PUBLISH OR PERISH: THE NEW YORK LIMITED LIABILITY COMPANY LAW PUBLICATION REQUIREMENT

THE FUNDAMENTAL FLAW OF AN OTHERWISE FLAWLESS LAW

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I.
INTRODUCTION

The Limited Liability Company ("LLC") is a business entity of recent inception in New York.[1] Since its inception, it has gradually become the state's most popular limited liability entity. The LLC's enabling statute, the New York Limited Liability Company Law,[2] was enacted primarily in response to a na-

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1. New York enacted its Limited Liability Company Law nearly two decades after the birth of the Limited Liability Company. The first Limited Liability Company statute was enacted in Wyoming in 1977. *See* WYO. STAT. ANN. § 17-15-101 (2004). Each state, in addition to the District of Columbia, now has a Limited Liability Company law. To date, the most popular jurisdiction for organizing an LLC is Delaware. Memorandum from Cheryl Wyatt, Department of State of the State of Delaware (March 26, 2004) (disclosing that in 2003 a total of 55,903 limited liability companies were formed in the State of Delaware) (on file with Journal) [hereinafter *Wyatt Memorandum*]. *See also* DEL. CODE ANN. tit. 6, § 18-101 (2004); Robert W. Wood, GUIDE TO LIMITED LIABILITY COMPANIES ¶ 103 [hereinafter *Guide to LLCs*]. For a table of each state statute, its citation and state income tax classification, *see, id.* at Appendix A. *See also* Mark A. Sargent and Walter D. Schwidetzky, LIMITED LIABILITY COMPANY HANDBOOK § 1:2 [hereinafter *LLC Handbook*].

2. N.Y. Ltd. Liab. Co. Law §§ 101-1403 (2004) [hereinafter *NYLLCL or Act*]. The Act was enacted on July 26, 1994 and made effective October 24, 1994. In addition to enabling the formation of domestic LLCs, it authorizes foreign limited liability companies to conduct business in New York State. *See id.* § 801–09. *See also infra* Section XIII. Furthermore, the Act permits the formation of domestic professional service LLCs and the operation of for-

tionwide trend towards the promotion of capital formation and commercial activity among small business limited liability enterprises.[3] The state's main objective was to accommodate the practical needs of small business owners by affording them the managerial flexibility and favorable tax benefits of the partnership, while also providing the conventional limited liability protection of the corporation.[4]

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eign professional service limited liability companies. *See id.* §§ 1201-1216, 1301-1309. Each of the foregoing entities is subject to the Limited Liability Company Law Publication Requirement. *See id.* §§ 206, 802(b), 1203(c)(2), 1306(d).

3. Advocates of the Act were concerned New York might lose its competitive edge in small business enterprise and development without its enactment. KARON S. WALKER ET AL., NEW YORK LIMITED LIABILITY COMPANIES AND PARTNERSHIPS: A GUIDE TO LAW AND PRACTICE § 1:2 (2002) [hereinafter *Walker on NY LLCs*]. When the Act was enacted, it was perceived as having the potential to spur vast new business and planning opportunities for New York's varied commercial interests. *Id.* at ix. At the time the Act was passed, a total of 46 states including the District of Columbia had already enacted statutes authorizing the formation of limited liability companies. *Id.* § 1:1. *See also* Bruce A. Rich, *Practice Commentaries* to N.Y. L.L.C. Law, 3-4 (2003) [hereinafter *Rich's LLC Practice Commentary*] (reporting that New York joined with substantially all of the other states in offering business entities the option of forming and operating as a limited liability company). At present, each state now has a law permitting the formation of LLCs. *Guide to LLCs, supra* note 1, ¶ 103. *See also* ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW § 3.02 (2003) [hereinafter *Pinto & Branson*] (explaining limited liability protection is pivotal to the formation of small businesses and consequently the development of capital formation, and that legislators perceive substantial benefits accrue from promoting small business limited liability entities). *See infra* Section IV.

4. *See generally* Bill Summary, A06001, An Act to Amend the Limited Liability Company Law In Relation to Publication Requirements, Amd. S1306, Ltd. Liab. L. (February 22, 2004) at 2 (identifying the purpose of the Act as assisting and encouraging the growth of small business in New York State) [hereinafter *Proposed Amendment to Act*]. The author of the leading treatise on the NY LLC has described its benefits as follows:

> The hybrid corporate and partnership characteristics that define an LLC more often than not make it the entity of choice for new businesses, joint ventures, restructurings, and the like. Owners of an LLC have both limited liability and the benefits of pass-through taxation, with none of the restrictions affecting Subchapter S corporations or limited partnerships. They can address ownership, management, economic and operational issues. . . without fear of losing their advantageous tax treatment.

Walker on NY LLCs, supra note 3, at ix. *See also id.* § 1:2 (explaining the goal of the Act's proponents was to produce a flexible statute that would permit

The import of the LLC to New York State's small business capital formation agenda is relatively uncontested.[5] While recent national statistics indicate small businesses account for roughly 58% of the private, non-farm workforce and generate 51% of the private gross domestic product,[6] their importance to the economic vitality of New York is even more marked. Small businesses employ the majority of the state's workforce and, excluding non-farm returns, accounted for more than $66.2 billion in business income in 2002.[7] Between 1999 and 2000, the most recent year for which statistics are available, small businesses added a net total of 174,436 employees, representing 80% of the state's net non-farm employment increase.[8]

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business-persons to tailor the New York LLC to their specific needs). In *Barklee v. Pataki*, Justice Schlesinger observed:

> The purpose of the [Act] was to encourage business and commerce by allowing for the formation of a new, to New York, form of business entity, one that combined a corporation's limitations on personal liability with the operating flexibility of a partnership. The statute was meant to expand business opportunities and to make this a more amenable place to do business.

Barklee Realty Co. v. Pataki, 12/3/2002 N.Y.L.J. 20 (col. 1), [hereinafter *Barklee I*]. *See also Pinto & Branson, supra* note 3, § 3.02 (noting state legislatures adopted limited liability company legislation in an attempt to extend the protection of limited liability to small investors).

5. Recent proposed legislation in the New York State Assembly to amend the Act characterizes the overarching justification for it as follows:

> The purpose of the limited liability [company] law is in part to assist and encourage the growth of small business in New York State. Small business is the backbone of our economy, accounting for most of the employment growth in our state, particularly in upstate counties.

Proposed Amendment to Act, supra note 4, at 2. *See also Walker on NY LLCs, supra* note 3, at ix (writing at the time of the Act's adoption it was touted by both entrepreneurs and lawyers as a potential source of new business for New York's commercial interests and that "as exaggerated as it might have seemed then, *such optimism has subsequently been fully justified*") (emphasis added).

6. U.S. Small Bus. Admin., SBA No. FS-0040, The Economic Impact of Small Businesses (2001).

7. U.S. Small Bus. Admin., Office of Advocacy, 2003 State Small Business Profile: New York, at 1 (2003).

8. *Id.*

During the course of New York's small business expansion,[9] the LLC has overwhelmingly become the entity of choice for these businesses. For instance, beginning in 1999 and through 2003, the number of LLCs organized in New York nearly doubled from 18,517 to 36,186.[10] During the same period, the number of new corporations increased by less than 3,000.[11] Statistics also confirm the LLC's popularity among small business owners outside New York.[12]

However, despite its popularity and the policy objectives of its enabling Act, the LLC is subject to an untenable, prohibitively expensive, sparingly employed and futile statutory obligation: the Publication Requirement.[13] Basically, the Publication Requirement requires that an LLC publish a legal notice

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9. *See generally id.* (noting that despite slow growth in national employment over the last several years, small businesses in New York continued to be a unique source of economic strength).

10. Interview with Alan Adami, Division of Corporations, Office of the New York Secretary of State (March 21, 2004) [hereinafter *Adami Interview*] (notes on file with Journal).

11. *Id.* From 1999 through 2003, the number of new business corporations formed in New York State decreased from 78,104 to 75,276. *Id.*

12. *See* 22 I.R.S. Stat. of Income Bull. 2, 52 (2002) (reporting that the "number of LLCs has been increasing rapidly" and that the number of limited liability companies rose from 589,403 to 718,704). *See also generally Wyatt Memorandum, supra* note 1 (reporting that in Delaware, the national corporation haven, only 32,394 corporations were formed in 2003 compared with 55,093 limited liability companies); Ryan Pace, *Choosing a Business Entity: Limited Liability Companies Increasingly Popular in Utah*, Utah Business, Oct. 1, 2003, No. 10. Vol. 17 at 46 (reporting that in 2002 more than 12,000 limited liability companies were formed compared with less than 10,000 corporations); James S. Haney, *Don't Undermine Tax Progress*, Wisconsin State Journal, July 18, 2003, at A8, *available at* http://www.madison.com/archives (reporting that between 1994 and 1999 the number of limited liability companies rose more than 240 percent while the number of corporations increased by slightly more than 17 percent). *See also* Marcus Green, *Choosing a Path to Great Form; More Entrepreneurs Favor Limited Liability Companies*, The Courier-Journal (Louisville), Oct. 28, 2002, at F1 (declaring the limited liability company as "the structure *du jour* for entrepreneurs" and that while in 1994 only 415 were organized in the State of Kentucky the number increased by the end of 2001 to 7,300).

13. NYLLCL § 206 (2004) [hereinafter *Section 206* or *Publication Requirement* or *Requirement*]. For a brief summary of the few instances in which a similar requirement is applied to other New York businesses, *see infra* Section VIII. Only 2 other states, with comparatively nominal economies, subject their LLCs to a so-called publication requirement. *See* Neb. Rev. Stat. §§ 21-2653 (2004); Ariz. Rev. Stat. Ann. §§ 29-635 (2004).

that contains its name, county and address for service of process for six consecutive weeks in two newspapers printed in the county in which the LLC is located.[14] The failure to comply with this statutory organizational requirement by the prescribed deadline results in the LLC's forfeiture of the right to bring suit in any court in New York State.[15]

Yet the purported policy basis for the Publication Requirement—to ensure that the general public in the locale where the LLC is located has adequate and sufficient business information concerning the LLC[16]—is not served or advanced as currently constituted. Rather, this policy is best served through the use of alternative means for the public disclosure of LLC-related business information, which are all more efficient and less expensive. And because compliance with the Publication Requirement contemplates the mere publishing of a notice that repeats the scant disclosures already available in an LLC's publicly-filed Articles of Organization, the Publication Requirement is nothing more than a formulaic requirement, devoid of any material facts that might assist the general public in learning about the LLC's purpose, business, ownership, management or capital structure.[17] In sum, the Act's Publication Requirement both deters usage of New York's LLC and frustrates the state's efforts to promote capital formation among small businesses.

This Article examines the Limited Liability Company Law's Publication Requirement, addresses its public policy weaknesses, analyzes its probable unconstitutionality and discusses the ways in which its deficiencies deter usage of New

14. *See* NYLLCL § 206. Customarily, the notice tracks the information previously disclosed in the LLC's publicly-filed initiatory certificate, the Articles of Organization. *See id.*

15. *See id.*

16. Demonstrative of this policy goal is the Publication Requirement's mandate that the county in which the LLC is located be disclosed. *See id. See also* Memorandum of Law in Support of Defendant's Motion for Summary Judgment in *Barklee Realty Co. v. Pataki*, Feb. 16, 2001 at 9-10 (alleging the intent of the Act's Publication Requirement is to provide members of the public with specific, important information about newly-organized LLCs). *See generally Barklee I, supra* note 4. *But see also infra* text accompanying notes 118-20 (maintaining the Act wrongfully permits an LLC to publish in a county where neither its principal office nor its operations are located).

17. *See infra* Section VIII.

York's LLC and consequently impair the state's efforts to promote small business capital formation.

II.
SUMMARY OF SECTION 206 OF THE ACT: THE PUBLICATION REQUIREMENT

In accord with New York's longstanding policy favoring the public disclosure of material information by its businesses,[18] the Act requires a domestic LLC to publish a legal notice promptly after its formation[19] or, in the case of the foreign LLC, upon being granted authorization to conduct business in New York State.[20] Specifically, Section 206 of the Act requires that within 120 days after the effective date of the LLC's initial Articles of Organization,[21] a copy of the LLC's Articles or a notice containing the substance of its Articles[22] must be published once a week for six consecutive weeks in at least two newspapers in the county where the LLC is located.[23]

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18. *See generally infra* Section VI.

19. NYLLCL § 206.

20. A foreign LLC is a limited liability company that has been organized in a state other than New York but is doing business in New York. The laws of the foreign LLC's home state govern its organization and internal affairs, in addition to the liability scheme affecting its members and managers, if any. NYLLCL § 801(a) It must legally qualify to conduct business within New York as a foreign business organization and therefore is required to file an Application for Authority, which is the relevant certificate filed with the Department of State. *Id.* § 802(a). More precisely, before doing business in New York State, the foreign LLC must apply for authority to do so by submitting an Application for Authority with information consistent with that required by a domestic LLC's Articles, along with a certified copy of its own Articles of Organization. In regard to the publication of a legal notice, all foreign LLCs in New York must satisfy a Publication Requirement consistent with the terms applicable to domestic LLCs within 120 days after the filing of its Application for Authority. *Id.* § 802(b).

21. The LLC is required to enumerate specified information in a document titled the Articles of Organization. Its filing creates the LLC and becomes the formative document providing public notice of the LLC's existence. *See* NYLLCL § 203(e) (requiring the LLC to enumerate specified information in its Articles of Organization as a condition precedent to its *de jure* formation) [hereinafter *Articles of Organization* or *Articles*].

22. Hereinafter *Notice of Publication* or *Publication Notice* or *Published Notice* or *Notice.*

23. NYLLCL § 206. Despite the Act's failure to expressly indicate, for purposes of the Publication Notice, the LLC's county is presumed to be the

Section 206 contemplates that the county clerk is charged with selecting the two newspapers, one of which must be located within the city or town where the LLC's principal office is to be located, unless that city or town is without a newspaper.[24] When there is no newspaper published in the city or town where the LLC's principal office is to be located, Section 206 requires publication to be made in a newspaper nearest to the LLC's office.[25] Section 206 also requires that proof of publication be filed with the Department of State by way of an affidavit from either the printer or publisher of both newspapers.[26]

The failure to publish the Notice and to file proof of its publication within 120 days after the effective date of the Articles prevents the LLC from maintaining any action or special proceeding in New York State.[27] However, the failure to comply with this statutory obligation does not invalidate any act on the part of the LLC or any contract to which it is a party.[28] Non-compliance also does not impede the right of another party to maintain any action or special proceeding in regard to any act committed by the LLC or any contract to which it is a party.[29] Furthermore, the failure to publish the Notice and to file proof of its publication does not prevent the LLC from defending any action or special proceeding.[30] More importantly, a formerly disqualified LLC may become eligible to maintain an action or special proceeding at a future date if it eventually complies with the requirements of Section 206.[31] Thus, the loss of the LLC's right to initiate suit is the sole statutory penalty for non-compliance with Section 206.[32]

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county in which the LLC maintains its "office." *See Rich's LLC Practice Commentary, supra* note 3, at 9.

24. NYLLCL § 206.

25. *Id.*

26. *Id.*

27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.* Therefore, in spite of the 120 day deadline imposed by Section 206, the LLC may "cure" its default by subsequently complying with the section.

32. *See generally* NYLLCL § 101-1403.

III.
THE PRINCIPAL DEBATE CONCERNING THE APPLICATION AND EFFECT OF THE PUBLICATION REQUIREMENT ON THE NEW YORK LLC

Section 206 provides that an LLC's failure to publish its Notice and file proof of its publication within 120 days from the effective date of its Articles bars the LLC from maintaining any action or special proceeding in any court in New York State.[33] Unless the LLC subsequently publishes the required Notice and files proof thereof, the LLC is permanently barred from maintaining *any* action anywhere in the State.[34]

An LLC's non-compliance with the Publication Requirement and the consequential loss of the right to sue is an anomalous penalty in the law of business organizations and in the context of both state and federal constitutional law in particular.[35] Moreover, an LLC's loss of the right to sue is an uncharacteristic penalty in the law of business organizations.[36]

This aberrant penalty, along with its departure from normative constitutional rights and its consequences for small

33. NYLLCL § 206 (emphasis added).

34. *Id.* (emphasis added). *See also Rich's LLC Practice Commentary, supra* note 3, at 8; *Walker on NY LLCs, supra* note 3, §§ 1:5, 5:12.

35. For a summary of the state and federal constitutional problems that pertain to impeding the right to sue, *see* Sections XI and XII.

36. Penalties imposed upon business entities for failing to comply with significant statutory obligations do not rise to the level of the penalty associated with Section 206. For example, a corporation's inadvertent failure to properly file its initiatory Certificate of Incorporation, which may create a *de facto* corporation, will nonetheless permit that corporation to make use of the statutory powers granted to *de jure* corporations under the New York Business Corporation Law. *See, e.g.*, Garzo v. Maid of the Mist S.B. Co., 303 N.Y. 516 (1952); Bankers Trust Co. v. Zecher, 426 N.Y.S.2d 960 (1980). *See also* N.Y. BUS. CORP. LAW § 409 (McKinney 2004) (indicating that a corporation's failure to file its Biennial Statement for the purpose of updating its information with the Secretary of State at most results in a $250 fine with an opportunity to cure, and at the very least the imposition of no fine with the same opportunity to cure). Even in the case of the Act, many of its most significant statutory requirements have no penalty for non-compliance. *See, e.g.*, NYLLCL § 417 (requiring the adoption of an Operating Agreement among an LLC's members within 90 days after the filing of its Articles with no penalty whatsoever for non-compliance mentioned therein or elsewhere within the Act). *See also id.* § 211 (delineating the requirements for when an Amendment to the Articles must be filed but not addressing any penalties for the failure to file within the prescribed 90 day period).

business capital formation, has engendered an intense debate. Most of the criticism of the Publication Requirement has been directed at its dubious public policy basis and the perception that it is an outmoded means of providing the disclosure of business-related information.[37] Another criticism has been that it stands in stark contrast to the state's public policy towards promoting capital formation.[38] And finally, criticism has been directed at the New York State legislature for passing the Act with Section 206's penalty.[39] These critiques have spurred an unprecedented legal, economic and political consensus against the requirement as the debate raises a number of overlapping constitutional and business-oriented considerations. Generally, the consensus is that the Publication Requirement is a punitive, expensive and inefficient requirement.[40]

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37. *See, e.g., Perish the Publication: The Possible Effect of Barklee Realty*, Bruce A. Rich, NYSBA Business Law Journal, Spring 2002, Vol. 6, No. 1, 31 [hereinafter *Perish the Publication*] (reporting that the information contained in an LLC's Publication Notice can be retrieved at the New York Department of State's website at no cost). *See also* Stuart Levine, *The 21st Century Trumped by the 19th*, Tax & Business Law Commentary, *at* http://taxbiz.blogspot.com/2003_10_01taxbiz_archive.html (Oct. 26, 2003) [hereinafter *Business Law Commentary*] (declaring that the purported public policy basis for the Act's Publication Requirement is a pretext for successful political lobbying by the newspapers upon state legislators).

38. *See Perish the Publication, supra* note 37, at 32 (noting that the repeal of Section 206 of the Act would encourage more people to form LLCs). *See generally Business Law Commentary, supra* note 37 (claiming the cost of complying with the Publication Requirement makes it considerably more expensive to form a limited liability company in New York than in any other state).

39. Several New York State legislators have sought to amend the Act's Publication Requirement by reducing its requirements for compliance. *See, e.g.*, Bill Summary, A06001, An Act to Amend the Limited Liability Company Law In Relation to Publication Requirements, Amd. S1306, Ltd. Liab. L. (Feb. 22, 2004); Bill Summary, S03336 (June 29, 2003) (proposing to amend the Act by shortening the length of time necessary for publication from 6 weeks to 2 weeks); Bill Summary, A03335 (June 29, 2003) (proposing to amend the Act by creating certain exemptions). *See also* Bill Summary, A09772 (Feb. 22, 2004) (indicating that almost 20 State Assembly members introduced an amendment to the laws governing the limited liability investment company, the limited liability company and the limited partnership for the purpose of modifying the Publication Requirements of these statutes).

40. *See, e.g., Business Law Commentary, supra* note 37 ("New York and its economy are simply too large to allow the publication of a legal notice in a local newspaper to provide any real notice. And, in the age of the Internet, there are any numbers of cheap and more effective ways of providing such

Initially, the Act was supported overwhelmingly by a number of interest groups ranging from political actors to legal practitioners to academics, all of whom fervently supported the Act but decried the Publication Requirement.[41] These dissenters included the Act's original sponsor in the New York State Assembly who adamantly opposed the addition of Section 206 to the originally sponsored Act.[42] The dissenters also included the New York State Attorney General,[43] as well as the Association of the Bar of the City of New York.[44] In spite of the broad consensus against the Publication Requirement, the original Act which included Section 206 was eventually passed.

Despite the broad consensus against the Requirement,[45] on February 24, 2004, New York's highest court implicitly confirmed the constitutionality of the Publication Requirement. In *Barklee Realty Company v. Pataki*,[46] the New York State Court of Appeals ordered a *sua sponte* dismissal of the appellants' claim that Section 206 violated, among other things, the right to constitutional due process under the federal and state constitutions, the right to equal protection under the federal and state constitutions, and the right of access to the courts under

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information. . ."). *See also Perish the Publication, supra* note 37, at 31 (maintaining the New York State Supreme Court decision in *Barklee I* which declared the Act's Publication Requirement unconstitutional "presents clear judicial recognition of the fact that the publication requirement lacks legal justification and operates as a barrier to business formation in New York").

41. *See supra* notes 4-6 and accompanying text.

42. *See generally* Legislative History for the State Assembly Standing Committee on Judiciary and Assembly Standing Committee on Corporations, Authorities & Commissions, Public Hearing on Limited Liability Company Legislation (June 11, 1992).

43. *See* Memorandum of New York State Attorney General to Governor Cuomo (outlining the Attorney General's disapproval over Section 206 being added to the Act's original bill and concluding it should be the primary reason why the Governor should not sign the bill into law) (on file with Journal).

44. *See Barklee I, supra* note 4.

45. For instance, in the Appellate Division proceeding in *Barklee*, Amicus briefs were filed on behalf of the Community Housing Improvement Program, Inc., the Rent Stabilization Association of N.Y.C., Inc., and the Small Property Owners of New York, Inc., *inter alia*, all of whom requested the Court affirm the Supreme Court decision that ruled the Publication Requirement violated both due process and equal protection under the state and federal constitutions. *Brief of Amici Curiae, Community Housing Improvement Program, Inc.* (on file with Journal).

