

PUBLIC POLICY AND THE "RIGHT" TO INCORPORATE

INTRODUCTION

General incorporation statutes which authorize incorporation for any lawful business purpose are in effect in all American jurisdictions except Oklahoma.¹ Most jurisdictions distinguish between the business corporation and the non-profit corporation, many having non-profit corporation statutes in addition to "business corporation" or "stock corporation" statutes.² Other jurisdictions, however, have "general corporation" acts or laws, under which provision is made for incorporation of non-profit as well as business corporations.³

The Model Business Corporation Act, prepared by the Committee on Corporate Laws of the American Bar Association, provides: "Corporations may be organized under this Act for any lawful purpose or purposes, except for the purpose of banking or insurance."⁴ Nineteen jurisdictions adhere to some version of the Act.⁵ The Model Non-Profit Corporation Act, published by the American Bar Association (ABA) as a companion to the Model Business Corporation Act, also allows corporations to be organized "for any lawful purpose or purposes."⁶ Non-profit corporation statutes based

¹ 1 Model Bus. Corp. Act Ann. 2d § 3, ¶ 2, at 58 (1971). Oklahoma constitutionally prohibits incorporation for purposes of dealing in real estate. Okla. Const. art. XXII, § 2. See Okla. Stat. Ann. tit. 18, § 1.9. Delaware, Iowa, Minnesota, Nevada, Oregon, Pennsylvania, Wisconsin, and Wyoming, among others, permit the corporate charter to specify simply that the corporation will engage in "any lawful activity." 1 Model Bus. Corp. Act Ann. 2d § 3, ¶ 2, at 58 (1971). In 1969, the requirement of former § 48(c) of the Model Business Corporation Act that the articles specify the purposes of the corporation was amended; that section (now § 54) of the Model Act now permits an "all purpose" provision in the articles of incorporation. ABA-ALI Model Bus. Corp. Act § 54(c) (1969). In some jurisdictions, however, the charter must state with varying degrees of specificity the nature of the business for which the corporation is organized. 1 Model Bus. Corp. Act Ann. 2d § 3, ¶ 2, at 58 (1971).

² 1 Model Bus. Corp. Act Ann. 2d § 3, ¶ 2, at 58 (1971); H. Henn, *Handbook of the Law of Corporations and Other Business Enterprises* 3 (2d ed. 1970) (hereinafter cited as H. Henn). The Model Business Corporation Act, for example, applies to all corporations for profit, except those with banking or insurance purposes. ABA-ALI Model Bus. Corp. Act §§ 2(a), (b), 3 (1969). Because of its definitions of "corporation," "domestic corporation," and "foreign corporation" as corporations "for profit," the Model Act excludes non-profit corporations from its ambit. See ABA-ALI Model Bus. Corp. Act §§ 2(a)-(b) (1969). The Model Non-Profit Corporation Act, on the other hand, applies to "a corporation no part of the income or profit of which is distributable to its members, directors or officers." ABA-ALI Model Non-Profit Corp. Act § 2(c) (1964).

³ See, e.g., Del. Code Ann. tit. 8, § 101(b) (1974) ("... to conduct or promote any lawful business or purposes, except as may otherwise be provided by the constitution or other law of this State." *Id.*).

⁴ ABA-ALI Model Bus. Corp. Act § 3 (1969).

⁵ H. Henn, *supra* note 2, at 6. The jurisdictions are: Wisconsin, Oregon, the District of Columbia, Texas, Virginia, North Dakota, Alaska, Colorado, Iowa, Wyoming, Utah, Mississippi, Nebraska, South Dakota, Washington, New Mexico, Montana, Georgia, and Rhode Island. *Id.*

⁶ ABA-ALI Model Non-Profit Corp. Act § 4 (1964).

in whole or in part on the Model Act have been enacted in twenty-one jurisdictions;⁷ two jurisdictions have similar acts.⁸

Thus, most, if not all, American jurisdictions permit incorporation for "any lawful business" or "any lawful purpose or purposes." Yet, while the state statutes may share this seemingly permissive language, the scope of the term "lawful" has received variant judicial construction.

The interpretation of the term "lawful" is especially important with respect to non-profit corporations.⁹ When groups of individuals seek to incorporate to advance relatively unpopular beliefs concerning political, economic, religious, or cultural matters, the interpretation of "lawful purposes" may become the focal point for the grant or denial of corporate status. Even though the advocacy of such beliefs may not be statutorily prohibited or "illegal," it may, nonetheless, be "unlawful" under the judicial construction of "lawful purposes" for incorporation. The critical question is whether "lawful" encompasses "public policy" considerations. To the extent that it does, "lawful" purposes may circumscribe the areas of permissible corporate advocacy, particularly when the views sought to be advanced may be deemed to be "repugnant" or "abhorrent."

Recently in *State ex rel. Grant v. Brown*,¹⁰ the majority of the Supreme Court of Ohio construed the Ohio statute which provided that "a corporation may be formed for any purpose or purposes for which natural persons lawfully may associate themselves."¹¹ The Greater Cincinnati Gay Society, Inc., an organization whose stated purpose was, in part, "[t]o promote acceptance of homosexuality as a valid life style . . .,"¹² sought a writ of mandamus to require the Secretary of State of Ohio to approve, file and record the organization's articles of incorporation.¹³ The Supreme Court of Ohio, in a per curiam opinion, denied the writ of mandamus, stating that the secretary of state was clothed with discretion in determining which articles to accept.¹⁴ The court also agreed with the secretary of state

⁷ 1 Model Bus. Corp. Act Ann. 2d § 3, ¶ 2, at 59 (1971); Kauper & Ellis, *Religious Corporations and the Law*, 71 Mich. L. Rev. 1500, 1554 & n.306 (1973). The Act was the basis for at least part of the non-profit corporation statutes in Alabama, Alaska, Arkansas, the District of Columbia, Georgia, Indiana, Iowa, Kentucky, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oregon, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wisconsin. *Id.*

⁸ 1 Model Bus. Corp. Act Ann. 2d § 3, ¶ 2, at 59 (1971) (Illinois and Missouri).

⁹ It has been noted that in no other nation in the world does the number and scope of non-profit organizations approach that in the United States. Oleck, *Non-Profit Types, Uses, and Abuses*: 1970, 19 Clev. St. L. Rev. 207, 217 (1970).

¹⁰ 39 Ohio St. 2d 112, 313 N.E.2d 847 (1974). *Grant* is discussed in Note, 6 U. Toledo L. Rev. 237 (1974).

¹¹ Ohio Rev. Code Ann. § 1702.03 (1971) (emphasis added).

¹² 39 Ohio St. 2d at —, 313 N.E.2d at 849 n.1 (dissenting opinion) (emphasis deleted).

