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Mitchell L. Beckloff

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**STATE ACTION IN SAN FRANCISCO ARTS & ATHLETICS,
INC. V. UNITED STATES OLYMPIC COMMITTEE:
LET THE GAMES BEGIN**

*The important thing in the Olympic Games is not to win but to take part, the important thing in life is not the triumph but the struggle. The essential thing is not to have conquered but to have fought well. To spread these precepts is to build up a stronger and more valiant and, above all, more scrupulous and more generous humanity.*¹

I. INTRODUCTION

In 1978, Congress promulgated the Amateur Sports Act² (ASA) which formally incorporated the entity commonly known as the United States Olympic Committee (USOC).³ In addition to defining the objectives and purposes of the USOC,⁴ Congress created and granted to the USOC an exclusive-use right to the words "Olympic," "Olympiad," "Citius Altius Fortius" and any other combination or simulation of these protected words that would tend to cause confusion with the USOC's use

1. B. HENRY & P. YEOMANS, AN APPROVED HISTORY OF THE OLYMPIC GAMES 1 (1984) (quoting Pierre de Coubertin, founder of the International Olympic Committee and modern Olympic Games). This idea has been adopted by the Committee as a basic Olympic principle. See *International Olympic Comm. v. San Francisco Arts & Athletics*, 219 U.S.P.Q. (BNA) 982, 986 (N.D. Cal. 1982), *aff'd*, 707 F.2d 517 (9th Cir. 1983), *permanent injunction aff'd*, 781 F.2d 733 (9th Cir. 1986), *aff'd sub nom. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971 (1987). For additional information on the International Olympic Committee, see *infra* notes 15-45 and accompanying text.

2. 36 U.S.C. §§ 371-396 (1982).

3. *Id.* §§ 371-372.

4. *Id.* § 374. For example, the statute specifies, in pertinent part, that the USOC shall: (1) establish national goals for amateur athletic activities and encourage the attainment of those goals; (2) coordinate and develop amateur athletic activity in the United States directly relating to international amateur athletic competition, so as to foster productive working relationships among sports-related organizations; (3) exercise exclusive jurisdiction, either directly or through its constituent members of committees, over all matters pertaining to the participation of the United States in the Olympic Games . . . including the representation of the United States in such games, and over the organization of the Olympic Games . . . when held in the United States; (4) obtain for the United States, either directly or by delegation to the appropriate national governing body, the most competent amateur representation possible in each competition and event of the Olympic Games . . . ; [and] (5) promote and support amateur athletic activities involving the United States and foreign nations

Id.

of the words.⁵ The ban on the use of these words by others, however, only extends to situations where the word is being used to promote the sale of goods or services, or where the word is being used to promote a theatrical exhibition or an athletic event.⁶ The purpose behind this congressional grant of protection was to assure that the USOC would retain the exclusive use of these words to promote its world-wide athletic competitions.⁷

This exclusive-use right granted to the USOC is more protective than an ordinary trademark,⁸ as ordinary trademark defenses⁹ are inap-

5. *Id.* § 380(a)(4). Specifically, the statute provides:

(a) Without the consent of the [USOC], any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—

....

(4) the words "Olympic", "Olympiad", "Citius Altius Fortius", or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity; shall be subject to suit in a civil action by the [USOC] for the remedies provided in the [Federal Trademark Act of 1946].

Id.

6. *Id.* § 380(a)(4). See *supra* note 5 for pertinent text of the statute.

7. "The fundamental purpose of [the Amateur Sports Act of 1978] was to safeguard the USOC's ability to raise the financial resources that are a critical component of America's capacity to send world-class amateur athletes into international competition without the massive government subsidies enjoyed by competitors from other nations. *United States Olympic Comm. v. Intelicence Corp.*, 737 F.2d 263, 264 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

8. The Federal Trademark (Lanham) Act of 1946, 15 U.S.C. §§ 1051-1127 (1982 & Supp. V 1987), defines trademark as "any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others." *Id.* § 1127 (1982).

It is commonly accepted that:

In general, trademarks perform four functions which are deserving of protection in the courts: (1) to identify one seller's goods and distinguish them from goods sold by others; (2) to signify that all goods bearing the trademark come from a single, albeit anonymous, source; (3) to signify that all goods bearing the trademark are of an equal level of quality; and (4) as a prime instrument in advertising and selling the goods.

1 J.T. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 3:1(B) (2d ed. 1984) (citations omitted).

9. For example, in an ordinary trademark infringement action, a plaintiff must prove "a likelihood of confusion." "'Likelihood of Confusion' is the basic test of both common-law . . . and federal statutory trademark infringement." 2 J.T. MCCARTHY, *supra* note 8, at § 23:1 (citations omitted). Confusion means that the defendant's goods or services are likely to be confused with the plaintiff's goods or services because of the defendant's use of the trademark. Confusion can be found through phonetic similarity, *see, e.g.*, *Coca-Cola Co. v. Clay*, 324 F.2d 198 (C.C.P.A. 1963) ("Cup-O'-Cola" held confusingly similar to "Coca-Cola"), visual similarity, *see, e.g.*, *Application of Calgon Corp.*, 435 F.2d 596 (C.C.P.A. 1971) (water droplet characters held confusingly similar), or meaning to consumer, *see, e.g.*, *National Ass'n of Blue*

plicable in an infringement suit brought by the USOC.¹⁰ Practically, this exclusive-use right prohibits any use of the word "Olympic" in a promotional context without the USOC's permission: Such an unpermitted use is an infringement of the USOC's exclusive right and allows the USOC to sue civilly for injunctive relief as well as for damages.¹¹

Although the federal government created the USOC and gave it an exclusive-use right in the word "Olympic," the Supreme Court of the United States decided in 1987, in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*,¹² that the USOC is a private entity and therefore, is not subject to the constitutional restraints applicable to a government entity.¹³ Thus, the USOC is free to exercise its exclusive intellectual property right in the word "Olympic" unhindered by the restraints imposed on federal governmental actors by the fifth amendment. The practical effect of this holding allows the USOC to make unrestrained decisions as to which groups will be permitted to use the word "Olympic" in their organizational activities. By labeling the USOC a private entity and thus, not subjecting the USOC to constitutional restrictions, the Court has in effect completely insulated the USOC's licensing actions from judicial review on constitutional grounds.

This Note considers, against the backdrop of established Supreme Court state action doctrine,¹⁴ the Court's holding that the USOC is a private entity. It then examines whether the Supreme Court's reasoning

Shield Plans v. United Bankers Life Ins. Co., 362 F.2d 374 (5th Cir. 1966) (Red Cross medical insurance held confusingly similar to Blue Shield medical insurance).

For an exhaustive explanation of confusion, see generally 2 J.T. MCCARTHY, *supra* note 8, at § 23.

10. See *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971, 2977-78 (1987) [*San Francisco II*].

11. 36 U.S.C. § 380 (1982) provides that any infringement is subject to the remedies available in the Federal Trademark Act of 1946. The remedies provided by the Federal Trademark Act are: (1) injunctive relief; (2) profits; (3) damages; (4) attorney fee's in "exceptional cases"; and (5) costs. 15 U.S.C. §§ 1116-1117 (1982).

12. 107 S. Ct. 2971 (1987).

13. *Id.* at 2984-87.

14. "State action" was first defined in the Civil Rights Cases, 109 U.S. 3 (1883), where the Supreme Court invalidated the Civil Rights Act of 1875, which prohibited discrimination based on race in public accommodations. *Id.* at 25. The Court interpreted the fourteenth amendment to prevent only discrimination by the government and not private parties. *Id.* at 11. The Court supported its interpretation using the language of the amendment itself. *Id.* The amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added).

The Court stated that "[i]t is State action of a particular character that is prohibited.

is consistent with previously articulated state action principles. Finally, this Note examines the Supreme Court's most recent state action case to explore current Supreme Court standards for state action analysis.

II. BACKGROUND

To better understand and evaluate the Supreme Court's treatment of state action in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*,¹⁵ this section provides a brief overview of the Olympic Games and the USOC.

The modern day Olympics are a revival of the ancient Olympic Games which began in Olympia, Greece in 776 B.C.¹⁶ These original games were held every four years and consisted of only one competition: a foot race.¹⁷ As a prize, the winner of this contest was awarded a simple olive wreath.¹⁸ As the games continued, however, prizes became more elaborate and athletic events such as boxing and wrestling were added.¹⁹ Eventually, in 394 A.D., Emperor Theodosius I of Greece banned the Olympic Games because increased competitiveness induced bribery, scandal and corruption.²⁰

Baron Pierre de Coubertin of France was responsible for the modern-day revival of the ancient Olympic Games.²¹ Inspired by the uncorrupted games of early Greece, Coubertin believed that a world-wide athletic competition would promote international goodwill.²² In 1892, he announced his plan to bring back the Olympic Games.²³ Part of

Individual invasion of individual rights is not the subject-matter of the amendment." Civil Rights Cases, 109 U.S. at 11 (emphasis added).

Thus, in order to find a violation of constitutional rights, the actor must be the government. With the exception of the thirteenth amendment and the privileges and immunities clause of the fourteenth amendment, the Constitution does not recognize individual invasion of rights, only constitutional violations by "state action." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1688 n.1 (2d ed. 1988).

"State action" can be on a state level or a federal level. For purposes of equal protection, the fifth amendment imposes upon the federal government essentially the same limitations as the fourteenth amendment imposes upon the states. See *infra* note 67 for further discussion of the Court's application of equal protection to the federal government through the fifth amendment.

