Constitutional Law—Scouting: Be Prepared Minnesota

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CONSTITUTIONAL LAW—SCOUTING: BE PREPARED MINNESOTA


André LaMere†

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I. INTRODUCTION

The Supreme Court allows the Boy Scouts, a private organiza-

† J.D. Candidate 2002, William Mitchell College of Law; B.A. Carleton College, 1996. I would like to thank Evan Wolfson for his inspiring work, my parents for raising me with a sense of justice, and most of all my wife, Melanie, for being my best friend and supporting me every step of the way.
tion, to discriminate against gays. It is the Boy Scouts' constitutional right. The *Dale* decision may not be surprising, but it is disheartening. However, the Minnesota Human Rights Act prohibits discrimination on the basis of sexual orientation in all public accommodations. Although the Boy Scouts itself is not a place of public accommodation, the government premises that it uses to conduct meetings are places of public accommodation.

Further, in allowing governmental state entities, such as public schools, to sponsor Boy Scout troops, Minnesota grants the Boy Scouts special privileges. This practice should not, and most probably cannot, under a legal challenge continue. This prohibition would violate no constitutional right of the Boy Scouts. Rather, the Boy Scouts can discriminate against gays; however, it simply needs to go elsewhere to conduct its activities.

This article begins with a history of the constitutional right to expressive association and explores the evolution of this right from the textually guaranteed rights of freedom of speech and freedom to peaceably assemble.

Following the history of this constitutional right is a description of the *Dale* case. Through careful analysis of the majority opinion and a particularly impassioned, cogent dissent, the article continues, determining that the *Dale* holding is based on flawed reasoning.

Finally, the last section of this article addresses the question of what happens next in Minnesota. Ostensibly, this final section of the note is the most valuable since it provides insight into the state's legal reactions and responses to the *Dale* decision. The State should and most likely can enjoin the Boy Scouts from using cer-

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1. Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2457 (2000). The United States Reporter citation was unavailable at the time of publication. This article references two cases involving James Dale, the New Jersey Supreme Court case and the United States Supreme Court case. The full citations are easily distinguishable. In short form citations, I have referred to the New Jersey case as *Boy Scouts* and the United States case as *Dale*.
2. MINN. STAT. ANN. § 363.03 (West, WESTLAW through 1999 Reg. Sess.).
4. *Id.*
5. *Id.*
6. *Infra* Part II.A-D.
7. *Infra* Part III.A-B.
8. *Infra* Part IV.A.
9. *Infra* Part IV.B.
tain state resources to promulgate its message.\textsuperscript{10}

\section{II. History}

\subsection{A. Early Predecessors Of The Right To Expressive Association}

"Expressive association" may be relatively new terminology, but the Supreme Court has recognized a right to freedom of association for many years.\textsuperscript{11} Although not an explicitly guaranteed constitutional right, freedom of association has its roots in the Constitutional rights of freedom of speech and freedom to peaceably assemble.\textsuperscript{12} Interestingly, two of the most cited cases in the 1920s and 1930s upholding these freedoms involved the protection of the rights of members of communist organizations.\textsuperscript{13} In \textit{Gitlow}, the Court held that the state might engage in actions towards self-preservation in response to a threat of a communist revolution without violating the Constitution.\textsuperscript{14} In the second communist case, \textit{DeJonge}, the Court held that peaceable assembly is constitutionally permitted even if participants are discussing objectives of the Communist party.\textsuperscript{15}

Later, these same rights were guaranteed to racist and antisemitic groups such as the Ku Klux Klan.\textsuperscript{16} In the grotesque facts of \textit{Brandenburg}, a leader of the Ku Klux Klan was convicted under an Ohio Criminal Syndicalism statute for advocating the necessity of violence in two different films.\textsuperscript{17} The films depicted twelve hooded Klan members surrounding a burning cross.\textsuperscript{18} Later the film fea-

\textsuperscript{10.} \textit{Id.}
\textsuperscript{12.} U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." \textit{Id.}
\textsuperscript{13.} \textit{Gitlow}, 268 U.S. at 663; \textit{DeJonge}, 299 U.S. at 365.
\textsuperscript{14.} \textit{Gitlow}, 268 U.S. at 668.
\textsuperscript{15.} \textit{DeJonge}, 299 U.S. at 365.
\textsuperscript{17.} \textit{Id.} at 444-45.
\textsuperscript{18.} \textit{Id.} at 445.
tured a vitriolic hate speech with numerous racial and anti-semitic slurs including suggestions of killing Blacks and Jews. The Court struck down Ohio’s act holding that the act forbids assembly. “Statutes affecting the right of assembly, like those touching on freedom of speech must observe the established distinctions between mere advocacy and incitement to imminent lawless action.”

