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THE PURPOSE CLAUSE IN THE CERTIFICATE OF INCORPORATION: A CLAUSE IN SEARCH OF A PURPOSE

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The public filing of a certificate of incorporation that contains a corporate purpose clause is mandated by statute in forty-eight states and in the District of Columbia.¹ This Article examines the

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¹ State statutes that mandate the public filing of a corporate purpose clause fall into three different categories. In the first category, fifteen states, the District of Columbia, and the 1960 versions of the Model Business Corporation Act require that the articles of incorporation set forth the purpose or purposes for which a corporation is being formed. See ALASKA STAT. § 10.05.255(a)(3) (1968); ARK. STAT. ANN. § 64-502(C) (1980); D.C. CODE ENCYCL. § 29-921a(c) (West 1968); GA. CODE ANN. § 14-2-171(a)(4) (1982); ILL. ANN. STAT. ch. 32, § 157.47(e) (Smith-Hurd 1954); MD. CORPS. & ASS'NS CODE ANN. § 2-104(a)(3) (1975); MASS. GEN. LAWS ANN. ch. 156B, § 13(a)(3) (West 1970); MISS. CODE ANN. § 79-3-105(c) (1973); MO. ANN. STAT. § 352.055(8) (Vernon Supp. 1984); N.D. CENT. CODE § 10-19-53(3) (1976); OKLA. STAT. ANN. tit. 18, § 1-208(a)(4) (West Supp. 1983); S.C. CODE ANN. § 33-7-30(2) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 47-2-5(3) (1983); TENN. CODE ANN. § 48-202(e)(i) (1979); UTAH CODE ANN. § 16-10-49(c) (1973); VT. STAT. ANN. tit. 11, § 1926(3) (1973); MODEL BUSINESS CORP. ACT § 48(c) (1960).

In the second category, thirty states and the 1971 version of the Model Business Corporation Act require that the articles of incorporation set forth a corporate purpose, yet permit the corporation to state that such purpose is to engage in or to include any lawful act or activities for which corporations may be organized under the given statutory charter. See ALA. CODE § 10-2A-91(a)(3) (1980); ARIZ. REV. STAT. ANN. § 10-054(A)(3) (1977); COLO. REV. STAT. § 7-2-102(1)(c) (Supp. 1983); CONN. GEN. STAT. ANN. § 33-290(a)(2) (West Supp. 1983); DEL. CODE ANN. tit. 8 § 102(a)(3) (1983); FLA. STAT. ANN. § 607.007 (West 1977); HAWAII REV. STAT. § 416-11(4) (Supp. 1983); IDAHO CODE § 30-1-54(c) (1980); IOWA CODE ANN. § 496A.49(3) (West Supp. 1983); KAN. STAT. ANN. § 17-6002(a)(3) (1975); KY. REV. STAT. § 271A.270(1)(c) (1981); LA. REV. STAT. ANN. § 12:24(B)(2) (West 1969); MONT. CODE ANN. § 35-1-202(1)(c) (1983); NEB. REV. STAT. § 21-2052(3) (1977); NEV. REV. STAT. § 78.035(3) (1981); N.H. REV. STAT. ANN. § 293-A:54(I)(c) (Supp. 1983); N.J. STAT. ANN. § 14A:27(1)(b) (West 1969); N.M. STAT. ANN. § 53-12-2(A)(3) (Supp. 1983); N.Y. BUS. CORP. LAW § 402(a)(2) (McKinney Supp. 1983); N.C. GEN. STAT. § 55-7(3) (1982); OHIO REV. CODE ANN. § 1701.04(A)(3) (Page 1978); OR. REV. STAT. § 57.311(1)(c) (1981); PA. STAT. ANN. tit. 15, § 1204(A)(3)(i) (Purdon Supp. 1983); R.I. GEN. LAWS § 7-1.1-43(c) (Supp. 1983); TEX. BUS. CORP. ACT ANN. art. 3.02(A)(3) (Vernon Supp. 1982); VA. CODE § 13.1-49(b) (1978); WASH. REV. CODE ANN. § 23A.12.020(3) (Supp. 1983); W. VA. CODE § 31-1-27(a)(3) (1982); WIS. STAT. ANN. § 180.45(1)(c) (West 1957); WYO. STAT. § 17-1-202(a)(iii) (1977); MODEL BUSINESS CORP. ACT § 54(c) (1971). Michigan permits all corporations, except those formed

reasons commonly offered for the inclusion of a purpose clause in the certificate of incorporation, and suggests that, although a corporation should be allowed to insert such a clause in its bylaws, compulsory inclusion of a purpose clause in the certificate or in the articles of incorporation is no longer justified.

