

April 1988

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### Recommended Citation

Lois Nitti, *The Gay Olympics: San Francisco Arts & Athletics v. United States Olympic Committee*, 8 Pace L. Rev. 373 (1988)

DOI: <https://doi.org/10.58948/2331-3528.1503>

Available at: <https://digitalcommons.pace.edu/plr/vol8/iss2/5>

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# The Gay Olympics: *San Francisco Arts & Athletics v. United States Olympic Committee*\*

## I. Introduction

Is it possible for Congress' interest in a private corporation to be substantial enough to permit violations of first amendment freedoms and yet weak enough for that private corporation to avoid the label "government actor" for fifth amendment purposes?

In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*,<sup>1</sup> where San Francisco Arts & Athletics, Inc. ("SFAA") was enjoined from using the word "Olympic" in the promotion of the "Gay Olympic Games," the Supreme Court demonstrated that it is, indeed, possible. The majority held that Congress may, without violating the first amendment, grant the United States Olympic Committee ("USOC"),<sup>2</sup> a private corporation, exclusive use of the word "Olympic" without requiring the USOC to prove that an unauthorized use is likely to cause confusion.<sup>3</sup> The Court reasoned that the restrictions on expressive speech were merely incidental in light of Congress' substantial interest in encouraging and rewarding the USOC's activities.<sup>4</sup> Congress has, through section 110 of the Amateur Sports Act,<sup>5</sup> properly granted the USOC the right to prohibit certain

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\* The author would like to thank Roberta Roos for her guidance and support throughout the writing of this Note.

1. 107 S. Ct. 2971 (1987).

2. For a discussion of the Olympic Games, see *infra* note 41.

3. *San Francisco Arts & Athletics*, 107 S. Ct. at 2978.

4. *Id.* at 2981.

5. Amateur Sports Act, 92 Stat. 3048 (1978) (codified at 36 U.S.C. §§ 371-396 (1983)).

Section 110 of the Amateur Sports Act 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—

(1) the symbol of the International Olympic Committee, consisting of 5 interlocking rings;

commercial and promotional uses of the word "Olympic" and various Olympic symbols.

At the same time that the Court rejected the SFAA's first amendment claim, it also rejected the SFAA's argument that the fifth amendment prohibits the USOC from enforcing its rights in a discriminatory manner. The Court held that the fifth amendment was not applicable because the USOC was not a "government actor" and thus, state action was not involved. The facts, procedural history, and a summary of the majority, concurring, and dissenting opinions are presented in Part II of this Note.

A discussion of the "state action" doctrine is found in Part

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(2) the emblem of the [USOC], consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief;

(3) any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by, the International Olympic Committee or the [USOC]; or

(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 Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946) [15 U.S.C. §§ 1051-1127]. However, any person who actually used the emblem in subsection (a)(2) of this section, or the words, or any combination thereof, in subsection (a)(4) of this section for any lawful purpose prior to September 21, 1950, shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services. In addition, any person who actually used, or whose assignor actually used, any other trademark, trade name, sign, symbol, or insignia described in subsections (a)(3) and (4) of this section for any lawful purpose prior to September 21, 1950 shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services.

(b) The [USOC] may authorize contributors and suppliers of goods or services to use the trade name of the [USOC] as well as any trademark, symbol, insignia, or emblem of the International Olympic Committee or of the [USOC] in advertising that the contributions, goods, or services were donated, supplied, or furnished to or for the use of, approved, selected, or used by the [USOC] or United States Olympic or Pan-American team or team members.

(c) The [USOC] shall have the exclusive right to use the name "United States Olympic Committee"; the symbol described in subsection (a)(1) of this section; the emblem described in subsection (a)(2) of this section; and the words "Olympic", "Olympiad", "Citius Altius Fortius" or any combination thereof subject to the preexisting rights described in subsection (a) of this section.

Amateur Sports Act, 92 Stat. 3048 (1978) (codified at 36 U.S.C. § 380 (1983)). Opinions and articles discussed in this Note refer to this section as "section 110" or as "section 380." For the sake of clarity, "section 110" will be used throughout this Note, regardless of the term used by the source cited.

III. Background information on the "state action" doctrine is provided, with particular attention paid to the various tests the Court has used in determining when private conduct is subject to fifth or fourteenth amendment prohibitions. Part III includes a discussion of the current trend in these cases and an analysis of the opinion in terms of "state action" with particular focus on the strong dissent by Justice Brennan.

Part IV explores the history of first amendment protection of noncommercial and commercial speech, with special attention paid to commercial speech both generally and in the context of trademark law. This Part also includes a discussion of the different rationales upon which a claim for trademark infringement may be based and the resulting first amendment ramifications. Other cases involving the USOC and section 110 actions are also to be found in Part IV, which concludes with an analysis of the Court's opinion regarding the first amendment issue.

Part V concludes that when viewed individually, each of the Court's holdings in *San Francisco Arts & Athletics*, although unfortunate, was not surprising in light of the current trends in trademark and state action law. Further, although the end result of each holding is the same, namely deference to the USOC at the expense of the SFAA's individual liberties, the holdings when viewed simultaneously are irreconcilable. The Court should not have found congressional interest in the USOC to be substantial enough to permit violations of first amendment freedoms while finding that same interest weak enough for the USOC to avoid the label "government actor."

## II. The Case

### A. *The Facts*

The SFAA is a nonprofit California corporation.<sup>6</sup> After its incorporation in 1981, the SFAA began to promote the "Gay Olympic Games," using those words on its mailings and letterheads and in local newspapers.<sup>7</sup> The Games were to be a nine-

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6. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971, 2975 (1987). The SFAA originally tried to incorporate under the name "Golden Gate Olympic Association," but was told by the California Department of Corporations that the word "Olympic" could not appear in its corporate title. *Id.*

7. *Id.*

day event to take place in August 1982, in San Francisco. The SFAA expected athletes from hundreds of U.S. cities as well as from foreign cities to participate.<sup>8</sup> The Games, which were "designed to combat homophobia and to work for the health and tolerance of gay and lesbian persons,"<sup>9</sup> were to have opened with a ceremony that was expected to rival that of the traditional Olympic Games.<sup>10</sup>

The SFAA sold T-shirts, buttons, bumper stickers, and other merchandise bearing the title "Gay Olympic Games" in order to cover the costs of the planned event.<sup>11</sup> In late December of 1981, the executive director of the USOC wrote to the SFAA informing it of the existence of section 110 of the Amateur Sports Act, which granted the USOC the right to prohibit certain commercial and promotional uses of the word "Olympic,"<sup>12</sup> and requesting that the SFAA immediately terminate the use of the word "Olympic" in its description of the planned games.<sup>13</sup> The SFAA complied with the USOC's request by agreeing to substitute the word "Athletic" for the word "Olympic," but one month later, the SFAA started using the term "Olympic" again.<sup>14</sup> The USOC became aware of the renewed use through a newspaper article in May 1982.<sup>15</sup> As a result, the USOC brought suit to enjoin the SFAA's use of the word "Olympic."<sup>16</sup>

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8. *Id.* The 1982 athletic event was ultimately called "Gay Games I," with 1,300 men and women from 12 countries, 27 states, and 179 cities participating. The "Gay Games II" were held in 1986 with approximately 3,400 participants from 17 countries. The 1990 Gay Games are scheduled to take place in Vancouver, B.C. *Id.* at 2975 n.2.

9. *International Olympic Comm. v. San Francisco Arts & Athletics, Inc.*, 789 F.2d 1319, 1320 (9th Cir. 1986) (quoting petition for reh'g 2).

10. *San Francisco Arts & Athletics*, 107 S. Ct. at 2975. Over 2,000 runners were to have relayed a torch from New York City across the country with the final runner entering Kezar Stadium in San Francisco and lighting the "Gay Olympic Flame" with the "Gay Olympic Torch." The opening ceremony was to have ended with uniformed athletes marching into the stadium behind their respective city flags. The competition was to consist of 18 different events with winners receiving gold, silver, and bronze medals. *Id.*

11. *Id.*

12. For text of section 110, see *supra* note 5.

13. *San Francisco Arts & Athletics*, 107 S. Ct. at 2975-76.

14. *Id.* at 2976.

15. *Id.*

16. *Id.*

## B. *Lower Court Opinions*

The litigation commenced with the filing of a civil action by the USOC and the International Olympic Committee ("IOC") against the SFAA and Thomas F. Waddell, its then president, in the Federal District Court for the Northern District of California on August 9, 1982.<sup>17</sup> The USOC brought this action under section 110 of the Amateur Sports Act to enjoin the SFAA's use of the term "Olympic" in promoting the "Gay Olympic Games," an athletic competition sponsored by the SFAA and scheduled to commence in San Francisco on August 28, 1982.<sup>18</sup> In answering that complaint, the SFAA counterclaimed for constitutional violations of its rights to free speech and association and equal protection of the laws.<sup>19</sup> The district court issued a temporary restraining order followed by a preliminary injunction against the use of the word "Olympic" by the SFAA. Following further proceedings, the USOC moved for summary judgment and a permanent injunction against the SFAA. Asserting that the matters of state action, likelihood of confusion, fair use in description, the intent of the SFAA in using "Olympic," and the discriminatory and speech-suppressing behavior of the USOC raised triable disputes of material fact as to both USOC's claim and the counterclaims, the SFAA opposed the motion.<sup>20</sup> Nevertheless, summary judgment and a permanent injunction were awarded to the USOC and the IOC. Attorneys' fees were also awarded.<sup>21</sup>

The SFAA appealed the judgment, the injunction, and the award of attorneys' fees to the U.S. Court of Appeals for the Ninth Circuit, which consolidated the appeals.<sup>22</sup> The court of appeals affirmed the summary judgment and the permanent injunction, but reversed and remanded the award of attorneys'

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17. *International Olympic Comm. v. San Francisco Arts & Athletics, Inc.*, 219 U.S.P.Q. (BNA) 982 (N.D. Cal. 1982).

18. *Id.*

19. Brief for SFAA, *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971 (1987) (No. 86-270) (LEXIS, Genfed Library, Supreme Court Briefs file).

20. *Id.*

21. *International Olympic Comm.*, 781 F.2d at 735.

22. *Id.*

fees.<sup>23</sup>

The court found that the Amateur Sports Act, in granting the USOC exclusive use of the word "Olympic," did so without requiring that the USOC prove that the unauthorized use was confusing<sup>24</sup> and without regard to the defenses<sup>25</sup> available to a defendant sued for a trademark violation under the Lanham Act, the general federal trademark statute.<sup>26</sup>

The court did not reach the SFAA's contention that the USOC violated the equal protection component of the due process clause of the fifth amendment by acting in a discriminatory manner<sup>27</sup> in its enforcement of its rights under the Amateur Sports Act, because it found that the USOC was not a government actor and therefore, not bound by the due process clause.<sup>28</sup> The court also found that the SFAA's first amendment rights of commercial speech were not violated by the Amateur Sports Act, which barred speech without regard to whether it was confusing.<sup>29</sup> It found that the word "Olympic" was essentially property and that such property rights could be protected without violating the first amendment.<sup>30</sup> Thus, the court found that the USOC was free, under section 110 of the Amateur Sports Act, to prohibit the SFAA from even nonconfusing use of the word

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23. *Id.*

24. *Id.* at 736. Under the general federal trademark statute, the Trademark Act of 1946 (commonly known as the Lanham Act), the owner of a trademark is protected only from unauthorized uses that are likely to cause confusion, to cause mistake, or to deceive. Lanham Act, § 16, 15 U.S.C. § 1066 (1982).

25. The relevant defense under the Lanham Act is commonly called the "fair use defense." See, e.g., S. KANE, TRADEMARK LAW, A PRACTITIONER'S GUIDE 172-73 (1987). The Lanham Act allows "the use of the name, term, or device . . . which is descriptive of and used fairly and in good faith only to describe to users the goods or services of such party, or their geographic origin." Lanham Act, § 33(b)(4), 15 U.S.C. § 1115(b)(4).

26. *International Olympic Comm.*, 781 F.2d at 736.

27. *Id.* at 736. The SFAA claimed that the "USOC has discriminated between homosexual groups and others in determining against whom to enforce its rights in 'Olympic.' It cites numerous other competitive games advertised as 'Olympics' which have gone unchallenged by USOC." *Id.*

28. *Id.* at 736-37. For a discussion of the state action doctrine, see *infra* notes 84-92 and accompanying text.

29. *International Olympic Comm.*, 781 F.2d at 737.

30. *Id.* For a discussion of "property" rationales of trademark law, see *infra* notes 267-300 and accompanying text (explaining the misappropriation and dilution rationales of trademark law).

"Olympic" without violating the SFAA's constitutional rights.<sup>31</sup>

Subsequently, the court of appeals denied the SFAA's petition for rehearing and rejected the suggestion for an en banc reconsideration. Three judges dissented from that order and found that the panel's interpretation of the Act raised serious first amendment issues.<sup>32</sup>

The SFAA petitioned the United States Supreme Court for a writ of certiorari.<sup>33</sup> The Supreme Court granted certiorari to review the issues of statutory and constitutional interpretation decided by the Court of Appeals.<sup>34</sup>

### C. *The Supreme Court*

#### 1. *The Majority*

##### a. *Statutory Interpretation of the Amateur Sports Act*

The Supreme Court affirmed the judgment of the court of appeals.<sup>35</sup> In affirming the court's statutory interpretation, the majority held that the language and legislative history of section 110 of the Amateur Sports Act clearly indicated Congress' intent to grant the USOC exclusive use of the word "Olympic" without regard to whether use of the word tends to cause confusion<sup>36</sup> and that section 110 does not incorporate the traditional trademark defenses<sup>37</sup> available under the Lanham Act.<sup>38</sup>

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31. *International Olympic Comm.*, 781 F.2d at 737.

32. *International Olympic Comm. v. San Francisco Arts & Athletics, Inc.*, 789 F.2d 1319, 1326 (1986).

33. *San Francisco Arts & Athletics*, 107 S. Ct. at 2976.

34. *Id.*

35. *Id.*

36. The Court found that the clause "tending to cause confusion" in section 110(a)(4) (synonymous with section 380(a)(4), *supra* note 5) modified only "any combination thereof" and was not properly read to apply to the word "Olympic." *Id.* at 2977.

37. The Court found that the reference in section 110 to Lanham Act remedies did not incorporate the traditional trademark defenses. *Id.* at 2978. For a discussion of the "fair use defense," see *supra* note 25. Moreover, the USOC already held a trademark in the word "Olympic" (36 U.S.C. § 380(a)(3)) and the SFAA's interpretation would make the Amateur Sports Act largely superfluous. *San Francisco Arts & Athletics*, 107 S. Ct. at 2978.

