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Comments

COMMENTS

MEMBERSHIP CORPORATIONS LAW § 10—DISCRIMINATION—THE RIGHT TO INCORPORATE IS A PRIVILEGE—THE STATE MAY REFUSE INCORPORATION TO ORGANIZATION FOSTERING DISCRIMINATION.—The right to be a corporation is not a natural or a civil right of any person,[1] but is dependent upon the consent of the sovereign power.[2]

Except insofar as they may be restrained by constitutional provisions[3] the legislatures of the several states, as depositaries of the sovereign legislature power have the inherent plenary power to create corporations and to determine and prescribe the mode of incorporation, the purposes for which corporations shall be created, the powers which shall be conferred upon them, and the conditions under which they may be exercised.[4]

Similarly legislative acts have been the source of requirements for incorporation,[5] but in ten states in the non-commercial areas discretionary

[1] People v. Mackey, 255 Ill. 144, 99 N.E. 370 (1912); A. B. Frank Co. v. Latham, 145 Tex. 30, 193 S.W.2d 671 (1946).

[2] Odum v. South Atlantic Casket Co., 30 Ga. App. 166, 117 S.E. 275 (1923); Weber Engine Co. v. Alter, 120 Kan. 557, 245 Pac. 143 (1926); Thedin v. First Nat. Bank of Savage, 67 Mont. 65, 214 Pac. 956 (1923); Peabody v. Interborough Rapid Transit Co., 121 Misc. 647, 202 N.Y. Supp. 287 (S.C.N.Y. County 1923); Chaffee v. Farmer's Co-op. Elevator Co., 39 N.D. 585, 168 N.W. 616 (1918); State ex rel. Forchheimer v. Le Bland, 108 Ohio St. 41, 140 N.E. 491 (1923).

[3] A corporation cannot be authorized contrary to constitutional limitations, either federal or state. Nesmith v. Sheldon, 7 How. 812, 12 L.Ed. 925 (1849); United States Trust Co. of N.Y. v. Brody, 20 Barb. 119 (1855); Paschall v. Whitsett, 11 Ala. 472 (1847); Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225 (1895); City of Aurora v. West, 9 Ind. 74 (1857); Penobscot Boom Corp. v. Lamson, 16 Me. 221, 33 Am. Dec. 656 (1839); Brown v. Corbin, 40 Minn. 508, 42 N.W. 481 (1849); Southern Coal Co. v. Yazoo Ice & Coal Co., 80 Miss. 860, 80 So. 334 (1919); Sylvester Watts Smyth Realty Co. v. American Surety Co. of New York, 292 Mo. 423, 238 S.W. 494 (1921); State v. Corkins, 123 Mo. 56, 27 S.W. 363 (1894); York Park Bldg. Ass'n v. Barnes, 39 Neb. 834, 58 N.W. 440 (1894); Bank of Chenango v. Brown, 26 N.Y. 467 (1863); Atkinson v. Marietta & C.R. Co., 15 Ohio St. 21 (1864); Bell v. Bank of Nashville, Peck, 269 (Sup. Ct. Tenn. 1823); The authority of the legislature to create corporations is absolute except as restricted by the Constitution of the United States and the Constitutions of the various states. Keetch v. Gordner, 90 Utah 432, 62 P.2d 273 (1936).

[4] Pacific Gas & Electric Co. v. State, 214 Cal. 369, P.2d 78 (1931), Followed in Pacific Gas & Electric Co. v. Jordon, 214 Cal. 793, 6 P.2d 82 (1931); Free Gift Soc. No. 25, Brothers and Sisters of Benevolence v. Edwards, 163 Ga. 857, 137 S.E. 382 (1927); Detroit Mortg. Corporation v. Vaughan, 211 Mich. 320, 178 N.W. 697 (1920), aff'd, 211 Mich. 320, 182 N.W. 526 (1921); Turner v. Turner Mfg. Co., 184 Wis. 508, 199 N.W. 155 (1924).

[5] See, Ballantine on Corporations Chp. II (Rev. Ed. 1946). English corporations were created by royal grant or charter and by private or special act of parliament before the enactment of general corporation laws. Prior to these laws, incorporation had been a royal favor or special parliamentary privilege.

The first large business corporations in England were the quasi-governmental foreign trading companies, created either by royal charter or by special act of Parliament with privileges of exploration, colonization and trading in lands across the sea.

control over the formation of new corporations has been vested in the judiciary,[6] the governor,[7] the secretary of state,[8] or other administrative officials.[9]

In New York the Membership Corporations Law[10] governs the non-commercial area where a corporation is one organized for purposes other than that of pecuniary gain.[11] Under this law control over the approach of the certificate of a non-profit incorporation is vested in the judiciary.[12] Furthermore, incorporation is a creation of the state,[13] and is a privilege rather than a right.[14]

The judicial control over membership incorporation is enumerated in Section 10 of the Membership Corporations Law which states that, ". . . Every certificate of incorporation filed under this chapter shall have indorsed 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. . . ."[15] The aforementioned control was upheld in early cases and is not now in doubt.[16]

Prior to that occurrence, English Law was generally concerned with non-profit corporations, including municipal, ecclesiastical, educational and charitable, rather than with commercial or business corporations.

See also History of The Law of Business Corporations Before 1800, 2 Harv. Law Rev. 105, 109, 165 (1888); Judicial Approval as a Prerequisite to Incorporation of Non-Profit Organizations in N.Y. and Pa., 55 Colum. Law Rev. 380 (1955).

6 G.A. Code Ann. § 22.203 (1936); M.E. Rev. Stat. C. 54, § 1 (1954); Mo. Ann. Stat. § 352.060 (Vernon 1952); N.Y. Membership Corporations Law, § 10; Pa. Stat. Ann. Tit. 15, § 2851-207 (Purdon's 1958); Va. Code § 13-222 (1950).