In effect, the purpose clause lost much of its importance over the last half-century with the eclipse of the *ultra vires* doctrine.² The purpose clause now serves to define the scope of management's authority rather than the corporation's capacity. To the extent that shareholders would like to limit the scope of management's authority and thereby limit corporate activities, they may include such restrictions in the bylaws or amend the bylaws to include such restrictions.³ While bylaws are not filed publicly,⁴ they guide corporate management and are regarded as a contract between the shareholders and the corporation.⁵ My proposal, then, does not adversely affect the viability of the purpose clause as a control device for the protection of the interests of minority or non-officer shareholders in the closely held corporation.

The requirement that corporate purposes be stated in the certificate or articles of incorporation, thus ensuring access for public inspection, traditionally has been justified as necessary to advance four separate interests: 1) the interest of a third party in determining whether a potential contract or transaction with a corporation

for an educational purpose, to use a broad purpose clause. MICH. COMP. LAWS ANN. § 450.1202(b) (West 1973). Indiana does not expressly require the certificate to include a purpose clause, but permits all but a few specified kinds of corporations to be "organized . . . for any lawful business purpose or purposes . . ." IND. CODE ANN. § 23-1-2-1 (Burns 1984).

Maine and Minnesota do not require any mention of purpose within the articles of incorporation. See ME. REV. STAT. ANN. tit. 13-A, § 404(1)-(2) (1981); MINN. STAT. ANN. § 302A.101 (West Special Pamphlet 1984). The California statute combines aspects of the second and third statutory forms, requiring that the articles include the phrase "[t]he purpose of the corporation is to engage in any lawful act," and that "[t]he articles shall not set forth any further or additional statement with respect to the purposes or powers of the corporation, except by way of limitation . . ." CAL. CORP. CODE § 202(b)(1)(i), (b)(3) (West Supp. 1984).

² See *infra* text accompanying notes 9-15.

³ This assumes that the power to alter, amend or repeal such bylaws, or adopt a new purpose clause in the bylaws, is vested in the shareholders unless reserved to the board by the articles of incorporation.

⁴ 8 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4173 (perm. ed.).

⁵ Appeal of Two Crow Ranch, Inc., 159 Mont. 16, 494 P.2d 915 (1972); Papalexioiu v. Tower West Condominiums, 167 N.J. Super. 516, 401 A.2d 280 (Ch. Div. 1979); O'Leary v. Board of Directors, 89 Wis. 2d 156, 278 N.W.2d 217 (1979); 8 W. FLETCHER, *supra* note 4, § 1466 (perm. ed.); see also M. SCHAEFTLER, THE LIABILITIES OF OFFICE: INDEMNIFICATION AND INSURANCE OF CORPORATE OFFICERS AND DIRECTORS 122-23 (1976).

is within the scope of the corporation's authority; 2) management's interest in ascertaining the lines of business in which the corporation is authorized to engage; 3) an investor's interest in knowing the kind of business in which he will be investing; and 4) the state's interests in overseeing corporate activity and consumer protection.⁶

The interest of third parties in a publicly filed purpose clause is interrelated with the ultra vires doctrine. The ultra vires doctrine provides that a corporation may perform only those legal acts that are within the purposes or powers conferred upon it by statute or by certificate of incorporation.⁷ An attempt by a corporation to act beyond its purposes or powers is considered to be an ultra vires activity and, in the past, was not legally binding, since neither the corporation nor the third party could enforce an ultra vires contract in court.⁸ The consequence of the doctrine was justified, in part, by the purpose clause requirement. The common law charged a party dealing with a corporation with knowledge of the contents of the publicly filed certificate of incorporation, including the purpose clause, regardless of whether the party actually examined the certificate.⁹ The ultra vires doctrine was widely criticized because of its reliance on such constructive notice; it was thought to be impractical and unreasonable to expect third parties to examine the certificate of incorporation of every corporation with which a business transaction was contemplated.¹⁰ Consequently, the constructive notice doctrine has been abandoned.¹¹ It

⁶ See 5 Z. CAVITCH, *BUSINESS ORGANIZATIONS WITH TAX PLANNING* § 101.01, at 101-14 to -15 (1983); N. LATTIN, *THE LAW OF CORPORATIONS* § 62, at 201-03 (2d ed. 1971); R. STEVENS, *HANDBOOK ON THE LAW OF PRIVATE CORPORATIONS* § 47, at 231-32 (2d ed. 1949).

⁷ See, e.g., W. CARY & M. EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 39 (5th ed. 1980). For a detailed comparison of various definitions of the ultra vires, see Schaeftler, *Ultra Vires—Ultra Useless: The Myth of State Interest in Ultra Vires Acts of Business Corporations*, 9 J. CORP. L. 81, 81 n.2 (1983).