38. *San Francisco Arts & Athletics*, 107 S. Ct. at 2977-78. The protection granted to the USOC under the Amateur Sports Act differs from normal trademark protection in two respects: the USOC need not prove that a contested use is likely to cause confusion and an unauthorized user does not have available the normal statutory defenses under the Lanham Act. *Id.* at 2978.

b. *First Amendment*

The majority then rejected the SFAA's contention that the word "Olympic" was a generic<sup>39</sup> word which could not gain trademark protection under the Lanham Act without violating the first amendment.<sup>40</sup>

According to the majority, the word "Olympic" was not a generic word since the USOC had distinguished the word through its own efforts,<sup>41</sup> and Congress could reasonably find that the word had acquired a "secondary meaning — 'has become distinctive of [the USOC's] goods in commerce.'"<sup>42</sup> Therefore, Congress' decision to grant the USOC a limited property right<sup>43</sup> in the word "Olympic" fell within the scope of trademark law protections and was thus "certainly within constitutional bounds."<sup>44</sup>

Rejecting the SFAA's contention that, in this case, section 110 suppresses political speech in violation of the first amend-

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39. "A common descriptive name of a product or service is generic. Because a generic name, by definition, does not distinguish the identity of a particular product, it cannot be registered as a trademark under the Lanham Act." *Id.* at 2978 n.7.

40. *Id.* at 2980.

41. The USOC, together with the IOC, have used the word "Olympic" since the modern Olympic Games began in 1896. The revival of the ancient Olympic Games was proposed by Baron Pierre de Coubertin of France to promote international understanding. *Id.* at 2979 (citing D. CHESTER, *THE OLYMPIC GAMES HANDBOOK* 13 (1975)). Coubertin created the IOC, which has established the elaborate rules and procedures for the conduct of the modern Olympic Games. *Id.* (citing Olympic Charter, Rules 26-69 (1985)). These rules also direct every national committee to protect the use of the Olympic flag, symbol, flame, and motto from unauthorized use. *Id.* (citing Olympic Charter, bylaws to Rules 6 and 53). "Under the IOC Charter, the USOC is the national olympic committee for the United States with the sole authority to represent the United States at the Olympic Games." *Id.* at 2978-80. Formally organized in 1921, the USOC replaced the informally organized "American Olympic Committee." It received its first corporate charter in 1950. The Court found that pursuant to its authority, the USOC has used the Olympic words and symbols extensively to fulfill its object under the Olympic Charter of "ensur[ing] the development and safeguarding of the Olympic Movement and sport." *Id.* (quoting the Olympic Charter, Rule 24).

42. *San Francisco Arts & Athletics*, 107 S. Ct. at 2980 (quoting Lanham Act, § 2(f), 15 U.S.C. § 1052(f)).

43. The Court discussed the principle that when a word acquires value "as the result of organization and expenditure of labor, skill and money" by an entity, that entity constitutionally may obtain a limited property right in the word. *Id.* at 2979 (citing *International News Serv. v. Associated Press*, 248 U.S. 215, 239 (1918)).

44. *Id.* at 2980.

ment,<sup>45</sup> the majority found that by prohibiting the use of the word "Olympic," neither Congress nor the USOC had prohibited the SFAA from getting its message across.<sup>46</sup> According to the SFAA, its use of the word "Olympic" was a political statement about the status of homosexuals in society.<sup>47</sup>

Reasoning that any restrictions here on expressive speech were "incidental to the primary congressional purpose of encouraging and rewarding the USOC's activities,"<sup>48</sup> the question was "whether the incidental restrictions on First Amendment freedoms are greater than necessary to further a substantial governmental interest."<sup>49</sup> Using this balancing approach, the majority found that the restrictions of section 110 were not broader than Congress reasonably could have determined to be necessary to further its interests in the USOC.<sup>50</sup>

Therefore, under the majority's reasoning, whether section 110 prohibits commercial or noncommercial use of the word "Olympic," as long as the application of the Amateur Sports Act is not broader than necessary to protect legitimate congressional interests, the Amateur Sports Act does not violate the first amendment.<sup>51</sup>

### c. *State Action*

Finally, the majority rejected the SFAA's fifth amendment discrimination claim.<sup>52</sup> Since the fifth amendment applies only to government, and not to private individuals or entities, for the USOC to be in violation of the fifth amendment, it was necessary to establish that its activities or its relationship to government were such that it should be subject to the restrictions of the fifth amendment.<sup>53</sup> This, the majority concluded, the SFAA

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45. Political speech is noncommercial or expressive speech which, unlike commercial speech, does not receive a limited form of first amendment protection. See *infra* notes 228-230 and accompanying text.

46. *San Francisco Arts & Athletics*, 107 S. Ct. at 2981.

47. *Id.* at 2980. See also *id.* at 2980 n.13.

48. *Id.* at 2981.

49. *Id.*

50. *Id.* at 2982.

51. *Id.* at 2983.

52. *Id.* at 2986-87.

53. *Id.* at 2984.

had failed to prove.<sup>54</sup> In reaching this conclusion, the majority found that: the USOC did not perform functions that had been “traditionally the *exclusive* prerogative” of the Federal Government;<sup>55</sup> there was no evidence that the Government coerced or encouraged the USOC in the enforcement of its exclusive right to use the word “Olympic”;<sup>56</sup> the granting of USOC’s corporate charter did not render the USOC a government agent;<sup>57</sup> and the Government was not a “joint participant” in the USOC’s enforcement of its right and there was no proof of a “close nexus” between the Government and the challenged action of the USOC.<sup>58</sup>

### 2. *Justice O'Connor*

Justice O'Connor, with whom Justice Blackmun joined, concurred in part and dissented in part. Justice O'Connor agreed with the majority’s construction of section 110 of the Amateur Sports Act, as well as with its holding that the statute was “within constitutional bounds.”<sup>59</sup> She dissented, however, to that part of the majority opinion which held that the USOC was not a “government actor” for fifth amendment purposes, and would have reversed the court of appeals’ finding of no government action and remanded the case for determination of the SFAA’s claim of discriminatory enforcement. Justice O'Connor believed that the USOC and the U.S. Government were joint participants in the challenged activity and, as such, subject to the equal protection provisions of the fifth amendment.<sup>60</sup>

### 3. *Brennan Dissent*

Justice Brennan, with whom Justice Marshall joined, stated in a strong dissent that “[t]he Court wholly fails to appreciate both the Congressionally created interdependence between the

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54. *Id.* at 2984-87. Since the Court found no government action, it had no need to address the merits of the SFAA’s discriminatory enforcement claim. It noted, however, that the SFAA’s claim was far from compelling. *Id.* at 2984 n.22.

55. *Id.* at 2985 (citations omitted) (emphasis in original).

56. *Id.* at 2986.

57. *Id.* at 2985.

58. *Id.* at 2986 n.29.

59. *Id.* at 2987 (O'Connor, J., concurring in part and dissenting in part).

60. *Id.* at 2987.

United States Olympic Committee (USOC) and the United States, and the significant extent to which § 110 of the Amateur Sports Act of 1978 infringes on noncommercial speech.”<sup>61</sup>

a. *Fifth Amendment — State Action*

Justice Brennan stated two independent reasons why the challenged action constituted government action.<sup>62</sup> He found, first, that “the USOC perform[ed] important governmental functions,” and second, that there “exist[ed] ‘a sufficiently close nexus between the [Government] and the challenged action’ of the USOC [so] that ‘the action of the latter may be fairly treated as that of the Government itself.’”<sup>63</sup>

Justice Brennan observed that, in representing the United States to the world community, the USOC performed a distinctive, traditional governmental function<sup>64</sup> which the majority overlooked.<sup>65</sup> He bolstered his argument with the fact that the President, in his January 1980 State of the Union address, announced his opposition to American participation in the 1980 summer Olympic games in Moscow. Shortly thereafter, the USOC announced that the United States would not participate in the 1980 Olympic games.<sup>66</sup> Justice Brennan found several other indicia of the USOC’s public role, especially its authority and ability, granted by the Amateur Sports Act, to govern national amateur athletics related to international competition.<sup>67</sup>

The second reason Justice Brennan would have found government action is that 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.”<sup>68</sup> First, he noted there was a variety of mutual benefits conferred by the relationship. Second, the USOC and the U.S. Gov-

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61. *Id.* at 2987 (Brennan, J., dissenting) (citation omitted).

62. *Id.*

63. *Id.* (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)).

64. *Id.* at 2988. By virtue of 36 U.S.C. §§ 374-375, the USOC is the exclusive representative of the United States to the International Olympic Committee. *Id.*

65. *Id.*

66. *Id.* at 2989.

67. *Id.* at 2989-90.

68. *Id.* at 2991 (Brennan, J., dissenting) (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

ernment were closely linked in the public eye in terms of their decisions.<sup>69</sup> Justice Brennan also found important the close financial and legislative links between the USOC's alleged discriminatory exercise of its word-use authority and the financial success of both the USOC and the U.S. Government, stating: "It would certainly be 'irony amounting to grave injustice' if, to finance the team that is to represent the virtues of our political system, the USOC were free to employ government-created economic leverage to prohibit political speech."<sup>70</sup>

b. *First Amendment*

Justice Brennan found the Amateur Sports Act, as interpreted by the majority, to be substantially overbroad, violating the first amendment because it prohibited a substantial amount of constitutionally protected conduct.<sup>71</sup> He found the Amateur Sports Act overbroad in two respects. First, it granted the USOC the remedies of a commercial trademark to regulate the use of the word "Olympic," but failed to incorporate the defenses to trademark infringement provided in the Lanham Act.<sup>72</sup> Justice Brennan stressed that these defenses were essential safeguards which prevented trademark power from infringing upon constitutionally protected speech.<sup>73</sup> Second, Justice Brennan found that section 110(a)(4) as interpreted by the Court, grants the USOC the authority to prohibit the use of the word "Olympic" even if the use is noncommercial or expressive.<sup>74</sup> Justice Brennan stressed that the overbreadth of the Amateur Sports Act is magnified in light of the "unfettered" discretion the USOC has to prohibit other entities from using the word "Olympic," especially when one considers the large number of such users.<sup>75</sup> This

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69. *Id.* at 2992.

70. *Id.* (citing *Burton*, 365 U.S. at 724).

71. *Id.* at 2994.

72. *Id.* at 2994-95.

73. *Id.* at 2995.

74. *Id.* Justice Brennan noted that this provision necessarily regulates only noncommercial speech, since every possible commercial use of the word "Olympic" is regulated by preceding sections of the statute. *Id.* at 2997 n.30. The Lanham Act applies only to commercial speech. See § 45, 15 U.S.C. § 1127.

75. *San Francisco Arts & Athletics*, 107 S. Ct. at 2998 (Brennan, J., dissenting). There are 200 users in the Los Angeles and Manhattan phone directories. *Id.* at 2998 n.32.

wide discretion, creates a potential for abuse which renders section 110 overbroad and, hence, unconstitutional on its face.<sup>76</sup>

According to Justice Brennan, the Amateur Sports Act further violated the first amendment by restricting speech in a way that is not content-neutral.<sup>77</sup> Under the first amendment, the government has no power to restrict expression because of its message, ideas, subject matter, or content.<sup>78</sup> Here, Congress enacted a statute which encouraged the USOC to endorse particular noncommercial messages,<sup>79</sup> while it left to the USOC's unfettered discretion the decision of whether other groups might use the word "Olympic."<sup>80</sup>

Even if section 110(a)(4) could be characterized as directly regulating commercial speech, in Justice Brennan's view, "its incidental restrictions on First Amendment freedoms are greater than necessary to further a substantial government interest."<sup>81</sup> The USOC's interest in the word "Olympic" could be adequately protected by rights coextensive with those in the Lanham Act, since there was no evidence in the record that the USOC's authority under the Lanham Act was insufficient to protect the USOC from economic harm.<sup>82</sup> Therefore, Justice Brennan would have allowed the SFAA to use the word "Olympic" in a nonconfusing and nonmisleading manner in the noncommercial promotion of a theatrical or athletic event, absent proof of resultant harm to the USOC.<sup>83</sup>

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76. *Id.*

77. *Id.* at 2999.

78. *Id.*

79. *Id.* Congress encouraged the USOC to allow the use of "Olympic" in the "Junior Olympics," the "Explorer Olympics," and the "Special Olympics." 36 U.S.C. § 374 (13).

80. *San Francisco Arts & Athletics*, 107 S. Ct. at 2999 (Brennan, J., dissenting) (citing *United States Olympic Comm. v. Golden Age Olympics, Inc.*, Opposition No. 62,426 (Patents and Trademarks Comm'n, June 4, 1981) (denial of use of "Olympic" to senior citizens group); *United States Olympic Comm. v. International Fed'n of Body Builders*, 219 U.S.P.Q. 353 (D.C. Cir. 1982) (denial of use to organization promoting body building)). For a discussion of other cases where the USOC has denied the use of the word "Olympic" or related emblems, see *infra* notes 316-333 and accompanying text.

81. *San Francisco Arts & Athletics*, 107 S. Ct. at 2999 (Brennan, J., dissenting).

82. *Id.*

83. *Id.* at 3000.

### III. Fifth Amendment — State Action Issue

#### A. Doctrine

The protection extended to individual rights by the U.S. Constitution is mainly directed against government action.<sup>84</sup> Therefore, some government or "state action"<sup>85</sup> is usually required for there to be a violation of these provisions. "State action" questions usually arise in the context of the fourteenth amendment,<sup>86</sup> although "state action" cases arising under the fifth amendment are not uncommon.<sup>87</sup>

In contrast with that of government, the behavior of private citizens and corporations is not controlled by the Constitution. In the *Civil Rights Cases*, in 1883, the Court held that "[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [fourteenth] amendment."<sup>88</sup> This doctrine has remained undis-

84. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1147 & n.1 (1978). An exception is the thirteenth amendment, which states that slavery and involuntary servitude are not to exist within the United States. The *Civil Rights Cases*, 109 U.S. 3, 20 (1883) (thirteenth amendment not mere prohibition of state laws establishing or upholding slavery, but absolute declaration that slavery shall not exist in the United States).

85. Throughout this Note, the terms "state action" and "government action" will be used synonymously as referring to both the Federal Government and state governments.

86. The fourteenth amendment states:

No State shall make or enforce any law which shall abridge the privileges and immunities of the 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. Most of the first ten amendments to the Constitution have been "incorporated" within the due process clause of the fourteenth amendment and thus made applicable to the states. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 315-16 (3d ed. 1986) [hereinafter NOWAK].

87. The case which is the subject of this Note arises under the fifth amendment. The first eight amendments to the Constitution, although they now apply to both the states and Federal Government, originally applied only to the Federal Government. *Baron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). In addition, the fourteenth amendment's equal protection guarantee now limits the Federal Government because of its incorporation within the due process clause of the fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). "[The Supreme] Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wisenfeld*, 420 U.S. 636, 638 n.2 (1975).