15. 107 S. Ct. 2971 (1987) [*San Francisco II*].

16. D. WALLECHINSKY, *THE COMPLETE BOOK OF THE OLYMPICS* xvii (1984).

17. *Id.* The foot race was a sprint. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*; see also J. KIERAN & A. DALEY, *THE STORY OF THE OLYMPIC GAMES* 16-17 (1969).

21. B. HENRY & P. YEOMANS, *supra* note 1, at 462.

22. J. KIERAN & A. DALEY, *supra* note 20, at 19.

23. D. WALLECHINSKY, *supra* note 16.

Coubertin's efforts included forming the International Olympic Committee (Committee), a body that still exists today, operating out of Lausanne, Switzerland.²⁴

The Committee is responsible for the rules and policies governing the Olympic Games which are held every four years.²⁵ This body selects the host city for each Olympic Games and participates in the overall negotiations for, and organization of, the Olympics.²⁶

Additionally, the Committee is charged with establishing eligibility rules to determine which countries' athletes may participate in the Olympic Games.²⁷ The Committee's coordinating duties are simplified by recognizing one national Olympic committee in each participating country.²⁸ In the United States, this body is the USOC.²⁹

Created as an unincorporated entity in 1921, the USOC coordinates the team that represents the United States in the Olympic Games.³⁰ The USOC is also responsible for entering athletes in the international athletic competition.³¹ Thus, an American athlete wishing to participate in the Olympic Games must be approved and entered into the competition by the USOC.³²

In 1950, Congress gave the USOC its first corporate charter.³³ In 1978, Congress, by enacting the ASA,³⁴ provided the USOC with specific corporate goals and purposes, thus directing the Olympic movement within the United States.³⁵ As previously noted,³⁶ other statutory provisions gave the USOC the exclusive-use right of the word "Olympic" and related terms.³⁷ Through this statutory grant, Congress sought to allow the USOC to raise funds by licensing the use of the word "Olympic" to private industry.³⁸

24. B. HENRY & P. YEOMANS, *supra* note 1, at 462.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 463.

29. *Id.*

30. *San Francisco II*, 107 S. Ct. at 2979-80 & n.11.

31. See 36 U.S.C. § 375(a)(3) (1982) (enabling USOC to control representation of United States in Olympic Games).

32. *Id.*; see also *id.* § 375(a)(1) (enabling USOC to serve as representative to Olympic Games).

33. *San Francisco II*, 107 S. Ct. at 2980 n.11.

34. 36 U.S.C. §§ 371-396.

35. See 36 U.S.C. § 374. See *supra* note 4 for pertinent text of the statute.

36. See *supra* notes 5-11 and accompanying text.

37. 36 U.S.C. § 380(a)(4). See *supra* note 5 for pertinent text of the statute.

38. "The fundamental purpose of [the] Act was to safeguard the USOC's ability to raise the financial resources that are a critical component of America's capacity to send world-class

The ASA also requires the USOC to provide the executive and legislative branches of the federal government with a detailed financial accounting of the USOC's expenditures each year.³⁹ Beyond this supervisory function, the Amateur Sports Act empowers the Secretary of Commerce to award grants totalling sixteen million dollars to the USOC in an effort to promote amateur athletics.⁴⁰ Accounting reports of the grant expenditures must also be presented by the USOC to Congress each year.⁴¹

In short, the federal government's involvement with the USOC is substantial and pervasive: Through statutes, Congress created the USOC and provided it with goals and purposes;⁴² the USOC's rights and powers are derived from congressional legislative action;⁴³ the government monitors the fiscal affairs of the USOC;⁴⁴ and the Commerce Department has granted the USOC sixteen million dollars in federal funds.⁴⁵

amateur athletes into international competition without the massive government subsidies enjoyed by competitors from other nations." *United States Olympic Comm. v. Intelicense Corp.*, 737 F.2d 263, 264 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984); *see also* *United States Olympic Comm. v. International Fed'n of Bodybuilders*, 219 U.S.P.Q. (BNA) 353, 355 (D.D.C. 1982) ("[the USOC's] funds primarily come from the private sector").

In the district court, the "USOC submitted evidence that it derives the bulk of its funds from private donations and licensing of the 'Olympic' name and emblem, with licenses raising \$40 million in [a] four-year cycle." Brief for Respondents at 5, *San Francisco II*, 107 S. Ct. at 2971 (No. 86-270).

39. 36 U.S.C. § 382a(a). The pertinent portion of the statute states:

The [USOC] shall, on or before the first day of June in each year, transmit simultaneously to the President and to each House of Congress a detailed report of its operations for the preceding calendar year, including a full and complete statement of its receipts and expenditures . . . of the [USOC] during the preceding year.

Id.

40. *Id.* § 384(a). The statute states: "The Secretary of Commerce . . . is authorized to award grants to the United States Olympic Committee . . . to assist in the development of amateur athletics in the United States. . . . The Secretary may . . . award grants to the [USOC] in a total sum not exceeding \$16,000,000 . . ." *Id.*

41. *Id.* § 384(b). The statute states:

The [USOC] shall . . . transmit to the Congress a report which shall include a detailed accounting of the funds made available to the [USOC] by the Secretary pursuant to subsection (a) of this section and a comprehensive description of those projects which the [USOC] anticipates it will finance during the next fiscal year with funds authorized by this section.

Id.

42. *Id.* § 374. See *supra* note 4 for pertinent text of the statute.

43. See, e.g., 36 U.S.C. § 375 (defining powers of USOC).

44. See *id.* § 382a(a); see *supra* note 39 for pertinent text of the statute (fiscal affair supervision). See 36 U.S.C. § 384(b); see *supra* note 41 for pertinent text of the statute (grant expenditure reporting).

45. See 36 U.S.C. § 384(a); see also *supra* note 40 for pertinent text of the statute (grant provision).

III. STATEMENT OF THE CASE

A. *The Facts*

In 1981, a group of individuals sought to incorporate in California under the name "Golden Gate Olympic Association."⁴⁶ The California Department of Corporations instructed the association that the word "Olympic" was unavailable for use in a corporate title.⁴⁷ Consequently, the group incorporated under its current name, San Francisco Arts & Athletics, Inc. (SFAA), and began to promote the "Gay Olympic Games" by using the title on its letterhead, mailings and in advertisements in local newspapers.⁴⁸

The "Gay Olympic Games" (Games) were to be a nine day athletic competition in San Francisco during August, 1982.⁴⁹ The promoters' purpose in staging the event was "to combat homophobia and to work for the health and tolerance of gay and lesbian persons."⁵⁰ SFAA expected that athletes from cities all over the world would participate in the athletic competitions. The Games were scheduled to open with a ceremony in San Francisco's Kezar Stadium.⁵¹ The ceremony was to begin with the lighting of a "Gay Olympic Flame," followed by a parade of the competing athletes marching behind the flags of their respective cities.⁵² The actual athletic competition was to feature eighteen different events,

46. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971, 2975 (1987) [*San Francisco II*].

47. *Id.*

48. *Id.*

49. *Id.*

50. *International Olympic Comm. v. San Francisco Arts & Athletics*, 789 F.2d 1319, 1320 (9th Cir. 1986) (Kozinski, J., dissenting) (denial of rehearing en banc). "Homophobia" is an exaggerated, inexplicable and illogical fear of homosexuals. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 862 (1977).

Other purposes of the Gay Olympic Games included:

- 1) To provide a healthy recreational alternative to a suppressed minority.
- 2) To educate the public at large towards a more reasonable characterization of gay men and women.
- 3) To attempt, through athletics, to bring about a positive and gradual assimilation of gay men and women, as well as gays and non-gays, and to diminish the ageist, sexist and racist divisiveness existing in all communities regardless of sexual orientation.

[SFAA's expectations] were that people of all persuasions would be drawn to the event because of its Olympic format and that its nature of 'serious fun' would create a climate of friendship and co-operation[,] false images and misconceptions about gay people would decline as a result of a participatory [*sic*] educational process, and benefit ALL communities."

San Francisco II, 107 S. Ct. at 2980 n.13 (quoting Joint Appendix at 93-94) (emphasis in original).

51. *Id.* at 2975.

52. *Id.*

with the winners of each event being awarded gold, silver or bronze medals.⁵³ To fund the event, SFAA sold merchandise such as bumper stickers, buttons and T-shirts bearing the title "Gay Olympic Games."⁵⁴

In December of 1981, the USOC notified SFAA that under the Amateur Sports Act of 1978,⁵⁵ the USOC had an exclusive right to use the word "Olympic" in promoting athletic contests.⁵⁶ It then directed SFAA to terminate its use of the word in promoting its athletic competition.⁵⁷ SFAA initially agreed to comply with this request, but later resumed unauthorized use of the word⁵⁸ on the ground that it had a constitutional right to do so.⁵⁹

Upon discovering the continued unauthorized use of the word, the USOC filed suit in the United States District Court for the Northern District of California to enjoin SFAA's use of the word.⁶⁰ The USOC claimed that under the ASA, any use of the word "Olympic" in a promotional context violated the USOC's exclusive-use right.⁶¹

After a hearing, the district court granted the USOC a temporary restraining order.⁶² A preliminary injunction was then granted after an additional hearing.⁶³ SFAA appealed to the United States Court of Appeals for the Ninth Circuit,⁶⁴ which upheld the preliminary injunction.⁶⁵ After discovery, the district court then granted summary judgment and a permanent injunction in favor of the USOC.⁶⁶ SFAA again sought review in the Ninth Circuit.