One may get a sense that the Court has an absolutist view of First Amendment rights—that it holds First Amendment rights above all else. Does the Court ever limit an individual’s First Amendment rights? The answer is “yes”; the Court has limited an individual’s First Amendment rights. To be sure, the Court treads carefully in this area and only restricts rights in situations of grave abuse. For example, in West Virginia State Board of Education v. Barnette, the Court held that local West Virginia authorities could not compel Jehovah’s Witness members to salute the flag at school. These rights, the Court continued, are “susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.”

B. The Right To Freely Associate And The Civil Rights Movement

One of the seminal cases, NAACP v. Alabama, not only demonstrated the Court’s strong reluctance to curtail the freedom of association, but also played a critical role in the civil rights movement. In NAACP, the state of Alabama attempted to coerce the NAACP into turning over its membership list to the state. Alabama claimed that the NAACP was violating a state statute, which required most out-of-state corporations to file a corporate charter with the Secretary of State and to designate a location to receive service of process. Further, Alabama claimed that the NAACP’s violation resulted in irreparable harm to the people and property

19. Id. at 446.
20. Id. at 448.
21. Id. at 449 n.4.
25. Id. at 639.
27. Id. at 453.
28. Id. at 451.
of the state. After litigation began in the case, Alabama moved for the production of lists of all members of the NAACP residing in the state. The NAACP refused, asserting that this production would substantially impede individual freedom to associate. Simply, people would be afraid to meet.

The Court accepted the NAACP's assertion, and held that the production of these documents would violate NAACP members' constitutional right to associate. In its decision, the Court specifically recognized that the members' rights would likely be violated because past revelations of members' names had resulted in economic detriment, loss of employment, threats of physical force, and other occurrences of public hostility.

While the civil rights movement benefited from the Court's protection of the freedom of association in NAACP, the civil rights movement also benefited from both the Court's unwillingness to find constitutional protection for statutes prohibiting mixed-race marriages and the Court's unwillingness to find constitutional protection for school discrimination based on race.

The Court forcefully rejected the idea of interpreting the constitutional rights as absolute rights; however, this did not indicate that the Court was eroding the sanctity of associational freedom. In Democratic Party of United States v. Wisconsin, the Court held that Wisconsin could not force the National Democratic Party to seat Wisconsin delegates at its convention if the Wisconsin delegates were chosen in a manner contrary to the national party's rules. The Court reasoned that if Wisconsin was permitted to seat its delegates, the constitutional associational freedom of the Democratic Party would be violated. As the Court eloquently wrote, "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share
the interests and persuasions that underlie the association’s being.\textsuperscript{38}

C. The Roberts Case—The Right To Expressive Association

In a landmark case, the Roberts Court held that a Minnesota state statute prohibiting discrimination on the basis of sex applied to the Jaycees, even if a slight infringement on the members’ constitutional right to expressive association occurred.\textsuperscript{39} The Court cited three reasons for its decision: (1) Minnesota has a compelling interest in eradicating sexism; (2) the Human Rights Act is not aimed at suppressing freedom of speech; and (3) the state advanced this goal with the least restrictive means.\textsuperscript{40} Further, the Court noted that permitting women in the organization effectuates no change in the message that the Jaycees are attempting to send.\textsuperscript{41}

Clearly, the Roberts Court valued Minnesota’s interest in eliminating sexism when rendering its decision. Again, three years later in Duarte, the Court reaffirmed its belief that a slight infringement on a group member’s right of expressive association is permitted if the state has a compelling interest in eliminating discrimination against women.\textsuperscript{42} Yet a third time, in 1988, the Court affirmed the two previous holdings and even expanded the doctrine. In New York State Club Ass’n,\textsuperscript{43} the Court held that a New York City law prohibiting discriminatory practices against women and minorities did not violate an individual club members’ constitutional right to expressive association.\textsuperscript{44} By 1988, the law was clear: state and even city interests are extremely important in considering whether a city or state law violates an individual’s constitutional right to expressive association.\textsuperscript{45} Simply, a state may have an overriding interest in eradicating some form of discrimination that will permit it to forbid certain public groups from discriminating against women and

