plaintiffs' complaint.<sup>191</sup> For instance, a lack of "standing" is cause for immediate dismissal, with which the court ultimately agreed.<sup>192</sup> Even assuming the court found standing, the complaint would likely still be dismissed due to its failure to adequately state claims for which relief could be granted.<sup>193</sup> Since the motion to dismiss was granted, the plaintiffs will receive no justice for their injuries. More importantly, the

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APPLIED ECONOMICS 1(2): 35, 35 (2009) (asserting "citizens learn about politics and government from the [media]").

187. See The Charter of the Democratic Party, *supra* note 3, at pmb1. (stating "we pledge ourselves to open, honest endeavor and to the conduct of public affairs in a manner worthy of a society of free people.").

188. David Weigel, *Florida Judge Dismisses Fraud Lawsuit Against DNC*, THE WASH. POST (Aug. 25, 2017), [www.washingtonpost.com/news/powerpost/wp/2017/08/25/florida-judge-dismisses-fraud-lawsuit-against-dnc/?utm\\_term=.30dc15f4b660](http://www.washingtonpost.com/news/powerpost/wp/2017/08/25/florida-judge-dismisses-fraud-lawsuit-against-dnc/?utm_term=.30dc15f4b660).

189. See Wilding Complaint, *supra* note 95, at 39 (showing complaint filed on July 13, 2016).

190. See discussion *infra* Section IV.C.

191. DNC Motion to Dismiss, *supra* note 100, at 4-12.

192. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotation marks and citation omitted) (holding that to establish standing the plaintiff must demonstrate (1) he has suffered "a concrete and particularized" injury, (2) that is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party [who is] not before the court," and (3) "likely . . . will be redressed by a favorable [judicial] decision").

193. Fed. R. Civ. P. 12(b)(6).

defendants, unfortunately, will walk away scot free. Thus providing no deterrence for politicians similar behavior in the future. Neither of the solutions proposed in part IV will face issues like those that were present in the class action complaint.<sup>194</sup>

Evidenced by the motion to dismiss being granted, the two proposals introduced below nevertheless are better solutions to the problem at the heart of this Comment. The class action, even though it was unsuccessful, in no way deters future similar behavior by members of party committees. The plaintiffs were seeking both compensatory and punitive damages.<sup>195</sup> However, money is not an issue for the deep pockets of political parties. Compensating the plaintiffs for their campaign donations, as well as paying punitive damages, very well may be a price parties are willing to pay if it means their preferred candidate is elevated to the General Election. Further, identifying who was injured and quantifying the value of the specific injuries for purposes of damages seems difficult, if not impossible. To solve these issues, a big picture, long term approach is needed. Hence, the proposals introduced and explained below.

#### IV. PROPOSAL

If there is a silver lining to the 2016 election season, it is the fact that citizens have now been made aware of the lack of integrity in the U.S. political arena. The DNC email leak brought to light what many citizens believed for some time - that at times, outside influences erode the fairness of elections.<sup>196</sup> This corruption must be eliminated. This section provides two alternative remedies depending on how courts label political parties moving forward. If the judiciary believes a political party to be a private association, fiduciary duties from the corporate context provide guidance on how to rectify a breach of those duties. On the other hand, if the courts believe political parties to be quasi-governmental actors, historic vote dilution claims provide the insight on how to deal with a party affecting the integrity of elections by undermining certain votes.

##### *A. The Fiduciary Duties of a Committee Member*

If political party committees are deemed to be private associations, the law should impose the same duties of loyalty and care on committee members that are imposed on corporate directors. As shown in section III.A, national committee members hold positions in their respective parties with similar

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194. See discussion *infra* part IV.