46. 2004 N.Y. LEXIS 267 [hereinafter *Barklee III*].

the New York State Constitution.[47] In its dismissal without an opinion, the Court provided only a single sentence for its reasoning in which it stated that the appeal presented "no substantial constitutional question."[48] This *sua sponte* dismissal without an opinion is suspect considering that both lower courts undertook full-fledged analyses of the legal questions presented in the case,[49] all of which directly related to matters of state and federal constitutional law.[50]

In addition, there are a host of ancillary constitutional questions and public policy issues that were *not* presented in the *Barklee* proceedings, many of which are analyzed in this Article. Though concluded, the *Barklee* proceedings neither indefinitely forestall nor legally preclude new constitutional or policy-based challenges to the legitimacy of the Publication Requirement.

IV.
THE MERITS OF THE LLC AS A BUSINESS FORM: THE BEST OF ALL WORLDS

What Is the LLC?

An LLC is an unincorporated legal entity of one or more persons.[51] As a legal entity, an LLC exists *separate and apart*

47. *See* Appellant's Notice of Appeal in *Barklee Realty Co. v. Pataki*, 2004 N.Y. LEXIS 267 (on file with Journal).

48. *See Barklee III* at 267.

49. For instance, in the State Supreme Court decision, Judge Schlesinger reviewed the constitutionally of Section 206 by analyzing it within the context of constitutional due process, equal protection and the right to access the courts of New York. The court held it unconstitutional on all three constitutional grounds. *See Barklee I, supra* note 4. The New York State constitutional issues were reviewed by the Appellate Division which eventually reversed the Supreme Court's decision regarding the state and federal constitutional issues. *See* Barklee Realty Co. v. Pataki, 765 N.Y.S.2d 599 (1st Dept. 2003) [hereinafter *Barklee II*].

50. *See infra* Sections XI, XII.

51. NYLLCL §§ 203(a)-(d), 102(w). It is important to note that the LLC, like the partnership, limited partnership and limited liability partnership, is an unincorporated business. *See Rich's LLC Practice Commentary, supra* note 3, at 4 ("An LLC is defined as an unincorporated organization of one or more persons having limited liability for the contractual obligations and other liabilities of the business, and is other than a partnership or trust."). *See also* N.Y. P'SHIP LAW § 10 ("A partnership is an *association* of two or more persons to carry on as co-owners a business for profit and includes for all purposes of

from the persons who compose it, meaning it may incur its own commitments and liabilities while also enjoying its own rights, powers and privileges.[52] The persons who stand separate and apart from the LLC, whom the Act refers to as its Members,[53] enjoy limited liability for the contractual commitments and financial obligations of the LLC.[54] This liability scheme most closely resembles that of the corporation in

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the laws of this state, a registered limited liability partnership"). However, unlike the limited partnership and limited liability partnership which are unincorporated business associations, the LLC is an unincorporated business *entity*. *See* NYLLCL § 203(d).

52. NYLLCL § 203(d) (providing that upon its formation, an LLC "shall be a separate legal entity"). *See also* UNIF. LTD. LIAB. CO. ACT § 201 (declaring that an LLC is "a legal entity distinct from its members.").

53. The investors, or equity-holders, in an LLC are termed "Members". *See* NYLLCL § 102(q) ("Member means a person who has been admitted as a member of a limited liability company in accordance with the terms and provisions of [the Act] and the operating agreement and has a membership interest in a limited liability company with the rights, obligations, preferences and limitations specified under [the Act] and the operating agreement"). Thus, a Member must both (1) be admitted as a Member into the LLC and (2) own a Membership Interest in the LLC. A Membership Interest essentially constitutes a Member's right to share in the profits and losses of the LLC, as well as the right to receive distributions and the right to vote. *See id.* §102(r). Although these Members are essentially the owners of the LLC, the LLC maintains its own separate legal existence. *See, e.g.*, NYLLCL § 203(d).

54. NYLLCL § 609 (stating that an LLC Member shall not be liable for the debts, obligations or liabilities of the LLC). Because the LLC is an artificial legal entity separate and apart from the Members who own it, the LLC is deemed under the law to be a separate legal "person" with its own legal existence, its own rights and privileges, and its own powers to purchase land, make contracts and file lawsuits. *See* NYLLCL § 203(d) (expressing that an LLC formed under the Act is a separate legal entity, the legal existence of which shall continue until the cancellation of the Articles of Organization); *id.* § 202 (providing that unless otherwise stated in the LLC's Articles of Organization, a chapter of the Act, or another law of the State of New York, an LLC may, among other things, institute a lawsuit, purchase real or personal property, dispose of all or part of its property or assets, and make contracts). In addition to owning and holding its own assets, if an LLC assumes or incurs liability, those assumed or incurred liabilities become liabilities of the LLC but not of its Members. *See, e.g., id.* § 601 (maintaining a Member has no interest in specific property of the LLC). Thus, the Members have limited liability in that they can only lose the amount of their investment.

which shareholders have limited liability for the contractual commitments and financial obligations of the corporation.[55]

Federal and state tax laws permit the election of whether the LLC is to be taxed as a partnership or corporation.[56] Because a corporation is normally burdened by "double taxation" under federal income tax laws,[57] the vast majority of LLCs elect to be taxed as partnerships.[58] As a partnership for

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55. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW, 40 (1991).

56. An LLC with at least two Members may elect to be taxed as a corporation or as a partnership. Under the "Check-the-Box" regulations, any new domestic "eligible entity" generally defined as an entity separate and apart from its owners such as a joint venture, or other contractual arrangements whereby participants carry on a trade or business for profit (excluding trusts or other specified classifications) which (a) have two or more members and (b) are not required to be taxed as a corporation for federal tax purposes, may elect to be classified as partnerships for federal taxation purposes. *See* 26 U.S.C. §§ 3401, 3501 (2003). *See also* 26 C.F.R. § 301.7701-3 (2004); *Guide to LLCs, supra* note 1, ¶ 902; *Walker on NY LLCs, supra* note 3, § 2:3. A business entity that has a single owner, such as a single-member LLC, may elect to be taxed as a corporation or as a disregarded entity, which still recognizes the LLC as an entity separate and apart from its owner. However, in cases where the election for a disregarded entity is made, the entity is treated as a sole proprietorship for federal taxation purposes. *See id.* It should be noted as well that certain business entities must be taxed as corporations under federal tax laws. In addition to corporations under federal and state law, this federal corporate tax classification also includes insurance companies, certain banks and joint-stock companies. *Guide to LLCs, supra* note 1, ¶ 902. *See also generally Linking Limited Liability and Entity Taxation: A Critique of the ALI Reporter's Study on the Taxation of Private Business Enterprises*, 62 U. PITT. L. REV. 223 (2000) (reviewing the historical basis and policy rationale for linking entity-level taxation to the presence of limited liability).

57. A corporation, in contrast to a partnership, may be subject to two levels of taxation for federal income tax purposes, excepting cases where the corporation has made the S Corporation election. Firstly, the corporation has to pay federal income tax to the extent it has a net positive taxable income. Secondly, if that corporation makes a distribution of its after-tax income, then its shareholders are thereafter generally required to report the amount of the distribution as dividend income, which is therefore subject to an additional level of taxation. *See generally Walker on LLCs, supra* note 3, § 2:1; *Guide to LLCs, supra* note 1, ¶ 201.

58. *Walker on NY LLCs, supra* note 3, § 2:1 ("The desire to obtain pass-through treatment, with its single-level tax, often leads taxpayers forming business entities to choose the partnership, rather than the C corporation, form. . . As a practical matter, taxpayers form LLCs (and other unincorporated organizations) *only* if they intend for them to be treated as partnerships for tax purposes.").

federal and state income tax purposes, an LLC's items of income, expense and credit are "passed through" to its Members.[59]

Subject to only a few exceptions, the LLC permits its Members to freely contract into the financial and managerial relationships that best suit the underlying business and the distinctive relationship among its Members.[60] It is this flexibility in structuring management that distinguishes the LLC from other business forms,[61] since the limited number of restrictions imposed upon its governance and managerial structure permits the Members to organize their business affairs according to their preferences.[62]

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59. "Pass through" or "flow through" taxation is the terminology most often used to describe the federal taxation of partnerships. Like the partnership, the LLC has the same "pass through" taxable status. *See Guide to LLCs, supra* note 1, § 5.01. For the most recent summary of the New York State Personal Income Tax Legislative Modifications affecting LLCs and their estimated tax payments, *see generally* 2004 NY Tax LEXIS 50 (Feb. 25, 2004).

60. *See, e.g., Rich's LLC Practice Commentary, supra* note 3, at 4; *Walker on NY LLCs, supra* note 3, § 1:2; Leona Beane & Michele A. Santucci, BUSINESS/CORPORATE LAW AND PRACTICE, General Practice Monograph Series, New York State Bar Association, 15 (2001) [hereinafter *Beane & Santucci*].

61. *See, e.g., Walker on NY LLCs, supra* note 3, § 3:5 (acknowledging that while the benefits of limited liability and pass through taxation are elements also available in S Corporations and Limited Partnerships, the "main characteristic that separates the LLC" and "makes them so attractive" is their flexibility in formulating the rights of the Members and their participation in its management and operation). *See also Walker on NY LLCs, supra* note 3, § 3:6 ("One of the major shortcomings of a limited partnership is that limited partners may run the risk of losing their limited liability to the extent that they are considered 'control persons.' The Act allows *all Members* of an LLC to participate in its management without affecting their limited liability.").

62. *See Walker on NY LLCs, supra* note 3, § 3:5. The business and conduct of the LLC is ordinarily proscribed in the Operating Agreement, an internal organizational and governance document that sets forth the rights, powers, duties and financial interests and objectives of the Members as between themselves, the Manager(s), if any, and the LLC. *See* NYLLCL § 417. Because the Operating Agreement may be utilized to override the statutory provisions of the Act, which essentially serves as a default statute in the absence of an agreement among the Members or Managers of the LLC, the Operating Agreement affords LLC Members the unique opportunity to draft and execute an operational document with full regard to the distinct attributes of the underlying business. In fact, with few limited exceptions, the Operating Agreement may be carefully tailored to almost all of the distinctive attributes of the particular membership of the LLC, its underlying business, and its financial objectives. Accordingly, the Operating Agreement may be viewed

Since the LLC combines the most appealing taxation and managerial features of the partnership with the traditional limited liability protections of the corporation, it is often characterized as a "hybrid" between the partnership and the corporation.[63] It is this hybrid composition which makes the LLC the preferred business vehicle among small business entrepreneurs.[64] Indeed, the broad contractual freedom to devise the

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as the embodiment of the Act's deference to freedom of contract principles. This deference to freedom of contract principles is integral to the Act and places the LLC at a unique and insuperable advantage over other business forms. By adopting a carefully tailored Operating Agreement, LLC Members have an unparalleled ability to *control* the outcome of financial and managerial contingencies that directly affect their investment. Controlling for the outcome of these contingencies, to the extent they may be predicted and accounted for in the Operating Agreement, evince the degree of risk reduction potentially attainable through utilization of the LLC form. Combined with the benefits of limited liability and pass through taxation, this brand of optimal managerial flexibility may constitute the LLC's principal advantage over other business entities. *See, e.g., Rich's LLC Practice Commentary, supra* note 3, at 12-13. *See also Walker on NY LLCs, supra* note 3, § 6:7.

63. *See, e.g.,* Robert W. Hamilton, BUSINESS ORGANIZATIONS: UNINCORPORATED BUSINESSES AND CLOSELY HELD CORPORATIONS (1996), §§ 6.1, 6.3 ("The attractiveness of this *hybrid business form* basically arises from its combination of desirable tax and business features: almost complete internal flexibility coupled with limited liability for all of its owners and the pass through tax treatment of a partnership") [hereinafter *Hamilton*]; *LLC Handbook, supra* note 1, § 1:3; *Guide to LLCs, supra* note 1, ¶ 208; *Walker on NY LLCs, supra* note 3, § 1:1. *See also Rich's LLC Practice Commentary, supra* note 3, at 4. Commentators are in agreement on the LLC and its superlative tax and liability scheme benefits. *See generally Guide to LLCs, supra* note 1, ¶ 101.

64. *See Guide to LLCs, supra* note 1, ¶ 201. *See also* ROBERT W. WOOD, LIMITED LIABILITY COMPANIES: FORMATION, OPERATION, AND CONVERSION (2d ed. 2001) at Preface ("[O]ne thing has remained eminently clear over the years and now has become even more true: LLCs are almost infinitely flexible, *perhaps the most flexible business entity that has yet been devised.*") (emphasis added) [hereinafter *Wood on LLCs*]. In the present business landscape, the LLC has become the most popular business form in New York State with an average of more than 20,000 formed annually. National trends also substantiate that the LLC has become the business entity form of choice among both small business entrepreneurs and venture capitalists. Realizing the import of encouraging small business capital formation and in recognition of its corresponding benefits for the local economy, the New York State legislature enacted Article VIII to the Act permitting foreign limited liability companies to conduct business in New York State. Indeed, the LLCs overwhelming popularity also recently prompted the legislature to enact Article XII to Act enabling the organization of limited liability companies for the rendition of professional services. If the public policies of the State of New York

LLC's managerial structure and the option of electing its tax classification, combined with the benefits of limited liability, make the LLC the optimal choice for almost any small business.

The Popularity & Usage of the LLC

Legislative developments in respect to the LLC categorically demonstrate its unparalleled appeal in the business enterprise market. Each State, including the District of Columbia, has a statute authorizing the formation of the Limited Liability Company.[65] This legislative development is the most rapid ever seen in respect to business entities.[66] Current statistics confirm the overwhelming popularity of the LLC.[67]

Notwithstanding the advantages of using the Subchapter S Corporation or the Limited Partnership for a small business

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are any indication, the LLC and its continued viability is linked inextricably to the present and future vitality of small business capital formation and economic growth in this State and beyond. *See Guide to LLCs, supra* note 1, ¶ 204 (maintaining the LLC's flexible management structure is preferred by small LLCs). *See also Walker on NY LLCs, supra* note 3, § 1:20 (noting the very characteristic that makes an LLC so appealing to "new enterprises" is its flexibility).

65. *See supra* note 3.

66. In addition to the LLC statutes of the fifty states and the District of Columbia, there is a Uniform Limited Liability Company Act which was promulgated in 1995. This Uniform Act was preceded by the American Bar Association's Prototype Limited Liability Company Act of 1992. Prior to the federal "Check-the-Box" Regulations, the Internal Revenue Service had responded to the frequency of usage and popularity of the LLC form with its own LLC-oriented revenue procedure. *See* Rev. Proc. 95-10, 1995-1 C.B. 501. Other federal agencies have also legally and formally recognized the LLC in their regulatory promulgations and policies. *See Guide to LLCs, supra* note 1, ¶ 103 (noting that the Federal Trade Commission, Small Business Administration, Department of Agriculture and Federal Election Commission have incorporated the LLC into their regulatory promulgations). Not to mention the international popularity of the LLC in Germany, France, and in Central and South America, it should also be noted that at least 48 states legally recognize the presence and operation of foreign LLCs. Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 BUS. LAW. 1, 1 (1995).

67. *See also* Darren S. Berger, PREPARING AND DRAFTING THE OPERATING AGREEMENT OF AN LLC AND PLLC, New York State Bar Association, A-3 (2002) ("During 1994, in New York 1133 new LLCs were formed while 124 other entities converted to an LLC, whereas 70,691 corporations were formed. In 2001 21,913 new LLCs were formed while 377 other entities converted to an LLC, where as 73,410 new corporations were formed.").

enterprise,[68] the LLC is now the most commonly formed business entity.[69] Historically, small business owners seeking both the benefits of limited liability and pass-through taxation settled on either the Subchapter S Corporation or the Limited Partnership.[70] Yet, because of the complications which arise when using the Subchapter S Corporation[71] or the Limited Partnership,[72] the LLC will likely supersede these business forms and, within a few years, render them obsolete.

The likelihood that the LLC will soon displace all other limited liability businesses is partly due to its flexibility and the fact that it may be used for almost every business.[73] More re-

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68. *See supra* text accompanying notes 10-12, 57, 60. *See also Perish the Publication, supra* note 37, at 32; *Walker on NY LLCs, supra* note 3, § 3:17 ("The creation of the S corporation was meant to allow small, closely-held corporations to have the benefit of limited liability without the burden of double taxation.").

69. Over the last three years, more LLCs have been formed than corporations. *See Adami Interview, supra* note 10.

70. *Guide to LLCs, supra* note 1, ¶ 201.

71. For example, Subchapter S Corporations have several restrictions that limit the growth and expansion of a small business enterprise, namely the restriction on foreign nationals as shareholders, and the requirement that there be only a single class of stock. Moreover, the Subchapter S Corporation, by virtue of its classification, directly inhibits the ultimate growth and expansion of the business enterprise by restricting the number of equity holders to not more than 75 individuals. Finally, the prohibition on corporate shareholders and other entities severely limits the ability of the Subchapter S Corporation to recruit experienced institutional shareholders and attain larger, available pools of investment capital. *See, e.g., Wood on LLCs, supra* note 64, § 3.01[C].

72. Arguably, the structure of the Limited Partnership most closely resembles the primary benefits inherent in the LLC form. However, the general partners, unlike Managers in an LLC, have unlimited liability for the debts and contractual commitments of the enterprise. Furthermore, the limited partners in a limited partnership may risk limited liability to the extent they participate in managerial affairs. Therefore, the Limited Partnership imposes a stern penalty upon those limited partners who may expectedly wish to exert control and influence over the decisions affecting their investment. As a result, the Limited Partnership format by its terms negates the benefits of its taxable status. *See, e.g., id.* § 3.01[D].

73. The Act permits the use of the LLC for almost any lawful business purpose, even areas that other limited liability entities like the corporation have been prohibited from operating. *See* NYLLCL § 201. *See also* 2003 NY Bank. LEXIS 11 (April 17, 2003) (permitting the entire conversion of an S Corporation with a New York State banking license into an LLC with no other filing than a Certificate of Merger). *See also Rich's LLC Practice Commentary, supra* note 3, at 7 (noting certain bank investment companies may oper-

cently, the LLC has become widely used by professional service concerns such as real estate brokerages, law firms and accounting firms.[74] The LLC may also be used in most states, including New York, by not-for-profits.[75] In addition, other limited liability entities and most unincorporated businesses may convert into an LLC by filing a single Certificate.[76]

At present, the LLC is most commonly used for real estate investments, high technology ventures and closely-held business enterprises.[77] Because of its advantages over the Limited Partnership, the LLC is also commonly used in the area of estate planning.[78] For foreign investors, the LLC has become the entity of choice because it has no restrictions on the basis of citizenship or the jurisdiction of its Members.[79]

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ate as LLCs). *See also* Michele A. Petruzzelli, *Limited Liability Companies May Now Own and Operate Hospitals*, 5/19/1998 N.Y.L.J. 1 (col. 1) (indicating that in light of the LLC's overwhelming popularity New York's Public Health Law was amended to permit LLCs to own and operate hospitals and home care service agencies). *But see Walker on NY LLCs, supra* note 3, § 5:1 (writing that a NY LLC may not be used for the business of banking or insurance).

74. *See, e.g., Hamilton, supra* note 63, § 6:10.

75. *Walker on NY LLCs, supra* note 3, § 1:5. *See also LLC Handbook*, § 3:101. *But see id.* § 1203(a) (mandating that a NY Professional Service LLC may be formed only to render a professional service within New York State for pecuniary profit).

76. *See generally* NYLLCL §§ 1001-1003 (providing for the merger or consolidation of other business entities, both domestic and foreign, into an LLC); *id.* § 1006 (governing the conversion of a partnership or limited partnership into an LLC). *See also* 2003 NY Bank. LEXIS 12 (approving a New York State registered mortgage broker to convert from an S Corporation into an LLC with no requisite filing with the Banking Department so long as notification of the new name has been provided). *But see* N.Y. Op. Att'y Gen. (Inf.) 1108 (1998) (declaring in an "informal and unofficial expression of the views" of the Attorney General's Office that a sewage-works corporation organized under the New York Transportation Corporations Law may not reorganize as an LLC because that statute prescribes another business entity for its particular purposes).

77. *See, e.g.*, Gerard R. Boyce & Paul J. Pollock, *Choice of Forum for LLC: New York or Delaware*, 3/14/1996 N.Y.L.J. 5 (col. 1) (observing that the NY LLC is ideal for venture financing purposes because the Act permits the Operating Agreement to provide for multiple classes or groups of members and managers possessing relative rights, powers, preferences and limitations).

78. *See id. See also Wood on LLCs, supra* note 64, § 1.09. *See also generally Hamilton, supra* note 63, § 6.10.

79. By comparison, the Subchapter S Corporation is disallowed from having shares owned by nonresident aliens. *See* I.R.C. § 1351(b)(1)(C) (2003). *See also Guide to LLCs, supra* note 1, ¶ 209 (noting that the LLC has no bar on

V.
THE CONSTRAINTS ON THE NEW YORK LLC: THE PUBLICATION REQUIREMENT AS AN AGGRAVATING FACTOR

Despite its superlative benefits, however, the LLC has its limitations.[80] Among them is the relative uncertainty in interpreting new statutes and the consequential risks in predicting judicial interpretations of the Act.[81] Because it was recently enacted, New York Courts have only adjudicated several cases that defined the extent of the LLC's powers.[82] This uncertainty may act as a disincentive to risk-adverse small business entrepreneurs who may forgo using the LLC to conduct business.[83]

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nonresident alien Members and that internationally-formed LLCs are allowed under most state LLC statutes, including the Act, to register to do business in any of the United States).

80. However, many of the shortcomings in forming and operating an LLC are inescapably a part of the business landscape and are thus among the unavoidable costs of doing business. That is, other business entities or associations would not fare any better under the same or similar circumstances.