\textsuperscript{38} Id. at 122 n.22 (quoting L. Tribe, American Constitutional Law 791 (1978)).
\textsuperscript{40} Id. at 623-28; see also M. Page Kelley, Roberts v. United States Jaycees: How Much Help for Women?, 8 Harv. Women’s L.J. 215, 221-22 (1985).
\textsuperscript{41} Roberts, 468 U.S. at 628.
\textsuperscript{43} N.Y. State Club Ass’n, Inc. v. City of New York, 487 U.S. 1, 5-6, 13 (1988).
\textsuperscript{44} Id. at 8.
\textsuperscript{45} Supra notes 39-40, 42-43.
minorities. In these cases, a slight infringement on the constitutional rights of the parties will be permitted.

D. Epilogue—The Law Remains The Same

In 1995, the Court ruled that a homosexual group could not march in a St. Patrick’s Day parade. The Court reasoned that forcing the parade organizers to allow this group to march infringed on the organizers’ First Amendment right to free speech. The Court found that Massachusetts’ application of its anti-discrimination statute was unconstitutional. Essentially, the law could not force the parade organizers to send a message of acceptance and tolerance of gays even if this is a socially encouraged behavior. However, the Court reaffirmed its previous holding that, as a general matter, anti-discrimination statutes do not violate First Amendment rights and the state has compelling interest in having these types of laws.

III. THE DALE DECISION

A. The Facts

James Dale joined Monmouth Council Cub Scout Pack 142 in 1978 at the age of eight. In becoming a member of the Boy Scouts three years later, Dale entered into the great American tradition of scouting. Dale was an exemplary scout, earning twenty-five merit badges in his ten years as an active youth scout. He reached the pinnacle of his scouting career in 1988 when he

46. Supra notes 39-40.
47. Id.
49. Id. at 573-74.
50. Id. at 573.
51. Id. at 579.
52. Id. at 572.
54. Id. at 2460 (Stevens, J., dissenting); Dale v. Boy Scouts of Am., 734 A.2d 1196, 1200-01 (N.J. 1999), rev’d, 120 S. Ct. 2446 (2000). “BSA membership is an American tradition. Since the program’s inception in 1910 through the beginning of this decade, over eighty-seven million youths and adults have joined BSA. As of December 1992, over four million youths and over one million adults were active BSA members.” Id. at 1200.
55. Dale, 120 S. Ct. at 2460.
earned the prestigious Eagle Scout Badge. Only three percent of all scouts earn the rank of Eagle Scout. The Boy Scouts approved Dale's application for adult membership in 1989. Dale became the Assistant Scoutmaster for Troop 73, his former youth troop.

About this same time, Dale moved away from home to attend Rutgers University. Shortly after arriving at college, Dale acknowledged to himself, friends, and family that he was gay. As the co-president of the Rutgers University Lesbian/Gay Alliance, he became active in the gay community; in July 1990 he attended a seminar that addressed the psychological and health needs of lesbian and gay teenagers. During the event, a newspaper reporter interviewed Dale, who spoke candidly about the difficulty he experienced coming to terms with his homosexuality. In July 1990, the newspaper published the article with a photograph of James Dale identifying him as the co-president of the Rutgers Lesbian/Gay Alliance.

After the publication of the article, Dale received a letter from Boy Scouts' Monmouth Council Executive James Kay revoking his Boy Scout membership. In response to this letter, Dale wrote to Kay in early August inquiring about the reason for his dismissal. Kay replied that the Boy Scouts forbid membership to homosexuals.

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56. *Boy Scouts*, 734 A.2d at 1204. It is clear from the record that Dale deserved to be recognized in the top three percent of scouts as he had acted as an Assistant Patrol Leader, Patrol Leader, Bugler, and Junior Assistant Scoutmaster. *Id.*

57. *Id.*

58. *Dale*, 120 S. Ct. at 2449.

59. *Id.*

60. *Id.; Boy Scouts*, 734 A.2d at 1204.

61. *Dale*, 120 S. Ct. at 2449; *Boy Scouts*, 734 A.2d at 1204.


63. *Id.* James Dale, 19, co-president of the Rutgers University Lesbian/Gay Alliance said he lived a double life while in high school, pretending to be straight while attending a military academy. He remembered dating girls and even laughing at homophobic jokes while at school, only admitting his homosexuality during his second year at Rutgers. Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens*, *Newark Star Ledger*, July 8, 1990, § 2, at 11. The article further demonstrated the need for assistance for gay and lesbian teens pointing out that twenty to thirty-five percent of gay and lesbian teens have attempted suicide. *Id.*

64. *Dale*, 120 S. Ct. at 2449; Borondy, *supra* note 63, at 11.


