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FREEDOM OF ASSOCIATION AND FREEDOM OF CHOICE IN NEW YORK STATE

Anthony Charles Vance†

Section 10 of the Membership Corporations Law, the basic authority in New York for the formation of non-profit social, civic, and political corporations, has been under attack with increasing frequency,¹ but until *Matter of Association for the Preservation of Freedom of Choice, Inc.*,² the restraints imposed by that provision of the statute requiring judicial approval as a prerequisite to incorporation have never been so clearly illuminated as a definite limitation on the right to organize for purposes not only protected by the first and fourteenth amendments, but which are clearly necessary if intelligent representative government is to flourish. The problems raised by that case are of far-reaching significance, and the prospective challenge to the constitutionality of the statute arising from the case makes timely an analysis of the implications of the case and of section 10 generally. The purpose of this comment will be to explore some of those implications.

I. BACKGROUND OF THE CASE

The Association for the Preservation of Freedom of Choice, Inc., consisted originally of a committee formed, as stated in its charter, "to promote the right to individual freedom of choice and association." The group's basic premise is that all persons should have the right to choose to associate or decline to associate with others based on ethnic or group distinctions, as well as on other grounds, and that such right is necessary to the fullest development of a multicultural society. The group takes no position as to whether individuals should or should not discriminate based on ethnic grounds in particular instances, but opposes governmental compulsion in this area.³ It is probable that the Association would oppose such legislation as a state-wide law forbidding discrimination in private

† See contributors' section, masthead, p. 306, for biographical data.

¹ See generally, Dwight, "Objections to Judicial Approval of Charters of Non-Profit Corporations," 12 Bus. Law. 454 (1957); Comment, "State Control over Political Organizations: First Amendment Checks on Powers of Regulation," 66 Yale L.J. 545 (1957); note, 55 Colum. L. Rev. 380 (1955).

² 17 Misc. 2d 1012, 187 N.Y.S.2d 706 (Sup. Ct. Queens County); aff'd on rehearing, 18 Misc. 2d 534, 188 N.Y.S.2d 885 (Sup. Ct. Queens County); application denied, 10 App. Div. 2d 604, 199 N.Y.S.2d 435 (2d Dep't 1959); appeal denied, 10 App. Div. 2d 711, 199 N.Y.S.2d 439 (2d Dep't); petition to revoke opinions denied, 10 App. Div. 2d 873, 202 N.Y.S.2d 218 (2d Dep't); motion to clarify order and decision of April 18, 1960 denied, 11 App. Div. 2d 713, 205 N.Y.S.2d 878 (2d Dep't); motion for consolidation of appeals denied, 8 N.Y.2d 910, 168 N.E.2d 826, 204 N.Y.S.2d 151 (1960); appeal pending in the Court of Appeals.

³ *Matter of Ass'n for the Preservation of Freedom of Choice, Inc.*, 17 Misc. 2d 1012, 187 N.Y.S.2d 706 (Sup. Ct. Queens County 1959).

housing.⁴ There is no question raised but that the group is and intends to carry out its program through lawful means, such as by putting out educational material, filing briefs amicus curiae, and appearing before legislative committees.

The group applied for judicial approval to incorporate as a New York Membership Corporation, and on May 13, 1959, the Supreme Court, Queens County, denied such approval based solely on the purposes set forth in the charter.⁵ The group's counsel then wrote the presiding justice two letters denying the conclusions he had come to in his opinion, and another counsel made such denials in chambers, and asked for a hearing. The justice acceded to the request for a hearing at first, but thereafter, upon receipt of a memorandum of law from counsel, revoked his promise,⁶ and on July 9, 1959, decided again to deny the approval required by section 10 based solely on the memorandum of law.⁷ Subsequently, the group was incorporated in the District of Columbia, and on October 6, 1959, the justice presiding signed orders denying the group approval as a New York membership corporation under section 10 of the Membership Corporations Law and denying the District of Columbia corporation approval to do business in New York under section 211(2) of the General Corporation Law for the reasons stated in his opinion. These orders are currently being appealed.

Meanwhile, to test the constitutionality of the statute on its face, the group sent a copy of its charter to the Secretary of State with a request that it be filed without the approval of a Supreme Court justice. The Secretary of State refused to file it, not alone for this reason, but because she held it to be a "hate-group corporation."⁸ The group promptly filed a petition under article 78 to compel her to file the charter; this too is pending.⁹

II. APPLICABLE STATUTORY STANDARD

Section 10 of the Membership Corporations Law states that "five or more persons may become a membership corporation for any lawful pur-

⁴ See Avins, "Anti-Discrimination Legislation as an Infringement on Freedom of Choice," 6 N.Y.L.F. 13 (1960).

⁵ Matter of Association for the Preservation of Freedom of Choice, Inc., 17 Misc. 2d 1012, 187 N.Y.S.2d 706 (Sup. Ct. Queens County 1959).

⁶ Matter of Association For The Preservation of Freedom of Choice, Inc., 22 Misc. 2d 1016, 201 N.Y.S.2d 135 (Sup. Ct. N.Y. County 1960).

⁷ Matter of Association for the Preservation of Freedom of Choice, Inc., 18 Misc. 2d 534, 188 N.Y.S.2d 885 (Sup. Ct. Queens County 1959).

⁸ 5 Race Rel. L. Rep. 259 (1960); N.Y. Times, February 14, 1960, p. 8, col. 5.