195. Wilding Complaint, *supra* note 95, at 38.

196. See 75% in U.S. See *Widespread Government Corruption*, GALLUP WORLD POLL (Sept. 19, 2015), [www.gallup.com/poll/185759/widespread-government-corruption.aspx](http://www.gallup.com/poll/185759/widespread-government-corruption.aspx) (finding “the percentage of U.S. adults who see corruption as pervasive has never been less than a majority in the past decade”).



responsibilities and duties to those of a corporate director.<sup>197</sup> Committee members are given power over the interests of voters, i.e., fair elections and policy ideologies expressed in party platforms. This relationship exposes voters to potential abuse by the committee members,<sup>198</sup> as evinced by the DNC email leak. Therefore, the law should impose on party committee members the fiduciary duties of loyalty and care so that they act in the interest of the *entire* party. The imposition of these duties would protect voters from abuse at the hands of their own party.<sup>199</sup> Further, imposing these duties will discourage committee members from acting in ways that may leave them open to liability, ultimately, contributing to the goal of promoting integrity in politics.

In the business of politics, situations will undoubtedly arise where the duty of loyalty is at issue. A fiduciary breaches his duty of loyalty when he fails to advance the best interest(s) of the corporation or fails to act in good faith.<sup>200</sup> Both political parties and voters have an interest in fair and unimpeded elections.<sup>201</sup> Therefore, party committee members should always put the voters' interests ahead of their own underlying interests.<sup>202</sup> If they are found to breach this duty by failing to do so, they will be liable for monetary damages. These damages will be deposited into an account used to help fund annual investigations, by a neutral third-party, into the specific party committee's actions. These investigations are geared towards promoting political party transparency.

Assuming committee members breach these duties, the available remedy is the shareholder derivative action, commonly used in the corporate context. "A derivative suit involves a shareholder of the corporation, acting nominally on behalf of that corporation, generally suing the directors . . . for mismanagement."<sup>203</sup> In a derivative suit, the corporation is suing itself.<sup>204</sup> Thus, in situations where a committee member's actions damage the reputation of the entire party, a voter would sue a committee member on behalf of that party. Damages will be decided on a case-by-case basis, depending on several factors. Those include, but are not limited to, the severity of the behavior at issue.

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197. See discussion *supra* Section III.A (highlighting the similarities between the roles of corporate directors and party committee members).

198. See Julian Velasco, *Fiduciary Duties and Fiduciary Outs*, 21 GEO. MASON L. REV. 157, 159 (2013) (stating those in fiduciary relationships are vulnerable to abuse).

199. *Id.*

200. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (2006).

201. See authority cited *supra* note 183.

202. See *supra* text accompanying note 52.

203. John D. Hughes, Gregory D. Pendleton, Jonathan Toren, *Shareholder Derivative Litigation A Primer for Insurance Coverage Counsel and Other Lawyers, Too*, 42 BRIEF 18, 19 (2013).

204. *Id.* at 20.

To provide committee members some protection, they will be afforded a defense analogous to the business judgment rule. “The business judgment rule shields directors from personal liability if, upon review, the court concludes the directors’ decision can be attributed to any rational business purpose.”<sup>205</sup> Committee members will be presumed to have acted in “good faith and in the honest belief that the action taken was in the best interests of the [party].”<sup>206</sup> This rule will prevent courts from “imposing unreasonably on the business and affairs of a [political party].”<sup>207</sup> In practice, if committee members make an honest mistake of judgment, they will not be personally liable.<sup>208</sup> This rule will place the burden of demonstrating bad faith on the voters challenging said action.<sup>209</sup> To rebut this rule, the voters must establish evidence that the committee member breached the duty of loyalty or care.<sup>210</sup>

### *B. A Reformulated Vote Dilution Claim*

On the other hand, if parties are viewed as quasi-governmental actors, state legislatures should implement a uniform statute banning all behavior by political parties, through their committee members, that is done with the intention of manipulating an election. The effects of a party breaking its own rules are different than the effects vote dilution tactics once had on the right to vote.<sup>211</sup> Notwithstanding this difference, these effects are dangerous and demand immediate attention. The right to vote is arguably a citizen’s most important right, and when intentional behavior infringes on it in any way, that behavior must be prevented.<sup>212</sup>

To succeed in bringing a claim under this statute, plaintiffs must provide clear and convincing evidence that the political party committee and/or specific committee member was *purposefully* or *knowingly* attempting to undermine certain votes and/or influence the election to benefit one candidate at the expense of another.<sup>213</sup>

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205. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1374 (Del. 1984).

206. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); *see Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989) (opining “the presumption initially attaches to a director-approved transaction . . . in the absence of any evidence of fraud, bad faith, or self-dealing . . .”).

207. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993).

208. *Unitrin, Inc.*, 651 A.2d at 1374.

209. *Moran v. Household Int’l, Inc.*, 490 A.2d 1059, 1074 (Del. Ch. 1985).

210. *Cede & Co.*, 634 A.2d at 361.

211. *See* discussion *supra* Section III.B (highlighting the differences between a party breaking its own rules and vote dilution tactics, such as the actors involved and the ability to quantify effects).

212. *See Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (proclaiming no right is more “precious” than the right to vote).

213. *See* MODEL PENAL CODE § 2.02(2)(a), General Requirements of Culpability (2016) (declaring a person acts purposely when “it is his conscious object to engage in conduct of that nature”); *see* MODEL PENAL CODE § 2.02(2)(b),

Empty accusations and allegations with no corroborating evidence will be cause for dismissal. Further, proving the required state of mind is necessary for a successful claim. A party's behavior will not be found to violate this statute if it is reckless or negligent.<sup>214</sup>

However, if the evidence provided is sufficient to allow a reasonable observer to conclude that the party had such intent, the claim will succeed. There need not be proof of any actual effects on the result of a primary election for two reasons. First, the appearance of impropriety is sufficient because it would be all but impossible to quantify these effects.<sup>215</sup> Second, the overall purpose of the statute is to dissuade a party's committee members from acting this way. Thus, allowing a committee member to hide behind the defense that ultimately "nothing happened," as they did in the class action, essentially takes the teeth out of this proposed statute.

If a party is found to violate the statute, the person(s) responsible will be required to step down from their position, and face up to a two-year ban from serving in said party's committee. These consequences are justified in order to deter others from engaging in similar behavior as well as to dissuade the same committee member from behaving similarly in the future.<sup>216</sup>

Undoubtedly, political parties will argue that the statute is unconstitutional by infringing on their right of association. However, this statute most likely will pass even the strictest judicial scrutiny, known as strict scrutiny.<sup>217</sup> Although the right of association is a fundamental right, governments have a compelling interest to guarantee that all votes are given the same weight and

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General Requirements of Culpability (2016) (declaring a person acts knowingly when "he is aware that his conduct is of that nature or that such circumstances exist").

214. See MODEL PENAL CODE § 2.02(2)(c), General Requirements of Culpability (2016) (stating a person acts recklessly when he "consciously disregards a substantial and unjustifiable risk"); see MODEL PENAL CODE § 2.02(2)(d), General Requirements of Culpability (2016) (stating a person acts negligently "when he should be aware of a substantial and unjustifiable risk").

215. See TOKAJL, *supra* note 16, at 69 (stating outside of malapportionment it is difficult to quantify ways that votes may be diluted).

216. See Kyron Huigens, *On Commonplace Punishment Theory*, 2005 U. CHI. LEGAL F. 437, 439 (2005) (finding "there are many conceivable ends, or aims, of punishment" including deterrence).

217. See *United States v. Carolene Prods.*, 304 U.S. 144, n. 4 (1938) (opining "there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments . . ."); see Adam Winkler, *Fatal In Theory and Strict In Fact: An Empirical Analysis of Strict Scrutiny In the Federal Courts*, 59 VAND. L. REV. 793, 868 (2006) (stating "Supreme Court has suggested that laws burdening . . . freedom of association are capable of overcoming strict scrutiny"). *But see id.* (finding "courts consistently ruled against laws that restricted the associational rights of political parties"). *But see, e.g., Arizona Libertarian Party v. Bayless*, 351 F.3d 1277, 1281 (9th Cir. 2003) (invalidating state law imposing a semi-closed primary on parties).

that elections are fair.<sup>218</sup> Further, it is narrowly tailored by only banning behavior that is done knowingly and with a purpose.

