

The (Dunkin’) Donut Hole: Fixing the LLC Loophole in State Campaign Finance Laws—A New Hampshire Exemplar

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INTRODUCTION

In the morning hours of November 9, 2016, as Americans woke up to the groggy realization that reality TV celebrity and real estate magnate Donald Trump had been elected the forty-fifth President of the United States, news networks began calling a lingering but important Senate race in New Hampshire. Democratic candidate Maggie Hassan defeated Republican rising star, incumbent Senator Kelly Ayotte by a razor-thin margin.¹ Hassan, a popular two-term governor, had ascended to the state’s chief executive office out of the New Hampshire Senate in 2012.² In winning that 2012 gubernatorial race—which established her as a national-level politician and the natural challenger to Ayotte in 2016—Hassan overcame massive flows of direct campaign contributions to her opponent sourced through limited liability companies (LLCs), such as Dunkin’ Donuts, Planet Fitness, and a large local real estate firm, all using

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1. James Pindell, *With Hassan Win, N.H. Turns Another Shade Blue*, BOS. GLOBE (Nov. 9, 2016), <https://www.bostonglobe.com/metro/2016/11/09/hassan-claims-victory-senate-race/TXJ3qdxlYbwzZi8X8GCCuK/story.html>.

2. Drew Gingrich, *Profile: New Hampshire Gov.-Elect Maggie Hassan*, USA TODAY (Nov. 7, 2012), <https://www.usatoday.com/story/news/politics/2012/11/07/hassan-new-hampshire-governor-profile/1690055/>.

a subtle gap found in particular state campaign finance laws known as the “LLC loophole.”³ The race to succeed her in 2016 would prove even more tempting to the big donors.⁴

As Hassan moved to the United States Senate, her corner office in Concord was won by a close margin by Republican Executive Councilor Chris Sununu.⁵ Ten days out from the election, Sununu received maximum contributions from seventeen LLCs sourced to the same address at DEKK Group, LLC, the Massachusetts parent company of a number of Dunkin’ Donuts franchises.⁶ Sununu’s opponent, Democrat and fellow Executive Councilor Colin Van Ostern, received contributions from LLCs belonging to the Brady Sullivan real estate conglomerate, which had previously been directing monies to dispatched Republican candidate and Manchester Mayor Ted Gatsas before his primary defeat.⁷ The Gatsas campaign was particularly fond of loophole-driven fundraising, having funneled in over a quarter of a million dollars from LLCs during the primaries.⁸ Direct contributions from LLCs across all New Hampshire gubernatorial candidates in 2016 reached over \$450,000, easily outpacing 2012.⁹ If this web of direct contribution money appears confusing, that’s because it is—and it’s completely legal.

New Hampshire’s campaign finance laws permit direct contributions to gubernatorial candidates from individuals or corporations of up to \$7,000 per campaign cycle.¹⁰ However, no state campaign finance statutes discuss, define, or even mention LLCs.¹¹ Each LLC is its own individual donor for the purpose of direct campaign contributions, regardless of who controls it. Thus, a wealthy individual can max out the \$7,000 direct

3. Brian Wallstin, *Gov. Candidate Kevin Smith Collects on LLC Loophole*, NHPR (Aug. 24, 2012), <http://nhpr.org/post/gov-candidate-kevin-smith-collects-llc-loophole> [https://perma.cc/97NZ-6273].

4. Brian Wallstin, *Loophole and Connections Help Gatsas Raise Big Dollars for Governor’s Race*, NHPR (Sept. 1, 2016), <http://nhpr.org/post/loophole-and-connections-help-gatsas-raise-big-dollars-governors-race> [https://perma.cc/9HQ2-CKRC].

5. Governor Chris Sununu is the youngest son of former New Hampshire Governor (and Chief of Staff to President George H.W. Bush) John Sununu. See Amy Coven, *Sununu Defeats Van Ostern in Close Governor’s Race*, WMUR (Nov. 9, 2016), <http://www.wmur.com/article/van-ostern-sununu-vying-to-become-new-hampshires-next-governor/8257824> [https://perma.cc/HV8X-6WUD].

6. Kathy Sullivan, *The Doughnut Hole in NH Campaign Finance Laws*, N.H. UNION LEADER (Jan. 17, 2017), <http://www.unionleader.com/Kathy-Sullivan-The-doughnut-hole-in-NH-campaign-finance-laws-01172017>.

7. See *id.*

8. See Wallstin, *supra* note 4.

9. *Id.*

10. See N.H. REV. STAT. ANN. § 664:4 (2017) (stating that candidates for governor may accept contributions up to \$5,000 from individuals before the June filing date, and an additional \$1,000 after the filing date for the primary election and for the general election, totaling \$7,000 over the election cycle).

11. Chapter 664 has no language on LLCs. See generally *id.*

contribution to his or her preferred candidate through every LLC under his or her control, limited only by imagination and the ability to set up as many LLCs as legally feasible.¹² A rich and resourceful person could disperse funds directly into the campaign coffers of a preferred candidate without limit—some have.¹³

The LLC loophole is hardly a feature unique to New Hampshire's campaign finance laws. New York, America's third-largest state economy and home to the world's most powerful financial nexus, permits maximum individual direct contributions of \$65,000 to statewide candidates¹⁴—and it has the same loophole.¹⁵ Democrat Andrew Cuomo won the state's 2010 and 2014 gubernatorial campaigns, and among his largest contributors was a real estate giant that used the LLC loophole to legally funnel millions in direct contributions to Cuomo and others through nearly twenty affiliated LLCs.¹⁶ That's not quite the \$27 donation that politicians like to tout on the campaign trail as evidence of virtuous citizen participation in representative democracy.¹⁷ All told, this loophole exists in the campaign finance laws of half a dozen states, encompassing a population of over 50 million Americans.¹⁸

This ought to be concerning to every American with an interest in fair elections and good government. Much of the national conversation over the 2016 presidential election revolved around anger regarding the influence of big money in politics, the dominance of elites in policy-making, and the appropriate safeguards of both elections and the right to vote. President Trump himself spent a significant portion of his victorious

12. Jay Surdukowski, *How to Spend \$1 Million in NH Politics*, N.H. BUS. REV. (Jan. 31, 2017), <http://www.nhbr.com/February-17-2017/How-to-spend-1-million-in-NH-politics/> [https://perma.cc/4MSD-9K6W].

13. See, e.g., Theodor Meyer, *Cuomo Has Raised Millions Through Loophole He Pledged to Close*, PROPUBLICA (June 13, 2014), <https://www.propublica.org/article/cuomo-has-raised-millions-through-loophole-he-pledged-to-close> [https://perma.cc/5EVG-MRTJ].

14. N.Y. BD. OF ELECTIONS, 2016 CONTRIBUTION LIMITS 1, 2 (2016), <https://www.elections.ny.gov/NYSBOE/Finance/2016ContributionLimits.pdf>.

15. N.Y. ELEC. LAW § 14-114 (McKinney 2017); see also Editorial, *New York's Big Money Loophole*, N.Y. TIMES, July 20, 2015, at A26.

16. Meyer, *supra* note 13.

17. Throughout the 2016 presidential primary cycle, Senator Bernie Sanders notably and repeatedly used a talking point about the average donation to his campaign being \$27 to contrast the small donors and regular people supporting his campaign with the high-dollar contributors and corporations backing other candidates, particularly former Secretary of State Hillary Clinton. See generally Philip Bump, *Bernie Sanders Keeps Saying His Average Donation Is \$27, But His Own Numbers Contradict That*, WASH. POST (Apr. 18, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/04/18/bernie-sanders-keeps-saying-his-average-donation-is-27-but-it-really-isnt/?utm_term=.ba1249495732.

18. See U.S. Census Bureau, *Annual Estimates of Resident Population: April 1, 2010 to July 1, 2017*, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bk mk> (last visited June 3, 2018).

campaign alleging that the elections were rigged against him by moneyed elites and powerful political adherents of the Washington status quo.¹⁹

Untangling the contempt many Americans feel for the various proclaimed corrupting influences in politics will be an arduous process for our system of government and our broader society. What to do about it all is a question that yields many answers, even more questions, and little consensus. How do we find agreement among contending interests in establishing the appropriate maximum contribution a citizen should be able to donate to his or her preferred candidate or ballot initiative? There is no one *right* answer. What about voter identification laws? Or the *Citizens United* decision—should the First Amendment protect the money spent on political speech or should a constitutional amendment be passed to overrule that decision?²⁰ What about the Electoral College? Term limits? More daunting still, how do we come up with a way to formally tackle these questions and reform our politics with bipartisan, comprehensive solutions?