⁹ Association for the Preservation of Freedom of Choice, Inc. v. Simon, 22 Misc. 2d 1016, 201 N.Y.S.2d 135 (Sup. Ct. N.Y. County); appeal dismissed, 8 N.Y.2d 909, 204 N.Y.S.2d 150, 168 N.E.2d 826 motion for leave to dispense with printing granted; printing dispensed with, 11 App. Div. 2d 673, 205 N.Y.S.2d 840 (2d Dep't); order denying mandamus aff'd, 11 App. Div. 2d 927 (2d Dep't 1960); appeal pending in the Court of Appeals.

pose." It also provides that "every certificated 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." While this statutory provision has been in existence since 1848,¹⁰ it was not interpreted by any appellate court until 1921, when the Second Department declared:

It is not the province of this court in any of its departments to set itself up as a censor of the tastes, social or political, of the people. However repugnant to our minds and consciences the Socialist program may be, we are not to stand in the way of organizations to promote its accomplishment, provided only it is clear that the purpose and intent of those organizations is to seek the accomplishment of that program by lawful methods. . . .¹¹

The above case was completely forgotten, and has not been cited by any justice exercising his powers under section 10, even in the judicial districts within the Second Department. Rather, shortly after the law was amended in 1924,¹² the Supreme Court, New York County, addressed itself to the question of why the Legislature had required approval of that court to incorporate. Reasoning in *Matter of Daughters of Israel Orphan Aid Soc'y*,¹³ that it could not be to check the papers for formal defects because the Secretary of State does that anyway, the court concluded by a process of elimination that it was to require "a finding that the objects and purposes of the proposed corporation are in accord with public policy—a determination that is more than ministerial and not a mere duplication of the function of the Secretary of State."

Such analysis contains a basic flaw. The statute itself requires two things: (1) That formal requirements be met, and (2) that the purposes be lawful. The Secretary of State will attend to the first since it is a clerical or ministerial function. The aid of the judiciary is needed, however, to interpret the charter's purposes to determine whether they are lawful, and it seems logical to conclude that it was for this reason that approval of a justice of the supreme court was required. Hence, the process of elimination in *Matter of Daughters of Israel Orphan Aid Soc'y*, appears to be an unwarranted graft of a new requirement on to the statutory scheme.

The court, moreover, in effect read into the New York statute the Pennsylvania requirement that the trial court find that the corporation's purposes are "not injurious to the community"¹⁴ by citing with approval

¹⁰ Section 10 was originally derived from N.Y. Sess. Laws 1848, ch. 319, § 1.

¹¹ *Matter of Lithuanian Worker's Literature Soc'y*, 196 App. Div. 262, 265, 187 N.Y. Supp. 612, 614 (2d Dep't 1921).

¹² N.Y. Sess. Laws 1924, ch. 519, § 2.

¹³ 125 Misc. 217, 219, 210 N.Y. Supp. 541, 543 (Sup. Ct. N.Y. County 1925).

¹⁴ Pa. Stat. Ann. tit. 15, § 2851-207 (Purdon 1958).

a passage to that effect from *In re Deutsch-Amerikanischer Volksfest-Verein*.¹⁵ The court, in so doing, ignored the language of that case that "the requirements fixed by law can neither be dispensed with *nor added to*." (Emphasis supplied.)

There are a number of unlawful purposes for which approval may be denied, but in each case where this has occurred the activity involved would be unlawful if done by individuals or unincorporated groups. Thus, a charter to engage in the teaching or advocacy of violent overthrow of the government is properly disapproved,¹⁶ but this is a crime whether committed singly or in concert.¹⁷ The fraudulent palming off of one corporation as another is unlawful,¹⁸ but unincorporated groups may equally be enjoined from such deception.¹⁹ A proposed charter to establish nudist colonies in Ohio was disapproved,²⁰ but nudism in Ohio violates its penal code with or without a corporate veil.²¹

The court here specifically absolved the Association for the Preservation of Freedom of Choice of any unlawful purpose. It held that "the sponsors of the proposed membership corporation are completely free to associate for the purposes they spelled out in the proposed certificate. They are also free to speak out in support of racial and religious discrimination."²² It would seem that after such a finding, the court would be required to approve the certificate under a proper construction of section 10.

However, the error in *Daughters of Israel Orphan Aid Soc'y* has spawned hideous judicial progeny, as decision after decision has cited it for the proposition that the justice is in effect at liberty to grant or deny applications based on his personal notion of what is good for the community.²³ For example, one justice denied an application because whether the method of taxation the corporation would advocate would be "equitable" was "a matter of speculation."²⁴ Another was disapproved because the justice thought the corporation ought to be named after an American.²⁵ Still another was disapproved because the justice thought an

¹⁵ 200 Pa. 143, 49 Atl. 949 (1901).

¹⁶ Matter of Lithuanian Worker's Literature Soc'y, *supra* note 11.

¹⁷ 54 Stat. 670, 671 (1940), as amended, 18 U.S.C. § 2385 (1958).

¹⁸ Matter of General Von Steuben Bund, Inc., 159 Misc. 231, 287 N.Y. Supp. 527 (Sup. Ct. N.Y. County 1936). See also Most Worshipful W.S.G.L.A.F.A. Colored Masons v. Most Worshipful P.N.G.L.F.A. Masons, 160 Pa. Super. 595, 52 A.2d 333 (1947).

¹⁹ See *Mele v. Ryder*, 8 App. Div. 2d 390, 188 N.Y.S.2d 446 (1st Dep't 1959), and cases cited therein.

²⁰ State ex rel. Church v. Brown, 165 Ohio St. 31, 133 N.E.2d 333 (1956).

²¹ Ohio Rev. Code Ann. § 2905.31 (Page 1954).

²² 18 Misc. 2d at 535, 188 N.Y.S.2d at 887.

²³ For a full parade of the "horribles," see note, 55 Colum. L. Rev. 380 (1955).

