

2005

# Jaycees Reconsidered: Judge Richard S. Arnold and the Freedom of Association

Richard W. Garnett

*Notre Dame Law School*, [rgarnett@nd.edu](mailto:rgarnett@nd.edu)

Follow this and additional works at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/law_faculty_scholarship)



Part of the [First Amendment Commons](#)

---

## Recommended Citation

Richard W. Garnett, *Jaycees Reconsidered: Judge Richard S. Arnold and the Freedom of Association*, 58 Ark. L. Rev. 587 (2005-2006).

Available at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/657](https://scholarship.law.nd.edu/law_faculty_scholarship/657)

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## Jaycees Reconsidered: Judge Richard S. Arnold and the Freedom of Association

Richard W. Garnett\*

In the summer of 1984, Judge Richard S. Arnold was reversed three times by the Supreme Court of the United States. In *Nix v. Williams*, the Justices disagreed with Judge Arnold's conclusion that any "inevitable discovery" exception to the Fourth Amendment's exclusionary rule should include a requirement that the government establish an absence of official bad faith.<sup>1</sup> That same week, the Court rejected Judge Arnold's conclusion that the Interstate Commerce Act preempted Minnesota's condemnation statute.<sup>2</sup> And, in *Roberts v. United States Jaycees*, the Court held—without dissent—that the First Amendment did not shield the Jaycees' men-only membership policy from the non-discrimination requirements of the Minnesota Human Rights Act.<sup>3</sup> All in all, Judge Arnold's opinions in these three cases were rejected by a combined vote of twenty-three to two.<sup>4</sup> More than a decade later, he quipped to some of his law clerks, "no one can be *that* wrong."

Well, maybe *some* could be that wrong,<sup>5</sup> but not, I think, Judge Arnold. Putting aside, for now, the merits of the Supreme Court's reversals of his inevitable-discovery and federal-preemption rulings, Judge Arnold's position and decision in the

---

\* Lilly Endowment Associate Professor of Law, Notre Dame Law School.

1. 467 U.S. 431 (1984), *rev'g* 700 F.2d 1164 (8th Cir. 1983).

2. *Hayfield N. R.R. Co. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984), *rev'g* 693 F.2d 819 (8th Cir. 1982).

3. 468 U.S. 609 (1984), *rev'g* *United States Jaycees v. McClure*, 709 F.2d 1560 (8th Cir. 1983).

4. In *Jaycees*, the vote was 7-0. *Id.* Chief Justice Burger, who had in 1935 been chapter president of the Jaycees in St. Paul, Minnesota, and Justice Blackmun, who was a former member of the Minneapolis chapter, did not participate in the case. *Id.* The decision in *Hayfield* was unanimous; the vote in *Nix* was 7-2. *Hayfield*, 467 U.S. at 622; *Nix*, 467 U.S. at 434.

5. In the Supreme Court's October Term of 1996, for example, opinions authored by Judge Stephen Reinhardt of the United States Court of Appeals for the Ninth Circuit were reversed unanimously by the Justices in *Washington v. Glucksberg*, 521 U.S. 702 (1997), *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Bennett v. Spear*, 520 U.S. 154 (1997).

*Jaycees* case deserved, and still deserve, more thoughtful and sympathetic treatment.

Unfortunately, however, even some of Judge Arnold's many friends and fans tend to treat as something of an embarrassing lapse or anomalous error his conclusion in that case that, because "the First Amendment . . . must[,] on occasion, protect the association of which we disapprove," the Constitution therefore protected the *Jaycees*' right not to admit women to full membership.<sup>6</sup> Judge Patricia Wald, for example—in the study, *Judge Arnold and Individual Rights*, which she contributed to a volume dedicated by a prominent law review to Judge Arnold and his work—reacted to his "enigmatic" *Jaycees* opinion with a patronizing and clunky golf analogy, suggesting that "[p]erhaps the best explanation lies in Judge Arnold's own golfing motion—even at his peak, Jack Nicholas [sic] had an off-day."<sup>7</sup> And, remarking on what seemed to her the tension between Judge Arnold's decision in *Dodson v. Arkansas Activities Association*<sup>8</sup>—an "exotic gender discrimination case"—in which he invalidated on equal-protection grounds the state's "half court" rules for high-school girls' basketball, on the one hand, and *Jaycees*, on the other, Judge Wald settled for the explanation that "in the one case he was dealing with a game, in the other, with a constitutional right. For recognition of the rights at stake," she concluded, "he gets an A; for balancing, he gets a B-."<sup>9</sup>

---

6. *Jaycees*, 709 F.2d at 1561.

7. Patricia M. Wald, *Judge Arnold and Individual Rights*, 78 MINN. L. REV. 35, 53 (1993).

8. 468 F. Supp. 394 (E.D. Ark. 1979).

9. Wald, *supra* note 7, at 49, 55-56. I have expressed my disappointment before with Judge Wald's assessment of Judge Arnold's work in what she frames as women's-rights cases. Richard W. Garnett, *Tribute to the Honorable Richard S. Arnold*, 1 J. APP. PRAC. & PROCESS 204, 212 (1999). Responding to the "skept[ic]ism" of "some women's groups" regarding Judge Arnold's "position in abortion cases," she insisted that, "[e]xcept for perhaps one case, . . . his record stands up well as a defender of a woman's right to control her body . . . ." Wald, *supra* note 7, at 50. In that "one case"—*Reproductive Health Service v. Webster*—Judge Arnold expressed in dissent the view that the Constitution permits the State of Missouri to express a view "about when human life begins," *i.e.*, at "conception." 851 F.2d 1071, 1085 (8th Cir. 1988) (en banc) (Arnold, J., concurring in part and dissenting in part), *rev'd*, 492 U.S. 490 (1989). No doubt hoping to allay the fears of the interest groups and political advisors who were, at the time, compiling short lists for President Clinton of potential nominees to the Supreme Court, Judge Wald observed, in Judge Arnold's defense, that his "narrow difference" with the majority "suggests not the

The analysis of *Jaycees* offered by the Judge's brother and judicial colleague, Morris Sheppard Arnold, is more sound, and reveals a better understanding both of Judge Arnold's commitments and of the constitutional question presented in *Jaycees*. As his brother suggested, it is probably Judge Arnold's "classical liberal" "high regard for individual rights and private ordering"—and not his high regard for games—that provides "the best way to comprehend [his] controversial ruling in [*Jaycees*]." <sup>10</sup>