81. Because it is a relatively new business form among other available business forms that may be either incorporated or organized, the LLCs and their conventional commercial transactions have not been "tested" as they have not yet become the subject of widespread adjudication. Aside from the complications which therefore arise when practitioners are asked to furnish legal advice about an unfamiliar legal structure, these uncertainties often lead small business owners to forgo utilizing the LLC as a business vehicle. *See, e.g., Guide to LLCs, supra* note 1, ¶ 208 ("[T]he LLC is still a relatively new business form and there is not much legal precedent on how certain issues would be resolved if they were adjudicated."); *LLC Handbook, supra* note 1, § 3:106 ("The law regarding LLCs has not had a lot of time to develop. Many states still do not have any significant appellate cases on LLCs."); *Walker on NY LLCs, supra* note 3, § 1:20 ("Interpretation and application of the Act, like that of any new law, is therefore unpredictable").

82. *See generally* MARK J. SILVERMAN & LISA M. ZARLENGA, A.L.I.-A.B.A., USE OF LIMITED LIABILITY COMPANIES IN CORPORATE TRANSACTIONS, (Sept. 20-21, 2004). For instance, it is not entirely clear if a Membership Interest may be deemed a "security" within the definition of state and federal securities laws. *Walker on NY LLCs, supra* note 3, § 13:2. If a Membership Interest is a "security", then it may be subject to a host of both state and federal securities regulations. *Id.* § 13:13. This would then preclude an LLC from operating within certain spheres or engaging in certain transactions or raising financing from certain investors. *See generally id.*, §§ 13:1-:17.

83. *See also Hamilton, supra* note 63, §§ 6.11-6.13 (reviewing the complexities and uncertainties in analyzing and applying securities law and employment law to the LLC).

This problem is compounded by the fact that the LLC is currently the most expensive business entity to form in New York State.[84] Its filing fee is nearly double that of the New York corporation.[85] In addition, the New York LLC's annual franchise taxes are comparatively higher than the franchise taxes imposed upon limited liability companies in most other states.[86] These costs must be considered in combina-

84. An LLC in New York is formed by the filing of the Articles of Organization, namely the formative document which, at the moment of its filing with the Office of the Secretary of the State of New York, forms the LLC, unless a later date for such formation not to exceed 60 days from the filing date is specified in its Articles of Organization. *See generally* NYLLCL §§ 203(a)–(d) (providing for the procedural requirements to be met in connection with the formation of a New York LLC). *See also generally Rich's LLC Practice Commentary, supra* note 3, at 7–8 (summarizing the Act's procedural and substantive requirements in forming an LLC). *See also Walker, supra* note 3, § 1:5 (relating to the formation of the LLC).

85. At present, the fee for filing an LLC's Articles of Organization is $200.00. *See* Limited Liability Company Fee Schedule (Feb. 2001) *at* http://www.dos.state.ny.us/corp/llcfees.html. By comparison, the fee for filing the initiatory document which creates a Corporation, the Certificate of Incorporation, is currently $125.00. *See* N.Y. Dept. of State, Business Corporation Filings (July 23, 2003), *at* http://www.dos.state.ny.us/corp/buscorp.html. Yet the fee for filing either a Certificate of Limited Partnership or a Certificate of Limited Liability Partnership is the same fee for filing Articles of Organization at $200. *See* N.Y. Dept. of State, Limited Partnership Filings (July 23, 2003), *at* http://www.dos.state.ny.us/corp/lpcorp.html.

86. *See* N.Y. Dept. of Taxation & Finance, New York Tax Status of Limited Liability Companies and Limited Liability Partnerships (Jan. 2003), *at* http://www.tax.state.ny.us/pdf/publications/Multi/Pub16_103.pdf (noting that "every domestic and foreign LLP & LLC that is treated as a partnership and has income, gain, loss or deduction from NY sources is subject to an annual filing fee."). *See also* N.Y. Dept. of Taxation & Finance, Important Notice Concerning Form IT-204-LL (Oct. 2003), *available at* http://www.tax.state.ny.us/pdf/ publications/Multi ("The amount of the filing fee for limited liability companies. . . which have income from NY sources, as determined pursuant to Tax Law section 631, has been increased to $100 multiplied by the total number of members. . . in the L.L.C. In addition, the minimum filing fee has been increased to $500 and the maximum filing fee has been increased to $25,000."). An LLC that derives income from New York City must additionally pay a 4% unincorporated business tax on net source income. *See Walker on NY LLCs, supra* note 3, § 3:4. *See also generally A Fair Share–At Least!*, Empirical Study by the Public Policy Institute of New York State, Inc., New York, NY (March 2003) (concluding that businesses currently account for more than one-third of all the tax revenues collected by New York State and its local governments) [hereinafter *Public Policy Institute Study*].

tion with the "start-up" fees typically associated with small businesses.[87]

In the absence of the Publication Requirement it should be presumed that the LLC would be more frequently used among small business entrepreneurs in New York because small business entrepreneurs in other states, where there is no publication requirement, form LLCs at a higher rate than the rate of formation in New York.[88] Simply, the costs of the Act's Publication Requirement, in combination with the other costs of the LLC, make it less popular in New York than in other states where the more general "start up" costs associated with the LLC are not "deal breakers" for small business entrepreneurs especially after accounting for the inflexible governance schemes and additional tax liabilities associated with using other business entities and particularly when non-New York LLCs are not subject to a publication requirement.[89]

Yet these inherent risks and transaction costs pale in comparison to the legal and economic burdens of the Act's Publication Requirement, which too often discourage the formation and usage of the LLC.[90] Indeed, compliance with the Publication Requirement has been routinely cited as the predominant deterrent against forming a New York LLC.[91]

This negative result is largely due to the costs of the Publication Requirement and the fact that compliance with its mandate is the most expensive requirement in forming any business entity or association in New York State.[92] While the average costs in complying with the Publication Requirement vary from county to county, this cost may range from $300 at the

87. *See, e.g.*, Charles W. Murdock, *Limited Liability Companies in the Decade of the 1990s: Legislative and Case Law Developments and their Implications for the Future*, 56 BUS. LAW. 499, 530 n.167 (2001).

88. *See supra* notes 12-13 and accompanying text.

89. *See supra* notes 57, 60 and accompanying text.

90. *See Perish the Publication, supra* note 37, at 32 (contending that the absence of the Publication Requirement would reduce the cost of forming a NY LLC and encourage more people to create these business entities).

91. *Id.* at 29 ("The expensive and legally useless publication of the formation announcement or qualification certificate has led many practisioners to advise their clients to avoid New York when forming these entities.").

92. It can be very expensive to comply with the Publication Requirement's directive to publish legal notice of incorporation for six consecutive weeks in two local newspapers in the county of the Company's principal office:

low end of the spectrum to as high as $1,600 or more in New York County.[93]

Since compliance is required during an LLCs "start-up" phase,[94] the burden of these costs encourages "Publication Forum Shopping" whereby an LLC purposefully designates in its Articles of Organization a county other than the county where its office or operations are physically located in order to save money.[95] "Publication Forum Shopping" effectively results in

COUNTY	NEWSPAPER	COSTS	MISCELLANEOUS
Albany	Albany Times Union	$80-120	Dependent upon size
Erie	The Buffalo News	$7.16 per line per day	
New York	New York Law Journal	$8.55 per line per week	14 line minimum; start price: $723.20
	New York Post	$500 to start	Price commensurate with size
	New York Times	$654.50 per inch per day (Wednesday rate; Tri-State edition)	Cheapest available
	The Village Voice	$4 per line per week	4 line minimum; start price: $96; weekly publication
	The Wall Street Journal	$567 per inch per day (East Coast edition); $266.98 per inch per day (New York area edition)	New York area edition publishes notices on Wednesdays only
Suffolk	The Long Islander	Less than $50	Average cost
Westchester	North County News	$3.65 per inch per week	
Ulster	The Daily Freeman	$0.48 1/2 per line per week	

Telephone Interviews by Erika Andresen with representatives of foregoing newspaper publications (Nov. 17, 2003). *See also* Gerard R. Boyce & Paul J. Pollock, *Choice of Forum for LLC: New York or Delaware*, 3/14/1996 N.Y.L.J. 5 (col. 1) (qualifying the Act's Publication Requirement as burdensome while noting that the costs associated with forming an LLC in New York versus Delaware weigh in Delaware's favor).

93. *Walker on LLCs*, *supra* note 3, § 5:12 n.2 (observing that the costs of complying with the LLC Publication Requirement may be as high as $1,000 to $1,600 in New York County and between $800 to $1,800 in Queens County). *See also* Tom Perrotta, *Legal Notice Requirement Struck Down*, 11/29/2001 N.Y.L.J. 1 (col. 1) (reporting that legal publication notices for an LLC may cost approximately $1,600).

94. Compliance with the Publication Requirement must be fully completed within 120 days of the LLC's formation. *See* NYLLCL § 206.

95. "Publication Forum Shopping" occurs because the Act does not prohibit forming an LLC in any particular county or require that the Articles

notice of the LLC being provided to members of the public in a county where the LLC is not located or operating, without notice being supplied to those in the county where the LLC is actually located or operating. In cases where "Publication Forum Shopping" is not undertaken, more often than not the election is made to skirt the Publication Requirement altogether. This is confirmed by the current rate of compliance with the Publication Requirement.[96]

Outside New York, the LLC has experienced unbridled popularity and usage despite its inherent imperfections. The primary difference between the New York LLC and the limited liability companies in almost every other state is that the former is subject to the Publication Requirement. This difference discourages small business entrepreneurs from forming LLCs in New York.

The consequences of small business entrepreneurs forgoing usage of the New York LLC or opting to form a limited liability company outside New York adversely affect the state's economic vitality. First, New York State's rate of LLC formation, though higher than a majority of states, already lags substantially behind the rate of formation in Delaware, the only major competitor of New York in the area of business formations.[97] Second, the Publication Requirement runs counter to

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designate the county where the LLC is physically located or operating. The scale of "Publication Forum Shopping" is difficult to assess, yet it is commonly encouraged among corporate practitioners and defended as a justifiable response to the excessive compliance costs in certain counties, particularly when these costs must be combined with other start-up costs. This practice is also undertaken and justified by the perception that certain county clerks have "close" relationships with certain newspaper publishers, and that these clerks have been known to use their unfettered discretion under Section 206 to demand that Notices be published in certain newspapers.

96. Since the Act's passage, approximately 50% of all LLCs formed in New York are currently in compliance with the Act's Publication Requirement. *Adami Interview, supra* note 10. For instance, only 27,591 affidavits of publication certifying compliance with the Publication Requirement were filed with the Secretary of State in 2002, the same year that a total of 34,192 LLCs were formed. Because 2 affidavits must be filed by each LLC in order to comply with the Publication Requirement, the 27,591 affidavits indicate that less than 14,000 LLCs are currently in compliance with the Act. *See id.*

97. During the latter half of the last century, New York tirelessly sought to compete with Delaware for the revenue, taxes and incorporation fees that are generated from the formation of new businesses. The Act's Publication Requirement does not make this effort any easier. Historically, Delaware has

the state's economic policies; the costs of impeding LLC formations reduces the aggregate fees generated from their formation, the business taxes that would accrue from their operations and the state's rate of employment.[98] Finally, despite the state's objective to promote small business capital formation, losing ground in the "Race to the Bottom"[99] reduces the rate of business and commercial activity in New York.

Adverse economic effects result from small business entrepreneurs forgoing usage of the New York LLC or electing to form a limited liability company outside of New York.[100] In light of these regressive effects, the question becomes what public policy objectives are purportedly advanced by the Publication Requirement

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usually been touted as the most popular jurisdiction for incorporation in the United States. While this may be true, the actual numbers belie this claim. For instance, in 2003 Delaware incorporated 32,394 businesses. *See Wyatt Memorandum, supra* note 1. However, New York exceeded this number in 2003 with 78,104 incorporations. *Adami Interview, supra* note 10. On its face, it would then appear that the "Myth of Delaware" is simply that. More importantly, these numbers might be indicative of New York being the preferred jurisdiction for incorporation and perhaps for other business formations. Yet, when it comes to limited liability companies, Delaware's numbers supersede New York's by a wide margin. In 2003, New York formed 36,186 LLCs. *Adami Interview, supra* note 10. Yet Delaware formed a total of 55,093 limited liability companies. *See Wyatt Memorandum, supra* note 1. This negative result may only be explained by the Publication Requirement. Indeed, but for the Publication Requirement, New York would be leading the nation in the formation of limited liability companies. However, the "Bane of the NY LLC" is not a myth but a reality. *See, e.g., Business Law Commentary, supra* note 37, at 1 (recognizing that the *Barklee* case and its appeal, in wrestling with the constitutionality of the Publication Requirement, had been "closely watched by LLC practicioners around the country" because a finding of its unconstitutionality would render New York a more suitable jurisdiction for forming and operating a limited liability company).

98. *See generally Public Policy Institute Study, supra* note 86 ("[B]usinesses across the Empire State will pay almost $30.5 billion in state and local taxes–or 34.1 percent of total tax collections–[for 2003]").

99. *See* Boyce & Pollock, *supra* note 92, at 5 (col. 2).

100. *See generally* The Business Council of New York State, Inc., *Report: New York Has One of the Nation's Most 'Anti-Entrepreneurial' Business Environments* (Oct. 2003), *at* http://www.bcnys.org/whatsnew/2003/ 1002SBSC.htm (reporting that the State of New York ranked 45th in a survey of all 50 states and the District of Columbia, in its appeal to small businesses). *See also generally* RAYMOND J. KEATING, SMALL BUS. SURVIVAL COMM., SMALL BUSINESS SURVIVAL INDEX 2003: RANKING THE POLICY ENVIRONMENT FOR ENTREPRENEURSHIP ACROSS THE NATION (Sept. 2003).

VI.
THE PURPORTED POLICY UNDERLYING THE PUBLICATION REQUIREMENT

In New York and a few other states it is longstanding policy to require certain businesses at or immediately after their formation to publish notices disclosing their respective business information.[101] The principal rationale for requiring a newly-formed business to publish a notice is to place the public within its county or general vicinity on notice of its existence and operation.[102] Essentially, the public has a right to know with whom it is doing business.

Another objective in requiring a newly-formed business to publish a notice is to protect the public against fraud, the nonperformance of contractual, financial or other obligations and the usurpation of creditors' rights.[103] In the event of these infractions, a published notice serves as a means for the public

101. *See Walker on NY LLCs, supra* note 3, at Appendix A (chart of all NY business forms indicating which require publication notices upon formation). *See also* CLEMENT BATES, THE LAW OF LIMITED PARTNERSHIP § 26 (1886) (listing those states before the turn of the 20th century that required notices to be published upon a limited partnership's formation).

102. *See, e.g.,* Bates, *supra* note 101, § 33 (explaining that the publication requirement of the limited partnership law is "absolutely essential" and is intended, in conjunction with the filing of the Certificate of Limited Partnership, to be "for the protection of the public"; and furthermore maintaining that non-compliance in connection therewith, even by reason of mistake, inadvertence or ignorance, is "entirely immaterial" for "the rights of third persons are just as effectually prejudiced."). *See* Van Riper v. Poppenhausen, 43 N.Y. 68, 72 (1870) (noting the New York Limited Partnership Act requires the publication of information about limited partnerships in the districts where their business is being conducted "so that the business public there may have full knowledge of the situation of the firm"). *See also* N.Y. Op. Att'y Gen. (Inf.) 162 (1984) (claiming that "persons doing business with the [limited] partnership" come to learn of the filing of its Certificate of Limited Partnership because of its compliance with the Publication Requirement of the New York Limited Partnership Act.).

103. *See, e.g.,* Buckle. v. Iler, 81 N.Y.S. 631, 632 (N.Y. App. Div. 1903) (stating that the publication requirement in New York's Limited Partnership Law is for "the protection of the public" and "the rights of creditors of a limited partnership."). *See also Bates, supra* note 101, § 29 (noting that creditors are protected notwithstanding non-compliance with the publication requirement of limited partnership law).

to ascertain where to serve process upon the LLC if the need to litigate arises.[104]

Since a notice usually contains basic information about a newly-formed business, a published notice assists interested members of the public who are considering doing business with or investing in that business. The availability of information about a business may be a precondition to third parties entering into business transactions or making direct investments.[105]

Nonetheless, the efficacy of a business's notice hinges upon the utility of the information disclosed, the extent of its dissemination and the relative ease in retrieving or accessing it. With the development of the Internet and other modern technology for information dissemination, it seems highly likely that there are methods of information dissemination more useful than printed Notices in local newspapers.

VII.
NEW YORK'S PUBLICATION REQUIREMENTS

The Disparate Application of Publication Requirements

Traditionally, states have obligated various partnerships, typically their limited partnerships, to publish legal notices.[106] Like most states that have a publication requirement, New York has adopted the conventional approach whereby all of its partnerships, except for the general partnership, are obligated to satisfy a publication requirement.[107] Consistent with New

104. Taking the LLC as an example, the Articles of Organization are required to disclose whether the LLC has designated the New York Secretary of State or a private actor as its agent for the service of process against it. *See* NYLLCL §§ 203(e)(4)–(5).

105. *See infra* Section VIII.

106. *See, e.g.*, N.Y. P'SHIP LAW § 121-201(c) (McKinney 2004) (setting forth the publication requirement for New York Limited Partnerships). *See also id.* § 121-1500(a) (proscribing the publication requirement in connection with the formation of New York Limited Liability Partnerships); *Bates, supra* note 101, §§ 26-27 (1996) (listing the states that require publication of legal notices and indicating that the limited partnership, once registered, must for six successive weeks in two newspapers publish in the county of its registration and subsequently file affidavits to establish compliance). Corporations, however, have traditionally not been subject to a similar publication requirement or otherwise obligated to file legal notices upon their formation.

107. *See Bates, supra* note 101, §§ 26-27.

York's apparent policy favoring the disclosure of information relating to newly-formed businesses, the LLC is among those businesses in New York that is subject to a publication requirement.[108]

However, in spite of the apparent wisdom of this policy, New York corporations are not subject to a publication requirement.[109] Nor are foreign corporations which conduct business in New York subject to a publication requirement.[110] Therefore, beyond the initial disclosures contained in a Certificate of Incorporation or an Application for Authority, not a single corporation in New York is required to undertake further disclosure whether pursuant to a publication requirement or similar requirement.[111]

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108. In New York, the LLC, the foreign LLC, the professional service LLC and the foreign professional service LLC are all subject to the Publication Requirement. *See* NYLLCL §§ 206, 802(b), 1203(c)(2), 1306(b). In addition, the New York limited partnership, foreign limited partnership, registered limited liability partnership and the foreign registered limited liability partnership are subject to a requirement of publication. *See* N.Y. P'SHIP LAW §§ 121-201(c), 121-902, 121-1500(d), 121-1502(f) (McKinney 2004).

109. New York's Business Corporation Law, Foreign Corporations Law, Professional Service Corporations Law, Foreign Professional Service Corporations Law, Not-For-Profit Corporations Law, Foreign Not-For-Profit Corporations Law, Special Not-For-Profits Corporations Law, Public Cemetery Corporations Law, Cooperative Corporations Law, Worker Cooperative Corporations Law, Agricultural Cooperative Corporations Law, Credit and Agency Corporations Law neither include nor apply a publication requirement or similar requirement. Yet this does not contravene New York's apparent policy favoring the disclosure of information relating to newly-formed businesses since the corporation, like the LLC, must still publicly-file its initiatory Certificate. No different from the LLC and its Articles of Organization, it is the Certificate of Incorporation that serves as the primary means for disseminating information relating to the newly-formed corporation. *See, e.g., Walker on NY LLCs, supra* note 3, § 6:8 (maintaining the Certificate of Incorporation of a newly-formed New York Business Corporation serves as the primary basis for providing information about the corporation to third parties).

110. *See generally id.*

111. Furthermore, nor does the failure to comply with significant corporate formalities bar a New York corporation from accessing the courts. In some cases, altogether misfiling or not filing the Certificate of Incorporation in no way bars a New York Corporation from the full benefits and entitlements of its statutory powers as a New York corporation, including its fundamental power to sue and maintain an action in New York courts. Corporations in New York are treated "specially", notwithstanding the state's purportedly strong public policy favoring the meaningful disclosure of important business information for the general public's protection. *But see*

Arguably, New York's disparate application of publication requirements is reasonable upon considering the marked differences between business entities and unincorporated associations and their respective liability schemes.[112] In the case of the Limited Partnership ("LP"), the basis for this distinction makes sense in view of its liability scheme[113] yet belies reason in the case of the LLC which is a limited liability entity.

The Historical Use of Publication Requirements in New York

New York's first publication requirement came about in 1919 with the enactment of the New York Limited Partnership Act.[114] The LP Act's publication requirement initially mandated the immediate publication of the partners' names in a limited partnership so that creditors and other persons doing business with an LP would have notice regarding which partners had unlimited personal liability for the LP's financial obligations.[115]

N.Y. BUS. CORP. LAW § 1312 (McKinney 2004) (requiring foreign corporations conducting business in New York to file a Certificate for Authority to conduct business in New York prior to gaining access to New York courts).

112. Because of the liability schemes of the various partnerships, it is somewhat justifiable that they be subject to a Publication Requirement. *See generally supra* Section IV.

113. *See, e.g.*, New York P'SHIP LAW § 121-201(c) (McKinney 2004) (providing that within 120 days after the filing of its Certificate of Limited Partnership a copy thereof or a notice containing the substance thereof must be published once each week for a period of six consecutive weeks in two newspapers selected by the county clerk in the county where the limited partnership's office is located). *See also id.* § 121-902(d) (applying the Publication Requirement to the foreign limited partnership in New York); *id.* § 121-1500(a) (providing that within 120 days after the filing of its Certificate of Limited Liability Partnership a copy thereof or a notice containing the substance thereof must be published once each week for a period of six consecutive weeks in two newspapers selected by the county clerk in the county where the limited liability partnership's office is located); *id.* § 121-1502(f) (mandating the Publication Requirement for a foreign registered limited liability partnership in New York). *But see also* N.Y. ARTS & CULT. AFF. LAW § 23.03(4) (McKinney 2004) (exempting domestic and foreign limited partnerships formed as theatrical production companies from the Publication Requirements of the Partnership Law).

114. 1916 Unif. Ltd. P'ship Act, N.Y. P'SHIP LAW §§ 90-120 (McKinney 2004).