88. 109 U.S. 3, 11 (1883). The *Civil Rights Cases* are credited with being the origin of the state action requirement. See Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1300 (1982).

turbed: the Constitution does not prohibit private deprivations of constitutional rights.<sup>89</sup>

There are two types of cases that arise under the fifth or fourteenth amendments.<sup>90</sup> First, there are cases involving "official" or "formal" governmental action, where the Court is asked to review some specific act of a branch of government that was done with formal authority.<sup>91</sup> Second, there are the cases where "official" government action is not involved. In these cases, the issue is whether a private actor's otherwise private conduct should be attributable to the government, thus making it "state action" and subjecting it to the restrictions of the fifth or fourteenth amendments.<sup>92</sup> This second group of cases, unlike the first, requires a two-step approach. Before the action can be subjected to review under the amendment, there must be a determination that state action exists.

## B. *Historical Background*

Until the end of World War II, the state action doctrine was narrow in scope and most of the Court's state action decisions dealt with the behavior of "formal governmental actors."<sup>93</sup> After World War II, however, until about 1970, state action underwent an expansion facilitated by a number of different doctrinal rationales.<sup>94</sup> This assortment of doctrines and tests has led to what is

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89. W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 1514 (5th ed. 1980). The Supreme Court has repeatedly stated that the Constitution offers no shield against "private conduct, 'however discriminatory or wrongful.'" *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

90. Discussion of cases arising under the fourteenth amendment applies equally to cases arising under the fifth amendment, the only difference being the Federal Government, rather than the state, is involved in the fifth amendment cases.

91. Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 228. "This category includes all legislative acts, executive or agency decisions, or judicial rulings of any level of government." *Id.* at 228 n.26.

92. *Id.* A "state action" question would arise in this context if an otherwise private actor was very involved with the state government or perhaps performed a state function and then, in that capacity, discriminated against another individual.

93. Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. 683, 685 (1984). It is interesting to note that the doctrine, which underwent a period of expansion after World War II, has now come full circle and the current scope is narrow once again. See *infra* notes 153-196 and accompanying text.

94. *Id.* at 689-90.

among the most enduring and often quoted remarks on modern American constitutional law — Charles Black's description of state action as a "conceptual disaster area."<sup>95</sup>

Within this pattern of confusion, two broad approaches to state action have existed.<sup>96</sup> In the first (and dominant) approach, the Court seeks links between formal governmental organs and private behavior.<sup>97</sup> Theories found in this category include the *symbiotic relationship* theory,<sup>98</sup> the *nexus* theory,<sup>99</sup> and the *state encouragement* theory.<sup>100</sup> The second approach focuses not on the linkage between the government and the private actor, but on the private actor's concrete activities and their consequences.<sup>101</sup> The public function doctrine falls into this category of state action theories.

### C. Theories

#### 1. Public Function Doctrine

After World War II, the mode of inquiry into the actor's conduct became more functional than formal. The focus shifted from the private actor's connections with the political state, to the specific activities of the private actor and the consequences of those activities.<sup>102</sup> According to the public function doctrine, "the actions of seemingly private actors may be inherently governmental, and thus subject to constitutional limitations, notwithstanding the absence of overt state responsibility for the ac-

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95. Black, *The Supreme Court, 1966 Term — Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967). See also *infra* notes 135-145 for a discussion of *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), where the Court openly admitted that "to fashion and apply a precise formula for recognition of state responsibility . . . is an 'impossible task' which '[t]his court has never attempted.' . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton*, 365 U.S. at 722.

96. Phillips, *supra* note 93, at 690.

97. *Id.*

98. For a discussion of the symbiotic relationship theory, see *infra* notes 134-145 and accompanying text.

99. For a discussion of the nexus theory, see *infra* notes 146-152 and accompanying text.

100. For a discussion of the state encouragement theory, see *infra* notes 117-133 and accompanying text.

101. Phillips, *supra* note 93, at 690.

102. *Id.*

tions challenged.”<sup>103</sup>

The first appearance of the public function doctrine was made when the Supreme Court decided *Marsh v. Alabama*.<sup>104</sup> *Marsh* involved a first amendment challenge to a trespass conviction of a Jehovah's Witness for distributing religious literature on the business block of a company-owned town in violation of the town owners' rules.<sup>105</sup> The town, known as Chickasaw, was owned by the Gulf Shipbuilding Corporation and had all the characteristics of any other American town. The appellant was warned that she could not distribute the literature without a permit and was told that no permit would be issued to her. When asked to leave the business block and Chickasaw, she declined and was arrested and charged with violating a state law which made it a crime to enter or remain on the premises of another after having been warned not to do so.<sup>106</sup> The Court overturned the conviction and, in subjecting the Gulf Shipbuilding Corporation to first amendment restrictions, the Court used the term “public function” twice.<sup>107</sup> The Court made it clear that had title to Chickasaw belonged to a municipal corporation instead of a private one and had appellant been arrested for violating a municipal ordinance rather than a private corporation's rule, the appellant's conviction would have to have been reversed.<sup>108</sup> The Court reasoned that people living in company-owned towns were free citizens of their state and country, just as were residents of municipalities, and there was no more reason to deprive them of the liberties guaranteed by the first and fourteenth amendments than there was for curtailing these freedoms with respect to any other citizens.<sup>109</sup>

Twenty-two years later, finding “striking similarities” between the central business district of a company town in *Marsh* and a suburban shopping center, the Court, in *Amalgamated*

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103. L. TRIBE, *supra* note 84, at 1163 (footnote omitted).

104. 326 U.S. 501 (1946).

105. *Id.* at 503. The corporation had posted a notice which read: “This is Private Property, And Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted.” *Id.*

106. *Id.* at 503-04.

107. *Id.* at 506-07.

108. *Id.* at 504.

109. *Id.* at 508-09.

*Food Employees Union Local 590 v. Logan Valley Plaza*,<sup>110</sup> applied the public function doctrine of *Marsh*. This marked a brief expansionary revival of the public function doctrine.<sup>111</sup> *Logan Valley* involved a first amendment challenge to a state court order enjoining picketing of a labor union within the confines of a privately owned shopping center because the pickets allegedly violated a state trespass law. The Supreme Court overturned the injunction, stating that "[t]he shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*."<sup>112</sup>

The expansive thrust of *Logan Valley* was short-lived. With *Jackson v. Metropolitan Edison Co.*,<sup>113</sup> the Court significantly narrowed the scope of the public function doctrine. In *Jackson*, the petitioner urged that state action was present because the private utility company, which terminated her electric service without notice, a hearing, or an opportunity to pay any amounts found due, provided an essential public service required to be supplied by state law, and hence, performed a "public function."<sup>114</sup> The Court held that although it had found state action present in the exercise by a private entity of powers "traditionally exclusively reserved to the state,"<sup>115</sup> there was no state action here. The state law imposed an obligation on the regulated utility to furnish service, but imposed no such obligation on the state. Since the furnishing of utility services, the Court held, was not traditionally the exclusive prerogative of the state, the action taken by the utility was not state action.<sup>116</sup>

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110. 391 U.S. 308 (1968).

111. For a discussion of the current trend of the public function doctrine, see *infra* notes 173-184 and accompanying text; note especially *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), which effectively overruled *Logan Valley*, and *Hudgens v. NLRB*, 424 U.S. 507 (1976) (where the Court held pickets did not have a first amendment right to enter the shopping center for the purpose of advertising their strike against their employer).

112. *Logan Valley*, 391 U.S. at 318.

113. 419 U.S. 345 (1974).

114. *Id.* at 352.

115. *Id.* The Court cited the following cases where it had found state action: *Nixon v. Condon*, 286 U.S. 73 (1932) (election); *Terry v. Adams*, 345 U.S. 461 (1953) (election); *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town); *Evans v. Newton*, 382 U.S. 296 (1966) (municipal park). *Id.*

116. *Jackson*, 419 U.S. at 353. It is interesting to note that the Court did not limit its state action analysis to whether Metropolitan performed a function which was traditionally exclusively reserved to the state. The Court also utilized the state encourage-

## 2. State Encouragement Theory

Under the state encouragement theory, state action is premised on governmental enforcement<sup>117</sup> or encouragement of private decisions.<sup>118</sup> The leading case in this area is *Shelley v. Kraemer*,<sup>119</sup> which involved appeals from state court judgments enjoining black purchasers from occupying property covered by racially restrictive covenants. The Court held the judicial enforcement of racially restrictive covenants forbidding the transfer of a white homeowner's land to nonwhites to be an unconsti-

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ment theory, the symbiotic relationship theory, and the nexus theory (for which this case is most famous) in reaching its conclusion that there was no state action. Applying the state encouragement theory, the Court rejected the notion that the utility's termination of services was state action because "the State has specifically authorized and approved the termination practice." *Id.* at 354. Metropolitan filed with the Public Utilities Commission a General Tariff, a provision of which stated Metropolitan's right to terminate service for nonpayment. The Court noted the district court's observation that the sole connection of the Commission with this regulation was the utility's simple notice filing with the Commission and the lack of action on the Commission's part to prohibit it. *Id.* at 355. The Court explained that the nature of governmental regulation of private utilities is such that the utility may frequently be required by the state regulatory commission to obtain approval for practices that a business regulated in less detail would be free to institute without such approval. The Court held that approval by the state utility commission of such a request from a utility, where the commission has not ordered the proposed practice, does not transmute the utility's practice into "state action." *Id.* at 357. For a discussion of state encouragement theory, see *infra* notes 117-133 and accompanying text.

The *Jackson* Court also failed to see the "symbiotic relationship" between the utility and the state as it found was present in the restaurant's relationship with the state agency in *Burton*. It found that the privately owned utility did not lease space from the state and was alone responsible for the provision of power to its customers. Although the utility paid taxes to the state and was subject to extensive regulation by the state, it was similar to the club in *Moose Lodge*, where the Court said: "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise." *Jackson*, 419 U.S. at 358 (citing *Moose Lodge No. 107 v. Irisv*, 407 U.S. 163, 176-77 (1972)). For a discussion of the symbiotic relationship theory, see *infra* notes 134-145 and accompanying text.

Finally, the *Jackson* Court held that the State of Pennsylvania was not sufficiently connected with respondent-utility's action in terminating petitioner's service so as to make the utility's conduct attributable to the state for purposes of the fourteenth amendment. 419 U.S. at 359. For a discussion of the "nexus" theory of state action, see *infra* notes 146-152 and accompanying text.

117. See Phillips, *supra* note 93, at 693.

118. See Nowak, *supra* note 86, at 432-37.

119. 334 U.S. 1 (1948).

tutional denial of equal protection.<sup>120</sup> The implications of *Shelley* were far-reaching<sup>121</sup> since it raised the possibility that all state enforcement of private activity denying constitutionally defined rights would be invalid, no matter how unobjectionable the general rule sanctioning such denials. In a criticism of *Shelley*, Herbert Wechsler asked: "May not the state employ its law to vindicate the privacy of property against a trespasser, regardless of the grounds of his exclusion, or does it embrace the owner's reasons for excluding if it buttresses his power by the law?"<sup>122</sup> Although the Court has continued to adhere to the view that state enforcement of a common-law rule is state action,<sup>123</sup> it has rejected an expansive reading of *Shelley*.<sup>124</sup>

In *Moose Lodge No. 107 v. Irvis*,<sup>125</sup> Irvis, a Negro guest of a member of Moose Lodge, was refused service at the club's dining room and bar solely because of his race.<sup>126</sup> Irvis claimed that because the Pennsylvania liquor board had issued Moose Lodge a private club license that authorized the sale of alcoholic beverages on its premises, the refusal of service to him was "state action" for the purposes of the equal protection clause of the fourteenth amendment.<sup>127</sup> Irvis sought injunctive relief that would require the liquor board to revoke Moose Lodge's license so long as it continued discriminatory practices.<sup>128</sup> The Supreme Court held the operation of a regulatory scheme enforced by the Pennsylvania Liquor Control Board<sup>129</sup> did not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to

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120. *Id.* at 20.

121. For a detailed discussion of the *Shelley* decision and the possibilities it held for expanding the state action doctrine, see Phillips, *supra* note 93, at 693-95.

122. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29-30 (1959).

123. See generally Rowe, *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of Flagg Brothers, Inc. v. Brooks*, 69 GEO. L.J. 745 (1981). But cf. Phillips, *supra* note 93, at 696 n.58 (citations omitted) ("But the Court's recent emphasis on the idea that the state must be 'responsible' for the behavior challenged as unconstitutional casts some doubt even on this facet of *Shelley*.").

124. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1002-03 (11th ed. 1986).

125. 407 U.S. 163 (1972).

126. *Id.* at 165.

127. *Id.*

128. *Id.*

129. For details of regulatory scheme, see *id.* at 176.

make the latter "state action" within the ambit of the equal protection clause of the fourteenth amendment.<sup>130</sup> One regulation of the Liquor Control Board, however, read "[e]very club licensee shall adhere to all of the provisions of its Constitution and By-Laws."<sup>131</sup> The Court held that although this regulation was neutral in its terms, its application here would result in the invocation of state sanctions to enforce a concededly discriminatory private rule.<sup>132</sup> Citing *Shelley*, the Court held that the application of state sanctions to enforce such a rule would violate the fourteenth amendment; therefore Irvis was entitled to a decree enjoining the enforcement of that regulation insofar as it required compliance by Moose Lodge with provisions of its constitution and bylaws containing racially discriminatory provisions.<sup>133</sup>

### 3. *Symbiotic Relationship or Joint Contract Theory*

The symbiotic relationship theory focuses on situations in which the affairs of formally public (government actors) and private actors are intertwined in such a way that each benefits from the relationship.<sup>134</sup> *Burton v. Wilmington Parking Authority*<sup>135</sup> has come to be identified with this rationale even though the *Burton* Court explicitly disavowed any unified conceptual approach to state action questions.<sup>136</sup>

*Burton* concerned a restaurant located in a publicly owned and operated automobile parking building which refused to serve the appellant food or drink solely because he was a Negro.<sup>137</sup> The parking building was owned and operated by the Wilmington Parking Authority (the "Authority"), an agency of the State of Delaware, and the restaurant was the Authority's

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130. *Id.* at 177.

131. *Id.*

132. *Id.* at 178-79.

133. *Id.* at 179.

134. The term "symbiotic relationship" is Justice Rehnquist's, and is found in his *Moose Lodge* opinion. 407 U.S. at 175 (1972). For a discussion of *Moose Lodge*, see *supra* notes 125-133 and accompanying text.

135. 365 U.S. 715 (1961).