Judge Wald had asked, with respect to the Judge's rulings in *Dodson* and *Jaycees*, how a "judge so quick to see the diminished future of a young athlete forced to play by 'girls' rules' [could] find it acceptable to bar young professional women from such an important business and social networking group as the Jaycees[.]" <sup>11</sup> But, of course, Judge Arnold had nothing to say about the "acceptab[ility]" of the Jaycees' decision to exclude women from full membership, except perhaps to hint that he personally disapproved. <sup>12</sup> (Indeed, I am confident that no one has ever suspected Judge Arnold of indulging any sympathy either for state-sponsored discrimination or for invidious private prejudices.) Instead, the question he addressed was whether, given our constitutional commitment to the freedom of speech, it was "acceptable" to

---

slightest ambivalence as to the fundamental validity of *Roe v. Wade*," and insisted that "orthodox feminists must recognize that his position is in most respects far more expansive than the present Supreme Court's." Wald, *supra* note 7, at 52-53. As I have written, though,

it could just as well be said that in [*Webster*] Judge Arnold demonstrated, by holding that a State *may* write into law, for purposes unrelated to abortion, its commitment to the principle that human life begins at conception, the independence from political orthodoxies and ideological demands that good judging requires.

Garnett, *supra*, at 211 n.30 (emphasis added); see also *id.* at 211 (expressing regret that some of the articles published in the tribute volume to which Judge Wald contributed seemed "designed to smuggle Judge Arnold's reasonableness past a gaggle of suspicious ideologues and self-appointed guarantors of progressive purity").

10. Morris S. Arnold, *Tribute to the Honorable Richard S. Arnold*, 1 J. APP. PRAC. & PROCESS 194, 197-98 (1999).

11. Wald, *supra* note 7, at 56.

12. See *Jaycees*, 709 F.2d at 1571 ("An organization of young people, as opposed to young men, may be more 'felicitous,' more socially desirable, in the view of the State Legislature, or in the view of the judges of this Court, but it will be substantially different from the Jaycees as it now exists."); cf. *id.* at 1561 ("Still less do we intend to express our own view of what the Jaycees is doing.").

force a private, non-commercial association to change its message and identity. In both *Dodson* and *Jaycees*, then, Judge Arnold's civil-libertarian commitments prompted him to cast a skeptical eye on the efforts of government—whether through chauvinistic basketball rules or a well-meaning anti-discrimination law—to pursue its own or the majority's agenda at the expense of constitutionally protected rights.<sup>13</sup> For Judge Arnold, governments constrained by our First Amendment and by a respect for the freedom of speech are limited to persuasion, not coercion, when trying to influence and shape the beliefs and expression of citizens and associations.

\* \* \* \* \*

Most readers are probably familiar already with the salient facts of *Jaycees* and with the outlines of the arguments raised, endorsed, and rejected in that case.<sup>14</sup> By way of a summary, it would be hard to improve on Judge Arnold's own succinct statement:

The United States Jaycees, a young men's civic and service organization, does not admit women to full membership. A Minnesota statute . . . forbids discrimination on the basis of sex in "places of public accommodation." The Supreme Court of Minnesota . . . interpreted this phrase to include the Jaycees, and the Minnesota Department of Human Rights . . . ordered the Jaycees to admit women to its local chapters in Minnesota. In this suit brought by the Jaycees, we are asked to declare the statute, as so applied and interpreted, unconstitutional, as in violation of the rights of speech, petition, assembly, and association guaranteed by the First and Fourteenth Amendments.<sup>15</sup>

Now, it is worth noting briefly, at the outset, a few matters that were *not* at issue, either before Judge Arnold and the Court of Appeals or before the Justices of the Supreme Court. For starters, it was neither seriously argued nor judicially entertained

---

13. See, e.g., *id.* at 1561 ("[The First Amendment] must, on occasion, include the freedom to choose what the majority believes is wrong.").

14. The facts in the necessarily incomplete description that follows are taken from the three courts' decisions in this case: *United States Jaycees v. McClure*, 534 F. Supp. 766 (D. Minn. 1982), *rev'd*, 709 F.2d 1560 (8th Cir. 1983), *rev'd sub nom. Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

15. *Jaycees*, 709 F.2d at 1561 (citation omitted).

that either the United States Jaycees or its local chapters were state actors subject to the non-discrimination requirements of the Fourteenth Amendment.<sup>16</sup> The “discrimination” at issue here—and Judge Arnold did not deny that the Jaycees practiced “discrimination”—was, as he observed, “nongovernmental.”<sup>17</sup> And so, at least part of the answer to Judge Wald’s question—*i.e.*, how a “judge so quick to see the diminished future of a young athlete forced to play by ‘girls’ rules’ [could] find it acceptable to bar young professional women from such an important business and social networking group as the Jaycees”<sup>18</sup>—is that the question whether government may discriminate against young women by forcing them to play basketball by different rules is quite different from the question of whether the Constitution requires government to tolerate private associations’ decisions to discriminate in their membership criteria. That is, for Judge Arnold, the same democratic values that underlie our constitutional commitment to equal protection of the laws are the basis for a no-less-fundamental commitment to limited government and a free civil society.

Second, and relatedly, the various federal courts who confronted the case had no occasion to weigh in on the determination by the Minnesota Department of Human Rights and the Supreme Court of Minnesota that the Jaycees was, in fact, a “place of public accommodation” within the meaning of that state’s Human Rights Act.<sup>19</sup> In other words, the question

---

16. *See, e.g., Jaycees*, 534 F. Supp. at 772 (“The doctrine of state action is not at issue here . . . . The absence of state action does not preclude an entity’s being a public accommodation.”). Several courts, however, *had* considered this question. *See Jaycees*, 709 F.2d at 1561 n.1 (citing cases).

17. *Jaycees*, 709 F.2d at 1561.