²⁴ Matter of Council for Small Business, Inc., 155 N.Y.S.2d 530 (Sup. Ct. Kings County 1956).

²⁵ Matter of Mazzini Cultural Center, Inc., 185 Misc. 1031, 58 N.Y.S.2d 529 (Sup. Ct. Kings County 1945).

Italian-American cultural association should not be confined to the transit system.²⁶ And in another case, a justice feared bloc voting.²⁷

Indeed, personal notions of public policy have so far crept into this area of the law that in one case two justices disagreed on the same clause of a charter. In *Matter of Patriotic Citizenship Ass'n*,²⁸ one justice, while not agreeing that a certain constitutional amendment sought by the sponsors would be a good one, declared that such proposal would not be ground for disapproval. Several months later, another justice nonetheless disapproved the charter for this reason.²⁹

Approval of charters are being granted on the same basis. For example, in *Matter of Committee for the Preservation of the Constitutional Right to Trial by Jury*,³⁰ it is clear that the justice who signed the certificate there was so enthusiastically in agreement with the incorporators that one would have had good cause to hesitate long indeed before submitting a certificate for a committee to abolish trial by jury to him although many judges have recommended this step and such a purpose would be equally lawful. Thus, a careful lawyer advising a group of incorporators as to the law could in truth suggest only that they study the political, economic, social, religious, and other background of all the justices of the supreme court in the county, select the one most likely to be in personal agreement with the corporation's purposes, watch until he is sitting in special term, and then present the certificate for approval, keeping their fingers crossed that by reason of illness, press of judicial business, etc., he is not transferred to another part. Such a game of judicial "Russian roulette" mocks the concept that we have a government of laws and not of men. As Judge Learned Hand observed:

For a judge to serve as a communal mentor appears to me to be a very dubious addition to his duties and one apt to interfere with their proper discharge. . . .

For myself it would be most irksome to be ruled by a bevy of Platonic Guardians even if I knew how to choose them, which I assuredly do not.³¹

III. UTILITY OF INCORPORATING DISSENTERS UNDER SECTION 10

Professor McKay of New York University Law School has suggested that although he disagrees with the refusal to grant a charter to the APFC because freedom of association is "short-changed," nonetheless he seems

²⁶ *Matter of Columbian Ass'n of New York City Transit Sys.*, 175 Misc. 876, 24 N.Y.S.2d 901 (Sup. Ct. Kings County 1940).

²⁷ *Matter of Voters Alliance for Ams. of German Ancestry, Inc.*, 64 N.Y.S.2d 298 (Sup. Ct. N.Y. County 1946).

²⁸ 52 N.Y.S.2d 311 (Sup. Ct. Kings County 1944).

²⁹ *Matter of Patriotic Citizenship Ass'n, Inc.*, 53 N.Y.S.2d 595 (Sup. Ct. Kings County 1945).

³⁰ 1 Misc. 2d 548, 151 N.Y.S.2d 1005 (Sup. Ct. Kings County 1956).

³¹ Hand, *The Bill of Rights* 71, 73 (1958).

to believe that "this organization may have little to contribute, and most of that purely negative."³² Assuming *arguendo* that a proper standard for the formation of a membership corporation is that it "comport with wholesome public policy,"³³ nonetheless "dissenting" organizations such as the APFC should be chartered as coming within this standard.

There is no question but that the court read its personal notions of public policy into section 10 in rejecting the APFC's charter. For example, it declared that "the court believes it is fully possible to . . . cherish ethnic differences and contributions" while at the same time banning institutions or practices which maintain any ethnic distinctions. Likewise, it apparently rejected the notion that reasonable people could even differ on the desirability of anti-discrimination legislation in any particular situation. Such a position is certainly a most extreme one.³⁴

However, a submission under section 10 should not be equivalent to giving the justice a membership blank. In such a proceeding there are no second-class political ideals or second-class organizations. "All litigants 'look alike' here."³⁵ As the Supreme Court of Pennsylvania declared:

It may be immediately observed that whether the court, because of personal predilection on the subject, does not wish it to appear that it approves of the purposes of the corporation is beside the point.³⁶

The Queens County Supreme Court analogized the APFC to an organization established to urge repeal of the laws against bigamy, and said that since such an organization could not be incorporated, neither could the APFC. This parallel is illuminating. Bigamy is even more clearly against public policy than discrimination.³⁷ Yet, for that matter every statute of the state is an expression of public policy from the most important to the most inconsequential. Were the court's reasoning followed, no one could ever incorporate to urge repeal or amendment of any statute, however desirable this might be. People who wished to keep statutes on the books could incorporate while those who advocate change

³² McKay, "Constitutional Law," 34 N.Y.U.L. Rev. 1359, 1361 (1959); cf. Green, "The Right to Communicate," 35 N.Y.U.L. Rev. 903, 924, n.75 (1960).

³³ Matter of Stillwell Political Club, 109 N.Y.S.2d 331, 333 (Sup. Ct. Kings County 1951); *In re Good Thief Foundation*, 47 N.Y.S.2d 511, 512 (Sup. Ct. Essex County 1944).

³⁴ See Brief for petitioner, pp. 13-14, Matter of Ass'n for the Preservation of Freedom of Choice, Inc., 10 App. Div. 2d 604, 199 N.Y.S.2d 435 (2d Dep't 1959).

³⁵ *Conley v. Daughters of the Republic*, 106 Tex. 80, 91, 156 S.W. 197, 201 (1913).

