August 2015

Corporations; First Amendment Rights; State ex rel Grant v. Brown

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CONSTITUTIONAL LAW

Corporations · First Amendment Rights

State ex rel Grant v. Brown, 39 Ohio St. 2d 112, 313 N.E.2d 847 (1974)

ON AUGUST 9, 1972 the Relators, Greater Cincinnati Gay Society, tendered articles of incorporation for a non-profit corporation to the Secretary of State of Ohio, under provisions of the Ohio Revised Code.[1] The Secretary of State refused to accept the incorporation papers, however, claiming that the purpose of the group, which was to promote acceptance of homosexuality as a valid life style, was contrary to public policy,[2] since homosexuality was then a criminal act.[3]

The Relators then filed a motion in the Supreme Court of Ohio asking for a writ of mandamus which would require the Secretary of State to accept, approve, file and record the proposed articles of incorporation. The Ohio Supreme Court in *State ex rel. Grant v. Brown*,[4] while acknowledging that the Secretary of State's reasoning was invalid,[5] still denied the writ on the basis of public policy.[6] The court held:

> Although homosexual acts between consenting adults are no longer statutory offenses, since the new criminal code came into effect, there is still reason for denying the writ. We agree with the Secretary of State that the promotion of homosexuality as a valid life style is contrary to public policy of the State.[7]

Although the dissenters acknowledged the existence of a first amendment question,[8] they chose to base their dissent upon the theory that the Secretary of State's position is merely ministerial and, therefore, he lacks the authority to refuse proposed articles of incorporation. The dissent rests on three basic arguments.

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[1] *See* OHIO REV. CODE ANN. § 1702.07(A) (Page 1968): "When articles of incorporation and other certificates relating to the corporation are filed with the Secretary of State, he shall, if he finds that they comply with the provisions of Sections 1702.01 to 1702.58, inclusive, of the Revised Code, endorse thereon his approval...."

[2] *See* OHIO REV. CODE ANN. § 1702.03 (Page 1960): "A corporation may be formed for any purpose or purposes for which natural persons lawfully may associate themselves...."

[3] *See* Law of October 1, 1953, Ch. 29 § 2905.44 (1953) Ohio Laws 417 § 1 (repealed 1974).

[4] State *ex rel.* Grant v. Brown, 39 Ohio St. 2d 112, 313 N.E.2d 847 (1974).

[5] Under House Bill 511 it is no longer a crime to engage in homosexual acts. *See* OHIO REV. CODE ANN. § 2907.01-.09 (Page Special Supp. 1973).

[6] 39 Ohio St. 2d at 114, 313 N.E.2d at 848.

[7] *Id.*

[8] 39 Ohio St. 2d at 117, 313 N.E.2d at 851 (Stern, J., dissenting): "... the United States Constitution (First Amendment) do[es] contain, however, a bias in favor of permitting people to speak their minds and promote their causes in a peaceful manner."

First, they argue that the legislature and not the Secretary of State is responsible for creating public policy.[9] The dissent thus interprets the legislative act of repealing the crime of sodomy as an assertion by the legislature that homosexual acts between consenting adults is no longer contrary to public policy.[10] Since it is well settled that a state's public policy is determined by the legislature,[11] the conclusion reached by the dissent appears valid.

Secondly, they argue that a "lawful purpose" is defined by statutory language and not by an amorphous doctrine of public policy.[12] The equating of public policy with "unlawful purpose" has been severely criticized in two recent New York cases.

In *Association For the Preservation of Freedom of Choice v. Shapiro*,[13] a certificate of incorporation had been denied *Freedom of Choice* because the association advocated the acceptance of bigotry and segregation[14] which are unlawful under the Constitution[15] and laws[16] of the State of New York. The denial was upheld in two lower court decisions[17] before being reversed by the New York Court of Appeals, which held it is perfectly lawful for a group to organize for the purpose of changing existing laws.[18] The court then concluded that "the public policy of the State is not violated by purposes which are not unlawful and to hold otherwise would be a contradiction in terms."[19]

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9 *Id.*

10 *See* I. SCHROADER AND L. KATZ, OHIO CRIMINAL LAW 73 (1974) (sexual activity of whatever kind between assenting adults in private ought not be a crime); *see generally, Code*, 23 CLEV. STATE L. REV. 1, 30 (1974) (Representative Tulley's amendment to make homosexual acts a criminal offense under the new code was defeated).