7 Miss. Code Ann. § 5310 (1942).

8 Iowa Code Ann. § 504.1 (Supp. 1953); Mass. Ann. Laws. C. 180, § 5 (1933. Supp. 1953); S.C. Code § 12-756 (1952).

9 Mass. Ann. Laws c. 180, § 6 (Supp. 1953); S.C. Code § 12-753 (1952).

10 See generally, N.Y. Membership Corporations Law.

11 N.Y. Membership Corporations Law § 2; In re. William McKinely Lodge No. 840, F. & A.M., 4 F. Supp. 280 (S.D.N.Y. 1933).

12 N.Y. Membership Corporations Law § 10.

13 See note 4, Supra.

14 Incorporation is a privilege granted by the state, and may be withheld on reasonable and nondiscriminatory grounds. Mele v. Ryder, 8 A.D.2d 390, 785, 188 N.Y.S.2d 446, 464 (1st Dep't. 1959).

Such was the status of incorporation under early English Law, and under early New York Law. See note 5, supra; see Ballantine On Corporations Law § 9 (Rev. Ed. 1946).

15 See, N.Y. Membership Corporations Law § 10 Historical Note for legislative history.

16 In New York the constitution does not prohibit the delegation of legislative powers. Nor has the question of whether the judiciary can be required to perform this function given rise to any serious constitutional objection. The Court of Appeals has indicated that although the performance of administrative duties could not be imposed upon the Supreme Court, it has long been New York practice to have the individual justices perform a variety of administrative functions such as the acknowledgement of conveyances, the appointment of commissioners of jurors, and the investigation of the financial affairs of villages. See Matter of Davies, 168 N.Y. 80, 102, 61 N.E. 118, 121 (1901).

The approval of the certificate by a justice of the Supreme Court is an indis-

In a recent case[17] where under Section 10[18] judicial authority was exercised, the Supreme Court, Special Term Queens County,[19] held that while sponsors of a proposed membership corporation are free to associate for purposes stated in their certificate, and further to speak out in support of racial and religious discrimination, the state is not compelled to grant them the benefits and privileges of incorporation.

Upon the instant motion for reconsideration as in the prior proceeding,[20] the sponsors of the Association for the Preservation of Freedom of Choice, Inc. sought approval of their certificate of incorporation under the Membership Corporation Law Section 10.[21] The application, however, was denied both in the previous hearing and in the instant case.

The sponsors of the proposed corporation were advocates of racial and religious discrimination, and sought to compel the state to grant them incorporation. The purposes indicated in the proposed charter were to promote the right to individual freedom of choice and freedom of association whereupon an individual would only associate with those persons with whom he wished to associate.[22] Justice Shapiro, speaking for the court, stated

pensible requisite to a creation of a membership corporation. Matter of Wendover Athletic Association, 20 Misc. 273, 128 N.Y.S. 561 (S.C.N.Y. County 1911); People v. Smith, 121 Misc. 338, 200 N.Y.S. 863 (S.C. Albany Special Term 1923). See also Matter of Agudath Hakehiloth, 18 Misc. 717, 42 N.Y.S. 985 (S.C.N.Y. County 1896) where a certificate of incorporation of a membership corporation making the annual meetings for the transaction of secular business fall out on Sunday was not approved by a justice of the Supreme Court, since the holding of such meetings on Sunday was contrary to public policy.

[17] In the Matter of Association for the Preservation of Freedom of Choice, Inc. 18 Misc. 2d 534, 188 N.Y.S.2d 885 (S.C. Queens County 1959).

[18] See note 12, supra.

[19] See note 17, supra.

[20] In the Matter of Association for the Preservation of Freedom of Choice, Inc., 17 Misc. 2d 1012, 187 N.Y.S.2d 706 (S.C. Queens County 1959).

[21] See note 12, supra.

[22] The purposes of the proposed corporation were: to promote the right to freedom of choice and freedom of association, such right being to associate only with those persons whom an individual desires to associate; to assist in the elimination of barriers to the exercise of freedom of choice, as well as preventing the deprivation of this right; to promote and aid in scientific research into problems of intergroup relations and to determine the effects of such problems on freedom of choice and association, and to aid in the publication of the results of such research; to enable groups in our society to find their fullest development through freedom of choice and association.

The object for which a corporation is organized is to be determined from what is stated in its certificate of incorporation and its constitution and by-laws. Vanderbuilt v. Commissioner, 93 F.2d 360 (1st Cir. 1937); Corbin v. American Industrial Bank & Trust Co., 95 Conn. 50, 110 Atl. 459 (1920); Turnervein "Lincoln" v. Board of Appeals of Cook County, 358 Ill. 135, 192 N.E. 780 (1934); Phelps v. Consolidated Vermillion & Extension Co., 157 Minn. 209, 195 N.W. 923 (1923).

As a general rule, the purpose for which a corporation is formed must be ascertained from its charter or certificate of incorporation. Rockford Masonic Temple Bldg. Assoc., 348 Ill. 567, 181 N.E. 428 (1932); People ex rel. Goodman v. University of Illinois Foundation, 388 Ill. 363, 58 N.E.2d 33 (1944); State v. New Orleans Water Supply Co., 111 La. 1049, 36 So. 117 (1904); United States Vinegar Co. v.

that although a group of individuals may carry out propaganda activities without the necessity of a license, a justice of the Supreme Court may deny such a group the privilege of incorporation.

The view expressed by Justice Shapiro is consistent with the prevailing law in New York.[23] A leading case on this point is *In re General von Steuben Bund Inc.*[24] There the purposes of the group were to unite Germans of the Christian faith, to promote understanding and extend assistance to them, and to preserve the best traditions of their nativity in harmony with those of America. The examining justice received evidence which indicated that the group proposed a dual allegiance for its members, to perpetuate people into racial groups, and thus to retard homogeneity. It was also noted that an organization of similar name and of better purpose existed and would be hindered by the existence of the proposed corporation. Thus the application for approval of incorporation was denied as contrary to public policy, and further, it was held that a justice examining an incorporation certificate of a proposed membership corporation has the duty to act as more than a ministerial officer, and must determine whether the objects and purposes are in accord with public policy.