¹³ 313 N.E.2d at 848.

¹⁴ *Id.* Judge Herbert, with whom Judge Paul W. Brown joined, concurred in the judgment, but disagreed with the language in the opinion which suggested that "unfettered discretion reposes in the Secretary of State." 313 N.E.2d at 849 (concurring opinion). Judge

that the promotion of homosexuality as a valid life style was contrary to state public policy.¹⁵ The fact that, as a result of the recent passage of a statute decriminalizing all private sexual activity between consenting adults, homosexual acts between consenting adults were no longer statutory offenses in Ohio was not considered dispositive. The court stated that there was "still reason for denying the writ."¹⁶

While the court in *Grant* construed the phrase "lawful" to encompass public policy considerations, as well as legislative and judicial statements of the law, a much narrower construction of the phrase "for any lawful purpose" was previously adopted by the majority of the New York Court of Appeals in *Association for the Preservation of Freedom of Choice, Inc. v. Shapiro*.¹⁷ The certificate of incorporation of the proposed corporation included the following purposes:

(a) to promote the right to individual freedom of choice and association, constituting the right of the individual to associate with only those persons with whom he desires to associate; . . .

(c) to assist in the elimination of barriers to individual freedom of choice and its exercise in specific instances, as well as preventing and guarding against deprivation of this right at large; and

(d) to find and promote the means through freedom of choice and association by which the numerous groups in our multicultural society can find their fullest development.¹⁸

A justice of the Supreme Court denied approval,¹⁹ stating that the duty of the court was not only to see that the requirements of the incorporation statute had been met, but also to determine whether the purposes of the proposed corporation are "lawful, in accord with public policy, and not injurious to the community."²⁰ On appeal,

Stern entered a dissenting opinion. *Id.* Judge William B. Brown concurred in the dissenting opinion of Judge Stern, stating that the duty of the secretary of state is ministerial—if the articles are filed in legal form following all legal requirements, he must accept them. *Id.* at 851 (dissenting opinion).

¹⁵ 313 N.E.2d at 848.

¹⁶ *Id.*

¹⁷ 9 N.Y.2d 376, 174 N.E.2d 487, 214 N.Y.S.2d 388 (1961) (hereinafter cited as *Freedom of Choice*).

¹⁸ *Id.* at 380, 174 N.E.2d at 488, 214 N.Y.S.2d at 389.

¹⁹ *In re Ass'n for the Preservation of Freedom of Choice, Inc.*, 17 Misc. 2d 1012, 1013, 187 N.Y.S.2d 706, 707 (Sup. Ct. 1959). At the time in question § 10 of the New York Membership Corporation Law (superseded in 1970 by the New York Not-For-Profit Corporation Law (McKinney 1970)) provided, in pertinent part: "Every certificate of incorporation filed under this chapter shall have endorsed thereon or annexed thereto the approval of a justice of the supreme court of the judicial district in which the office of the corporation is to be located." [1960] Laws of N.Y. ch. 985, § 1.

²⁰ *In re Ass'n for the Preservation of Freedom of Choice, Inc.*, 17 Misc. 2d 1012, 1013, 187 N.Y.S.2d 706, 707 (Sup. Ct. 1959).

the New York Court of Appeals rejected previous lower court decisions which in its view had "enlarged this comparatively simple and narrow judicial function [to ascertain whether the proposed corporation was for a lawful purpose] and [had] engrafted thereon the requirement 'of a finding that the objects and purposes of the proposed corporation are in accord with public policy . . . and not injurious to the community . . .'"²¹ The court then concluded that state public policy is not violated by purposes which are not unlawful, and that approval of articles of incorporation cannot be denied on the basis of "vague, indefinite and elusive" standards as to what might be injurious to the community.²²

Various reasons have been advanced in support of a broad construction of "lawful purposes," encompassing extra-statutory "public policy" considerations. Incorporation has been viewed as a privilege which the state can withhold from organizations whose objectives are a "contradiction" of state law.²³ Therefore, it has been contended that a "lawful" purpose must be in conformity with both the "letter" and "spirit" of the law,²⁴ and that in order for the purposes of a proposed corporation to be "lawful" they must not only be legal but must also be in accord "with an explicitly defined public policy of a State."²⁵ Finally, it has been emphasized that freedom of association is not tantamount to a right to incorporate,²⁶ and that there are purposes for which individuals are free to associate and express their views, but not as a corporation.²⁷

The narrow construction of "lawful purposes," whereby public policy is not violated by purposes which are not unlawful, in effect

²¹ *Freedom of Choice*, 9 N.Y.2d at 382, 174 N.E.2d at 489, 214 N.Y.S.2d at 391, citing *In re Daughters of Israel Orphan Aid Soc'y*, 125 Misc. 217, 219, 210 N.Y.S. 541, 543 (Sup. Ct. 1925). See also *In re Stillwell Political Club, Inc.*, 26 Misc. 2d 931, 932, 109 N.Y.S.2d 331, 333 (Sup. Ct. 1951); *Lewis v. Harlem Dental Co.*, 189 App. Div. 359, 362, 178 N.Y.S. 533, 536 (1919).

²² 9 N.Y.2d at 382, 174 N.E.2d at 489, 214 N.Y.S.2d at 391. Judge Burke dissented. *Id.* at 383, 174 N.E.2d at 490, 214 N.Y.S.2d at 392 (dissenting opinion). Judge Froessel concurred in Judge Burke's opinion. *Id.* at 386, 174 N.E.2d at 491, 214 N.Y.S.2d at 394 (dissenting opinion).

²³ *Id.* at 384, 385, 174 N.E.2d at 490, 214 N.Y.S.2d at 392, 393 (Burke, J., dissenting). Judge Burke emphasized that the organizers of the proposed corporation were seeking to: [O]btain "the imprimatur of incorporation", bearing the blessing of the Supreme Court, the benediction of the Secretary of State, and the rights to affix the characterization "Incorporated under the Laws of the State of New York" to public matter so as to enable the organizers to assure themselves the prestige which accompanies the privilege

Id. at 384, 174 N.E.2d at 490, 214 N.Y.S.2d at 392 (dissenting opinion).

²⁴ *Id.* at 384, 174 N.E.2d at 490, 214 N.Y.S.2d at 393 (dissenting opinion).

²⁵ *Id.*

²⁶ *Id.* at 385-86, 174 N.E.2d at 491, 214 N.Y.S.2d at 394 (dissenting opinion).