53. *Id.*

54. *Id.*

55. 36 U.S.C. §§ 371-396 (1982).

56. *San Francisco II*, 107 S. Ct. at 2975-76.

57. *Id.*

58. *Id.* at 2976.

59. Brief for Respondents at 5, *San Francisco II*, 107 S. Ct. at 2971 (No. 86-270). SFAA based its right on the first amendment. *Id.* For a summary of SFAA's first amendment argument in the Supreme Court, see *infra* note 81.

60. *San Francisco II*, 107 S. Ct. at 2976.

61. *Id.*

62. Brief for Respondents at 5, *San Francisco II*, 107 S. Ct. at 2971 (No. 86-270).

63. *Id.* This is the only reported opinion at the district court level. *International Olympic Comm. v. San Francisco Arts & Athletics*, 219 U.S.P.Q. (BNA) 982 (N.D. Cal. 1982), *aff'd*, 707 F.2d 517 (9th Cir. 1983), *permanent injunction aff'd*, 781 F.2d 733 (9th Cir. 1986), *aff'd sub nom. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971 (1987).

64. Brief for Respondents at 7, *San Francisco II*, 107 S. Ct. at 2971 (No. 86-270).

65. *International Olympic Comm. v. San Francisco Arts & Athletics*, 707 F.2d 517 (9th Cir. 1983), *permanent injunction aff'd*, 781 F.2d 733 (9th Cir. 1986), *aff'd sub nom. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971 (1987).

66. Brief for Respondents at 8, *San Francisco II*, 107 S. Ct. at 2971 (No. 86-270).

B. The Reasoning of the Ninth Circuit

In the court of appeals, SFAA contended that enforcement of the Amateur Sports Act against the SFAA violated the equal protection component of the fifth amendment of the United States Constitution.⁶⁷ Specifically, SFAA asserted that in denying SFAA the use of the word "Olympic," the USOC had unconstitutionally discriminated against the SFAA because the group consisted mainly of homosexuals.⁶⁸ In support of this allegation, SFAA cited "numerous other competitive games advertised as 'Olympics' "⁶⁹ upon which the USOC had failed to take any legal action.⁷⁰ As of August of 1982, these competitions included the:

International Police Olympics; Armenian Olympics; Olympic of Ballet; Olympics of the Mind; Senior Olympics; Golden Olympics; Firemens Olympics; United States Skill Olympics; Virginia Golden Olympics; Wrist-Wrestling Olympics; Crab-Cooking Olympics; Dog Olympics; Nude Olympics; Rat Olympics; WackyOlympics; Xerox Olympics; [and] Alcoholic Olympics.⁷¹

67. *International Olympic Comm. v. San Francisco Arts & Athletics*, 781 F.2d 733, 736 (9th Cir. 1986) [*San Francisco I*], *aff'd sub nom. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971 (1987).

Although there is no express provision in the fifth amendment that constitutes an equal protection clause, the Supreme Court reads one into the amendment. The equal protection clause is thus implied through the due process clause. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (desegregation of public schools in District of Columbia dictated by due process clause of fifth amendment); *see also Washington v. Davis*, 426 U.S. 229 (1976) (District of Columbia's police officer application test alleged to violate due process clause of fifth amendment).

68. *San Francisco I*, 781 F.2d at 736.

69. *Id.*

70. *Id.*

71. Brief for Petitioners at 8, *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971 (No. 86-270) [*San Francisco II*].

The USOC sought to distinguish these cases by explaining that SFAA's use would "most likely affect the value of the term 'Olympic.'" Brief for Respondents at 42, *San Francisco II*, 107 S. Ct. at 2971 (No. 86-270).

Additionally, the USOC asserted that the "Crab-Cooking Olympics" and "Dog Olympics" were not "serious athletic contests, but rather are essentially shows." *Id.* at 41. The USOC did not, however, distinguish any of the other contests cited by SFAA.

Moreover, the USOC added that "[the USOC] has no vendetta against [SFAA] or anyone else. In fact, when [SFAA] at first agreed voluntarily to drop the word 'Olympic,' . . . [the USOC's] executive director thanked them and wished them success in their event." *Id.* at 42 n.60.

The only uses the USOC has expressly authorized in the area of athletic competitions are the "Special Olympics" (for the mentally disabled), the "Junior Olympics" and the "Explorer Olympics" (both for youngsters). Brief for Petitioners at 8, *San Francisco II*, 107 S. Ct. at 2971 (No. 86-270). The authorization for the handicapped complies with one of the goals Congress established for the Committee. *See* 36 U.S.C. § 374(13) (1982).

The Ninth Circuit, however, never reached the merits of SFAA's equal protection claim. The court held that the USOC was a private entity and was therefore not subject to the restraints of the Constitution.⁷²

SFAA had urged the court that judicial enforcement of the USOC's exclusive-use right constituted sufficient involvement by the government to trigger the guarantees of the Constitution.⁷³ SFAA relied on *Shelley v. Kraemer*⁷⁴ where the Supreme Court of the United States held that state court enforcement of restrictive racial covenants in real property titles constituted state action and thus violated the fourteenth amendment.⁷⁵ In response, the Ninth Circuit concluded that *Shelley* governs only where a court intervenes between private parties so as to somehow benefit the state.⁷⁶ Mere governmental enforcement of private rights, it said, will not trigger the protections of the Constitution.⁷⁷

Finding that the USOC was not a state actor, the Ninth Circuit refused to reach the merits of SFAA's equal protection claim. After the Ninth Circuit denied SFAA's petition for a rehearing en banc,⁷⁸ SFAA petitioned the Supreme Court of the United States for a writ of certiorari.

IV. REASONING OF THE SUPREME COURT

A. *The Majority Opinion*

The Supreme Court granted the writ⁷⁹ but affirmed the decision of the Ninth Circuit.⁸⁰ Significantly, the Court agreed with the Ninth Circuit that the USOC was not a state actor, and as such was not subject to

72. *San Francisco I*, 781 F.2d at 736-37.

73. *Id.* at 737.

74. 334 U.S. 1 (1948).

75. *Id.* at 20.

76. *San Francisco I*, 781 F.2d at 737. The court cited *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). But see *infra* notes 113-30, 177-93 and accompanying text for contrary arguments that (1) the court inaccurately characterized the holding of *Burton*; and (2) the government is not merely an intermediary between two private parties. For further discussion of *Burton*, see *infra* notes 113-30 and accompanying text.

77. *San Francisco I*, 781 F.2d at 737.

78. *International Olympic Comm. v. San Francisco Arts & Athletics*, 789 F.2d 1319, 1320 (9th Cir. 1986).

79. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 312 (1986).

80. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971 (1987) [*San Francisco II*]. The majority opinion was written by Justice Powell. Justice Powell was joined by Chief Justice Rehnquist and Justices White, Stevens and Scalia. Justices Blackmun and O'Connor dissented from the majority in the finding that the respondents were not state actors. *Id.* at 2987 (O'Connor, J., concurring in part and dissenting in part). Justice Brennan filed a dissenting opinion that Justice Marshall joined. *Id.* (Brennan, J., dissenting). For a discussion of the dissent, see *infra* notes 97-107 and accompanying text.

the restraints of the Constitution. Thus, it too avoided having to consider SFAA's equal protection claim.⁸¹

The Justices examined the USOC to determine whether it was a state actor and therefore bound by the Constitution. Although Congress granted the USOC a corporate charter,⁸² this factor alone did not propel the USOC into state actor status.⁸³ The Court noted that all corporations receive their corporate charters from some government, usually a state, and that such limited involvement by the government has never been sufficient by itself to transform a corporation into a state actor.⁸⁴ Further, the Court reaffirmed that even heavy regulation by the government does not constitute sufficient state involvement to make the regulated entity a state actor.⁸⁵

The Court also held that although Congress gave the USOC an exclusive-use right in the word "Olympic" and related terms, such power did not render the USOC a state actor.⁸⁶ The Court reasoned that while all trademark rights are given by governmental acts, the private actions of trademark holders have not been regarded as governmental acts.⁸⁷ Moreover, the Court stated that although Congress intended to help the

81. *San Francisco II*, 107 S. Ct. at 2986-87. SFAA asserted that the USOC had sought to prevent SFAA from using the word "Olympic" solely because the USOC disapproved of SFAA's largely homosexual membership. Brief for Petitioner at 10, *San Francisco II*, 107 S. Ct. at 2971 (No. 86-270).

In addition to SFAA's state action claim, SFAA argued that it should be able to assert trademark defenses against the USOC. *San Francisco II*, 107 S. Ct. at 2976. The Court rejected SFAA's claim. In considering 36 U.S.C. § 380(a)(4), the Court relied on the plain language of the statute, which forbids any person from using the word "Olympic," regardless of its non-confusing use. *Id.* at 2977; see *supra* note 5 for pertinent text of the statute. Further, the "legislative history demonstrates that Congress intended to provide the USOC with exclusive control of the use of the word 'Olympic' without regard to whether an unauthorized use of the word tends to cause confusion." *San Francisco II*, 107 S. Ct. at 2977.