If resolving these many dilemmas will be a heavy lift for our society at large and for the men and women our republic formally tasks with broaching these questions, then they are certainly outside the scope of this Note. The purpose contained within is rather to point a flashlight at one obvious manifestation of unfairness in a poorly lit warehouse of state campaign finance laws and to propose a solution.

The LLC loophole would seem to break Otto von Bismarck's oft-quoted axiom that "politics is the art of the possible." Closing the LLC loophole is not just possible—it would be great politics. It would reinforce norms of fairness in our elections and, practically speaking, be a relatively simple legislative fix of campaign finance statutes. There is a veritable *menu* of options available to legislators in states that have the loophole but have not seriously attempted to close it.

Ultimately, closing the loophole is a question of fairness. Many argue that the amount of money candidates can receive is objectionable. Whether a candidate or a campaign ought to be able to accept millions, if not billions, of dollars in campaign contributions is not the focus of this Note. Neither is whether an individual ought to be permitted to give \$100 or \$100,000 as a direct contribution. What is precisely intended is a proposal to eradicate the effect of laws, or rather loopholes in laws, that allow

19. See, e.g., Niraj Chokshi, *Trump Accuses Clinton of Guiding Global Elite Against U.S. Working Class*, N.Y. TIMES (Oct. 13, 2016), <https://www.nytimes.com/2016/10/14/us/politics/trump-comments-linked-to-antisemitism.html?mtrref=www.google.com>; Linda Qiu, *Donald Trump's Baseless Claims About the Election Being 'Rigged'*, POLITIFACT (Aug. 15, 2016 3:01 PM), <http://www.politifact.com/truth-o-meter/statements/2016/aug/15/donald-trump/donald-trumps-baseless-claims-about-election-being/> [<https://perma.cc/RMP9-DM5B>].

20. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 314 (2010).

enterprising individuals to evade the intent of state legislatures in determining fair contribution limits, above which an individual shall not go, whether that individual is a natural person or a corporate entity.²¹

Part I of this Note reviews the mechanics of the LLC loophole and its prevalence around the country and then examines the legal and political circumstances of loopholes in New York and Washington, D.C. New York's loophole is the highest profile case, and efforts to close the loophole are ongoing. D.C., however, successfully closed its LLC loophole. The D.C. City Council employed "affiliated entities" language in new statutes to ensure that contributions are sourced to their ultimate hand regardless of the business entities used to distribute the campaign cash.²²

Part II of this Note focuses in on New Hampshire's unique circumstances for closing its LLC loophole. Why look at New Hampshire as a case study? It is a small state with porous campaign finance laws, large corporate players that pour money into state races, and a strange and gigantic citizen legislature. It also plays an outsized role in national politics due to its first-in-the-nation presidential primary and will be the site of many speeches railing against money in politics starting early next year, as democratic candidates begin their diner-to-diner slog toward the January 2020 primary. The state is particularly well suited for a bipartisan solution to the LLC loophole that may provide a blueprint for bipartisan reform in the remaining states. The loophole has become well known to key political insiders in the state (including some who want to close it), and its exploitation has been rampant in recent gubernatorial races.²³ Democrats lobbed the first salvo at the loophole in the form of a Senate Bill in January of 2017, but the legislation garnered only one Republican vote and was killed in a procedural maneuver in February.²⁴ Part II further reviews the current relevant statutes and aforementioned legislative effort, weighs the methods employed in other states for correcting the LLC

21. Other types of "LLC loopholes" that afflict campaign finance laws in other states should not be confused with the sort at issue here. These will not be explored in this Note, but they are worth mentioning to distinguish from the issue here. In Iowa, for example, corporations avoid total state bans on corporate contributions by registering subsidiary LLCs. Sarah G. Raaii, *A Penny for Your Votes: Eliminating Corporate Contribution Bans and Promoting Disclosure After Citizens United*, 100 IOWA L. REV. 1357, 1369 (2015). In Delaware, laws protecting LLC anonymity keep huge contributions of hidden origin flowing into campaigns in New York, which is plagued by the LLC loophole at issue here. Chris Bragg, *Delaware LLC Laws Allow Anonymous Donors to Pour Cash into New York Races*, ALBANY TIMES UNION (Apr. 30, 2016), <http://www.timesunion.com/tuplus-local/article/Secret-refuge-for-dark-money-7385988.php> [https://perma.cc/H62X-W8FX].

22. See D.C. CODE §§ 1-1161.01, 1-1163.33 (2018).

23. See Wallstin, *supra* note 3; Wallstin, *supra* note 4.

24. John DiStaso, *NH Senate Votes to Require Political Advocacy Groups to Register, Report Expenditures*, WMUR (Feb. 23, 2017), <http://www.wmur.com/article/nh-senate-votes-to-require-political-advocacy-groups-to-register-report-expenditures/8973997> [https://perma.cc/RU4B-Y7C7].

loophole, and culminates in a legislative proposal for closing New Hampshire's loophole.

Part III broadens the lens to discuss the legal and political circumstances implicated in any attempt to close the LLC loophole—in New Hampshire and other states around the country. While fixes are not necessarily difficult from a statutory perspective, powerful national forces push a laissez-faire approach to campaign finance motivated by corporate interests but anchored in First Amendment doctrine.²⁵ There is a reason that even tepid followers of national politics know the words “*Citizens United*.” This should be of great concern to advocates of campaign finance reform. One of the few unifying features of government criticism across the left–right divide in recent years is condemnation of the undue influence of money in politics.

I. THE MECHANICS AND PREVALENCE OF LLC LOOPHOLES

Fixing the LLC loophole for New Hampshire or any other state requires an understanding of what statutory gaps were created in campaign finance regulatory schemes when creating LLCs came into vogue without their effect being accounted for by state legislatures. The various ways that the federal and state governments have adapted (or not) have left signposts as to how states actively looking to close this loophole could proceed.

A. Federal Election Law

Federal election law does not include an LLC loophole. It bans direct corporate contributions to candidates for federal office but permits contributions from individual persons, LLCs, and partnerships.²⁶ Federal election regulations define an LLC as a “business entity that is recognized as a limited liability company under the laws of the State in which it is established.”²⁷ Each LLC is thus not a corporation under federal or state law but its own legal entity for the purposes of making a contribution. This is where the statutory contribution rules regarding LLCs end in states with the loophole.²⁸

Federal regulations, however, prevent any loophole within that same section.²⁹ Under federal law, a person cannot donate to a candidate in amounts aggregating over a contribution index limit for each federal

25. See Michael Beckel, *Supreme Court Gives Corporations, Unions Power to Spend Unlimited Sums on Political Messaging*, CTR. FOR RESPONSIVE POL. (Jan. 21, 2010), <https://www.opensecrets.org/news/2010/01/supreme-court-gives-corporatio/> [https://perma.cc/D55M-EYGT].

26. 11 C.F.R. § 114.2(a) (2018).

27. *Id.* § 110.1(g)(1).

28. See N.H. REV. STAT. ANN. § 664:4 (2017).

29. See 11 C.F.R. § 110.1 (2018).

office.³⁰ How an LLC chooses to be classified by the Internal Revenue Service—as a partnership, as a corporation, or as an individual person—determines how its contributions are treated.³¹ Since federal law bans corporate contributions, it leaves LLCs with two options. First, for LLCs made up of only one person, contributions will be attributed to that person.³² When making the contribution, the LLC is bound to “provide information to the recipient committee as to how the contribution is to be attributed, and affirm to the recipient committee that it is eligible to make the contribution.”³³ Accordingly, “A contribution by an LLC that elects to be treated as a partnership by the Internal Revenue Service . . . or does not elect treatment as either a partnership or a corporation pursuant to that section, shall be considered a contribution from a partnership.”³⁴ Under the second option, if the LLC files with the IRS as a partnership, its contributions get attributed to the partnership itself *and* to its members in the proportion of their profit-share from the LLC “according to instructions which shall be provided by the partnership to the political committee or candidate” or “by agreement of the partners.”³⁵ A scheming person could use the partnership classification to, in effect, flout the individual limit, but it would require the participation of the LLC’s fellow members and would still be capped at double the contribution limit minus the profit-share of the other members.³⁶

Because of these added rules, federal law bears no LLC loophole. Contributions get attributed back to the source individual, even if they are divided up among the LLC’s members. However, one can envision how state legislatures would not wholesale import the federal scheme limiting business influence into their own codes, many of which have aggressively partisan political climates. Twenty-two states have total bans on corporate

30. *Id.* §§ 110.1(b)(1), 110.17.