The *General Von Steuben case*[25] among others indicated that incorporation is a privilege to be granted, rather than a right.[26]

Foehrenbach, 148 N.Y. 58, 42 N.E. 403 (1895), affirming, 74 Hun. 435, 26 N.Y.S. 632 (Sup. Ct. 1st Dept. 1893).

But this does not prevent a court from looking behind the corporate organization and holding it illegal on the showing that the real purpose and acts done are in violation of the law. Kittinger v. Churchill, 161 Misc. 3, 292 N.Y. Supp. 35 (S.C. Erie County 1936), affirmed, 249 App. Div. 703, 292 N.Y. Supp. 51 (4th Dept. 1936); Application of Howard Memorial Fund, 155 N.Y.S.2d 126 (S.C. Kings County 1956); Application of Council of Orthodox Rabbis, Inc., 10 Misc. 2d 62, 171 N.Y.S.2d 664 (S.C.N.Y. County 1958); See also, Application of United Cadet Ass'n, Inc., 13 Misc. 2d 957, 178 N.Y.S.2d 479 (S.C. Bronx County 1958).

A corporation is not illegal, unless it is shown that the end it has in view is illegal, or the means whereby it intends to attain that end is illegal. New York Motion Picture Co. v. Universal Film Mfg. Co., 77 Misc. 581, 137 N.Y.S. 278 (S.C.N.Y. County 1912).

[23] See note 14, supra.

[24] In re General Von Steuben Bund, 159 Misc. 231, 287 N.Y.S. 527 (S.C.N.Y. County 1936).

[25] Ibid.

[26] In re Bay Explorers of America, 67 N.Y.S.2d 108 (S.C.N.Y. County 1946). Here the application was denied because of the danger that the public might confuse the proposed corporation with one sponsored by the Boy Scouts of America; Application of United Winograder Medical Center In Israel, Inc., 125 N.Y.S.2d 279 (S.C.N.Y. County 1953). The appellants sought to solicit for the establishment of a medical center in Israel, but nothing in the proposed certificate demonstrated how this could be achieved. The justice exercised his judicial function in deciding that from the surrounding circumstances, including the fact that the proposed corporation would impair well known agencies, the special privilege of granting a charter would be denied.

See e.g. In re Good Thief Foundation, Inc., 47 N.Y.S.2d 511 (S.C. Essex County 1944) where a charter was granted to a proposed corporation housing as its purpose the receipt of funds for moral betterment, religious advancement, temporal improve-

Justice Shapiro continued, reasoning that the Legislature intended to give the court the discretion to grant incorporation, and further that the court in its discretion, before approving a proposed membership corporation, must judicially determine that public policy is not violated.[27]

The court also stated in the prior hearing that the objects and purposes of the proposed corporation must be lawful and in accord with public policy.[28] In a leading case[29] a corporation was proposed for purely charitable

ment and rehabilitation of inmates of a penal institution because of the indication of a benefit to public policy.

[27] Application of Stillwell Political Club, 109 N.Y.S.2d 331 (S.C. Kings County 1951). It was held that before approving a proposed membership corporation, it is the duty of the court to be satisfied that substance as well as form does not violate wholesome public policy under a corporate charter which upon being approved by the court will be accepted by the Secretary of State.

[28] See note 20, supra at 1013, 187 N.Y.S.2d at 707; A corporation cannot be organized for a purpose which renders it contrary to the common or statute law of the state, or contrary to public policy. See, United States v. American Tobacco Co., 221 U.S. 106, 31 S. Ct. 632, 55 L.Ed. 663 (1911); Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L.Ed 619 (1911); United States v. Northern Securities Co., 120 Fed. 721 (C.C.D. Minn. 3d Div. 1903); aff'd, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed 679 (1904); State ex rel. White v. Citizens Light & Power Co., 172 Ala. 232, 55 So. 193 (1911); People ex rel. Los Angeles Bar Ass'n v. California Protective Corp., 76 Cal. App. 354, 244 Pac. 1089 (1926) (It is implied in absence of any express provision); Harding v. American Glucose Co., 182 Ill. 551, 55 N.E. 577, 64 L.R.A. 738 (1899); Dunbar v. American Telephone & Telegraph Co., 224 Ill. 9, 79 N.E. 423 (1906); State ex rel. Le Blanc v. Michel, 113 La. 4, 36 So. 869 (1904); Franklin Co. v. Lewiston Inst. for Savings, 68 Me. 43, 28 Am. Rep. 9 (1877); Richardson v. Bohl, 77 Mich. 632, 43 N.W. 1102, 6 L.R.A. 457 (1889); State v. Nebraska Distilling Co., 29 Neb. 700, 46 N.W. 155 (1890); Dittman v. Distilling Co. of America, 64 N.J.E. of 537, 54 Atl. 570 (1903); People v. North River Refining Co., 121 N.Y. 582, 24 N.E. 834 (1890); Matter of Daughters of Israel Orphan Aid Society Inc., 125 Misc. 217, 210 N.Y.S. 541 (S.C.N.Y. Special Term 1925) (The N.Y. Membership Corporations Law § 10, requires submission of articles to a justice of the Supreme Court, and his endorsement thereon of his approval. Thereafter the articles are with such indorsement to be filed with the Secretary of State. The approval of a justice is not a duplication of the determination which the Secretary of State makes, but is a finding and certification that the objects and purposes of the corporation are in accord with public policy.); Kuszuhowski v. Buffalo Telegram Corp., 131 Misc. 563, 227 N.Y. Supp. 435 (S.C. Erie County 1928), First Nat. Bank of Chicago v. F.C. Trebein Co., 59 Ohio St. 316, 52 N.E. 834 (1898); Myatt v. Ponca City Land & Improvement Co., 14 Okla. 189, 78 Pac. 185 (1903); In re First Church of Christ, Scientist, 205 Pa. 543, 55 Atl. 536 (1903); McGrew v. City Produce Exchange, 85 Tenn. 572, 4 S.W. 38 (1887); Taylor Feed Pen Co. v. Taylor Nat. Bank, 177 S.W. 176 (Tex. Civ. App. 1915); State v. International Inv. Co., 88 Wis. 512, 60 N.W. 796 (1894).