66. *Id.*

67. *Id.* Dale has mentioned numerous times that the skills he gained from the Boy Scouts are what gave him the courage to acknowledge his sexual orientation. Ironically, the very organization that facilitated a difficult time in his life would be the same organization that would revoke his membership. Interview
B. Procedural Facts

1. The New Jersey Superior Court

In July 1992, Dale commenced an action against the Boy Scouts in the New Jersey Superior Court. Both Dale and the Boy Scouts moved for summary judgment. The court granted summary judgment in favor of the Boy Scouts. Further, the court concluded that the Boy Scouts had a clear policy of excluding homosexuals. Therefore, the First Amendment freedom of expressive association protected the Boy Scouts from being forced to accept Dale, an avowed homosexual, as an assistant scout leader.

2. The New Jersey Superior Court—Appellate Division

The Appellate Division affirmed the dismissal of Dale's common law claim. However, the Appellate Division reversed and

with Evan Wolfson, Attorney for James Dale and Senior Staff Attorney, Lambda Legal Defense and Education Fund in New York City, N.Y. (July 20, 2000).

68. Dale, 120 S. Ct. at 2449. Dale asserted that the Boy Scouts had violated New Jersey's public accommodations statute as well as the common law of New Jersey when it revoked his membership based on his sexual orientation. Id. at 2449-50. New Jersey's public accommodations statute reads in relevant part:

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation ... without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.


69. Boy Scouts, 734 A.2d at 1205.

70. Dale, 120 S. Ct. at 2450. The court did not apply New Jersey's public accommodations law because the Boy Scouts is not a place of public accommodation. Id. Alternatively, the Boy Scouts is a "distinctly private group" and is "exempted from coverage under New Jersey's law." Id. Further, the court rejected Dale's claim that there is a common law claim based in public policy. Instead, the court held that New Jersey's public policy is based on the public accommodations law and because the public accommodations law does not apply, there is no common law claim. Id.

71. Id.

72. Id. The First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

remanded the rest of Dale’s claims for further proceedings. The court rejected the Boy Scouts’ federal constitutional claims of freedom of expressive association.

3. The New Jersey Supreme Court

In a unanimous seven to zero decision, the New Jersey Supreme Court affirmed the judgment of the Appellate Division. The court held that the Boy Scouts is a place of public accommodation and therefore, the public accommodations law applies to the organization. Further, the Boy Scouts are not exempt from the public accommodations law under any of the exceptions of the law.

74. Id.
75. Id. In its decision, the court reasoned about the constitutional claims: In our view, there is a patent inconsistency in a notion that a gay scout leader who keeps his secret hidden may remain in scouting and the one who adheres to the scout laws by being honest and courageous enough to declare his homosexuality publicly must be expelled. We also cannot accept the proposition that the BSA has a constitutional privilege of excluding a gay person when the sole basis for the exclusion is the gay’s exercise of his own First Amendment right to speak honestly about himself.

76. Dale, 120 S. Ct. at 2450.
77. Id.
78. Id. The exceptions to the New Jersey public accommodations law are stated in the law as follows:

Nothing herein [in the statute] contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post secondary school from using in good faith criteria other than race, creed, color, national origin, ancestry or affectional or sexual orientation in the admission of students.


Specifically, the New Jersey Supreme Court rejected the assertion that the Boy Scouts were exempt because they were a “distinctly private” organization. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1217 (N.J. 1999), rev’d, 120 S. Ct. 2446 (2000).

We reject the suggestion that the BSA organization as a whole is not a place of public accommodation because more stringent membership criteria are applied to a single component of the organization, its adult members .... An extension of defendants’ argument would be that the BSA is not a place of public accommodation because of the demanding standards that must be met to become an Eagle Scout.

Id. Obviously, it is an absurd suggestion that an organization is not a place of public accommodation simply because certain members must meet very high
As to the federal constitutional claims, the court separated the claim into two distinct issues: (1) the right to intimate association, and (2) the right to expressive association. The court held that the Boy Scouts did not warrant constitutional protection for the right to intimate association because of its nonselective nature. Specifically, the court held that the large size, inclusive nature, and the permitting of nonmembers to attend meetings demonstrate that the Boy Scouts are not so personal or so private as to merit constitutional protection.