136. See *supra* note 95.

137. *Burton*, 365 U.S. at 716.

lessee.<sup>138</sup>

Burton claimed that the restaurant's refusal to serve him abridged his rights under the fourteenth amendment to the Constitution. The court of chancery concluded that the lease, whether a "device" or executed in good faith, would not "serve to insulate the public authority from the force and effect of the Fourteenth Amendment."<sup>139</sup>

The Supreme Court of Delaware reversed, disposing of the issue on summary judgment, holding that the restaurant was acting in a "purely private capacity" under its lease and that its action was not that of the Authority and was not therefore, state action for fourteenth amendment purposes.<sup>140</sup> This decision was, in turn, reversed by the U.S. Supreme Court, which held that Burton's exclusion, under the circumstances, was discriminatory state action in violation of the equal protection clause of the fourteenth amendment.<sup>141</sup> The Court acknowledged that the *Civil Rights Cases*, established that "[i]ndividual invasion of individual rights is not the subject-matter of the [fourteenth] amendment' . . . and that private conduct . . . does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in" the private conduct.<sup>142</sup> The *Burton* Court considered several factors<sup>143</sup> as relevant in the determination of whether the Authority (and through it, the state) had become

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138. *Id.*

139. *Id.* at 720 (citing *Burton v. Wilmington Parking Auth.*, 150 A.2d 197, 198 (Del. Ch. 1959)).

140. *Id.* at 716.

141. *Id.* at 717.

142. *Id.* at 722 (quoting *The Civil Rights Cases*, 109 U.S. 3, 11 (1883)). For a discussion of the *Civil Rights Cases*, see *supra* notes 88-89 and accompanying text.

143. The *Burton* Court explicitly considered the following factors as relevant to its decision: 1) The building in which the restaurant sat was publicly owned and devoted to public uses; 2) the costs of land acquisition, building construction, and building maintenance were defrayed entirely from city donations, from loans and revenue bonds, and from the proceeds of commercial rentals and parking services; 3) the commercially leased areas (e.g., the restaurant area) were physically and financially integral to the state's plan to operate the garage as a self-sustaining unit; 4) the upkeep and maintenance of the parking building were payable out of public funds and were the responsibility of the public agency running the operation; and 5) the relationship between the parking facility and the restaurant was such as to confer on each a variety of mutual benefits (e.g., restaurant guests obtained a place to park and the existence of the restaurant added to the facility's parking business). *Id.* at 723-24.

involved to a significant extent with the discriminating restaurant.<sup>144</sup> Considering these factors, the Court stated:

Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement [necessary to create state action].<sup>145</sup>

#### 4. *The Nexus Theory*

The nexus theory, as set forth by Justice Rehnquist in *Jackson v. Metropolitan Edison Co.*,<sup>146</sup> provides that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."<sup>147</sup> In *Jackson*, the Court rejected a due process challenge to a regulated private utility's termination of electrical service, having found no state action.<sup>148</sup> The issue in state action cases under the nexus theory is: How close must the nexus between the government and the regulated private entity be? The *Jackson* Court implied that it must be very close indeed.<sup>149</sup> What was necessary (and missing) for a finding of state action was the state commission's *ordering*<sup>150</sup> the utility's proposed practice (of terminating services upon nonpayment of bill) rather than merely *approving* it.<sup>151</sup> "*Jackson's* doctrinal innovations make it perhaps the most significant single decision in the

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144. *Id.*

145. *Id.* at 724.

146. 419 U.S. 345.

147. *Id.* at 351.

148. See *supra* notes 113-116 and accompanying text (discussing the Court's analysis of this case under the public function doctrine, the state encouragement theory, and the symbiotic relationship theory).

149. *Jackson*, 419 U.S. at 358-59.

150. The Court distinguished *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952), which petitioner relied on heavily and where, following an investigation on its own motion, the public utilities commission placed its imprimatur on the practices of the private entity namely the installation of piped in music on buses. *Jackson*, 419 U.S. at 356-57.

151. *Id.* at 357.

Burger Court's state action cutback."<sup>152</sup>

#### D. *Trend in State Action Cases*

Under the Warren Court, the state action doctrine went through an expansionary period,<sup>153</sup> so much so that the state action requirement appeared to be reduced to a mere formality.<sup>154</sup> However, the events of the 1970's and 1980's have proved otherwise. The effect of the Burger Court cutback on the state action doctrine has been to limit constitutional challenges to formally private activity.<sup>155</sup> The trend of the Warren Court has been so severely reversed that, by 1979, an eminent authority concluded that state action is "the clearest area of conservatism on the part of the Burger Court and the most unqualified reversal of position from that adhered to by the Burger Court's predecessor."<sup>156</sup>

In 1982, with *Rendell-Baker v. Kohn*<sup>157</sup> and *Blum v. Yaretsky*,<sup>158</sup> the Burger Court provided further evidence of its narrow approach to the state action doctrine. The plaintiffs in *Blum* were a class of Medicaid patients challenging decisions by the nursing homes in which they lived, to discharge or transfer them without notice or an opportunity for a hearing.<sup>159</sup> In finding no state action, the Court held that the mere fact that a private business is subject to state regulation does not convert its action into that of the state for purposes of the fourteenth amendment.<sup>160</sup> The Court noted that a state can normally be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement that

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152. Phillips, *supra* note 93, at 704.

153. For a discussion of this doctrinal expansion which lasted through the late 1960's, see *supra* notes 94-101 and accompanying text.

154. Phillips, *supra* note 93, at 700-01.

155. *Id.* at 701.

156. Schwartz, *Olympic Committee and Government Action*, N.Y.L.J. Sept. 15, 1987, at 2, col. 1 (citing J. CHOPER, *State Action*, in CHOPER, KAMISAR & TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1978-1979*, at 265 (National Practice Institute 1979)). This conclusion was based upon the Supreme Court's decisions in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Hudgens v. NLRB*, 424 U.S. 507 (1967); and *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978).

157. 457 U.S. 830 (1982).

158. 457 U.S. 991 (1982).

159. *Id.* at 995-96.

160. *Id.* at 1004.

the choice must in law be deemed to be that of the state.<sup>161</sup> The Court also held that even though the state subsidized the cost of the nursing home facilities, paid the patients' expenses, and licensed the facilities, the actions of the nursing homes were not converted into state action.<sup>162</sup> Finally, the Court held that the nursing homes did not perform a function that has been "traditionally the exclusive prerogative of the State"<sup>163</sup> so as to establish the required nexus between the state and the challenged action.<sup>164</sup>

In *Rendell-Baker*,<sup>165</sup> a discharged vocational counselor for a privately operated school brought an action under 42 U.S.C. § 1983, claiming she had been discharged by the school in violation of her first amendment right to free speech and her fourteenth amendment right to due process. The Court held that the ultimate issue in determining whether a person is subject to suit under section 1983 is the same question as posed in cases arising under the fourteenth amendment: Is the alleged infringement of federal rights fairly attributable to the state?<sup>166</sup> The Court found no state action when applying the various tests spelled out in *Blum*.<sup>167</sup> The Court held that the fact that the school received ninety percent of its operating budget from public funds did not make the discharge decisions actions of the state. Further, the Court found that the decision to discharge was not compelled<sup>168</sup> or even influenced by any state regulation. Even though the school performed a *public function*<sup>169</sup> in education, this did not transform its acts into "state action."<sup>170</sup> Finally, the Court found that since the school's fiscal relationship with the

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161. *Id.* See also *supra* notes 117-133 and accompanying text (discussing state encouragement theory).

162. *Blum*, 457 U.S. at 1011.

163. *Id.* (citing *Jackson*, 419 U.S. at 353).

164. *Id.*

165. 457 U.S. 830.

166. *Id.* at 838.

167. *Id.* at 839-43. See also *supra* notes 158-164 (discussing *Blum*) and notes 102-152 (discussing the various tests the Court has employed to determine whether state action is present).

168. *Rendell-Baker*, 457 U.S. at 841.

169. For a discussion of the public function doctrine, see *supra* notes 102-116 and accompanying text.

170. *Rendell-Baker*, 457 U.S. at 842 ("That a private entity performs a function which serves the public does not make its acts state action.").

state was no different from that of many contractors performing services for the state, there was no "symbiotic relationship"<sup>171</sup> between the school and the state.<sup>172</sup>

One way in which the Burger Court achieved this narrowing of the state action doctrine was by more sharply defining and more strictly limiting the reach of the public function doctrine.<sup>173</sup> The Burger Court had begun this process in 1972 with *Lloyd Corp. v. Tanner*,<sup>174</sup> where it commenced its reversal of the effect of *Logan Valley*.<sup>175</sup> In *Lloyd*, Vietnam War protestors sought declaratory and injunctive relief against a private shopping mall for its refusal to allow them to distribute handbills in the mall.<sup>176</sup> Vacating a lower court injunction permitting the handbilling to proceed,<sup>177</sup> the Court distinguished *Logan Valley* by stating that since the handbilling in *Lloyd* was not related to the mall's operations, *Logan Valley* was not controlling.<sup>178</sup> *Hudgens v. NLRB*<sup>179</sup> dealt the final blow to *Logan Valley* by declaring that *Lloyd* had effectively overruled *Logan Valley*.<sup>180</sup> *Hudgens*, like *Logan*, involved a first amendment challenge by union picketers against the owner of a shopping center who threatened the picketers with criminal trespass action.<sup>181</sup> The Court held that the pickets did not have a first amendment right to enter the private shopping center for the purpose of advertising their strike against their employer, a lessee of the shopping center.<sup>182</sup>

The scope of the public function strand of the state action

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171. For a discussion of the symbiotic relationship theory, see *supra* notes 134-145 and accompanying text.

172. *Rendell-Baker*, 457 U.S. at 843.

173. Phillips, *supra* note 93, at 701.

174. 407 U.S. 551 (1972). For a discussion of the public function doctrine, see *supra* notes 102-116 and accompanying text.

175. 391 U.S. 308 (1968). For a discussion of *Logan Valley*, see *supra* notes 110-112 and accompanying text.

176. *Lloyd*, 407 U.S. at 556.

177. *Id.* at 570.

178. *Id.* at 564-66.

179. 424 U.S. 507 (1976).

180. *Id.* at 518. The Burger Court has rendered other Warren Court state action decisions virtually useless without actually overruling them. Schwartz, *supra* note 156, at 2, col. 2.

181. *Hudgens*, 424 U.S. at 508.

182. *Id.* at 520-21.

doctrine was narrowed further still with the Burger Court's holding in *Jackson v. Metropolitan Edison Co.*,<sup>183</sup> which limited its reach to exercises by private entities of powers "traditionally exclusively reserved to the state."<sup>184</sup> *Jackson* also contributed to the Burger Court cutback on the other strands<sup>185</sup> of the state action doctrine.<sup>186</sup>

With *Jackson*, the Court implicitly rejected the symbiotic relationship doctrine formulated in *Burton v. Wilmington Parking Authority*,<sup>187</sup> by ignoring *Burton's* teaching that distinct indicia of, or rationales for, state action can be assessed in their aggregate or cumulative impact.<sup>188</sup>

The Burger Court also cast some doubt, in the *Jackson* opinion, as to the continued vitality of the state encouragement strand<sup>189</sup> of the state action doctrine analysis by holding that approval by the state of the utility's termination practice was "no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired."<sup>190</sup> However, it was not until *Flagg Bros. v. Brooks*<sup>191</sup> that this strand of state action analysis was virtually eliminated.<sup>192</sup>

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183. 419 U.S. 345 (1974).

184. *Id.* at 352. See also Schwartz, *supra* note 156, at 2, col. 2 ("The [Burger] Court . . . has rendered the public function doctrine virtually useless by requiring that the functions have been 'traditionally the exclusive prerogative' of government.") (emphasis in original).

185. Reference to "strands" here means the tests or theories the Court has used in order to determine the existence of state action; see *supra* notes 102-152 and accompanying text (discussing the various tests).

186. *Jackson* has been called the most significant singular decision in the Burger Court's state action cutback. See Phillips, *supra* note 93, at 704 (discussing *Jackson's* doctrinal innovations).

187. 365 U.S. 715.

188. *Jackson*, 419 U.S. at 362-63 (Douglas, J., dissenting) ("Though the Court pays lip service to the need for assessing the totality of the State's involvement in this enterprise, . . . its underlying analysis is fundamentally sequential rather than cumulative."). See also Schwartz, *supra* note 156 ("The Court has given the symbiotic relationship doctrine formulated in *Burton v. Wilmington Parking Auth.* a niggardly interpretation.") (citing *Blum*, 457 U.S. 991 (1982); *Rendell-Baker*, 457 U.S. 830 (1982); *Jackson*, 419 U.S. 345 (1974); *Moose Lodge*, 407 U.S. 163 (1972)).

189. For a discussion of the "state encouragement" theory, see *supra* notes 117-133 and accompanying text.

190. *Jackson*, 419 U.S. at 357.

191. 436 U.S. 149 (1978).

192. Phillips, *supra* note 93, at 705-06.

In *Flagg Bros.*,<sup>193</sup> the Court rejected a due process challenge to a warehouseman's threat to sell personal property pursuant to a New York Uniform Commercial Code provision, which allowed such a sale in order to satisfy unpaid storage charges.<sup>194</sup> The Court rejected the claim that the defendant's action was authorized and encouraged by the permissive UCC provision and stated that "[t]his Court, however, has never held that a state's mere acquiescence in a private action converts that action into that of the State."<sup>195</sup> The Court held that in order for the state to be responsible for the act of a private party, the state must, by its law, compel that act.<sup>196</sup>

### E. *Application to San Francisco Arts & Athletics*

Given the current trend,<sup>197</sup> the *San Francisco Arts & Athletics* Court's determination that the USOC's enforcement of its exclusive right to use the word "Olympic"<sup>198</sup> did not constitute government action under the fifth amendment<sup>199</sup> is not surprising.<sup>200</sup>

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193. 436 U.S. 149. This case, *Jackson*, and *Moose Lodge* comprise what is called the "Rehnquist Trilogy," the trio of cases that cemented the Court's new direction. Phillips, *supra* note 93, at 703.

194. *Flagg Bros.*, 436 U.S. at 166.

195. *Id.* at 164.

196. *Id.* at 164-65.

197. For a discussion of the Burger Court's narrow approach in state action cases, see *supra* notes 155-196 and accompanying text.

198. See 36 U.S.C. § 380, reproduced *supra* note 5.

199. *San Francisco Arts & Athletics*, 107 S. Ct. 2971, 2984-87 (1987).