⁸ Schaeftler, *supra* note 7, at 82 & n.3.

⁹ See H. BALLANTINE, *ON CORPORATIONS* § 99, at 253-55 (1946). For a more detailed treatment of the constructive notice doctrine and its history, see *id.*; Brimble, *Ultra Vires Under the Texas Business Corporation Act*, 40 TEX. L. REV. 677, 688-89 (1962); Ham, *Ultra Vires Contracts Under Modern Corporate Legislation*, 46 KY. L.J. 215, 222-23 (1958).

¹⁰ See, e.g., Carpenter, *Should the Doctrine of Ultra Vires Be Discarded?*, 33 YALE L.J. 49, 6263 (1923).

¹¹ See, e.g., 7A W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 3426, at 40-41 (rev. perm. ed. 1978); Ham, *supra* note 9, at 224-25; Note, *Powers—Ultra Vires—Problems Remaining After Legislative and Judicial Modification of the Doctrine*, 34 NOTRE DAME LAW. 99, 99 (1958). At least one jurisdiction has abolished the constructive notice doctrine by statute. See OHIO REV. CODE ANN. § 1701.08(B) (Page 1978).

follows that mere inclusion of a purpose clause in the certificate no longer provides a sufficient basis for charging the public with notice of a corporation's limitations.

Furthermore, an overwhelming majority of jurisdictions has enacted statutes that, for the most part, preclude invocation of the *ultra vires* defense in dealings between corporations and third parties.¹² These statutory provisions typically state that the *ultra vires* defense may be raised only in limited circumstances, such as in a proceeding by a shareholder to enjoin the performance of an *ultra vires* executory contract, in a derivative action against the executive responsible for the *ultra vires* activity, or in a *quo warranto* proceeding by the state to dissolve a corporation or to enjoin it from entering into an *ultra vires* transaction.¹³ Since the rights of a third party under a *consummated* *ultra vires* transaction are no longer affected, potential third parties have even less incentive than they formerly had to ascertain the permissible scope of corpo-

¹² Forty-four states and the District of Columbia have enacted statutory solutions to the *ultra vires* problem that either are identical to or comparable with § 7 of the Model Business Corporation Act. See ALA. CODE § 10-2A-24 (1980); ALASKA STAT. § 10.05.018 (1968); ARIZ. REV. STAT. ANN. § 10-007 (1977); ARK. STAT. ANN. § 64-106 (1980); COLO. REV. STAT. § 7-3-105 (1974); CONN. GEN. STAT. ANN. § 33-292 (West 1960); DEL. CODE ANN. tit. 8, § 124 (1983); D.C. CODE ENCYCL. § 29-905 (West 1968); FLA. STAT. ANN. § 607.021 (West 1977); GA. CODE ANN. § 14-2-22 (1982); IDAHO CODE § 30-1-7 (1980); ILL. ANN. STAT. ch. 32, § 157.8 (Smith-Hurd 1954); IND. CODE ANN. § 23-1-10-4 (Burns 1984); IOWA CODE ANN. § 496A.6 (West 1962); KAN. CORP. CODE ANN. § 17-6104 (Vernon 1975); KY. REV. STAT. 271A.035 (1981); LA. REV. STAT. ANN. § 12:42 (West 1969); ME. REV. STAT. ANN. tit. 13-A, § 203 (1981); MD. CORPS. & ASS'NS CODE ANN. § 1-403 (1975); MICH. COMP. LAWS ANN. § 450.1271 (West 1973); MINN. STAT. ANN. § 302A.165 (West Special Pamphlet 1984); MISS. CODE ANN. § 79-3-11 (1973); MO. ANN. STAT. 351.395 (Vernon 1966); MONT. CODE ANN. § 35-1-110 (1983); NEB. REV. STAT. § 21-2006 (1977); N.H. REV. STAT. ANN. § 293A:7 (Supp. 1983); N.J. STAT. ANN. § 14A:3-2 (West 1969); N.M. STAT. ANN. § 53-11-6 (Supp. 1983); N.Y. BUS. CORP. LAW § 203 (McKinney 1983); N.C. GEN. STAT. § 55-18 (1982); N.D. CENT. CODE § 10-19-6 (1976); OR. REV. STAT. § 57.040 (1981); PA. STAT. ANN. tit. 15, § 1303 (Purdon 1967); R.I. GEN. LAWS § 7-1.1-6 (1970); S.C. CODE ANN. § 33-3-30 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. §§ 47-2-60 to -2-63 (1983); TENN. CODE ANN. § 48-405 (1979); TEX. BUS. CORP. ACT ANN. art. 2.04 (Vernon 1980); UTAH CODE ANN. § 16-10-6 (1973); VT. STAT. ANN. tit. 11, § 1854 (1973); VA. CODE § 13.1-5 (1978); WASH. REV. CODE § 23A.08.040 (1974); W. VA. CODE § 31-1-10 (1982); WIS. STAT. ANN. § 180.06 (West 1957); WYO. STAT. § 17-1-106 (1983).