11 *See* State v. Atkinson Co., 313 U.S. 508 (1941); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); LeForce v. Bullard, 454 P.2d 297 (Okla. 1969).

12 29 Ohio St. 2d at 116-117, 313 N.E.2d at 850. *See* Gay Activists Alliance v. Lomenzo, 31 N.Y.2d 965, 293 N.E.2d 255, 341 N.Y.S.2d 108 (1973); Ass'n For Preservation of Freedom of Choice v. Shapiro, 9 N.Y.2d 376, 174 N.E.2d 487, 214 N.Y.S.2d 388 (1961). *Compare* Law of May 5, 1933, Ch. 15 § 7201 Ohio Law 289, Art. II § 201 (repealed 1972), *with* PA. STAT. ANN. tit. 15 § 7311 (Supp. 1974), *and* N.Y. NOT-FOR-PROFIT CORP. LAW § 201(A) (McKinney 1970). *But see In re* Excavating Mach. Owners Ass'n, 25 Misc. 2d 419, 205 N.Y.S.2d 265 (Sup. Ct. 1960); *In re* Stillwell Political Club, 26 Misc. 2d 931, 109 N.Y.S.2d 331 (Sup. Ct. 1951); *In re* Patriotic Citizenship Ass'n, 26 Misc. 2d 995, 53 N.Y.S.2d 595 (Sup. Ct. 1945).

13 Ass'n For the Preservation of Freedom of Choice v. Shapiro, 9 N.Y.2d 376, 174 N.E.2d 487, 214 N.Y.S.2d 388 (1961).

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

15 *See* N.Y. CONST. Art. 1 § 11: "No person shall because of race, color, creed or religion, be subject to any discrimination in his civil rights...."

16 *See* N.Y. CIV. RIGHTS LAW § 40-41 (McKinney 1948) (no discrimination in place of public accommodations); N.Y. EDU. LAW § 313 (McKinney 1969) (no discrimination in education); N.Y. EXEC. LAW § 291 (McKinney 1972) (no discrimination in employment).

17 *See* Ass'n For Preservation of Freedom of Choice v. Shapiro, 17 Misc. 2d 1012, 187 N.Y.S.2d 706 (Sup. Ct., 1959); *aff'd* 18 Misc. 2d 534, 188 N.Y.S.2d 885 (Sup. Ct. 1959).

18 9 N.Y.2d at 383, 174 N.E.2d at 490, 214 N.Y.S.2d at 392.

19 9 N.Y.2d at 382, 174 N.E.2d at 489, 214 N.Y.S.2d at 391.

Freedom of Choice was followed by *Gay Activists Alliance v. Lomenzo*,[20] whose facts are identical with those in *Brown*. In *Gay Alliance*, the Secretary of State of New York refused to accept the incorporation papers of the Gay Activists contending that while it is not unlawful to advocate homosexuality, it is "still unlawful to engage in homosexual activities in New York,"[21] and thereby the group's purpose was contrary to public policy.[22] The court of appeals reversed the Secretary of State's action, holding that "since in the present case the appellants acknowledge that the formal requirements were complied with and the purpose for which the corporation is to be formed offends no law, the Secretary of State lacked the authority to label the purposes violative of public policy."[23]

The third argument is that the Secretary of State's position is merely ministerial, in that his discretion is limited to particulars contained within the *Ohio Revised Code*. Therefore, the use of public policy arguments by the Secretary of State is an abuse of his discretion and a denial of the Relator's fourteenth amendment rights of due process and equal protection.[24]

Traditionally the fourteenth amendment has been invoked to curtail abusive acts by public officials in administrative proceedings,[25] as well as in the issuance of licenses[26] and permits.[27] Although fourteenth amendment rights have been asserted sparingly[28] and indirectly[29] in the area of incorporation, the general rule that has evolved is that the statutes of the jurisdiction define the limits of official discretion. Thus a violation of the fourteenth amendment results when either: (1) a statute or rule is

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[20] Gay Activists Alliance v. Lomenzo, 31 N.Y.2d 965, 293 N.E.2d 255, 341 N.Y.S.2d 108 (1973).

[21] *See* N.Y. PENAL LAW § 130.38 (McKinney 1967): "A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person."