³⁶ Application of Conversion Center, 388 Pa. 239, 243, 130 A.2d 107, 109 (1957). See also Application of N.Y. Soul Clinic, 208 Misc. 612, 614, 144 N.Y.S.2d 543, 545 (Sup. Ct. Bronx County 1955); "[T]here is intended no approval (or disapproval) of any particular religion or church, no commendation (or lack of it) as to any specific theology." Cf. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

³⁷ All forms of bigamy are made felony. N.Y. Pen. Law § 340. However, not all forms of ethnic discrimination are prohibited, and such types that are carry only liability for damages as the penalty for violation. N.Y. Civ. Rights Law §§ 18d, 41.

would be relegated to unincorporated groups. Surely, section 10 was not enacted as the guardian of the status quo. And if the analogy has any other meaning, it is that some ideas are more equal than others, and may be specially favored to enjoy the protection of protagonists in corporate armor. Surely this is the very quintessence of the "indiscriminate imposition of inequalities" which the court so loudly decries.

While the practice of bigamy is criminal, advocacy of repeal of the laws forbidding it is lawful,³⁸ and however inconsistent bigamy may be with modern sociology, psychology, or western religious beliefs, no harm would befall the community by having a corporation engaged in attempting to spread the notion that laws against bigamy should be repealed. Modern democratic society provides its own checks against erroneous ideas more effective than any "censor of the tastes, social or political, of the people." As the Supreme Court of Pennsylvania has declared:

Not only is a citizen of this country entitled to the free expression of his religious beliefs, but he may by peaceful persuasion endeavor to convert others thereto, and we are aware of no bar to individuals organizing to effectuate their guaranteed rights in this regard. . . . Government may not interfere with organized or individual expression of belief or disbelief. Propagation of belief . . . is protected.³⁹

Queens Supreme Court here postulated that when "ideas seem counter to the mores or policies of our laws" propagation of such ideas is harmful to the community. It seems doubtful that the APFC's ideas can be so characterized, but assuming arguendo that the premise is sound, the conclusion surely does not follow. Laws are constantly being enacted and repealed; agitation for either is a normal function of an enlightened citizenry in a representative government and is in no sense harmful to the community. As for what it would be desirable to agitate for, the United States Supreme Court has declared:

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor.⁴⁰

The instant situation illustrates clearly the desirability of incorporating "dissenting organizations." Ideas, to be effective, must be intelligently developed, carefully documented, and capably presented. In this modern

³⁸ Cf. *State ex rel. Church v. Brown*, 165 Ohio St. 31, 33, 133 N.E.2d 333, 335 (1956); "The merits of nudism as a doctrine of life need not be considered in deciding this case." See also *Application for Amendment of Certificate of Incorporation of Saints of God in Christ, Inc.*, 194 N.Y.S.2d 339, 340 (1959): "A determination to grant or deny 'consent and approbation' does not and cannot indicate approval or disapproval of the religious beliefs of the group involved."

³⁹ *Application of Conversion Center*, 388 Pa. 239, 130 A.2d 107, 110 (1957).

⁴⁰ *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940), quoted with approval in *Application of Conversion Center*, *supra* note 36, at 110-11.

day and age, only an organization which makes this its function is capable of so doing. The voice of the individual, whatever his resources and ability, is lost in so vast a republic.⁴¹ Modern conditions make the right to speak as individuals without the right to organize a phantom right.

It is reasonable to assume that the APFC will oppose anti-discrimination legislation in private housing.⁴² In so doing, it will be alone in representing a substantial segment of New York opinion. It is a well known fact that New York State harbors a proliferation of membership corporations supporting anti-discrimination legislation.⁴³ They are well financed,⁴⁴ and so able to flood periodicals, other media of communication, and courts with amicus curiae briefs, that they almost trip over each other's feet.⁴⁵ One justice even intimated that there were so many such organizations in New York that another should not be chartered for fear of duplication.⁴⁶ The absence of organizations on the other side is noteworthy. It results in a complete stifling of the competition of ideas.

Nor can it be said that such absence indicates a uniformity of agreement as to the desirability of anti-discrimination legislation. When the Sharkey-Isaacs-Brown Law was first proposed,⁴⁷ the New York Times opposed it in spite of the fact that "for years this newspaper has dedicated itself to opposing bigotry" because it opposed the bill's "method of compulsion."⁴⁸ The Wall Street Journal attacked the law as violative of rights "absolutely fundamental to the common law and the political philosophy on which this country was founded."⁴⁹ There were other demonstrations of widespread public hostility,⁵⁰ and when the bill was voted on, one

⁴¹ Robison, "Protection of Associations from Compulsory Disclosure of Membership," 58 Colum. L. Rev. 614, 620 (1958).

⁴² See Avins, "Anti-Discrimination Legislation as an Infringement on Freedom of Choice," 6 N.Y.L.F. 13 (1960).

⁴³ In the N.Y. Times, March 19, 1959, p. 65, col. 7, it is stated:

Ninety organizations in the state sent a joint telegram yesterday to Governor Rockefeller and legislative leaders calling for enactment of the Metcalf-Baker . . . bill . . . [outlawing] discrimination in the sale and rental of most private housing in this state. It is similar to the Sharkey-Isaacs-Brown law.

It is significant that the article mentions no organizations as having sent a telegram in opposition. Cf. *American Jewish Congress v. Carter*, 19 Misc. 2d 205, 190 N.Y.S.2d 218, 222 (Sup. Ct. N.Y. County 1959).

⁴⁴ For example, the Commission on Race and Housing recently obtained \$305,000 from the Fund for the Republic to conduct some studies on integrated housing. N.Y. Times, Feb. 21, 1960, p. 58, col. 3; *id.*, Feb. 29, 1960, p. 29, col. 1.

⁴⁵ See Vose, "NAACP Strategy in the Covenant Cases," 6 W. Res. L. Rev. 101, 133-38, 141-43 (1955).