Five other states, while not using the approach of the Model Business Corporation Act, have adopted statutes that change the common law. See CAL. CORP. CODE § 208 (West 1977); MASS. GEN. LAWS ANN. ch. 155, § 11 (West 1970); NEV. REV. STAT. § 78.135(3) (1981); OHIO REV. CODE ANN. § 1701.13 (Page 1978); OKLA. STAT. ANN. tit. 18, § 1.18 (West 1953). Hawaii is the only state that has retained and, in fact, codified the common-law doctrine. See HAWAII REV. STAT. § 416-31 to -32 (1976).

¹³ E.g., MODEL BUSINESS CORP. ACT § 7 (1971).

rate activity.¹⁴ Accordingly, the "notice to third parties" rationale no longer supports the public filing requirement.

Arguably, a third party may still wish to examine the purpose clause in order to avoid the risk that the transaction will be enjoined by a shareholder at the executory stage. There is little evidence, however, that this risk is more than minimal. In the past 20 years, only four reported cases involved attempts by shareholders to enjoin ultra vires activities.¹⁵ The plaintiff was successful in only

¹⁴ Under the statutory provisions precluding the use of ultra vires by a third party, it remains possible for a court to enjoin performance of a third party's contract with a corporation at the request of a shareholder or at the request of the state. *See, e.g.*, DEL. CODE ANN. tit. 8, § 124 (1983); MICH. COMP. LAWS ANN. § 450.1271 (West 1973); N.Y. BUS. CORP. LAW § 203 (McKinney 1983); MODEL BUSINESS CORP. ACT § 7 (1971). To this extent, a third party's ignorance of the permissible range of corporate purposes could operate to his detriment. *See* R. JENNINGS & R. BUXBAUM, CORPORATIONS 133 n.1 (5th ed. 1979). For a proposal to eliminate shareholder's standing to enjoin ultra vires executory contracts, see Schaeftler, *Clearing Away the Debris of the Ultra Vires Doctrine—A Comparative Examination of U.S., European and Israeli Law*, LAW & POL'Y INT'L BUS., (1984). For a proposal to eliminate state standing to enjoin otherwise lawful ultra vires acts, see Schaeftler, *supra* note 7, at 91-93.

¹⁵ *Cushman & Wakefield, Inc. v. Dollar Land Corp.*, 44 App. Div. 2d 445, 447-48, 355 N.Y.S.2d 409, 411-12 (1st Dep't 1974) (noting prior unreported action validating ultra vires agreement despite grant of preliminary injunction); *Goodma v. Ladd Estate Co.*, 246 Or. 621, 623, 427 P.2d 102, 103-04 (1967) (denial of injunction to bar enforcement of admitted ultra vires guarantee agreement); *Diamond Paint Co. v. Embry*, 525 S.W.2d 529, 537 (Tex. Civ. App. 1975) (injunction denied on ground that enforcement of ultra vires contract is inequitable); *Inter-Continental Corp. v. Moody*, 411 S.W.2d 578, 591 (Tex. Civ. App. 1966) (minority shareholder permitted to intervene in action to enjoin payment of note issued to satisfy personal obligation of corporation president).

It is evident that actions to enjoin ultra vires activities are infrequent for the following reasons: 1) the potential threat of injunction exists only when the third party enters into a transaction with a limited-purpose corporation, a rare occurrence in the modern business world; 2) the scope of the transaction entered into by the management of the limited-purpose corporation must exceed that permitted by the corporation's purpose clause, an equally rare occurrence; 3) the likelihood that a non-controlling shareholder would detect that a transaction is ultra vires while the transaction is executory is rather slim; 4) a shareholder is likely to be deterred from seeking an injunction by the inconvenience and expense involved; 5) the ultra vires transaction probably would have to be unprofitable for the corporation, or at least thought to be unprofitable by the complaining shareholder, since it is unlikely that a shareholder would act contrary to his own immediate pecuniary interests; and 6) a majority of the shareholders could amend the purpose clause in the articles of incorporation to transform the ultra vires activity into a legitimate one, leading to a dismissal of pending injunction proceedings or to annulment of an injunction already granted.