[22] Gay Activists Alliance v. Lomenzo, 66 Misc. 2d 456, 320 N.Y.S.2d 994 (Sup. Ct. 1971), *rev'd*, 31 N.Y.2d 965, 293 N.E.2d 255, 341 N.Y.S.2d 108 (1973).

[23] 31 N.Y.2d at 966, 293 N.E.2d at 256, 341 N.Y.S.2d at 109.

[24] 29 Ohio St. 2d at 117, 313 N.E.2d at 850.

[25] *See* Cox v. New Hampshire, 312 U.S. 569 (1941); Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968); United States v. Peeble, 220 F.2d 114 (7th Cir. 1955); Bogan v. New London Housing Authority, 366 F. Supp. 861 (D. Conn. 1973); Sands v. Wainwright, 357 F. Supp 1062 (D. Fla. 1973); Clean Air Constituency v. Cal. St. Air. Resource Bd., 11 Cal. 3d 801, 523 P.2d 617, 114 Cal. Rptr. 577 (1974).

[26] *See, e.g.*, Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Glicker v. Michigan Liquor Control Comm'r, 160 F.2d 96 (6th Cir. 1947).

[27] *See, e.g.*, Staub v. City of Baxley, 355 U.S. 313 (1958); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[28] *See* Consumers Co-Op Ass'n v. Arn, 163 Kan. 489, 183 P.2d 453 (1947); Bologno v. O'Connell, 7 N.Y.2d 155, 164 N.E.2d 389, 196 N.Y.S.2d 90 (1959); Church v. Brown, 165 Ohio St. 31, 133 N.E.2d 333 (1955).

[29] The court rarely refers to the fourteenth amendment by name. In most instances the courts use terms such as arbitrary, capricious and beyond discretion which have been associated with fourteenth amendment rights. *See* Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Lovell v. Griffin, 303 U.S. 444 (1938).

arbitrarily applied by the official or (2) the limits set by the statute are too vague.[30]

The refusal by the Secretary of State in *Brown* to file the proposed articles of incorporation seemingly falls within the first criterion. The *Ohio Revised Code* adequately defines the requirements for incorporation.[31] Therefore, the use of public policy arguments by the Secretary of State results in a capricious application of the statutes involved. A similar conclusion was reached by the courts in *Freedom of Choice*[32] and *Gay Alliance*.[33]

All three arguments seem persuasive but the first amendment argument, mentioned but left undeveloped by the dissent, would seem even more decisive. Under such an analysis the majority opinion in *Brown* should be viewed as the most recent attempt by a state to restrict freedom of speech and association to those groups which profess controversial and unpopular ideas.

The state's power to grant incorporation, licenses, and permits has traditionally been used to regulate freedom of speech and association.[34]

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30 *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973); Cases cited notes 27 and 29 *supra.*

31 *See* OHIO REV. CODE ANN. § 1702.01 *et seq.* (Page 1964) (Non-Profit Corporation Law); OHIO REV. CODE ANN. § 2907-2907.37 (Page's Spec. Supp. 1973). *See also* State *ex rel* Grant v. Brown, 29 Ohio St. 2d 112, 116, 313 N.E.2d 847, 850 (1974) (Stern, J., dissenting): "[t]he existence of 58 distinct statutes serves more to circumscribe and limit whatever discretionary authority the Secretary of State does possess."

32 9 N.Y.2d at 382, 174 N.E.2d at 489; 214 N.Y.S.2d at 391:

> Within such a scope the individual Justice would be at liberty to indulge in his own personal predilections as to the purposes of a proposed corporation, and impose his own personal views as to the social, political and economic maatters involved. This is the direct antithesis of judicial objectivity, especially in an ex parte proceeding where no evidence is taken.

33 31 N.Y.2d at 966, 293 N.E.2d at 256, 341 N.Y.S.2d at 109: "[T]he Secretary of State's refusal to accept the petitioner's certificate was arbitrary, being in excess of his authority."