115. *See generally Perish the Publication, supra* note 37, at 29. *See* N.Y. P'SHIP ACT § 121-201(a)(5) (McKinney 2004) (requiring the name and address of each general partner in the LP) *id.* §§ 121-201(b)–(c) (stating that (i) a gen-

At this time, the Certificate of Limited Partnership was filed with the clerk in the county where the LP was located.[116] Yet the county clerks did not generally maintain and index their filings.[117] This deficient filing system hampered the process of reviewing LP filings.[118]

The Uniform Limited Partnership Act of 1922 abolished the LP's publication requirement at which time "substantial compliance" with the statute's filing requirements for the Certificate of Limited Partnership sufficed for duly forming a LP.[119] However, the publication requirement was reinstituted in 1939.[120]

It was not until 1980 that both the publication requirement and due formation were finally linked. By then the New York Limited Partnership Act provided that the LP was not duly formed and was barred from commencing any business until such time as the first full week of publication had been completed.[121] Thereafter, the LP's continued existence was contingent upon its completion of six full weeks of publication and the filing of its affidavit of publication.[122]

With the passage of the Revised Limited Partnership Act ("RLPA") in 1991,[123] an LP remained subject to the publication requirement but for the first time was barred from maintaining an action in any New York court for the failure to com-

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eral partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the limited partnership and the other partners and (ii) a general partner has of an LP has the liabilities of a partner in a partnership without limited partners to the limited partnership and to the other partners).

116. The Certificate of Limited Partnership is the functional equivalent of the Articles of Organization or the Articles of Incorporation in that it is the formative Certificate that must be filed for the purpose of forming the LP. *See* N.Y. P'SHIP ACT § 121-201 (McKinney 2004).

117. *Perish the Publication, supra* note 37, at 30.

118. At least one commentator has suggested that the problems associated with searching for a Certificate of Limited Partnership arguably run in favor a publication requirement. *See id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 29-30.

123. Rev. Ltd. Liab. P'ship Act, N.Y. P'SHIP LAW §§ 121-101, 121-1300 (McKinney 2004).

ply with the requirement.[124] This penalty was enforced despite the introduction of a centralized state filing system;[125] that is, rather than being filed with the clerk in the county where the LP was located, the Certificates of LP were to be filed with the Secretary of State's office.[126]

With the inception of this centralized filing system, the county clerks' role in the LP filing process was eviscerated except for their administration over the publication requirement.[127] This is because the introduction of a centralized statewide filing system made it unnecessary to also require a local filing. Moreover, this system was a marked improvement over the disorganization associated with the county clerks' non-indexed business filings, especially since this system enabled the public to search these records statewide.[128]

Notwithstanding these changes, the RLPA publication requirement nonetheless contemplated an integral role for the county clerks in the compliance scheme.[129] As a result, it is widely believed that the maintenance of an arguably unnecessary and duplicative registration process on the state and county levels was intended to prevent attenuating the role of these clerks in the recordation process. It should be noted as well that popular suspicion about the Publication Requirement is partly due to the fact that during the phase leading up to the eventual adoption of the RLPA, the newspaper lobby successfully convinced legislators to add to the original bill a chapter requiring the publication of notices by *foreign* LPs, which was unprecedented.[130] Although the final version of the

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124. *Id.* The RLPA, while precluding the maintenance of an action in any New York court, did not bar the LP from conducting business. *See id.* § 121-201(c) (McKinney 2004).

125. *See Perish the Publication, supra* note 37, at 30.

126. *See id.*

127. This is because the role now played by the county clerks in the LP formation process has been reduced to solely supervising compliance with the publication requirement. *See, e.g., id.* ("The drafters [of the RLPA] had argued that publication was archaic in light of the change to a central filing of short form Certificates of Limited Partnership with the DOS, *and without further filings with the county clerks.*") (emphasis added).

128. *See Perish the Publication, supra* note 37, at 30.

129. *Id.*

130. The author of the RLPA advised during legislative sessions that because the Certificates of Limited Partnership were to be filed with the Department of State there was no need to have the publication requirement.

RLPA obliged both domestic and foreign LPs to publish, Governor Cuomo took the position that the chapter amendment requiring publication was useless.[131]

As was the case with the RLPA, the newspaper lobby played an integral role in the inclusion of the Publication Requirement in the Act.[132] In addition, because the Act's drafters were concerned that the LLC might be likened to a corporation, thereby threatening its potential tax classification as a

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See generally Memorandum of New York State Attorney General to Governor Cuomo (remarking that in supporting the incorporation of the Act's Publication Requirement the New York media sought to preserve a benefit for certain publications that derived substantial revenue from the preexisting publication requirements of the partnerships) (on file with Journal).

131. *Id.* In his official Memorandum announcing the RLPA's enactment, Governor Cuomo stated explicitly that the chapter amendment requiring "publication of useless boilerplate information, including information without any relevance under the new law, is unnecessary." *See id.*

132. One critique of the LLC's Publication Requirement has aptly noted:

> [T]he ostensible purpose of informing the public is a mere pretense. There is a dirty secret behind the [Act], a dirty secret that LLC practicioners around the country are all aware of–the purpose of the [publication] requirement is purely and simply to provide a subsidy to the newspapers around the state that rely on fees from legal notices for their support. Those newspapers form a powerful lobby in Albany. Their support of or opposition a state legislators can spell the difference between success or failure in a close election. (And, the fact that, at the time the notice requirement found its way into the state, the son of the publisher of the largest of these newspapers was the leader of one of [sic] houses of the New York legislature probably did not impede the passage of the provision).

Business Law Commentary, supra note 37. More importantly, in his official Memorandum to Governor Cuomo, the Attorney General made the following observations:

> As you might expect, there was strong lobbying in favor of the publication requirement from a number of representatives of New York media. While those who supported publication did so on the alleged argument that it would increase public knowledge, it was my belief at the time that the publication requirement was solely an attempt to preserve a benefit for certain publications that derived considerable income from the publication of partnership notices. However, it was also my view at the time that it would be difficult if not impossible for the bill to pass without a publication requirement because of the support that media interests generated among legislators.

Memorandum of New York State Attorney General to Governor Cuomo (on file with Journal).

partnership,[133] they sought to distinguish it from the traditional corporation. They addressed this concern by adding provisions with substantial similarities to the RLPA. It is within this legal and political context that the New York legislature enacted the final version of the Act which included the LLC Publication Requirement.

In reviewing this history, it is apparent that the Act's Publication Requirement was originally intended to serve purposes other than ensuring disclosure by newly-formed LLCs. At the very least, there were several motivations for incorporating a publication requirement into the Act, ranging from the legal to the political.[134] Taking the history of the LP's publication requirement as an example,[135] the inclusion of the LLC's Publication Requirement in the Act cannot be understood as an effort to inform the public about newly-formed LLCs.[136] Rather, the history of the Publication Requirement suggests the legislature's appeasement of special interests.[137]

VIII.
THE LLC PUBLICATION REQUIREMENT AS DEFICIENT NOTICE

An LLC's Articles of Organization is the template for compliance with the Publication Requirement.[138] Whether the Articles or a Notice including its contents is published, the Publication Requirement contemplates that through publication the public will be put on notice of the information disclosed in the LLC's Articles. Thus the extent to which the Act's Publication Requirement achieves its purported policy objective—to provide the public with business information concern-

133. This was a concern because the LLC's members, like shareholders in a corporation, have limited liability. This was also reflective of the concern that the Internal Revenue Service had not yet recognized the LLC as among those entities or associations which could elect to be taxed as a partnership. *See, e.g., Rich's LLC Practice Commentary, supra* note 3, at 5. *See also Perish the Publication, supra* note 37, at 30.

134. *See supra* notes 132-33 and accompanying text.

135. By comparison to the LP's publication requirement, the LLC Publication Requirement cannot be said to exist for the purpose of informing the public about who is responsible for the debts and liabilities of the LLC. NYLLCL § 609.

136. *See supra* notes 130, 132 and accompanying text.

137. *See supra* note 129-33 and accompanying text.

138. NYLLCL § 206.

ing the LLC—hinges upon the specific information contained in the LLC's Articles. Generally, this information consists of the name of the LLC, the county where its office is located, its dissolution date (if any), a statement designating the Secretary of State as its agent for service of process or the name and address of its registered agent for service thereof, and whether any of its members shall be liable for the LLC's debts or obligations.[139] Therefore, the utility of the Publication Requirement turns on the utility of the disclosures in an LLC's Articles.[140]

However, the disclosures required under Section 206 fail in achieving the purported public policy objective underlying the Publication Requirement. Nor do Section 206's disclosures achieve this objective as effectively as less punitive alternatives,[141] which do not impede small business capital formation.[142] Even assuming the adequacy and sufficiency of the information disclosed in LLC Notices, a comparative analysis of the publication requirements of other New York businesses patently discredit the purported policy underlying the Publication Requirement.

The Publication Requirements of Other Unincorporated New York Businesses

A comparative review of the publication requirements applied by New York statutes for other unincorporated businesses,[143] namely the Limited Partnership Act[144] and Limited

139. *Id.* As previously stated, an LLC's Manager or Member may voluntarily assume personal liability for its debts and obligations. *See id.* § 609(b).

140. *See supra* note 33 and accompanying text. Essentially, a member of the public might forgo doing business with an LLC if it has a reputation in the community for bad practices, the provision of inadequate products and services and undesirable managers and employees. For these purposes, identification of the managers responsible for an LP's business is obviously made easy by virtue of the names and address of the managing partners for the LP (i.e., the general partners) being disclosed so as to enable members of the public to ascertain who are the responsible parties in cases of mismanagement or outright fraud. *See, e.g.*, N.Y. P'SHIP ACT § 121-201(a) (McKinney 2004).

141. *See Rich's LLC Practice* Commentary, *supra* note 3, at 30.

142. *See supra* notes 97-100 and accompanying text.

143. The LLC, like the partnership, limited partnership and limited liability partnership, is an unincorporated business. *See Rich's LLC Practice* Commentary, *supra* note 3, at 4 ("An LLC is defined as an unincorporated organi-

Liability Partnership Act,[145] demonstrates the inefficacy of the LLC's Publication Requirement. Since the publication of legal notices by business associations may be attributed to the requirements governing the formation of limited partnerships;[146] the publication requirement of the New York limited partnership has for almost a century served as the exemplar for the dissemination of material business information[147] Accordingly, the efficacy of the LLC's Publication Requirement may be assessed by reference to its well-established counterpart in partnership law.

While New York's Partnership Law does not require the publication of any legal notice,[148] New York's Limited Partner-

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zation of one or more persons having limited liability for the contractual obligations and other liabilities of the business, and is other than a partnership or trust."). *See also* N.Y. P'SHIP LAW § 10 (McKinney 2004) ("A partnership is an *association* of two or more persons to carry on as co-owners a business for profit and includes for all purposes of the laws of this state, a registered limited liability partnership"). However, unlike the limited partnership and limited liability partnership which are unincorporated business associations, the LLC is an unincorporated business *entity. See* NYLLCL § 203(d).

144. N.Y. P'SHIP ACT § 121-1300 (McKinney 2004).

145. *Id.* §§ 121-1500, 121-1506.

146. *See Perish the Publication, supra* note 37, at 29-30.

147. The New York Limited Partnership Act was adopted by the legislature in 1919. Article 8 of the 1919 Limited Partnership Act required publication of a legal notice *immediately* after the filing of a Certificate of Limited Partnership. Failure to file caused all limited partners to be treated as general partners for liability purposes. *See generally id.*

148. Instead, the only filing required by a New York general partnership is the filing of a Certificate of Partnership in each county where the partnership will be doing business. N.Y. GEN. BUS. LAW §130(a) (McKinney 2004). This Certificate of Partnership must contain the name and address of the partnership along with the name and address of each partner. Moreover, an Amendment to this Certificate must be filed in the event of a change in the address of either the partnership itself or one of its partners. An additional requirement is that the precise age of any person under the age of eighteen who is also a partner must be indicated in the Certificate. More importantly, the Certificate must be signed and duly acknowledged by each member of the partnership. *Id.* Upon a review of the foregoing, it may be argued that these formation requisites that are applied to the general partnership are more favorable to the needs of the general public and more responsive to the policy requiring the disclosure of material information regarding New York businesses than either the Act's Articles of Organization or its published notice. In a straight and simple comparison, the general partnership's Certificate not only requires the names, addresses and signatures of each partner-a requirement which is not imposed upon the LLC's members by

ship Law and Limited Liability Partnership Law require notices to be published in newspapers in the counties where the offices of LPs and LLPs are located.[149] These statutes mandate that the disclosures made in the Certificates forming these partnerships[150] also be made in their corresponding publication notices.

In the case of New York's Limited Partnership Law, a copy of the LP's Certificate of Limited Partnership or a notice disclosing its contents must be published within 120 days after its filing.[151] Publication must occur once per week for six consecutive weeks in two county newspapers where the principal office is to be located.[152] Within that same 120 day period, publication must be confirmed by filing an affidavit with the Secretary of State.[153] As in the case of the LLC Act, the failure to effectuate publication does not impair the validity of any contract or act of the limited partnership, but rather, like Section 206's penalty, bars it from maintaining any action in any New York State court.[154]

Similarly, a New York Limited Liability Partnership must publish its Certificate of Limited Liability Partnership or a notice of its contents once a week for a period of six consecutive weeks in two county newspapers where its principal office is to be located.[155] Publication must be made within 120 days after the filing of its Certificate with the Secretary of State, and within the same time period the LLP must file proof of publication with the Secretary of State by written affidavit.[156] Noncompliance with the publication requirement neither impairs

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the Act in any way whatsoever-but this Certificate is to be filed in *each county in New York State where the general partnership conducts business. Id.* In the case of the LLC, the Act imposes no similar requirement upon the LLC despite its purported policy in promoting disclosure about the LLC to the general public. *See, e.g., supra* note 33 and accompanying text.

149. *See* N.Y. P'SHIP ACT §§ 121-201(c), 121-1500(a) (McKinney 2004).

150. For the Limited Partnership, the formation document is referred to as the Certificate of Limited Partnership. *See id.* § 121-201(a). In the case of the Limited Liability Partnership, it is referred to as the Certificate of Limited Liability Partnership. *Id.*

151. *See id.* § 121-201(c).

152. *See id.*

153. *See id.*

154. *See id.*

155. *See id.* § 121-1500(a).

156. *See id.* §121-1500(a)(9).

nor invalidates any contract or act to which the LLP is a party, but nonetheless penalizes it by precluding the maintenance of any action or special proceeding in any New York State court.[157]

The LLC's Publication Requirement and its counterparts in the partnership law appear to be substantially the same in that these requirements mandate the publication of information upon the business's formation and carry the same penalty for non-compliance. A closer evaluation, however, reveals that both the New York Limited Partnership Act and the Limited Liability Partnership Act require additional disclosures to be made in their Certificates, which serve as the templates for their respective publication requirements Upon consideration, these additional disclosures are qualitatively superior to those contained in an LLC's Articles and by extension its Notice, and are more effective in advancing the policy of ensuring the disclosure of meaningful information about newly-formed businesses than the LLC's Publication Requirement.

First and foremost, the LP and LLP Laws require that their Certificates indicate the name and business address or residence street address of all partners. By comparison, the Act neither requires the names or addresses of any of the LLC's members. The partnerships laws' also require that the formative certificate be signed and acknowledged by each partner in the partnership. The Act has no such obligation; in fact, no member of the LLC is required to sign the Articles.

The disclosures required by the New York Limited Partnership Law and the Limited Liability Partnership Law more readily enable third parties to learn the identity of members in the community who are partners in these partnerships. These partnership requirements protect the public interest by enabling third parties to personally seek recourse against those individual partners who might be liable for certain obligations of the partnership. Moreover, these requirements also serve as a deterrent to fraud and the commission of other civil and criminal violations of law since the community is on notice of the exact commercial and residential location of each partner.

Since the Act does not require the disclosure of the name, address or other identifier of either a Member or Manager of

157. *See id.*

the LLC, the vast majority of Articles filed lack the names or other identification of anyone formally associated with the entity. Moreover, the Act does not require a Member or Manager to be a signatory to the Articles of Organization. In fact, since the "Organizer" or Promoter of the LLC[158] is not required by the Act to be either a Member of or Manager in the LLC, it is commonplace for the Articles of Organization to be filed without any reference whatsoever to a single Member or Manager of the LLC.[159]

In short, the Act's Publication Requirement constitutes a significant divergence from the disclosures mandated by the publication requirements of the LP and LLP laws. Notwithstanding its purported disclosure policy, the Act does not require any identification of the name or address of any LLC Member or Manager in the Articles of Organization. Since the Articles are most frequently used as the template for complying with the Act's Publication Requirement, the Act fails in promoting the purported policy of the Publication Requirement[160]

More confounding is that the LLC Publication Requirement, rather than incorporating the best features of the LP and LLP publication requirements, incorporates their most egregious features.[161] A prime example is the lack of any obli-

158. The Act enables one or more persons to act as an "Organizer" for the formation of the LLC, whereby such Organizer may prepare, sign and file the Articles of Organization. Additionally, the Act does not require the Organizer to be a member of the LLC that the Organizer forms. *See* NYLLCL § 203(b) ("An organizer may, but need not be, a member of the limited liability company that he or she forms."). An Organizer or Promoter is a party charged with the obligation to manage all of the required formalities in connection with the formation and start-up of the business. Accordingly, these terms are used interchangeably.

159. Typically, the Articles of Organization are filed by an attorney or expert service company such as the Corporation Service Company or Bloomberg. While the Service of Process statement in the Articles must list an address, no name is required unless a registered agent is designated. *See id.* § 203(e)(4). The vast majority of LLCs do not have registered agents for Service of Process because of the costs involved with their retention.

160. *See supra* Section VI.

161. Clearly the most important material information provided by the partnership laws' publication requirement is the specific identification of the names and addresses of the partners, so that recourse for a grievance may be sought and achieved by personally contacting these individuals. N.Y. P'SHIP LAW §§ 121-201(c), 121-1500 (McKinney 2004).

gation under the publication requirements of the Act or the LP and LLP partnership laws to publish an "Amendment to the Publication Notice" upon the occurrence of a material event in their businesses or operations.[162] Basically, an entire reconstitution of the LLC's original management and membership may be undertaken without the public becoming notified of this change by virtue of any new or amended Publication Notice. Therefore, the LLC may change its name or move to a new county without being required to issue a new or Amended Publication Notice.[163]

Thus, after its initial compliance with the Publication Requirement, there is no continuing obligation on the LLC to issue a new, amended or revised Publication Notice even upon the filing of an Amendment to its original Articles of Organization. Considering the purported policy for the Publication Requirement, the absence of a rule that would require the disclosure of a material change in the LLC, whether relating to its name, governance scheme, liability scheme or location is incomprehensible, unless the Publication Requirement was not intended to ensure the disclosure of meaningful information to the public about LLCs.[164] At the very least, the absence of a

162. That is, the Limited Partnership Law and the Limited Liability Partnership Law impose the publication requirement at the time of newly-constituted partnerships upon their filing of the Certificate of Limited Partnership or the Certificate of Limited Partnership, respectively. *See id.* However, these same laws do not obligate these partnerships to reinitiate compliance with their publication requirements; neither is the publication of a new notice or an amendment to the initial notice subsequent to a material change in the partnership required. This is the same shortcoming found in the Act, as the LLC is neither obligated in any case to ever subsequently publish a new notice or an amendment to the initial Notice despite the entity's perpetual duration. The Publication Requirement does not oblige the LLC to file an additional Notice or an Amended Notice if the Articles of Organization are ever amended. *See, e.g.*, NYLLCL § 206. *See also id.* §§ 211(d)(1)-(9) (imposing an obligation upon the LLC in the event it changes its name, county, dissolution date, registered agent for service of process and certain aspects of its management, in addition to ancillary matters). The Articles may also be amended voluntarily so long as the amendments might have been lawfully contained in the initial Articles. *See id.* § 211(b).

163. *See* NYLLCL § 206.

164. *See generally Business Law Commentary, supra* note 37 (explaining the Publication Requirement is indicative of the newspaper lobby's influence in Albany). *See also Perish the Publication, supra* note 37, at 30 ("[T]he support of the newspaper interests has permitted the requirement to publish to survive

rule that would require the LLC to publish a new or revised Notice upon a change to its initial Articles of Organization which previously served as the template for its Notice negates its entire purpose.[165]

Comparison with the New York Corporation Law

The Act's disclosure regime, even when viewed in a light most favorable to it, is also substandard when compared to the disclosure regimes of other business entities such as the corporation. Since the New York corporation is spared from observing a publication requirement, its Certificate of Incorporation serves as the main resource for the public to obtain material information about the corporation's business, location and operations.[166] An examination of the corporation's Certificate of Incorporation and its required disclosures evinces the weaknesses of the Act's Publication Requirement and its failure to provide adequate and sufficient information to the public.

A. *The NYBCL's Certificate of Incorporation*

Under New York's Business Corporation Law,[167] a corporation's Certificate of Incorporation[168] must include: (i) the

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as an expensive vestigial remnant at a time of Internet access to information regarding the formation and subsequent existence of the entity").

165. *See supra* note 16 and accompanying text.

166. *See Walker on NY LLCs, supra* note 3, § 6:8 (discussing that the Certificate of Incorporation of the newly-formed New York Business Corporation Law serves as the primary basis for providing public information to third parties).

167. *See* N.Y. BUS. CORP. LAW §§ 101–2001 (McKinney 2004).

168. In order to form a business corporation under the laws of New York, a Certificate of Incorporation must be filed in accordance with the terms of Section 402 of the NYBCL. *See generally* N.Y. BUS. CORP. LAW § 402 (McKinney 2004). *See also Beane & Santucci, supra* note 60, at 34 (reviewing the content required for a Certificate of Incorporation in New York); Arthur Norman Field & Morton Moskin, New York and Delaware Business Entities: Choice, Formation, Operation, Financing, Acquisitions § 12.17 (1997). *Compare* N.Y. BUS. CORP. LAW § 1503 (McKinney 2004) (setting forth the requisite content of a Certificate of Incorporation when forming a New York Professional Corporation). *Compare also* N.Y NOT-FOR-PROFIT CORP. LAW § 113 (setting forth the content required in a Certificate of Incorporation when forming a New York Not For Profit Corporation). *Compare also* N.Y COOP. CORP. LAW § 11 (delineating the information required to be contained in a Certificate of Incorporation when forming a New York Cooperative Corporation).

name of the corporation,[169] (ii) the purpose for which it was formed,[170] (iii) the county within which its office is located,[171] (iv) the aggregate number of shares the corporation may issue,[172] (v) the designation of the Secretary of State as the Agent for Service of Process and the post address to which Process shall be mailed by the Secretary,[173] (vi) the name and address within the State of New York of the registered agent, if any,[174] and (vii) the duration of the corporation if it is not perpetual.[175] The contents of a Certificate of Incorporation clearly provide more detailed, substantive disclosure than the disclosure contained in an LLC's Articles of Organization.