31. *Id.* § 110.1(g)(2)–(4).

32. *Id.* § 110.1(g)(5).

33. *Id.*

34. *Id.* § 110.1(g)(2).

35. *Id.* § 110.1(e)(1)–(2).

36. An LLC owner intent on maximizing their legal contribution could first contribute the maximum amount through his or her LLC. If the maximum contribution is \$2,500, and the LLC contributed that amount, it would have to be directly attributed to the LLC member who contributed it or attributed to the membership in accordance with their profit shares from the LLC. By the latter method, if the original donor only had a 20% profit share, only \$500 would be attributed to the donor despite that he or she had paid the full contribution made on behalf of the LLC. The donor could then contribute an additional \$2,000, as only \$500 had thus far been attributed to the donor. With a 20% share in the LLC, a donor could feasibly contribute \$4,500 through the LLC and in his or her individual capacity. Such maneuvering is complicated but possible.

contributions or partnership contributions.³⁷ Over a dozen states have no individual contribution limits whatsoever,³⁸ meaning there is no need for a wealthy contributor to filter money through LLCs.

B. *Loopholes Across America*

LLCs are formed and registered under state laws, and they are not difficult to organize. Filing fees, often as little as \$100, vary from state to state, and there is an entire online industry dedicated to quick registration, with some merchants advertising assistance and LLC formation in ten minutes.³⁹ Few websites require more than a name, address, and some form of organizational document. Some states, like New Hampshire, require that the LLC's "certificate of formation shall set forth the nature of the primary business or the purpose" of the new entity with the caveat that it can freely change to serve any other lawful purpose.⁴⁰ Other jurisdictions consider a statement of the business purpose of the LLC to be an optional component of formation.⁴¹ Any individual with significant business assets could set up multiple LLCs in a very short period of time. In states with the loophole, each LLC can contribute the maximum contribution to a preferred candidate.⁴² Thus, owners of expansive businesses have this bonus democratic right built in to their businesses, and they can exploit it with ease. As the 2014 Cuomo campaign demonstrated in New York, this scheme can be manipulated to an astronomical effect.⁴³

As discussed, New York and New Hampshire are not the only states with this LLC loophole style. Colorado, Florida, South Carolina, and Vermont also have this gap in their campaign finance statutes. Colorado's loophole has been in effect for decades—partisan bickering kept it alive despite attempts to close it in 2006 and 2007.⁴⁴ Florida's LLC loophole remains just one of a myriad of the state's campaign finance concerns, and

37. See NAT'L CONFERENCE OF STATE LEGISLATURES, STATE LIMITS ON CONTRIBUTIONS TO CANDIDATES (2016), <http://www.ncsl.org/Portals/1/documents/legismgt/elect/ContributionLimitstoCandidates2015-2016.pdf> [<https://perma.cc/AF5R-2XW2>].

38. See *id.*

39. See, e.g., SWYFT FILINGS, *File an LLC Online Today in as Little as 10 Minutes*, https://www.swyftfilings.com/sem/filellc/fileanllc?gclid=EAIaIQobChMI8LWak6LM2wIVj8JkCh2nig1BEAAYBCAAEgKF9_D_BwE [<https://perma.cc/KMK3-T6U4>].

40. N.H. REV. STAT. ANN. § 304-C:31(c) (2017).

41. See, e.g., D.C. CODE §§ 29-801.07, 29-802.01 (2018); N.Y. LTD. LIAB. CO. LAW § 203(e)(7) (McKinney 2017).

42. See Surdukowski, *supra* note 12.

43. See Meyer, *supra* note 13.

44. Renee Davis, *Amended Campaign Finance Bill Falls Short*, COLO. COMMUNITY MEDIA (Apr. 4, 2007), <http://coloradocommunitymedia.com/stories/Green-Amended-campaign-finance-bill-falls-short,36704> [<https://perma.cc/TUB5-B9QN>].

there has been little discussion about closing it.⁴⁵ In South Carolina, lawmakers have made no movement toward closing the loophole either.⁴⁶ The loophole appeared in Vermont's local papers in early 2016 when a gubernatorial candidate spoke of the issue, but legislators have yet to take any action.⁴⁷

1. Potential Hurdles to Closing LLC Loopholes

The principal obstacles to closing the loophole are awareness and political will, not legal authority. Two other jurisdictions—Maryland and D.C.—successfully voted to close their loopholes in 2013 by amending their campaign finance statutes through legislation in the Maryland State Legislature and the D.C. City Council, respectively.⁴⁸ Neither Maryland nor D.C. has had the validity of their legislative action challenged in court.⁴⁹ Any such suit would likely be thrown out very quickly. In the 2010 *Citizens United* decision, the United States Supreme Court said that regulating direct candidate contributions from corporate and partnership-like entities served an important government interest in preventing corruption and that states were permitted to ban such contributions.⁵⁰

Accordingly, LLCs are not likely to be differentiated from their fellow business entities for the purposes of campaign finance regulation. In 2012, the Supreme Court declined to review a challenge to a city ordinance that expanded a corporate contribution ban to LLCs (as well as partnerships and limited liability partnerships).⁵¹ The Second Circuit

45. Lucas Daprile, *Loopholes Pump Limit-Skirting, Hard-to-Track Money into State Races*, TCPALM (Jan. 28, 2016), <http://www.tcpalm.com/news/politics/local/loopholes-pump-limit-skirting-hard-to-track-money-into-state-races—24743fd5-39f4-662d-e053-0100007f-365914871.html> [https://perma.cc/F87A-4AD2].

46. Paul Bowers, *Donations from Duplicate Addresses Pour into Mayoral Race*, CHARLESTON CITY PAPER (Apr. 30, 2015), <http://www.charlestoncitypaper.com/TheBattery/archives/2015/04/30/donations-from-duplicate-addresses-pour-into-mayoral-race> [https://perma.cc/SKZ8-S2K4].

47. Neal P. Goswami, *Dunne Shuns Corporate Funds*, BARRE MONTPELIER TIMES ARGUS (Mar. 11, 2016), <https://www.timesargus.com/articles/dunne-shuns-corporate-funds/> [https://perma.cc/Y76G-PHM7].

48. See Mike DeBonis, *Campaign Finance Reform Bill Heads Toward D.C. Council Vote*, WASH. POST (Oct. 17, 2013), <https://www.washingtonpost.com/blogs/mike-debonis/wp/2013/10/17/campaign-finance-reform-bill-heads-toward-d-c-council-vote> [https://perma.cc/LP53-64GQ]; Michael Dresser, *Campaign Finance Loophole May Be Plugged*, BALT. SUN (Feb. 7, 2013), http://articles.baltimoresun.com/2013-02-07/news/bs-md-campaign-finance-20130207_1_john-properties-loophole-state-board [https://perma.cc/C76J-NRGJ].

49. See Martin Austerhuhle, *As Campaign Cash Loophole Closes, DC Businesses Give Big*, WAMU (Feb. 10, 2015), http://wamu.org/news/15/02/05/as_campaign_cash_loophole_closes_dc_businesses_rush_to_give_big [https://perma.cc/RNA3-CL3W]; Editorial, *A Rare Win for Good Government in Annapolis*, BALT. SUN (Apr. 15, 2013, 6:00 AM), <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-campaign-money-20130415-story.html>.

50. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010).

51. *Ognibene v. Parkes*, 671 F.3d 174, 195–97 (2d Cir. 2011), *cert. denied* 567 U.S. 935 (2012).

concluded that a local restriction on LLCs served an important government purpose and did not violate the First Amendment. The Second Circuit held that

legal distinctions between these entities and corporations do not make them less of a threat of corruption or circumvention. For the reasons that justify the corporate contribution prohibition, therefore, the legislature permissibly determined that there is no room in City campaigns for entity contributions. While limits may minimize circumvention and the appearance of corruption, the City is free to decide that these evils must be eliminated to ensure the public's faith in the electorate system.⁵²

The legal distinction between an LLC and a corporation does not equate to a difference in how direct candidate contributions from such entities affect transparency or undue influence in elections. Cities and states are free to decide if contributions from particular entities are in line with their values.