18. Wald, *supra* note 7, at 56.

19. The relevant proceedings and conclusions on this question are set out in Judge Murphy’s opinion for the United States District Court, *Jaycees*, 534 F. Supp. at 767-68, and in Judge Arnold’s opinion, *Jaycees*, 709 F.2d at 1563-65. For citations to some other cases considering this issue, *see, e.g., 709 F.2d* at 1561 n.1. According to the Supreme Court of Minnesota, the Jaycees were a “place of public accommodation” within the meaning of Minnesota Statute section 363.01(18), and not a “private association[] [or] organization[]” exempted from the provision’s non-discrimination requirements, because, *inter alia*, “[m]en between 18 and 35 are indiscriminately admitted to membership . . . without any selectivity”; “[t]he organization is in the business of selling memberships, a business it assiduously promotes”; and “[c]ommercial language, *e.g.*, ‘marketing,’ is used to describe the recruitment of new members . . . .” *Id.* at 1564-65 (summarizing and paraphrasing the

for Judge Arnold and his colleagues was not so much whether the Jaycees was within the Act's intended and actual regulatory scope—it was—but whether the First Amendment permitted the Act to require the Jaycees to admit women to full membership, notwithstanding its men-only policy.<sup>20</sup> Similarly, in two of its recent, leading “expressive association” cases—*Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*<sup>21</sup> and *Boy Scouts of America v. Dale*<sup>22</sup>—the Supreme Court focused on the constraints imposed by the Constitution on the application of local anti-discrimination laws, and not on whether Boston's St. Patrick's Day-Evacuation Day Parade or the Boy Scouts of America were, in fact, “public accommodations” within the meaning of those laws.<sup>23</sup>

Returning to the case's procedural history: after the relevant Minnesota officials and judges concluded that the United States Jaycees was covered by the state's Human Rights Act, and that its membership policy constituted an unfair discriminatory practice within the meaning of that Act, and after the Jaycees was enjoined either from discriminating on the basis of sex in membership or revoking the charters of local chapters that ended such discrimination, it brought the matter before the United States District Court.<sup>24</sup> There, the Jaycees contended,

---

Minnesota Supreme Court's decision). As Judge Arnold observed, “We of course take as a given that the Jaycees is a ‘place of public accommodation’ within the meaning of the Minnesota statute.” *Id.* at 1566. He later noted, though, that the Jaycees might well have been “startled” by the Minnesota Supreme Court's interpretation of that statute. *Id.* at 1577.

20. The federal courts *did* consider the question of whether the Act, as authoritatively construed by the Supreme Court of Minnesota, was unconstitutionally vague or overbroad. See *Jaycees*, 534 F. Supp. at 772-74 (holding that the Act, so construed, was neither vague nor overbroad); *Jaycees*, 709 F.2d at 1576-78 (declining to reach “overbreadth” issue but concluding that “the Minnesota Supreme Court, in the course of interpreting the key statutory phrase, has . . . introduced such an element of uncertainty as to make it impossible for people of common intelligence to know whether their organizations are subject to the law or not”); *Jaycees*, 468 U.S. at 629-31 (agreeing with the District Court that the “concerns” underlying the void-for-vagueness doctrine were “not seriously implicated by the Minnesota Act, either on its face or as construed in this case,” and the “state court's articulated willingness to adopt limiting constructions that would exclude private groups from the statute's reach . . . does not create an unacceptable risk of application to a substantial amount of protected conduct”).

21. 515 U.S. 557 (1995).

22. 530 U.S. 640 (2000).

23. See generally *Dale*, 530 U.S. 640; *Hurley*, 515 U.S. 557.

24. *Jaycees*, 534 F. Supp. at 768.

among other things, that this application and enforcement of the Act violated its freedom of association protected by the First Amendment.<sup>25</sup>

Judge Murphy rejected the Jaycees' arguments and its First Amendment challenge.<sup>26</sup> She opened her analysis by questioning "whether association not directed at the exercise of other First Amendment rights enjoys constitutional protection."<sup>27</sup> Assuming, though, that "association is itself protected," she stated that the Jaycees' "practice of distinguishing the rights and privileges of men and women members" was "not afforded affirmative constitutional protection . . . ."<sup>28</sup> What's more, she continued, "[e]ven assuming the Jaycees' membership policy constituted an exercise of a protected right to associational freedom, the state has shown a sufficiently compelling interest"—namely, the "interest in preventing discrimination in public accommodations on the basis of sex"—"to overcome such a right."<sup>29</sup> Finally, Judge Murphy observed that the application and enforcement of the Human Rights Act "does not require the Jaycees to abandon its purpose of providing leadership training, self-improvement, and community involvement to young men."<sup>30</sup>

The Court of Appeals for the Eighth Circuit, in an opinion written by Judge Arnold, reversed.<sup>31</sup> For starters, Judge Arnold

---

25. *Id.*

26. *Id.* at 774.

27. *Id.* at 770.

28. *Id.*; see also *Jaycees*, 534 F. Supp. at 771 ("While the Jaycees has a right to believe that its organization should only advance the interests of men, its practice of excluding women from equal benefits does not enjoy protection under the circumstances presented.").

29. *Id.* at 377; see also *id.* ("The right to associate is not absolute; even a significant interference with the right of association may be sustained if the state demonstrates a sufficiently important interest and avoids unnecessary abridg[e]ment of First Amendment rights.").

30. *Id.* at 772. It is not clear what relevance this observation has, or was intended to have. That is, having already stated that Minnesota's "compelling" and "important" interest in eradicating sex discrimination in public accommodations justified "even a significant interference with the right of association," it is not clear what legal work was done by the court's conclusory rejection of "the Jaycees' contention that its purpose would be destroyed" by the Act's application. *Id.* at 771-72. The matter of the nature and extent of the burden imposed on the Jaycees' freedom of association by the Act—as opposed to the bare fact of such a burden—was considered in more detail by the Eighth Circuit and the Supreme Court. See *infra* notes 31-60 and accompanying text.