### *C. The Above Proposals' Advantages Over Wilding*

The imposition of fiduciary duties on committee members may take some time to generate the ideal deterrent effect, most likely one successful derivative action. However, once a party committee is found guilty for breach of fiduciary duty and consequently ordered to pay into the investigatory fund, committee members will clearly understand what is acceptable and what is not. Once this initial suit transpires, committee members will be on notice and deterred from behaving in a similar fashion to that of the DNC in the 2016 presidential primaries. This deterrence is ideal because the unavoidable length of time inherent in litigation will be completely avoided. Additionally, with the big picture in mind, depositing the damages into the investigatory fund promotes political transparency in a way the class action is unable to do.

Similarly, the proposed state statute is better than a class action because the statute's punishments are geared towards the individuals responsible. For instance, instead of being ordered to pay monetary damages, the responsible party will be forced to step down from their position and will become banned for a specific amount of time. Avoiding all the problems associated with damages, i.e. the inability to quantify, and the fact that a party may be willing to pay those damages if it means their candidate moves forward, is also better than the relief requested in the class action lawsuit. The dismissed class action does not have the same deterrent effect as the statute. It allows defendants to continue this behavior while the litigation is pending. By the time any verdict comes down, if at all, the guilty party will be indifferent to the results.

These proposed solutions are focused on deterring future behavior similar to that of the DNC's during the 2016 presidential primaries as a result of the difficulty courts have in rectifying "damages" once they have transpired. As acknowledged, these solutions will take time to initially gain traction. However, once they do, they will deter the sort of behavior that is Comment is centered around.

## V. CONCLUSION

Regardless of one's views on the 2016 election season, it cannot be denied that sensitive, yet important issues were, and still are,

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218. See Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 939 (1988) (stating the obligation of equality might serve as the justification for a compelling governmental interest).

being brought to citizens' attention. Particularly, citizens are very aware of the lack of integrity in our elections. Most recently, for example, Commenters have accused Russia of attempting to influence the outcome of the presidential election between President Donald Trump and Secretary Hillary Clinton. This Comment does not deal with situations similar to the Russian hacks. It does, however, aim to deal with situations where fellow Americans in positions of power attempt to erode the integrity of America's political system.

Courts have made clear that individuals possess no fundamental right to run for office or to be a party's candidate in an election.<sup>219</sup> Moreover, an individual as a result essentially has no right to express his beliefs as the presidential candidate for a political party<sup>220</sup> or to associate with an "unwilling partner."<sup>221</sup> In no way do the individual rights of a candidate running for office outweigh the rights of political parties.<sup>222</sup> Therefore, anyone that finds themselves in a situation similar to Senator Sanders during the 2016 Democratic primaries may be out of luck due to courts' historical reluctance to interfere in intra-party controversies.<sup>223</sup> However, courts should interfere when a party undermines the United States democracy and infringes on its constituents' rights to vote.

All voters, regardless of political affiliation or view, want to eliminate instances similar to the one brought to light by the DNC email leak. Voters want to feel like their vote is as important as their neighbors. In addition, courts recognize the importance of the right to vote as evidenced by the measures taken, highlighted in sections II and III, to protect it. Nonetheless, we still have behavior affecting that right and inherently, our entire political system. This allows many to question the legitimacy of our democracy. Hence, the proposals introduced in section IV, above.

This Comment attempts to emphasize the fact that our political system needs refurbishing. The proposed solutions in this Comment may not suffice, but those in positions of power, like the heads of political party national committees, must be held accountable for actions that erode the integrity present in our political system. If we want to see real change and accountability, it is no longer enough to allow those responsible to step-down from these positions unscathed. The powerful, for once, need to face real consequences, for accountability breeds not only responsibility but most importantly authenticity within our political processes.

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219. *Batko v. Sayreville Democratic Org.*, 373 N.J.Super. 93, 95 (Super. Ct. App. 2004) (opining, "[t]here is no fundamental right to run for office or to be a party's candidate for an election.").

220. *Duke v. Massey*, 87 F.3d 1226, 1234 (11th Cir. 1996).

221. *Id.*

222. *Id.* at 1232-33.

223. *O'Brien v. Brown*, 409 U.S. 1, 4-5 (1972).