Also, SFAA contended that the first amendment prevented the USOC from holding this exclusive-use right in the word "Olympic." *Id.* at 2978. The Court found SFAA's argument unpersuasive. "Because Congress reasonably could conclude that the USOC has distinguished the word 'Olympic' through its own efforts, Congress' decision to grant the USOC a limited property right in the word 'Olympic' falls within the scope of trademark law protections, and thus certainly within constitutional bounds." *Id.* at 2980. Also, "[e]ven though this protection may exceed the traditional rights of a trademark owner in certain circumstances, the application of the [Amateur Sports] Act to this commercial speech is not broader than necessary to protect the legitimate congressional interest and therefore does not violate the First Amendment." *Id.* at 2983.

82. 36 U.S.C. § 371-372 (1982).

83. *San Francisco II*, 107 S. Ct. at 2985.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

USOC with funding,⁸⁸ that fact did not make the USOC a governmental entity.⁸⁹

Moreover, the Court recognized that a private entity will be considered a state actor where the private entity is performing what has traditionally been an exclusive governmental function.⁹⁰ While the USOC performs actions that are of national interest and serves the general public, the Court concluded that the administration of amateur sports contests is not a traditional governmental function.⁹¹

The Court agreed that the government can be held answerable for the decisions of a private entity when the government has coerced or substantially encouraged the private entity to make a certain decision.⁹² However, SFAA could not prevail on this argument, either, for the government had not been responsible for the USOC's decision to preclude SFAA from using the word "Olympic."⁹³ The only federal involvement the Court perceived was a possible failure to supervise the USOC, but such passive acquiescence would not suffice to make the actions of the USOC governmental in nature.⁹⁴

Thus, the Court held that the USOC was not a state actor, and that it was therefore not subject to the Constitution.⁹⁵ Accordingly, the Court did not reach SFAA's fifth amendment equal protection claim.⁹⁶

88. *Id.*

89. *Id.* The Court relied on *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and *Blum v. Yaretsky*, 457 U.S. 991 (1982) for this proposition. In *Rendell-Baker*, the Court rejected a claim by discharged personnel of a private school that government regulation and public funding made the school a state actor. 457 U.S. at 840-42.

In *Blum*, Medicaid patients in a nursing home challenged the decisions of the nursing home in transferring or discharging the patients without notice and an opportunity to be heard. 457 U.S. at 993. The Court found that although the home was extensively regulated, there was not a close nexus between the regulations and the challenged action. *Id.* at 1004. Additionally, the Court found no governmental coercion in the decisions made by the nursing home. *Id.* Finally, the Court held that providing nursing home services was not traditionally associated with sovereignty. *Id.* at 1005. Thus, the Court rejected the patients' claim that the home was a state actor. *Id.*

90. *San Francisco II*, 107 S. Ct. at 2985. It can be argued that this standard may not be viable considering the Court's recent ruling in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), where the Court held that it is impossible for courts to define traditional governmental functions. Indeed, the Court has limited the public function determination in state action cases. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (function exclusively performed by the government); see also *infra* text accompanying notes 131-58 for further discussion of the public function test for state action.

91. *San Francisco II*, 107 S. Ct. at 2985.

92. *Id.* at 2986.

93. *Id.*

94. *Id.*

95. *Id.* at 2984-87.

96. *Id.* at 2986-87.

B. The Dissenting Opinions

Four Justices dissented,⁹⁷ believing that the USOC did qualify as a state actor.⁹⁸ Justices O'Connor and Blackmun agreed with the majority's rejection of SFAA's other claims,⁹⁹ but would have remanded the case for a determination of the claim of discrimination.¹⁰⁰ Justice Brennan, joined by Justice Marshall,¹⁰¹ disagreed with the majority on all counts¹⁰² and would likewise have remanded the case for a determination of whether SFAA's discrimination claim was valid.¹⁰³

All dissenting Justices found the USOC to be a state actor under Justice Brennan's "symbiotic relationship" analysis,¹⁰⁴ while Justices Brennan and Marshall also relied on the "public function" test.¹⁰⁵ Justice Brennan asserted that under either of these previously articulated Supreme Court tests, the USOC was a state actor.¹⁰⁶ Thus, four members of the Court agreed that the USOC was a state actor and that the case should have been remanded for a determination of SFAA's discrimination claim.¹⁰⁷

V. ANALYSIS

Precedent in the area of state action has been conflicting and confusing.¹⁰⁸ The Court has often established state action to exist in a certain

97. The four Justices were Brennan, Marshall, Blackmun and O'Connor. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971, 2987 (1987) [*San Francisco II*] (O'Connor, J., concurring in part and dissenting in part); *id.* (Brennan, J., dissenting).

98. *Id.* (O'Connor, J., concurring in part and dissenting in part); *id.* (Brennan, J., dissenting).

99. See *supra* note 81 for a summary of SFAA's other claims.

100. *San Francisco II*, 107 S. Ct. 2987 (O'Connor, J., concurring in part and dissenting in part).

101. *San Francisco II*, 107 S. Ct. at 2987 (1987) (Brennan, J., dissenting).

102. *Id.* at 2987 (Brennan, J., dissenting). Justice Brennan agreed with SFAA that the exclusive-use right violated the first amendment. See *supra* note 81 for a brief discussion of SFAA's claims. The Justice based his first amendment analysis on the overbreadth doctrine and discriminatory regulation of expression. *San Francisco II*, 107 S. Ct. at 2994-99 (Brennan, J., dissenting).

103. *Id.* at 2993 (Brennan, J., dissenting).

104. *Id.* at 2991-93 (Brennan, J., dissenting). See *infra* notes 113-30 and accompanying text for a discussion of the symbiotic relationship test.

105. *Id.* at 2988 (Brennan, J., dissenting). See *infra* notes 131-58 and accompanying text for a discussion of the public function test.

106. *Id.* at 2987-93.

107. *Id.* at 2987 (O'Connor, J., concurring in part and dissenting in part); see also *id.* at 2993 (Brennan, J., dissenting).

108. "There still are no clear principles for determining whether state action exists. As Judge Friendly recently observed, the statement fifteen years ago that the 'state action cases

situation, only to later limit its effect.¹⁰⁹ From this precedent, the Court has created a labyrinth that can support any decision the Court may desire to reach. This decision-making process results in the Court's failure to articulate and adhere to concrete state action requirements, making a plaintiff's burden of proving state action nearly impossible to meet. The decision in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*¹¹⁰ demonstrates that the Court has begun a retreat from its nearly insurmountable state action test. This is ironic considering the result in the case.

This section examines the USOC and analyzes the Court's decision in *San Francisco Arts & Athletics* under the most recent state action test articulated by the Court. By examining the Court's analysis of state action in *San Francisco Arts & Athletics* and the Court's most recent state action decision,¹¹¹ the Court's discomfort with the stringent test for state action will become clear. Finally, the Author proposes that the Court should continue its trend in making state action a reality for plaintiffs instead of a legal fiction.

A. State Action Standards

To analyze the Court's decision in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*,¹¹² the Court's previously established state action tests must be reviewed. This section therefore sets forth the standards that the Supreme Court has used to determine when state action exists.

1. The symbiotic relationship test

In 1961, the Court found state action to exist when the state was significantly involved with a "private entity."¹¹³ In *Burton v. Wilmington Parking Authority*,¹¹⁴ a state agency leased some commercial space in

were a "conceptual disaster area" . . . would appear even more apt today." Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503, 504 (1985) (quoting Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982) (citing Black, *Foreward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 70 (1967)) (footnote omitted).

109. Compare *Marsh v. Alabama*, 326 U.S. 501 (1946) (mere traditional public function) with *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (public function that traditionally has been exclusively reserved to the sovereign).

110. 107 S. Ct. 2971 (1987) [*San Francisco II*].

111. *West v. Atkins*, 108 S. Ct. 2250 (1988).

112. 107 S. Ct. 2971 (1987) [*San Francisco II*].

113. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

114. 365 U.S. 715 (1961).

a state-owned parking garage to a coffee shop operator.¹¹⁵ The coffee shop refused to serve the plaintiff on the basis of his race.¹¹⁶ The plaintiff sued in state court for declaratory and injunctive relief.¹¹⁷ The Supreme Court of Delaware dismissed Burton's complaint, holding that the coffee shop was a private entity and as such, its activities were not restricted by the Constitution.¹¹⁸

On appeal, the Supreme Court of the United States stated that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."¹¹⁹ The Court noted that there were mutual benefits present between the government and the coffee shop owner under the lease agreement.¹²⁰ While the building and land were publicly owned,¹²¹ the leased premises "constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its [parking] project as a self-sustaining unit."¹²² Further, the state advanced funds for the repair and maintenance of the building.¹²³ The coffee shop also increased the value of the state's realty by adding fixtures and creating customers for the parking garage.¹²⁴ Additionally, the Court noted that the building that housed the coffee shop appeared to be public in character.¹²⁵ Official government signs were posted on the structure while state and federal flags flew from the roof.¹²⁶

The Supreme Court held that the coffee shop was a state actor.¹²⁷ The Court claimed that when the government is significantly involved in a mutually beneficial relationship with a private entity, that entity's conduct is limited by constitutional boundaries.¹²⁸

115. *Id.* at 719.

116. *Id.* at 716.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 724. "It cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits."
Id.

121. *Id.* at 723.

122. *Id.* at 723-24.

123. *Id.* at 724.

124. *Id.*

125. *Id.* at 720.

126. *Id.*

127. *Id.* at 725.

128. *Id.* at 724.

It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and

The *Burton* case represents the notion that a private entity could be so intertwined with the state that it would become a state actor.¹²⁹ Where the state has "insinuated itself into a position of interdependence with [a private entity] . . . it must be recognized as a joint participant in the challenged activity."¹³⁰ Thus, under *Burton*, a seemingly private entity's actions could constitute state action where the entity and the government have a mutually beneficial dependent relationship.