31. *Jaycees*, 709 F.2d at 1579.



displayed none of the District Court's ambivalence about the existence of a fundamental right to association. "It is beyond debate," he stated, quoting the Supreme Court's decision in *NAACP v. Alabama*,<sup>32</sup> "that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."<sup>33</sup> Judge Arnold was convinced that the Jaycees was more than just a business, that it engaged in a wide variety of activities—including "political and ideological" ones—and that the Jaycees and its activities were therefore protected by the First Amendment.<sup>34</sup>

To be sure, Judge Arnold acknowledged that "[e]ven First Amendment rights . . . must yield at times to state interests, just as that 'liberty' which the Due Process Clause protects is not insulated from every assault of government . . . ."<sup>35</sup> Unlike the trial court, however, Judge Arnold took up the question of "the degree to which the State wishes to interfere with the [Jaycees'] right of association," as well as the "nature of the State interest advanced to support the challenged interference."<sup>36</sup> He wrote:

The validity of a particular abridgement-in-fact can be determined only after a careful analysis of the extent and nature of the abridgement, the state interest asserted to justify the abridgement, the extent to which this interest will be impaired if the abridgement is set aside by the courts, and the extent to which this interest can be vindicated in less intrusive ways.<sup>37</sup>

In Judge Arnold's view, the "abridgement" at issue here—*i.e.*, "intrud[ing] upon [a] group's internal organization or integral activities"—"goes to the heart of the kind of association that [the Jaycees] has had and desires to continue, an association for the advancement . . . of young men. If the statute is upheld, the basic purpose of the Jaycees *will* change."<sup>38</sup> True, he conceded, an "organization of young people, as opposed to young men,

---

32. 357 U.S. 449 (1958).

33. *Jaycees*, 709 F.2d at 1566 (quoting *NAACP*, 357 U.S. at 460).

34. *Id.* at 1570.

35. *Id.*

36. *Id.* (emphasis added).

37. *Id.* at 1570-71.

38. *Jaycees*, 709 F.2d at 1570-71 (emphasis added).

may be more 'felicitous,' more socially desirable, in the view of the State Legislature, or in the view of the judges of this Court, but it will be substantially different from the Jaycees as it now exists."<sup>39</sup>

Now, with respect to the State's interest in eradicating discrimination, Judge Arnold appeared to have no difficulty agreeing with Judge Murphy that the interest was "compelling."<sup>40</sup> However, he insisted, "whether the interest is 'compelling' *enough* to override the right asserted, is a question that requires . . . a more particularized analysis."<sup>41</sup> He took note of the fact, for example, that the "Jaycees [was] the only group whose membership practices [had] ever been subjected" to the Act and stated that "an asserted state interest that is being applied only selectively appears to that extent weaker than a state policy applied consistently and across the board."<sup>42</sup> He explained both that "upholding the claimed right of association would impair the [State's interest] only to a limited extent," and also that "there are other ways in which the state can express its displeasure with the Jaycees' discriminatory membership practice . . . ."<sup>43</sup>

At the end of the day, as Judge Arnold recognized, "these are questions of degree" and the "lines are not always clear . . . ."<sup>44</sup> Nor, he stated, after reviewing the relevant cases, was the outcome clearly "controlled by precedent. We must look," instead, "to principle and reason."<sup>45</sup> And, this examination for Judge Arnold pointed toward the conclusion that

even though we might think that the Jaycees would survive, even be improved, if women were admitted, some scope must be given to the private choice of those who are now in the organization. The right to choose with whom one *will*

---

39. *Id.* at 1571.

40. *Id.* at 1572.

41. *Id.*

42. *Id.* at 1573.

43. *Jaycees*, 709 F.2d at 1572-73; *see also id.* at 1576 ("The interest of the state, though compelling in the general sense, will be less seriously impaired than at first appears if this challenged interference is prevented . . . . And the state has other ways, perhaps less effective, but still powerful, to vindicate its interest.").

44. *Id.* at 1574.

45. *Id.* at 1576.

associate necessarily implies, within some limits, the right also to choose with whom one will *not* associate.<sup>46</sup>

So, the application of Minnesota's public-accommodations statute to the Jaycees' membership policy was, on these facts, not permitted by the First and Fourteenth Amendments.<sup>47</sup>

The Supreme Court of the United States, without dissent, reversed the Eighth Circuit's ruling.<sup>48</sup> The Court, per the Judge's friend, mentor, and former boss, Justice Brennan, agreed with Judge Arnold that the First Amendment's protections include safeguards for the freedom of expressive association.<sup>49</sup> He agreed also with Judge Arnold that "[f]reedom of association . . . plainly presupposes a freedom not to associate."<sup>50</sup> And, he conceded that by "requiring the Jaycees to admit women as full voting members," the Minnesota Human Rights Act "interfere[d] with the internal organization or affairs" of the

46. *Id.*

47. Judge Lay dissented, stating that the "attempt of the Jaycees to exclude women from their full membership seeks protection under . . . an outdated rationale of our jurisprudence, one which relegated women to a status inferior to that of men." *Jaycees*, 709 F.2d at 1579 (Lay, J., dissenting). From the outset, then, it appears that Judge Lay misunderstood the nature of the case, which was not about the "outdated rationale" for the Jaycees' membership policy, but about the Jaycees' right, as an expressive association protected by the First Amendment, to select its own members and craft its own message. Judge Lay's charge, then, that the "Jaycees operate on the arbitrary sentiment that men have a natural monopoly on such advocacies" and that "this only serves to perpetuate the chauvinistic myth that women are incapable of dealing with such matters,"—even if the charge were true—hardly seems to have engaged the Jaycees' claim, and Judge Arnold's conclusion, that the First Amendment protected the Jaycees' right, within limits, to "perpetuate . . . chauvinistic myth[s]." *Id.* at 1580 (Lay, J., dissenting). Judge Lay also contended that "speculative supposition[s] that the Jaycees' creed 'may' change if women are granted equal privileges is a manifestly inadequate basis upon which to deprive the state [of] its overpowering interest within this sphere of public accommodation[]." *Id.* at 1580-81 (Lay, J., dissenting).

48. *Jaycees*, 468 U.S. at 612.

49. *See id.* at 622 ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of . . . ends."). Justice Brennan distinguished the First Amendment "freedom of expressive association" from the "freedom of intimate association" included in the liberty protected by the Fourteenth Amendment. *Id.* at 617-20. Because the Jaycees chapters are "neither small nor selective," the Court held that they "lack the distinctive characteristics that might afford constitutional protection [under the intimate-association theory] to the decision of its members to exclude women." *Id.* at 621. Judge Arnold had also recognized that "the Jaycees is not an intimate group," and that "[t]his is hardly a private club, in the customary sense of that word . . . ." *Jaycees*, 709 F.2d at 1571.

50. *Jaycees*, 468 U.S. at 623.