200. This is only the third case in which the USOC has been challenged as being a "government actor." In *DeFrantz v. United States Olympic Comm.*, 492 F. Supp. 1181 (1980), the court held that the decision of the USOC not to send an American team to the summer Olympics was not state action. *Id.* at 1194. In reaching this conclusion, the court, distinguishing *Burton*, found that the Federal Government and the USOC did not enjoy a "symbiotic relationship" (e.g., the USOC had, at that time, received no federal funding even though funding was authorized under the Amateur Sports Act). *Id.* at 1193. In fact, the only link the court found was that the Amateur Sports Act required the USOC to submit an annual report to the President and Congress, which "hardly convert[ed] such an independent relationship to a 'joint participation.'" *Id.* The court also rejected the athletes' argument that the "campaign of governmental persuasion, personally led by President Carter, crossed the line from 'governmental recommendation,' . . . into the area of 'affirmative pressure,'" thus creating a "sufficiently close nexus between the [government] and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Id.* (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). Furthermore, the court also found that

Under the current restrictive definition of public function<sup>201</sup> which renders the doctrine virtually meaningless,<sup>202</sup> it seemed a simple matter for the majority to find that, while the USOC performed important governmental functions in the national interest, "[n]either the conduct nor the coordination of amateur sports has been a traditional governmental function."<sup>203</sup> However, as Justice Brennan observed in his dissent, the USOC performs a distinctive, traditional governmental function in that it "represents this Nation to the world community."<sup>204</sup>

National representation is not the USOC's only public function. Congress' dissatisfaction with the performance of the United States in international athletic competitions led it to grant the USOC an unprecedented administrative authority over all private American athletic organizations involved in international competition.<sup>205</sup>

Thus, unlike the nursing home in *Blum*,<sup>206</sup> or the private

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even if the vote of the USOC had constituted state action, the athletes had no constitutionally protected right to compete in amateur athletics. *DeFrantz*, 492 F. Supp. at 1194. Therefore the precedential value of this case for purposes here is minimal at best.

The second case involving the USOC and a claim of state action, *Martin v. International Olympic Comm.*, 740 F.2d 670 (1984), also offers little guidance. Although women runners in *Martin* were ultimately unsuccessful, their claim that the lack of equal medal opportunities for women in the 1984 Olympic Games violated their equal protection rights under the fifth amendment was found to involve a constitutionally protected right. *Id.* at 677. *Cf. DeFrantz*, 492 F. Supp. 1181. However, *Martin*, like *DeFrantz*, is of little precedential value as to the issue of what constitutes state action because, in affirming the district court's finding of state action, the court's *entire* discussion was as follows: "[W]e cannot say, on this record, that the district court erroneously found state action present." *Martin*, 740 F.2d at 677.

201. See *supra* notes 173-184 and accompanying text (discussing the Burger Court cutback on the public function doctrine).

202. See *San Francisco Arts & Athletics*, 107 S. Ct. at 2988 n.1 (Brennan, J., dissenting) (limiting the doctrine to "exclusive" governmental functions has the undesirable consequence of "freezing into law a static conception of Government and our judicial theory of government action would cease to resemble contemporary experience").

203. *San Francisco Arts & Athletics*, 107 S. Ct. at 2985.

204. *Id.* at 2988 (Brennan, J., dissenting). The majority's weak argument in rejecting this contention was that the USOC's representational function could not be said to be traditionally and exclusively governmental because "[a]ll sorts of private organizations send 'national representatives' to participate in world competitions." *San Francisco Arts & Athletics*, 107 S. Ct. at 2985 n.27.

205. *Id.* at 2990 (Brennan, J., dissenting). "The legislative history reveals . . . that no actor in the private sector had ever performed this function, and indeed never could perform it absent enabling legislation." *Id.*

206. 457 U.S. 991.

school in *Rendell-Baker*,<sup>207</sup> or the private club in *Moose Lodge*,<sup>208</sup> or even the public utility in *Jackson*,<sup>209</sup> the USOC does not merely provide a public service.<sup>210</sup> It "has been endowed by the Federal Government with the exclusive power to serve a unique, national, administrative, adjudicative, and representational role."<sup>211</sup>

Since the state encouragement strand of the state action doctrine has been virtually eliminated,<sup>212</sup> the majority's finding of no state action under this test was very predictable.<sup>213</sup> It is equally unsurprising that the Court found the Federal Government's various involvements with the USOC were insufficient to render its allegedly discriminatory enforcement government action.<sup>214</sup>

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207. 457 U.S. 830.

208. 407 U.S. 163.

209. 419 U.S. 345.

210. 107 S. Ct. at 2991 (Brennan, J., dissenting).

211. *Id.* Justice Brennan noted that these attributes also distinguish the USOC from most of the "69 other federally created private corporations such as the American Legion, Big Brothers-Big Sisters of America, Daughters of the American Revolution, Veterans of Foreign Wars of the United States, whose presumed status as private actors is not threatened by a finding of government action here." *Id.* at 2991 n.11 (citation omitted).

212. See *supra* text accompanying notes 189-196 (discussing the impact of *Jackson*, 419 U.S. 345, and *Flagg Bros.*, 436 U.S. 149, on this doctrine). In order to find state action under this strand, the "private" decision must have been coerced or significantly encouraged by the government. See *supra* text accompanying notes 117-118.

213. The Court stated that "[a]t most, the Federal Government, by failing to supervise the USOC's use of its rights, can be said to exercise '[m]ere approval or acquiescence in the initiatives' of the USOC. This is not enough to make the USOC's actions those of the Government." *San Francisco Arts & Athletics*, 107 S. Ct. at 2986 (citations omitted).

It is interesting to note in discussing the state encouragement strand in this case, the SFAA, relying on *Shelley v. Kraemer*, 334 U.S. 1, argued that the district court's grant of injunctive relief in favor of the USOC constituted government action. *San Francisco Arts & Athletics*, 107 S. Ct. at 2987 n.30. However, the *San Francisco Arts & Athletics* Court sidestepped the question altogether because, although the petition for certiorari argued that the USOC was a state actor, it did not raise the issue of whether the district court's grant of injunctive relief constituted government action, and this question was not "fairly encompassed" within the questions presented. *Id.* See also Schwartz, *supra* note 156, at 3, cols. 1-2 (discussing the Court's avoidance of the *Shelley* issue).

214. *San Francisco Arts & Athletics*, 107 S. Ct. at 2985. The fact that Congress granted USOC a corporate charter was insufficient because all corporations are chartered by government and "[t]hey do not thereby lose their essentially private character." *Id.* The fact that the USOC was subject to federal regulation was insufficient because even extensive governmental regulation was an insufficient basis for finding state action. *Id.*

However, the Court, by considering each facet of government action separately, failed to look at the whole picture.<sup>215</sup> When one looks at the whole picture, it becomes clear that the USOC and the Federal Government "[e]xist[ed] in a symbiotic relationship sufficient to provide a nexus between the USOC's challenged action and the Government."<sup>216</sup> This relationship provided a variety of mutual benefits, as did the relationship in *Burton*.<sup>217</sup>

The Amateur Sports Act conferred upon the USOC authority and responsibilities never before held by a private organization in this country,<sup>218</sup> substantial financial resources,<sup>219</sup> and the power to raise additional funds through the exclusive use of the word "Olympic" and related emblems.<sup>220</sup> In return, the U.S. Government obtained an effective organization to coordinate all amateur athletics related to international competition.<sup>221</sup> Further, there was a strong connection between the USOC and the U.S. Government in the eyes of the public both here and abroad.<sup>222</sup>

There was also a close financial and legislative link between the USOC's alleged discriminatory exercise of its word-use authority and the financial success of both the USOC and the Government. Given that the purpose of this grant of unique discre-

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*See, e.g., Blum*, 457 U.S. 991; *Rendell-Baker*, 457 U.S. 830; *Jackson*, 419 U.S. 345. The fact that Congress granted the USOC a "trademark plus" in the word Olympic, even though designed to help the USOC obtain funding, did not warrant a finding of government action because governments "may subsidize private entities without assuming constitutional responsibility for their actions." *San Francisco Arts & Athletics*, 107 S. Ct. at 2985.

215. Schwartz, *supra* note 156. "When one analyzes all of the involvement with government what emerges is a governmentally created entity that is regulated, receives special benefits and performs a critical representational function. In short, it shows an entity that is fairly akin to a governmental agency." *Id.* at 2, col. 4. *See also Burton*, 365 U.S. 715 (holding that distinct indicia of state action should be assessed in their aggregate or cumulative impact). *But see supra* notes 187-188 and accompanying text (discussing the *Jackson* Court's implicit rejection of *Burton*'s teaching).

216. *San Francisco Arts & Athletics*, 107 S. Ct. at 2991-92 (Brennan, J., dissenting).

217. *Id.* at 2992.

218. *Id.*

219. The USOC was authorized to seek up to \$16 million annually in grants from the Secretary of Commerce. 36 U.S.C. § 384(a).

220. 36 U.S.C. § 380.

221. *San Francisco Arts & Athletics*, 107 S. Ct. at 2992 (Brennan, J., dissenting).

222. *Id.* at 2992 (citing *Burton*, 365 U.S. at 724).

tion was to enhance the fundraising ability of the USOC,<sup>223</sup> and that the USOC has used this discretion to discriminate against the SFAA, then here, as in *Burton*, "profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency."<sup>224</sup>

Finally, the issue of state action deserved more sensitive handling than that afforded by the Court, especially when the entity challenged as a state actor was engaged in what the challenger claims to be invidious discrimination.<sup>225</sup>

#### IV. First Amendment Issue

##### A. Protected Speech

The first amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."<sup>226</sup> There are two types of speech protected by this clause, noncommercial speech and, to a lesser extent, commercial speech.<sup>227</sup>

##### 1. Noncommercial Speech

Noncommercial or expressive speech is any speech which does not advertise a service or product for profit or for a business purpose.<sup>228</sup> An important subcategory of noncommercial speech is political speech.<sup>229</sup> Although there are various interpre-

223. *San Francisco Arts & Athletics*, 107 S. Ct. at 2981-82.

224. *Burton*, 365 U.S. at 724.

225. The second circuit has explicitly stated that its state action tests will differ depending on the nature of the substantive claim advanced. See, e.g., *Taylor v. Consolidated Edison Co.*, 552 F.2d 39, 42-43 (2d Cir.), *cert. denied*, 434 U.S. 845 (1977) (lesser degree of governmental involvement needed to find state action in racial discrimination case than in due process or first amendment case; sexual discrimination cases also require (unspecified) lesser degree of governmental involvement). See also *Fortin v. Darlington Little League*, 514 F.2d 344, 347-48 (1st Cir. 1975) (Little League, chartered by Congress, held to be engaged in state action when it used public resources to provide softball games for boys only).

226. U.S. CONST. amend. I.

227. G. GUNTHER, *supra* note 124, at 972.

228. See J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* 923 (2d ed. 1983). See also *infra* note 231 (defining commercial speech).

229. "Political speech" is speech that participates in the process of representative democracy and does not advocate violent overthrow of the government or incite unlawful acts. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 300 (1978). Although many first amendment theorists admit that the speech clause bears an essential relationship to the

tations of the first amendment language, political speech, by wide agreement, is the type of speech that most clearly comes within the protection of the first amendment.<sup>230</sup>

## 2. Commercial Speech

### a. General Commercial Speech

The extent to which commercial speech<sup>231</sup> is protected by the first amendment is not quite so clear. What is clear is that the extent of protection afforded commercial speech is less than that which noncommercial speech receives.<sup>232</sup> In fact, until recently,<sup>233</sup> restrictions on commercial speech were thought to be exempt from first amendment prohibitions.<sup>234</sup>

The judicial approach to commercial speech was first set forth in 1942 in *Valentine v. Chrestensen*<sup>235</sup> where the Supreme

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democratic political process, there is no such wide acceptance that protection is limited to political speech. Judge Bork, arguing on behalf of such a limitation, has acknowledged that his belief in the political speech principle "departs drastically from existing Court-made law." *Id.* at 302 (citing Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971)).

230. G. GUNTHER, *supra* note 124, at 972. This is consistent with the three major justifications advanced by Justice Louis Brandeis in his concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927), to support the fundamental right to freedom of speech as it is embodied in the first amendment. First, freedom of speech is an essential requirement for democratic self-government; only through the unfettered exchange of ideas can the electorate make informed and effective decisions. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring). Second, free speech serves as a safety valve in society by channeling potentially violent energy into peaceful forms of expression and public dialogue. *Id.* Finally, freedom of speech is justified as an end in itself, for an individual must be free to speak and hear in order to realize his full human potential. *Id.*

231. Commercial speech has been defined as "speech of any form that advertises a product or service for profit or for business purpose." J. NOWAK, *supra* note 228, at 923.

232. G. GUNTHER, *supra* note 124, at 972. For a discussion of permissible restrictions on commercial speech and the two step analysis used by the Court to determine whether a governmental restriction on commercial speech violates the first amendment, see *infra* notes 241-254 and accompanying text.

233. For a discussion of the end of the old commercial speech doctrine in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), see *infra* notes 239-247 and accompanying text. In an earlier case, the Court indicated that the first amendment might be used to protect purely commercial speech, but did not explicitly so hold. *Bigelow v. Virginia*, 421 U.S. 809 (1975) (advertisement announcing availability of legal abortions protected by the first amendment).

234. See, e.g., *Breard v. Alexandria*, 341 U.S. 622 (1951). See also *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) ("We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.").

235. 316 U.S. 52 (1942).

Court upheld a New York City ordinance banning the public distribution of handbills containing advertising matter.<sup>236</sup> In what has become known as the "commercial speech doctrine," the Court stated that although the first amendment would prevent state and city authorities from totally prohibiting communication by handbills, it "imposes no such restraint on government as respects purely commercial advertising."<sup>237</sup> The effect of *Valentine* was to exclude completely commercial speech from first amendment protection. For the next three decades, commercial speech was viewed as inferior to speech that concerned political or social information because it sought merely to improve the economic position of the speaker. Commercial speech was therefore regulated like any other economic activity.<sup>238</sup>

The end of the old "commercial speech doctrine" came about in 1976, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>239</sup> when the Supreme Court held that a state cannot prohibit pharmacists from advertising their prices since the consuming public has a protected first amendment interest in the free flow of truthful information concerning a lawful activity.<sup>240</sup> The *Virginia Board* Court made it clear that commercial speech, like other varieties, is protected. However this did not mean commercial speech could never be

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236. *Id.* at 54. The Court upheld an entrepreneur's conviction for distributing leaflets which advertised a commercial exhibition of a former Navy submarine. *Id.* at 55.

237. *Id.* at 54.

238. See Comment, *Commercial Speech and the First Amendment-Continuing Uncertainty After Six Years*, 12 CAP. U.L. REV. 115, 122 n.38 (1982) (citing *Breard v. Alexandria*, 341 U.S. 622 (1950)).

239. 425 U.S. 748 (1976) (invalidating statute making illegal the advertisement of prescription drug prices as unprofessional conduct).