On solid legal ground, a state legislature attempting to close the LLC loophole need only look to the practical statutory schemes already in place. The federal scheme described at the beginning of this section is a model in theory, but the relevant sections of the federal election law were designed with no LLC loophole.⁵³ Maryland and D.C. remain the only state governments to have closed an existing LLC loophole, while the bipartisan gravy train provided by the loophole in New York has slowed the ongoing efforts to follow suit.⁵⁴

2. Maryland Reform

Maryland's legislature took action in 2013, passing an omnibus election and campaign finance reform bill that closed its LLC loophole.⁵⁵ Maryland law already prevented corporations from using their subsidiary corporations as separate contributors, and the new legislation broadened the scope of the rule to capture LLCs by banning separate contributions to the same candidate from affiliated "business entities."⁵⁶ Under the new law, contributions are "considered as being made by one contributor if: (i) one business entity is a wholly owned subsidiary of another; or (ii) the

52. *Id.* at 197–98.

53. 11 C.F.R. § 110.1(g) (2018).

54. Wayne Barrett, *The Multi-Million-Dollar Payoff: How New York's Most Powerful Politicians Use the LLC Loophole to Rake In Money Hand Over Fist from Many of the State's Most Powerful Business Interests*, N.Y. DAILY NEWS (June 5, 2016), <http://www.nydailynews.com/opinion/wayne-barrett-multi-million-dollar-payoff-article-1.2660439>.

55. See Editorial, *supra* note 49.

56. See *id.*

business entities are owned or controlled by at least 80% of the same individuals or business entities.”⁵⁷ This amendment prevents a person or business from setting up LLCs purely for dispersing campaign funds beyond Maryland’s \$6,000 limit, as LLCs are now explicitly listed among the “business entities” defined by the new law.⁵⁸

Maryland’s reform does not apply where the controlling company does not share eighty percent of the same ownership.⁵⁹ It is difficult to ascertain how much wiggle room this leaves a determined contributor, but legislative behavior in the 2016 session indicates that there is still an intent to fully seal the loophole. Maryland House Democrats introduced a bill to remove the text of the 2013 reform and replace it with a total ban on affiliated “business entities” making contributions, but the bill stalled out.⁶⁰

B. *The Divergent Cases of New York and Washington, D.C.*

Part II of this Note will apply the lessons of this section to the distinct situation in New Hampshire. The most useful cases to review for any New Hampshire legislator looking to close the LLC loophole are New York and D.C., where one can view a complicated and ongoing closure attempt (New York) as well as a clean and complete sealing of the loophole (D.C.).

1. New York

In New York, a 1996 state Board of Elections ruling created the LLC loophole by mandating that LLCs were to be treated like individuals who can donate the maximum contribution to a particular candidate in a statewide race.⁶¹ The mandate completely distinguished them from other business entities like corporations and partnerships, and thus, LLCs were not subject to the limits or prohibitions that applied to other business entities.⁶² In the last two years, the governor, the legislature, and a lawsuit all attacked the state’s LLC loophole. The lawsuit was dismissed in early 2016.⁶³ The Assembly passed legislation that would, like Maryland, stifle

57. MD. CODE ANN., ELEC. LAW § 13-226(e) (West 2018).

58. *Id.* § 13-226(e)(1).

59. Editorial, *supra* note 49.

60. H.B. 297, 159th Gen. Assemb., 436th Sess. (Md. 2016); *Maryland House Bill 297*, LEGISCAN, <https://legiscan.com/MD/bill/HB297/2016> [<https://perma.cc/BH2R-NZFB>].

61. N.Y. BD. OF ELECTIONS, *1996 Opinion #1*, in FORMAL OPINIONS 1974-PRESENT (Jan. 30, 1996), <http://www.elections.ny.gov/NYSBOE/download/law/Opinions11202015.pdf> [<https://perma.cc/548Z-6L8G>].

62. *Id.*

63. Chris Bragg, *Appeal “Very Likely” of LLC Loophole Case Dismissal*, TIMES UNION (Mar. 17, 2016, 4:41 PM), <http://blog.timesunion.com/capitol/archives/247227/appeal-of-llc-loophole-case-dismissal-very-likely/> [<https://perma.cc/MA6L-UELQ>].

but not seal the loophole; however, it failed to make it out of the Senate before the 2016 session ended.⁶⁴

The 2016 bill that came out of the Assembly would have classified LLCs like partnerships,⁶⁵ meaning an LLC could contribute up to \$2,500 without having to attribute contributions to its ownership or membership. For larger contributions, the aggregated total would “be attributed to each partner or limited liability company member whose share of the contribution exceeds ninety-nine dollars.”⁶⁶

The New York Assembly’s proposed reform would have degraded exploitations of the loophole by cutting the amount LLCs can give without properly attributing the contribution by a whopping ninety-six percent. Given the enormous advertising costs political campaigns face in the New York media market,⁶⁷ such reform would have a significant effect. While he has no doubt been the greatest beneficiary, Governor Cuomo has repeatedly reintroduced the legislation, but thus far he has yet to carry it near the finish line.⁶⁸

In spite of his legislative efforts, Governor Cuomo has since intimated that a constitutional convention might be necessary to close the loophole,⁶⁹ though a more recent discussion of an omnibus ethics bill again included talk of trying to close the loophole.⁷⁰ New York remains the only state with an open LLC loophole that has seen both consistent press attention to the problem and some popular support for fixing it.

64. Patricia Fahy, *End-of-Session Thoughts and Recap*, TIMES UNION (June 27, 2016), <http://blog.timesunion.com/fahy/end-of-session-thoughts-and-recap/281/> [https://perma.cc/PS2N-EJXC]. The appeal was ultimately unsuccessful, with the New York appellate court upholding the dismissal earlier this year. Chris Bragg, *Appeal to End 'LLC loophole' Is Rejected*, TIMES UNION (Mar. 29, 2018), <https://www.timesunion.com/news/article/Appeal-to-end-LLC-loophole-is-rejected-12791004.php> [https://perma.cc/GD5V-9D86].

65. A.B. 7870, 148th Gen. Assemb., Reg. Sess. (N.Y. 2016).

66. *Id.*

67. See Maggie Aland, *Local & National TV Advertising Costs & How to Advertise*, FITSMALLBUSINESS.COM (Nov. 28, 2017), <https://fitsmallbusiness.com/tv-advertising/> [https://perma.cc/BJ24-QX3C]; Felix Richter, *New York is the World's Media Capital*, STATISTA (Mar. 11, 2015), <https://www.statista.com/chart/3299/new-york-is-the-worlds-media-capital/> [https://perma.cc/299Y-45PS].

68. Lisa Foderaro, *On Ethics, Cuomo Budget Entered Like a Lion and Emerged Like a Lamb*, N.Y. TIMES (Apr. 11, 2017), https://www.nytimes.com/2017/04/11/nyregion/on-ethics-cuomo-budget-entered-like-a-lion-and-emerged-like-a-lamb.html?_r=0.

69. David Howard King, *Cuomo Appears to Give Up on Legislature Closing LLC Loophole*, GOTHAM GAZETTE (June 22, 2016), <http://www.gothamgazette.com/index.php/state/6409-cuomo-appears-to-give-up-on-legislature-closing-llc-loophole> [https://perma.cc/C8FZ-XKEM].

70. *Governor Pushes Ethics Reform, Again*, NYPIRG (Nov. 7, 2016), <https://www.nypirg.org/capitolperspective/governor-pushes-ethics-reform-again/> [https://perma.cc/6V8J-WSDH].

2. Washington, D.C.

While New York's legislature has sputtered on the issue, the D.C. City Council approved the country's most comprehensive legislation to close an LLC loophole. The city's 2013 electoral reform bill defined "affiliated entities" of businesses and prohibited contributions between such entities from exceeding the individual limit.⁷¹

D.C.'s new laws do not explicitly name LLCs among what its code broadly calls "business entities."⁷² However, LLC's are considered an "affiliated entity" and are subject to the prohibition on contribution limits.⁷³ Entities are considered to be affiliated if "(A) [o]ne of the entities controls the other; or (B) [t]he entities share a controller, whether that controller is another entity or an individual."⁷⁴ The bill also defines "[b]usiness contributor(s)" as "a business entity making a contribution and all of that entity's affiliated entities."⁷⁵

The specific language in the bill that sealed the loophole mandated that "[a] business contributor shall certify for each contribution that it makes that no affiliated entities have contributed an amount that when aggregated with the business contributor's contribution would exceed the limits imposed by this chapter."⁷⁶ Enforcement and oversight authority is delegated to D.C.'s Office of Campaign Finance; business contributors must provide the office identities and information about affiliated entities.⁷⁷

The law went into effect in 2015.⁷⁸ Only three years old, its precise impact going forward will have to be studied. However, if business reaction to the new rules is a reasonable measure, the Council appears to have accomplished its goal. Before the law took effect, business contributors piled in cash to preferred candidates through their assorted LLCs to exploit the loophole for one last hurrah.⁷⁹

One could extrapolate from the varied approaches to closing the LLC loophole that there are creative means to do so beyond the methods employed by the governments that have done so or have tried. However, if reform-minded state legislators could choose any plan to stymie the

71. See D.C. CODE §§ 1-1161.01, 1-1163.33 (2018).

72. *Id.* § 1-1161.01(4).