[29] Matter of German Jewish Children's Aid Inc., 151 Misc. 834, 272 N.Y.S. 540 (S.C.N.Y. County 1934). See also, Matter of Patriotic Citizenship Ass'n, 52 N.Y.S.2d 311 (S.C. Kings County 1944); But see supra note 28, Matter of Daughters of Israel Orphan Aid Society Inc.

Under the Membership Corporations Law, § 10, the Secretary of State may refuse to file a certificate of a proposed membership corporation because of formal defects, even after approval by a Supreme Court justice. People v. Nelson, 46 N.Y. 477 (1871); People v. Rice, 68 Hun. 24, 22 N.Y.S. 631 (1st Dept. 1893), (Where a certificate of incorporation was approved by a justice and later denied by the Secretary of State on the grounds that the objects are of a business nature, and are there-

purposes, which were to facilitate the entry of German Jewish children into the United States, to aid them to prevent them from becoming public charges, and to place them in foster homes or institutions.

Such purposes were held to have been proper objects, consistent with public policy, and which warranted approval of a certificate of incorporation.[30]

While construing the objects and purposes of the proposed corporation in light of public policy[31] the court herein noted the sponsors' contention, that they were entitled to freedom of association, and further that the state public policy against discrimination based on race, creed or color in certain fields of activity was no bar to approval.[32]

Justice Shapiro spoke to the petitioner's contention by stating that where the purpose of a proposed corporation was to undermine the established legal guarantees of equal treatment, regardless of race or creed,[33] and there is a state public policy against discrimination based on race or creed,[34] the purposes of a proposed corporation are unlawful.

fore not authorized); See also, Bernstein v. Moses, 133 Misc. 513, 231 N.Y. Supp. 699 (Sup. Ct. Albany County 1928). Where there is an application to file a certificate of incorporation, under the Membership Corporations Law, the Secretary of State is under a duty to pass on questions, both as to the form of the certificate and to whether or not it was entitled to be filed under the statute); In some jurisdictions it has been held that if some of the proposed purposes of a corporation have been unauthorized, the Secretary of State may refuse to permit the charter or articles of incorporation to be filed, Gulf, C. & S.F. Ry. Co. v. Morris, 67 Tex. 692, 4 S.W. 156 (1887); Miller v. Tod, 95 Tex. 404, 67 S.W. 483 (1902); City of San Antonio v. Salvation Army, 127 S.W. 860 (Tex. Civ. App. 1910); Staacke v. Routledge, 175 S.W. 444 (Tex. Civ. App. 1915); State v. Nichols, 38 Wash. 309, 80 Pac. 402 (1905); State v. Nichols, 40 Wash. 437, 82 Pac. 744 (1905).

30 Other corporations held lawful—See generally, Demarest v. Flack, 128 N.Y. 205, 28 N.E. 645 (1891); U.S. Vinegar Co. v. Schlegel, 143 N.Y. 537, 38 N.E. 729 (1894); In re Independent Children's Dress Workers of Harrisburg, 45 Dauph. 392 (Pa. Com. Pl. 1938). A non-profit corporation may be formed for the purpose of organizing a labor union when such purposes are lawful and not injurious to the community. For corporations held unlawful, see generally, In re German and Austrian-Hungarian War Veterans Post No. 65 of Glendale Queens Inc., 13 N.Y.S.2d 207 (S.C. Queens County 1939) (A semi-military organization proclaiming Americanism while secretly worshipping the swastika); Application of Stewart, 174 Misc. 902, 22 N.Y.S.2d 164 (S.C. Albany County 1940) An organization to act as agent for persons making bets on horses and to place such bets at race tracks where pari-mutual betting is authorized by law [Purposes were held illegal]; In re Societa Fra-ENate-Di Torre-Faro, Inc., 175 Misc. 373, 22 N.Y.S.2d 688 (S.C. Kings County 1940) Allegiance toward two countries; In re Columbia Ass'n of New York City Transit System, Inc. 175 Misc. 876, 24 N.Y.S.2d 901 (S.C. Kings County 1940); In re Grand Jurors Ass'n, Bronx County, N.Y., Inc., 25 N.Y.S.2d 154 (S.C. Bronx County 1941), The organization might promote unanimity of thought and opinion in the official grand jury); In re Victory Committee of Greenpoint of Patriotic Social & Fraternal Club, Inc., 59 N.Y.S.2d 546 (S.C. Kings County 1945), (Duplication of work already being done); In re Marine Corps Vets Foundation, 79 N.Y.S.2d 18 (S.C. Kings County 1948), Duplication.

31 See supra note 22, Kittinger v. Churchill.

32 See note 17, supra at 535, 188 N.Y.S.2d at 886.

33 Id. at 536, 188 N.Y.S.2d at 888.

34 Ibid.

The sponsors further contended in support of racial discrimination that the public policy of equal rights for all did not seek to eliminate ethnic differences amongst our populace, but recognized and promoted the contributions of various ethnic groups.[35]

But the Justice noted that equality of rights for all could exist as a policy which included ethnic contributions regardless of existing ethnic differences without the necessity of racial discrimination or conflict.

Such prejudices or bigotries were not upheld as the objects and purposes of a proposed corporation in leading New York cases.[36] In the *Matter of Catalonian Nationalist Club*,[37] where on an application of the Club for approval of its certificate of incorporation as a membership corporation, the certificate stated that the Club's object was to make a center of representation in North America of Catalonion culture and to make a center of the legitimate national aspirations of Catalonia; and furthermore to diffuse information thereof, and to strengthen the bonds of brotherhood among Catalonians of New York. The certificate was denied because the Club required a dual fealty. Justice Levy held that any organization which proposed to perpetuate the division of the people into racial groups, and thus retard racial homogeneity, should not be sanctioned.[38]

Justice Shapiro in the case at hand, also referred to the concise national policy against discrimination upheld by the courts,[39] as reflected in

[35] Constitution of the State of New York, Art. I, Sec. 11 [That no person shall be denied the equal protection of the laws, nor because of race, color, creed or religion be subject to discrimination by any person, firm, corporation, institution or by the state or any subdivision thereof.]