The possibility of state interference with a contract involving a corporation also is minimal. A recent survey of state attorneys general and secretaries of state indicates that during the past decade, ten actions, at most, have been brought by a state to enjoin an ultra vires act or to dissolve a corporation for engaging in such activity. *See* Schaeftler, *supra* note 7, at 90-91 & nn. 37-38.

one of these cases.¹⁶ In any event, the elimination of the need publicly to file a purpose clause would not prevent a third party who desires to know the limitations of the corporation's authority to act from requesting a copy of the corporate bylaws from the corporation's office. If the corporation refuses to comply with this request, then the third party would have reason to conclude that the corporation has something to hide, and might well decide not to deal with the corporation. Moreover, as a practical matter, a party dealing with a corporation in the present business and legal environment does not independently examine the corporate purpose clause. Rather, a third party relies on a legal opinion issued by the corporation's counsel, based on a study of the relevant law and corporate documents, that informs him that the company has the authority to enter into the desired transaction.

Since the demise of the ultra vires doctrine, the purpose clause ostensibly now serves to define the scope of management's authority rather than corporate capacity. Nevertheless, the relationship between corporate management's desire to discern the extent of its authority and the existence of a publicly filed purpose clause is tenuous at best. It is unrealistic to assume that corporate management either refers to, or is guided by, the corporation's purpose clause. To the extent that management needs to ascertain the boundaries of its authority, it may readily do so by examining available copies of the corporation's articles and bylaws, as well as any applicable statutes. Although bylaws are not filed publicly,¹⁷ they are regarded as a contract between the shareholders and the corporation, and guide corporate management in carrying out its responsibilities.¹⁸ The argument that a corporation that delineates its corporate purpose must rely on publicly filed information to guide its management is akin to the assertion that a coach reads his pre-game comment in the newspapers to know how to direct his team during the course of the game. In short, public filing of the corporation's purpose clause cannot be justified on the ground

¹⁶ *Inter-Continental Corp. v. Moody*, 411 S.W.2d 578, 591 (Tex. Civ. App. 1966).

¹⁷ 8 W. FLETCHER, *supra* note 11, § 4173, at 608-09 (rev. perm. ed. 1982); G. SEWARD, *BASIC CORPORATE PRACTICE* 51 (1966).

¹⁸ *See, e.g.*, *Appeal of the Two Crow Ranch, Inc.*, 51 Mont. 16, 21, 494 P.2d 915, 919 (1972); *Papalexiou v. Tower W. Condominium*, 167 N.J. Super. 516, 531, 401 A.2d 280, 287 (Ch. Div. 1979); *O'Leary v. Board of Directors*, 89 Wis. 2d 156, 169, 278 N.W.2d 217, 222 (1979); 8 W. FLETCHER, *supra* note 11, § 4166, at 592 (rev. perm. ed. 1982); *see also* M. SCHAEFTLER, *THE LIABILITIES OF OFFICE: INDEMNIFICATION AND INSURANCE OF CORPORATE OFFICERS AND DIRECTORS* 122-23 (1976) (bylaws characterized as statutory contract).

that it serves to inform management of the scope of management's authority.

Public filing of the purpose clause also has been justified on the ground that it gives potential investors notice of the scope of management's authority to use funds invested in the company. Yet, if a potential stockholder wishes to know the range of permissible activities of the corporation, either he or the selling shareholder can contact the office of the corporation and request a copy of the corporate bylaws as could any other interested third party. Furthermore, typical investors in medium and large corporations do not rely on, or even examine, the purpose clause prior to making a decision to invest in the corporation. These investors usually investigate the industry or line of business in which the corporation is actively involved. Such information obviously cannot be gathered from the certificate's purpose clause, since the purpose clause delineates all permissible activities that the corporation *may* engage in rather than the specific ventures and businesses it *in fact* is pursuing.

Finally, the state historically has had an interest in ensuring that "an enterprise it had chartered [does] not become perverted to other ends."¹⁹ Two legislative developments in the 20th century, however, illustrate the diminishment of this state interest, and thus have led to the decline in the role of the purpose clause in general. First, restrictions on the number and kind of purposes for which a business may be incorporated have disappeared. This development is exemplified by state statutory provisions based on section 54(c) of the Model Business Corporation Act, which permits the certificate of incorporation merely to state that the corporation may engage in "any lawful business."²⁰ A recent survey

¹⁹ D. VAGTS, *BASIC CORPORATION LAW* 168 (1st ed. 1973). The concept that a state has an interest in preventing a corporation that it has chartered from engaging in illegal or improper activities is related to the state concession theory of corporate existence. See Schaeftler, *supra* note 7, at 87. Under this theory, a corporation's capacity is limited to those powers granted to it by the sovereign, since it had been, and could only have been, created by affirmative act of the sovereign. *Id.*; see Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 *YALE L.J.* 382, 385-94 (1922) (tracing development of the concession theory in early English common law). In the late 19th century, this method of granting corporate charters gave way to incorporation under general incorporation acts, in which initial restrictions on corporate purpose were short lived. See Schaeftler, *supra* note 7, at 87-88.