2. The public function test

In addition to *Burton*'s symbiotic relationship test, the Supreme Court has found state action when a private entity performs a traditional public function.¹³¹ For example, in *Evans v. Newton*,¹³² decided in 1966, the Court held that a private park, due to its municipal nature and public function, was a state entity whose actions were limited by the Constitution.¹³³ In *Evans*, a United States Senator devised a plot of land to the Mayor and City of Macon, Georgia to be used as a park for "whites only."¹³⁴ The city acted as trustee for the park but soon sought to remove itself, acknowledging that it could not act in a discriminatory manner.¹³⁵ Several black citizens intervened, asking that the court refuse to appoint private trustees, as requested by the city, alleging that racial segregation was unconstitutional and against the public policy of the United States.¹³⁶

The Supreme Court of Georgia denied the relief requested by the black citizens.¹³⁷ The Supreme Court of the United States reversed. It was clear to the Court that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."¹³⁸

The Court held that the municipal character of the park, coupled

unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings.

Id. at 724-25.

129. *Id.* at 725.

130. *Id.*

131. See *Evans v. Newton*, 382 U.S. 296, 301 (1966); see also *Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

132. 382 U.S. 296 (1966).

133. *Id.* at 301.

134. *Id.* at 297.

135. *Id.*

136. *Id.* at 298.

137. *Id.*

138. *Id.* at 299.

with the city's control over it, subjected the park's operation to the restraints of the Constitution even if operated by private parties.¹³⁹ The park's public character required that it be treated as a public institution, subject to the prohibitions contained in the Constitution, regardless of who held title to the land.¹⁴⁰

The proposition that private entities may be treated as state actors was not unique to *Evans*. In *Marsh v. Alabama*,¹⁴¹ decided in 1946, the Supreme Court held that exclusive property rights must sometimes yield to first amendment rights where a public function is being performed.¹⁴² In *Marsh*, a private corporation owned a town in Alabama that was easily and freely accessible to all members of the public.¹⁴³ The town prosecuted a Jehovah's Witness for disseminating religious materials on the corporate property.¹⁴⁴

The Supreme Court struck down the state court criminal trespass conviction, noting that people who lived in or visited a company town could not be denied their freedom of speech or religion merely because the property was held by a private actor.¹⁴⁵ The Court held that "[o]wnership does not always mean absolute dominion."¹⁴⁶ The Court noted that "the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is [*sic*] subject to state regulation."¹⁴⁷ Thus, the Court noted that although facilities are private, they could be subject to constitutional restrictions in certain situations.¹⁴⁸

The *Marsh* Court explained that the company was performing a public function by running the town.¹⁴⁹ It stated that "[w]hen [the Court] balance[s] the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion . . . the latter occupy a preferred position."¹⁵⁰ Thus, where a seemingly private entity

139. *Id.* at 301-02.

140. *Id.* at 302.

141. 326 U.S. 501 (1946).

142. *Id.* at 509.

143. *Id.* at 503.

144. *Id.*

145. *Id.* at 509.

146. *Id.* at 506.

147. *Id.*

148. *Id.*

149. *Id.* at 507. Thus, running a town is a traditional public function. *Id.*

150. *Id.* at 509.

was performing traditional governmental functions, state action would be found to exist.

Subsequent to *Marsh*, the Court narrowed the public function test drastically.¹⁵¹ In addition to requiring that the activity performed by the entity be a traditional public function, the Court began requiring an element of exclusivity.¹⁵² Thus, the public function test could be met only if the entity was performing an activity that *traditionally* had been *exclusively* reserved to the state.¹⁵³ For example, in *Jackson v. Metropolitan Edison Co.*,¹⁵⁴ a private utility company, extensively regulated by the state, did not have to provide a customer with procedural due process protections before her electrical services were terminated.¹⁵⁵ The Court reasoned that the utility was not a state actor because providing electrical service was not a function "traditionally [and exclusively] associated with sovereignty."¹⁵⁶ Although the utility was required by state statute to provide customers with electricity, arguably a public function, the guarantees of the Constitution did not apply because the utility was not performing an exclusive sovereign function.¹⁵⁷ Under this narrowed view of the public function test, state action existed only when an entity's function was normally performed solely by the sovereign.¹⁵⁸

3. *Lugar's* refinement of the state action test

In 1982, in *Lugar v. Edmondson Oil Co.*,¹⁵⁹ the Supreme Court further redefined the state action test. The Court set forth a concrete, two-part formula to be used in determining whether the actions of a private entity could be labeled state action.¹⁶⁰

Lugar, a truckstop operator, was sued in Virginia state court by his creditor/supplier, Edmondson Oil Company.¹⁶¹ Before commencement of that action, Edmondson was granted prejudgment attachment of

151. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); see also *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

152. *Jackson*, 419 U.S. at 352 (public function must have been "traditionally exclusively reserved to the State").

153. *Id.*

154. 419 U.S. 345 (1974).

155. *Id.* at 358-59.

156. *Id.* at 353.

157. *Id.*

158. The narrow view taken by the Court now makes it extremely difficult to use this theory. The Court has specified that elections, education, fire and police protection and tax collection are probably the only functions which traditionally have been exclusively reserved to the government. *Flagg Bros.*, 436 U.S. at 157-64.

159. 457 U.S. 922 (1982).

160. *Id.* at 937.

161. *Id.* at 924.

Lugar's property in an ex parte hearing.¹⁶² Edmondson had alleged that Lugar might dispose of the property to defeat any judgment against him.¹⁶³ Lugar then brought suit in federal court against Edmondson Oil and its president, alleging that the defendants acted jointly with the state and deprived Lugar of due process as required by the fourteenth amendment.¹⁶⁴ The district court held that Lugar failed to state a valid claim for relief as Edmondson Oil was not a state actor.¹⁶⁵ The Court of Appeals for the Fourth Circuit affirmed.¹⁶⁶

In reversing the lower court, the Supreme Court held that private parties engage in state action when: (1) the party depriving persons of a constitutional right can be labeled a state actor; and (2) the deprivation of a constitutional right is accomplished under color of state law or a privilege created by the government.¹⁶⁷ Thus, under *Lugar*, the Court will find state action where the questioned conduct is undertaken by a state actor, acting pursuant to a right or duty created by the government.

The *Lugar* Court stated that to meet the first part of the test—whether the entity is a state actor—previously articulated state action tests, such as *Evans'* public function test or *Burton's* symbiotic relationship test, could be used.¹⁶⁸ *Lugar* thus did not overrule the previous state action tests, but simply added an additional requirement to the analysis. According to *Lugar*, the previous state action tests only establish whether the seemingly private entity is a state actor.¹⁶⁹ Therefore, to find state action, the second part of the *Lugar* test must be satisfied as well.

The second part of the *Lugar* analysis requires that the state actor operate pursuant to a state law or privilege.¹⁷⁰ In *Lugar*, this requirement was met because Edmondson Oil invoked a prejudgment attachment procedure which had been established by state law.¹⁷¹ Thus, there was a direct relationship between the deprivation of Lugar's procedural due process rights and a government created privilege.

The Court concluded that Edmondson Oil was a state actor who

162. *Id.*

163. *Id.*

164. *Id.* at 925.

165. *Id.*

166. *Id.*

167. *Id.* at 937.

168. *Id.* at 939.

169. *Id.*

170. *Id.* at 937.

171. *Id.* at 941.

had acted pursuant to a privilege created by the government.¹⁷² Hence, Edmondson Oil's conduct was deemed to constitute state action.

B. Current State Action Standards Applied To San Francisco Arts & Athletics

In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*,¹⁷³ the Supreme Court appears to have reached the correct result regarding state action, but for incorrect reasons. This section analyzes the USOC under the state action test articulated in *Lugar v. Edmondson Oil Co.*¹⁷⁴ and evaluates the Court's skewed analysis in *San Francisco Arts & Athletics*. Instead of twisting precedent to find no state actor, the Court should have relied on part two of the *Lugar* test to dismiss SFAA's discrimination claim.

1. State actor requirement

Part one of the *Lugar* test for determining state action requires that the alleged unconstitutional conduct involve a state actor.¹⁷⁵ Employing the reasoning of the *Lugar* Court, this requirement can be met through the "symbiotic relationship," "public function," or other state action tests.¹⁷⁶

a. Burton's symbiotic relationship test

Under *Burton v. Wilmington Parking Authority*,¹⁷⁷ a private entity is found to be a state actor where the government and a seemingly private entity have a mutually beneficial relationship.¹⁷⁸ In *San Francisco Arts & Athletics*, the USOC and the government had a symbiotic relationship which should have been deemed to satisfy this test.

First, Congress has conferred many benefits on the USOC. The USOC owes its very existence to Congress.¹⁷⁹ Federal statutes prescribe the purposes and goals of the USOC,¹⁸⁰ as well as preclude any internal

172. *Id.* at 941-42. Edmondson Oil Company was found to be a state actor under a state compulsion theory. *Id.* See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), for an illustration of the joint participant theory.

173. 107 S. Ct. 2971 (1987) [*San Francisco II*].

174. 457 U.S. 922 (1982).

175. *Id.*

176. For a discussion of the "symbiotic relationship" test and the "public function" test, see *supra* notes 113-58 and accompanying text.

177. 365 U.S. 715 (1961).

178. *Id.* at 723-24.