Discrimination is barred in places of public accommodation when based on race or creed, N.Y. Civil Rights Law, §§ 40, 41; in employment, N.Y. Executive Law § 291; in education, N.Y. Education Law § 313, among other statutes.

[36] Matter of Catalonian Nationalist Club, 112 Misc. 207, 184 N.Y. Supp. 132, 133 (S.C.N.Y. County 1920); Castle Hill Beach Club, Inc. v. Auburg, et al., 298 Misc. 35, 142 N.Y.S.2d 432 (S.C. Bronx County 1955) aff'd App. Div. 2d 943, 2 N.Y.2d 596, 162 N.Y.S.2d 1 (1957).

A corporation formed under the Membership Corporations Law was not exempt from the provisions of the Executive Law with respect to discrimination in places of public accommodation. The corporation entered into a lease with the landlord whereby all of the net income was to be paid as rent, and by-laws provided for voting by one class of members, controlled by the landlord. The court held that where the State Commission Against Discrimination found that a corporation was never a bona fide membership corporation and further that the real purpose was to exclude negroes and to benefit a landlord corporation, the commission was justified in holding that organizations formed for the purpose of perpetuating the division of people into racial groups will not be sanctioned; nor will approval be given to a membership corporation being used as a cloak of respectability to conceal its discriminatory practices.

See also, National Labor Relations Board v. Express Pub. Co., 312 U.S. 426, 437, 61 S.Ct. 693, 700, 85 L.Ed. 930, 937-38 (1941); Holland v. Edwards, 307 N.Y. 38, 45, 119 N.E.2d 581, 584 (1954).

[37] See supra note 36, Matter of Catalonian National Club.

[38] Id. at 208, 184 N.Y. Supp. at 133.

[39] Hiraboyashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943), The court stated where distinctions were made between citizens solely

the Fifth and Fourteenth Amendments to the Federal Constitution.[40]

As early as the Civil Rights Cases,[41] where state laws and acts done under state authority, and by state officers, executives or officials were deemed to come within the protection of the Fourteenth Amendment, discrimination had been contrary to our national policy. And much later in *Shelly v. Kramer*,[42] the United States Supreme Court held that while restrictive covenants as to ownership or occupancy of property, based on race or color, cannot in themselves be regarded as a violation of the Equal Protection Clause of the Fourteenth Amendment, judicial enforcement by state courts of such covenants is inhibited by the equal protection clause of such amendment.

Thus it is clear that to allow the sponsors of the Association for the Prevention of Freedom of Choice, Inc. to compel the state to grant approval to its charter would not only be violative of a strong national policy against discrimination,[43] but as well contrary to a well established state policy

because of their ancestry such is odious to a free people whose institutions are founded upon the doctrine of equality.

Legislative classification or discrimination based on race alone has often been held to constitute a denial of equal protection. See e.g., Yickwo v. Hop Kins, 118 U.S. 356, 6 S.Ct. 1064 30 L.Ed. 220 (1886); Yu Cong Eng v. Trinidad, 271 U.S. 500, 46 S.Ct. 619 70 L.Ed. 1059, (1926); Hill v. Texas, 316 U.S. 400, 62 S.Ct. 1159 86 L.Ed. 1559 (1942).

[40] See supra note 39, Yickwo v. Hop Kins, et seq.

[41] Civil Rights Cases, 109 U.S. 3, 11, 17, 27 L.Ed. 835, 839, 841 (1883). Discrimination by a state or municipality against any person within its jurisdiction because of race or color generally constitutes a denial of the equal protection of the laws. Hall v. State, 136 Fla. 644, 187 So. 392 (1939); Chaires v. City of Atlanta, 164 Ga. 755, 139 S.E. 559 (1927); Tovey v. Levy, 401 Ill. 393, 82 N.E.2d 441 (1948); Dixon v. State, 224 Ind. 327, 67 N.E.2d 138 (1946); Weiss v. Leaon, 359 Mo. 1054, 225 S.W.2d 127 (1949); KenjiNamba v. McCourt, 185 Or. 579, 204 P.2d 569 (1949); Biggs v. Washington Nat. Ins. Co. 275 S.W.2d 566 (Tex. Civ. App. 1955).

[42] Shelly v. Kramer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1947) The historical context in which the Fourteenth Amendment became a part of the Constitution indicates that the matters of primary concern were the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the states based on considerations of race and color. The provisions of the Amendment are to be construed with that fundamental purpose in mind. Contra, Northwest Civil Ass'n v. Sheldon, 317 Mich. 416, 27 N.W.2d 36 (1947), Enforcement of a racial restriction composed on lots in a subdivision was held not contrary to the public policy of Michigan or violative of Federal or State Constitutional provisions. Note: This point was decided on the authority of Sipes v. McGhee, subsequently reversed by the Supreme Court in 334 U.S. 1, 68 S.Ct. 836 192 L.Ed. 1161 (1947).

[43] The provision of the Federal Constitution prohibiting discrimination against persons because of race or color, while directed against state action, nevertheless evidences a definite national policy. James v. Marionship Corp. 25 Col. 2d 721, 155 P.2d 329 (1944). The Constitutional mandate against racial discrimination has reference to state action, and does not apply to private contracts or to action of an individual in invasion of the rights of another individual. Modern Amusements Inc. v. New Orleans Public Service Inc., 183 La. 898, 165 So. 137 (1935); Lion's Head Lake v. Braezinski, 23 N.J. Misc. 290, 43 A.2d 729 (1945); Kemp v. Rubin, 188

against the same such prejudice.[44]

Justice Shapiro concluded aptly,[45] that no such group should be permitted to organize in a corporate form to promote racial and religious discrimination under the guise of freedom of association, nor as a matter of right to be sanctioned by receiving the imprimatur of the court.