Jaycees and therefore “infringe[d]” upon its freedom of expressive association.<sup>51</sup>

Unlike Judge Arnold, however, Justice Brennan and his colleagues were “persuaded that Minnesota’s compelling interest in eradicating discrimination against its female citizens justify[d] the impact that application of the statute to the Jaycees may have on the male members’ associational freedoms.”<sup>52</sup> Unlike Judge Arnold, the Court concluded that Minnesota had advanced this interest “through the least restrictive means of achieving its ends. Indeed,” Justice Brennan continued, “the Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members’ freedom of expressive association.”<sup>53</sup> After all, Minnesota’s requirement that the Jaycees admit women to full membership did not, Justice Brennan reasoned, “impede the organization’s ability to engage in . . . protected activities” and did not require any “change in the Jaycees’ creed of promoting the interests of young men . . . .”<sup>54</sup> For Justice Brennan, the Jaycees’ claim—and Judge Arnold’s view—that “by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization’s speech” rested on little more than “sexual stereotyping” and “unsupported generalizations about the relative interests and perspectives of men and women.”<sup>55</sup> Finally, however—and even assuming that the Act’s application *did* cause “some incidental abridg[e]ment of the Jaycees’ protected speech”—the Justices agreed that the “effect is no greater than is necessary to accomplish the State’s legitimate purposes.”<sup>56</sup>

---

51. *Id.*

52. *Id.*

53. *Id.* at 626. This line of reasoning seems out of place; after all, if the application of the Human Rights Act really imposed *no* “serious burdens” on the freedom of expressive association, it is not clear why the Act’s application should require justification under the Court’s strict-scrutiny methodology. What’s more, just a few pages earlier, the Court had acknowledged that the Act’s application “infringe[d]” the Jaycees’ First Amendment rights. *Id.* at 623.

54. *Jaycees*, 468 U.S. at 627.

55. *Id.* at 628.

56. *Id.* The Court then noted that “acts of invidious discrimination”—considered “wholly apart from the point of view such conduct may transmit”—such as “violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.” *Id.* But again,

Justice O'Connor—at that time, of course, the Court's only female member—agreed that the “application of the Minnesota law to the Jaycees [did] not contravene the First Amendment . . . .”<sup>57</sup> In her opinion, the Court's approach was “both overprotective of activities undeserving of constitutional shelter and underprotective of important First Amendment concerns.”<sup>58</sup> Justice O'Connor contended that the membership policies and “occasional” expressive activities of *commercial* associations should not enjoy the demanding protections of the First Amendment—a “shopkeeper has no constitutional right to deal only with persons of one sex”—and the Jaycees are best regarded as a commercial organization.<sup>59</sup> In cases involving true expressive organizations, however, Justice O'Connor would have avoided altogether searching judicial inquiries into the “membership-message connection”; after all, “[w]hether an association is or is not constitutionally protected in the selection of its membership should not depend on what the association says or why its members say it.”<sup>60</sup>

\* \* \* \* \*

Justice Brennan would later write, in his own *Tribute to Chief Judge Richard S. Arnold*, that “Judge Arnold rarely erred in my view, but I was ready to provide a gentle guiding hand when the occasion arose in *Roberts v. United States Jaycees*.”<sup>61</sup> There can hardly be any doubt that Justice Brennan's disagreement would have weighed heavily on Judge Arnold's

---

this line of argument seems in serious tension with the Court's earlier recognition that the First Amendment protects a freedom of expressive association, which includes the right *not* to associate, and that regulatory interference with an association's membership policies can constitute an infringement upon that freedom.

57. *Id.* at 632 (O'Connor, J., concurring in part and concurring in the judgment).

58. *Jaycees*, 468 U.S. at 632 (O'Connor, J., concurring in part and concurring in the judgment).

59. *Id.* at 634, 638-40 (O'Connor, J., concurring in part and concurring in the judgment). Judge Arnold had also recognized that, if the Jaycees and its activities were “purely commercial,” “this case would be easy. No extended analysis would be necessary to show that the Jaycees must lose.” *Jaycees*, 709 F.2d at 1569. However, he insisted, “much more is involved here.” *Id.* “[T]he advocacy of political and public causes, selected by the membership, is a not insubstantial part of what [the Jaycees] does.” *Id.* at 1570.

60. *Jaycees*, 468 U.S. at 632-33 (O'Connor, J., concurring in part and concurring in the judgment).

61. William J. Brennan, Jr., *Preface: A Tribute to Chief Judge Richard S. Arnold*, 78 MINN. L. REV. 1, 2 (1993).

own assessment of his opinion and reasoning, and must have inspired him to reconsider it carefully. Still, in an interview with one of his former law clerks, now-Professor Polly Price, given almost exactly twenty years after the Supreme Court reversed his decision, Judge Arnold re-affirmed his view that “the stronger side [of the case] was the side of liberty, liberty of association.”<sup>62</sup> He was aware, of course, that the ruling “wasn’t good politics”; he was aware also of the possibility that his position had undermined his chances of serving in the Clinton Administration or even as a Justice.<sup>63</sup> Notwithstanding his respect and affection for Justice Brennan, though, Judge Arnold continued to believe that the Court’s opinion reversing him in *Jaycees* “sounded strange” and that, “in principle, I think I did the right thing.”<sup>64</sup>

So, *did* Judge Arnold do “the right thing”? For starters, it is worth noting that, in recent years, in several high-profile First Amendment cases, the Court seems to have moved closer to, if not embraced explicitly, Judge Arnold’s stance and approach in *Jaycees*. In *Hurley*, for example, the Court concluded unanimously that the First Amendment did not permit the application of a Massachusetts public-accommodations law to the decision by the South Boston Allied War Veterans Council to exclude the Irish-American Gay, Lesbian, and Bisexual Group of Boston from the St. Patrick’s Day-Evacuation Day parade.<sup>65</sup> And, as Judge Arnold once observed, “the language in [*Hurley*] reads a lot like my opinion [in *Jaycees*].”<sup>66</sup>

Specifically, Justice Souter’s majority opinion is—like Judge Arnold’s in *Jaycees*—sensitive to the very real, even if diffuse and generalized, effect that a compelled change in a speaker’s *identity* and *membership* can have on the content and effect of a speaker’s *message*.<sup>67</sup> “[T]he Constitution,” Justice Souter wrote, “looks beyond written or spoken words as mediums of expression.”<sup>68</sup> And, he emphasized, “a private

---

62. Interview by Polly Price with Richard S. Arnold, Circuit Judge, Eighth Circuit Court of Appeals, in Little Rock, Ark. (June 30, 2004) [hereinafter Interview].