179. 36 U.S.C. § 371 (1982) actually created the USOC.

180. *Id.* § 374. See *supra* note 4 for pertinent text of the statute.

changes without notice and comment pursuant to administrative procedures.¹⁸¹

Beyond giving life to the USOC, Congress also conferred sustenance upon it. Primarily, the government gave the Committee its valuable exclusive-use right to the words "Olympic," "Olympiad," and "Citius Altius Fortius."¹⁸² Further, the USOC is endowed with remedies against parties who combine or simulate the protected words in a manner that is likely to cause confusion.¹⁸³ Although this privilege is not pecuniary, it allows the USOC to raise substantial amounts of money through implementing licensing and marketing plans with private industry.¹⁸⁴ While public donations are accepted by the USOC, the licensing of the protected words is the only active way the USOC may raise money.¹⁸⁵ Thus, the substantial livelihood of the USOC was granted by the government.

Congress also supervises the Committee's finances. Although the USOC has never requested a grant, federal funding totalling sixteen million dollars is available to the USOC.¹⁸⁶ The ASA also requires the

181. 36 U.S.C. § 375(b) provides in pertinent part that:

The [USOC] shall adopt and may amend a constitution and bylaws not inconsistent with the laws of the United States or of any State, except that the [USOC] may amend its constitution only if it—

(1) publishes in its principal publication a general notice of the proposed alteration of the constitution, . . . the time and place of the [USOC's] regular meeting at which the alteration is to be decided, and a provision informing interested persons that they may submit materials as authorized in paragraph (2); and

(2) gives to all interested persons, prior to the adoption of any amendment, an opportunity to submit written data, views, or arguments concerning the proposed amendment for a period of at least 60 days after the date of publication of the notice.

Id.

182. *Id.* § 380(a)(4). See *supra* note 5 for pertinent text of the statute.

183. See, e.g., *United States Olympic Comm. v. Intelicense Corp.*, 737 F.2d 263, 267 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

184. *Id.* at 264 (fundamental purpose of ASA is to allow USOC to raise its own funds).

185. 36 U.S.C. § 380 also allows the USOC to license the Olympic symbol/logo which consists of five interlocking rings in blue, yellow, black, green and red. See also *supra* note 38 for a brief discussion of licensing and fund raising by the USOC.

186. 36 U.S.C. § 384(a). See *supra* note 40 for pertinent text of the statute. Although the USOC has never actually applied for grants pursuant to 36 U.S.C. § 384, the USOC has been awarded federal monies. In 1980, the USOC received ten million dollars. This was a payment from the federal government to offset the USOC's losses from the 1980 Moscow Olympic Games boycott. *San Francisco II*, 107 S. Ct. at 2984 n.25.

Congressional dissenters from the approval of the Amateur Sports Act of 1978 felt that the grants to be given to the USOC would constitute government involvement in amateur athletics. H.R. REP. NO. 1627, 95th Cong., 2d Sess. 44-47 (1978). "[I]f we are to involve the Federal Government in this area and use public funds to subsidize Olympic-related actions, I feel it is incumbent upon us to take positions consistent with the human rights policies we have adopted in other international programs." *Id.* at 45 (dissenting remarks of Rep. Drinan).

USOC to file annual reports with Congress.¹⁸⁷

Moreover, the Amateur Sports Act of 1978 also confers upon the USOC the right to perform as the sole representative of the United States to the International Olympic Committee, the organizing body of the Olympic Games.¹⁸⁸ Through this right, the USOC retains the exclusive power to decide which amateur American athletes will participate in the Olympic Games.

The government in turn derives valuable benefits from the USOC. Congress enacted the ASA in response to the disorganized state of amateur athletics in the United States.¹⁸⁹ The government now has "for the first time in its history, an exclusive and effective organization to coordinate and administer all amateur athletics related to international competition, and to represent that program abroad."¹⁹⁰ Strong representation by the American team in the Olympics reflects well on the nation as a whole.¹⁹¹

Further, as in *Burton*, where the public perception of the entity's status as a governmental actor was influential in a finding of state action,¹⁹² the public perception of the USOC as a governmental actor is also strong. The USOC appears to be part of the government—it flies the American flag, uses patriotic insignia, tallies medal winners by nation and has the national anthem performed when an American athlete wins a gold medal. These factors overwhelmingly convey the impression that the USOC and the Olympic team are acting on behalf of the government.

The mutual benefits enjoyed by the government and the USOC surely meet the test of *Burton*. Through the ASA, the government "has so far insinuated itself into a position of interdependence with [the USOC] that it must be recognized as a joint participant in the challenged activity."¹⁹³ By meeting the symbiotic relationship test, the USOC satis-

187. 36 U.S.C. § 382a(a). See *supra* note 39 for pertinent text of the statute.

188. For additional information on the International Olympic Committee see *supra* notes 15-41 and accompanying text.

189. H.R. REP. NO. 1627, 95th Cong., 2d Sess. 8-9 (1978).

190. *San Francisco II*, 107 S. Ct. at 2992 (Brennan, J., dissenting).

191. As has been stated:

Every aspect of the Olympic pageant, from the procession of athletes costumed in national uniform, to the raising of national flags and the playing of national anthems at the medal ceremony, to the official tally of medals won by each national team, reinforces the national significance of Olympic participation. Indeed, it was the perception of shortcomings in the nation's performance that led to the Amateur Sports Act of 1978.

Id. at 2988 (Brennan, J., dissenting) (emphasis in original).

192. *Burton*, 365 U.S. at 720. See *supra* notes 113-30 and accompanying text for a full discussion of *Burton*.

193. *Id.* at 725.

fied the state actor requirement of part one of the *Lugar* state action test.

b. Evans' public function test

Another way to satisfy part one of the *Lugar* state action standard is by meeting the public function test articulated in *Evans v. Newton*¹⁹⁴ and *Marsh v. Alabama*.¹⁹⁵ Although the Court has narrowed the test in subsequent cases,¹⁹⁶ if a seemingly private entity performs an activity that traditionally has been exclusively reserved to the state, the entity meets the state actor requirement of *Lugar*.¹⁹⁷

The USOC performs a traditional governmental function normally reserved to the sovereign. The ASA tacitly gives to the USOC the right to engage in foreign affairs by allowing the USOC to be the sole representative of the United States in international athletic activities. The USOC is responsible for determining which athletes will represent the United States in the Olympic Games.¹⁹⁸ As Justice Brennan stated, "[a]s the Olympic Games have grown in international visibility and importance, the USOC's role as [the United States'] national representative has taken on increasing significance."¹⁹⁹

The political ramifications of this function are significant. Although the Games are not intended to be political, in practice they have become so. For example, in response to the Soviet Union's invasion of Afghanistan, the United States boycotted the 1980 Moscow Olympic Games.²⁰⁰

194. 382 U.S. 296 (1966).

195. 326 U.S. 501 (1946).

196. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); see also *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

197. *Lugar*, 457 U.S. at 939.

198. 36 U.S.C. § 375(a)(3) (1982) states: "The [USOC] shall have the perpetual succession and power to organize, finance, and control the representation of the United States in the competitions and events of the Olympic Games . . . and obtain . . . amateur representation for such games."

199. *San Francisco II*, 107 S. Ct. at 2988 (Brennan, J., dissenting).

200. D. WALLECHINSKY, *supra* note 16, at xix.

With his eyes on the upcoming presidential election and his pride on the line, [President] Carter engaged in extensive arm-twisting to get other nations to support the boycott. Some governments, such as those of Great Britain and Australia, supported the boycott, but allowed the athletes to decide for themselves if they wanted to go to Moscow. No such freedom of choice was allowed U.S. athletes, as Carter threatened to revoke the passport of any athlete who tried to travel to the U.S.S.R.

Id.

The American boycott in 1980 was not the first boycott in the history of the Olympics. For example, African nations boycotted the 1976 Olympic Games in Montreal, Canada to protest a New Zealand rugby team's touring of South Africa. *Id.* The African Nations demanded expulsion of New Zealand from the competition. *Id.*

Other nations that have boycotted the Olympic Games at various times include: Egypt, Iraq, Lebanon, Holland, Spain, and Switzerland. *Id.* at xviii-xix.

The USOC's decision not to participate in the 1980 Moscow Games was based on presidential and congressional coercion consisting of threats of legal action and financial cutbacks.²⁰¹ Such interest by Congress and the President in the Olympic Games demonstrates the substantial impact of the USOC's actions on foreign policy.²⁰²

The impact of the Olympics on foreign affairs also is demonstrated through other recent Olympic Games. Disappointed with the performance of American athletes in the 1988 Winter Olympic Games in Calgary, Canada, the USOC created an "Overview" committee to improve the performance of American athletes in future Games.²⁰³ The chairman of the new "Overview" committee, George Steinbrenner, characterized the Olympics as "'a matter of national and international pride The World Series, the Super Bowl, [have] some international interest, [but they don't] pit nation against nation the way the Olympics do.'"²⁰⁴ Further, before leaving for the 1988 Summer Games in Seoul, Korea, American Olympians were briefed by the State Department and were given a videotaped blessing by President Reagan.²⁰⁵

Additional support for the proposition that the USOC is performing the traditional sovereign function of foreign affairs and relations can be found by examining the history of the ASA. Originally, President Ford established a commission to report on the diminishing performance of American teams at the Olympic Games.²⁰⁶ The commission recommended the establishment of the USOC as a solution to poor American performance.²⁰⁷ After creating the USOC, Congress has essentially kept control over it in an attempt to supervise the USOC's important governmental activities. The USOC is required to report to Congress annually.²⁰⁸ Moreover, providing funds to the USOC assures that the USOC may continue to carry out its important governmental function.