Similarly, the court held that reinstating Dale to member status would not infringe on the Boy Scouts' right of expressive association. The court did agree that the Boy Scouts instill moral beliefs in its members, but the Boy Scouts are far from being an organization whose central goal or theme is to unite in opposition against homosexuality.

In addition, the court found that New Jersey had a compelling interest in eliminating the harmful effects of discrimination, even if this meant a slight infringement on the Boy Scouts' constitutional rights.

4. The United States Supreme Court

The United States Supreme Court reversed the New Jersey Su-
The Court held that New Jersey cannot force the Boy Scouts to accept members whose membership would jeopardize the organization's message. However, this freedom of expressive association is not absolute. To even reach the stage where it must be determined whether the Boy Scouts' right to expressive association was infringed, the Court first examined if the Boy Scouts even engage in expressive association. The Court concluded that the Boy Scouts engage in expressive association based on the Scout Laws and Scout Oath. The Boy Scouts asserted and the Court ac-

85. Dale, 120 S. Ct. at 2458.
86. Id. In addition to this potential derogation of the organization, the Court also cautions that the law must avoid "interfer[ing] with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." Id. at 2458 (quoting Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston, 515 U.S. 557, 579 (1995)).
87. Dale, 120 S. Ct. at 2451. The Court cites Roberts, underscoring the fact that the Court is willing to override constitutional rights when there are compelling state interests that merit this action. Id. (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)). The Roberts Court held that the Jaycees could not discriminate against women, thus ignoring the Minnesota Human Rights Act, because "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms." Roberts, 468 U.S. at 623 (1984).
88. Dale, 120 S. Ct. at 2451. The Court is absolutely correct in reasoning that to render a judicious verdict, the Court must make an exhaustive review of the factual record. Hurley, 515 U.S. at 567-68; see also Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984). "[T]he rule is that we examine for ourselves the statements in issue and the circumstances which they are made to see ... whether they are of a character which the principles of the First Amendment...protect." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (quoting Pennekamp v. Florida, 328 U.S. 331, 335 (1946)).
89. Dale, 120 S. Ct. at 2451-52. The Scout Laws and Scout Oath are quite lengthy, but a thorough reading of them is required to understand and ultimately reject the Court's majority opinion. "Scout Oath: On my honor I will do my best to do my duty to God and my country and to obey the Scout Law; to help other people at all times; to keep myself physically strong, mentally awake, and morally straight." Dale v. Boy Scouts of Am., 734 A.2d 1196, 1202 (N.J. 1999), rev'd, 120 S. Ct. 2446 (2000).
Scout Law:

A scout is TRUSTWORTHY. A Scout tells the truth. He keeps his promises. Honesty is a part of his code of conduct. People can always depend on him.

A Scout is LOYAL. A Scout is true to his family, friends, Scout leaders, school, nation, and world community.

A scout is HELPFUL. A Scout is concerned about other people. He willingly volunteers to help others without expecting payment or reward.

A Scout is FRIENDLY. A Scout is a friend to all. He is a brother to other
cepted the belief that homosexuality conflicts with the Boy Scout Law on being "morally straight" and "clean."90 The Court found that the Boy Scouts have consistently promulgated a position rejecting homosexuality as a legitimate lifestyle.91 Therefore, the Court held that if Dale was reinstated as an assistant scoutmaster, the Boy Scouts would be forced to convey a message that homosexuality is a legitimate lifestyle, which is in direct conflict with its professed beliefs.92 The Court concluded the federal constitutional rights dis-

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A Scout is COURTEOUS. A Scout is polite to everyone regardless of age or position. He knows that good manners make it easier for people to get along together.

A Scout is KIND. A Scout understands there is strength in being gentle. He treats others as he wants to be treated. He does not harm or kill anything without reason.

A Scout is OBEDIENT. A Scout follows the rules of the family, school, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.

A Scout is CHEERFUL. A Scout looks for the bright side of life. He cheerfully does tasks that come his way. He tries to make others happy.

A Scout is THRIFTY. A Scout works to pay his way and to help others. He saves for the future. He protects and conserves natural resources. He carefully uses time and property.

A Scout is BRAVE. A Scout can face danger even if he is afraid. He has the courage to stand for what he thinks is right even if others laugh at him or threaten him.

A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He goes around with those who believe in living by these same ideals. He keeps his home and community clean.