⁴⁶ *Application of Kneseth Harabanium, Inc.*, 131 N.Y.S.2d 543, 544 (Sup. Ct. N.Y. County 1954).

⁴⁷ Now New York City Local Law No. 80 (1957), New York City Administrative Code ch. 41, tit. X, §§ X 41-1.0 (1957).

⁴⁸ Editorial, N.Y. Times, June 15, 1957.

⁴⁹ Editorial, Wall Street Journal, July 29, 1957.

⁵⁰ See N.Y. Times, July 31, 1957, p. 1, col. 2. In the N.Y. Times, June 19, 1957, p. 1, col. 1 & p. 24, col. 2, it was reported that: "Another factor was the trend in the heavy mail that has been pouring into City Hall since the bill was introduced May 21, Mayor

councilman opposed it and two pointedly abstained.⁵¹ Similar opposition has arisen to a proposed state-wide law on the same subject.⁵²

The real reason why no effective organization has heretofore arisen to challenge anti-discrimination legislation is the name-calling which would almost certainly be levied at its members. The court's characterizations of the APFC and its members in this case constitute a graphic illustration of the risk of defamation run by opponents of such laws. That a group of responsible individuals can be found who are willing to so jeopardize their reputations for their beliefs should be an occasion for celebration regardless of where one stands on this issue, and not a signal for judicial name-calling. The APFC's role of constructive opponent to such laws should make its operation of value to legislative, executive, and judicial branches of government alike.⁵³ True competition of ideas is the only sure road to sound public policy.

IV. JUDICIAL BIAS IN DETERMINING WHETHER CORPORATION ACCORDS WITH PUBLIC POLICY

One of the problems endemic to judicial findings under section 10 is the necessity of assuring that the justice to whom a certificate is submitted does not have such strong feelings against the purposes of the proposed corporation that his whole view of their activities becomes a jaundiced and distorted reflection of an intense personal antipathy. This possibility is a very real one when the justice's only guide is a vague standard of "wholesome public policy." No better illustration can be found than that which occurred in this very case, where charges and countercharges of bias have been leveled by both justice and attorney.⁵⁴ I will attempt to sift those attacks to determine the extent to which they may be valid.

The justice presiding in this case called the proposed corporation a "hate-group," and charged that the individual incorporators were "prej-

Wagner's office reported 3,300 pieces of mail to date opposed and 1,000 in favor. Some councilmen said their mail was running 4 to 1 opposed."

⁵¹ N.Y. Times, Dec. 6, 1957, p. 1, col. 4.

⁵² See N.Y. Times, March 9, 1960, p. 23, col. 1, where the Chairman of the New York State Senate Finance Committee stated: "This bill would take away the last vestige of right from the private citizen to do what he wants with his own land. There are still a few people who feel that they have a right to do with their own property what they see fit."

⁵³ State Senator George R. Metcalf, coauthor of the Metcalf-Baker Bill to forbid discrimination in private housing, wrote to the APFC General Counsel on March 7, 1960, as follows: "I agree with the sentiments expressed in your letter of March 2nd, namely that opponents of the proposed fair housing legislation should have an opportunity to be heard in a public forum."

⁵⁴ 17 Misc. 2d at 1013, 1014, 187 N.Y.S.2d at 707, 709, aff'd on rehearing, 18 Misc. 2d at 538, 539, 188 N.Y.S.2d at 889, 890. In the APFC's brief before the Appellate Division supra note 34, at pp. 22-27, the group charged the justice presiding with bias. See also Avins, supra note 41, at 28, n.62.

udiced and bigoted." Such charges do not appear to be supported by any evidence.

The Association's brief to the Appellate Division identified the following as five major fallacies which the court was guilty of:

(1) All persons who advocate freedom of choice and association and the right of individuals to make distinctions based on ethnic grounds do so because they themselves desire to make such distinctions.

(2) All persons who make distinctions based on ethnic grounds necessarily do so for irrational reasons and hence are bigoted.

(3) All distinctions based on ethnic grounds are necessarily irrational.

(4) All distinctions based on ethnic grounds necessarily violate the state and federal constitutions.⁵⁵

(5) Freedom of choice and association will necessarily always result in a choice of non-association or discrimination.

Since the court was not personally acquainted with the incorporators, and since it did not hold a hearing on their personal views, its characterizations were unsupported by any evidence or record. Moreover, its epithet of "hate group" likewise lacked evidence to support it, for such a group is one which tries to stir up hatred against a segment of the population,⁵⁶ and the APFC's purposes appear to be different.

The court's opinion shows some internal inconsistencies regarding the statements made in the memorandum submitted to it. Thus, at the top of one page, the court declares: "There is a state public policy against discrimination. The memorandum of law submitted in support of the application acknowledges this fact." At the bottom of the same page it states: "In my opinion I stated that there is a 'public policy of our State against discrimination because of race or creed.' The memorandum of law submitted on behalf of the petitioners disagrees with that statement."⁵⁷ Either the memorandum agrees or disagrees; but it cannot do both. In fact, it disagreed in part, but contended that it would make no difference.

In the first opinion, the court declared: "Organizations . . . thus regarding homogeneity, should not be sanctioned."⁵⁸ In the second opinion, after the APFC memorandum was submitted arguing the unsoundness of this position, the court conceded "the public policy of the State of New York does not seek to eliminate ethnic differences in our populations,"⁵⁹

⁵⁵ Cf. *Reed v. Hollywood Professional School*, 338 P.2d 633, 636 (Cal. App. 1959): "To appellant's contention that any distinction or discrimination based upon race is repugnant and void under the Constitution of the United States or of this state, this court cannot agree."