73. See *id.* §§ 1-1161.01, 1-1163.33.

74. *Id.* § 1-1161.01(2A).

75. *Id.* § 1-1161.01(4A).

76. *Id.* § 1-1163.33(b).

77. *Id.* § 1-1163.13(b)(2)–(3).

78. See Martin Austerhuhle, *As Campaign Cash Loophole Closes, DC Business Give Big*, WAMU (Feb. 10, 2015), http://wamu.org/news/15/02/05/as_campaign_cash_loophole_closes_dc_businesses_rush_to_give_big [<https://perma.cc/BKB2-922D>].

79. *Id.*

wealthy donors who currently exploit the loophole, the D.C. model is the most complete and feasibly the simplest to graft on to existing campaign finance statutes.

II. CLOSING NEW HAMPSHIRE'S LLC LOOPHOLE

New Hampshire's small size, uniquely citizen-driven government, and relatively balanced partisan climate make it a better test case for bipartisan reform than states with intractable (New York) or ignored (Florida) LLC loopholes. In New Hampshire's recent gubernatorial election cycle, now-Governor Sununu was the beneficiary of several LLC contributors, including seventeen maximum contributions (totaling \$119,000) from Dunkin' Donuts franchises.⁸⁰ Prior to his general election matchup with Van Ostern (who himself benefitted, albeit more modestly, from an LLC network), Sununu defeated three primary rivals, including Mayor Gatsas, who had vastly out raised him in the Republican primaries.⁸¹ While Sununu had a significant proportion of his contributions directed to him through LLCs, Gatsas had been the preferred candidate of area elites—over a quarter of his fundraising haul came from LLCs.⁸² The 2016 involvement of a few mega-donors, like the DEKK owner of the Dunkin' Donuts franchises and the locally ubiquitous Brady Sullivan real estate firm, outpaced even the 2012 distributions of direct contributions.⁸³

As discussed in Part I, if New Hampshire residents want to close the LLC loophole, they have several blueprints. Washington, D.C.'s reform is by far the most comprehensive and straightforward. New Hampshire's current campaign finance laws are minimalist when compared with other states, and it would not be particularly complicated to graft in the necessary language. Democrats in the State Senate proposed their own fix in January 2017, but it was quickly felled by Senate Republicans.⁸⁴ The models demonstrated by the FEC, Maryland, and New York offer feasible alternatives and potential compromises. New Hampshire's political institutions, however, are very different from the D.C. City Council,⁸⁵ making sweeping reform potentially unpalatable to local business interests

80. Sullivan, *supra* note 6.

81. Ella Nilsen, *Van Ostern, Gatsas Lead in Campaign Cash in N.H. Governor's Race*, CONCORD MONITOR (Aug. 25, 2016), <http://www.concordmonitor.com/NH-gubernatorial-candidates-submit-campaign-finance-reports-4307595> [<https://perma.cc/A4RD-37L8>].

82. Wallstin, *supra* note 4.

83. *See id.*

84. *See* DiStaso, *supra* note 24.

85. *See infra* Part II.B.

and a tactical puzzle for supportive legislators in the partisan minority.⁸⁶ Fortunately for reformers, as long as one citizen with a dozen LLCs can make thirteen maximum contributions, thus exercising political rights unavailable to the vast majority of New Hampshire residents, this issue will not go away.⁸⁷

A. *Structural Changes to the New Hampshire Statutes*

New Hampshire's current campaign finance prohibitions offer little hindrance to eager legislators hoping to fashion a legal closure of the LLC loophole. Chapter 664 of the New Hampshire Statutes governs the field, and its current rules pertaining to contributions are captured in a relatively small number of provisions included therein.⁸⁸ It bans partnership contributions but not corporate contributions.⁸⁹ State courts have not ruled on LLCs and political contributions. New Hampshire's campaign finance statutes include LLCs within the definition of "business organizations," but are otherwise silent on LLCs.⁹⁰ These "[b]usiness organizations" only appear elsewhere in the chapter in the context of either coercion or signatures on political advertising.⁹¹ No legal impediments to closing the LLC loophole appear to obstruct meaningful action.

However, there are practical challenges of note here. As discussed in Part I, Delaware's permissive corporate secrecy laws (which envelope LLCs) are exacerbating the problem in New York. These laws would similarly prevent New Hampshire from ascertaining the affiliations of Delaware LLCs. Any bill introduced in the New Hampshire legislature should include oversight and compliance language to force disclosure of LLC affiliations, as was done in D.C.

The mechanics of reforming New Hampshire's campaign finance statutes are fairly straightforward. Other than the partnership contribution ban,⁹² state law currently imposes no other prohibitions on businesses; LLCs and corporate donors are individuals for the purposes of direct

86. In addition to NHPR and WMUR, two others—attorney Jay Surdukowski and New Hampshire Union Leader columnist and attorney Kathy Sullivan—have published significant written work discussing or critiquing New Hampshire's LLC loophole. See Jay Surdukowski, *Heart of Darkness: New Hampshire Campaign Finance Law Since Citizens United*, 13 U.N.H. L. REV. 215, 243 (2015); Kathy Sullivan, *Gatsas Jumping Through Loopholes as He Runs for Governor*, N.H. UNION LEADER (Sep. 7, 2016), <http://www.unionleader.com/Kathy-Sullivan-Gatsas-jumping-through-loopholes-as-he-runs-for-governor-09082016>; see also, e.g., Wallstin, *supra* note 4; DiStaso, *supra* note 24.

87. Surdukowski, *supra* note 86, at 243.

88. See N.H. REV. STAT. ANN. § 664 (2017).

89. *Id.* § 664:4, II.

90. *Id.*

91. *Id.* § 664:7.

92. *Id.* § 664:2, XVI.

candidate contribution limits.⁹³ The chapter contains no language discussing subsidiaries or other business affiliations. It does ban union-affiliated contributions, but this does not apply to business organizations.⁹⁴ The reform effort spearheaded by State Senator Dan Feltes last year offered a look into the Democratic caucus's view on closing the loophole.⁹⁵ While the New York and federal models are worth weighing as well, it is the D.C. model for reform that offers the most certain and mechanically sound closure of New Hampshire's LLC loophole.

1. The January 2017 Senate Bill

In late January, State Senator Dan Feltes introduced Senate Bill 115 in an attempt to close New Hampshire's LLC loophole by adding a statute to Chapter 664 that would attribute LLC contributions to the owners of LLCs.⁹⁶ The bill itself would have amended Chapter 664:4 to ensure that LLC contributions "be attributed to its members as if the contribution were made by the members."⁹⁷ Under this scheme, an LLC owned by a single person would have a contribution attributed to the owner directly; an LLC with multiple owners would have the contribution allocated proportionally between the members based on their ownership stake.⁹⁸ After a negative recommendation coming out of the elections committee, the bill was quickly deemed "inexpedient to legislate" on February 23, which, in New Hampshire legislative jargon, means it is dead.⁹⁹

Essentially, this proposed reform followed the Maryland model, but with less room for maneuvering by the contributor, as there was no eighty percent threshold for LLCs with multiple members. In principle, this would make it very difficult, but not impossible, for a high-dollar donor to outsize his or her contribution limit. A brief discussion of the political reasons for this bill's death will follow in Part II.B. Mechanically, this model could be pursued again.

2. New York and Federal Models

New Hampshire could opt to follow the proposed New York model. A bill could do this by adopting the proposed New York partnership and LLC language into the New Hampshire statutes applicable only to

93. *Id.* § 664:4.

94. *Id.* § 664:4, III.

95. Sullivan, *supra* note 6.

96. Paige Sutherland, *N.H. Lawmaker Calls Removing 'LLC Loophole' on Campaign Donations a Bipartisan Issue*, NHPR (Jan. 31, 2017), <http://nhpr.org/post/nh-lawmaker-calls-removing-llc-loophole-campaign-donations-bipartisan-issue#stream/0> [<https://perma.cc/3Z48-Y9XL>].