More importantly, much of the information contained in a Certificate of Incorporation pertains to the corporation's capitalization.[176] The NYBCL requirement that the corporation disclose its capital structure is of direct benefit to third parties interested in investing in the business. The requirement of a publicly-disclosed statement regarding capitalization

169. N.Y. BUS. CORP. LAW § 402(a)(1) (McKinney 2004).

170. *See id.* §402(a)(2).

171. *Id.* § 402(a)(3).

172. *Id.* §§ 402(a)(4)-(6). Moreover, the Certificate of Incorporation must also disclose if the corporation will have multiple classes of stock, the numbers of shares within each class, the par value or absence of par value of the shares, along with the relative rights, preferences and limitations of each class of shares, the designation of each series of preferred stock (if any), plus the relative rights, preferences and limitations of each series of preferred stock, and a statement as to any optional grants of power to the corporation's board of directors to authorize and designate series of preferred stock and to establish the relative rights, preferences and limitations of any series thereof.

173. *See id.* § 402(a)(7).

174. *Id.* § 402(a)(8).

175. *Id.* § 402(a)(9). The Certificate of Incorporation may also include any additional material information relating to, among other things, the exculpation or extinguishment of personal liability under certain circumstances to directors and shareholders, and other matters. *See, e.g., id.* §§ 402(b)-(c). The Certificate of Incorporation may contain any provision consistent with the NYBCL or any other New York statute pertaining to the corporation's business and affairs, as well as the rights of any of its directors, officers or shareholders. Additionally, the Certificate of Incorporation may contain provisions that are also stated in the corporation's Bylaws. *See generally id.* § 402(c). For a summary of the major optional provisions that may be included in a New York business corporation's Certificate of Incorporation, *see, e.g., Field & Moskin, supra* note 168, § 12.17.

176. *See* N.Y. BUS. CORP. LAW §§ 402(a)(4)–(6) (McKinney 2004).

also mitigates public concerns relating to fraud and fiscal insolvency.[177] Additionally, the corporation is required in its Certificate to declare any optional grants of power to the corporation's board of directors that may authorize them to designate a series of preferred stock and to establish the relative rights, preferences and limitations of any series thereof.[178] This information provides notice to potential investors regarding whether the board of directors has extraordinary rights to control the corporation's capital.

On the whole, the corporation's Certificate of Incorporation includes material information about the corporation's capitalization so a prospective patron, vendor or investor is in the position to make an informed evaluation of the corporation's capital structure. This information is also helpful when inquiring into the corporation's financial position and the ability of the corporation's management to control its finances. Additionally, this information assists potential investors because it relates to the rights and privileges appurtenant to an equity investment.[179] Furthermore, these required disclosures also advance the state's policy in ensuring the availability of meaningful information concerning newly-formed businesses.

By comparison, the Act requires no disclosure of an LLC's capitalization in its Articles of Organization.[180] While the Act permits an LLC's organizers to voluntarily disclose information beyond what is required in the Articles,[181] the likelihood of such voluntary disclosure is close to nil, particularly when any future change in that information obligates the LLC to file

177. *See id. See also Buckle*, 81 N.Y.S. at 632.

178. *See* N.Y. BUS. CORP. LAW § 402(a)(6) (McKinney 2004).

179. *See generally id.* § 402(a). In addition to the specifics of its capital structure, a simple review of the corporation's Certificate of Incorporation enables a potential investor to discern whether it is closely-held or not, whether stockholders are treated disparately or dispossessed of certain economic or financial rights and privileges, or whether the board of directors possesses the exclusive authority to alter or modify the rights and privileges of any class or classes stockholders.

180. *See* NYLLCL § 203.

181. *See id.* §203(e)(7) (permitting the Articles of Organization to contain any provision other than those required provisions so long as the information supplemented does not contravene a provision of the Act or is not inconsistent with law).

an amendment to its Articles and assume the administrative and financial costs therefor.[182]

The utility of the NYBCL's disclosure regime is also evident in its requirement that the corporation explicitly acknowledge in its Certificate of Incorporation any details that pertain to its internal structure if it differs from the usual corporation.[183] For example, the NYBCL requires a corporation to disclose in its Certificate all material information relating to the voting rights of its respective corporate constituencies[184] in addition to the voting rights of the corporation's management.[185] Moreover, a corporation's Certificate must

182. *See id.* § 211(c). An Amendment to the Articles of Organization must be effected when the LLC changes its name, its county, and its dissolution date, among other things. *See id.* § 211(c). Yet an Amendment to the Articles of Organization must also be filed if the information contained in the supplementary provisions that were included in the initial Articles also changes.

183. *See, e.g., Beane & Santucci, supra* note 60, at 34-40 (discussing the usual and customary standards when forming a New York Business corporation and describing the mandatory contents of the Certificate of Incorporation under the provisions of the NYBCL). *See also id.* at 37-38 (outlining the various optional provisions that may be supplemented with the mandatory provisions required by the NYBCL in a newly-formed corporation, and analyzing why some of these optional provisions may be best suited for closely-held corporations formed under the NYBCL); N.Y. BUS. CORP. LAW § 402(b) (McKinney 2004) (compelling disclosure in the Certificate of Incorporation if the personal liability of the directors is limited in certain circumstances).

184. The Certificate of Incorporation must specifically indicate in respect to voting whether the corporation limits the rights of shareholders to vote, modifies the election of directors by a vote other than a plurality, adopts a super-majority quorum requirement for purposes of shareholder meetings, adopts a super-majority voting requirement for matters entitled to be voted upon, whether any class or series of shareholders will vote as a class in connection with business transactions or at shareholder meetings, whether the corporation shall have cumulative voting, when the corporation has imposed restrictions on the board of directors in relation to its management of the corporation, and whether shareholders shall have preemptive rights. *See generally* N.Y. BUS. CORP. LAW §§ 613, 614, 616-18, 620, 622 (McKinney 2004).

185. The NYBCL requires a statement in the Certificate of Incorporation if the corporation provides for the election of one or more directors by any one class or series of shareholders, or by its bondholders voting as a class. The NYBCL also mandates that any classification of directors be referenced in its Certificate of Incorporation. In addition, the Certificate of Incorporation is required to indicate when a super-majority of the board of directors is required to constitute a quorum at a meeting for the transaction of business of the corporation, when action by unanimous written consent of the board of directors or any committee thereof has been restricted, and when a super-majority of the board of directors must by an affirmative vote approve the

specifically disclose when it has an uncommon corporate purpose.[186]

Furthermore, amendments to the initial Certificate of Incorporation or to any subsequent amendments thereto[187] must be made when the corporation has authorized additional shares for issuance beyond the number previously specified in its initial Certificate or any subsequent amendments thereto.[188] In addition, an Amendment to the Certificate of Incorporation must be publicly-filed when a corporation removes any class of shares from among its authorized shares,[189] increases or reduces the par value of its shares,[190] changes any authorized shares into a different number of shares of the same class,[191] modifies the designation of any class or series of shares or their rights, preferences or restrictions,[192] modifies the mode of authorization to issue preferred stock, or modifies any rights, preferences or restrictions in connection therewith.[193] Finally, the corporation must also file an amendment to its initial Certificate of Incorporation when it modifies any provision thereof,[194] and must publicly

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transaction of business of the corporation. *See* N.Y. BUS. CORP. LAW § 703-09 (McKinney 2004). The Corporation must also clearly indicate in its Certificate of Incorporation when the authority of its board of directors has been delegated to an executive committee of directors. *See id.* §§ 710, 712.

186. *See, e.g., id.* § 201(d) (requiring the disclosure of when a corporation is being established as a day care center for children); § 201(e) (requiring the disclosure of when a corporation is being established as a hospital or facility for health care services).

187. A corporation may be required under N.Y. BUS. CORP. LAW § 801 to "amend an amendment" to the Certificate of Incorporation if it has authorized or otherwise approved a provision that essentially overrides the substance of an earlier Amendment or series of Amendments.

188. *See id.* § 801(b)(7). In addition to an increase in the number of authorized shares, the corporation must file an Amendment to its Certificate of Incorporation if it has decreased the number of shares authorized for issuance. *See id.* Moreover, the corporation must amend its Certificate when it has either increased or decreased the number of shares of any class or series of shares of stock.

189. *See id.* § 801(b)(8).

190. *See id.* §§ 801(b)(9)-(10).

191. *See id.* § 801(b)(11).

192. *See id.* § 801(b)(12).

193. *See id.* § 801(b)(13).

194. *See id.* § 801(b)(14).

file an Amendment for any change in its name or county or for any change that is fundamental to its business .[195]

A Certificate's contents place third parties on notice of the corporation's existence, capital structure, governance structure, voting rights, and complementary matters.[196] Whether read individually or collectively, the provisions of a Certificate of Incorporation provide full, substantive disclosure to third parties in regard to a corporation's determinative features.[197] The NYBCL's policy of disclosure and the availability of material public information relating to a newly-formed corporation also promotes the objectives of capital formation. Third parties, whether they are prospective patrons, vendors or investors, are afforded the kind of information necessary to make an informed decision about whether to do business with or invest in a newly-formed corporation.[198]

Comparatively, the Act neither obligates an LLC to disclose divergences from usual and customary LLC standards nor requires it to disclose substantive information in its Articles of Organization or Publication Notice. The only informa-

195. *See generally id.* §§ 801(b)(1)-(6). Among other things, the corporation must disclose in an Amendment any change to its name, corporate purpose, office location, and duration.

196. *See Walker, supra* note 3, § 6:8.

197. *See id.* § 6:8 ("Because the voting rights of shareholders are effectively disclosed in the Certificate of Incorporation (when read in the context of the mandatory provisions of the NYBCL) and because each corporation has one board of directors with full management authority (unless there is a special provision in the Certificate of Incorporation), *a copy of the Certificate of Incorporation will disclose the main features of the corporation's voting rights and management authority.*") (emphasis added).

198. The contents of the Certificate of Incorporation constitute what is deemed generally as material information. Though not reducible to a single definition, material information is that kind of information an investor would deem important in making an investment decision. There can be no doubt that the Certificate's mandated disclosures concerning the relative rights and preferences of common and preferred stock, the indemnification of directors, the extinguishment of personal liability of the directors, supermajority voting rights or no voting rights and the like all become, both individually and in the aggregate, information that would specifically inform an investor about the corporation's management, capital structure and voting rights and therefore appreciably assist investment decision-making.

tion required by the Act in the LLC's Articles or Notice is its name, county and location for service of process.[199]

Thus the Act not only fails to mandate the meaningful disclosures of the LP and LLP laws[200] but also fails to mandate the substantive disclosures required by the NYBCL. Notwithstanding the state's imperative to protect the general public and assist third parties' in their business and commercial decision making, the Act only obligates the disclosure of *de minimis* information and thereby fails to advance its own policy apparently directed at ensuring the availability of material information relating to newly-formed LLCs.

Misguidedly, an LLC is neither required by the Act nor expected to provide in its Articles of Organization any disclosure relating to the voting rights of its Members or Managers, its management structure or its management's authority.[201] In fact, recent amendments to the Act deleted whatever semblance of disclosure about an LLC's internal organization that was previously required in the Articles of Organization.[202] In comparison to other business associations and entities, the Act's disclosure regime, consisting primarily of the Articles of Organization and its ensuing Notice, fails by not requiring the kind of qualitative public disclosure that might assist the general public in learning about newly-formed LLCs.

IX.
THE INHERENT PARADOX OF THE LLC PUBLICATION REQUIREMENT

In spite of the Act's purported policy favoring publication, the failure to comply with Section 206's Publication Requirement does not preclude the LLC from functioning as a

199. All that the Act requires is that an LLC's Articles of Organization disclose the LLC's name, county, dissolution date (if any), and address for service of process or that of its registered agent. *See generally* NYLLCL § 203. The sole additional requirement is in the unusual case a member decides to be liable for the LLC's debts, liabilities and obligations, whereupon this arrangement must be expressly assumed and memorialized in the Articles as well. *See id.* § 203(e)(6).

200. *See supra* note 33.

201. *See* NYLLCL §§ 203, 206.

202. *See generally Rich's LLC Practice Commentary, supra* note 3, at 9-10.

business entity.[203] Non-compliance with the Publication Requirement does not suspend the effectiveness of the LLC's Articles of Organization[204] Nor does non-compliance cause dissolution of the LLC,[205] or nullify any contract entered into or any act committed by the LLC.[206] Moreover, the failure to

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203. *See, e.g.*, NYLLCL § 206. *See also Rich's LLC Practice Commentary, supra* note 3, at 8; *Walker on LLCs, supra* note 3, §§ 1:5, 5:12.

204. *See generally Walker on NY LLCs, supra* note 3, § 5:2 ("Although there is also a publication requirement, the Act seems to indicate that failure to publish will not affect the valid formation of a New York LLC").

205. *See* NYLLCL § 702 (stating that the supreme court within the judicial district where an LLC's office is located may, upon application by or on behalf of a member, dissolve the LLC whenever it is not reasonably practicable to carry on the business in conformity with the LLC's Articles or Operating Agreement). *See also id.* § 701 (stating that an LLC's Articles of Organization or Operating Agreement shall itself provide the events causing its dissolution, excepting cases where there is a judicial dissolution under Section 702 of the Act or there are no remaining members to continue the LLC); *id.* § 809 (expressly providing that the attorney general shall be empowered to bring actions restraining a foreign LLC from conducting business in New York State if that LLC lacks a certificate of authority or is engaged in a prohibited business activity under New York State law).

206. NYLLCL § 206. *But see Rich's LLC Practice Commentary, supra* note 3, at 8 ("From a practical standpoint, until publication is completed and the affidavit is filed, counsel would not be able to opine that the LLC had been validly formed and is in good standing, which could hamper the LLC from entering into material contractual relationships, borrowings and other transactions where the LLC is to deliver an opinion of its counsel at closing."). Notwithstanding one commentator's suggestion that legal counsel would be prevented from delivering a legal opinion relating to the valid formation or good standing of the LLC, this reading and particular interpretation of the Act cannot be substantiated. Indeed, by its own terms Section 206 denotes a contrary conclusion. Specifically, Section 206 neither precludes nor invalidates the consummation or effectiveness of any contract or act of the limited liability company or the right of any other party to the contract to maintain any action or special proceeding thereon. *See* NYLLCL § 206. Excepting the ability to file an action in New York State, the LLC may generally transact business on the same terms as other business entities and may even defend an action to vindicate its rights. *See id. But see* NYLLCL § 201 (specifically prohibiting the formation of an LLC for any lawful business purpose when another statute specifically requires another business entity or natural person to be formed or used for that particular business purpose). Furthermore, the New York Secretary of State may issue a Certificate of Good Standing to an LLC or any other party irrespective of whether or not the LLC has complied with Section 206's requirements. *But see Rich's LLC Practice Commentary, supra* note 3, at 8 (maintaining an LLC practitioner could not opine an LLC is in "good standing" if it has not satisfied Section 206). Moreover, the LLC's valid formation under Section 203 as compared with the Publication

comply with Section 206's requirements does not nullify or otherwise remove LLC members' limited liability protection,[207] or sacrifice a Member's ability to institute an action in his own capacity.[208]

Thus, an LLC that has not complied with the Publication Requirement is not materially impaired in respect to its business operations since the Act nonetheless permits that LLC to employ almost every power granted under Section 202, including the power to make contracts, purchase property, borrow money, make investments and hire employees.[209] Therefore, an LLC that has failed to comply with the Publication Requirement is not bereft of any business powers vested by the Act, except for the loss of the right to bring or maintain an action or special proceeding in New York courts.[210]

When viewed in the context of the purported policy underlying the Publication Requirement, an LLC's full exercise of its fundamental powers in the absence of publishing a Notice under Section 206 means that the public may be without the information the legislature supposedly deemed necessary for its protection. If non-compliance does not impair the majority of the broad powers granted by Section 202 of the Act,[211] this leaves an unwitting public to the mercy of an LLC which can fully enter into contracts, borrow money, assume obliga-

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Requirement under Section 206 are mutually exclusive issues. *See* NYLLCL § 203(d) ("A limited liability company is formed at the time of the filing of the initial articles of organization with the department of state or at any later time specified in the articles of organization, not to exceed sixty days from the date of such filing. The filing of the articles of organization shall, in the absence of actual fraud, be conclusive evidence of the formation of the limited liability company at the time of its filing. . ."). Therefore, absent more, an LLC's failure to comply with the procedural or substantive requisites of Section 206 does not mean that an LLC is ineligible from receiving a Certificate of Good Standing from the Secretary of State, or that the LLC has not been validly formed consistent with the requisites of Section 203.

207. *See* NYLLCL § 609.

208. *See id.* § 610.

209. *See id.* §§ 202, 206.

210. Though the first delineated power of an LLC under Section 202 of the Act (titled "Powers" [of the LLC]) is the power to sue, an LLC that does not satisfy the requisites of Section 206 is devoid of any *legal* power to enforce its other rights and privileges when stripped of its right to bring suit under circumstances where the LLC's rights and privileges are either lost to or threatened by third parties. *See supra* note 34 and accompanying text.

211. *See* NYLLCL § 202.

tions and conduct its business without the public first being put "on notice" of its existence.

The justification for the Publication Requirement, namely that the general public should have adequate and sufficient information about the LLC, is contravened where the Act permits the LLC to operate and contract indefinitely without publication.[212] This problem is more acute when the definitive agency authority of the LLC is not determinable without the availability of the LLC's Articles of Organization or the substance of the Publication Notice.[213] Because the LLC has the discretion in electing to be Member-managed or Manager-managed,[214] the public cannot readily verify the parties who may bind the LLC unless the substance of the Publication Notice has been made publicly available.[215] Since the Act forgives the LLC for acts by Members or Managers that are not "for apparently carrying on in the usual way the business of the limited liability company,"[216] third parties must diligently investigate the specific agency authority of each Member or Manager. Moreover, third parties must then be cautious in interpreting the acts of an LLC's Members or Managers that are not in the ordinary course of its business.[217]

This is but one example of how the Act is truly at cross-purposes with itself. If the fundamental objective of Section 206 is to promote the disclosure of material business informa-

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212. *See id.*

213. *See id.* § 412. *See also Rich's LLC Practice Commentary, supra* note 3, at 14 (observing that the general public may be confused until it becomes "more familiar with LLCs and learns to avoid certain statutory presumptions regarding the apparent authority of the managers").

214. *See* NYLLCL § 401.

215. This is because the Articles of Organization must state affirmatively whether the LLC is to be "manager-managed." *See id.* § 401(a). But even this statement does not indicate with any specificity whether the LLC is to be managed by one or more managers or a class of managers. *See Rich's LLC Practice Commentary, supra* note 3, at 10. In fact, 1997 Amendments to the Act unwisely deleted this requirement. *See id.*

216. NYLLCL § 412. *See Rich's LLC Practice Commentary, supra* note 3, at 14 ("The [Act] acknowledges the rigidity of the apparent authority presumption by providing in Section 412 that an act by a manager or member that is not apparently for carrying on the business of the LLC in the usual way does not bind the LLC. . .").

217. *See Rich's LLC Practice Commentary, supra* note 3, at 14 (The concept of the "usual way" would imply that a third party should question the authority of a manager who undertakes any extraordinary act on behalf of his LLC).

tion deemed necessary for the general public's protection, this objective is not advanced where an LLC may fully conduct business operations in the absence of publishing its Notice. However, if the Articles of Organization close the gap by disseminating this material information, then the Articles diminish and may even obviate the need for the Publication Requirement.[218]

The Act is also at cross-purposes with itself in its affording an LLC the right to cure non-compliance with the Publication Requirement *at any time.*[219] On the one hand, the Act prohibits the LLC from bringing any action in any court in New York State. Yet at the same time the Act permits the LLC to commence a *post facto* curative Publication which immediately removes the bar to bringing a suit. Notwithstanding the apparent policy underlying the Publication Requirement, the LLC indefinitely reserves the right to comply with the Publication Requirement, even subsequent to its default under Section 206 for failing to effect publication within the 120 day period following the effectiveness of its Articles of Organization[220]

This curative entitlement directly contravenes the purpose of the Publication Requirement. If the policy towards publication is to inform the public about the LLC and its business operations within a given locale, an LLC may, in the absence of compliance with Section 206, operate for an indefinite period of time without effecting publication,[221] thereby interminably disadvantaging members of the public. However, if an LLC's publicly-filed Articles of Organization closes the

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218. Indeed, a New York corporation satisfies public notice with the filing of its Certificate of Incorporation. If this formality were not sufficient in placing the general public on "notice", then this would validate the need for a requirement of publication in the case of the corporation. Yet not a single corporation in New York is subject to a publication or similar requirement. Presumably, the Certificate of Incorporation is alone sufficient for purposes of providing sufficient and adequate notice. For some inexplicable reason sufficient notice is not achieved merely by an LLC publicly filing its Articles of Organization. *See supra* note 179 and accompanying text. *See also supra* note 108 and accompanying text.

219. *See* NYLLCL § 206 (emphasis added).

220. *See id.*

221. *See id.* § 203(e)(3) (providing that an LLC may have perpetual duration); *id.* § 701(a)(1) (providing that an LLC may have perpetual duration unless the Articles of Organization or Operating state otherwise).

gap, the question becomes why the Publication Requirement is even necessary—let alone required.

It would seem the apparent policy of Section 206 would be advanced if an LLC that had failed to comply with its requirements were precluded from transacting business or contracting with the public at large until it had complied with the Publication Requirement. However, this is simply not the case. The Act runs afoul of its own policy by extending to the LLC a *carte blanche* curative entitlement to comply with Section 206 at any point even though members of the public, who ostensibly should have received prior notice of the LLC's business information, have already conducted business with it. .

X.