63. *Id.*

64. *Id.*

65. 515 U.S. at 559.

66. Interview, *supra* note 62.

67. See generally *Hurley*, 515 U.S. 557.

68. *Id.* at 569.

speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.”<sup>69</sup> Judge Arnold had emphasized that the regulation at issue in *Jaycees* “has the potential of changing” the content of what the Jaycees are saying precisely “because it purports to specify . . . the identity of those who may be Jaycees, and who therefore [may] determine the content of what Jaycees say.”<sup>70</sup> Similarly, Justice Souter recognized in *Hurley* that the “selection of contingents to make a parade” is protected by the First Amendment, and that the “communication produced by the [parade’s] organizers would be shaped by all those . . . who wished to join in with some expressive demonstration of their own.”<sup>71</sup>

It is particularly interesting, in light of the salience in contemporary policy and other conversations of “diversity” and its value, that both Justice Brennan and Judge Lay seemed so insistent that nothing more than chauvinistic stereotyping could justify, or even explain, the Jaycees’ view that requiring them to admit women to full membership would alter its message on important political, cultural, and moral issues. Justice Brennan’s and Judge Lay’s assertions sound dated today, like the kind of things one might have expected from an elderly, well-meaning, liberal male jurist eager to say “the right thing” about sex discrimination and stereotypes in the mid-1980s. Perhaps these jurists felt comforted, and even righteous, in professing hostility toward and even bewilderment at the idea that the admission of women would affect, and perhaps alter, the expression and message of the Jaycees.

Today, though, we are more likely to appreciate that the make-up of communities and groups *does* affect their tones and claims. In our debates over diversity in admissions, faculty hiring, *etc.*, nearly all of us accept the idea that a rich conversation requires recruiting and retaining different kinds of people, precisely because of the different perspectives they are (perhaps simplistically) assumed to bring. It would seem, then, that Judge Arnold was both correct, and prescient, in endorsing

---

69. *Id.* at 569-70.

70. 709 F.2d at 1576.

71. 515 U.S. at 570, 573.

the Jaycees' contrary claim. As he concluded, a group has a right to prefer a monochromatic or homogenous or "non-diverse" conversation internally, and a clear, unconfused, unvaried message externally. In any event, it is hard to see why recognizing and implicitly endorsing the premise of today's diversity arguments should have prompted such incomprehension.

The Court's more recent—and more controversial—decision in *Boy Scouts of America v. Dale* arguably comes even closer to Judge Arnold's reasoning in *Jaycees*. In *Dale*, Chief Justice Rehnquist wrote a majority opinion invalidating, on expressive-association grounds, the application of New Jersey's public-accommodations law to the Boy Scouts' decision to expel an openly gay assistant scoutmaster.<sup>72</sup> In *Dale*, as in *Jaycees*, a non-profit association's membership policies were challenged as violating a state's anti-discrimination laws.<sup>73</sup> And, the New Jersey Supreme Court, like the Supreme Court in *Jaycees*, concluded that the First Amendment did not protect the group's decision to exclude, or discriminate, concluding that Mr. Dale's "membership does not violate [the] Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [Boy Scouts] existing members' ability to carry out their various purposes,'"<sup>74</sup> or "compel [the] Boy Scouts to express any message";<sup>75</sup> the government's interest in "eliminat[ing] the destructive consequences of discrimination from our society" is essential;<sup>76</sup> and the public-accommodations law burdened no more speech than was necessary to achieve this goal.<sup>77</sup>

Unlike the *Jaycees* Court, though, the *Dale* majority refused to second-guess or scrutinize closely either the affected association's own characterization of its own mission and message or its assessment and predictions concerning distorting effects of the non-discrimination law's application.<sup>78</sup> It was

---

72. See generally 530 U.S. 640.

73. See *id.* at 644.

74. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1225 (N.J. 1999) (quoting Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987)).

75. *Id.* at 1229.

76. *Id.* at 1227.

77. *Id.* at 1223.

78. See generally *Dale*, 530 U.S. 640.



clear to Chief Justice Rehnquist that the Scouts "engage[] in expressive activity," and he also insisted that "it is not the role of the courts to reject a group's [characterization of its own] expressed values because they disagree with those values or find them internally inconsistent."<sup>79</sup> On the question of whether New Jersey's public-accommodations law requirement of Mr. Dale's "presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire not to 'promote homosexual conduct as a legitimate form of behavior,'" the Chief Justice stated, "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."<sup>80</sup> Of particular importance, perhaps, was his recognition that the message of the Scouts is not identical with, or reducible to, the expression of its members. Thus, the fact that some—even many—members of the Boy Scouts disagreed with the Scouts' stated views concerning homosexual conduct did not undermine or require judicial re-interpretation of the association's message.<sup>81</sup>

For the *Dale* majority, then, the application of New Jersey's public-accommodations law was unconstitutional in this case, notwithstanding *Jaycees* and similar cases, because "in . . . [those] cases we . . . conclude[d] that the enforcement of [the] statutes would not materially interfere with the ideas that the organization sought to express."<sup>82</sup> In *Dale*, on the other hand, the "state interests embodied in New Jersey's public

---

79. *Id.* at 650-51.

80. *Id.* at 653. *See also id.* at 654.

As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.

*Id.* The Court also noted, however, that this "is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." *Dale*, 530 U.S. at 653.

81. *Id.* at 655-56 (stating that some members' disagreement with the Scouts was "irrelevant" and that the "fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection").

82. *Id.* at 657.

accommodations law [did] not justify such a severe intrusion on the Boy Scouts' right[] to freedom of expressive association."<sup>83</sup>

Now, the question of whether Judge Arnold was correct in persisting in the belief that he "did the right thing" in *Jaycees* is certainly not answered merely by noting that the Supreme Court's recent expressive-association decisions read a bit more like Judge Arnold's than like Justice Brennan's. I am confident that Judge Arnold would agree—indeed, he acknowledged as much, at least implicitly, in *Jaycees*—that conscientious and reasonable people could disagree about the extent to which the Jaycees' First Amendment rights were burdened, about the "weight" of those rights as against the non-discrimination values underlying the public-accommodations law, and about the closeness of the fit between the expression-burdening regulation, on the one hand, and the state's compelling policy interest, on the other.<sup>84</sup>

All that said, it strikes me that Judge Arnold's opinion is consistent with a rich understanding of the First Amendment's "freedom of speech" and with an appropriate appreciation for the structural and other contributions to that freedom of expressive associations and their messages. To be sure, although some scholars have found much to celebrate in *Dale*,<sup>85</sup> the Court's expressive-association doctrine and decisions are vulnerable to fair criticism. For starters, and to state the obvious, the First Amendment itself says nothing about the freedom of association, expressive or otherwise.<sup>86</sup> For a jurist who has been characterized—as Richard S. Arnold has—as

---

83. *Id.* at 659.