34 Between the period of 1896-1950 States frequently denied incorporation to those groups whose policies were either unlawful or contrary to public policy. *See e.g. In re* Lithuanian Workers' Literature Soc'y, 196 App. Div. 262, 187 N.Y.S. 612 (Ct. App. 1921) (advocated socialism); *In re* Stillwell Political Club, 26 Misc. 2d 931, 109 N.Y.S.2d 331 (Sup. Ct. Kings Co. 1951) (advocated extreme nationalism); *In re* Patriotic Citizenship Ass'n, 26 Misc. 2d 995, 53 N.Y.S.2d 595 (Sup. Ct. Kings Co. 1945) (wanted to amend Constitution to alienate any person or group that criticizes or teaches violent overthrow of government). *See generally,* Comment, *Judicial Approval as a Prerequisite to Incorporation of Non-Profit Organization in New York and Pennsylvania,* 55 COL. L. REV. 380 (1955).

However, the courts have allowed incorporation of an unpopular group, when a judge or secretary of state has personally agreed with the group's philosophy. *See In re* Good Thief Foundation, 47 N.Y.S.2d 511 (Sup. Ct. Essex County 1944) (moral betterment and rehabilitation of inmates of prisons or penal institutions); *In re* Certificate of Incorporation of the German Jewish Children's Aid, 151 Misc. 834, 272 N.Y.S. 540 (1934) (to facilitate the entry of German Jewish children into the United States).

Incorporation has also been denied where associations conduct activities that are adequately performed by other organizations. *See In re* Excavating Mach. Owner's Ass'n, 25 Misc. 2d 419, 205 N.Y.S.2d 265 (Sup. Ct. 1960); *In re* Council of Orthodox Rabbis, 10 Misc. 2d 62, 171 N.Y.S.2d 664 (Sup. Ct. 1958); *In re* Waldemar Cancer

The Gay Society of Cincinnati, through incorporation, sought to obtain those privileges which result from corporate status.[35] As a result of these benefits, Relators would be elevated to a position where they could more effectively challenge discriminatory laws against homosexuals.[36]

The State of Ohio, by denying the Relators the ability of incorporation, has thereby effectively limited the exchange of ideas on the issue of homosexuality. Thus, under the rationale of the *Brown* case any group of individuals wishing to maintain the status quo would be permitted to incorporate, while those who advocate change would be relegated to the status of an unincorporated group. This seems to be clearly contrary to the first amendment right of freedom of speech and association.

Although the courts have not dealt specifically with the states' power to grant incorporation as a means of restricting first amendment rights, they have attacked the states' inhibition of first amendment rights through the use of permits[37] and licenses.[38] The two basic principles that have developed from these cases in the area of first amendment rights are: (1) Although first amendment rights are not absolute,[39] a slight infringe-

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Research Ass'n, 205 Misc. 560, 130 N.Y.S.2d 426 (Sup. Ct. 1954) (already have the American Cancer Society).

Regarding licenses *see* Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cox v. New Hampshire, 312 U.S. 569 (1941); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964). Regarding permits *see* Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Hague v. C.I.O., 307 U.S. 496 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

[35] Two major advantages of incorporation are: (1) limited liability, *see* OHIO REV. CODE ANN. § 1701.13(E)(1) (Page Supp. 1973) ("A corporation may indemnify or agree to indemnify a director, officer or employee. . . ."), and (2) tax benefits, *see* INT. REV. CODE OF 1954 § 501(C)(3).

[36] Homosexuals have been discriminated against in areas of: (1) employment, *see* McKeand v. Laird, 490 F.2d 1262 (9th Cir. 1973); Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1965); (2) marriage, *see* Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971); (3) child custody cases, *see* Nadler v. Superior Courts, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967); *cf. In re* J.S.C. 129 N.J. Super. 486, 324 A.2d 90 (Sup. Ct. 1974); (4) naturalization proceedings, *see* Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967), and, (5) housing, *see* E. Chaitin v. V. Lefcourt, *Is Gay Suspect*, 8 LINCOLN L. REV. 24, 28 (1973).

[37] *See* Staub v. City of Baxley, 355 U.S. 313 (1958); Cantwell v. Connecticut, 310 U.S. 296 (1940); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[38] Licensing that is arbitrary has been stricken down by the courts. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941); Glicker v. Michigan Liquor Control Comm'n, 160 F.2d 96 (6th Cir. 1947). Although there were earlier cases expressing a contrary view, *e.g.*, Murphy's Tavern Inc. v. Davis, 70 N.J. Super. 87, 175 A.2d 1 (1961), and Paddock Bar Inc. v. Division of Alcoholic Beverage Control, 46 N.J. Super. 405, 134 A.2d 779 (1957), it is now generally held that, absent any indecent or immoral conduct, the mere fact that homosexuals gather in a licensed premise is an insufficient ground to suspend or revoke a liquor license. *See* Vallerga v. Department of Alcoholic Beverage Control, 53 Cal. 2d 313, 347 P.2d 909, 1 Cal. Rptr. 494 (1960); One Eleven Wines & Liquor Inc. v. Division of Alcoholic Beverage Control, 50 N.J. 329, 235 A.2d 12 (1967).