THE RIGHT TO SUE: ACCESS TO THE COURTS

In addition to the paradoxical policy underlying the Publication Requirement, Section 206 of the Act is also constitutionally suspect. In addition to New York's longstanding policy concerning the disclosure of material information relating to businesses operating in the state, New York also has a strong public policy favoring access to its courts and subjects any infringement on access to a heightened standard of scrutiny.[222] More specifically, New York has traditionally recognized a fun-

222. Under New York State law, limitations on the right to access the State's civil courts are subject to a substantive due process analysis, whereby any restriction or limitation of such a right is only permissible where the challenged provision is adopted "in the interest of the community, is reasonable in relation to its subject, and affords litigants the fundamentals of procedural due process." Colton v. Riccobono, 67 N.Y.2d 571, 576 (N.Y. 1986). *See also* Morello v. James, 810 F.2d 344, 346-47 (2d Cir. 1987) (holding that the right to access the courts is subject to substantive due process and cannot be obstructed regardless of the procedural means applied); Smithson v. Ilion Hous. Auth., 510 N.Y.S.2d 788, 790-91 (N.Y. 1986) (even though access to the courts is not by itself a constitutionally protected right, the State may not arbitrarily restrict access to the judicial process); *Barklee I* (concluding that the Act's Publication Requirement fails to meet the standards enunciated by the United States Supreme Court in *Boddie v. Connecticut*, 401 U.S. 371 (1971), as the State lacked a "countervailing state interest" in enacting Section 206). *See also generally* McCoy v. Goldin, 598 F.Supp. 310, 315 n.4 (S.D.N.Y. 1984) ("The right of access to the courts cannot be infringed upon or burdened. It is as fundamental a right as any person may hold.").

damental right of access to its courts that can neither be restricted nor limited in an arbitrary way.[223]

This fundamental "right to sue" has been explicitly memorialized in certain sections of the New York State Constitution.[224] More importantly, in the case of business organizations, this right has been explicitly guaranteed to all corporations and joint stock companies, as well as business entities that enjoy the powers and privileges of corporations in New York.[225] This constitutionally guaranteed state right has been extended to New York's corporations and other business entities on substantially the same terms as natural persons for more than one hundred and fifty years.[226]

The provision of a state constitutional right to sue constitutes an extraordinary grant of power by the state, especially considering that the corporation lacks any common law right

223. *See Smithson*, 510 N.Y.S.2d at 790-91; *Colton*, 67 N.Y.2d at 576; *Morello*, 810 F.2d at 346-47 (holding that the right to access the courts is subject to substantive due process and cannot be obstructed regardless of the procedural means applied); Spock v. U.S., 464 F.Supp. 510, 519 (S.D.N.Y. 1978) (*citing* Cal. Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (holding that the First Amendment guarantee of the right to petition includes the right to access the courts)).

224. *See, e.g.*, N.Y. CONST. art. X, § 4 (guaranteeing that corporations shall have the right to sue in like cases as natural persons). *See also id.* at art. I, § 8 (guaranteeing the right of action in the New York State Constitution to recover damages for injuries resulting in death shall never be abolished).

225. Roberts v. Anderson, 226 F. 7, 11-13 (2d Cir. 1915) (business organizations created under Articles of Association or by agreement as joint-stock companies are entitled to rights and privileges under art. X, § 4 of the New York State Constitution).

226. *See* N.Y. CONST. art. X, § 4. The New York State Constitutional provision explicitly guaranteeing that corporations may sue in like cases as natural persons was first adopted and made a part of the New York State Constitution in 1846. *See* PETER J, GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 225-26 (1991). *See also* Mortgage Comm'n of N.Y. v. Great Neck Imp. Co., 162 Misc. 416, 419 (N.Y. Sup. Ct. 1937) (holding that a corporation's right to sue gives "corporations the same protection and subjects them to the same liability which would involve an individual under the same circumstances.").

to sue.[227] Indeed, few states grant their corporations a state constitutional right to sue at all.[228]

Reasonably interpreted, Section 206 of the Act bars access to New York's courts in violation of the New York State Constitution.[229] Accordingly, Section 206 also violates New York State's constitutional guarantee of Due Process,[230] and furthermore the federal Constitution's 14th Amendment guarantee of Due Process.[231] Even assuming the constitutionality of Section 206, the mere preclusion of access to New York courts contravenes the state's fundamental public policy favoring access to its courts.

XI.
THE NEW YORK STATE CONSTITUTIONAL RIGHT OF THE LLC TO SUE

Article X of the New York State Constitution clearly establishes that all corporations in New York have a guaranteed right like natural persons to sue and be sued.[232] Specifically,

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227. *See* Finox Realty Corp. v. Lippman, 296 N.Y.S. 945, 949 (N.Y. Mun. Ct. 1937) (explaining that corporations were a part of the sovereign state of New York and could not sue or be sued at common law until this rule was relaxed). *But see id.* (noting that because the New York State Constitutional provision granting corporations the right to sue is contrary to the rule at common law, it must be strictly construed).

228. *See* ALA. CONST. art. XII, § 240 ("all corporations shall have the right to sue, and shall be subject to be sued, in all courts in like cases as natural persons"); ARIZ. CONST. art. XIV, § 1 ("corporations shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons"); CAL. CONST. APPX. I, art. IV § 33 ("corporations have the right to sue, and shall be subject to be sued, in all Courts, in like cases as natural persons"); N.C. CONST. art. VIII, § 2 ("all corporations shall have the right to sue and shall be subject to be sued in all courts, in like cases as natural persons"); WASH. CONST. art. VII, § 5 ("corporations shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons").

229. *See infra* Section XI.

230. N.Y. CONST. art. I, § 6. *See also* People v. Priest, 136 N.Y.S. 575 (1912).

231. The denial of Due Process under New York State's Constitutional provisions violates the 14th Amendment's guarantee of Due Process. U.S. CONST. amend. XIV. Furthermore, if the LLC is a person under state law, Section 206 may impermissibly contravene both the New York State Constitution's guarantee of Equal Protection and the 14th Amendment's guarantee of Equal Protection. *See* N.Y. CONST. art I, § 1.

232. Williams v. Village of Port Chester, 97 App. Div. 84 (N.Y. App. Div. 1904), *aff'd*, 183 N.Y. 550 (1905). In *Williams*, the Appellate Division found

Article X, Section 4 of the New York Constitution provides in full:

> **[Inclusions in term "corporations"; Right of corporation to sue and be sued]**
> The term corporations as used in this section and in sections 1, 2 and 3 of this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons.[233]

A cursory review of Section 4's language establishes that this state constitutional guarantee makes no distinction between the different types of New York corporations.[234] In some cases, a restriction or limitation of this right may therefore be violative of a New York State Constitutional right.[235] Furthermore, the grant of this state constitutional right cannot

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that the right granted to corporations is *substantively* the same right held by natural persons. In making reference to this constitutional right of corporations, the Appellate Division interpreted Article X, Section 4 as follows:

> What, then, are we to understand by the language used in [Article X, Section 4] of the [state] Constitution. . .? Can there be any question that it was the intention of this provision that the artificial citizens to be created by the Legislature should, in so far as their civil rights were concerned, be placed upon an equal, not a better, footing than natural born citizens? Could the language have any other purpose than to read into every statute creating a corporation for private purposes, as distinguished from a mere agency of the State, a provision that it should enjoy the equal privileges of citizens in our courts? This is the idea naturally suggested by the language. It is the right of these artificial citizens under the provisions of Section 1 of the 14th Amendment to the Federal Constitution, guaranteeing the equal protection of the laws, and it is the only construction which is in harmony with the provisions of our Constitutional system in its letter and spirit.

See id. at 95. *See also Galie, supra* note 226, at 225 ("[Article X, Section 4] makes the law uniform in its operation upon corporations, associations and joint-stock companies, and individuals.").

233. N.Y. CONST. art. X, § 4 (2004).

234. *See id.*

235. *But see* N.Y. BUS. CORP. LAW § 1312(a) (McKinney 2004) (requiring a foreign corporation to file an Application for Authority prior to its ability to maintain an action or proceeding in a New York court).

be rescinded by the legislature because such an act would amount to a Due Process violation under both the New York State and federal Constitutions.[236]

Moreover, Section 4 makes the law uniform in its application, and guarantees that "associations and joint stock companies" possess the same right "in like cases as natural persons" to sue, provided they possess the powers or privileges of corporations not possessed by partnerships or individuals.[237] Thus, Section 4 purposefully draws a bright line distinction between entities having "corporate" powers and other businesses.[238] This distinction is made clear by Section 4 so that entities that are *legal* persons under the law have the right to sue in the same cases as do *natural* persons,[239] thereby minimizing distinctions between legal and natural persons for purposes of court access.[240]

However, Article X, Section 4 does not explicitly reference the Limited Liability Company. Its references are limited only to corporations, associations and joint-stock companies possessing "corporate" powers and privileges.[241] In evaluating whether Section 206 violates certain provisions of the New York State Constitution, therefore, the relevant inquiry is whether Article X, Section 4 may be reasonably interpreted to include the LLC.

The LLC Analogized to the Corporation

Upon reviewing the similarities between the LLC and the corporation, it is readily apparent that the two are closely analogous.[242] As a preliminary matter, it is important to note that

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236. Article I, Section 1 of the New York State Constitution has been interpreted to guarantee Due Process of Law. *See* N.Y. CONST. art. I, § 1 ("No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land").

237. N.Y. CONST. art. X, § 4.

238. This distinction is made clear so that business entities are treated uniformly rather than disparately, while ensuring that individuals or aggregates of individuals, such as partnerships, are not included. *See infra* text accompanying notes 240-41. *See also* Section XI.

239. N.Y. CONST. art. X, § 4.

240. *See Galie, supra* note 226, at 225-26.

241. N.Y. CONST. art. X, § 4.

242. "An LLC. . . constitutes a separate legal entity. . . [and] the interests of a member is analogous to shareholders of a corporation. . ." *See* Exchange Point v. United States, 100 F.Supp.2d 172, 175 (S.D.N.Y. 1999). *See also gener-*

the LLC is, by statutory designation, a legal *entity* wherein its Members are separate and apart from the LLC itself.[243] This legal construction emulates that of the corporation, which is also a legal entity separate and apart from its shareholders.[244] Current interpretations of the LLC support this view.[245]

As noted previously, an LLC's Members have limited liability for its debts and contractual obligations in the same way that a corporation's shareholders have limited liability.[246] The entity theory of both the corporation and the LLC form the basis for why each limited liability entity is obligated to dis-

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ally Rich's LLC Practice Commentary, supra note 3, at 5 (noting the LLC "possesses the *corporate* trait of limited liability"). *See also id.* (maintaining that the LLC can be "closely compared to an *S Corporation*"); *Hamilton, supra* note 63, § 6:3 (noting the similarities between LLC statutes and the corporate statutes); *In re* Barman, 237 B.R. 342 (B.C. Ed. Mich. 1999) (identifying that an LLC is sufficiently analogous to the corporation that principles applicable to the corporation should be considered for purposes of interpreting Bankruptcy Code). *But see* Cosgrove v. Bartolatta, 150 F.3d 729 (holding that similar to partnerships, the LLC has the citizenship of its members for purposes of diversity jurisdiction).

243. *See supra* note 52 and accompanying text.

244. *See supra* notes 52-55 and accompanying text.

245. NYLLCL § 203(d). *See also* UNIF. LIAB. CO. ACT § 201 (McKinney 2004) (defining the LLC as a separate legal entity from its Members). *See* Debra R. Cohen, *Citizenship of Limited Liability Companies for Diversity Jurisdiction*, 6 J. SMALL & EMERGING BUS. L. 435, 465 (2002) (equating the LLC to the corporation as both are separate legal entities). The Ninth Circuit Court of Appeals has held that the LLC is a separate legal entity like the corporation and merits treatment as a legal person under the law just like the corporation. In a recent unpublished case, the Ninth Circuit wrote:

> LLCs were not a form of business entity at the time the California legislature enacted Section 20999.25(a). However, the legislature had already enacted the California Corporations Code. Thus, when it enacted Section 20999.25(a), the legislature understood that corporations were considered distinct legal entities. Considering the legislature's understanding of corporations at the time it enacted Section 20999.25(a), and the fact that LLCs are also treated as distinct legal entities, both corporations and LLCs fit within the meaning of "another person" as stated in Section 20999.25(a).

Abrahim & Sons Enterprises v. Equilon Enterprises, LLC, 2002 WL 511724, *1 (9th Cir. 2002). *See also Walker on NY LLCs, supra* note 3, § 17:2 (explaining that an LLC is presumed to be a person for purposes of the Bankruptcy Code).

246. *See generally* NYLLCL § 609 (concerning the limited liability of LLC Members). *See also generally* N.Y. BUS. CORP. LAW § 628 (regarding the limited liability of a corporation's shareholders).

charge its own debts and liabilities.[247] Essentially, the LLC's assumption of obligations should properly be viewed as the responsibility of the LLC rather than its Members.[248]

By comparison, the New York partnership is not a legal entity and partners are therefore personally liable for the partnership's debts and liabilities.[249] Though the LLC may elect to

247. *See id.* As an entity, the underlying legal organization exists separate and apart from its constituent participants, whether they are directors, officers or shareholders (as in the case of the corporation), or partners in a partnership consistent with the Entity Theory under the Revised Uniform Partnership Act of 1997. *See* REV. UNIF. P'SHIP ACT § 201(a) (McKinney 2004). This Entity Theory is fully incorporated into and contemplated by the Act. Indeed, the Act expressly adopts this Entity Theory in providing that upon its formation, the LLC "shall be a separate legal entity, the existence of which as a separate legal entity shall continue until the cancellation of the limited liability company's articles of organization." NYLLCL § 203(d). This specific acknowledgement is further confirmed by the Act's other provisions including those relating to Members and their lack of personal liability for the LLC's debts, obligations and liabilities, the LLC's property, litigation commenced by members of the LLC, and the Act's grant of broad powers employed exclusively by the LLC in its own individual name and capacity. *See generally* NYLLCL § 203(d), 609(a), 601, 610, 202. Upon a review of its seminal provisions, the Act has wholly adopted and applied the Entity Theory to the NY LLC. S*ee Hamilton, supra* note 63, § 8.4 (explaining the Entity Theory of the corporation).

248. *See* NYLLCL § 609.

249. Under both common law and its first model statute, the partnership is viewed as an "aggregate of persons", meaning the partners who compose it are not severable from the partnership itself. *See generally* William A. Gregory & Thomas R. Hurst, UNINCORPORATED BUSINESS ASSOCIATIONS 370 (2d ed. 2002) ("A partnership has historically been considered to be a mere aggregate of its individual members and *is not recognized as a separate legal entity.*"). *See also* Larry D. Soderquist, A.A. Sommer, Jr., Pat K. Chew & Linda O. Smiddy, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES, MATERIALS, PROBLEMS 78 (5th ed. 2001) (indicating that pursuant to the Aggregate Theory of the partnership the partnership's rights and obligations accrue to its partners as the owners of the business as opposed to the partnership itself.). *See also generally* UNIF. P'SHIP ACT (1914) (adopting the "mercantile" or "aggregate" theory of the partnership"). Under this "Aggregate" Theory, the partnership is simply not an entity. A direct corollary to this view is if the partnership is liable for a contractual debt or financial obligation so are the partners who comprise the partnership. This common law Aggregate Theory was eventually incorporated into the Uniform Partnership Act, which was adopted by the New York State legislature in 1919, and remains the law in New York State. *See generally* N.Y. P'SHIP ACT §§ 1-45 (1914). *See also generally* 15A NY Jur. Business Relationships § 1381 (observing that "a partnership, unlike a corporation, generally, is not a legal entity separate and apart from the individuals composing it."). *But see* People v. Smithtown General Hospi-

be taxed as a partnership and permits its Members to freely contract into their preferred managerial and financial relationship, these elements are the only predominant similarities between the LLC and the partnership, excluding the New York LLC's Publication Requirement.[250] And unlike the limited partnership where the general partners have personal liability, the Managers of an LLC avoid such liability.[251] In fact, the dissimilarities between legal entities such as the corporation and the LLC and other businesses like the partnership is fully contemplated by the language of Article X, Section 4.

Furthermore, like the corporation, the LLC is a legal "person" under the law.[252] Federal agencies[253] and almost one-half of the states have adopted the view that the LLC is a legal "person."[254] Most importantly, the New York State Constitution's benchmark for distinguishing between business entities that possess the state constitutional right to sue and businesses which lack that power is whether they are legal persons under the law.[255] The predominant view in both federal and state law is that the LLC possesses all the attributes of legal personhood.[256]

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tal, 399 N.Y.S.2d 993, 995 (1977) (noting that under certain circumstances courts may deem a partnership to be a separate entity). Accordingly, this Aggregate Theory stands in marked contrast to the Entity Theory of the corporation.

250. It should be noted that while the election of partnership classification for tax purposes results in "pass through" taxation, an S corporation may essentially elect to be taxed as a partnership as well. Therefore, taxable status is not a definitive guide when distinguishing between particular business organizations.

251. In addition, unlike limited partners in a Limited Partnership, Members in an LLC who "take part in the control of the business" are not liable.

252. *See, e.g.*, Nicholas Karambelas, 2 Limited Liability Companies: Law, Practice & Forms § 5:7 (2d ed. 2004) ("Like the corporation, the LLC is a 'person'").

253. *Id.* § 4:19 (indicating that the Federal Elections Commission in its Advisory Opinions has concluded that the LLC is a person).

254. The LLC is a legal person in the following states: Arkansas, California, Connecticut, Georgia, Illinois, Indiana, Iowa, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Vermont and Washington. *See generally* Peter M. Fass & Derek A. Wittner, *Limited Liability Company Interests*, BLUE SKY PRAC. FOR PUBLIC AND PRIVATE DIRECT PARTICIPATION OFFERINGS, Appendix 13A (2003-2004).

255. *See supra* notes 54, 238-40, 245 and accompanying text.

256. With the exception of the federal tax election whereby the LLC may elect to be taxed as a partnership, for almost all other purposes the LLC is a

In addition, when interpreting the LLC, courts have used the same analytical norms that have traditionally been applied exclusively to the corporation.[257] For example, many state courts apply the "piercing the corporate veil" doctrine to the LLC.[258] This doctrine has also been applied to the New York LLC.[259] Like the corporation, an LLC may also only appear in court through an attorney,[260] and has a direct interest in litiga-

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corporate-type entity with the same powers, privileges and attributes as a corporation. *See Rich's LLC Practice Commentary, supra* note 3, at 5. The Ninth Circuit Court of Appeals has also adopted the view that the LLC and the corporation are directly analogous. In acknowledging that the LLC is a "person" under the law, the Ninth Circuit opined in a recent case:

> In the first part of our analysis, we must determine what types of entities fall within the meaning of "another person" under Section 20999.25(a). We believe that corporations and limited liabilities companies (LLC) fall within that meaning. Corporations and LLCs are distinct legal entities, separate from their stockholders or members. The purpose of forming these types of businesses is to limit the liability of their members. The acts of a corporation or LLC are deemed independent of the acts of its members. For this reason, both corporations and LLCs are included within the definition of "person" in the California Corporations Code.

Abrahim & Sons Enterprises v. Equilon Enterprises, LLC, 2002 WL 511724, *1 (9th Cir. 2002).

257. *See e.g., In re* ICLNDS Notes Acquisition, LLC 259 B.R. 289, 292 (Bankr. N.D. Ohio) (holding that the LLC, like a corporation, may only appear in court through an attorney). *See also* Water, Waste & Land, Inc. v. Lanham, 955 P.2d 997, 1001 (Colo. 1998) (relying on principles of corporate law to interpret an LLC statute); C&J Builders and Remodelers, LLC v. Geisenheimer, 733 A.2d 193, 195 (Conn. 1999) (using established principles of corporate law to define the LLC under its statute).

258. Among the states that apply this equitable doctrine to the LLC are California, Colorado, Florida, Georgia, Illinois, Massachusetts, Minnesota, Montana, North Dakota, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia and Wisconsin. *Guide to LLCs, supra* note 1, ¶¶ 1003-53. *See, e.g.,* Ditty v. CheckRite, Ltd., 182 F.R.D. 639 (D. Utah 1998) (applying the doctrine of piercing the corporate veil to an LLC). *See also Hamilton, supra* note 63, § 6.3 (writing that some states *expressly* provide that the "piercing the corporate veil" doctrine is applicable to the LLC). However, this doctrine's application to the LLC is not universally recognized. *See, e.g.,* Cal. Corp. Code § 17101 (West 2004); Colo. Rev. Stat. § 7-80-107 (2003).

259. *See generally* Westmoreland Associates v. Kispert, 2002 WL 31777885, at *3-4 (N.Y. City Civ. Ct. Sept. 20, 2002).

260. *See, e.g., In re* ICLNDS Notes Acquisition, LLC, 259 B.R. 289 (Bankr. N.D. Ohio) (holding the LLC like the corporation may only appear in court through an attorney).

tion when it is a proper party to a controversy.[261] Indeed, courts have applied the concept of the corporate derivative action to the LLC.[262] And because the entire structure of the Act is modeled after the NYBCL, the New York State legislature likely construed at its inception that the LLC is an entity similar to the corporation.[263]

The Catch-All Language of Article X, Section 4 of the New York State Constitution

Even assuming the LLC is not directly analogous to the corporation, the LLC is nonetheless a legal entity that falls within the default provision of Article X, Section 4. In pertinent part, Section 4 states expressly that corporations "shall be construed to include all associations and joint-stock companies having any of the powers or privileges not possessed by individuals or partnerships."[264] On its face, Section 4 distinguishes explicitly between statutory business entities which have the powers and privileges that corporations possess and non-statutory businesses that lack those powers; predominantly, these non-statutory businesses take the form of either general part-

261. Nicholas Karambelas, 2 Limited Liability Companies: Law, Practice & Forms § 5:7 (2d ed. 2004).

262. *See generally* Weber v. King, 110 F. Supp. 2d 124, 131-33 (E.D.N.Y. 2000) (holding that members of a NY LLC could bring a derivative action on behalf of the LLC under common law despite the Act's silence on the matter).

263. *See generally Walker on NY LLCs, supra* note 3, § 1:2 (reporting that the Committee that proposed the Act tailored it after the NYBCL). *See also* Darren S. Berger, PREPARING AND DRAFTING THE OPERATING AGREEMENT OF AN LLC AND PLLC, New York State Bar Association, A-8 (2002) (noting that the Act has corporate-style governance provisions). *See also id.* at A-10 (explaining the Act's default provisions in regard to corporate governance matters including annual meetings and meeting procedures, quorum, notice and waiver thereof are dealt with in the same manner as in the corporate context). *See also generally Hamilton, supra* note 63, § 6.3 ("LLC statutory provisions relating to purposes and powers are also closely modeled after similar provisions in state corporation statutes."). Courts in jurisdictions other than New York have frequently relied on corporate law principles in interpreting an LLC statute. *See, e.g.*, Taurus Advisory Group, Inc. v. Sector Management, Inc., 1996 WL 502187, at *2 (Conn. Super. Ct. 1996); Poore v. Fox Hollow Enter., No. C.A. 93A-09-005, 1994 WL 150872, at *2 (Del. Super. Ct. 1994); Hagan v. Adams Property Associates, 253 Va. 217, 220 (1997).