84. *See, e.g.*, 709 F.2d at 1576 ("[O]ur decision is not controlled by precedent."); *id.* at 1574 ("Obviously these are questions of degree. The lines are not always clear . . .").

85. *See generally, e.g.*, Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119 (2000); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002); Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917 (2001).

86. Jed Rubenfeld, *The Anti-antidiscrimination Agenda*, 111 YALE L.J. 1141, 1142 (2002) [hereinafter *Agenda*] (noting that *Dale* cannot be explained as a "textualist" decision because, "of course[,] the First Amendment does not enumerate any freedom of association"); *id.* at 1157 ("[T]here can be no doubt that *Dale* displays, textually speaking, a most generous and expansive approach to constitutional meaning."). *See also* Jed Rubenfeld, *The New Unwritten Constitution*, 51 DUKE L.J. 289, 296-97 (2001) [hereinafter *Constitution*].

"Justice Black revived,"<sup>87</sup> this might impose at least a minor hurdle in the way of a conclusion that an association's "freedom of expressive association" prevents the application of an otherwise-valid anti-discrimination law.<sup>88</sup> In part for this reason, one prominent critic of *Dale*, Professor Jed Rubenfeld, has concluded that the case should be regarded not so much as a vindication of First Amendment freedoms but as a manifestation of some Justices' substantive opposition to the anti-discrimination agenda underlying public-accommodations laws.<sup>89</sup>

Now, there is certainly something to the argument—noted by both Judge Murphy and Justice Brennan<sup>90</sup>—that the First

87. John P. Frank & A. Leon Higginbotham, Jr., *A Brief Biography of Judge Richard S. Arnold*, 78 MINN. L. REV. 5, 23 (1993).

88. Judge Arnold acknowledged, in *Jaycees*, that the First "Amendment does not contain the word 'association,' nor does any other portion of the Constitution . . ." 709 F.2d at 1566. Nevertheless, he concluded, "There are rights protected by the federal Constitution that are not specifically spelled out in so many words in that document. Among these rights is the . . . freedom of association . . ." *Id.* at 1568. In one of Judge Arnold's best-known opinions—*Henne v. Wright*—he expressed the view that the Constitution protected the right of a woman to pick a surname for her baby even if the child lacked a legally established connection to the man (*i.e.*, the child's father) whose name she wanted to give the child. 904 F.2d 1208, 1216 (8th Cir. 1990) (Arnold, J., concurring in part and dissenting in part). Judge Arnold stated:

The right of privacy is not the beneficiary of explicit textual protection in the federal Constitution. It is an unenumerated right. . . . People existed, and had rights, before there was such a thing as government. . . . The source of rights was not the State, but, as the Declaration of Independence put it, the "Creator."

*Id.* at 1216-17 (Arnold, J., concurring in part and dissenting in part).

89. *Agenda*, *supra* note 86, at 1142 ("It is possible that an anti-antidiscrimination agenda, deeply felt but as yet poorly theorized, is working itself out in the current Court's jurisprudence."). Professor Rubenfeld has criticized *Dale* directly and in detail elsewhere, too. See, e.g., Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001).

90. See *Jaycees*, 468 U.S. at 628.

[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.

*Jaycees*, 534 F. Supp. at 770; see also *id.* (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)) ("Invidious private discrimination may be characterized as a form of exercising freedom of association . . . but it has never been accorded affirmative constitutional protections.").

Amendment does not provide protection against the application to conduct of otherwise-valid laws and regulations simply because that conduct is animated by, colored by, or freighted with some expressive or ideological motivation.<sup>91</sup> As Professor Rubenfeld puts it,

Imagine an ordinary case in which a person claims that an otherwise constitutional law cannot be applied to him because he wants to engage in the prohibited conduct for 'expressive' reasons. Tax protesters make this kind of claim every day. Normally, this kind of claim is not thought to raise any significant free speech problems.<sup>92</sup>

Put differently, "[p]eople are not supposed to get First Amendment immunity just because they want to break a law for expressive purposes."<sup>93</sup> So, why should the Boy Scouts' or the Jaycees' discriminatory conduct be treated differently from the tax protester's ideologically motivated violations? Professor Rubenfeld asks:

The objection, then, to the Court's reasoning in *Dale* is this: why are the Boy Scouts any different from tax protesters? The Boy Scouts want to violate a law in order to communicate a message. So do tax protesters. The Boy Scouts say that their ability to communicate a view that they sincerely and centrally hold will be significantly impaired if they are made to comply with the law. So do tax protesters. The Boy Scouts feel they will be forced to communicate a deeply obnoxious message if made to obey the law. So do tax protesters. But the tax protester's claim will be dismissed. His claim gets no strict scrutiny. Why is the same not true of the Boy Scouts?<sup>94</sup>

In my view, expressive-association cases *are*—or, at least, can reasonably be regarded as—different than the hypothetical tax-protester cases. In the former, the better way to frame the issue is not "should this act of discrimination be exempted from valid anti-discrimination laws simply because it is expressive or ideologically motivated?" Rather, the question should be, "may

---

91. Cf., e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *United States v. O'Brien*, 391 U.S. 367 (1968).

92. *Agenda*, *supra* note 86, at 1157; see also *Constitution*, *supra* note 86, at 297 (discussing tax-protester example).

93. *Constitution*, *supra* note 86, at 298.

94. *Id.*

the government require non-commercial, private associations to accept as members and leaders persons whose presence or leadership will, in the associations' view, undermine or transform their values and message?"<sup>95</sup> That is, in cases like *Jaycees*, *Hurley*, and *Dale*, the issue is not so much whether the First Amendment somehow launders externally-directed, other-regarding conduct that the legislature has the power to prohibit and punish. The conduct at issue—*i.e.*, discrimination in membership and leadership—is of First Amendment concern not simply because it is freighted with or motivated by ideas, but because it goes to the structure and identity of the association *as an association*. It would seem sensible, for example, to distinguish for First Amendment purposes between requiring the National Organization for the Reform of Marijuana Laws ("NORML") to admit anti-drug crusaders and requiring NORML to comply with laws prohibiting the distribution of controlled substances.