A Scout is REVERENT. A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others.

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90. Dale, 120 S. Ct. at 2452-53. "We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed ...." Id. at 2453 (quoting United States Supreme Court Pet'r Br. at 6, Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000) (No. 99-699)).

91. Dale, 120 S. Ct. at 2453.

92. Id. at 2454. Here, the Court relies heavily on Hurley. In that case, the Court held that an Irish gay, lesbian, and bisexual group could not march in a St. Patrick's Day parade because the group's inclusion in the parade would violate the First Amendment freedom of speech right of the parade organizers. Hurley, 515 U.S. at 580-81. Simply, it is a parade organizer's prerogative as to what message he or she chooses to convey or chooses not to convey. Id. at 575. In the present case, the Court analogized that the Boy Scouts are in the same position as the parade organizers; an inclusion of Dale would force the Boy Scouts to promulgate a point of view contrary to its beliefs. Dale, 120 S. Ct. at 2454.
discussion in holding that the Boy Scouts is an expressive association and that any forced inclusion or reinstatement of Dale would infringe on this First Amendment right. 93

Lastly, the Court determined that New Jersey's Public Accommodations Law is not applicable to the case at bar for fear of infringement on First Amendment rights. 94

IV. THE ANALYSIS

A. The Dale Holding

The Dale holding is a wrong decision. First, it is based on a questionable reading and misunderstanding of the facts. 95 Second, the Court repeatedly concocts the same incessantly trite argument. 96 Third, the decision not so subtly drips with an underlying indifference, if not enmity, towards the rights of gays. 97

The Court duly noted that it has an obligation to review the factual record. 98 In its review, the Court relied on a few suspect documents and found that the Boy Scouts had a clearly established policy that forbade homosexuality. 99 Specifically, the Court used

93. Dale, 120 S. Ct. at 2455. In reaching this conclusion, the Court asserts that there are three reasons why the forced inclusion of Dale will convey an undesirable message: 1) a group does not have to associate for the sole purpose of disseminating a certain message to maintain First Amendment protections; 2) even if the Boy Scouts discourage adult members from discussing sexual issues, youth scouts under the supervision of a gay scout leader will presumably receive a "gay" message; and 3) not every person of a group has to maintain the same belief in order for the organization as a whole to be entitled to First Amendment protection. Id. at 2454-55. Here, the Court is stating that the Boy Scouts' First Amendment rights will be infringed if Dale is an assistant scoutmaster. Id. at 2455. Notably and curiously, the Court offers no legal support for any of these three reasons.

94. Id. at 2457.

95. Infra notes 99-105 and accompanying text.

96. Infra note 125.

97. Infra note 127.

98. Dale, 120 S. Ct. at 2451. In Sullivan, the Court held that an examination of the facts in a case involving constitutional issues is necessary to ensure that there is no suppression of constitutional rights. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964). The Court recognized that the Seventh Amendment states that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States ...." Id. at 285 n.26. However, the Court went on to conclude that there may be some instances where a federal right is at issue and the Court must examine the facts to make a decision on the federal question. Id. In Sullivan, a widely known case that advanced the civil rights movement, the Court's bold decision to reexamine the facts eventually led to a landmark decision that protected the New York Times newspaper from an alleged claim of libel. Id. at 286.

99. Dale, 120 S. Ct. at 2453.
two documents to support this assertion, both of which are suspicious. The first document is a 1978 position statement to the Boy Scouts' Executive Committee stating that homosexuals are not appropriate leaders in scouting.\footnote{100} However this document was not a publicly distributed document, in fact, it was more like a secret document.\footnote{101} Admittedly, a statement that is not disseminated is not automatically rendered meaningless. However, it is unusual that the Court would find that an unknown policy of discrimination against homosexuals directly in opposition with the Boy Scouts' widely proclaimed message of inclusion of all boys and young men is compelling evidence of the Boy Scouts' anti-gay position.\footnote{102}

The second, yet equally dubious document the Court relies on is a 1991 position statement and its subsequent revisions.\footnote{103} However, this document and its descendants are clearly questionable in that they were promulgated after Dale's expulsion.\footnote{104}

