[Tulsa Law Review](https://digitalcommons.law.utulsa.edu/tlr)

Volume 11 | Number 1

1975

# Constitutional Law–A Sufficient Nexus Test for a Finding of State Action in Civil Rights Litigation

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## Recommended Citation

Richard M. Eldridge, *Constitutional Law--A Sufficient Nexus Test for a Finding of State Action in Civil Rights Litigation*, 11 Tulsa L. J. 116 (2013).

Available at: https://digitalcommons.law.utulsa.edu/tlr/vol11/iss1/11

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porate retail outlet could provide. Additionally the convenience of location could save unnecessary travel expense.

The practice of pharmacy has long been considered a profession[33] closely linked to public health. The same public policy impliedly prevails over this practice. In Oklahoma, though, the extent of regulation has been quite different.[34] For example, mercantile corporations can employ registered pharmacists. Pharmacists are allowed to collocate in buildings with medical doctors. Additionally, no total ban exists prohibiting retail pharmaceutical advertising. The public health appears unaffected by the "commercialism" in this profession.

The challenges to the statutes in this area have generally been a matter of construction, with few reversals of the legislative power to enact such measures. A statutory proximity requirement will always be difficult to elucidate, and therefore, consideration should be given to the necessity of this regulation in light of its repeated invalidations. A review should be made of the basis for prohibiting corporate involvement in this field. These debatable questions, as to the reasonableness, wisdom and propriety of such legislation, remain the duty and responsibility of the lawmaking body. The changing times and modern awareness of today's society require a fuller evaluation of these restrictions by the Oklahoma State Legislature.

*George P. Roberts, Jr.*

## CONSTITUTIONAL LAW—A SUFFICIENT NEXUS TEST FOR A FINDING OF STATE ACTION IN CIVIL RIGHTS LITIGATION. *Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees*, 495 F.2d 883 (10th Cir.), *cert. denied*, 95 S. Ct. 505 (1974).

In the recent case of *Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees*,[1] the Court of Appeals for the Tenth Circuit encountered the persistent constitutional question of what consti-

33. OKLA. STAT. tit. 59, § 353.2 (1971).
34. OKLA. STAT. tit. 59, § 353 (1971).

1. 495 F.2d 883 (10th Cir.), *cert. denied*, 95 S. Ct. 505 (1974).

tutes state action. The question was posed in the context of a sex discrimination case brought under title 42, section 1983 of the United States Code[2] in the United States District Court for the Northern District of Oklahoma. The bylaws of the United States Jaycees limited chapter membership to males. Accordingly when the Rochester Chapter permitted women the privilege of chapter membership, that chapter was subjected to expulsion from the United States Jaycees. In the district court, plaintiffs alleged that the existence of state action was evidenced by the tax benefits and government funds given to the United States Jaycees. The district court rejected plaintiffs' contention and dismissed the action for failure to present a substantial federal question.[3] On appeal, the Tenth Circuit, preliminarily, accepted the proposition that discrimination based on sex is unconstitutional if state action is demonstrated.[4] The court then proceeded to ascertain whether there was a sufficient showing of state action to support a section 1983 cause of action. The court of appeals affirmed the district court's dismissal, holding that state involvement was insufficient unless "the alleged unconstitutional conduct relate[s] specifically to governmental action."[5]

The *Jaycees* opinion articulated a restricted view of what constitutes state action. In formulating this approach the court turned to prior Tenth Circuit decisions,[6] which appeared to require a direct nexus between the government involvement and the complained of activity. The Tenth Circuit also utilized a composite standard drawn from two United States Supreme Court decisions.[7] The Supreme Court in *Moose Lodge No. 107 v. Irvis*[8] found that the mere presence of a liquor license did not in and of itself constitute state action. The *Moose*

2. 42 U.S.C. § 1983 (1970).

3. Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees, No. 73-C-66 (N.D. Okla., June 26, 1973).

4. 495 F.2d at 885. The court relied upon Frontiero v. Richardson, 411 U.S. 677 (1973) and Reed v. Reed, 404 U.S. 71 (1971) as support for this holding.

5. *Id.* at 888.

6. Ward v. St. Anthony's Hospital, 476 F.2d 671 (10th Cir. 1973) (a small percentage of governmental funding was insufficient to constitute state action since the state was not shown to have played any part in the alleged civil rights deprivation); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969) (unrelated and collateral discriminatory policies of private organizations do not furnish the state action necessary to support a civil rights suit).

7. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Waltz v. Tax Commission, 397 U.S. 664 (1970).

8. 407 U.S. 163 (1972). The state scheme of granting liquor licenses was not sufficient to bring the private club's restriction of membership and guest privileges to nonblacks within the scope of state action.