The Scouts' "discrimination" is not protected by the First Amendment simply because it "communicate[s]" a message, but because an expressive association's membership and leadership is integral to its ability to play an important role in nurturing the "freedom of speech." The point is, the freedom of speech protected by the First Amendment includes, and is well served by, protections not only for associations' *members*—their privacy rights, their own speech rights, and so on—but also for their *own* identity, distinctiveness, and message. As I have discussed in more detail elsewhere, expressive associations play an important *structural* role in our civil society and discourse;

---

95. In *Jaycees*, Judge Arnold evoked a similar distinction, in his discussion of *Runyon v. McCrary*, where the Court held that 42 U.S.C. § 1981 prohibited a private school from discriminating on the basis of race. *Jaycees*, 709 F.2d at 1575 (citing *Runyon v. McCrary*, 427 U.S. 160 (1976)). Distinguishing the case, Judge Arnold noted that

admission of a student to a school has nothing necessarily to do with the school's own internal governance. Nonpublic schools are governed by their owners or boards of trustees, not by a vote of the student body. The *Jaycees*, on the other hand, is governed by its members and their elected representatives, and a change in the makeup of the membership could well result in a change in the ideas or dogma that the organization propagates.

*Id.*

they are not merely repositories for the views and commitments of individuals.<sup>96</sup> I have argued:

[W]e are who we are, and flourish to the extent that we do, because of the associations in which we're "nested" . . . . [A]ssociations are not simply vehicles for self-actualizing choices by autonomous monads. They might be that, too, but they are more than just that. That is, while it is true that we speak and express ourselves through associations, we are also spoken to and formed by them and by *their* expression.<sup>97</sup>

Expressive associations, then, can be treated differently under the First Amendment, and their "discrimination" can be treated differently, because of the role they play, as mediating institutions, in protecting political freedoms and checking government power.<sup>98</sup> In other words:

[A]ssociations are about social structure as much as self-expression. They get in the way just as they facilitate. They are the hedgerows of civil society. They are wrenches in the works of whatever hegemonizing ambitions government might be tempted to indulge . . . . They hold back the bulk of government and are the "critical buffers between the individual and the power of the State." They are "laboratories of innovation" that clear out the civic space needed to "sustain the expression of the rich pluralism of American life." Associations are not only conduits for expression, they are the scaffolding around which civil society is constructed, in which personal freedoms are exercised, in which loyalties are formed and transmitted, and in which individuals flourish.<sup>99</sup>

---

96. See generally Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2001) [hereinafter *Associations*]. That is, associations are more than—in John Garvey's words—"procedural device[s] for coordinating large numbers of similar interests . . . ." JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 149 (1996).

97. *Associations*, *supra* note 96, at 1849 (citations omitted) (emphasis added).

98. Cf. *Dale*, 530 U.S. at 647-48 (noting that the freedom of association is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas").

99. *Associations*, *supra* note 96, at 1853-54 (quoting *Jaycees*, 468 U.S. at 618-19; PETER L. BERGER & RICHARD JOHN NEUHAS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* 36 (1977)).

This structural view of associations and their role in civil society is not set out in Judge Arnold's *Jaycees* opinion, but I believe it is consonant with his approach, with his work in some other cases, and with his civil-libertarian commitments generally. Judge Arnold would have appreciated, I believe, the force of the claim that the expression—and the expressive, message-protecting and message-forming conduct—of associations should be protected because of the work associations do in providing ideological competition for the state.<sup>100</sup> In *Twin Cities Area New Party v. McKenna*, for example, he joined an opinion (later reversed by the Supreme Court) invalidating on First Amendment grounds a Minnesota statute prohibiting multiple-party nominations in the general election.<sup>101</sup> That opinion's emphasis on the importance to the political process of competition and on the dangers of state efforts to manage our political conversations is consonant, I think, with Judge Arnold's reasoning in *Jaycees* and with the account of the freedom of association outlined above. In *Forbes v. Arkansas Educational Television Commission*—yet another case in which Judge Arnold's involvement seems to have spelled doom for the ruling in the Supreme Court—Judge Arnold agreed with Ralph Forbes, a fringe candidate for Congress who had been excluded by a government-owned television station from a candidates' debate, that the First Amendment does not permit state actors to discriminate against “non-viable” candidates in this way: “Political viability is a tricky concept,” he insisted.<sup>102</sup> “We should leave it to the voters at the polls, and to the professional judgment of nongovernmental journalists. A journalist employed by the government is still a government employee.”<sup>103</sup> And, in *Richenberg v. Perry*—a case involving a challenge to the military's “Don't Ask, Don't Tell” policy with respect to gays and lesbians—Judge Arnold reminded us that

---

100. *Id.* at 1854 (stating that associations are “the state's competitors in the arena of education and formation); *id.* at 1856 (“[T]he expression of free and independent associations competes with the liberal state for the honor of shaping our souls.”).

101. 73 F.3d 196 (8th Cir. 1996), *rev'd sub nom.* *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

102. 93 F.3d 497, 504-05 (8th Cir. 1996), *rev'd*, 523 U.S. 666 (1998).

103. *Id.* at 505.

“‘[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.’”<sup>104</sup>

\* \* \* \* \*

In sum, it would seem a mistake—or at least too hasty—to write off Judge Arnold’s *Jaycees* opinion as the product of an “off-day,” or as an anomalous failure to understand the stakes in a case involving the conflict between state power and individual rights. (The opinion *is* anomalous in one way, however: it is one of the longest opinions the Judge ever wrote.)

Justice Brennan himself recognized that “Judge Arnold has consistently vindicated the First Amendment guarantees of freedom of the press and freedom of speech, even in cases in which the protected expression was controversial, distasteful, or hateful.”<sup>105</sup> Judge Arnold’s ruling and reasoning in *Jaycees*, it seems to me, is of a piece with this commendable legacy.

---

104. 97 F.3d 256, 264 (8th Cir. 1996) (quoting *Stanley v. Georgia*, 394 U.S. 557, 565 (1969)).

105. Brennan, *supra* note 61, at 1-2.