W. S. K.

CONSTITUTIONAL LAW—PUBLIC EMPLOYEES AND THE FIFTH AMENDMENT.—The most recent and perhaps the most profound metamorphosis ever to occur regarding the Bill of Rights has taken place during the past decade as an incident to the struggle to prevent communist infiltration in vital positions of government. The change has been manifested most clearly in the permissible inferences and consequences which may derive from the invocation of the Fifth Amendment, particularly as they affect the right of a public employee to his job. The basic question, on which the United States Supreme Court is itself seriously divided, is whether an adverse inference may reasonably be drawn concerning the prior conduct of a public servant who validly asserts the privilege against self-incrimination, and whether he may be discharged from public employment for exercising this constitutional right.

It is clear that the constitutional protection against being compelled to give testimony against oneself in a criminal action would be illusory if the very act of asserting the privilege constituted an admission of incriminating facts which could be used as evidence. On this theory, the principle is well established that the valid assertion by a person of the privilege will not, in a criminal action, give rise to an inference that he is guilty of a crime or of acts tending to connect him with a crime.[1] Most jurisdictions

Misc. 310, 69 N.Y.S.2d 680 (S.C. Queens County 1947), aff'd 273 App. Div. 789, 75 N.Y.S.2d 768 (2d Dept. 1947) reversed on other grounds, 298 N.Y. 590, 81 N.E.2d 325 (1948).

But enforcement of such private contracts or agreements by state courts constitutes state action barred by the constitutional mandate Coleman v. Stewart, 33 Cal. 2d 702, 204 P.2d 7 (1949); Rice v. Sioux City Memorial Park Cemetery Inc. Iowa, 245 Iowa 147, 60 N.W.2d 110 (1953) aff'd, 348 U.S. 880 75 S.Ct. 122, 99 L.Ed. 693 (1954); Phillips v. Naff, 332 Mich. 389, 52 N.W.2d 158 (1952); Wayts v. Winkler, 357 Mo. 1082, 212 S.W.2d 411 (1948); Rich v. Jones, 142 N.J. Eq. 215, 59 A.2d 839 (1948); See supra, Kemp. v. Rubin; Correll v. Earley, 205 Okl. 360, 237 P.2d 1017 (1951).

[44] See notes 35, 36 supra.

[45] See note 17, supra at 538, 188 N.Y.S.2d at 889.

[1] Ullman v. United States, 350 U.S. 422, 426-428, 76 S. Ct. 497, 100 L. Ed. 511 (1956); Burdick v. United States, 236 U.S. 79, 35 S. Ct. 267, 59 L. Ed. 476 (1915). Maffie v. United States, 209 F.2d 225, 228 (1st Cir. 1954); United States v. Shaughnessy, 212 F.2d 128 (2d Cir. 1954); Spector v. United States, 193 F.2d 1002 (9th Cir. 1952); Healey v. United States, 186 F.2d 164 (9th Cir. 1950); Consult 8 Wigmore, Evidence 412 (3d ed., 1940).

have gone further in defense of this right of silence and refuse to permit any comment on the failure of the witness to deny or explain any adverse evidence against him, since the threat of comment constitutes a form of compulsion upon him to testify, thereby weakening the extent of the protection afforded by the privilege.[2] Similarly, in a civil case, although a party to the action must testify if called as a witness even though his answers may constitute evidence adverse to him in that action,[3] he has the same right as any other witness to refuse to testify on incriminating matters.[4] While it may appear initially that a number of courts have permitted an adverse inference to be drawn against a party to a civil action solely on the basis of the latter's invocation of the Fifth Amendment,[5] such an inference is usually simply the failure of the silent party to rebut the evidence of his adversary. The adverse inference that results is therefore not based solely on the fact that a party has refused to testify against himself on an incriminating matter, but rather upon his failure to offset the weight of the other party's preponderance of evidence.

In *Sheiner v. State*[6] the Supreme Court of Florida reversed the disbarment of an attorney who had exercised the privilege against self-incrimination, indicating that an inference of improper conduct based solely on an exercise of this Fifth Amendment right, in the absence of any other evidence in support thereof, was violative of due process of law. The court stated:

"Did the state prove the charge against appellant by conclusive evidence? . . . I do not think the state can abandon proof of charges against an attorney for unprofessional conduct and disbar him on grounds that he challenges and that are not proven."

The concurring opinion added:

"If the appellant has manifested a want of fidelity to the system of lawful government which he has sworn to uphold and preserve, *let it be shown by a 'preponderance of evidence' in what has come to be known . . . as the American way.*"[7]

The *Sheiner* case therefore poses the all important problem of whether use of the Fifth Amendment privilege against self-incrimination is merely significant in a civil proceeding as indicating a failure to rebut the opposing evidence, or whether *ipso facto* there arises a presumption of wrongdoing for which a public employee may be summarily dismissed.

[2] People v. Adamson, 27 Cal. 2d 478, 165 P.2d 3 (1946); Dunmore, Comment on Failure of Accused To Testify, 26 Yale L.J. 464 (1917); Reeder, Comment Upon Failure of Accused To Testify, 31 Mich. L. Rev. 40 (1932).

[3] 8 Wigmore, Evidence 176-77, 327 (3d ed., 1940).

[4] McCarthy v. Arndstein, 262 U.S. 355, 43 S. Ct. 562, 67 L. Ed. 1023 (1923); McCarthy v. Arndstein, 266 U.S. 34, 45 S. Ct. 16, 69 L. Ed. 158 (1924); Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).

[5] United States v. Mammoth Oil Co., 14 F.2d 705 (8th Cir. 1926), aff'd, 275 U.S. 13, 48 S. Ct. 1, 72 L. Ed. 137 (1927).

[6] 82 So. 2d 657 (Fla. 1955).

[7] Id., at 666.