In addition to its reliance on formal documents, the Court asserted that homosexuality is not compatible with the Scout Oath and Law.\footnote{105} The Court's flawed review of the factual record was

\begin{itemize}
\item \footnote{100} Id.
\item \footnote{101} Id. at 2463 (Stevens, J., dissenting).
\item \footnote{102} Id.
\item \footnote{103} Id. at 2453.
\item \footnote{104} Id. at 2464 (Stevens, J., dissenting).
\item \footnote{105} Id. at 2452. Specifically, the Court reasonably held that some people would interpret the words "morally straight" and "clean" in the Scout Oath and Law to signify the encouragement of heterosexuality. \textit{Id.} However, without any demonstration that the BSA had ever intended the word "straight" and "clean" to refer to heterosexuality, the Court accepted the BSA's contention at face value that these words were implicitly encouraging heterosexuality. \textit{Id.} at 2453. The problem with this reasoning is that the Court failed to address the BSA's explicit explanation of the words "morally straight" and "clean" that appeared in its very own publications. \textit{Id.} at 2461-62 (Stevens, J., dissenting). When describing the term "morally straight," the Scoutmaster Handbook states, "In any consideration of moral fitness, a key word has to be 'courage.' A boy's courage to do what his head and his heart tell him is right. And the courage to refuse to do what his heart and his head say is wrong." \textit{Id.} at 2461 (Stevens, J., dissenting) (quoting App. at 239-40). With regards to the term "clean," the Boy Scout Handbook states, "A Scout keeps his body and mind fit and clean ... You never need to be ashamed of dirt that will wash off ... There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts." \textit{Id.} at 2461 (quoting App. at 225-26). Further, a suggested lesson on how to teach the meaning of "clean" involves using two pots, one dirty on the outside and clean on the inside, the other clean on the outside and dirty on the inside. The lesson demonstrates that a scout can easily clean his outside, but one must be determined to keep his inside clean. \textit{Id.} at 2461 n.2 (citing App. 289-90). Obviously, the BSA's own definitions of "morally straight" and "clean" do not make any implicit or explicit reference to sexual orientation. \textit{Id.} at 2461.
\end{itemize}
perpetuated by the Court’s unsupported view that the Court must accept the Boy Scouts of America’s statements about the facts at face value.\textsuperscript{106}

Other than these few documents, the Court relied on a California case to demonstrate the Boy Scouts’ disapproval of homosexuality.\textsuperscript{107} However, this California case relied on unusual reasoning as well.\textsuperscript{108} In \textit{Curran v. Mount Diablo Council of the Boy Scouts of America}, the court held that the California Unruh Civil Rights Act cannot compel the Boy Scouts to accept members who express contrary views.\textsuperscript{109} However, in the court’s conclusion, it ponders whether the NAACP could be forced to accept a Ku Klux Klan member or if B’nai B’rith could be forced to accept an anti-Semite.\textsuperscript{110} Obviously, the court is struggling with a constitutional question. Not only is it offensive for the California Supreme Court to compare a person of different sexual orientation to a person committed to tenets of bigotry, but wouldn’t a much more comparable question be: Can the Jaycees exclude women? Can the Rotary Club exclude women? Can private New York clubs, which benefit the business community, discriminate in their memberships? Interestingly, but not surprisingly, the Supreme Court has answered all of these questions and the answer has been “no” each time.\textsuperscript{111}

The Court reviewed the facts, but the review seems problematic in that the Court did not review all of the facts, especially those facts suggesting that the Boy Scouts have not disseminated a consistent policy of disapproval of homosexuality. For example, the Court discussed the Boy Scout Oath and Law and surmised that some people may construe the terms “morally straight” and “clean”

\textsuperscript{106} \textit{Id.}
\textsuperscript{107} \textit{Dale}, 120 S. Ct. at 2453. Here, the Court cites the 1998 \textit{Curran} decision. Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218 (Cal. 1998).
\textsuperscript{108} \textit{Curran}, 952 P.2d at 257.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} N.Y. State Club Ass’n, Inc. v. City of New York, 487 U.S. 1, 12-13 (1988) (holding that New York City’s human rights law prohibiting discrimination in membership in certain clubs does not violate the clubs’ constitutional rights); Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537, 549-50 (1987) (holding the California Unruh Civil Rights Act serves a compelling state interest when it is used to compel the Rotary Club to allow women members, and therefore the Act does not violate the Rotary’s constitutional rights); Roberts v. U.S. Jaycees, 468 U.S. 609, 630-31 (1984) (holding that Minnesota’s Human Rights Act is not too broad in compelling the Jaycees to allow women to join, and therefore does not infringe on the Jaycees’ constitutional rights).
to signify discouragement of homosexuality. However, the Court made no attempt at all to discern the meaning of how some people would construe the term "brave" or "trustworthy."