[39] *See* Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47, 52 (1912).

ment may be held to constitute a violation;[40] and, (2) even though a person has no right to a valuable governmental benefit[41] he may not be denied that benefit in a manner that infringes upon his constitutional rights.[42] Based upon these principles, the courts have developed rules which have apparently been disregarded by the majority in *Brown*.

The first rule disregarded by the court in *Brown* is that there can be no condition precedent on a benefit that is bestowed under the law.[43] Thus, conditions on welfare benefits,[44] unemployment compensation,[45] tax exemptions,[46] public employment,[47] and bar admissions[48] have all been invalidated as a prior condition on a right that already exists.[49] The court in *Brown* has sanctioned the use of conditions on the right of incorporation by requiring groups that seek incorporation to profess the same ideas as the state officials who pass upon their articles of incorporation. Such actions are clearly contrary to the cases that have developed in the last quarter century.

The second rule which the *Brown* court failed to follow deals with the right to associate to further ideas. An association, by providing the individual with both economic and physical resources,[50] enhances effective advocacy of both public and private points of view, especially in controversial areas.[51] For this reason, the right of association is considered essential to minority groups and is therefore rarely restricted.[52] Since sponsors of a denied corporation still have a right to associate to advance

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[40] *See* Bates v. Little Rock, 361 U.S. 516, 523 (1960); *See also* Hannegan v. Esquire, 327 U.S. 146 (1946); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[41] *See* Ashley v. Ryan, 153 U.S. 436, 441 (1894) (the right of incorporation depends solely upon the grace of the state and is not a right inherent in the parties).

[42] Perry v. Sindermann, 408 U.S. 593 (1972).

[43] California v. LaRue, 409 U.S. 109, 137 (1972) (Marshall, J., dissenting).

[44] Shapiro v. Thompson, 394 U.S. 618 (1969) (one-year residency requirement for welfare overturned). *But cf.* Wyman v. James, 400 U.S. 309 (1971) (upheld home visits by case worker as a condition precedent for assistance).

[45] Sherbert v. Verner, 374 U.S. 398 (1963) (denied unemployment compensation because unable to work on Sabbath).

[46] Speiser v. Randall, 357 U.S. 513 (1958) (denial of tax exemption to claimants who engaged in certain forms of speech).

[47] Keyishian v. Bd. of Regents, 385 U.S. 589, 605 (1967).

[48] Konigsberg v. State Bar, 353 U.S. 252, 273 (1957) (a state may not exercise power to select their own bars in such a way as to infringe upon freedom of political association). *But see* Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971) (loyalty oath as requisite for bar admission upheld).

[49] *But see* American Communication Ass'n v. Douds, 339 U.S. 382 (1950). Here, the Supreme Court upheld a federal statute which required labor union officials, as a condition precedent to use N.L.R.B. facilities, to file a non-communist affidavit. The Court justified this action on the grounds that communist leadership of organized labor would pose a clear and present danger to the national interest.

[50] Beauharnais v. Illinois, 343 U.S. 250, 263 (1952).

[51] N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).

[52] *See* Braid v. State Bar, 401 U.S. 1, 6 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); *cf.* Sweezy v. New Hampshire, 354 U.S. 234 (1957).

their beliefs,[53] the question is whether a denial of incorporation violates the first amendment.