⁵⁶ *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *People v. Waite Circle League of Am.*, 408 Ill. 564, 97 N.E.2d 811 (1951); *Brownstein v. Morris*, 203 N.Y.S.2d 465 (1960); *N.Y. Times*, June 23, 1960, p. 1, col. 1 (Nazi Party).

⁵⁷ 18 Misc. 2d at 536, 537, 188 N.Y.S.2d at 888.

⁵⁸ 17 Misc. 2d at 1014, 187 N.Y.S.2d at 708.

⁵⁹ 18 Misc. 2d at 536, 188 N.Y.S.2d at 888.

but still defended *Matter of Catalonian Nationalist Club*⁶⁰ from which the first quotation was taken. Homogeneity means that everyone is the same; the court has declared this to be the state's public policy while acknowledging that the state's policy is also to perpetuate differences. The inconsistent positions used to buttress the same argument lend force to the APFC's contentions of a preconceived bias.

The court misconstrued the memorandum of law submitted to it. Thus, to show the inapplicability of *Hirabayashi v. United States*,⁶¹ one of the Japanese detention cases cited in the court's first opinion, the APFC memorandum said "there is a vast difference between imposing martial law on an American citizen and sending him off to detention or concentration camps and merely declining to rent an apartment to him." The court read this sentence as follows: "What [the APFC's] point of view is. . . may be gleaned from their contention that there is nothing wrong in 'merely declining to rent an apartment' to one by reason of his race or his creed or his color."⁶² In addition, the court declared that "counsel seek to justify their intent to support racial and religious discrimination,"⁶³ while the memorandum of law stated: "The Klan did advocate discrimination against minorities. . . [T]he Association does not have such an aim"; and also stated: "freedom of choice does not necessarily lead to discrimination or distinctions based on ethnic grounds." To repeat a denial of purpose twice should be sufficient.

The short of the matter is that the APFC has the better of the argument in the welter of charges and countercharges of bias. It is clear that the court used preconceived ideas of its purpose and ignored everything unfavorable to it.⁶⁴

Proceedings under section 10 are susceptible to political bias. If justices are to be left free to deny incorporation on so vague a standard as "wholesome public policy," the temptation to read one's own notions of what public policy is or should be into the statute is well nigh irresistible. Nothing can cause a greater divergence of opinion than what "public policy" should be, and hence the practical effect of section 10 is to leave incorporators at the unrestrained mercy of the particular calendar assignment for that day.

True, it has been held that particular views on public questions do not

⁶⁰ 112 Misc. 207, 184 N.Y. Supp. 132 (Sup. Ct. N.Y. County 1920).

⁶¹ 320 U.S. 81 (1943).

⁶² 18 Misc. 2d at 537, 188 N.Y.S.2d at 888.

⁶³ 18 Misc. 2d at 536, 188 N.Y.S.2d at 888.

⁶⁴ Cf. *People v. McLaughlin*, 150 N.Y. 365, 379, 44 N.E. 1017, 1021 (1896):

That . . . courts may be unconsciously biased to the injury of one of the parties must be admitted. Prejudice is often an insuperable barrier to the fair and impartial administration of the law. Its influence is subtle, insidious and often unconsciously warps the judgment and blinds the intelligence of those surrounded by its atmosphere.

constitute disqualifying bias in an administrative proceeding,⁶⁵ but these cases relate to administrative agencies whose standards are fixed by, and known from, statute.⁶⁶ Surely it would be an impermissible delegation of administrative authority to provide that an agency might regulate or forbid conduct, or issue licenses, or take other action, without setting forth any standards to which the agency had to conform.⁶⁷ Otherwise, persons are at the mercy of the arbitrary will or whim of the agency.

If no more certain guide is to be given to a justice of the Supreme Court than "wholesome public policy," it would seem that incorporators should have a constitutional right, analogous to the right not to be tried by a biased judge or jury,⁶⁸ to have the application passed upon by a justice who does not hold personal views so antagonistic to those of the incorporators that he will be tempted to translate those views into the public policy of the state. Otherwise, the basis of rejection will become, as it has here, political, social, moral, or economic differences between the justice and the incorporators, and the Supreme Court will truly become the "censor of the tastes, social or political, of the people."

V. RIGHT TO A HEARING ON THE PURPOSES OF THE CORPORATION

As I have noted above, no hearing was granted to the APFC, but rather the court made certain observations and drew conclusions from the statement of purposes in its charter and a memorandum of law. The infirmities of this procedure are patent.

Thus, the memorandum of law consisted, not of a full disclosure of the corporation's purposes, but rather of arguments containing fragmentary bits which might be deemed to shed some light on its objectives.

⁶⁵ *FTC v. Cement Institute*, 333 U.S. 683, 700, 703 (1948).

⁶⁶ 2 *Davis*, *Administrative Law* § 12.01 (1958).

⁶⁷ *Carlson v. Landen*, 342 U.S. 524, 542-44 (1952); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *United States v. Chicago, M.S.P. & P.R.R.*, 282 U.S. 311 (1931); *State v. Traffic Tel. Workers' Fed'n*, 2 N.J. 335, 353, 66 A.2d 616, 625 (1949); *Packer Collegiate Institute v. University of State of N.Y.*, 298 N.Y. 184, 189, 81 N.E.2d 80, 82 (1948). In *Bologno v. O'Connell*, 7 N.Y.2d 155, 159, 196 N.Y.S.2d 90, 93 (1959), it was held:

Where it is difficult or impractical for the Legislature to lay down a definite, comprehensive rule, a reasonable amount of discretion may be delegated to the administrative officials.

However, this is obviously not to be construed as a grant of limitless authority to provide for the health, safety, and general welfare. Administrative discretion must be guided by an express or clearly implied standard, policy or purpose. (Emphasis omitted).