201. *San Francisco II*, 107 S. Ct. at 2988 (Brennan, J., dissenting).

202. The Olympic Games often operate as a political stage fraught with international drama. "For example, Jesse Owens' dramatic performance in the 1936 Olympic games was widely perceived as a rebuke to Hitler and Nazism." *Id.* at 2989 n.8 (Brennan, J., dissenting). Additionally, Justice Brennan, in dissent, noted that "the tragic, politically motivated attack on the Israeli Olympic Team in 1972, in which 11 Israeli athletes, 5 Arabs, and one German policeman were killed, forever dispelled any illusion that the Olympics could exist apart from the violent vicissitudes of international politics." *Id.* at 2990 n.8 (Brennan, J., dissenting).

203. *Leave It To George and His Good Old Yankee Know-How*, Los Angeles Times, February 25, 1988, § III, at 6, col. 1.

204. *Id.*

205. Los Angeles Times, August 26, 1988, § II, at 1, col. 1.

206. *San Francisco II*, 107 S. Ct. at 2990 (Brennan, J., dissenting).

207. H.R. REP. NO. 1627, 95th Cong., 2d Sess. 9 (1978).

208. 36 U.S.C. § 382a(a) (1982). See *supra* note 39 for pertinent text of the statute.

As the sole representative of the United States in the area of international amateur athletic competitions, the USOC meets the requirements of the narrowed public function test. The USOC functions as a representative of the United States to the world community. The USOC's representation of the nation is a traditional public function which has exclusively been reserved to the sovereign. Such a capacity manifestly mandates finding that the USOC is a state actor and thus satisfies part one of the *Lugar* test for state action.

2. Pursuant to a state created privilege requirement

Although the USOC qualifies as a state actor under part one of the *Lugar* test, the USOC must also satisfy part two of the test to have its conduct deemed state action. Part two requires that the private entity act pursuant to a governmentally created law or privilege.²⁰⁹ In *Lugar*, the Court specifically noted that to meet part two of the test in a discrimination case, the government must be the source of the decision to discriminate.²¹⁰ The Court explained that the *Lugar* test would only be met if "the decision to discriminate [can] be ascribed to a[] governmental decision."²¹¹ Where the alleged discriminatory policies of an entity are unrelated to the government decisions that affect that entity, the second part of the *Lugar* test is not satisfied.²¹² Thus, as illustrated by *Lugar*, the government rule or privilege must cause the deprivation of constitutional rights.²¹³

This requirement cannot be met by the facts of *San Francisco Arts & Athletics*. The government has imposed no rule of conduct upon the USOC mandating that the USOC discriminate. Congress granted the USOC the ability to license the word "Olympic" but Congress did not make any licensing decisions, nor did it provide any guidelines that arguably condoned such alleged discrimination against homosexuals.²¹⁴

The USOC has complete discretion as to whether it will license the

209. *Lugar*, 457 U.S. at 937.

210. *Id.* at 938.

211. *Id.* The Court cited *Moose Lodge v. Iris*, 407 U.S. 163 (1972), where no state action was found, as an example of this second *Lugar* requirement in a case involving a discrimination claim. *Lugar*, 407 U.S. at 938. In *Moose Lodge*, a local branch of a fraternal organization refused to serve a black. 457 U.S. at 164-65. The plaintiff urged that because the state liquor control board had issued the lodge a liquor license and regulated the entity, the Court must deem the lodge a state actor. *Id.* at 171. The Court rejected the plaintiff's claim finding that the state regulation did "not sufficiently implicate the State in the discriminatory . . . policies of Moose Lodge." *Id.* at 177.

212. *Lugar*, 457 U.S. at 938.

213. *Id.* at 937-38.

214. 36 U.S.C. 380(a)(4). See *supra* note 5 for pertinent text of the statute.

word "Olympic" to an organization. Neither Congress nor any other governmental body influences these USOC licensing decisions. The USOC's decision to forbid SFAA from using the word "Olympic" was unrelated to the government. The "governmental decisions that did affect [the USOC, i.e. corporate creation, goals and purposes] were unconnected with [the USOC's alleged] discriminatory policies."²¹⁵ Instead, the USOC's decision could be attributed to sound business practices and judgment.²¹⁶ The USOC was merely acting to protect its lucrative licensing franchise, granted by Congress, which is the only active means by which the USOC can raise funds. Thus, because the USOC was not acting pursuant to a government created rule of conduct, part two of *Lugar's* state action test was not satisfied. The majority's result, although arrived at in a different manner, was therefore correct.

C. *The Hidden Agenda in San Francisco Arts & Athletics*

While in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*²¹⁷ the Court properly concluded that the actions of the USOC could not be attributed to the government, the majority's reasoning was flawed. The *San Francisco Arts & Athletics* Court did not rely on *Lugar v. Edmondson Oil Co.*²¹⁸ in finding that no state action was present. Instead of focusing on the second prong of the *Lugar* test, upon which the Court could have easily dismissed SFAA's claim, the majority concentrated on the state actor component of the *Lugar* test. In the process, the Court ignored *Burton v. Wilmington Parking Authority*,²¹⁹ distinguished the *Marsh v. Alabama*²²⁰ principle and, in effect, found that part one of the state action test was not satisfied²²¹—a conclusion that is contrary to precedent.

Considering the relative ease with which the Court could have disposed of SFAA's discrimination claim under part two of the *Lugar* test,

215. *Lugar*, 457 U.S. at 938. By contrast, in *Lugar*, where the Court found that Edmondson Oil Company was acting pursuant to state rules of conduct, Edmondson Oil Company had no choice regarding how to pursue its litigation. Once it made the decision to take legal action, the state, by law, mandated the procedures to be followed. *Id.* at 924.

216. *Cf. Rendell-Baker v. Kohn*, 457 U.S. 830, 843-44 (1982) (White, J., concurring) (exercising professional judgments does not sufficiently implicate government).

217. 107 S. Ct. 2971 (1987) [*San Francisco II*].

218. 457 U.S. 922 (1982).

219. 365 U.S. 715 (1961). "The Court fails to mention *Burton v. Wilmington Parking Authority*, a case on which [SFAA] heavily relies. In each of the decisions principally relied on today, the Court thought it important to discuss and distinguish *Burton*." *San Francisco II*, 107 S. Ct. at 2991 n.12 (Brennan, J., dissenting) (citations omitted).

220. 326 U.S. 501 (1946).

221. *San Francisco II*, 107 S. Ct. at 2985.

the majority's approach is curious. Instead of laboriously finding that there was no state actor, the Court could have assumed *arguendo* that the USOC was a state actor and then concluded that part two of the *Lugar* test had not been met.

In retrospect, the Court's backward approach in *San Francisco Arts & Athletics* may have signaled the end to the strict second requirement for state action established in *Lugar*. The Court perhaps ignored *Lugar* in an attempt to extinguish *Lugar*'s standards for judging state action. At the same time, the Court simply may not have been prepared to reach the merits of SFAA's claim—that the USOC had unconstitutionally discriminated against homosexuals—and therefore, purposefully secreted itself in the thicket of state action doctrine.

1. Current Supreme Court analysis of state action

The hint as to what may have prompted the Court's treatment of *Lugar* is provided by the Supreme Court's most recent state action decision, *West v. Atkins*.²²² In *West*, the Court determined that a doctor under a contract to provide medical care to prison inmates had engaged in state action.²²³ A prison inmate alleged that he had received negligent medical care from the state-contracted doctor.²²⁴ The inmate brought an action against the doctor for violating his eighth amendment rights.²²⁵ The district court dismissed the inmate's claim, finding that there was no state action.²²⁶ The Court of Appeals for the Fourth Circuit affirmed the decision.²²⁷

In *West*, the court of appeals rested its conclusion on *Polk County v. Dodson*,²²⁸ a case that essentially followed the *Lugar* analysis. In *Dodson*, a public defender withdrew from representing a criminal defendant on appeal, on the ground that the defendant's claims were without merit.²²⁹ The defendant subsequently brought suit against his lawyer, alleging that his constitutional rights had been violated by the public defender's withdrawal.²³⁰ The Supreme Court held that the actions of the public defender were not state action.²³¹

222. 108 S. Ct. 2250 (1988).

223. *Id.* at 2260.

224. *Id.* at 2252-53.

225. *Id.* at 2253.

226. *Id.*

227. *Id.*

228. 454 U.S. 312 (1981).

229. *Id.* at 314.

230. *Id.* at 315.

231. *Id.* at 317-18.

In determining that there was no state action, the *Dodson* Court relied on a *Lugar*-type test.²³² Part one of the test was easily satisfied because the public defender was an agent of the state.²³³ Part two, however, was not met,²³⁴ for the public defender's "assignment entailed functions and obligations in no way dependent on state authority."²³⁵ Although canons of professional responsibility bound the public defender, she did not act pursuant to government-created rules of conduct.²³⁶ The Court analogized the relationship between the criminal defendant and the public defender to a relationship between "any other lawyer and client."²³⁷ Thus, the challenged decisions of the public defender could not be ascribed to any governmental decision.²³⁸ Not able to attribute the behavior of the lawyer to some governmental decision, the criminal defendant could not bring a constitutional claim against the public defender as there was no state action.