²⁰ See MODEL BUSINESS CORP. ACT § 54(c) (1971). Section 54 of the Model Business Corporation Act states that:

The articles of incorporation shall set forth:

demonstrated conclusively that the overwhelming majority of corporations in most states, particularly medium and large-sized corporations, has adopted broad, boilerplate purpose clauses or, where available, an "any lawful purpose" clause.²¹ The liberalization of

c) The purpose or purposes for which the corporation is organized which may be stated to be, or to include, the transaction of any or all lawful business for which corporations may be incorporated under this Act.

Id.; see *supra* note 1.

²¹ The author conducted a survey in the following manner to determine the popularity of broad purpose clauses. A questionnaire was sent to the Secretary of State of each state. It requested a true or false answer to each of the following four statements, as well as specification of the percentage of the state's corporations to which each statement applied:

1. Most of the articles of incorporation in your file contain permissive boilerplate language describing the purposes of the company or an "any lawful activity" purpose clause.

2. To the extent that the articles of incorporation contain a limited purpose clause, they were filed by relatively small corporations.

3. The overwhelming majority of certificates of incorporation filed with your office during the last decade include a very broad purpose clause.

4. Large corporations (more than \$1 million in assets and at least 100 shareholders) almost always contain a very broad purpose clause.

Forty-three states responded to the questionnaire. The answers to questions one and three in the questionnaire reflected the opinions and best estimates of those individuals in the Secretary of State offices who were responsible for reviewing articles of incorporation filed with their office prior to issuance of a certificate of incorporation. Three of the states provided inconclusive information. Approximately one-third of the states were not prepared to respond to questions two and four, since they were unable to differentiate among corporations with large or small numbers of shareholders or assets. Twenty-nine officials answered question two based upon a "gut" impression, while twenty-seven did the same for question four.

Although no accurate information was available regarding the total number of business corporations currently active in each state, dates on the number of new incorporations in each state can be found in a publication of the United States Bureau of Census. See U.S. BUREAU OF CENSUS, STATE AND METROPOLITAN AREA DATA BOOK 519 (1982). In 1980, 10 states comprised 59.6% of all new incorporations, and 20 states comprised 78.1% of all new incorporations. *Id.* A correlation between the number of new corporations in each of the top 10 and 20 states and the total number of corporations in each grouping is assumed.

Results:

Question 1: Thirty-two states supported the statement that most articles of incorporation in their files contain a broad boilerplate purpose clause or an "any lawful purpose" provision. All of the top 10 corporate states and 15 out of the 17 responses received from the top 20 states supported this statement. Of the remaining top 20 states, one response was indecisive and another indicated that the number of corporations with broad purpose clauses is about the same as the number of corporations with limited purpose clauses.

Question 2: Twenty-four out of the twenty-nine states responding to this question agreed that most articles of incorporation containing a limited purpose clause were filed by relatively small corporations. Nine responses from the top 20 corporate states supported this statement and one disagreed. The majority of these small corporations may well be professional corporations, which are required by statute to have a specific purpose clause. *E.g.*, N.Y. BUS. CORP. LAW § 1503(b)(i) (McKinney Supp. 1983).

Question 3: Thirty-two states agreed that the overwhelming majority of certificates of incorporations filed in the last decade included a very broad purpose clause. Fourteen out of

purpose clauses and the growing popularity of "any lawful activity" purpose clauses undercut the rationale for state control over corporate purposes. The second legislative development has been the grant of authority to amend the purpose clause.²² This development has vitiated further the state's interest in preventing a corporation from engaging in activities beyond its stated purpose, since the purpose clause can be altered at anytime by the unilateral act of the corporation to reflect the corporation's actual activities.

It may be contended that the elimination of a public filing requirement would create a fundamental danger that the incorporators may choose to engage in illegal activity, conduct a business that is highly regulated, or embark on a venture requiring special state attention.²³ In the absence of a publicly filed purpose clause, the state would not be informed of such activities, and hence would be unable to prohibit or oversee them. It is unlikely, however, that those intending to engage in illegal activities would inform the state of their plans by describing such activities in the purpose clause. Thus, it is doubtful that state agencies could utilize the corporate purpose clause to weed out illegal practices. Furthermore, the fact that the vast majority of corporations, particularly those engaged in regulated activities such as insurance and banking, incorporate with the aid of legal counsel substantially reduces the risk either of incorporation for illegal purposes or of failure to obtain required prior consent of a state agency.