²⁷ *Id.* See also *In re Ass'n for the Preservation of Freedom of Choice, Inc.*, 18 Misc. 2d 534, 188 N.Y.S.2d 885 (Sup. Ct. 1959) where, in denying a petition for a rehearing, the justice of the Supreme Court concluded that although the sponsors of the proposed corporation were free to associate for the purposes set forth in their proposed certificate of incorporation, they could not "compel the State to grant them for these purposes, the benefits and privileges of incorporation as a membership corporation." *Id.* at 535, 188 N.Y.S.2d at 887.

construes "lawful" to mean only that an activity is "authorized, sanctioned, or at any rate not forbidden by law."²⁸ Under this construction, the statutory requirement of a "lawful" purpose is met if the articles of incorporation state a purpose "not contrary to general statutes."²⁹ This view is intended to limit the amount of discretion to be exercised by an official, such as a judge or the secretary of state, in dealing with proposed articles of incorporation, thereby preventing the official from becoming the spokesman or interpreter of the state's public policy.³⁰ It is further emphasized that fundamental concepts such as freedom of association and freedom of expression are involved³¹ which should not be subjected to an official's unguided discretion.³² Finally, under the narrow construction of "lawful" it has been noted that approval of a corporate charter does not imply state approval of the views of its sponsors and that dissenting organizations are entitled to freedom of expression and to an equal, objective application of the statute.³³

Grant and *Freedom of Choice* suggest the issues raised by the use of broad, "extra-statutory" public policy considerations such as those adopted by the majority in *Grant* in determining whether the purposes or objects of a proposed corporation are "lawful." Initially, this comment will focus on the question of the proper interpretation of "lawful" as a matter of statutory construction. Although the constitutionality of the kind of construction of "lawful purposes" adopted by the majority in *Grant* has never been directly tested, statutes which might be construed as allowing judicial or administrative officers to subjectively evaluate the lawfulness of a non-profit organization's proposed purposes have received strong criticism.³⁴ The constitutional questions raised by the introduction of "extra-statutory" public policy considerations will therefore be examined.

STATUTORY CONSTRUCTION

The determination of the proper construction of the term "lawful" as it appears in corporation statutes requires resort to standard rules of statutory interpretation. First among the pertinent rules is the principle that statutes are to be given their plain meaning.³⁵ The

²⁸ *Grant*, 313 N.E.2d at 850 (Stern, J., dissenting).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Freedom of Choice*, 9 N.Y.2d at 382-83, 174 N.E.2d at 489, 214 N.Y.S.2d at 391.

³² *Id.* at 382, 174 N.E.2d at 489, 214 N.Y.S.2d at 391.

³³ *Id.* at 383, 174 N.E.2d at 490, 214 N.Y.S.2d at 392.

³⁴ See Dwight, *Objections to Judicial Approval of Charters of Non-Profit Corporations*, 12 Bus. Law. 454 (1957). See also McAulay & Brewster, *In re Application of the Association for the Preservation of Freedom of Choice*, 6 How. L.J. 169 (1960); Note, 6 U. Toledo L. Rev. 237 (1974); Comment, 66 Yale L.J. 545, 550-55 (1957); Note, 55 Colum. L. Rev. 380, 394-95 (1955).

³⁵ See *United States v. American Trucking Ass'n*, 310 U.S. 534 (1940):

There is, of course, no more persuasive evidence of the purpose of a statute than

dissenting judges in both *Grant* and *Freedom of Choice* referring to dictionary definitions, came to opposite conclusions as to the proper interpretation of "lawful."³⁶ Thus, it would seem that application of public policy considerations in determining the lawfulness of a proposed corporate purpose does not necessarily follow from the plain meaning of the term. Furthermore, it is submitted that the rule of statutory construction that legislative history is relevant to a determination of the proper meaning of statutory language, particularly where the statutory language is not clear,³⁷ leads to the conclusion that the phrase "lawful purpose" should be construed narrowly.

Control over corporate formation has traditionally rested in the state legislative departments.³⁸ Originally, corporate capacity could only be attained by special legislative charter. Partly because of the gross favoritism inherent in such a system, general incorporation statutes were passed in all states.³⁹ Yet, the potential for favoritism, or discrimination and arbitrariness, is inherent in a system whereby a state official is given discretion to determine that particular corporate purposes, while not contrary to any specific statute, are nonetheless against "extra-statutory" public policy.

Even if the official who is granted such broad discretion attempts to apply the broad "extra-statutory" standard on an even-handed basis, no guidelines are, or in reality can be, given for its application. It would seem that if the state legislature determined that certain purposes should not be undertaken in a corporate form, it could designate them specifically rather than vesting broad discretion in a single administrative official to fashion the state's public policy on a case-by-case basis. Such an approach would appear logically consistent with the basic role of the legislator, since he is commonly charged with considerations of "public policy." Thus, it would seem that the narrow construction of lawful purposes applied in *Freedom of Choice* is consistent with the purposes underlying the adoption of general incorporation statutes. The broad

the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislature. In such cases we have followed their plain meaning.

Id. at 543.

³⁶ Compare *Grant*, 313 N.E.2d at 850 (Stern, J., dissenting) (lawful purpose is one "not contrary to general statutes") with *Freedom of Choice*, 9 N.Y.2d at 384, 174 N.E.2d at 492, 214 N.Y.S.2d at 393 (Froessel, J., dissenting) (lawful purpose is one which is in conformity with "not only the letter, but also the spirit of the law").

³⁷ See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring); *United States v. American Trucking Ass'n*, 310 U.S. 534 (1940): "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids the use, however clear the words may appear on 'superficial examination.'" Id. at 543-44.

³⁸ See, e.g., *Title Co. v. Wilcox Bldg. Corp.*, 302 U.S. 120, 127-28 (1937); *Ashley v. Ryan*, 153 U.S. 436, 441 (1894).

³⁹ *Kauper & Ellis, Religious Corporations and the Law*, 71 Mich. L. Rev. 1500, 1509 & n.40. (1972).

interpretation of "lawful purpose" as encompassing "extra-statutory" public policy considerations adopted in *Grant* would, on the other hand, appear to encourage the favoritism, discrimination, and arbitrariness which the states intended to eliminate through the passage of general incorporation statutes.

CONSTITUTIONAL LIMITS OF STATE POWER OVER INCORPORATION—IN GENERAL

In analyzing the constitutionality of the denial of incorporation on the basis of broad "extra-statutory" public policy considerations, it should be emphasized that the United States Supreme Court has explicitly held that there is no natural or fundamental right to conduct business in the form of a corporation.⁴⁰ Incorporation is a privilege within the authority of the sovereign states.⁴¹ Moreover, state control clearly reaches the purposes for which a corporation may be formed.⁴²

State authority over corporations and their formation is not, however, without limitation. A state may not impose conditions which require the relinquishment of a constitutional right or which conflict with the Constitution.⁴³ Thus, for example, in the area of state power over the conditions under which foreign corporations may do business within the state, the Supreme Court has held void provisions revoking the license of a foreign corporation for exercising its constitutional right to remove suits brought against it from the state courts to the federal courts,⁴⁴ provisions subjecting a foreign corporation to payment of a tax not only on its property within the state, but also on its property outside of the state in violation of the due process clause of the Fourteenth Amendment,⁴⁵

⁴⁰ *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 536 (1922).