While it is true that a private employer, in the absence of contractual or statutory limitations, may fire his employees at will,[8] a public employer is subject to constitutional limitations in firing its employees;[9] the states or their subdivisions being limited by applicable provisions of both state and federal constitutions.[10] It has therefore been held by the Supreme Court that if the discharge of a state employee is arbitrary, unreasonable or discriminatory, it will violate the due process provision of the Fourteenth Amendment.[11] It would thus appear that only if invocation of the Fifth Amendment creates an unfavorable inference, or if the exercise of this privilege against self-incrimination impairs the ability of the employee to properly perform his job, thus giving a reasonable basis for discharge, may the government terminate employment upon such a failure to testify as to possibly incriminating matters. If neither an unfavorable inference nor an impairment of the employees efficient performance of his job arises in such a case, a firing would in effect be punishment for invoking a constitutional right,[12] thereby defeating the purpose of protecting one who so fails to testify.

Such a dismissal in the nature of punishment for invoking the guarantee of the Fifth Amendment is equally unconstitutional where the public employer requires, as a condition of employment, that employees refrain from exercising the privilege, despite the frequent claim that this is merely a condition of employment to be met, and that firing for breach of the condition is not a punishment imposed by the employer but mere enforcement of a contractual right. It has repeatedly been held that a state cannot abrogate a constitutional right by making the forebearance of that right a condition of carrying on a lawful activity; a person, courts have stated, is entitled to continue to carry on that lawful activity although having failed to comply with such a condition of the state.[13] Some limitations, it is true, have been imposed on the rights of public employees, but it is well established that such conditions limiting the employees' constitutional rights are permissible only when the exercise of such a right would substantially interfere with the proper performance of the job.[14] An obvious example is the

[8] Odell v. Humble Oil & Refining Co., 201 F.2d 123 (10th Cir. 1953).

[9] United States v. Lovett, 328 U.S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946); United Public Workers v. Mitchell, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1947); Ex parte Curtis, 106 U.S. 371, 1 S. Ct. 381, 27 L. Ed. 232 (1882).

[10] Wieman v. Updegraff, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216 (1952); Garner v. Los Angeles Board of Public Works, 341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317 (1951); State ex rel. Christian v. Barry, 123 Ohio St. 458, 175 N.E. 855 (1931).

[11] McAuliffe v. City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).

[12] Deprivation of livelihood has been held to be a form of punishment. United States v. Lovett, 328 U.S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946).

[13] Hague v. C.I.O., 307 U.S. 496, 515, 59 S. Ct. 954, 83 L. Ed. 423 (1939). In Alston v. School Board of Norfolk, 112 F.2d at 997, the court held that knowledge of such a condition abrogating a constitutional right would not bind the employee contractually if the public agency could not constitutionally impose such a condition.

[14] McAuliffe v. New Bedford, 155 Mass. 216, 29 N.E. 517 (1892); McCrory v. Philadelphia, 345 Pa. 154, 27 A.2d 55 (1942); People ex rel. Clifford v. Scannell, 74 App. Div. 406, 77 N.Y. Supp. 704 (1st Dept. 1902).

restriction on the political activities of public employees, which has been held to be reasonable in that such political activity would interfere with performance of the duties of such employees.[15]

The explanation of why no unfavorable inference should arise from use of the Fifth Amendment in civil cases, when it is clear that the privilege is available only when incriminating matters arise in such cases, has been given by the Supreme Court on several occasions. Despite the assertion by John Marshall that a witness could claim the privilege against self-incrimination only if *his actual answer would in fact* tend to incriminate him,[16] subsequent cases seem to reject that doctrine.[17] The emphasis now appears to be on the subject matter of the question, and a witness is permitted to refuse to answer a question which under the circumstances might require an incriminating answer regardless of what the actual answer in fact would be.[18] This doctrine is most clearly set out in *Hoffman v. United States,*[19] where the Supreme Court, in considering the right of a witness to refuse to answer a question which appeared on its fact to be innocuous, stated:

"To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered *might* be dangerous because injurious disclosure could result. . . . The court should have considered that truthful answers by petitioner to these questions *might* have disclosed that he was engaged in such proscribed activity. . . . In this setting it was not perfectly clear, from a careful consideration of all of the circumstances in the case, that the witness is mistaken, and that the answers cannot possibly have such tendency to incriminate."

It would thus seem that the Supreme Court has recognized the multitude of reasons other than fear of incrimination which may motivate a witness to invoke his privilege to remain silent. Whether this view has been consistently followed is, in view of quite recent decisions, extremely doubtful. Particularly emblematic of the equivocal standing of the Fifth Amendment are the cases dealing with the dismissal of public school teachers who rely on that provision of the constitution.

In the recent case of *Slochower v. Board of Higher Education,*[20] the United States Supreme Court dealt with the issue of the right of a public employee to the privilege against self-incrimination. Prior to the *Slochower* case, the issue had been posed in appellate courts in Massachusetts,[21]

[15] United Public Workers v. Mitchell, 330 U.S. 75, 97-101, 67 S. Ct. 556, 91 L. Ed. 754 (1947).

[16] United States v. Aaron Burr, 25 Fed. Cas. 38 (C.C. Va. 1807).

[17] Quinn v. United States, 349 U.S. 155, 75 S. Ct. 668, 99 L. Ed. 964 (1955); Hoffman v. United States, 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (1951).

[18] See note 17, supra. Also see Burdick v. United States, 236 U.S. 79, 35 S. Ct. 267, 59 L. Ed. 476 (1915).

[19] 341 U.S. at 486, 71 S. Ct. at 821, 95 L. Ed. at 1124 (1951).

[20] 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1956).

[21] Faxon v. School Committee of Boston, 331 Mass. 531, 120 N.E.2d 772 (1954).