⁶⁸ *United States v. Peebles*, 220 F.2d 114, 118, 120 (7th Cir. 1955); *Pittsburg S.S. Co. v. NLRB*, 167 F.2d 126, 128 (6th Cir. 1948), *rev'd* on other grounds, 337 U.S. 656 (1949); *NLRB v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943); *In re Doyle*, 312 Mich. 205, 20 N.W.2d 161 (1945); *Ponder v. Davis*, 233 N.C. 699, 706, 65 S.E.2d 356, 360 (1951). As the court declared in *NLRB v. Ford Motor Co.*, 114 F.2d 905, 909 (6th Cir. 1940): "We may accept as fundamental, the axiom that a trial by a biased judge is not in conformity with due process of law." citing *Tumey v. Ohio*, 273 U.S. 510, 522 (1926); *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912); *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 294 (1937).

However, these bits were mostly concerned in this case with refuting the first opinion, and hence the memorandum conceded a number of positions for the sake of argument only which the court seized upon as reflections of the corporation's purposes. Such piecing together is hardly desirable for a proceeding where a full-dress hearing can be held.

Moreover, the court in its first opinion had nothing more before it than the statement of purposes, yet declared that such purposes were "but a cloak for the real purpose for which the corporation is sought to be organized." Unless the purposes show this plainly on their face—and by characterizing them as a "cloak" and "mask" the court appears to refute this idea—the conclusions cannot possibly in reason or logic stem from them. Such conclusions are based on nothing more than suspicion, surmise, and conjecture. To so conduct any form of legal proceeding is a parody of due process.⁶⁹

Where one court suspected that the stated purposes might have been a "cloak" for an ulterior purpose, it requested the corporation's sponsors to submit further affidavits.⁷⁰ This procedure is undoubtedly proper, and suffices where the affidavits disclose the lawful purposes of the corporation, and where the justice can use these affidavits as on a motion for summary judgment to grant the charter. However, before refusal of the charter, a full-dress hearing should be required in proceedings under section 10. No lesser procedure can satisfy the demands of due process.⁷¹ As the Supreme Court of Pennsylvania declared in *In re Incorporation of Philadelphia Labor's Non-Partisan League Club*:⁷²

In reviewing the court's action, the difficulty we see is that it did not give the applicants an opportunity to be heard, even after they had filed exceptions. . . . At least the applicants should have the chance to show that those matters alleged against them are untrue or mistaken or susceptible of another interpretation. . . .

While the application for a charter may not be subject to exactly the

⁶⁹ *Bridges v. Wixon*, 144 F.2d 927, 932 (9th Cir. 1944), rev'd on other grounds, 326 U.S. 135, 156 (1945); *Ellis v. Henderson*, 204 F.2d 173, 175 (5th Cir. 1953); *United States v. Sage*, 118 F. Supp. 33, 35 (D. Neb. 1954); *United States v. Everngan*, 102 F. Supp. 128, 130 (S.D.W. Va. 1951); *In re Schmidt*, 68 F. Supp. 765 (N.J. Cal. 1946); *United States ex rel. Hull v. Stalter*, 61 F. Supp. 732, 734 (N.D. Ind. 1945), aff'd, 151 F.2d 633, 635 (7th Cir. 1945); *St. Louis-San Francisco Ry. v. Mangam*, 199 Ark. 767, 770, 136 S.W.2d 158, 160 (1940); *Hunter v. Zenith Dredge Co.*, 220 Minn. 318, 19 N.W.2d 795 (1945); *People ex rel. Consol. Water Co. v. Maltbie*, 275 N.Y. 357, 366, 9 N.E.2d 961, 965 (1937); *Rich Hill Coal Co. v. Bashore*, 334 Pa. 449, 474, 7 A.2d 302, 314 (1939). In *Dickinson v. United States*, 346 U.S. 389, 397 (1953), the court declared: "[D]ismissal of the claim solely on the basis of suspicion and speculation is . . . foreign to our concepts of justice."

⁷⁰ *In re German & Austrian-Hungarian War Veterans Post No. 65*, 13 N.Y.S.2d 207 (Sup. Ct. Queens County 1939).

⁷¹ *Greene v. McElroy*, 360 U.S. 474 (1959); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950); *Morgan v. United States*, 304 U.S. 1 (1938); *Republic Nat'l Bank v. Crippen*, 224 F.2d 565 (5th Cir. 1955); *Smith v. Dental Prods. Co.*, 168 F.2d 516, 519 (7th Cir. 1948); *Bospect Realty Corp. v. McGoldrick*, 283 App. Div. 566, 128 N.Y.S.2d 918 (1954).

⁷² 328 Pa. 465, 196 Atl. 222 (1938).

same rules as some other judicial proceedings, it is subject to the fundamental one that persons before a court shall not be condemned by a judge's finding without being given an opportunity to be heard.⁷³

As noted above, the Secretary of State rejected the APFC's demand to file its certificate without approval of a justice of the supreme court, but not for that reason alone. It was ruled that New York State laws were "expressly intended to deny the right and privilege of doing business in the State of New York to any hate-group corporation" and that "The law of our state is not intended to aid or abet anti-Americanism under beguiling fronts."⁷⁴ In reply to the APFC's demand for a hearing on the findings as to the nature of the group, the Secretary of State declared: "Although there are no requirements of law for such a hearing, it would have been a useless formality to have one."⁷⁵

Of course, it is perfectly proper for the Secretary of State to reject papers defective on their face *for that reason*, and had the rejection here been because of the lack of approval required by section 10, no criticism could have been made. An administrative official must assume the validity of the statute under which he acts until the courts declare otherwise,⁷⁶ and since this defect appeared on the face of the papers, a hearing thereon would have indeed been a "useless formality." But although a valid reason may exist for administrative action, when the agency acts for incorrect reasons, its position cannot be sustained because a correct ground may be found.⁷⁷

The Secretary of State's ruling here turned on the nature of the corporation. Elementary fairness requires that when an administrative official makes findings as to the nature of a corporation as the ground for refusing to file its certificate, a hearing first be held to determine the facts on which

⁷³ *Id.* at 468, 196 Atl. at 224.