17 responses received from the top 20 corporate states supported the same statement. Two of the top 20 states indicated that 50% of the recently filed certificates contain a broad purpose clause, and one state provided an inconclusive response.

Question 4: Twenty-three state officials agreed that large corporations are unlikely to use limited purpose clauses in their certificates of incorporation. Only four states disagreed with this statement. Eight out of the top 20 corporate states responded to question four and all of those states supported the statement.

The attached table summarizes each state's responses to the author's questionnaire:

SEE TABLE ON NEXT TWO PAGES

²² See, e.g., DEL. CODE ANN. tit. 8, § 242(a)(2) (1983); N.Y. BUS. CORP. LAW § 801(b)(2) (McKinney 1963); MODEL BUS. CORP. ACT § 58(c) (1971); see also Note, *Amending the Articles of Incorporation*, 15 S.C.L. REV. 506, 538 (1963) ("generally recognized charter amendments include [those] . . . enlarging or limiting the corporate purpose").

²³ See, e.g., 5 Z. CAVITCH, BUSINESS ORGANIZATIONS WITH TAX PLANNING § 101.01, at 101-15 (1983) (corporate purpose clause useful in determining "whether the corporation ha[d] been organized for a lawful purpose"); 1 S. FLANAGAN, FLETCHER CORPORATION FORMS ANNOTATED § 268 (4th ed. 1981) (purpose clause requirement enables state to ascertain whether corporation is governed by special statute).

It also has been suggested that the elimination of public filing of the purpose clause will adversely affect third parties whose concern for the public interest in preventing corporations from engaging in illegal activity occasionally prompts them to examine corporate purpose clauses.²⁴ Newspapers, better business bureaus, credit bureaus, and "numerous other groups" reportedly review corporate purpose clauses through the office of the Secretary of State.²⁵ Although these organizations have a valid concern for the public interest, it is apparent that the existence of the corporate purpose clause per se is extraneous to that concern. As mentioned earlier, a simple request for a copy of the corporation's bylaws provides the avenue through which access to a corporation's purposes may be gained. Arguably, the corporation may choose not to cooperate, but such a line of argument sidesteps the issue. Any complaint that merits investigation by a consumer advocate will not be resolved solely through an examination of the purpose clause. It is the illegal nature of specific corporate conduct that is of public concern, rather than the fact that an act falls outside the scope of the permissible activities delineated in the purpose clause. If any action is to be taken against a corporation, it will likely be taken because of illegal, not *ultra vires*, activities.

Some critics may argue that social reformers conceivably could find invaluable information in the purpose clause to advance their causes. They might posit, for example, the following scenario: M.G., a publicly held corporation that conducts some of its business operations in South Africa, has a purpose clause that contains limitations on doing business in countries that constantly violate human rights. The Interfaith Center on Corporate Responsibility (ICCR),²⁶ an organization dedicated to social reform, quickly seizes

²⁴ Letter from Allen J. Beerman, Secretary of State of Nebraska to Michael Schaeftler (June 14, 1982); Letter from Peter P. Harrington, Jr., Assistant Director, Corporations Division of the Office of the Secretary of State of Massachusetts to Michael Schaeftler (October 4, 1982).

²⁵ Letter from Allen J. Beerman, Secretary of State of Nebraska to Michael Schaeftler, at 2 (June 14, 1982) (discussing proposal to eliminate public filing and amendment requirements in regard to purpose clause); see Letter from Peter P. Harrington, Jr., Assistant Director, Corporations Division of the Office of the Secretary of State of Massachusetts to Michael Schaeftler (October 4, 1982) (contending that "change of purpose" amendments "provide a clearer description of current corporate activities" for purposes of consumer protection and law enforcement).

²⁶ The ICCR has in recent years challenged loans, sales and other business activities of American corporations in South Africa. See E. HERMAN, *CORPORATE CONTROL, CORPORATE POWER* 270 (1981). Using its status as an institutional investor, the ICCR has sponsored

the opportunity to purchase enough shares in M.G. to enable ICCR to raise the threat of a derivative action in order to persuade M.G.'s executives to cease operations in South Africa. The ICCR could have acquired the information necessary to obtain this advantage over M.G. as a result of its prior examination of the purpose clauses of the many corporations doing business in South Africa. Once a group such as the ICCR identifies those few corporations with purpose clause limitations on such activities, it could most effectively concentrate its efforts and limited resources on those relatively easy targets. Viewed from this perspective, the purpose clause filing requirement can be seen as providing a benefit for certain public interest groups and thus for the public at large.²⁷