California,[22] and New York,[23] all of which upheld as valid a condition of employment requiring public employees to refrain from exercising the Fifth Amendment right to silence. In the *Slochower* case, a professor at a city college was summarily dismissed under a provision of the New York City Charter[24] requiring such dismissal upon the refusal of a city employee to testify as to his official conduct.[25] The validity of such a provision was not clearly decided, however, inasmuch as the case was peculiar in several respects, including the following: (1) the professor was testifying before a federal legislative committee not investigating his fitness to hold his position nor his official conduct in general; (2) Slochower had given the requested information ten years earlier before a state legislative committee and before a faculty board of investigation, so that in effect he was not withholding any information not already at the disposal of his superiors;[26] (3) The automatic discharge did not permit consideration of the fact that the questions not answered pertained to a remote period of time having little relevance, if any, to present fitness.[27]

Four of the justices dissented,[28] based partly on what they considered the duty of a teacher to furnish facts pertinent to official inquiries, with failure to do so implying an unfitness.[29] One dissenter added the reasoning of the *Faxon*[30] case which had stated that failure on the part of the teacher to answer would shake public confidence in the public school system.[31] This was indeed a strange way to measure the constitutional rights of an individual, but the case itself is even more significant in showing how the

22 Board of Education v. Eisenberg, 129 Cal. App. 732, 277 P.2d 943 (1954).

23 Daniman v. Board of Higher Education, 306 N.Y. 532, 119 N.E.2d 373 (1954); Goldway v. Board of Higher Education, 176 Misc. 1023, 37 N.Y.S.2d 34 (S. Ct. 1942). In the Daniman case, fourteen plaintiffs appealed to the Supreme Court of the United States. Of these, only Harry Slochower's appeal was allowed on procedural grounds.

24 The relevant portion of the section states that any employee who shall "refuse to testify or to answer any question regarding the property, government or affairs of the city . . . on the ground that his answer would tend to incriminate him" shall be summarily dismissed.

25 In passing on the construction of this provision the New York Court of Appeals, in the Daniman case, stated: "The assertion of the privilege against self-incrimination is equivalent to a resignation." 306 N.Y. at 538. This was the construction which was therefore binding on the United States Supreme Court in the Slochower case.

26 The court cited its holding in Garner v. Board of Public Works, 341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317 (1951), where it had previously held that a municipality investigating the fitness of its employees could discharge them for failure to sign loyalty oaths. It should be noted that the only possible application to the Slochower case would be the requirement that fitness for the job be the subject of the inquiry; Garner did not involve use of the constitutional right to remain silent.

27 The court noted here, in commenting on the application of the New York statute, that "in practical effect the questions are taken as confessed and made the basis of the discharge." 350 U.S. at 557.

28 Id., at 559.

29 Id., at 561-62.

30 Id., at 565-56.

31 See note 19, supra.

Supreme Court was retreating from its previously liberal interpretation of the Fifth Amendment and the inferences flowing therefrom.

The question as to which path the Supreme Court would take in dealing with facts more directly involving use of the Fifth Amendment by a public employee under investigation about his fitness than in the *Slochower* case was apparently resolved in two recent decisions.[32] In *Lerner v. Casey*,[33] a subway conductor employed by the New York City Transit Authority was fired under the Security Risk Law[34] when he refused to answer a question as to whether he was *then* a communist. The refusal to answer was based on the Fifth Amendment, which the New York Court of Appeals[35] held to be such "evidence" of "doubtful trust and reliability" as to constitute grounds for discharge under the statute in question. The court distinguished the *Lerner* case from the facts in the *Slochower* case, stating that *present* membership in the Communist Party was not a remote question, and that this inquiry, unlike that in the *Slochower* case, was an inquiry into the fitness of the employee. The Court of Appeals furthermore noted that Lerner was fired neither because membership in the Communist Party was inferred from his refusal to testify, nor from the mere fact that he invoked the Fifth Amendment, but rather because of the doubt that was created as to his trustworthiness and reliability. In a strong dissent, Judge Fuld called the decision a "sweeping condemnation" of the Supreme Court, stating that this was in fact an imputation of guilt constituting an "arbitrary action" and a denial of due process.

In affirming the New York court, the Supreme Court was able to reach its conclusion on the basis of the fact that the Fifth Amendment was not available to Lerner in this state proceeding, as it applies only to the federal government.[36] However, in sweeping dicta the court made it clear that state has the power to demand answers relevant to fitness for employment, including membership in the Communist Party. Thus, said the court, although the Transit Authority relied on a statute dealing with loyalty, the discharge could take place on the mere failure to reply to a question dealing with fitness, even where the Fifth Amendment had properly been invoked. The dissent by four members of the court is interesting in that the opposite extreme is resorted to, i.e. that an employee may refuse to answer a question as to a political belief or association without invoking the Fifth Amendment, and discharge for such a failure to answer would be a denial of due process. As Justice Douglas stated, "the fitness of a subway conductor for his job depends on his health, his promptness, his record for reliability, not on his politics or philosophy of life."[37]

[32] Lerner v. Casey, 357 U.S. 468, 78 S. Ct. 1311, 2 L. Ed. 2d 1423 (1958); Beilen v. Board of Public Education, 357 U.S. 399, 78 S. Ct. 1317, 2 L. Ed. 2d 1414 (1958).

[33] Ibid.

[34] Laws of New York, c. 233 (1951).

[35] 2 N.Y.2d 355, 161 N.Y.S.2d 7 (1957).

[36] Twining v. New Jersey, 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908).

[37] See Lerner v. Casey, note 32, supra. In a recent California case, the petitioner

It is quite clear that the Supreme Court has, in an attempt to facilitate the purging of communists from government employment, departed from the traditional concept of the Fifth Amendment as a recourse for the potentially innocent. No longer does the court follow the doctrine that evidence of unfitness should be offered at a hearing, where failure to answer would necessitate an inference of unfitness from mere invocation of the privilege, but would be based on the preponderance of evidence. This would be, as the Florida Supreme Court so succinctly described it,[38] the "American way." A. G. W.

appealed his denial of admission to the state bar based on his refusal to answer questions concerning membership in the Communist Party. The Supreme Court reversed the California court's refusal to review, and remanded the case. Konigsberg v. State Bar of California, 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810 (1957). The California Supreme Court, upon rehearing the case, ruled that Konigsberg was properly excluded from the bar. The court was careful to adhere to the admonition of the United States Supreme Court that failure to admit the petitioner should not be based on mere refusal to answer or on grounds of disloyalty, but rather on their inability to check the candidate's qualifications. Konigsberg v. State Bar of California, 344 P.2d 777 (1959).

[38] See note 7, supra.