⁴¹ "That the right to be a state corporation depends solely upon the grace of the State, and is not a right inherent in the parties is settled." *Ashley v. Ryan*, 153 U.S. 436, 441 (1894). See also *Title Co. v. Wilcox Bldg. Corp.*, 302 U.S. 120, 124-25 (1937); *Martinez v. Asociacion de Senoras*, 213 U.S. 20, 25 (1909); *Maine v. Grand Trunk Ry.*, 142 U.S. 217, 228 (1891).

⁴² "[T]he state prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the State's control." *Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28, 43 (1900). See also *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 72 (1928) (state may adopt reasonable regulations to confine purposes within limits "consistent with the rights of others and the public welfare"); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 536 (1922) (state may impose conditions and duties reasonably necessary to prevent corporate activities from operating "to the detriment of the rights of others with whom it may come in contact"); *Horn Silver Mining Co. v. New York*, 143 U.S. 305, 313 (1892) (state may impose conditions "most suitable to the public interests and policy").

⁴³ See, e.g., *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 535 (1941); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 507 (1926); *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 456 (1874).

⁴⁴ E.g., *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922).

⁴⁵ E.g., *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 349 (1922); *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 48 (1910).

and, provisions of a tax or license law which operate to deny to a foreign corporation the equal protection of laws.⁴⁶

FREEDOM OF ASSOCIATION

The power of a state in dealing with corporations has also been recognized as subject to the right to freedom of association. In *NAACP v. Alabama*,⁴⁷ the Court emphasized that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."⁴⁸ In holding that the state of Alabama could not compel disclosure of the membership lists of a foreign corporation as a condition of qualifying to do business in the state,⁴⁹ the Court noted that state action which might curtail freedom to associate is subject to the closest scrutiny.⁵⁰ Furthermore, it is immaterial whether the beliefs sought to be advanced concern political, economic, religious or cultural matters or whether the state's action is unintended, rather than direct.⁵¹

Therefore, while it is clear that there is no "right" to incorporate, it is also clear that a state may not exercise its power over the privilege in such a manner as to violate the constitutional right to associate. In a situation involving both a state-controlled privilege and freedom of association, the Court in *Healy v. James*⁵² dealt with the denial by a state college of official recognition to a group of students who desired to form a local chapter of a radical political organization, Students for a Democratic Society (SDS). The president of the school refused recognition, in part, because the organization's goals were "antithetical to the school's policies . . ."⁵³ The Court noted that nonrecognition barred the group from using campus facilities for holding meetings,⁵⁴ and denied them access to the school newspaper and campus bulletin boards, ". . . the customary media for communicating with the administration, faculty members, and other students."⁵⁵ Reasoning that the denial of official recognition was a form of prior restraint of the associational activities of the students, the Court concluded that once an application which conformed to existing requirements was filed, the college was under a

⁴⁶ E.g., *Air Way Elec. Appliance Corp. v. Day*, 266 U.S. 71, 85 (1924); *Southern Ry. v. Greene*, 216 U.S. 400, 418 (1910).

⁴⁷ 357 U.S. 449 (1958).

⁴⁸ *Id.* at 460.

⁴⁹ *Id.* at 466.

⁵⁰ *Id.* at 460-61.

⁵¹ *Id.*

⁵² 408 U.S. 169 (1972).

⁵³ *Id.* at 174-75.

⁵⁴ *Id.* at 176.

⁵⁵ *Id.* at 181-82.

"heavy burden" to justify its decision of rejection.⁵⁶ Disagreement with a group's philosophy, or finding its views repugnant, stated the Court, is insufficient reason to deny First Amendment rights.⁵⁷ The state "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."⁵⁸

It is submitted that the decision in *Healy v. James* is relevant to the analysis of the constitutionality of a denial of incorporation on broad, "extra-statutory" public policy grounds. The state college in *Healy* took the position that all the proposed organization was denied was a "stamp of approval," and that the students involved could still meet informally on campus, as individuals if not as a recognized organization, and, in any event, could meet as a group off campus.⁵⁹ The Court held, however, that denial of the use of campus facilities hindered the ability of the organization to communicate in a campus environment, and could hardly be viewed as an "insubstantial" impediment.⁶⁰

In the context of denial of incorporation for "extra-statutory" public policy reasons, it has been similarly emphasized that, despite the denial of the "imprimatur of incorporation,"⁶¹ the individuals involved are nonetheless free to associate and express their views, though not as a corporation.⁶² The Court in *Healy* specifically rejected such reasoning where the denial of official recognition by the state results in a substantial impediment of the ability of an organization to communicate and the ability of its individual members to associate.⁶³ The question then becomes whether denial of incorporation for "extra-statutory" public policy reasons results in a similar substantial impediment of the right to associate.

Arguably, both *NAACP v. Alabama* and *Healy* involved more substantial burdens on the right to associate than does denial of corporate status to an organization. In *NAACP*, the foreign corporation could not function in Alabama without furnishing its membership lists and qualifying to do business in the state. In *Healy*,

⁵⁶ *Id.* at 184. The Court recognized that legitimate interests might exist to justify such restraint; the state, however, bears the burden of demonstrating them. *Id.*

⁵⁷ *Id.* at 187.

⁵⁸ *Id.* at 187-88.

⁵⁹ *Id.* at 182-83.

⁶⁰ *Id.* at 181-82.

⁶¹ See note 23 *supra*.

⁶² See text at note 27 *supra*.

⁶³ 408 U.S. at 182. The court in *Gay Students Org. v. Bonner*, 509 F.2d 652 (1st Cir. 1974), which held that a university's ban on the social functions of an officially recognized student homosexual organization violated the First Amendment, 509 F.2d at 662, has said: "[T]he [*Healy* Court] focused not on the technical point of recognition or non recognition, but on the practicalities of human interaction. . . . The ultimate issue at which inquiry must be directed is the effect which a regulation has on organizational and associational activities, not the isolated and for the most part irrelevant issue of recognition *per se*."