240. *Id.* at 773. Commercial speech rights have been recognized in an increasing number of advertising areas: *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (striking down state limitations on attorney advertising); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (invalidating a prohibition of any advertisement or display of contraceptives, a product which was not only legal but constitutionally protected); *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977) (holding that first amendment does not permit a municipality to prohibit by ordinance the posting of "For Sale" or "Sold" signs even though the town acted to stem what it perceived as the flight of white homeowners from a racially integrated community); *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (invalidating state regulation banning all public utility advertising which promoted the use of electricity, finding the state's ban broader than necessary to further the state interest in energy conservation).

regulated.<sup>241</sup> The Court set forth three types of permissible restrictions on commercial speech.

First, it noted that mere time, place, or manner<sup>242</sup> restrictions are often proper provided "they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information."<sup>243</sup> Second, restrictions on false, deceptive, or misleading speech are permissible<sup>244</sup> since the first amendment does not prohibit the state from insuring that the stream of commercial information flows cleanly as well as freely.<sup>245</sup> The third permissible restriction on commercial speech, according to the Court, is on commercial speech which proposes illegal transactions.<sup>246</sup>

Since *Virginia Board* made it clear that commercial speech is not absolutely protected by the first amendment,<sup>247</sup> a two-step method of analysis<sup>248</sup> has been developed in the modern speech cases to determine whether the regulation of commercial speech violates the first amendment. The first step is to determine whether the speech is truthful, nonmisleading speech concerning a lawful commercial activity. If the government is attempting to restrict or punish false or misleading advertising, it will not be

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241. *Virginia Bd.*, 425 U.S. at 770.

242. *Id.* at 771. In *San Francisco Arts & Athletics*, Justice Powell, writing for the Court, argued that the restriction was only of the manner in which the SFAA expressed itself and did not prohibit the SFAA from conveying its message. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971, 2981 (1987). See *supra* text accompanying note 46.

243. *Virginia Bd.*, 425 U.S. at 771. Dissenting in *San Francisco Arts & Athletics*, Justice Brennan found the Amateur Sports Act to violate the first amendment by restricting speech in a way that was not content neutral. 107 S. Ct. at 2999 (Brennan, J., dissenting). See *supra* notes 76-80 and accompanying text.

244. *Id.* Justice Stewart elaborated on this issue in his concurrence. Unlike libel actions, where the first amendment offers some protection in the appropriate circumstances even for false factual statements, the commercial advertiser is generally not under the deadline pressures of the press, knows the product or service he seeks to sell, and is in a position to verify the accuracy of his statements; consequently there is little danger that state regulation of false or misleading price or product advertising will chill nondeceptive commercial expression. *Id.* at 777-78 (Stewart, J., concurring).

245. *Virginia Bd.*, 425 U.S. at 772.

246. *Id.* at 772 (citing *Pittsburgh Press Co. v. Human Rights Comm'n*, 413 U.S. 376 (1973)).

247. *Id.* at 770.

248. NOWAK, *supra* note 86, at 924.

subjected to an overbreadth analysis<sup>249</sup> and will therefore not be required to show that its law is no more extensive than necessary to achieve that purpose.<sup>250</sup>

After the court has found that the regulation restricts non-misleading commercial communications, the second step is to determine whether the governmental regulation directly advances a substantial governmental interest without unnecessary restrictions on freedom of speech.<sup>251</sup> Under this balancing test, the governmental regulation will fail if the government interest is not sufficiently substantial to justify a restriction on speech or if the means used to advance such an interest either do not directly advance the governmental interest or do so with an unnecessary burden on the ability to communicate the commercial message.<sup>252</sup> Since the *Virginia Board* decision, only two governmental regulations of advertising have survived this analysis, and both did so on the ground that the commercial speech at issue tended to be misleading.<sup>253</sup> Of the two, *Friedman v. Rogers*<sup>254</sup> is of particular interest since it illustrates the principle that the government can constitutionally restrict the use of trademarks as long as that use is found to be deceptive or misleading.

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249. An overbroad statute is one that is designed to burden or punish activities which are not constitutionally protected, but the statute includes within its scope activities which are protected by the first amendment. See NOWAK, *supra* note 86, at 840. See also Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales For The Protection of Trade Symbols*, 1982 WIS. L. REV. 158, 159 (False or deceptive commercial speech receives no protection from the first amendment. Therefore, traditional trademark theory with its historic emphasis on consumer deception and confusion is well within constitutional bounds.).

250. See NOWAK, *supra* note 86, at 924.

251. *Id.*

252. *Id.* In *San Francisco Arts & Athletics*, the majority found that the Amateur Sports Act restricted mainly commercial speech and therefore applied a similar test, which required a balancing between the governmental interest and the magnitude of the speech restriction. 107 S. Ct. at 2981. This test is essentially the same as the four-part test in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

253. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (upholding prohibition of in-person solicitation of clients by attorneys for pecuniary gain); *Friedman v. Rogers*, 440 U.S. 1 (1978) (upholding ban on optometrists' use of trade names in advertising).

254. 440 U.S. 1.

b. *Trademark Law*

First amendment rights have been limited by trademark laws. The traditional purpose of trademark law has been to secure to the owner of the mark the goodwill of his business and to enable consumers to distinguish among competing products.<sup>255</sup> Several rationales have been advanced in support of trademark protection.

(1) *The Confusion Rationale*

The law of trademarks has its roots in the common-law action of deceit in which a member of the public claimed that he was deceived into buying a merchant's product through the latter's misleading adoption of a competitor's trademark.<sup>256</sup> A trademark was the owner's means of identifying his products. The owner's rights extended only to those situations where customers were led to believe that the infringer's products originated with the trademark owner.<sup>257</sup> Thus, the concept of customer confusion is the touchstone of traditional trademark theory.<sup>258</sup>

Early courts even required that the trademark owner show actual consumer confusion.<sup>259</sup> This requirement was dispensed

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255. S. KANE, *TRADEMARK LAW: A PRACTITIONER'S GUIDE* 11-12 (1987).

256. McClure, *Trademarks and Unfair Competition: A Critical History of Legal Thought*, 69 *TRADEMARK REP.* 305, 311 (1979). The trademark owner itself was powerless to prevent unauthorized uses of the mark. *Id.* In time, however, courts of equity began to allow these trademark owners injunctive relief against a competitor's use of the mark. *Id.* at 313.

Trademarks are also afforded legal protection under state statutory provisions. *See, e.g.,* MODEL STATE TRADEMARK BILL (1964), reprinted in 2 J. MCCARTHY, *TRADEMARKS AND UNFAIR COMPETITION* § 22:4. The infringement of federally registered marks is governed by the comprehensive registration and enforcement provisions of the Trademark Act of 1946, commonly known as the Lanham Act, 15 U.S.C. §§ 1051-1127 (1982 & Supp. 1986).

257. *See, e.g.,* *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924) ("A trade mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his."). During the first half of the twentieth century, the owner's protection expanded to noncompeting goods, but this did nothing to undermine the dominance of the confusion rationale. *See* Denicola, *supra* note 249, at 163-64.

258. *See* Denicola, *supra* note 249, at 160.

259. Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 VA. L. REV. 1079, 1082 (1986).

with, however, and the test for trademark infringement came to focus instead upon the likelihood of such confusion.<sup>260</sup> This likelihood of confusion standard is utilized by the federal trademark statute, the Lanham Act,<sup>261</sup> as well as by state statutory provisions.<sup>262</sup>

Reliance on the confusion rationale as the primary basis of liability, which restricts judicial intervention to instances in which the mark is used to misrepresent the source or sponsorship of goods or services, has insulated traditional trademark doctrine from constitutional attack.<sup>263</sup> Regulation of deceptive or misleading commercial speech presents no constitutional difficulties.<sup>264</sup> Thus, under the traditional confusion rationale, the rights afforded a trademark owner are not restricted by the first amendment. However, trademark law has sometimes ventured beyond the confines of the traditional confusion model<sup>265</sup> by

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260. See, e.g., *Standard Oil Co. of N.M. v. Standard Oil Co. of Cal.*, 56 F.2d 973, 976 (10th Cir. 1932) (affirming lower court's injunction restraining Standard Oil Company of New Mexico from using that name because it was so similar to plaintiff-Standard Oil Company of California that it was probable the public would be confused). See also 2 J. MCCARTHY, *TRADEMARKS AND UNFAIR COMPETITION* § 23.1 (2d ed. 1984).

261. The essential question in any suit brought under the Lanham Act, 15 U.S.C. §§ 1051-1127 (1982 & Supp. 1986), is "whether a substantial number of ordinarily prudent purchasers are likely to be misled or confused as to the source of the different products." *Mushroom Makers Inc. v. R.G. Barry Corp.*, 441 F. Supp. 1220, 1225 (S.D.N.Y. 1977), *aff'd*, 580 F.2d 44 (2d Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). Section 32 of the Lanham Act authorizes a civil action to remedy any unauthorized use that "is likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1114(1)(a) (1982 & Supp. 1986).

262. State trademark provisions supplement the common law and, with the exception of the antidilution provisions, merely restate the confusion rationale. See Denicola, *supra* note 249, at 161. For a discussion of antidilution provisions, see *infra* notes 286-299 and accompanying text.

263. See Denicola, *supra* note 249, at 165.

264. *Id.* See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

*Id.* at 771-72. See also *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). "[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Id.* at 456. For a discussion of permissible restrictions of commercial speech, see *supra* notes 241-246 and accompanying text.

265. See generally Denicola, *supra* note 249, at 158. See also *infra* notes 250-279

those seeking to extend the scope of trademark protection.<sup>266</sup> The rationales employed in this pursuit are more closely allied with property<sup>267</sup> than with tort.<sup>268</sup> Under the misappropriation and dilution rationales, which utilize the property conception of trademark rights, there is no need for a showing of confusion, and "[w]hen consumer confusion ceases to be the touchstone . . . the accommodation between trademark law and the first amendment becomes more problematic."<sup>269</sup>

## (2) *Misappropriation Rationale*

The common law tort of misappropriation was born<sup>270</sup> in a 1918 Supreme Court decision which upheld an injunction prohibiting the International News Service ("INS") from appropriating the news of the Associated Press ("AP") in a competing news service, until its commercial value to the AP had dissipated, despite the absence of any misrepresentation as to the source of the news.<sup>271</sup> The Court described defendant INS's wrong as "taking material that has been acquired by the plaintiff AP as the result of organization and the expenditure of labor, skill and money, and . . . in appropriating it and selling it as its own."<sup>272</sup> In characterizing the AP's interest in the news, the Court chose the term "quasi-property."<sup>273</sup> The misappropriation doctrine has been broadly invoked<sup>274</sup> to remedy injuries result-

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and accompanying text (discussing two alternative models: misappropriation and dilution rationales).

266. See generally Denicola, *supra* note 249.

267. The exclusive right to use a particular symbol to distinguish the source of goods was denominated a property right by the Supreme Court in the *Trademark Cases*, 100 U.S. 82 (1879). This property conception of trademark rights has generally remained subsidiary to notions of deception and commercial morality. See generally McClure, *Trademarks and Unfair Competition: A Critical History of Legal Thought*, 69 TRADE-MARK REP. 305 (1979).

268. See Denicola, *supra* note 249, at 166.

269. *Id.*

270. Unlike most common-law causes of action, which mature gradually and are "eventually acknowledged by an appropriate christening, the tort of misappropriation is generally considered to have sprung full-blown" out of *International News Serv. v. Associated Press*, 248 U.S. 215 (1918). See Denicola, *supra* note 249, at 171-72.

271. *International News Serv.*, 248 U.S. at 242.

272. *Id.* at 239. For a discussion of similar reasoning used by the *San Francisco Arts & Athletics* majority, see *supra* notes 41-43 and accompanying text.

273. *International News Serv.*, 248 U.S. at 236.

274. This theory has been used to enjoin the following unauthorized activities:

ing from the misappropriation of a plaintiff's "quasi-property" interest in commercial assets created by his investment of effort, time, and money.<sup>275</sup> Even the Supreme Court has used the misappropriation doctrine to protect a performer from the appropriation of his act by a television station.<sup>276</sup>

The exclusive right to control the commercial exploitation of famous trademarks is a specific application of this general common-law action for misappropriation.<sup>277</sup> Although many trademark "misappropriation" cases premise liability on confusion of "association" or "connection," that "association" or "connection" may refer to the simple fact that the sight of a familiar trademark will call to mind the trademark owner, and

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broadcasting of professional baseball games, *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); *National Exhibition Co. v. Fass*, 143 N.Y.S.2d 767 (Sup. Ct. 1955); *Mutual Broadcasting Sys., Inc. v. Muzak Corp.*, 177 Misc. 489, 30 N.Y.S.2d 419 (Sup. Ct. 1941); the publishing of answers to problems appearing in a college textbook, *Addison-Wesley Pub. Co. v. Brown*, 207 F. Supp. 678 (E.D.N.Y. 1962); record and tape pirating, *A & M Records, Inc. v. M.V.C. Distrib. Corp.*, 574 F.2d 312 (6th Cir. 1978); *Gai Audio of N.Y., Inc. v. Columbia Broadcasting Sys.*, 27 Md. App. 172, 340 A.2d 736 (1975); *Columbia Broadcasting Sys. v. Melody Recordings, Inc.*, 134 N.J. Super. 368, 341 A.2d 348 (1975); *Mercury Record Prod., Inc. v. Economic Consultants, Inc.*, 64 Wis. 2d 163, 218 N.W.2d 705 (1974), *appeal dismissed*, 420 U.S. 914 (1975); sale of photos of a World's Fair, *New York World's Fair 1964-1965 Corp. v. Colourpicture Pub., Inc.*, 141 U.S.P.Q. (BNA) 939 (N.Y. Sup. Ct. 1964), *aff'd*, 21 A.D.2d 896, 251 N.Y.S.2d 885 (1964); recordings of the Metropolitan Opera, *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951); radio stations relying on newspaper subscriptions rather than news bureaus, *Associated Press v. KVOS*, 80 F.2d 575 (9th Cir. 1935); *Veatch v. Wagner*, 116 F. Supp. 904 (D. Alaska 1953); *Pottstown Daily News Pub. Co. v. Pottstown Broadcasting Co.*, 411 Pa. 383, 192 A.2d 657 (1963); trade journals that have appropriated information from competitors, *McCord Co. v. Plotnick*, 108 Cal. App. 2d 392, 239 P.2d 32 (1951); *Bond Buyer v. Dealer Digest Pub. Co.*, 25 A.D.2d 158, 267 N.Y.S.2d 944 (1966); *Gilmore v. Sammons*, 269 S.W. 861 (Tex. Ct. App. 1925).