In *West*, a unanimous Supreme Court found that the court of appeals' reliance on *Dodson* was erroneous.²³⁹ In finding that the actions of the state-contracted doctor were state action, the Court was forced to distinguish *Dodson*. Despite the nearly identical facts, the Court found *Dodson* unpersuasive.²⁴⁰ The Court simply explained that in *Dodson*, there was no state action because the attorney was an adversary to the state.²⁴¹ In contrast, the relationship between the doctor and the state in *West* was one of cooperation.²⁴² This flimsy distinction provided the Court with the opportunity to hold that the acts of the doctor constituted state action.²⁴³

The *West* decision is wholly inconsistent with *Lugar*. While the doctor was an employee of the state, thus satisfying part one of the *Lugar* test,²⁴⁴ the doctor did not act pursuant to governmental decisions. Under a *Lugar* analysis, the doctor's conduct in *West* cannot be found to

232. *Id.*

233. A state official is a state actor. *See, e.g., Lugar*, 457 U.S. at 935-36 n.18.

234. *Dodson*, 454 U.S. at 317-19.

235. *Id.* at 318.

236. *See Lugar*, 457 U.S. at 937.

237. *Dodson*, 454 U.S. at 318.

238. *Id.*

239. *West*, 108 S. Ct. at 2256.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* "In contrast to the public defender, Doctor Atkins' professional and ethical obligation to make independent medical judgments, did not set him in conflict with the State and other prison authorities." *Id.*

244. "[S]tate employment is generally sufficient to render the defendant a state actor" *Lugar*, 457 U.S. at 936 n.18.

constitute state action just as the public defender's conduct was not state action in *Dodson*. There is no government-created rule or privilege motivating either the doctor or the public defender that could be determined to have deprived another of constitutional rights. The medical scenario of *West* is consistent with the legal scenario of *Dodson*: Both the doctor and the lawyer acted pursuant to professional and ethical obligations, not state law. Therefore, in finding in *West* that the doctor's acts were state action, the Court ignored part two of the *Lugar* state action analysis.

2. Effect of *San Francisco Arts & Athletics* and *West*

In *West*, the Court could not avoid part two of the *Lugar* test by finding that there was no state actor since the doctor was clearly an agent of the state. Thus, the Court was forced to deal with part two of the test and attempted to distinguish it. Yet, the message seems clear: The *Lugar* test is no longer favored by the Court. Although neither *San Francisco Arts & Athletics* nor *West* expressly overruled *Lugar*, the Court's deviation from the standard may demonstrate that the *Lugar* test is no longer viable for determining state action.

In *San Francisco Arts & Athletics*, the Court ignored *Burton*²⁴⁵ and struggled to distinguish the *Marsh* principle²⁴⁶ in an attempt to avoid relying on and hence, reinforcing the legitimacy of the second part of the *Lugar* test. Using part two of this state action test in *San Francisco Arts & Athletics* would have injected *Lugar* with new life and would have prevented the Court from retreating from the test with ease in later cases such as *West*. By failing in *San Francisco Arts & Athletics* to fully analyze the USOC under the state action test, the Court easily eroded the *Lugar* principle.

Given the Court's reluctance to use part two of the *Lugar* test, the Court's only option was to manipulate the previous state action cases in order to find no state actor. By finding that the USOC was not a state actor, the Court bypassed SFAA's equal protection claim, and thereby avoided deciding whether homosexuals are a suspect or quasi-suspect class for the purposes of equal protection.

Had the Court reached this issue, it would have found the lower

245. Justice Brennan criticized the majority for failing to distinguish *Burton*. *San Francisco II*, 107 S. Ct. at 2991 n.12 (Brennan, J., dissenting). Additionally, the Justice noted that the majority had relied upon cases where the Court had distinguished *Burton*. *Id.* (Brennan, J., dissenting).

246. *Id.* at 2985 (Court's analysis focused on amateur sports generally rather than overall effect of Olympics).

courts in conflict.²⁴⁷ For example, in 1988, the Ninth Circuit held that homosexuals are a suspect class and accordingly entitled to strict scrutiny in an equal protection analysis.²⁴⁸ Justices Brennan and Marshall agree with the Ninth Circuit.²⁴⁹ As the Supreme Court has not yet squarely confronted this issue,²⁵⁰ such a decision would likely create quite a political stir as homosexuality is often viewed as a question of morality, rather than merely a matter of legal classification.²⁵¹

Although the Court has successfully avoided analyzing whether homosexuals are a suspect class for equal protection purposes, in *Bowers v. Hardwick*²⁵² the Court did address homosexual sexual activity in a substantive due process context.²⁵³ A homosexual had brought suit against the state of Georgia, alleging that the state's sodomy law was unconstitutional under the due process clause of the fourteenth amendment.²⁵⁴ The statute in question criminalized all acts of consensual sodomy regardless of the sexual orientation of the participants.²⁵⁵ By focusing on whether the Constitution guaranteed a fundamental right to engage in homosexual sodomy, a plurality of the Court concluded that there was no such right and therefore, the state sodomy law was constitutional.²⁵⁶

247. Compare *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (homosexuals are not quasi-suspect or suspect class) and *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) and *Rich v. Dirks*, 735 F.2d 1220, 1229 (10th Cir. 1984) with *Watkins v. United States Army*, 847 F.2d 1329, 1349 (9th Cir.), *reh'g granted*, 847 F.2d 1362 (9th Cir. 1988) (homosexuals are suspect class).

248. *Watkins*, 847 F.2d at 1329. "We find not only that our analysis of each of the relevant factors supports our conclusion, but also that the principles underlying [the] equal protection doctrine—the principles that gave rise to these factors in the first place—compel us to conclude that homosexuals constitute a suspect class." *Id.* at 1349.

249. *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009 (1985) (Brennan, J., dissenting). In *Mad River*, the Court without opinion denied certiorari of a school teacher's claim that she had been fired from her job solely because she was a homosexual. *Id.* (Brennan, J., dissenting). Justice Brennan, joined by Justice Marshall, dissented from the denial of certiorari. *Id.* (Brennan, J., dissenting).

Justice Brennan stated "discrimination against homosexuals or bisexuals based solely on their sexual preference raises significant constitutional questions under both prongs of our settled equal protection analysis." *Id.* at 1014 (Brennan, J., dissenting).

250. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986). For a detailed discussion of *Bowers* and an examination of homosexuals under an equal protection analysis, see generally Note, *Bowers v. Hardwick: A Giant Step Back for Privacy Rights*, 20 LOY. L.A.L. REV. 1013 (1987) (authored by Randi Maurer).

251. See *infra* text accompanying note 259.

252. 478 U.S. 186 (1986).

253. *Id.* at 190.

254. *Id.* at 188-89.

255. *Id.* at 188 n.1.

256. *Id.* at 190-91. "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the

Justice Blackmun, dissenting in *Bowers*, pointed out the majority's issue dodging. The Justice contended that the majority had manipulated its result by failing to address the case as involving constitutional rights of privacy.²⁵⁷ Moreover, Justice Blackmun harshly criticized the majority for focusing on sexual orientation, given the statute's broad language.²⁵⁸

The Court's difficulty with homosexual issues in constitutional terms is illustrated by Chief Justice Burger's comments:

[T]he proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. . . . Blackstone described "the infamous crime against nature" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.²⁵⁹

While the decision may be difficult or unpopular, it is the duty of the Court to enforce constitutional mandates.²⁶⁰ Instead of continuously manipulating the doctrine of state action to reach or avoid reaching a result, the Court should adhere to concrete standards.

In sum, when the Supreme Court heard *San Francisco Arts & Athletics* in 1987, the *Lugar* test for state action may already have fallen into disfavor. The *West* case decided one year later adds support to this proposition. Yet, a straight forward application of the pre-*Lugar* state action test would have compelled the Justices to reach SFAA's equal protection claim. This the Court was unprepared to do. It therefore performed a tortured analysis of state action cases in order to find that the USOC was simply not subject to constitutional limitations of any kind.

many States that still make such conduct illegal and have done so for a very long time." *Id.* at 190.

257. *Id.* at 202-03 (Blackmun, J., dissenting). "The Court's cramped reading of the issue before it makes for a short opinion, but it does little to make for a persuasive one." *Id.* (Blackmun, J., dissenting). "A fair reading of the [sodomy] statute and of the complaint clearly reveals that the majority . . . distorted the question this case present[ed]." *Id.* at 200 (Blackmun, J., dissenting).

258. *Id.* at 199 (Blackmun, J., dissenting).

259. *Id.* at 196-97 (Burger, C.J., concurring) (quoting 4 W. BLACKSTONE, COMMENTARIES *215).

260. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

VI. CONCLUSION

After *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*²⁶¹ and *West v. Atkins*,²⁶² the strict state action requirements of *Lugar v. Edmondson Oil Co.*²⁶³ appear to no longer apply. The failure of the majority to rely on *Lugar* signals a trend that the Court will no longer adhere to that test.

Whether *Lugar* endures as an analytical weapon in the Court's arsenal of state action tests remains to be seen. It is possible that the Court is returning to a standard more favorable to those challenging the conduct of alleged state actors. The retreat from *Lugar* may well help these plaintiffs. Yet, because the state action analysis is still malleable, as illustrated by *San Francisco Arts & Athletics*, the Court remains free to manipulate the doctrine to reach or avoid controversial issues.

*Mitchell L. Beckloff**

261. 107 S. Ct. 2971 (1987).

262. 108 S. Ct. 2250 (1988).

263. 457 U.S. 922 (1982).

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