*Lodge* decision was interpreted by the Tenth Circuit court as articulating a "sufficient nexus"[9] test for determining state action. The nexus test had also been utilized in a Supreme Court case involving the question of state establishment of religion, *Waltz v. Tax Commission.*[10] The *Jaycees* opinion analogized the test utilized for determining whether state assistance constitutes state action to the one used to determine whether state assistance constitutes the establishment of religion;[11] both require the court to measure the nature and quantitative significance of the state's support of private institutions. The *Jaycees* court's interpretation of *Moose Lodge* and prior Tenth Circuit decisions, coupled with the analogous establishment of religion test gleaned from *Waltz,* apparently supports the restrictive interpretation that state action requires "a sufficient *nexus* between the discrimination and the alleged state action."[12]

The plaintiff-appellants proposed an alternative conceptual scheme and in effect argued that the "state must . . . refrain from dealing with discriminators regardless of whether the discrimination is related to the alleged state action."[13] This position carries with it the apparent support of the 1973 Supreme Court decision *Norwood v. Harrison*[14] which involved state assistance to private schools in the form of text book grants. The state assistance was held to be constitutionally impermissible due to the schools' discriminatory admissions policies. The *Norwood* decision did not appear to require any nexus between the text book aid and the challenged admissions policies.

More apparent support for the position of the plaintiff-appellants can be found in earlier Supreme Court decisions, most notably *Burton v. Wilmington Parking Authority.*[15] The *Burton* case involved a private restaurant located in a public garage facility. When the discriminatory service policies of the restaurant were challenged as state

9. 495 F.2d at 888.

10. 397 U.S. 664 (1970). The Court held that a New York state statute exempting religious organizations from property taxation did not itself establish, sponsor or support religion in violation of the first amendment.

11. 495 F.2d at 888.

12. *Id.* (emphasis in original); *accord,* Junior Chamber of Commerce of Kansas City v. Missouri State Junior Chamber of Commerce, 508 F.2d 1031, 1033 (8th Cir. 1975). *Contra,* New York City Jaycees, Inc. v. United States Jaycees, Inc., 377 F. Supp. 481, 489 n.34 (S.D.N.Y. 1974).

13. 495 F.2d at 887.

14. 413 U.S. 455 (1973).

15. 365 U.S. 715 (1961). Although the *Jaycee* opinion cites the *Burton* opinion as support, the holding of *Burton* appears to be more clearly aligned with the petitioners' proposed state action test.

action, the Supreme Court articulated a test of "sifting facts and weighing circumstances"[16] for determining the presence of state action. The landlord-tenant relationship coupled with the public nature of the facility was held to constitute state action in the *Burton* opinion.

The tenor and emphasis of *Burton* and *Norwood* appears to be that discrimination and state action are two independent elements of a section 1983 cause of action, and that no causal relationship or nexus between state action and the discrimination need be shown. The *Norwood* schools were discriminatory with or without the text book support. The restaurant involved in the *Burton* case could have refused service to blacks in a privately owned building. However, the substantial quantitative involvement by the state in both *Burton* and *Norwood* transformed the actions of the otherwise private entities into state action.

The position postulated by the plaintiff-appellants appears to be more in line with past Supreme Court decisions involving state action. *Moose Lodge* may be distinguished from the *Jaycees* case, in that, in *Moose Lodge* the totality of the state contact with the private club was a liquor license; whereas in *Jaycees*, the state had granted significant financial assistance to the organization's programs. The use of *Waltz* by analogy appears to be unnecessary since there is adequate case law in point with the *Jaycees* case. The Supreme Court cases *Burton* and *Norton* appear to be consistent with the plaintiff-appellants position as opposed to the nexus approach adopted in the *Jaycees* opinion.

In the recent case of *Jackson v. Statler Foundation*,[17] the Court of Appeals for the Second Circuit was faced with a somewhat analogous fact pattern to the *Jaycees* case. In *Jackson*, the racially discriminatory practices of a private foundation were challenged as state action due to the charitable tax exemptions given to the foundation. The Second Circuit examined a line of Supreme Court decisions[18] and concluded that state action is determined by the extent and nature of the state involvement in the institutions.[19] The *Jackson* opinion did not

16. 365 U.S. at 722.

17. 496 F.2d 623 (2d Cir. 1974). Tax advantages given to an otherwise private foundation coupled with the presence of state officials on the foundation's governing body established state action.

18. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

19. 496 F.2d at 629. The opinion submitted five factors which could be examined to determine the presence of state action. The factors included: (1) the degree to which the "private" college or foundation is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that