264. N.Y. CONST. art. X, § 4.

nerships or sole proprietorships.[265] Because it is a statutory form of business entity with almost all of the powers and privileges possessed by corporations and other statutory business entities, the LLC falls squarely within the language and meaning of Section 4.

In addition, the assertion that the LLC is more analogous to the partnership than the corporation runs counter to the express language of the New York State Constitution. First and foremost, the LLC cannot fall within Section 4's express language when it refers to the "partnership" because it is the partnership which is expressly excluded from the provisions of Article X. Read in conjunction with the other provisions of Article X, it is apparent that the rights, benefits, entitlements, and restrictions referred to in Article X pertain exclusively to the corporation and other business entities with "corporate" powers, as opposed to unincorporated, non-statutory businesses.[266]

Second, the plain meaning of Section 4 suggests that the LLC falls squarely within its scope. Section 4 states in part that Article X of the New York Constitution "shall be construed to include" all associations and joint-stock companies.[267] A reasonable construction of this language indicates that this clause should be liberally construed.[268] The use of the words "in-

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265. *See supra* note 238.

266. *See supra* note 238-40 and accompanying text.

267. N.Y. CONST. art X, § 4.

268. In Highway & City Freight Drivers v. Gordon Transports, Inc., 576 F.2d 1285 (8th Cir. 1978), the court was interpreting the language of Section 1(8) of the Federal Bankruptcy Code, which essentially contains the same language as Art. X, Sec. 4 of the NY State Constitution. In holding that a labor union fell within the language and definition of "corporation", the Court made the following observation:

> Basic principles of statutory construction lend support to a broad construction of the definition of corporation and under § 1(8) of the Act. Section 1(8) uses the word "includes" when setting out the types of organizations that come within the definition rather than the word "means". When a statute is phrased in this manner, the fact that the statute does not specifically mention a particular entity (in this case labor unions) does not imply that the entity falls outside of the definition.

Id. at 1289. *See also id.* at 1290 (*citing* Collier on Bankruptcy in recognizing that amendments to the Bankruptcy Code were "meant to enlarge the statutory meaning of 'corporation' beyond its ordinary meaning" and calling for "a *broad, inclusive construction of the language used*"). *See also* Solomon v. Bar-

cludes" or "including" requires an inclusive rather than exclusive interpretation. Drafters customarily use the terms "includes" or "including" in order to ensure against a narrow construction.[269] Accordingly, by its own terms, Section 4's language calls for a liberal construction.

Third, the precise language in regard to "corporations" combined with Section 4's explicit directive that "[corporations] shall be construed to include all associations and joint-stock companies having any of the powers or privileges not possessed by individuals or partnerships" distinctly differentiates those business entities where the capital subscribed to the entity is alone responsible for the debts and liabilities of the ongoing concern from other businesses.[270] The LLC is such a business entity precisely because its Members have liability only up to the amount of capital subscribed.[271] By contrast, sole proprietors and partners in a partnership have unlimited personal liability. Indeed, the basic premise of Section 4 is that these businesses require disparate legal treatment because of their liability scheme.

Fourth, Section 4's language is substantially the same as the language contained in Section 1, Subsection 8 of the Federal Bankruptcy Code, which has been interpreted to include the LLC within its statutory definition of a "corporation."[272] Specifically, Subsection 8 states in relevant part:

> 'Corporation' shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making capital subscribed alone responsible for the

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man (*In re* Barman), 237 B.R. 342, 348 (Bankr. E.D. Mich. 1999) (maintaining that the Bankruptcy Code makes clear that "includes" and "including" are not limiting and not meant to be exhaustive).

269. *See, e.g., Walker on NY LLCs, supra* note 3, § 17:2 n.5.

270. *See In re* Carthage Lodge, 230 F. 694, 698 (N.D.N.Y. 1916). As stated earlier, this is the subtext to entity theory, whereby the entity itself bears responsibility for its own financial obligations and contractual commitments. *See supra* notes 52-55, 63, 238-41 and accompanying text.

271. NYLLCL § 609.

272. *See generally Walker on NY LLCs, supra* note 3, § 17:2 (explaining that the word "corporation" under the Bankruptcy Code includes a "partnership association organized under a law that makes only the capital subscribed responsible for the debtors of such association" which, because of its broad scope, includes LLCs).

> debts of the association, joint-stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument.[273]

A cursory review of this language evinces that both Subsection 8 and Article X, Section 4 contain virtually identical language in describing the same concept: a corporation is an entity where the capital subscribed is solely responsible for its debts and liabilities. While LLCs are not specifically referenced in the Federal Bankruptcy Code, Bankruptcy courts have uniformly interpreted the term "corporation" to include the LLC.

Finally, legal precedent indicates that Section 4's language is to be liberally construed so as to include all business "bodies" and "associations," whether or not strictly defined as corporations under the law.[274] A liberal construction of Section 4 intelligibly justifies viewing the LLC as falling within its purview. The fact that Section 4 was adopted more than a century and a half ago is of no consequence. In fact, the normative approach is for both state and federal courts to incorporate the LLC into the definitions of statutes even though their enactment precedes its inception.[275]

XII.
THE BASIS OF THE LLC'S FEDERAL CONSTITUTIONAL RIGHT TO SUE

Besides the LLC's guaranteed right to sue under the New York State Constitution, the Publication Requirement is also constitutionally suspect under the federal Constitution. Notwithstanding the broad deference courts afford states in enacting legislation regulating commercial and economic enterprises,[276] limitations upon access to state and federal courts is

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273. 11 U.S.C. § 101(9) (2000).

274. *See In re* Carthage Lodge, 230 F. 694, 702 (N.D.N.Y. 1916).

275. *See generally* Abrahim & Sons Enterprises v. Equilon Enterprises, LLC, 2002 WL 511724, *1 (9th Cir. 2002).

276. *See, e.g.*, Reagans v. Farmers' Loan & Trust Co., 154 U.S. 362, 412 (1893) (holding a "reasonableness test" is to be applied when reviewing the constitutionality of state economic regulatory legislation under the due process clause).

an entirely different matter.[277] Total exclusion to access is even more problematic.[278] Indeed, a number of courts including the United States Supreme Court have unambiguously held that there is a constitutional right of access to the courts.[279]

As a matter of federal law, it is incontrovertible that both natural persons and artificial persons enjoy the same right of access to federal courts.[280] For this reason and other reasons,

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277. In the federal arena, there is a wide range of case law recognizing that although the right to access the courts is not a federally-guaranteed constitutional right, it is a special right subject to restraints that must be carefully prescribed and reasonably applied. *See, e.g.,* M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) ("[The] Court's decisions concerning access to judicial processes, commencing with *Griffin* [351 U.S. 12 (1956)] and running through *Mayer* [404 U.S. 189 (1971)], reflect both equal protection and due process concerns."). *See also* Christopher E. Austin, *Due Process, Court Access Fees, and The Right to Litigate,* 57 N.Y.U. L. REV. 768 (1982).

278. *See* McCoy v. Goldin, 598 F.Supp. 310, 315 n.4 (S.D.N.Y. 1984) ("The right of access to the courts cannot be infringed upon or burdened. It is as fundamental a right as any person may hold."); Chambers v. Baltimore & Ohio R. R. Co., 207 U.S. 142, 148 ("In an organized society [the right to sue is] conservative of all other rights, and lies at the foundation of orderly government."); Boddie v. Connecticut, 401 U.S. 371, 377, 383 (1971) (holding that under both the due process and equal protection clauses of the Fourteenth Amendment, States must have a "countervailing state interest" when access to courts is limited or denied).

279. *See* McCoy v. Goldin, 598 F.Supp. 310, 315 n.4 (S.D.N.Y. 1984). *See also* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (stating that a cause of action is a property right protected by the 14th Amendment Due Process Clause); Rogan v. City of Boston, 267 F.3d 24, 28 (1 st Cir. 2001) ("There is a constitutional right of access to the courts. It follows, therefore, that 'it can be a deprivation of life, liberty, or property, without due process of law, in violation of the Fourteenth Amendment, for state officials to deny a person adequate, effective, and meaningful access to the courts.'"); Johnson v. Avery, 393 U.S. 483, 485 (1969) (asserting that the right to petition the government includes the right of access to the courts); Acevedo v. Surles, 778 F.Supp. 179, 184 (S.D.N.Y. 1991) (ruling that there is a First Amendment right of access to the courts); Martinez v. California, 444 U.S. 277, 281-82 (1980) (observing that a cause of action under State tort law was a property right protected by the Fourteenth Amendment Due Process Clause). *But see* United States v. Kras, 409 U.S. 434 (1973) (holding that Fourteenth Amendment Due Process is not violated where statute imposed filing fees as condition to indigent obtaining discharge in bankruptcy, and furthermore pronouncing that the proper standard of review therefor is rational basis).

280. *See generally id.*; Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886) (extending Fourteenth Amendment Equal Protection to corpo-

Section 206's punitive bar to accessing the courts raises a host of federal constitutional questions, all of which when answered cast significant doubt on the constitutionality of the Publication Requirement.[281]

The Publication Requirement Violates the 14th Amendment Guarantees of Due Process and Equal Protection

The United States Supreme Court has repeatedly held that legal entities such as corporations are both "persons" under the laws of the United States and the United States Constitution.[282] Subject to several specific exceptions,[283] the Su-

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rations); Boddie v. Connecticut, 401 U.S. 371, 377 (1971) (establishing that "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."). *See also* Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987) (reviewing the uniform recognition of the corporation as a person).

281. Among the questions raised by the Act's Publication Requirement are: (1) whether Section 206 violates either Due Process or Equal Protection under either the state or federal constitutions; (2) whether Section 206 violates Article X of the New York State Constitution; (3) whether Section 206 should properly be subject to heightened scrutiny above rational basis scrutiny as it imposes limitations on the right to sue and the right to access the courts; (4) whether Section 206 is discriminatory against the LLC as the Publication Requirement is not applied to other New York State business entities; (5) whether Section 206 is discriminatory against the LLC as the Act's Publication Requirement is distinctly disparate as compared with the Publication Requirements of other New York business organizations; and (6) whether Section 206, if a permissible and justifiable exercise of the legislature, serves the public policy objective intended to be served. *See* NYLLCL § 206.

282. A well-established legal principle is that the term "persons" when used in acts of Congress, unless expressly provided otherwise, is to be interpreted as including corporations. *See, e.g.*, 1 U.S.C. § 1 (1988) (providing that unless the context otherwise indicates, in determining any act of Congress, the term "person" includes corporations). Professor Soderquist offers a concise review of the range of federal constitutional rights currently held by the corporation: "Under federal constitutional law, corporations are also treated as persons. For example, corporations enjoy the protections of the First, Fourth and Fifth Amendments, although these rights sometimes differ from those held by natural persons." Larry D. Soderquist, *Theory of the Firm: What a Corporation Is*, 25 J. CORP. L. 375, 376 (2000). *See also* Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641 (1982); Santa Clara v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886) (stating that a corporation is entitled to equal protection under the Fourteenth Amendment); Hale v. Henkel,

preme Court has also held that legal entities as "persons" under the law enjoy a legal status substantially similar to that of natural persons.[284] Most importantly, the Supreme Court has held that the corporation is a "person" under the Fourteenth Amendment with respect to the federal constitutional guarantees of Due Process and Equal Protection.[285] The Court has held this position for almost a century and a half.[286]

In relation to the LLC and the bounds of its federal constitutional rights, the appropriate inquiry is whether the LLC is a legal entity analogous to the corporation. If an LLC is indeed a legal entity, it would be possess the same rights and privileges under the federal constitution that are enjoyed by other legal entities. As far as the right to sue is concerned, this would establish the unconstitutionally of Section 206 under the federal constitution.

A. *The LLC as a Separate Legal Entity*

Section 206 of the Act states in unequivocal terms that the New York LLC is a "separate legal entity."[287] In addition to this

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201 U.S. 43, 76 (1906) (ruling that a corporation, as an association of individuals, has a Fourth Amendment right against unreasonable searches and seizures).

283. *See, e.g.*, Hale v. Henkel, 201 U.S. at 75 (the Fifth Amendment right against self-incrimination is inapplicable to the corporation). *See also* F. Joseph Warin & Michael D. Bopp, *Corporations, Criminal Contempt and the Constitution: Do Corporations Have a Sixth Amendment Right to Trial by Jury in Criminal Contempt Actions and, If So, Under What Circumstances?* 1997 COLUM. BUS. L. REV. 1, 13-17; Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Coherent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 885-86 (1996).

284. *See, e.g.*, Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 589-90 (1987); Note, *What We Talk About When We Talk About Persons: The Language of Fiction*, 114 HARV. L. REV. 1745, 1750-54 (2001).

285. *See* Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 188-89 (1888).

286. *See supra* notes 282-84.

287. NYLLCL § 203. *See also NY Rich's LLC Practice Commentary, supra* note 3, at 4 (noting that the LLC, as developed in the United States in 1977, "follows forms of business entities" used regularly in Europe and Latin America). *See also Walker on NY LLCs, supra* note 3, §§ 1:1-1:3 (explaining that the history of the LLC both as a business form and in terms of its tax classification indicates it is an "entity"). *See also id.* ¶ 104 (maintaining that the LLC as a phenomenon has been modeled after its international prede-

unambiguous declaration, interpretations of Section 206 have universally deemed the New York LLC as a "separate legal entity."[288] The Act's legal designation as a "separate legal entity" is consistent with the normative view of the LLC outside New York State.[289]

This designation is a determinative factor in evaluating the bounds of the LLC's federal rights, privileges and entitlements, primarily because its legal designation corresponds directly with that of the New York business corporation[290] and with corporations outside New York State.[291] If this is the case, the extent of the LLC's federal constitutional rights may be

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cessors in South and Latin America, Germany and France, all of which deem the LLC an "entity.").

288. *See, e.g., Beane & Santucci, supra* note 60, at 15 (explaining that, by statute in New York, "[T]he LLC is formed as a separate legal entity, separate from the members."). *See also Walker, supra* note 3, § 5:1 ("Formation of a [New York] LLC creates a separate entity, notwithstanding the taxation of an LLC as a flow-through entity, with its individual members—rather than the entity—liable for taxes."). *See also Michelle A. Santucci,* LIMITED LIABILITY COMPANIES, 1 ("The [New York] limited liability company ('LLC') is a statutory form of business entity").

289. Widespread recognition of the LLC as a "separate legal entity" has been customary since its inception in the United States in 1977. Among other things, the model code for LLCs expressly states that "a limited liability company is a separate legal entity distinct from its members." UNIF. LTD. LIAB. CO. ACT § 201 (1996). The Comment to the LLC model code furthermore makes it clear that the LLC is legally distinct from its constituent parts and possesses and maintains a panoply of rights unto itself. *Id.* at cmt. Delaware, the business incorporation and organization haven for the entire nation, has also adopted the same legal designation for the LLC. *See* DEL. CODE ANN. tit. 6, § 18-201(b) (1974) ("A limited liability company formed under this [statute] shall be a separate legal entity"). *See also* Elf Atochem North America, Inc. v. Jaffari, 727 A.2d 286, 288 (Del. 1999) (referring continuously to the Delaware LLC as a "separate legal entity").

290. *See, e.g., Beane & Santucci, supra* note 60, at 12 (writing that the New York business corporation, governed by and subject to the New York Business Corporation Law, is "a separate legal entity created by statute.").

291. It is a fundamental principle of American law that the business corporation is a legal entity separate and apart from its corporate constituents (i.e. its directors, officers and shareholders). *See generally Hamilton, supra* note 63, § 8.4 (maintaining that "a corporation is traditionally viewed as a fictitious legal entity separate from its owners, the shareholders). *See also Pinto & Branson, supra* note 3, § 1.01 ("A corporation is a separate legal entity which owes its existence to the state."). *See also* Larry D. Soderquist, A.A. Sommer, Jr., Pat K. Chew & Linda O. Smiddy, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES, MATERIALS, PROBLEMS 13 (5th ed. 2001) ("We believe that the most useful conception of the corporation begins with

assessed on the same terms as those rights that belong to other "separate legal entities" such as the corporation.

As discussed earlier, current law treats the corporation as a "person" for purposes of Fourteenth Amendment Due Process and Equal Protection.[292] The federal constitutional rights enjoyed by the corporation on the basis it is a legal entity with its own rights and liabilities may be extended to the LLC which, as a similar entity, is separate and apart from its Members with its own powers and authority, assets and liabilities, and capacity to contract, borrow money and sue.[293] In denying the LLC the right to sue, or otherwise barring its right to access the courts, Section 206 unconstitutionally violates the 14th Amendment Equal Protection and Due Process clauses.

XIII.
THE PUBLICATION REQUIREMENT AS APPLIED TO FOREIGN LLCS VIOLATES THE FEDERAL COMMERCE CLAUSE

The Foreign LLC Publication Requirement

The Publication Requirement also violates the federal Constitution's Commerce Clause.[294] Section 802(b) of the Act,

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a view of the corporation as an entity having a legal status separate and distinct form the people who comprise it).

292. *See* Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 188-89 (1888).

293. *See generally* NYLLCL § 202.

294. The federal Commerce Clause states that Congress shall "regulate commerce with foreign nations and among the several states and with the Indian tribes." U.S. CONST., art. I, § 8, cl. 3. In Gibbons v. Ogden, 22 U.S. 1, 196 (1824), the Supreme Court clarified that "[T]his power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are proscribed in the constitution." While the federal Constitution expressly reserves the power to regulate commerce in the United States Congress, this power has been held to be concurrent with that of the states. *See, e.g.*, H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949). However, this state power cannot *unreasonably* interfere with commerce. *See* South-Central Timber Development v. Wunnicke, 467 U.S. 82 (1984) (states have concurrent power to regulate Commerce so long as such regulations have not been previously proscribed by the Congress and do not unreasonably interfere with commerce"). However, unless the commercial matter is expressly granted to the states, Congress has exclusive subject matter jurisdiction over that commercial matter. In terms of assessing the constitutionality of the Foreign LLC Publication Requirement, the United States Supreme Court has strictly construed state enactments that burden persons or things in interstate commerce while intruding

which applies to foreign LLCs and is the functional equivalent of Section 206, also bars access to New York courts if foreign LLCs fail to comply with the Publication Requirement.[295] Al-

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upon Congress' authority over interstate commerce. An example is United States v. Lopez, 514 U.S. 549, where the Supreme Court maintained specifically that it is Congress that may regulate the channels of interstate commerce as well as intrastate activities which, in the aggregate, substantially impact interstate commerce. *See id.* at 558-59. The Court also enunciated that the proper test for determining whether the power to regulate a particular commercial activity is within Congress' power is to assess the regulation "substantially affects" interstate commerce. *See id.* at 559. Perhaps most importantly, the Court also made clear that Congress may "protect the instrumentalities of persons and things in interstate commerce, notwithstanding that the burden, imposition or threat results from intrastate activities." *Id.* Extensions of this principle have been used by the courts to declare the unconstitutionality of state enactments that discriminate against people and things in interstate commerce. *See generally* Brown-Forman Distillers Corp. v. NY State Liquor Authority, 476 U.S. 573 (1986); Northwest Central Pipeline Corp. v. State Corporation Commissioner of Kansas, 484 U.S. 810. Discrimination in interstate commerce has been *broadly* construed. *See generally* Katzenbach v. McClung, 379 U.S. 294 (1964) (prohibiting racial discrimination in interstate commerce). *See also* New Energy Corporation of Indiana v. Limbach, 486 U.S. 269 (prohibiting forms of economic protectionism in interstate commerce that effectively discriminate against out-of-state entities in an attempt to benefit in-state entities). Moreover, the term "commerce" itself has been broadly construed under the Commerce Clause. In interpreting its bounds, the United States Supreme Court has said, "Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities." *See generally* Welton v. Missouri, 91 U.S. 275, 280 (1876). *See also* Dahne-Walker Milling Company v. Bondurant, 257 U.S. 282 (1921) ("[C]ommerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse."). Because foreign LLCs are entities engaged in economic and commercial activities that squarely constitute interstate commerce, the Publication Requirement represents an unconstitutional form of economic protectionism that violates the Commerce Clause. *See generally* Brown-Forman Distillers Corp. v. NY State Liquor Authority, 476 U.S. 573 (1986); Northwest Central Pipeline Corp. v. State Corporation Commissioner of Kansas, 484 U.S. 810.

295. It should be noted as well that NYBCL Section 1312(a) also prohibits a foreign corporation doing business in New York without authority from maintaining any action or special proceeding in any court in New York State. Although such "Door Closing Statutes" such as NYLLCL § 802(a) and the Act's Publication Requirement have been upheld as constitutional exercises of state legislatures, they have been sparingly applied by both New York Courts and other state courts where the balancing of the interests of foreign entities to bring suits in State and Federal courts have been recognized as

though Section 802(b) is substantially the same as Section 206,[296] because it applies to foreign legal entities engaged in commercial activities that are primarily interstate, it violates the federal Commerce Clause and the federal interest in promoting the uniform movement of goods and services between the states. Because it directly burdens this interest by discouraging foreign LLCs from operating in New York, we must question the constitutionality of the Publication Requirement.

Foreign LLCs generally engage in economic and commercial activities between states. These activities constitute interstate commerce and are therefore protected against legislative enactments that benefit in-state entities while burdening "foreign" entities.[297] To the extent the Act benefits the New York LLC while burdening foreign LLCs, it violates the federal Commerce Clause. The Publication Requirement as applied to foreign LLCs engaged in interstate commerce also violates the Commerce Clause because it discriminates against "foreign" entities while advancing no legitimate state interests that cannot be served through reasonable nondiscriminatory alternatives.[298]

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critical interests. *See* S&K Sales Co. v. Nike, Inc., 816 F.2d 843, 853-54 (2d Cir. 1987) (holding that a stay of judgment in favor of foreign corporation doing business in New York without authority until foreign corporation complied with NYBCL's publication requirement was warranted under circumstances); Netherlands Shipmortgage Corp. v. Madias, 717 F.2d 731, 735 (2d Cir. 1983) ("Because jurisdiction rests on diversity, [NYBCL § 1312] precludes the maintaining of an action by an unauthorized foreign corporation not only in state courts but also in the state courts of New York, but also in the federal courts located in that state."). *But see* Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276 (1961) (upholding New Jersey Door Closing Statute where corporation was engaged primarily in intrastate activities). Similar to Section 206 of the Act, Section 802(b) requires a foreign LLC to publish a legal notice for six consecutive weeks in at least two newspapers in the county where that LLC is located as a condition of achieving the right to maintain an action in New York courts. NYLLCL § 802(b).