⁷⁴ N.Y. Times, Feb. 14, 1960, p. 8, col. 5.

⁷⁵ Letter of Secretary of State to General Counsel, APFC, March 1, 1960.

⁷⁶ *Public Util. Comm'n v. United States*, 355 U.S. 534, 539 (1958); *Engineers Pub. Serv. Co. v. SEC*, 78 App. D.C. 199, 213, 138 F.2d 936, 952-3 (1943); *Todd v. SEC*, 137 F.2d 475, 478 (6th Cir. 1943); *Panitz v. District of Columbia*, 72 App. D.C. 131, 112 F.2d 39 (1940); 3 *Davis*, *Administrative Law* § 20.04 (1958). It might be noted that administrative remedies need not be exhausted where constitutional issues are raised since the agency cannot pass on them anyway. *Hillsborough Township v. Cronwell*, 326 U.S. 620, 625-26 (1946); *Platt v. City of New York*, 196 Misc. 360, 92 N.Y.S.2d 138 (Sup. Ct. Richmond County), *rev'd* on other grounds, 276 App. Div. 873, 93 N.Y.S.2d 738 (2d Dep't 1949). See also *New York Post Corp. v. Kelley*, 296 N.Y. 178, 71 N.E.2d 456 (1947); *Dun & Bradstreet, Inc. v. City of New York*, 276 N.Y. 198, 11 N.E.2d 728 (1937).

⁷⁷ *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947): "When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." This was quoted with approval in *Barry v. O'Connell*, 303 N.Y. 46, 50, 100 N.E.2d 127, 129 (1951).

the ruling is predicated.⁷⁸ And since the court's conclusions were unsupported, this was doubly true as to the ruling of the Secretary of State.

The need for a hearing in section 10 proceedings is especially highlighted by the facts of the instant case. The court and the Secretary of State called the APFC "malevolent," "anti-American," a "hate-group," etc. Clearly, such epithets are defamatory, and tend to hold up the group and its members to hatred, contempt, and ridicule. Such statements, especially when made by judges and high public officials, would tend to cause members to resign, deter others from joining, dry up sources of funds, and otherwise wreck a group which is just starting. When made by private persons, such statements would be libelous per se,⁷⁹ and a non-profit corporation could no doubt collect heavy damages for it.⁸⁰ Yet when a justice or Secretary of State makes these statements, he is not only immune from libel suits,⁸¹ but spreads a blanket of immunity of endless elasticity over the statements, which permit them to be repeated with immunity by anyone forever.⁸² The incalculable harm which such defamatory statements can cause is a telling demonstration of the need for rigid adherence to the requirements of due process in section 10 proceedings.

Moreover, an applicant enters a section 10 proceeding with a presumption that its purposes are lawful and not harmful to the community. For this reason, no hearing is necessary if the charter is to be approved, but only where disapproval is contemplated. Hence, the burden is on the opponents of the charter during a hearing thereon. As one case held:

The appellant's idea seems to be that the Master should have affirmatively found facts which would support reasons why the granting of a charter would not be injurious to the community. But that would be to impose the burden of proof on the wrong party. One is not required to negative a fact of which there is no affirmative proof either direct or presumptive.⁸³ (Emphasis omitted.)

⁷⁸ Similarly, one who has no "right" . . . may nevertheless have a "right" to fair treatment when state officers grant, deny, suspend, or revoke . . . licenses. . . .

The fundamental proposition . . . is that some kinds of unfairness are deemed deserving of judicial relief even when they appear in a context of privileges or gratuities. 1 Davis, *Administrative Law* § 7.12, at 456 (1958). See also *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117, 123 (1925); Byse "Opportunity to be Heard in License Issuance," 101 U. Pa. L. Rev. 57 (1952).

⁷⁹ See *Annots.*, 171 A.L.R. 709 (1947); 33 A.L.R.2d 1196 (1954), and cases cited therein.

⁸⁰ *New York Soc'y for the Suppression of Vice v. MacFadden*, 260 N.Y. 167, 183 N.E. 284 (1932).

⁸¹ *Barr v. Matteo*, 360 U.S. 564 (1959); *Howard v. Lyons*, 360 U.S. 593 (1959); 53 C.J.S., *Libel and Slander*, §§ 103, 104 (1948).

⁸² *Thayer*, *Legal Controls of the Press* § 62, at 366 (1956); 53 C.J.S., *Libel and Slander*, §§ 123, 124, 126, 127 (1948).

⁸³ *In re Incorporation of the Nottingham Fire Co.*, 394 Pa. 631, 634, 149 A.2d 119, 120 (1959).

VI. CONCLUSION

Proceedings under section 10 of the Membership Corporations Law have left much to be desired in terms of protection of groups not in accord with the views of justices to whom applications were submitted. As in the case of the Association for the Preservation of Freedom of Choice, Inc., this section has become a vehicle for throttling unpopular dissent from majority viewpoint. Violations of both procedural as well as substantive due process so clearly present in the instant case are endemic to proceedings heretofore had under this statute. It may be predicted with some degree of assurance that unless these proceedings are raised to conform to elementary standards of due process, the statute itself will not survive a constitutional attack.