97. S.B. 115, 2017 Gen. Court, Reg. Sess. (N.H. 2017).

98. *Id.*

99. See DiStaso, *supra* note 24.

LLCs.¹⁰⁰ The proposed New York threshold ceiling of \$2,500¹⁰¹ for listing the contributions to individual members of the LLC would be absurd given New Hampshire's comparative individual contribution limit of \$7,000, so a state-specific corresponding threshold would have to be agreed upon by the legislature. Given the relative size difference between maximum contributions in New York and New Hampshire, legislators would have to come to a consensus on setting the appropriate threshold for attributing contributions.

Using the federal model is conceivable but practically difficult. LLCs would be bound by the classification they choose with the IRS. Importing this scheme into Chapter 664 could be complicated, as New Hampshire bans partnership contributions and allows corporate contributions¹⁰²—the inverse of the federal rules. One of the essential features of the federal regulations applicable to LLCs is the ability to use the partnership scheme for attributing contributions on the basis of a partner's profit-share,¹⁰³ which would not translate neatly to LLCs that chose to report as corporations. While mechanically possible, the tax-related scheme involved would likely spell political doom for any fix modeled off the federal scheme.

3. Following the Washington, D.C. Model

The D.C. statutory scheme best captures the intent of legislatures to set individual contribution limits in the first place. Integrating that scheme into New Hampshire's campaign finance laws would be relatively simple. It would require augmenting Chapter 664's Definitions section to add a definition of "affiliated organizations" as "one of the organizations controls the other; or the organizations share a controller, whether that controller is another organization or an individual."¹⁰⁴ As the state already defines business organizations,¹⁰⁵ using "organizations" consistent with how D.C. used "entities" would likely meet the least resistance. A bill would also need to add a "business contributors" definition of "a business organization making a contribution and all of that organization's affiliated organizations."¹⁰⁶

The principal mechanism for closing the loophole could be borrowed from the D.C. statutes and deployed in the form of an addition to the RSA 664:4-c Contributions section: "A business contributor shall certify for

100. *See generally* A. 7870, 2017-2018 Assemb., Reg. Sess. (N.Y. 2016).

101. *Id.*

102. N.H. REV. STAT. ANN. §§ 664:2, 4 (2017).

103. 11 C.F.R. § 110.1(e)(1)–(2) (2018).

104. *See* D.C. CODE § 1-1163.13 (2018).

105. N.H. REV. STAT. ANN. § 664:2 (2017).

106. *See* D.C. CODE § 1-1163.13 (2018).

each contribution that it makes that no affiliated organizations have contributed an amount that when aggregated with the business contributor's contribution would exceed the limits imposed by this chapter."¹⁰⁷ The enforcement and compliance responsibilities given to D.C.'s Office of Campaign Finance could also be delegated to the New Hampshire Secretary of State's Elections Division.¹⁰⁸

D.C.'s reform stands out as a more complete solution against Maryland's similar affiliated business entities scheme or even the scheme employed by Senate Democrats in January. By adopting the Maryland model or reviving the language from the New Hampshire Senate bill, New Hampshire would only shrink rather than seal its LLC loophole. By capping contributions among affiliated entities, D.C. is the only government body that has totally sealed an LLC loophole.¹⁰⁹ Reformers in New Hampshire should take note and follow in stride.

B. New Hampshire has a Unique Political Environment to Push for Reform

Despite the failure of Senate Bill 115 in January, campaign finance reform efforts in New Hampshire have found moderate bipartisan success before and recently. For example, in 2016, new filing requirements were signed into law in the 2016 General Court session to moderate fanfare,¹¹⁰ though the final bill was watered down by partisan politicking.¹¹¹ Still, this law compels candidates for office and political committees to file full reports of contributions and expenditures with the Secretary of State's office at regular intervals.¹¹²

However, other attempts at campaign finance and electoral reform have not been so fortunate.¹¹³ New Hampshire publicly grappled with a different loophole, known pejoratively as the "Hassan loophole," after a 2014 Attorney General Opinion clarified that unlimited cash transfers between political committees prior to the filing date were indeed legal.¹¹⁴ This issue raised much consternation among New Hampshire politicians and

107. *See id.*

108. *Id.* § 1-1163.13(b)(2)-(3).

109. *See generally id.* §§ 1-1161.01, 1-1163.33.

110. Act of June 21, 2016, ch. 270, 2016 N.H. Laws 1; S.B. 458, 2016 Gen. Court, Reg. Sess. (N.H. 2016); *see also* Editorial, *Year-Round Sunlight: Sanborn Bill is a Great Start*, N.H. UNION LEADER (May 10, 2016), <http://www.unionleader.com/Year-round-sunlight-Sanborn-bill-is-a-great-start>.

111. S.B. 458 Docket History, 160th Gen. Court, Reg. Sess. (N.H. 2016).

112. Act of June 21, 2016, ch. 270, 2016 N.H. Laws 1.

113. S.B. 457, 2016 Gen. Court, Reg. Sess. (N.H. 2016).

114. Surdukowski, *supra* note 86, at 233.

the state media, and Hassan used this loophole to help raise funds for her 2014 reelection bid.¹¹⁵

Senate Bill 115, drafted by Democrats, was likely doomed from the start. Incepted barely a few weeks into the new session after Republicans assumed control of both houses of the legislature and the governor's office,¹¹⁶ a more successful approach would have been a bill drafted and sponsored in tandem with multiple Republicans on board. However, such cooperation may well have been unavailable so early in the term, the first in over a decade since the state GOP had last held the governor's office and the legislature.¹¹⁷ It may also have been partisan posturing for the electorate. Despite its failure, one important development came out of the bill's failure: a better understanding of the argument in favor of maintaining the loophole. Specifically, Republican opposition to the bill was based, at least officially, on the bill's discriminatory targeting of LLCs.¹¹⁸

Broadly, New Hampshire has a unique political environment. It has a bizarre, enormous, citizen-run legislature. While its Senate is composed of only twenty-four members, the New Hampshire Constitution provides its lower house with up to 400 state representatives.¹¹⁹ This makes its House of Representatives the fourth largest elected legislative body in the English-speaking world behind the House of Commons, the United States House of Representatives, and the Parliament of India.¹²⁰ It is essentially a volunteer body, with its members collecting \$100 annual salaries.¹²¹ The level of talent and seriousness varies significantly—within its Republican caucus during the last session, representatives ranged from a thoughtful millionaire entrepreneur, who finished a close second in the gubernatorial primary,¹²² down to a squalid opportunist and Trump surrogate who

115. Brian Wallstin & Brady Carlson, *Republicans Accuse Hassan Of Taking Illegal Campaign Contributions*, NHPR (July 17, 2014), <http://nhpr.org/post/republicans-accuse-hassan-taking-illegal-campaign-contributions#stream/0> [<https://perma.cc/K5GK-H925>].

116. See generally Allie Morris, *GOP Sweeps N.H. House and Senate: 'Beautiful Day to Be a Republican'*, CONCORD MONITOR (Nov. 9, 2016), <http://www.concordmonitor.com/republicans-sweep-into-state-office-maintaining-control-of-senate-house-5919154> [<https://perma.cc/7GD7-8ZNG>].

117. Democrats John Lynch (four terms) and Maggie Hassan (two terms) had consecutively occupied the governorship since January 2005.

118. DiStaso, *supra* note 24.

119. N.H. CONST. art. XV., pt. II.

120. New Hampshire Almanac, *State Government Overview*, NH.gov, <https://www.nh.gov/nhinfo/stgovt.html> [<https://perma.cc/F54M-VD3M>].