509 F.2d at 658-59.

non-recognized campus organizations were excluded from all use of campus facilities and were denied access to the customary media for communicating in a campus environment. Admittedly, the privilege of incorporation is not crucial to freedom of association;⁶⁴ individuals who are denied corporate status are free to function as an unincorporated association. Yet, neither *NAACP* nor *Healy* required absolute deprivation of the right to associate as a prerequisite to invalidation of the state action. The Court in *NAACP* spoke of "restraint" and "deterrent effect" on freedom of association,⁶⁵ and the Court in *Healy* recognized that denial of recognition as a campus organization was a not "insubstantial" impediment, which resulted in "disabilities" on the individuals attempting to exercise their right of association.⁶⁶

Thus, it may be contended that the burden on associational rights which results from denial of the corporate privilege, while possibly not as great as the burdens which the Court recognized in *NAACP* and *Healy*, is nonetheless sufficiently substantial to warrant constitutional protection. Significant disadvantages or disabilities may result from a denial of incorporation. For example, it has been suggested that the imprimatur of incorporation may vest an organization with a "badge of legality" which, although of minimal importance to large, established organizations, may be of extreme importance to organizations seeking to advance relatively unpopular views.⁶⁷ Furthermore, denial of incorporation may place an organization at a serious disadvantage in competing with incorporated associations.⁶⁸ In this regard, it has been noted that fear of unlimited personal liability, however, groundless, may prevent persons from becoming members of unincorporated associations.⁶⁹ Finally, the inability to sue or hold property may financially disadvantage an unincorporated organization.⁷⁰ Thus, to some extent, corporate status may encourage both membership in, and acceptance of, a non-profit organization and may provide financial alternatives more amenable to the accumulation of the resources necessary to attain widespread publication of the views the organization seeks to advocate. In sum, it may be contended that the denial of the corporate status imposes significant disadvantages on an organization so as to deter substantially the First Amendment right to associate.

⁶⁴ McAulay & Brewster, *supra* note 34, at 169.

⁶⁵ 357 U.S. at 462, 463, 466.

⁶⁶ 408 U.S. at 182, 183.

⁶⁷ McAulay & Brewster, *supra* note 34, at 169-70.

⁶⁸ Comment, 66 Yale L.J. 545, 552-54 (1957).

⁶⁹ *Id.* at 553. The author recognized that although statutes have not conferred limited liability on members of unincorporated associations, the common law requirement that a creditor prove that the member sought to be held liable had authorized the debt-producing act has, in effect, achieved that same result. *Id.* at 551 n.36. Nevertheless, the author concludes that unincorporated association is so identified with unlimited liability that non-profit corporations with limited liability obtain an advantage in acquiring additional membership. *Id.* at 553 n.48.

⁷⁰ *Id.* at 553-54.

Furthermore, it is submitted that even if, assuming *arguendo*, the burdens imposed by denial of incorporation are less substantial than those previously held invalid by the Court, the First Amendment freedom of association should prevent arbitrary denial of incorporation under a broad "extra-statutory" public policy standard such as that adopted by the majority in *Grant*. Even if denial of the privilege of incorporation does not constitute a substantial burden on the activities of an organization, it may nonetheless operate as a punishment based on the views sought to be expounded by the organization. The corporation is unquestionably a form of association, and an organization which deems it desirable to pursue its associational activities in that form should not be prevented from doing so on the basis of the views it seeks to advocate. Having recognized that a state cannot "restrict speech or association simply because it finds the views expressed by any group to be abhorrent,"⁷¹ it would seem logically inconsistent for the Court to limit recognition of the First Amendment freedom of association to "substantial" restrictions. Lesser restrictions on the right to associate, it is submitted, should also be justified by a controlling state interest.

In both *NAACP* and *Healy*, the Court utilized a balancing test in assessing the validity of state restriction of associational rights. Under *NAACP* a showing of controlling state justification for the deterrent effect on the right to associate will establish the validity of the state action,⁷² while under *Healy* the state action will be sustained if the state satisfies its "heavy burden" . . . to demonstrate the appropriateness of [its] action."⁷³ Rather than simply allowing the state to impose less substantial restrictions on the right of association, it would seem appropriate to assess the validity of less significant restrictions on freedom of association through application of the balancing test, by requiring a lesser countervailing state interest to justify a less substantial infringement or restriction on associational rights. In this manner, freedom of association would not be subject to arbitrary restrictions, be they very substantial or only moderately so; at the same time, legitimate state interests would still justify appropriate restriction on an individual's freedom of association.

If the right to associate is extended to reach less substantial state restrictions, the legitimacy of a state's denial of incorporation for "public policy" reasons would depend on the interest which the state sought to advance by the denial. The reasons which justify statutory restrictions on the rights of an individual would justify denial of incorporation on a limited, "statutory" public policy basis—the state has the requisite controlling interest in preventing the incorporation of a group of individuals to achieve purposes which are expressly prohibited by statute and which they could not

⁷¹ *Healy v. James*, 408 U.S. 169, 187-88 (1972).

⁷² 357 U.S. at 466.

⁷³ 408 U.S. at 184.

pursue as individuals.⁷⁴ A broad, "extra-statutory" standard such as that adopted by the majority in *Grant* is not, however, limited to the express statutory prohibitions of the state.⁷⁵ The state can, under such a standard, deny the "privilege" of incorporation for purposes which the individuals would be free to pursue either as individuals or as unincorporated organizations.⁷⁶ Yet, by recognizing that individuals or organizations are free to pursue such activities, except in a corporate form, the state has, it is submitted, implicitly negated any interest whatsoever in denial of incorporation for "extra-statutory" reasons, since the denial results in neither regulation nor absolute prevention of the activity proposed by the would-be corporation.⁷⁷

The restriction on freedom of association resulting from a state's denial of incorporation based solely on "extra-statutory" public policy grounds, rather than the express statutory law of the state, would seem to further no apparent state interest. Therefore, even assuming that corporate status is of questionable significance in furthering the associational interests of the members of an organization, that interest, however minimal, would be sufficient to invalidate the extra-statutory restriction.

PRIOR RESTRAINT

In addition to its finding of an insufficient state interest to justify the resulting deterrent effect on the students' associational activities, the Court in *Healy* noted that the system which vested authority in the state college's president to deny official recognition operated as a prior restraint on those associational activities.⁷⁸ Similarly, assuming a sufficient nexus between incorporation and the First Amendment rights of association and expression, it is submitted that a system whereby a secretary of state or a judge may deny incorporation under a statute authorizing incorporation for "lawful purposes" on the basis of "extra-statutory" public policy grounds operates as a prior restraint.⁷⁹

There is a "heavy presumption" against the constitutionality of prior restraint on expression.⁸⁰ While the protection as to prior or

⁷⁴ See text at notes 28-29 *supra*.

⁷⁵ See text at notes 14-16, 23-25 *supra*.

⁷⁶ See text at note 27 *supra*.

⁷⁷ "Since refusal of a charter need not prevent the applicants from undertaking the contemplated activities as individuals or as an unincorporated association, it would not appear that denial of incorporation is an effective means of prevention or regulation." Note, 55 *Colum. L.J.* 380, 395 (1955).