275. See Denicola, *supra* note 249, at 173.

276. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). The plaintiff brought a damages action against the defendant-broadcast station for "unlawful appropriation" of his "professional property" when his 15-second "human cannonball" act was filmed in its entirety by the defendant and shown on a television news program later the same day. *Id.* The Court found that the act was the product of the plaintiff's own talents and energy, the end result of much time, effort, and expense, and that defendant's broadcast posed a substantial threat to the economic value of plaintiff's performance since, if the public could see the act on television for free, it would be less willing to pay to see it at the fair. *Id.* at 575.

277. See Denicola, *supra* note 249, at 171. "Given the universality of the moral admonitions that underlie the concept of misappropriation, its appearance in the law of trademarks is hardly surprising." *Id.* at 174.

not that the defendant is in any way endorsed or sponsored by or otherwise commercially affiliated with the trademark owner.<sup>278</sup> In one such case, various National Hockey League teams succeeded in obtaining an injunction against the sale of "patches," or cloth emblems, featuring reproductions of the teams' trademarks even though the defendant was willing to include a notice on its "patches" stating that they were not authorized by the teams.<sup>279</sup> In applying this rationale, the courts have also enjoined: the manufacture and sale of Volkswagen customizing kits employing a grill and hood ornament resembling that of a Rolls-Royce;<sup>280</sup> the use of the mark "JAWS" on food disposers;<sup>281</sup> and the use of the words "DAILY PLANET" as a newspaper title.<sup>282</sup>

However, this effort to expand trademark rights has been challenged in numerous decisions struggling to keep trademark rights fixed to the traditional limits of the confusion rationale. Such decisions distinguish between uses that cause the public to bring the plaintiff to mind and those that actually deceive, thereby refusing to prevent the appropriation of trade symbols in the absence of confusion.<sup>283</sup> Absent public confusion, even the

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278. *Id.* at 167-68.

279. *Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Mfg., Inc.*, 510 F.2d 1004 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975). Other "patches" cases have had similar results: *Boston Professional Hockey Ass'n v. Reliable Knitting Works, Inc.*, 178 U.S.P.Q. (BNA) 274 (E.D. Wis. 1973); *National Football League Properties, Inc. v. Dallas Cap & Emblem Mfg., Inc.*, 26 Ill. App. 3d 820, 327 N.E.2d 247 (1975); *National Football League Properties, Inc. v. Consumer Enterprises, Inc.*, 26 Ill. App. 3d 814, 327 N.E.2d 242, *cert. denied*, 423 U.S. 1018 (1975). See generally Fletcher, *Still More About Patches*, 67 TRADEMARK REP. 76 (1977) (by counsel for Boston Professional Hockey Ass'n).

280. *Rolls-Royce Motors Ltd. v. A & A Fiberglass, Inc.*, 428 F. Supp. 689 (N.D. Ga. 1976).

281. *Universal City Studios, Inc. v. Montgomery Ward & Co.*, 207 U.S.P.Q. (BNA) 852 (N.D. Ill. 1980) (enjoined because of the possibility of "association" or "connection" with the motion picture of that title).

282. *D C Comics, Inc. v. Powers*, 465 F. Supp. 843 (S.D.N.Y. 1978). "Moreover, in the case at bar, I find substantial evidence indicating that the adoption by defendants of the name Daily Planet in 1969 was merely an attempt to cash in on the Superman story and its notoriety." *Id.* at 849.

283. See, e.g., *Toho Co. v. Sears, Roebuck & Co.*, 645 F.2d 788 (9th Cir. 1980) (holding garbage bag seller's use of "Bagzilla" name and figure and slogan "monstrously strong bags" posed no likelihood of confusing consumers by suggestion that bags were made, sponsored, or endorsed by creators of Godzilla character); *Carson v. Here's Johnny Portable Toilets, Inc.*, 498 F. Supp. 71 (E.D. Mich. 1980) (holding entertainer failed to establish that use of the trademark "Here's Johnny Portable Toilets" presented

Girl Scouts were unable to enjoin the use of their trademarks on a poster depicting a pregnant Girl Scout and captioned, "Be Prepared."<sup>284</sup>

Another objection to the misappropriation rationale is that a plaintiff relying on this theory of trademark infringement presents a much weaker case than one who claims the use causes confusion or deception. In the misappropriation cases, the plaintiff cannot be seen as the protector of consumer interests, who seeks redress both for personal wrongs and for general fraud on the public.<sup>285</sup>

### (3) *Dilution Rationale*

The dilution theory, like the misappropriation rationale, utilizes the property conception of trademark rights and is therefore not dependent upon a showing of confusion or other public injury.<sup>286</sup> The dilution theory for the protection of trademarks was first set forth in a 1927 law review article which considered the use of similar marks on noncompeting goods:

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a likelihood of confusion and therefore failed to establish trademark infringement); Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Chandris America Lines, Inc., 321 F. Supp. 707 (S.D.N.Y. 1971) (use of circus operator's trademark "Greatest Show on Earth" in phrase "Greatest Show on Earth Isn't" in advertisement of Caribbean cruise was not likely to cause confusion and was therefore not a trademark infringement); University of Notre Dame Du Lac v. Twentieth Century Fox Film Corp., 22 A.D. 452, 256 N.Y.S.2d 301, *aff'd*, 15 N.Y.2d 940, 207 N.E.2d 508, 259 N.Y.S.2d 832 (1965) (injunction denied to University of Notre Dame prohibiting the use of its name and symbols in a film that parodied its football program).

284. *Girl Scouts of the United States of America v. Personality Posters Mfg. Co.*, 304 F. Supp. 1228 (S.D.N.Y. 1969).

285. See Denicola, *supra* note 249, at 176. Although it may be easy to underestimate the significance of consumer interest in trademark litigation, as early as 1883, the Supreme Court stated that relief for the owner of a mark was appropriate "not only as a matter of justice to him, but to prevent imposition upon the public." *Manhattan Medicine Co. v. Wood*, 108 U.S. 218, 223 (1883).

286. See Denicola, *supra* note 249, at 183. As previously noted, when trademark protection is delimited by the confusion rationale, recourse to first amendment principles is unnecessary. See *supra* notes 263-264 and accompanying text. However, when trademark owners are invoking the misappropriation and dilution rationales with increased frequency and the internal limitations of the confusion rationale are abandoned, "free speech rights must enter the calculus of competing interests." See Denicola, *supra* note 249, at 190: "The first amendment implications of the broad and ill-defined rights associated with misappropriation and dilution theory, however, have received little attention." *Id.*

The real injury in all such cases can only be gauged in the light of what has been said concerning the function of a trademark. It is the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon non-competing goods. The more distinctive or unique the mark, the deeper is its impress upon the public consciousness, and the greater its need for protection against vitiation or dissociation from the particular product in connection with which it has been used.<sup>287</sup>

Although the dilution rationale was never expressly incorporated into federal trademark legislation,<sup>288</sup> several states have enacted antidilution statutes designed "to protect a distinctive trademark from the gradual whittling away of its distinctiveness through use by third parties on nonconfusing, noncompeting products."<sup>289</sup> The rationale of an antidilution statute is that the more the public sees a given mark, the more the value and advertising impact of that mark deteriorates.<sup>290</sup> One court, in enjoining the use of the word "Tiffany's" by a Boston lounge, found it diluted the distinctiveness of the New York jeweler's mark and characterized the nature of the injury as a "risk of an erosion of the public's identification of this very strong mark with the plaintiff alone, thus diminishing its distinctiveness, uniqueness, effectiveness, and prestigious connotations."<sup>291</sup>

Additionally, the business reputation of the trademark owner may be subject to tarnishment.<sup>292</sup> These antidilution stat-

287. Comment, *The Rationale Basis of Trademark Protection*, 40 HARV. L. REV. 813, 825 (1927).

288. See Denicola, *supra* note 249, at 182.

289. 1 J. GILSON, TRADEMARK PROTECTION AND PRACTICE § 5.05[9], at 41.

290. *Id.* at 41.

291. *Tiffany & Co. v. Boston Club, Inc.*, 231 F. Supp. 836, 844 (D. Mass. 1964).

292. The *Tiffany* court identified plaintiff's additional interest:

[O]r the risk may be that of detracting from the plaintiff's good will by the possibility that defendant's use of plaintiff's unique mark will tarnish plaintiff's trade name by reason of public dissatisfaction with defendant's product and a resultant holding of this dissatisfaction against plaintiff. An alternative to this second risk is the danger of public identification of plaintiff's trade name or mark with a product or service of a type incompatible with the quality and prestige previously attached by the public to the plaintiff's product.

*Id.* at 844. Although this threat of tarnishment may arise in the absence of confusion if the trademark is used in a manner that undermines its positive image, the courts have forestalled this form of injury by covert manipulation of the confusion rationale. See Denicola, *supra* note 249, at 186. Courts have used the confusion rationale to enjoin: the

utes have been significantly influenced by the Model State Trademark Bill, which states:

Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark registered under this Act, or a mark valid at common law, or a trade name valid at common law, shall be a ground for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.<sup>293</sup>

Those states possessing antidilution statutes have generally given them a narrow application.<sup>294</sup> Judicial reluctance to accept antidilution statutes may be due to a desire to tailor state trademark law to federal trademark law (the Lanham Act),<sup>295</sup> thus avoiding a federal-state confrontation. Further, there may be skepticism about this particular form of ownership protection since an owner's interest in the distinctiveness of his mark, a bewildering, ill-defined intangible, is usually adequately protected by the broadening confusion standards.<sup>296</sup> Lastly, judicial reluctance to give these antidilution statutes more than a narrow

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use of "Genital Electric" on T-shirts and briefs, *General Electric Co. v. Alumpa Coal Co.*, 205 U.S.P.Q. (BNA) 1036 (D. Mass. 1979); the use of a well-known "Enjoy Coca-Cola" design on a poster featuring a facsimile of the symbol, but advocating instead, "Enjoy Cocaine," *Coca-Cola Co. v. Gemini Rising Inc.*, 346 F. Supp. 1183 (E.D.N.Y. 1972); a pornographic movie featuring an actress occasionally clad in a Dallas Cowboys Cheerleader's uniform, *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979); a poster depicting a group of former Dallas Cowboys Cheerleaders wearing only a portion of their former attire, *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184 (5th Cir. 1979); and the use of the slogan "Where there's life . . . there's Bud" by an insecticide manufacturer who substituted the word "Bugs" for "Bud," *Chemical Corp. of America v. Anheuser-Busch, Inc.*, 306 F.2d 433 (5th Cir. 1962), *cert. denied*, 372 U.S. 965 (1963). The dilution statutes provide a more explicit approach to the tarnishment problem and many recent opinions do utilize them as an alternative ground for relief. *See, e.g., Pussycat Cinema*, 604 F.2d 200; *Gucci Shops, Inc. v. R.H. Macy & Co.*, 446 F. Supp. 838 (S.D.N.Y. 1977); *Tiffany*, 231 F. Supp. 836.

293. MODEL STATE TRADEMARK BILL § 12 (1964), *reprinted in* 2 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 22:4 (2d ed. 1984).

294. *See* J. GILSON, *supra* note 289, at 55.

295. The Lanham Act does not protect against dilution; however the legislative history of the Lanham Act gives little support for the notion that Congress, in declining to protect mark owners against dilution, intended to pre-empt, insofar as interstate commerce is concerned, state dilution statutes. *See* Note, *Dilution: Trademark Infringement or Will-O'-The Wisp?*, 77 HARV. L. REV. 520, 524 (1964). *See also* S. Rep. No. 1333, 79th Cong., 2d Sess. (1946).

296. *See* Note, *supra* note 295, at 528-29.

application may result from the fact that, unlike the confusion case, there is no public interest to tip the balance in favor of the trademark owner.<sup>297</sup> Despite this judicial reluctance, trademark owners increasingly are pressing claims under both the misappropriation and the dilution theory.<sup>298</sup> It is interesting to note that the USOC, itself, included in its complaint a cause of action under the California antidilution statute,<sup>299</sup> as it has in other cases decided under section 110 of the Amateur Sports Act.<sup>300</sup>

### B. Other USOC Cases

*Stop the Olympic Prison v. United States Olympic Committee*<sup>301</sup> was the first case<sup>302</sup> decided under section 110 of the Amateur Sports Act and was not one initiated by the USOC. Instead, the USOC was sued by a nonprofit public interest organization, Stop the Olympic Prison ("STOP"), which opposed construction of housing for athletes participating in the 1980 Lake Placid Winter Olympic Games because the housing was to be converted into a federal prison after the games. As a protest, STOP designed and distributed posters displaying the Olympic Rings and Torch and bearing the inscription "STOP THE OLYMPIC PRISON."<sup>303</sup> Refusing to comply with a letter from the USOC requesting that it cease using the Olympic designations, STOP sought a declaratory judgment that it had a first amendment right to print and distribute its poster and to use the word "Olympic" and the symbol of the interlocking rings as an expression of opposition to the prison.<sup>304</sup> In addition, STOP

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297. *Id.* at 529. For a discussion of similar criticisms of the misappropriation rationale, see *supra* note 285.

298. "The notion of trademark misappropriation even in the absence of any likelihood of confusion is evident in much of the current case law, and the long dormant concept of trademark dilution appears poised to further expand the scope of trademark rights." See Denicola, *supra* note 249, at 159.

299. CAL. BUS. & PROF. CODE § 14330 (West 1987).

300. See, e.g., *Stop the Olympic Prison v. United States Olympic Comm.*, 489 F. Supp. 1112 (S.D.N.Y. 1980). For a discussion of *Stop the Olympic Prison*, see *infra* notes 301-315 and accompanying text.

301. 489 F. Supp. 1112 (S.D.N.Y. 1980).

302. It should be noted that this was the only case decided under section 110 of the Amateur Sports Act that the USOC lost.

303. *Stop the Olympic Prison*, 489 F. Supp. at 1114-15.

304. *Id.* at 1116.

sought a judgment declaring that its use of the word "Olympic" and the interlocking rings violated neither the trademark rights of the USOC nor former section 379 of title 36.<sup>305</sup> The USOC counterclaimed for trademark infringement under section 110, traditional trademark infringement and false designation of origin under sections 32(1)<sup>306</sup> and 43(a)<sup>307</sup> of the Lanham Act, violation of New York's antidilution and disparagement laws, and defamation.<sup>308</sup>

The court in *Stop the Olympic Prison* recognized that section 110 could not be interpreted to mean that only the USOC and its licensees were allowed to use the Olympic designations, and therefore sought to determine the range of uses to which the USOC could properly claim exclusive right under section 110.<sup>309</sup> The court held that STOP's poster violated neither subsections (a) nor (c) of section 110 because the posters were not used "for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition."<sup>310</sup> The essentially noncommercial use of the Olympic designations was held not to be within the range of uses for which the USOC could claim exclusive rights under the Amateur Sports Act.<sup>311</sup>

The court dismissed the balance of the USOC's counterclaims since the USOC failed to prove trademark infringement,<sup>312</sup> produced no evidence of trademark dilution,<sup>313</sup> and failed to prove STOP's poster was false or misleading, thus vitiating USOC's disparagement claim.<sup>314</sup> Although the court found

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305. *Id.* STOP had failed in its complaint before the enactment of the Amateur Sports Act. The action should therefore have been decided under former section 379. *Id.* at 1117-18. However, the court applied section 110 of the act because both parties assumed it would apply. *Id.* at 1118.