121. N.H. CONST. art. XV., pt. II.

122. Allie Morris, *Capital Beat: What was Behind Frank Edelblut's Surprise Finish?*, CONCORD MONITOR (Sept. 20, 2016), <http://www.concordmonitor.com/how-did-Frank-Edelblut-squeak-out-an-unexpected-second-finish-in-NH-governor-race-4760735> [<https://perma.cc/T8MR-TWUB>].

repeatedly and unapologetically called for Secretary Clinton to be executed in the national press.¹²³

New Hampshire is also a small state with fewer than 1.5 million residents,¹²⁴ and \$7,000 buys a lot more advertising time there than in New York.¹²⁵ When top gubernatorial candidates head into the primaries with roughly \$1 million raised, several hundred thousand dollars aggregated from a handful of donors is a significant advantage if others are playing by the spirit of the rules rather than exploiting the loophole.¹²⁶ New Hampshire also holds an outsized influence in national politics. Its first-in-the-nation primaries bring national politicians to the state to chat with voters and bend the ear of local politicians.¹²⁷ Additionally, the state's voters score exceptionally high in voter power indices—fewer than 3,000 votes, the closest margin of the fifty states, determined the allocation of four electoral votes that have been decisive before.¹²⁸ In 2000, if 4,000 New Hampshire voters who pulled the lever for George Bush had instead voted for Al Gore, Florida's famous recount would not have mattered.¹²⁹

In a nutshell, New Hampshire could play a significant or leading role in closing the LLC loophole for 50 million Americans around the country. Chapter 664 offers a fairly open canvas for a statutory fix, and D.C.-style reform could easily be written into its campaign finance laws. It also is a small state where elections can be impacted by a few hundred thousand dollars entering the race from a small group of interested parties. Unlike Maryland and D.C., New Hampshire does not have Democratic supermajorities in its legislative bodies.¹³⁰ The State's political situation is

123. Jim O'Sullivan, *Trump Advisor says Clinton Should Be 'Shot for Treason'*, BOST. GLOBE (Jul. 20, 2016), <https://www.bostonglobe.com/metro/2016/07/20/trump-adviser-says-clinton-should-shot-for-treason/KiPEX1qqH7DCtKF6GNZhQK/story.html>.

124. *Quick Facts: New Hampshire*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/NH> [<https://perma.cc/FAK9-BLGC>].

125. See generally Aland, *supra* note 67.

126. Over three-quarters of the LLC contributions to gubernatorial candidates went to the three Republican candidates out of the six total candidates fundraising in the gubernatorial race. See Wallstin, *supra* note 4.

127. See generally Lindsey Cook, *Why New Hampshire Matters in Presidential Elections*, U.S. NEWS & WORLD REPORT (Feb. 2, 2016), <https://www.usnews.com/news/blogs/data-mine/2016/02/02/why-new-hampshire-matters-in-presidential-elections>.

128. Nate Silver, *Election Update: Watch New Hampshire For Signs Of A Trump Comeback*, FIVETHIRTYEIGHT (Oct. 14, 2016), <http://fivethirtyeight.com/features/election-update-watch-new-hampshire-for-signs-of-a-trump-comeback> [<https://perma.cc/5E5P-8E5Y>].

129. *2000 Official Presidential General Election Results*, FED. ELECTION COMMISSION, <http://www.fec.gov/pubrec/2000presgeresults.htm> [<https://perma.cc/7CMF-SG3J>].

130. In Maryland, Democrats held 33 of the 47 seats in the senate and 91 of 141 seats in the house after the 2014 elections; in D.C., a Republican has not held a city council seat since the last Republican councilor lost her seat in 2008. See Jonathan O'Connell, *Carol Schwartz, Patrick Mara Lose D.C. Council Race*, WASH. BUS. J. (Nov. 5, 2008), <https://www.bizjournals.com/washington/>

such that some sustained noise could draw its citizen legislature to take up the cause in a bipartisan fashion. With no action on the loophole in the 2018 legislative session, the spring of 2019 offers the next opportunity to publicly put questions about campaign finance reform directly to the parade of fresh presidential candidates while a campaign finance bill is introduced in the legislature. This scenario becomes all the more tempting if Andrew Cuomo decides to run. All of this leads into the final question: how do politics affect the likelihood of reforming the LLC loophole, in New Hampshire or anywhere else?

III. THE BROADER POLITICS OF CLOSING THE LLC LOOPHOLE

The political challenges to closing LLC loopholes do not neatly line up along partisan lines, though it must be acknowledged that, broadly, campaign finance reform is more commonly being stifled from the political right, and that is true of this issue as well.

A. *Bipartisan Apathy and Exploitation*

In New Hampshire, both parties have fundraised from LLCs, though the disparity in 2016 was tremendous.¹³¹ Not all of the LLCs that have contributed are vessels for wealthy donors to exploit the loophole and pile in cash, but some are.¹³² Ted Gatsas, for example, had the Brady Sullivan real estate firm dispatching funds in full force during the Republican primary, but the local rainmakers switched party allegiance after Gatsas bowed out and funded Chris Sununu's Democratic opponent.¹³³ Four years ago, as noted, Dunkin' Donuts and Planet Fitness took a vested interest in trying to defeat Maggie Hassan.¹³⁴

Beyond the LLC loophole, other campaign finance reforms have been urged by both major parties, though often in opposition to political opponents. Republicans filed the complaint with the Attorney General that spurred the "Hassan loophole" opinion,¹³⁵ and Democrats pushed the aforementioned new disclosure requirements to go on offense against Republicans in 2016.¹³⁶ It is ultimately apparent that there is room to maneuver in this space, and bipartisan action is difficult but possible.

stories/2008/11/03/daily52.html [https://perma.cc/7BF7-ZLSW]; *Maryland General Assembly*, BALLOTEDIA, https://ballotpedia.org/Maryland_General_Assembly [https://perma.cc/LVY8-2A3P].

131. Wallstin, *supra* note 4.

132. See Sullivan, *supra* note 6.

133. Wallstin, *supra* note 4.

134. Wallstin, *supra* note 3.

135. Letter from Joseph Foster, N.H. Attorney General, to Jennifer Horn, N.H. Republican State Committee Chairman (Aug. 1, 2014), <http://www.doj.nh.gov/media-center/press-releases/2014/documents/20140801-jennifer-horn-letter.pdf> [https://perma.cc/JK3S-T7PD].

136. Act of June 21, 2016, ch. 270, 2016 N.H. Laws 1.

New York also demonstrates the contending interests involved. Governor Cuomo has been the loudest voice for closing New York's LLC loophole, but he has also been its biggest benefactor.¹³⁷ Reform in the legislature over the last two sessions was largely put down by Republican opposition in the State Senate.¹³⁸ New York's financial sector is one of the few major fundraising centers for state Republicans,¹³⁹ so cutting off the loophole further cuts into their fundraising strength in the heavily Democratic state. The many Democrats who exploited the loophole also stood to gain little by fighting for the bill. Above partisan lines, enacting a rule that allows incumbents with connections to exploit those connections will favor those already in office, and reform presents a conflict of interests. Even though the Democratic Party dominates Maryland and Washington, D.C., closing the loophole was a slog that took years to come to fruition.

The other four states with open LLC loopholes run the gamut geographically and politically. Colorado is the only one of the four to have moved towards closing the LLC loophole. A decade ago, a push was made to eliminate it, but it was killed, first by a Governor's veto¹⁴⁰ and then again by the legislature in a subsequent effort.¹⁴¹ In Florida, Governor Rick Scott and his allies have been handsomely rewarded by the loophole in their campaigns, and no serious effort has been undertaken.¹⁴² The same can be said of South Carolina, where former Governor Nikki Haley and others benefitted from the generosity of a handful of big players with expansive business networks.¹⁴³ Strongly left-wing Vermont also has the loophole, but virtually nobody is talking about it.¹⁴⁴ Pressure to exploit or keep these loopholes intact has an apparent rightward bend, but it is bipartisan to be sure.

137. Meyer, *supra* note 13.

138. Chris Bragg, *Squadron: Senate GOP Again Bends Rules to Kill 'LLC loophole' Bill*, TIMES UNION (May 28, 2015), <http://blog.timesunion.com/capitol/archives/236098/squadron-senate-gop-again-bends-rules-to-kill-llc-loophole-bill> [<https://perma.cc/6MZP-R6C4>].

139. See generally Tom Kertscher, *Jim DeMint Says Wall Street Gives Much More to Democrats Than Republicans*, POLITIFACT (Apr. 16, 2014), <http://www.politifact.com/wisconsin/statements/2014/apr/16/jim-demint/not-many-times-more-democrats-sometimes-do-raise-m/> [<https://perma.cc/K6JJ-ULNX>].

140. Andrew Oh-Willeke, "LLCs" Governor Owens' Favorite Loophole, COLO. INDEP. (Aug. 22, 2006), <http://www.coloradoindependent.com/465/llcs-governor-owens-favorite-loophole> [<https://perma.cc/9F8A-6HA3>].