The basic reason for associating is to acquire certain advantages, *i.e.*, support, finance and security, which unless obtained places an individual at a severe disadvantage when competing against other existing groups. In *Healy v. James*,[54] Relators were denied recognition by a university because of their political beliefs.[55] The Supreme Court held there can be no doubt that denial of official recognition to college organizations, without justification, burdens or abridges their associational rights. "The primary impediments to free association following from non-recognition is the denial of use of common facilities for meeting and other appropriate purposes."[56]

An act may be merely restrictive, rather than prohibitive, and still abridge a first amendment right.[57] The fact that Gay Society of Cincinnati will lose tax exemption and indemnification is analogous to the students in *Healy* who lost their right to use college facilities. In both cases, the groups were ill-equipped to advance their beliefs and ideas, thereby defeating the purpose behind the right to associate.[58]

Finally, the *Brown* decision sanctioned the use of prior restraint of a first amendment right. Under the doctrine of prior restraint, a state is not entitled to regulate in advance what expressions and ideas will be expressed.[59] The doctrine of prior restraint, though usually associated with the area of censorship of newspapers,[60] books[61] and movies,[62] has been extended into the area of licensing and permits. By retaining the power to either issue or withhold permits and licenses, for the use of public

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[53] *See* Ass'n For the Preservation of Freedom of Choice v. Shapiro, 18 Misc. 2d 534, 188 N.Y.S.2d 885 (Sup. Ct. 1959).

[54] Healy v. James, 408 U.S. 169, 181-183 (1972). *See also* Gay Students Organization v. Bonner, 367 F. Supp. 1088 (D.N.H. 1974).

[55] Students were members of S.D.S.

[56] Healy v. James, 408 U.S. 169, 181 (1972).

[57] *See* cases cited note 40 *supra.*

[58] *See* N.L.R.B. v. Ford Motor Co., 114 F.2d 905, 913 (6th Cir. 1940): "[T]he right to form opinions is of little value if such opinions cannot be expressed, and the right to express it is of little value if it may not be communicated to those immediately concerned."

[59] Near v. Minnesota, 283 U.S. 697 (1931) (previous restraint of newspaper unconstitutional); Cantwell v. Connecticut, 310 U.S. 296, 305 (1940) (prior restraint of a first amendment right is unconstitutional); *cf.* Organization For a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (prior restraint on expression comes to the court with a heavy presumption against constitutional validity).

[60] *See* New York Times Company v. United States, 403 U.S. 713 (1971) (government attempt to stop printing of Pentagon papers).

[61] *See* Bantam Books v. Sullivan, 372 U.S. 58 (1963) (sale of books to juveniles limited).

[62] *See* Joseph Burstyn v. Wilson, 343 U.S. 495, 503 (1951) (attempt to ban movie by denying license).

facilities, parks and streets,[63] a municipality can effectively limit the freedom of speech and association of unpopular groups.[64] It is this situation that the Supreme Court, in *Staub v. City of Baxley*,[65] addressed itself:

> It is undeniable that the ordinance authorized the Mayor and the Council of the City of Baxley to grant or refuse to grant the required permit in their uncontrolled discretion. It thus makes enjoyment of speech contingent upon the will of the Mayor and Council of the City although the fundamental right is made free from congressional abridgment by the first amendment and is protected by the fourteenth from invasion by state action.... For these reasons the ordinance on its face imposes an unconstitutional prior restraint upon the enjoyment of first amendment freedoms and lays a forbidden burden upon exercise of liberty protected by the Constitution.[66]

Although "prior restraint" has been limited in the past to the area of licensing and permits, its rationale should be applicable in the area of incorporation. Thus the State of Ohio, in denying incorporation rights, is restraining freedom of speech in the area of homosexuality before the topic is debated in the public forum. This seems an obvious violation of the rule against prior restraint.

One could limit the *Brown* decision to the facts presented, thereby accepting a rationale that is both inaccurate as well as naive. Viewed broadly, however, the homosexuals in *Brown* are merely additional victims of government action thwarting basic civil rights. At this level *Brown* represents an unfortunate affirmation of a state's power to restrict the freedom of speech and association of those groups that profess controversial ideas. The weakness in viewing *Brown* narrowly is that it justifies the abandonment of fundamental and basic principles. It was to this rationale that Brandeis, in his concurring opinion in *Whitney v. California*,[67] addressed himself: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."[68]

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[63] *See* Kunz v. New York, 340 U.S. 290 (1951); Schneider v. State, 308 U.S. 147, 163, 164 (1939); Hague v. C.I.O., 307 U.S. 496, 516 (1939); Lovell v. Griffin, 303 U.S. 444, 452 (1938).

[64] Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969).

[65] Staub v. City of Baxley, 355 U.S. 313 (1958).

[66] *Id.* at 325.

[67] Whitney v. California, 274 U.S. 357, 377 (1926) (Brandeis, J., concurring).

[68] *Id.*