306. The Trademark Act of 1946 (Lanham Act), Pub. L. No. 87-772, § 32, 60 Stat. 437 (codified at 15 U.S.C. § 1114 (1976)).

307. The Trademark Act of 1946 (Lanham Act), § 43, 60 Stat. 441 (codified at 15 U.S.C. § 1125 (1976)).

308. *Stop the Olympic Prison*, 489 F. Supp. at 1116.

309. *Id.* at 1119.

310. *Id.* at 1118-19 (quoting section 110).

311. *Id.* at 1119. This case is important in that it stands for the proposition that section 110 does not prohibit the noncommercial use of the Olympic designations.

312. *Id.* at 1121-22.

313. *Id.* at 1123.

314. *Id.* at 1124.

it unnecessary to address STOP's first amendment claim, it did imply that a use which did not mislead viewers into assuming that the USOC endorsed the user's viewpoint might be protected by the first amendment.<sup>315</sup>

In *United States Olympic Committee v. International Federation of Bodybuilders*,<sup>316</sup> the range of uses test developed in *Stop the Olympic Prison*<sup>317</sup> was abandoned.<sup>318</sup> Instead, the USOC was granted relief on the rationale that an unauthorized use of an Olympic designation would dilute that designation's value to the USOC, thus making it less marketable.<sup>319</sup> The defendant, International Federation of Bodybuilders ("IFBB"), was a nonprofit organization which annually sponsored the well-known professional body building contest entitled "Mr. Olympia" and also published magazines about bodybuilding.<sup>320</sup> Weider Health and Fitness was a codefendant engaged in selling health food supplements and sporting equipment under the names "Joe Weider Olympians" and "Olympian" through its subsidiary, the defendant I. Brute Enterprises.<sup>321</sup> Two health food stores which sold Weider's products were also defendants in the case.

The USOC sought de novo review of a 1974 Trademark Trial and Appeal Board decision which permitted, over USOC's objection, the registration of the word "Mr. Olympia" as a service mark for IFBB's professional muscle beauty contest, as well as an injunction to prevent the defendants from using the "Mr. Olympia" mark in any manner. The court agreed with the Board's conclusion that there was no likelihood of confusion between the USOC's use of the mark "Olympic" and the IFBB's use of the mark "Olympia."<sup>322</sup> Next, the court held that all of

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315. *Id.* at 1126.

316. 219 U.S.P.Q. (BNA) 353 (D.D.C. 1982).

317. *See supra* notes 309-311 and accompanying text (discussing *Stop the Olympic Prison*).

318. *Bodybuilders*, 219 U.S.P.Q. at 360-61. The court makes no reference to the "range of uses" test in its analysis.

319. *Id.* at 360.

320. *Id.* at 354-56.

321. *Id.* at 354.

322. *Id.* at 357-58, 360. The court also noted that the IFBB had been using the mark since 1965 with no evidence of confusion between that contest and the Olympic Games and that there were significant differences between the two events. The Olympic Games

the defendants except the IFBB<sup>323</sup> had violated section 110<sup>324</sup> and consequently issued an injunction preventing the remaining defendants from using any Olympic designations or simulations thereof.<sup>325</sup>

The antidilution rationale was utilized again in *United States Olympic Committee v. Union Sport Apparel*,<sup>326</sup> in finding a section 110 violation. Defendant Union Sport Apparel marketed apparel and related accessories displaying a logo of three interlocking rings along with the letters "U.S.A."<sup>327</sup> As in *Bodybuilders*,<sup>328</sup> the *Union Sport Apparel* court issued a permanent injunction and an order for impoundment of the defendant's infringing goods and manufacturing materials. However, unlike the court in *Bodybuilders*, the *Union Sport Apparel* court issued an order awarding the USOC treble damages, its costs and attorneys' fees, and defendant's wrongful profits.<sup>329</sup>

The commercial marketing of the five-ring Olympic symbol in the United States without the USOC's consent was found to be violative of section 110 in *United States Olympic Committee v. Intelicense Corp.*<sup>330</sup> Defendant Intelicense had entered into agreements with the IOC under which Intelicense was granted exclusive worldwide rights to market official Olympic pictograms.<sup>331</sup> However, as a prerequisite to the marketing of the pictograms in the territory of each National Olympic Committee ("NOC"), the agreements provided that Intelicense must first secure the approval of each NOC. Ignoring the USOC's refusal of permission to market the pictograms in the United States, In-

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were an amateur sports event held every four years whereas the "Mr. Olympia" contest was an annual professional theatrical exhibition. *Id.*

323. *Id.* at 357. Section 110 was held inapplicable to the IFBB because the IFBB had registered its mark in 1974, four years prior to the enactment of section 110. *Id.*

324. *Id.* at 357, 361.

325. *Id.* at 363.

326. 220 U.S.P.Q. (BNA) 526 (E.D. Va. 1983).

327. *Id.* at 527.

328. 219 U.S.P.Q. 353.

329. *Union Sports Apparel*, 220 U.S.P.Q. at 530-31. The court noted that while section 110 was an independent cause of action, it afforded the USOC the same kinds of remedies available under the Lanham Act. *Id.* at 529.

330. 737 F.2d 263 (2d Cir. 1984).

331. *Id.* at 265. The pictograms were graphic designs of athletes participating in various summer and winter sports against a backdrop of the five Olympic interlocking rings. *Id.*

telicense proceeded to license the use of pictograms on products marketed in the United States.<sup>332</sup> The Court of Appeals for the Second Circuit, in affirming the district court's issuance of a permanent injunction, examined the history of section 110 and concluded that it could not "imagine a more blatant violation of the Act."<sup>333</sup>

### C. *Application to San Francisco Arts & Athletics*

Section 110 of the Amateur Sports Act, as interpreted by the *San Francisco Arts & Athletics* Court, bestows upon the USOC *something more* than a trademark.<sup>334</sup> This interpretation renders the Amateur Sports Act unconstitutional because it prohibits a substantial amount of constitutionally protected speech.<sup>335</sup> Unlike the Lanham Act, which affords traditional trademark protection delimited by the confusion rationale<sup>336</sup> and thereby confined to the realm of commercial speech,<sup>337</sup> section 110 regulates noncommercial as well as commercial speech<sup>338</sup> because its protection is not delimited by the confusion rationale.<sup>339</sup>

332. *Id.*

333. *Id.* at 267.

334. *San Francisco Arts & Athletics*, 107 S. Ct. at 2978. *See also id.* at 2994 n.20 (Brennan, J., dissenting) ("Nowhere in the Legislative History is there any hint that Congress equated USOC's word-use authority over "Olympic" with its trademark power.").

335. 107 S. Ct. at 2994 (Brennan, J., dissenting).

336. *See* 15 U.S.C. § 1066. *See also* Denicola, *supra* note 249, at 190 ("When trademark protection is delimited by the confusion rationale, recourse to constitutional principles is unnecessary.").

337.

A key Lanham Act requirement that limits the impact of trademarks on noncommercial speech is the rule that a trademark violation occurs only when an offending trademark is applied to *commercial* goods and services. The Amateur Sports Act is not similarly qualified. Section 110 (a) (4) "allows the USOC to prohibit the use of 'Olympic' for promotion of theatrical and athletic events," even if such uses "go beyond the 'strictly business' context."

107 S. Ct. at 2997 (Brennan, J., dissenting) (citations omitted).

338. *Id.* Section 110(a)(4) "necessarily regulates only noncommercial speech, since every possible commercial use of the word 'olympic' is regulated by preceding sections of the statute." *Id.*

339. *Id.* at 2997. *See also* Denicola, *supra* note 249, at 190 ("When the internal limitations of the confusion rationale are abandoned, free speech rights must enter the calculus of competing interests.").

The SFAA is a California nonprofit corporation chartered to conduct public cultural events, including athletic competitions and arts activities, "to educate the general public on the vitality, variety and versatility of the gay movement," and to "help balance the onslaught of the Moral Majority's perspective as to homosexuals and to demonstrate the gay community's noncommercial involvement in a healthy endeavor."<sup>340</sup> The SFAA's use of the word "Olympic" was certainly noncommercial<sup>341</sup> and could well be termed "political speech."<sup>342</sup> Although the Court conceded that "some" uses of "Olympic" prohibited under section 110 may involve noncommercial (expressive) speech,<sup>343</sup> the majority proceeded to discount the importance of this possible first amendment infringement.

First, the Court held that section 110 merely restricted the manner in which the SFAA could convey its message.<sup>344</sup> Section 110 cannot be regarded as a mere time, place, and manner statute, however, since by preventing the use of the word "Olympic," the Act violates the first amendment by prohibiting dissemination of a message for which there is no adequate translation.<sup>345</sup>

Then, reasoning that section 110 applied mainly to commercial speech, the Court ignored the SFAA's noncommercial use of

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340. Brief for SFAA, *San Francisco Arts & Athletics v. United States Olympic Comm.*, 107 S. Ct. 2971 (1987) (No. 86-270) (LEXIS, Genfed Library, Supreme Court Briefs file).

341. The incidental monetary transactions occurring when "Gay Olympics I" sponsors used "Olympic" on their posters and T-shirts, which were sold to raise money for their nonprofit corporate cause, do not fit the definition of commercial speech. Speech containing a subsidiary commercial element is not thereby transformed into the less protected form of "commercial speech." *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943). First amendment free expression need not be "free" in the monetary sense to receive full protection under the first amendment. See *New York Times v. Sullivan*, 376 U.S. 254, 265-66 (1964) (paid advertisement does not lose its first amendment protection, for its content of political and ideological speech, because of the subsidiary fact that the advertisement was paid for).

342. For a discussion of the first amendment protection afforded political speech, see *supra* notes 227-230 and accompanying text.

343. *San Francisco Arts & Athletics*, 107 S. Ct. at 2980.

344. *Id.* at 2981.

345. *Id.* at 2998 (Brennan, J., dissenting). "[A] title such as 'The Best and Most Accomplished Amateur Gay Athletes Competition' would not serve as an adequate translation of [the SFAA's] message." *Id.* (citing *International Olympic Comm. v. San Francisco Arts & Athletics, Inc.*, 789 F.2d 1319, 1321 (9th Cir. 1986) (Kozinski, J. dissenting)).

the word "Olympic," applied the test for determining the constitutionality of restrictions on nonmisleading commercial speech, and held that the incidental restrictions on the SFAA's freedom of speech were no greater than necessary to further a substantial government interest.<sup>346</sup> Even if section 110 could be characterized as directly regulating only commercial speech,<sup>347</sup> its incidental restrictions are still greater than necessary to further a substantial government interest. As Justice Brennan points out in his dissent, even without section 110(a)(4), the USOC would have the authority under the Lanham Act to enforce its "Olympic" trademark against commercial uses of the word that might cause consumer confusion and a loss of the mark's distinctiveness.<sup>348</sup> The record provided no evidence that the USOC's protection under the Lanham Act was insufficient to safeguard against economic harm.<sup>349</sup>

Continuing under the erroneous assumption that section 110 regulates mainly commercial speech, it was necessary to determine whether the restrictions on free speech were in furtherance of a substantial governmental interest. The purpose of the grant of the "trademark plus" in the word "Olympic" was to enhance the fundraising ability of the USOC.<sup>350</sup> The substantiality of the government's interest here is highly questionable,<sup>351</sup> especially when what is essentially a mere subsidization is purported to justify interference with the first amendment rights of others. Moreover, the Court's finding that Congress' interest in the USOC was substantial is incredible in light of its simultaneous holding that Congress' involvement with the USOC was so minor that the USOC was not a "government actor" for fifth amendment purposes.

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346. *San Francisco Arts & Athletics*, 107 S. Ct. at 2981.

347. For a discussion of section 110's restrictions on noncommercial speech, see *supra* notes 336-339 and accompanying text.

348. *San Francisco Arts & Athletics*, 107 S. Ct. at 2999 (Brennan, J., dissenting).  
349. *Id.*

350. "Section 110 directly advances these governmental interests [promoting the USOC's activities] by supplying the USOC with the means to raise money to support the Olympics and encourages the USOC's activities by ensuring that it will receive the benefits of its efforts." *San Francisco Arts & Athletics*, 107 S. Ct. at 2982.

351. See 789 F.2d 1319, 1324 (9th Cir. 1986) (Kozinski, J., dissenting) ("If this is the only interest supporting the USOC's monopoly, I seriously doubt whether it would justify even a minor restriction of free speech.").

## V. Conclusion

In *San Francisco Arts & Athletics*, the Supreme Court achieved the absurd. It simultaneously adopted two contradictory conclusions: the USOC carries out a significant national mission that deserves protection against individuals exercising their first amendment rights, and the USOC's relationship with the national government is too insignificant to make the USOC's activities "state action" subject to the restrictions of the fifth amendment.

The Court's holding that section 110 did not violate the first amendment rights of the SFAA is unfortunate, though hardly surprising once one accepts the premise that Congress has a substantial interest in the USOC, and once one recognizes the growing efforts to expand trademark protection by invoking the dilution rationale of trademark law. However, in abandoning the traditional confusion rationale of trademark law, the potential for first amendment infringements expands. Section 110, as interpreted by the Court, prohibited a substantial amount of constitutionally protected speech, including the SFAA's use of the word "Olympic."

The holding that the USOC was not a "government actor" for fifth amendment purposes was also quite predictable in light of the Burger Court's narrow approach to the state action doctrine. The Court, in its continuing efforts to free the private enterprise sector from the restraints of the fourteenth and fifth amendments, even when the private entities are extensively involved with the government, has subordinated the interests of those dealing with these entities by denying them their fifth and fourteenth amendment protections. The SFAA was denied its fifth amendment right to equal protection under the law when the USOC enforced its congressionally granted word-use authority in a discriminatory manner.

The Court made it very clear that Congress had a substantial interest in the USOC's activities. So substantial was Congress' interest that the Court permitted the SFAA's first amendment rights to be violated. Incredibly, at the same time, the Court found Congress' interest and involvements with the USOC to be so negligible that it refused to find the USOC was a "government actor" for fifth amendment purposes. Therefore, although these concurrent holdings had the same end result,

namely deference to the USOC at the expense of the SFAA's individual liberties, they are irreconcilable.

Unfortunately, the SFAA's individual liberties will not be the last to be subordinated to a so-called private enterprise that has extensive government connections. For, with this decision, the Supreme Court has dealt the final blow to the already terminal state action doctrine.

*Lois Nitti*