141. Davis, *supra* note 44.

142. Daprile, *supra* note 45.

143. Jeremy Borden, *Donors in Governor's Race Using Loophole*, POST & COURIER (Oct. 16, 2014), http://www.postandcourier.com/politics/donors-in-governor-s-race-using-loophole/article_f8cd95c0-d3db-52b0-a25d-04c944609937.html [<https://perma.cc/83T7-CMAB>].

144. See Goswami, *supra* note 47.

B. *Ascendency of Money-in-Politics as a Bipartisan Issue*

The real political driver of campaign finance reform writ large will be its prominence in popular consciousness about the outsized influence of money in politics. The rise of political candidates Senator Bernie Sanders and President Donald Trump pulled back the veil on the tremendous disdain a significant portion of the U.S. has for moneyed elites and the politicians they fund. The high-dollar fundraising superiority of traditional Republican primary candidates like Governor Jeb Bush or Democratic Nominee Secretary Hillary Clinton was woefully insufficient to propel them over the top and actually served as a bludgeon for their opponents who painted them as subordinates of the cosmopolitan or financial elite.¹⁴⁵ With the national tide on this issue potentially lifting all boats, campaign finance has the potential to become a national bipartisan issue. President Trump's turbulent first year in office has given rise to broad questions about emoluments, conflicts of interest, and nepotism.¹⁴⁶ These developments could weaken headwinds to reform. A push to close the LLC loophole in states afflicted with it could benefit from such a trend, but states pursuing reform and fulfilling their democracy-lab responsibilities could also create regional and ultimately national currents that help propel the broader conversation on campaign finance.

C. *Law and Politics in Citizens United*

No discussion of the political climate surrounding a campaign finance reform issue would be complete without noting *Citizens United*. A common lamentation of the political left, it has unleashed a torrent of money into American election cycles.¹⁴⁷ However, a constitutional amendment to nullify it is extraordinarily unlikely, and any hope for that proposition looks like false hope. The good news for reform is both that the political animus it inspires is very real, and—more pertinently—the language of the decision itself identifies the regulation of direct

145. Michael Beckel, *Elite 'Bundlers' Raise More than \$113 Million for Hillary Clinton*, CTR. FOR PUB. INTEGRITY (Sept. 23, 2016), <https://www.publicintegrity.org/2016/09/23/20254/elite-bundlers-raise-more-113-million-hillary-clinton> [https://perma.cc/53RS-UZW3].

146. See Aaron Blake, *Jared Kushner Is Showing Us Exactly Why Anti-Nepotism Laws Exist*, WASH. POST (Feb. 21, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/02/21/jared-kushner-is-showing-us-exactly-why-anti-nepotism-laws-exist/?utm_term=.a4294ee8f660; Sharon LaFraniere, *Lawsuit Over Trump's Ties to His Businesses Is Allowed to Advance*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/28/us/trump-emoluments-lawsuit.html>.

147. See, e.g., Robert G. Boatright, Michael J. Malbin & Brendan Glavin, *Independent Expenditures in Congressional Primaries After Citizens United: Implications for Interest Groups, Incumbents and Political Parties*, 5 INT. GROUPS & ADVOC. 119 (2016).

contributions as entirely appropriate and able to stand up to the First Amendment scrutiny that the case is known for.¹⁴⁸

The plaintiffs had challenged an element of federal election law that required that “televised electioneering communications funded by anyone other than a candidate” but explicitly intended to aid that candidate “must include a disclaimer” declaring said candidate be “responsible for the content of this advertising.”¹⁴⁹ Compelled disclosure does not offend the First Amendment because the sufficient government interest in getting the voters this information is great enough to meet the exacting scrutiny standard in play.¹⁵⁰ This traces back to the Court’s articulation of the principle in *Buckley v. Valeo*, when it distinguished direct contributions from independent expenditures and the sufficient government interest in preventing corruption or the appearance of it under strict scrutiny.¹⁵¹ Justice Kennedy restated that the principle lives on unmolested by the decision.¹⁵²

Even in the Court’s most vilified take on campaign finance and the protection the First Amendment offers to money entering the electoral-political fray, the Court reasserted the principle that direct contributions have a corrupting effect that governments can regulate.¹⁵³ Closing the LLC loophole fits perfectly within this narrative. This is about clean government. It is about direct gifts in enormous sums given outside the scope of what was intended by right for the individual citizen. It is about fighting corruption. A bipartisan win is no good politician’s enemy, and an easy fix that adds a little more fairness to elections could be low-hanging fruit in this climate for an ambitious young legislator in Colorado, Florida, or New Hampshire.

D. *A Moral Imperative*

Mechanically, closing LLC loopholes are easy fixes—the statutes are not particularly complicated, and there are numerous models to follow, ranging from the absolute to the compromise, so state governments have the opportunity to flesh these issues out with the political opposition and the public to find their best fit. But allowing these loopholes to perpetuate and continue to stain state elections is also a moral failing. As long as these loopholes remain open, residents of the at issue live under campaign finance regimes where the wealthiest citizens can flout the intent of

148. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 366 (2010).

149. *Id.*; 2 U.S.C. § 441d(d)(2) (2012).

150. *Citizens United*, 558 U.S. at 367.

151. *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976).

152. *Citizens United*, 558 U.S. at 436.

153. *Id.* at 348.

legislatures and contribute exorbitantly beyond what the average citizen may legally contribute. It is essential that concerned legislators take action to accomplish what they can.

The unique opportunity to close LLC loopholes amidst a national consciousness trending towards political reform makes acting on this issue a moral imperative for anyone who thinks it ought to be closed. Among the questions about how to reform American politics posed in the introduction of this note, none have answers as overwhelmingly obvious as what ought to be done with LLC loopholes. Should error and neglect in state laws exploited exclusively by moneyed elites be rectified? It does not take long to mull that over.

As this Note has detailed, many states' campaign finance codes are riddled with loopholes affording a variety of ways that enterprising campaigns can accept and spend money beyond intended limits and mischievous donors can legally purchase a louder, more influential voice in a state race.¹⁵⁴ Some states have no limits on the amount an individual can contribute to a state race.¹⁵⁵ The state level is where reform is most needed and most likely to be accomplished. Where there are glaring holes in law creating unfairness and exploitation in the financing of political campaigns, state executives, legislators, and concerned citizens ought to take decisive action to fix the problem.

Closing the LLC loophole is a question of curbing legal but ethically dubious political activity. When questioned by a reporter, the Gatsas campaign in New Hampshire remarked that the candidate was simply following the law by which all the candidates were bound.¹⁵⁶ Of course, when the question is about the exploitation of a loophole in the law that binds them, such a response is hardly satisfying or reflective of good judgment or character. The politics of the day are sympathetic to rhetoric or efforts dedicated to restoring confidence in the fairness of politics and society, and whether that is among our gravest concerns. Those who wish to see this loophole closed in their state should not waste this opportunity.

CONCLUSION

This Note is about a fairly simple problem with a fairly simple solution. To the average American, positing that wealthy individuals and enterprises ought to be able to flout the will of the people and assert greater rights in making political contributions sounds absurd—but that is precisely what schematic errors and neglect in campaign finance laws have

154. See, e.g., *supra* notes 44–47.

155. See, e.g., ALA. CODE §§ 17-5-1–21 (2017); IND. CODE § 3-9-2-4 (2017); VA. CODE § 24.2-945 (2017).

156. Wallstin, *supra* note 4.

done. Candidates for high state office should not be smurfing maximum contributions from Dunkin' Donuts franchises and similarly crafted conglomerations of LLCs to flagrantly avoid New Hampshire's contribution limit. Governor Cuomo should not be able to rake in millions using the LLC loophole while pushing campaign finance reform with a straight face.

There are solutions—D.C. and Maryland have found the first ones—and it best serves other states suffering this statutory deficiency to follow suit. Several models exist, and there are likely other ways to creatively deal with this problem that have not been reviewed or suggested here. New Hampshire Senate Democrats took up the issue right away, and while they failed, this should not dissuade them from maintaining the pressure on their Republican colleagues for reform. If there is one thing they could learn from New York, it is how to keep this issue relevant in the halls of government and in the press.

Ultimately, this Note argues that New Hampshire is uniquely suited among the states with this loophole to take decisive action on this and preserve a little more confidence in government than its citizens will have had the day before. A myriad of questions surround how to best manage our politics at the national, state, and local levels. Very few have easy answers—this one does. Fixing the LLC loophole is no panacea, but perhaps a small victory can start a trend. If any unifying result could come out of the results of November 8, 2016, it could well be a pushback against the sordid business of financing our politics.