The short answer to this argument is that public interest groups that are not also security holders ought not to have standing to interfere with internal corporate matters. Since the purpose clause is, in essence, an agreement between the corporation and its investors, those wishing to keep the corporation within the bounds of the purpose clause should be shareowners with a vested interest in corporate profits. What public interest is served by the purpose clause requirement if that requirement merely aids an activist group—with no economic stake in the targeted corporation, and whose complaints should be addressed to the White House or to Capitol Hill—in selecting the corporation whose management is most vulnerable to harassment as a method by which it can publicize its social causes? Moreover, such tactics are unlikely to succeed. A company entangled in the web of circumstances described in the M.G. example would be unlikely to give in to a small new investor such as the ICCR. Rather, it would attempt to persuade its other shareholders that the issue of investments in South Africa

resolutions making social responsibility a higher corporate priority at shareholder meetings. Smith, *Church Priorities*, Wall St. J., Sept. 22, 1980, at 24, col. 3.

²⁷ The benefit can be seen by examining the alternative, and less effective, approach that would have to be taken to acquire the same amount of influence over corporate behavior if M.G. had no purpose clause limitations on doing business in South Africa. The ICCR would have to acquire at least \$1000 worth of stock in each of the many corporations doing business in South Africa and then submit a shareholder proposal in the proxy statements of each of these corporations, requesting termination of such operations. See Amendments to Rule 14a8, 48 Fed. Reg. 38, 218 (1983) (to be codified at 17 C.F.R. § 240.14a-8). Past experience with the proxy machinery indicates that such socially oriented resolutions generally are supported by less than 5% of the shareholder vote and thus are unlikely to be adopted. See D. VOGEL, *LOBBYING THE CORPORATION* 120-21 (1978).

is a foreign policy question that should be decided by the State Department, not by private citizens who sit in corporate boardrooms. It then would be a simple matter for the corporation to adopt amendments to the purpose clause to repeal any limitations on investments in South Africa, thus removing the nuisance potential of such actions against management.²⁸

Furthermore, elimination of the purpose clause requirement would not adversely affect the ability of shareholders to limit the scope of corporate activity. Shareholders may still opt to insert in the bylaws a purpose clause with majority or supermajority voting requirements for any amendment or change on such clause, if they so desire.²⁹ This proposal, then, would not preclude minority or nonofficer shareholders from using a purpose clause to limit management's authority and to protect their interests.

On balance, the costs of filing updated corporate purpose clauses with a public office outweigh the marginal utility derived from preserving the status quo. Under the present system, state employees not only must handle the filing of corporate purpose clauses and their amendments, but also must make available the information contained therein at the request of any person or public interest group. Although the monetary cost may be relatively low, this process imposes bureaucratic and clerical burdens on the state without generating any tangible benefit for the public. As has been demonstrated, purpose clauses nowadays are drafted very broadly. Such clauses delineate all permissible activities in which the corporation may engage, rather than reveal the specific ventures and business the corporation is *in fact* pursuing. Tradition and the proclivity to maintain the status quo account, to a large extent, for the continued requirements of including a purpose clause in the certificate and related amendments each time the cor-

²⁸ In the unlikely situation in which amendments to the purpose clause need approval by supermajority vote of 99% of the outstanding shares, the ICCR would need to control only 1% of the shares in order both to veto any legitimization of corporate business activities in South Africa and to force termination of its South African operations. The confluence of such a supermajority requirement and a suitable purpose clause limitation is so improbable that this possibility offers no real grounds for advocating retention of the purpose clause requirement.

²⁹ The power to alter, amend or repeal a corporation's bylaws, or to adopt a new purpose clause in the bylaws, often is vested in the shareholders by state law unless reserved to the board in the articles of incorporation. 8 W. FLETCHER, *supra* note 11, § 4178, at 636 (rev. perm. ed. 1982).

poration's purposes change.³⁰ In view of the absence of any compelling reason for retention of the purpose clause in the certificate, corporate codes should be cleansed by abolishing this requirement.

³⁰ It is the author's belief that the request for inspection of the purpose clause is often made by misinformed lawyers who are unaware of the demise of the ultra vires doctrine. These lawyers erroneously believe that corporations may be able to avoid transactions entered into with their clients by raising the ultra vires defense. Elimination of the public filing of the purpose clause will have an educational effect on such members of the bar. Attorneys approaching the Secretary of State's office with a request to examine the purpose clause of a certain corporation will be informed that the record no longer accurately reflects the contents of that corporation's purposes. These attorneys may then realize that the ultra vires defense has been truly abolished insofar as third parties, unaware of purpose clause limitations, are concerned.