296. While the Publication Requirement itself is the same as between foreign and domestic LLCs, foreign LLCs have additional prerequisites that are condition precedents to the ultimate satisfaction of the Publication Requirement.

297. *See* New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273, 278 (1988) (providing that the Commerce Clause prohibits economic protectionism devised to benefit in-state economic objectives at the expense of out-of-state competitors).

298. *See generally* Oregon Waste Sys., Inc. v. Dep't of Envt'l Quality of Oregon, 511 U.S. 93, 99 (1994) (recognizing that a per se rule of invalidity is

Interstate Commerce, the Commerce Clause and the Publication Requirement

As a preliminary matter, the inquiry into whether Section 802(b) violates the Commerce Clause must first be analyzed by reference to Section 802(a) of the Act. In relevant part, Section 802(a) provides that prior to doing business in New York a foreign LLC must apply for such "authority" by filing an Application for Authority.[299] A failure on the part of a foreign

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applied to state enactments that are facially discriminatory unless the state provides as a justification that such enactment advances a legitimate state interest that cannot otherwise be adequately served through a reasonable and nondiscriminatory alternative).

299. NYLLCL § 802(a). The application that must be filed pursuant to § 802(b) is the Application for Authority. This requirement is best understood and interpreted by reference to its predecessor in corporate law, Section 1312(a) of the NYBCL. In terms of NYBCL § 1312(a) and its consequential bar to maintaining suit for failure to gain authority to do business in New York, several courts have suggested its intent is to protect New York businesses from unfair competition. *See, e.g.,* Dixie Dinettes, Inc. v. Schaller's Furniture, Inc., 335 N.Y.S.2d 632 (1972) (identifying the purpose behind NYBCL § 1312(a)'s bar to maintaining suit as protecting domestic corporations from unfair competition from unauthorized foreign corporations which make use state facilities and avail themselves of state benefits). However, other courts have held that the reason is to ensure the discharge of contractual obligations. *See, e.g.* New York Airline Exchange, Inc. v. Bag, 698 N.Y.S.2d 694 (2d Dept. 1999). Regardless, in the case of the foreign corporation, the bar to maintaining an action is not premised upon any failure to comply with a Publication Requirement or similar requirement. Rather, any bar to bring suit is based in the foreign corporation's failure to provide any notice whatsoever to either the State or the general public. In other words, but for the filing of the Application for Authority no formal notice of any kind would occur. This explains at least one of the motivating *factors* behind the main reason for the Application for Authority and why failure to file *might* justify the bar against access to New York Courts - otherwise neither the State nor the public would ever be cognizant of how to serve process against the corporation, find the location of its in-state office, etc. *See* N.Y. BUS. CORP. LAW § 1304 (McKinney 2004). The filing of an Application for Authority is alone sufficient for placing the public on notice of the foreign corporation and thereby nullified any reason to otherwise bar access to New York courts. Accordingly, this rationale obviously calls into question the legitimacy of the Act's Publication Requirement. As noted previously, this makes the LLC the only entity with full limited liability coverage subject to a Publication Requirement presumably because its Articles of Organization and Application for Authority are deficient for public notice purposes as compared with either the Certificate of Incorporation for domestic corporations and the Application for Authority for foreign corporations. *See supra* notes 108, 111, and accompanying text.

LLC to be granted this authority triggers Section 802(b)'s penalty, making it ineligible to proceed in any New York state court.[300]

Since the Application for Authority is the obligatory precursor to satisfying the Publication Requirement, the initial inquiry is whether the foreign LLC is doing business in New York. "Doing business" in New York generally requires the commission of systematic, continuous and regular activities within the state.[301] Conduct that ranges from maintaining a bank account, operating an office as a depository for Memberships Interests, holding meetings or proceeding as a party in litigation are activities that do not rise to the level of doing business in New York.[302] Thus, a foreign LLC may have "presence" in New York but this does not by itself rise to the level of doing business.[303] Doing business in New York requires a

300. *See generally id.* § 808.

301. *See generally* Note, *Foreign Corporations: What Constitutes 'Doing Business' Under New York's Qualification Statute?*, 44 FORDHAM L. REV. 1042 (1976).

302. *See generally* NYLLCL § 803(a). *See also* § 803(b) (stating that activities which do not amount to doing business are not dispositive on the issue of whether a foreign LLC may be subject to service of process).

303. New York courts have held that the test for doing business in New York is focused on whether an entire business is actually being run from New York or whether the primary business location is in New York. Otherwise, the placement and acceptance of orders and the sale and delivery of goods does not constitute doing business in New York. Commentator Pearson, Jr. aptly summarizes New York's view of what constitutes "doing business" as follows:

> Noting that the test of doing business in New York for the purpose of the closed-door statute is not the same as the test of doing business for jurisdictional purposes. . . [A]lthough both tests raise constitutional Issues, the latter involves the due process clause, while the former involves The commerce clause. . . [I]t is often asserted that "more" is required for closed-door statutes than for jurisdictional purposes. . . [I]f the foreign corporation's New York contacts, no matter how extensive, were merely for the purpose of solicitation and activities incidental to the sale and delivery of goods into the state, the corporation was engaged in interstate commerce and was constitutionally beyond the reach of the closed-door statute. On the other hand. . . if such corporation was engaged in local business on more than an isolated or accidental basis, it was required to comply with [NYBCL § 1312(a)].

James O. Pearson, Jr., *What Constitutes Doing Business Within State for Purposes of State "Closed-Door" Statute Barring Unqualified or Unregistered Foreign Corporation from Local Courts–Modern Cases*, [hereinafter *Pearson on Doing Business in States*], 88 A.L.R. 4th 466, *6a (2002) (endnotes omitted). *See also Rich's LLC Practice Commentary, supra* note 3, at 25.

higher level of activity than the level of activity that subjects a party to the jurisdiction of New York's courts under its long-arm statute.[304] Consequently, the "doing business" standard is deemed to be a stricter standard, requiring a substantial level of regular and continuous business-related activity on the part of a foreign LLC.[305]

If a foreign LLC's activities are primarily intrastate the Commerce Clause is not implicated,[306] but if its activities are primarily *interstate* the Act's Publication Requirement may violate the Commerce Clause by impermissibly barring access to New York courts.[307] State enactments that impose burdens on a business' exercise of its federal privilege to engage in inter-

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304. New York's long-arm statute relates to in-personam jurisdiction. *See generally* New York Civil Practice Law and Rules, Section 302. This form of jurisdiction is among the fundamental bases in establishing the "minimum contacts with the state [necessary] such that the maintenance of a [lawsuit would] not offend traditional notions of fair play and substantial justice." Int'l Shoe v. Washington, 326 U.S. 310 (1945). *See also* Storwal Int'l, Inc. v. Thom Rock Realty Co., 784 F.Supp. 1141 (S.D.N.Y. 1992).

305. *See generally id.*

306. *See, e.g.,* Talbot Mills, Inc. v. Benezra, 231 N.Y.S.2d 229 (1962).

307. In analyzing this issue, one commentator has written:

> One of the exclusions specified in the model act and in the state statutes following it is the transaction of any business in interstate commerce. Hence, the issue of what constitutes doing business is often framed in terms of whether the foreign corporation's activities in the forum state involved interstate or intrastate activity, or, more, precisely, whether such activities were sufficiently separate from the corporation's interstate business that it could be required to qualify to do business in the forum state, and could be barred from the local courts for noncompliance, without placing an impermissible burden on interstate commerce in violation of the commerce clause.

Pearson on Doing Business in States, supra note 303, at *2a (endnotes omitted). *See also* Great White Whale Advertising, Inc. v. First Festival Productions, 438 N.Y.S.2d 655 (1981); Stafford-Higgins Industries, Inc. v. Gaytone Fabrics, Inc., 300 F. Supp. 65 (S.D.N.Y. 1969) (holding that the corporation's maintenance of a New York office with several salesmen, with business and telephone directory listings for that office, the placement and acceptance of business orders at that office and the delivery of the ordered products to New York did not constitute doing business in New York); James Talcott, Inc. v. J. J. Delaney Carpet Co., 213 N.Y.S.2d 354 (1961), *aff'd* 222 N.Y.S.2d 312 (1st Dept.) (holding that a corporation was not doing business in New York though the corporation had a showroom and office in New York where majority of business' orders were shipped from another state into New York).

state commerce violate the federal Constitution.[308] The more burdensome the "qualifying" or "licensing" requirement is for authorization to engage in interstate commerce, the greater the likelihood this requirement violates the Commerce Clause.[309]

The Publication Requirement as an "Extra & Extraordinary" Unconstitutional Burden on Interstate Commerce

As an historical matter, a state legislative enactment that requires foreign businesses to comply with in-state "licensing" requirements as a precondition to gaining access to that state's courts—commonly referred to as "Door Closing statutes"—are presumptively valid.[310] Courts have held that filing certificates which provide notice of a foreign entity that conducts business in that state are *de minimis* obligations which are necessary for the public's protection.[311] Upon satisfying this requirement, a foreign business has open access to that foreign jurisdiction's courts.[312] In like manner, with the exception of foreign LLCs all foreign business entities and organizations that conduct business in New York have only the Application for Authority to file in order to gain access to the state's courts.[313] In the case of these entities, there is only a single obligatory step that must be satisfied in gaining the right to sue.

However, the same cannot be said of the Act as applied to foreign LLCs. Instead, a foreign LLC's Application must be filed and thereafter the LLC must satisfy the Publication Requirement.[314] Adding the time and expense associated with satisfying the Publication Requirement to the filing fees to be-

308. *See generally* Int'l Fuel & Iron Corp. v. Donner Steel Co., Inc., 242 N.Y. 224, 229 (1926) (explaining that the NYBCL's Door Closing Statute may not obstruct or burden the exercise of the privilege of interstate commerce and that any state act or enactment that does so is void under the commerce clause).

309. *See generally id.*

310. *See generally Pearson on Doing Business in States, supra* note 303.

311. *Id.*

312. *See id.*

313. *See, e.g.*, N.Y. BUS. CORP. LAW §1312 (McKinney 2004) (requiring a foreign business corporation to file an Application for Authority in order to conduct business).

314. NYLLCL § 802.

come licensed to conduct business in New York, a foreign LLC is unnecessarily burdened.

This unprecedented burden is incompatible with the traditional requirements associated with valid Door Closing statutes. Since Door Closing statutes are strictly construed in light of the fundamental interests at stake, the application of the Publication Requirement to foreign LLCs amounts to a significant departure from presumptively valid Door Closing statutes in that it imposes the state's most costly business licensing requirement, the most time-consuming in that access to the courts cannot be achieved earlier than 6 weeks from the filing of the Application, and the most nonconforming when compared with the requirements generally associated with gaining court access.[315] Indeed, the *more* burdensome this "dual" requirement of application and publication, the greater likelihood it violates the federal Commerce Clause.[316]

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315. *See generally supra* notes 92-97 and accompanying text. Moreover, it is most likely that Section 802's compliance scheme is the most expensive business licensing requirement associated with business formations. Excluding the cost of retaining a registered agent or an attorney, it is more expensive than any other business licensing requirement in Delaware. *See, e.g.*, Boyce & Pollock, *supra* note 77. *Compare* the New York Secretary of State's website, *at* http://www.dos.state.ny.us/corp/corpspub.html (June 13, 2004) (delineating the various fees in regard to business formations in the state) *with* the Delaware Secretary of State's website, *at* http://www.state.de.us/corp/fee.shtml (June 13, 2004) (outlining the various fees in connection with business formations in the State of Delaware). Indeed, it is more expensive than the domestic LLC Publication Requirement because Section 802's Application for Authority is an additional cost to which foreign LLCs are subject.

316. In *Int'l Fuel & Iron Corp. v. Donner Steel Co., Inc.*, 242 N.Y. 224 (1926), the New York State Court of Appeals observed the high standard of review applied to state enactments imposing the most minimal intrusions on interstate commerce. In reviewing the parameters of the NYBCL's Door Closing Statute which precludes a foreign corporation's right to sue for failing to gain permission to do business, the Court maintained:

> That the [Door Closing Statute] cannot be taken literally is quite evident. A foreign corporation may transact some kinds of business within the State without procuring a certificate or submitting to control. If its business be interstate, it is beyond State interference. 'A corporation of one State may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. . .'

New York's highest court has also established that a statute requiring foreign entities to apply for permission prior to doing business in New York or otherwise forfeit their right to sue must be interpreted in a manner that avoids an unlawful interference with interstate commerce. .[317] This further tips the balance against the foreign LLC Publication Requirement because imposing two requirements for the purpose of gaining the right to sue in New York, when viewed against the federal and state courts' liberal construction of the Commerce Clause, amounts to an unconstitutional violation of the federal Constitution.

The Publication Requirement as Discrimination in Interstate Commerce

Foreign LLCs that have "presence" in New York but do not conduct business in the state, while exempt from filing the Application for Authority on account of their infrequent and low-level in-state business activities, are nonetheless required to file an Application for Authority and subsequently satisfy the Publication Requirement.[318] However, since they fall within the jurisdiction of New York courts pursuant to the state's long-arm statute, foreign LLCs may be sued in New York regardless of whether they have gained a right to sue.[319] This is where the fundamental inequity of the Publication Requirement is most evident. Because the Publication Requirement denies foreign LLCs the right to sue under circumstances where they can be hauled into New York's courts, this inequity effectively constitutes discrimination in interstate commerce[320] and therefore violates the federal Commerce Clause.[321]

Id. at 229 (*quoting* Dahnke-Walker Co. v. Bondurant, 257 U.S. 282, 291 (1921)).

317. *Id.* at 231.

318. *See supra* text accompanying notes 292-97.

319. *See supra* text accompanying note 295.

320. *See* NYCPLR § 302 (permitting a suit in a New York court against a foreign person or entity relating to conduct on the part of that person or entity which caused injury or damage within the state).

321. *See generally* Brown-Forman Distillers Corp. v. NY State Liquor Authority, 476 U.S. 573 (1986); Northwest Central Pipeline Corp. v. State Corporation Commissioner of Kansas, 484 U.S. 809; Katzenbach v. McClung, 379 U.S. 294 (1964).

The Foreign LLC Publication Requirement: The Act at Cross Purposes

Section 802 contemplates that the loss of the right to sue is the sole penalty for non-compliance with the Publication Requirement. While the Act does not bar a foreign LLC from doing business in New York if it fails to file the Application for Authority, the Act does bar a foreign LLC from maintaining an action if it fails to comply with the Publication Requirement.[322] It is the exclusive application of this penalty that violates the Commerce Clause. Foreign LLCs would neither apply for nor benefit from obtaining authority to do business in New York for any reason other than to satisfy the Publication Requirement since there is no penalty for non-compliance with Section 802(a) itself.[323]

As a matter of public policy, the claim that the Publication Requirement exists to ensure the disclosure of important business information is a fallacy considering that the state permits foreign LLCs to indefinitely conduct business in the absence of ever filing the Application for Authority or any other document.[324] Because a foreign LLC faces no penalty under Section 802(a) if it fails to file the Application, not only does the public lose the benefit of *any* filing but that foreign LLC may conduct business indefinitely in New York, a result which directly contravenes the purported policy underlying the Publication Requirement.

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322. *See* NYLLCL §§ 802(a)–(b). *Compare* NYLLCL § 206.

323. *See supra* Section XIII. This is not the only example of how the Act is at cross purposes with itself. *See supra* text accompanying notes 318-22 (exploring the other ways in which the Act's purported policies are eclipsed by its paradoxical and incongruous provisions).

324. Absent the filing, a foreign LLC might therefore operate and do business in New York under circumstances where neither the state nor the general public has *any notice* of its operations let alone its existence. This outcome is at cross purposes with the Act since the requirement of filing an Application for Authority and thereafter commencing publication of the Notice is less likely to be accomplished because, among other things, a foreign LLC is more likely to balk at compliance in view of the expense and period for compliance. This simply frustrates efforts to protect unwary members of the public who transact business with the foreign LLC.

The Uselessness of the Foreign LLC Publication Requirement

Finally, the Publication Requirement is an exercise in futility and uselessness since the Application for Authority already provides adequate and sufficient disclosure to the public.[325] Ironically, the Act presupposes the information contained in its own Application for Authority is inadequate, thereby necessitating the additional obligation of the Publication Requirement. In other words, if the Act's Application provided adequate and sufficient third party notice, there would be no need for subsequent compliance with the Publication Requirement. Since the Application must be filed before compliance with the Publication Requirement can be initiated, the Act by its own terms presumes the insufficiency of the Application's disclosure.

However, this is a faulty presumption since the foreign LLC's Application for Authority provides disclosure superior to that in a domestic LLC's Articles of Organization.[326] Furthermore, this presumption is unjustifiable since the disclosure statements contained in an Application for Authority, albeit different, are qualitatively equivalent to those contained in the Certificates of the LP and LLP.[327] The rationale for applying the Publication Requirement to foreign LLCs is unsound if the disclosures made in the Application are already adequate and sufficient as well as qualitatively on par with the formative certificates of other business organizations.

In terms of disclosure, the foreign LLC's Application for Authority represents a radical improvement to a domestic LLC's Articles of Organization. The Act only requires the domestic LLC to disclose its name, address, county and registered agent's information.[328] Also, the Act does nothing to en-

325. *Compare* N.Y. BUS. CORP. LAW § 802(a) *with* NYLLCL § 203.

326. The Act does not require the domestic LLC to disclose its address, a single name of any of its Managers or Members or any of their respective addresses. *See* NYLLCL § 206.

327. Again, the Certificates of the partnership laws are the exemplars in providing adequate and sufficient material information to the public. The Certificate of each requires the disclosure of the names and addresses of all partners. *See supra* text accompanying notes 158-64.

328. *See generally* NYLLCL § 203.

courage an LLC to make additional disclosures beyond providing this required information.[329]

By comparison, in an Application for Authority a foreign LLC must disclose its office address in its home jurisdiction, the name and address of an authorized officer in its home jurisdiction where a copy of the foreign LLC's Articles of Organization is available or, in the case its Articles are not publicly-filed, the name and address of the person responsible for providing a copy of it.[330] In sum, the Application discloses more than a foreign LLC's name, jurisdiction of formation, date of formation, county in New York where its office shall be located and designation for service of process, which is the only information provided in a domestic LLC's Articles.

A Comparison of the Act's Publication Requirements

On balance, the Act requires the domestic LLC to disclose markedly less information in its Articles and consequently in its Notice than the disclosures required of other business entities and associations, including those required by the foreign LLC.[331] There is little, if any, justification for the Act to allow domestic LLCs to disclose less information than foreign LLCs, especially since domestic LLCs outnumber foreign LLCs in New York and represent the bulk of LLC-related business and commercial activity in the state.[332]

The substantive disclosures required of the foreign LLC in its Application also obviate the need to publish the Notice. All things considered, the foreign LLC's Application and the Notice which supercedes its filing are patently superior to both the domestic LLC's Articles and Notice. The Act nonetheless imposes a dual requirement for court access, whereupon a foreign LLC must file the Application and publish the Notice. Aside from being unnecessary, this dual requirement renders the foreign LLC Publication Requirement more burdensome

329. *See* The New York Secretary of State website, *available at* http://www.dos.state.ny.us/llc (providing a free-of-charge fill-in template for forming a domestic LLC).

330. *See generally* NYLLCL § 802(b).

331. *Compare* NYLLCL § 206 *with* § 802(b), N.Y. P'SHIP ACT §§ 121-201(c), 1500(a) and N.Y. BUS. CORP. LAW § 402.

332. This fact also indicates the sheer volume of income and taxes that accrue on account of domestic LLC business activities. *See generally Public Policy Institute Study, supra* note 86.

than the NYBCL's Application for Authority and the LP and LLP Publication Requirements, in addition to the Act's domestic LLC Publication Requirement,[333] More importantly, this burdensome requirement violates the Commerce Clause when applied to foreign LLCs engaged in interstate commerce.

XIV.
THE LIMITED LIABILITY COMPANY LAW PUBLICATION REQUIREMENT: A FUNDAMENTAL FLAW OF AN OTHERWISE FLAWLESS ACT

The Publication Requirement, in failing to further or advance its purported policy objective, while prohibiting access to New York's courts for non-compliance with its mandate, exemplifies a total failure of rational public policymaking and serves and directly undermines the benefits of the New York LLC and the fundamental purpose of its enabling statute. Furthermore, the punitive effect of the Publication Requirement also compromises the exercise of both state and federal constitutional rights.

The New York LLC is invaluable to ameliorating the inherent challenges faced by small business owners and entrepreneurs, whose business and commercial activities are largely responsible for the most recent economic expansion. The LLC's tax, liability and governance schemes make it responsive to the critical needs of small business owners as well as the need of the state to stimulate future economic growth.

Yet the Publication Requirement discourages usage of the New York LLC by imposing a costly and time-consuming burden during the fee-intensive start-up phase in the LLC's development. The Publication Requirement also discourages usage of the New York LLC by potentially depriving it of a state and

333. Despite its superlative disclosure regime, the NYBCL's Application for Authority to be filed by foreign corporations does not require the disclosure of either its address in its home jurisdiction, the address of its principal office, the name and address of an authorized officer who is required to provide a copy of its Certificate or Articles of Incorporation and other requirements that foreign LLC's are subject to. *See* N.Y. BUS. CORP. LAW § 1304(a). *See also* NYLLCL §§ 802(a)(1)–(8). Indeed, it might be said that the foreign LLC's Application for Authority is the Act's *only* publicly-filed disclosure document that provides adequate and sufficient third party notice as it permits members of the public to ascertain the corporation's contact information and business location. *See* NYLLCL §§ 802(b)(6)–(7).

federal constitutional right: the right to access the courts and sue. In discouraging usage of the LLC and consequently diminishing small business capital formation, the Publication Requirement too often negatively outweighs the benefits of using the New York LLC and thus compromises its potential to stimulate economic growth.