⁷⁸ 408 U.S. at 184. See text at note 56 *supra*.

⁷⁹ In most jurisdictions, the articles of incorporation are filed with the secretary of state, who makes the determination as to lawfulness. H. Henn, *Handbook of the Law of Corporations and Other Business Enterprises* 221 (2d ed. 1970). If the articles are found to contain unlawful provisions, the secretary is under a duty to reject them. *Id.* at 222 n.17. In some jurisdictions, a court order (e.g., Alabama, Georgia) or approval of the state attorney general (e.g., Maine, New Hampshire) is required. *Id.* at 222 & nn.9 & 10.

⁸⁰ *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (state court's

previous restraint is not absolutely unlimited,⁸¹ limitations have been recognized only in exceptional cases.⁸² In numerous decisions, the Supreme Court has held that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without "narrow, objective, and definite standards" to guide the licensing authority is unconstitutional.⁸³ While it is clear that the statutory "lawful purpose" requirements are not unconstitutional on their face, it is submitted that such provisions may be unconstitutional as applied by the courts. Therefore, the question becomes whether an "extra-statutory" public policy standard for the denial of incorporation is sufficiently objective to allow the resultant prior restraint on the First Amendment right to associate.

An analysis of specific standards which the Court has held unconstitutionally vague, broad, or indefinite is enlightening. An ordinance which required an organization seeking to solicit members who would pay "dues" or "fees" to apply to the mayor and city council for a permit which they could grant or refuse to grant after considering "the character of the applicant, the nature of the organization for which members are desired to be solicited, and its effects upon the general welfare of [the] citizens"⁸⁴ has been held an unconstitutional prior restraint in that it granted uncontrolled discretion to an administrative official.⁸⁵ Similarly, an ordinance granting a city commission power to prohibit a parade, procession, or demonstration on city streets based on consideration of "public welfare, peace, safety, health, decency, good order, morals or convenience"⁸⁶ was held an impermissible prior restraint.⁸⁷ Likewise, an ordinance which permitted the banning of motion picture films on the basis of a determination by the New York State Board of Regents that it was "sacrilegious" was held to set "the censor . . . adrift upon a

designation of distribution of literature as to the "blockbusting" activities of an individual as an invasion of privacy held not sufficient to support injunction); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968) (failure to give notice, formal or informal, and to provide an opportunity for an adversary proceeding before the holding of a rally was restrained, held incompatible with the First Amendment); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (system of prior administrative restraints by non-judicial body, listing particular publications as objectionable, held an unconstitutional prior restraint).

⁸¹ *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

⁸² *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503-04 (1952).

⁸³ *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969). See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 558 (1965) (system allowing unfettered discretion in local officials in the regulation of use of streets for peaceful parades and meetings held an unwarranted abridgment of freedom of speech and assembly); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. at 504-05 (statute forbidding the showing of any motion picture film without a license and authorizing denial of a license upon the censor's conclusion that the film is "sacrilegious" held void as a prior restraint); *Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951) (lack of standards in city's practice as to issuance of licenses for the use of city parks to hold public meetings rendered that practice a prior restraint in contravention of Fourteenth Amendment).

⁸⁴ *Staub v. Baxley*, 355 U.S. 313, 314 n.1 (1958).

⁸⁵ *Id.* at 325.

⁸⁶ *Shuttlesworth v. Birmingham*, 394 U.S. 147, 149 (1969).

⁸⁷ *Id.* at 150-51.

boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies."⁸⁸

It should be emphasized that a statute authorizing incorporation for "lawful purposes" is not invalid on its face—the construction given an incorporation statute is all-important in determining the possibility of unconstitutional prior restraint. Even if "lawful purposes" is construed so as to include a "not against public policy" standard, it would appear possible to avoid unconstitutional prior restraint by narrowly construing "public policy" as being limited to the express statutory prohibitions of the state, rather than encompassing "extra-statutory" considerations. Such a "statutory" public policy standard would appear acceptable—the laws of the state would provide the "narrow, objective, and definite" standards necessary to avoid unconstitutional prior restraint on the First Amendment freedoms of association and expression.⁸⁹

An "extra-statutory" public policy standard such as that applied in *Grant* is, on the other hand, hardly more definite than standards such as "sacrilegious" or standards which allow an administrative official to base his decision on considerations such as the effects on the "general welfare" or "good order." Given a holding that an activity can be against public policy although not contrary to any particular statute, an official is, in effect, free to develop his own standards of "public policy" based on his own personal views, beliefs, or predilections. He is, in reality, a censor, determining what points of view may be expressed by corporations. Placing such discretion in the hands of an official invites arbitrariness and prior restraint as to views inimical to those of the granting official, for "[s]peech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment . . ."⁹⁰ Given broad discretion, a biased or narrowminded official would, in effect, be able to promote standardization of both speech and thought. If incorporation for any "lawful purpose" is given such a broad "extra-statutory" public policy construction, it is done at the expense of fundamental constitutional values, and at the risk of unconstitutional prior restraint. Thus, it is submitted that the lawful purpose requirement was unconstitutional as applied by the court in *Grant*.

⁸⁸ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504-05 (1952).

⁸⁹ See authorities cited in note 83 *supra*.

⁹⁰ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). It should be noted that the existence of judicial review of the secretary of state's determination as to which purposes are against public policy does not obviate the constitutionally questionable prior restraint aspects of the Ohio incorporation process. "[T]he availability of a judicial remedy for abuses in the system . . . still leaves that system one of previous restraint . . ." *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940).

At least one case supports this analysis. In *Smith v. Ladner*⁹¹ the Mississippi statutory procedure for issuing charters to non-profit corporations, was challenged as vesting unconstitutionally broad discretion in the governor to grant or deny non-profit corporate charters. Under the statute, an application for a non-profit charter was to be submitted to the secretary of state, who in turn would submit the application to the attorney general.⁹² After making a finding as to whether the issuance of the proposed charter would be "contrary to the best interests of the State of Mississippi,"⁹³ the attorney general would then submit the application, together with his opinion, to the governor, who was vested with absolute power to approve or refuse the proposed charter.⁹⁴

The federal district court, noting that courts have repeatedly held that any statute conferring such absolute and arbitrary discretion on a state official to grant or deny a privilege is unconstitutional,⁹⁵ stated that even if it were argued that the statute in question limited the governor's disapproval to charters which were not in the "best interest" of the state, and thus did not grant absolutely unlimited discretion, that standard was so vague as to be unconstitutional on its face.⁹⁶ The court, therefore, held that when an application for a non-profit corporation did not violate the constitution or statutes of the state, the charter must be issued, and that any attempt to allow the rejection of such a charter on the basis that its issuance would not be in the best interest of the state, without providing further standards for such a determination, would be constitutionally invalid.⁹⁷

While a statute which limits incorporation to "lawful purposes" is not void on its face, it is submitted that a construction of "lawful purposes" such as that adopted in *Grant* permits unconstitutional discretion tantamount to that granted by a statute which limits incorporation to purposes which are determined to be in the "best interest" of the state. No guidelines are imposed for the application

⁹¹ 288 F. Supp. 66 (S.D. Miss. 1968).

⁹² See id. at 67, 68 n.1, construing [1942] Miss. Code Ann. § 5310.1.

⁹³ Id.

⁹⁴ [1942] Miss. Code Ann. § 5310.1, quoted in 288 F. Supp. at 67 & 68 n.1.

⁹⁵ 288 F. Supp. at 68.

⁹⁶ Id. at 69. The court cited with approval the Supreme Court's decision in *Staub v. Baxley*, 355 U.S. 313, 322 (1955). See text at notes 83-84 supra. See also *Yick Wo v. Hopkins*, 118 U.S. 356 (1886):

When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.

Id. at 369-70.

⁹⁷ 288 F. Supp. at 71. Section 5310.1 was repealed, and reenacted in different form, in 1968. [1968] Miss. Laws, ch. 275. The new law provides that the governor must immediately upon receipt of a charter approve it, unless the attorney general states that, in his opinion, the proposed corporation violates the constitutions or laws of Mississippi or of the United States, in which case the application will be rejected. Id. § 1.

of "extra-statutory" public policy considerations. In effect, such a judicial construction would seem to grant the same absolutely unlimited discretion which caused the Mississippi statute in *Smith v. Ladner* to be held void on its face.

FIRST AMENDMENT RATIONALE

It is further submitted that a construction of "lawful" purpose as encompassing broad, "extra-statutory" public policy considerations also conflicts with the policies underlying the First Amendment. Association has been recognized as enhancing effective advocacy of both public and private points of view, especially controversial ones.⁹⁸ In this regard, it has been appropriately noted:

The conduct of an association is likely to acquire unique qualities, to have effects which can originate only with an association rather than an individual. In practice, through the accumulation of resources, through the focusing of effort, and through the other results of organization, an association may be able to achieve objectives so far beyond individual effort as to be qualitatively different.⁹⁹

In analyzing an "extra-statutory" public policy approach to limitation of incorporation, consideration should be given to the importance in modern society of the corporate form and the cumulative benefits corporate status may offer to group association. The importance of the corporation has long been recognized, and it has been stated that the corporation is now "by far the best and most popular form of organization for most group enterprises."¹⁰⁰ For whatever reasons, corporate status has become the most popular and well recognized form of organization today for both business and non-business enterprises, and, it is submitted, in the case of an organization advocating relatively unpopular views, a status in which members of the public sharing those or similar views might be willing to associate themselves more readily.¹⁰¹ To the extent that widespread acceptance of the corporate status and cognizance of the corporation's potential power encourages membership, it enhances the effective advocacy of that association.

Recognition of the additional power and public acceptance which corporate status may afford a non-profit organization might seem to lend support to a view that reference to "extra-statutory" public policy should be available in situations where it seems likely that a state interest will be harmed by the more effective advocacy which may result from corporate status. However, under the

⁹⁸ See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

⁹⁹ Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. 1, 4 (1964).

¹⁰⁰ Oleck, *Non-Profit Types, Uses, and Abuses*: 1970, 19 Clev. St. L. Rev. 207, 217 (1970).

¹⁰¹ See text at notes 67-69 *supra*.

American system of government, accommodation is made for the widest varieties of tastes and ideas.¹⁰² The possibility of resultant abuse from unfettered exercise of First Amendment rights is well-recognized, "[b]ut the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."¹⁰³ Therefore, in spite of this probability of abuse of First Amendment rights, courts nonetheless recognize that not only abstract discussion, but the most vigorous advocacy, must be protected.¹⁰⁴

The scope of the First Amendment protection recognizes that, regardless of this potential for abuse and regardless of the truth, popularity, or social utility of the views propounded,¹⁰⁵ unfettered First Amendment rights are necessary for a government responsive to the will and needs of its people. Correspondingly, if the corporate form is conducive to stronger advocacy and an enhanced likelihood of acceptance of unpopular views, it does not necessarily follow that incorporation should be denied on the basis of "extra-statutory" public policy. Though the abuses which may result from the scope of First Amendment protection may be magnified by the corporate form, it is suggested that the probability of the achievement of the important objectives which underlie the First Amendment is also increased.

EQUAL PROTECTION—DENIAL OF A PRIVILEGE

Moreover, the possible constitutional infirmity of the application of an "extra-statutory" public policy standard cannot be avoided on the basis that, even if a state incorporation statute may operate as a prior restraint on associational rights, it does so in the context of the "privilege" of incorporation. Even though a person may have no "right" to a governmental benefit and even though the government may deny such a benefit for myriad reasons, there are some reasons upon which the government may not rely.¹⁰⁶ In numerous decisions, the United States Supreme Court has recognized that benefits or privileges may not be denied to a person on a basis that infringes upon First Amendment freedoms.¹⁰⁷

¹⁰² *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157 (1946).

¹⁰³ *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

¹⁰⁴ See, e.g., *NAACP v. Button*, 371 U.S. 415, 429 (1963).

¹⁰⁵ See text at note 116 *infra*. Mr. Justice Black has noted: "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (dissenting opinion).

¹⁰⁶ See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (state college professor's lack of tenure or a contractual right to re-employment did not, in and of itself, defeat his claim that the nonrenewal of his contract violated his right to free speech).

¹⁰⁷ The Court has applied this principle to the denial of welfare payments, *Graham v.*

The rationale for this rule is both simple and convincing. First, if the government could deny a benefit on the basis of a person's constitutionally protected speech or associations, the exercise of those freedoms would, in effect, be penalized and inhibited. In this manner, the government could indirectly "produce a result which [it] could not command directly."¹⁰⁸ For example, in the *Grant* situation it could not be seriously contended that Ohio could prevent public exposition by an individual of homosexual views, even if those views advocated the repeal of existing laws.¹⁰⁹ Nor could it be successfully maintained that Ohio could prevent the informal association of homosexuals to promote homosexuality or for other purposes not in violation of the laws of Ohio. Yet, in the context of the "privilege" of incorporation, the *Grant* court asserts that the state can prevent the formation of a corporation for the same purposes which an individual could seek to achieve with impunity. The effect of the court's position in *Grant* is to maintain that while a state may not deny a person freedom of speech, it may withhold the privilege of incorporation, which, it is submitted, may punish the individual for the content of his speech.

The second reason for the rule that a state may not deny a

Richardson, 403 U.S. 365, 374 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969); the opportunity for public employment, *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967); unemployment benefits, *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1962); federal social security benefits, *Flemming v. Nestor*, 363 U.S. 603, 611 (1960); tax exemptions, *Speiser v. Randall*, 357 U.S. 513, 518 (1958); and second-class mail rates, *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158 (1946).

¹⁰⁸ *Perry v. Sindermann*, 408 U.S. at 597; *Speiser v. Randall*, 357 U.S. at 526. See *Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926), where in holding that a state statute regulating the privilege of using state highways and requiring private carriers to obtain permits as common carriers and to submit to regulation as common carriers violated the Due Process clause, the Supreme Court stated:

It would be a palpable incongruity to strike down an act of state legislation which, by words of expressed divestment, seeks to strip the citizens of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.

Id. at 593.

¹⁰⁹ Advocacy of the repeal of laws is constitutionally protected speech; however, incitement to imminent lawless action may be proscribed by the state. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969):

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id. at 447. "Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action" *Id.* at 449 n.4. Moreover, freedom to advocate change in the laws is a recognized goal of the United States Constitution. See *Stromberg v. California*, 283 U.S. 359 (1931): "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system." *Id.* at 369.

"benefit" or "privilege" on the basis of an individual's protected speech or associations is the belief that "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence."¹¹⁰ For example, allowing a state to deny the "privilege" of incorporation for "extra-statutory" public policy reasons would allow the state to draft an ever-increasing list of unacceptable views.¹¹¹ Just as a state cannot compel an organization to sacrifice constitutional rights for the "privilege" of incorporation, it would appear that it should not, in return for the "privilege" of non-profit corporate status, circumscribe the areas of permissible corporate advocacy.

The possibility of denial of Fourteenth Amendment equal protection of the laws inherent in a construction of "lawful" purposes which permits denial of incorporation on broad "extra-statutory" public policy grounds should not be disregarded.¹¹² The Supreme Court has stated:

It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or . . . the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.¹¹³

The interpretation given to "public policy" considerations in the application of statutes providing for incorporation for "lawful" purposes is central to the analysis of a potential equal protection issue. The construction of "lawful" which was adopted by the New York Court of Appeals in *Freedom of Choice*—that state public policy is not violated by expressed purposes that are not unlawful¹¹⁴—would not appear to pose equal protection problems. Under such a construction of an incorporation statute, a public official cannot engage in selective enforcement of the incorporation statute, determining which expressions of view will be permitted and which will not. He has no broad discretionary power; if the purposes of a proposed

¹¹⁰ *Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 594 (1926).

¹¹¹ "[T]o withdraw the second-class rate from this publication today because its contents seemed to one official not good for the public would sanction withdrawal of the second-class rate tomorrow from another periodical whose social or economic views seemed harmful to another official." *Hannegan v. Esquire, Inc.*, 227 U.S. 146, 158 (1946).

¹¹² *Cf. Cox v. Louisiana*, 379 U.S. 536, 557 (1965) ("Also inherent in such a system allowing parades or meetings only with the prior permission of an official is the obvious danger to the right of a person or group not to be denied equal protection of the laws." *Id.*); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951).

¹¹³ *Cox*, 379 U.S. at 557-58.

¹¹⁴ See text at note 22 *supra*.

corporation are not contrary to the express laws of the state, he must approve the articles of incorporation.

The construction of incorporation for "lawful" purposes adopted by the Supreme Court of Ohio in *Grant*¹¹⁵ raises potentially serious equal protection problems. The broad discretionary power granted to the secretary of state invites him to engage in invidious discrimination in determining which corporate purposes will be permissible as not "against public policy" and encourages selective application of the "extra-statutory" public policy restriction. Thus, it is conceivable that while a corporation to promote the acceptance of homosexuality as a valid life style would be found unacceptable, an association for the promotion of patriotism would be permitted. While reasonable persons may differ as to the relative merits of each purpose, constitutional protections are afforded "without regard . . . to the truth, popularity, or social utility of the ideas and beliefs which are offered."¹¹⁶ Therefore, an incorporation statute which is construed as vesting broad discretionary power in a state administrative official to determine whether a proposed corporation's purposes are "lawful" in the sense of not being contrary to "extra-statutory" determinations of public policy, increases the likelihood of denial of equal protection and is contrary to the principle that "[t]he right to equal protection of the laws . . . has a firmer foundation than the whims or personal opinions of a local governing body,"¹¹⁷ or of a single administrative official.

CONCLUSION

It is submitted that from a standpoint of both constitutional substance and policy, a rule similar to that applied by the court in *Freedom of Choice* should be adopted. It should be emphasized that it is not suggested that states should exercise no control whatsoever over incorporation or that the states have no valid interest in the purposes of proposed corporations. It is not disputed that the importance and power of the corporate form also increases the potential for abuse, and that a state is obligated to protect the general welfare of its citizens. While the state has legitimate interests in the regulation of incorporation, those interests are not jeopardized under an approach whereby citizens may join together to achieve any purposes which they may legally pursue as individuals—for any purpose not contrary to the legislative and judicial pronouncements of the law. Once the state approves an organization's articles of incorporation, it maintains substantial power over the activities of the corporation¹¹⁸ and can act when corporate abuses threaten the

¹¹⁵ See text at notes 14-16 supra.

¹¹⁶ *NAACP v. Button*, 371 U.S. 415, 445 (1963).

¹¹⁷ *Niemotko*, 340 U.S. at 272.

¹¹⁸ How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power There is nothing in the federal

general welfare of its citizens.¹¹⁹ This power is sufficient to protect the legitimate interests of the state and renders unnecessary the broad discretionary power to deny incorporation for "extra-statutory" public policy reasons. In addition, a system which permits incorporation where the expressed purposes are not contrary to the laws of the state will ensure that the valuable privilege of incorporation will be granted in accordance with legislative intent and commonly accepted equitable principles.

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Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized.

Title Co. v. Wilcox Bldg. Corp., 302 U.S. 120, 127-28 (1937). For example, the Model Business Corporation Act provides that a corporation may be dissolved by a court decree in an action filed by the attorney general when it is proven either that the corporation procured its articles through fraud or has continued to exceed or abuse the authority conferred on it by the state. ABA-ALI Model Bus. Corp. Act §§ 94(b)-(c) (1969). Furthermore, under the Model Act the state retains the power to prescribe such regulations, provisions and limitations as the legislature may deem advisable, such regulations, provisions and limitations being binding upon all corporations subject to the Act, and the legislature also retains the power to amend, repeal or modify the Act. *Id.* § 149.

¹¹⁹ Cf. Note, 55 Colum. L.J. 380 (1955), where the author suggests a system under which "charters proper on their face would be filed automatically, subject of course to revocation for illegal activities." *Id.* at 394.