Even with the flawed factual analysis, it is possible that the Court may have pointed to overwhelming legal precedent or public policy that would support the holding in favor of the Boy Scouts. However, the Court did not do this; the Court never addressed New Jersey's interest in eliminating discrimination against gays. All this in spite of the fact that there is much evidence suggesting that this type of discrimination renders harmful effects. A few of the deleterious effects of this type of discrimination include discrimination in employment and housing, consistent occurrences of verbal harassment, and the occurrence of crimes against people because of sexual orientation. For example, in 1998, 1,248 hate crimes were reported against gay men, lesbians, or bisexuals. While numbers are not particularly persuasive without some context in which to compare them, it would seem apparent to the average reader that the occurrence of over twelve hundred crimes based on one's sexual orientation is far too many. Plus, a brief of the American Psychological Association notes the figure is probably low be-

112. Dale, 120 S. Ct. at 2452.
113. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1202 (N.J. 1999), rev'd, 120 S. Ct. 2446 (2000). The Boy Scout Handbook defines the term "brave" as having the "courage to stand for what he thinks is right even if others laugh at him or threaten him." Id. The Boy Scout Handbook defines the term "trustworthy" as someone who is honest "as part of his code of conduct." Id. When reading these definitions, one cannot help but think that some would argue that James Dale acted both brave and trustworthy, under the Boy Scout Handbooks' definition, when he revealed his homosexuality. However, the Court never addressed this possible interpretation of those terms. In fact, the Court ignored this part of the Boy Scout Handbook altogether.
114. Dale, 120 S. Ct. at 2456-57. Here, the Court recognizes that in previous cases, it has held that states have compelling interests in eradicating discrimination. Id. at 2456. "By prohibiting gender discrimination in places of public accommodation, the Minnesota Act protects the State's citizenry from a number of serious social and personal harms .... It [discrimination] thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984). Further, in Duarte, the Court cited a study by the U.S. Department of Commerce to bolster the contention that allowing women in Rotary Clubs will lead to a more representative group of community leaders. Duarte, 481 U.S. at 549 n.7 (citing U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 400 (1986)).
115. Amicus Curiae American Psychological Association in Support of Resp't at 26, Boy Scouts, 734 A.2d at 1200-01.
116. Id. at 27.
cause of variation in reporting methods as well as victims' hesitation to report the crimes for fear of retribution or retaliation.\textsuperscript{117} Additionally, these types of crimes are often unusually gory.\textsuperscript{118}

In the \textit{Dale} decision, the Court relied on case after case holding that discrimination renders deleterious effects on the people of a particular state.\textsuperscript{119} Therefore, the Court held that laws forbidding discrimination are enforceable and do not infringe on an organization's First Amendment rights to freedom of expressive association.\textsuperscript{120}

To come to its conclusion in the current case, the Court asserted that forcing the Boy Scouts to accept a gay assistant scout leader would force the Boy Scouts to give an inherently different message than the message that the Boy Scouts intended.\textsuperscript{121} In support of this, the Court notes its previous holding that a parade organizer cannot be forced to include a group, if that group's inclusion will convey a message that the organizer does not wish to send.\textsuperscript{122} As before, here the Court relied on a case with facts very

\begin{thebibliography}{122}
\bibitem{117} Id.
\bibitem{118} Anthony S. Winer, \textit{Hate Crimes, Homosexuals, and the Constitution}, 29 \textit{Harv. C.R.-C.L. L. Rev.} 387, 410 (1994). One particularly gruesome example from 1992: Schindler had recently told his commander he was gay and wanted an administrative discharge. Meanwhile, word of his homosexuality and impending discharge spread throughout the ship's crew. The murder of Schindler [a gay Navy seaman] was unprovoked and especially brutal. Helvey [the assailant] later described how he had kneeled Schindler in the groin, punched him in the face, and cradled Schindler's neck and head in his left arm as he punched him repeatedly in the face. Helvey said he then brought Schindler down to the floor, where he stomped on his face and chest with his feet. Schindler was so disfigured by the beating that his mother could recognize him only by the tattoos on his arms; the Navy said that his skull was battered, that most of his ribs were broken. The physician who performed the autopsy said that Schindler's lungs were bruised and his liver was completely destroyed. The brutal characteristics of Schindler's murder are consistent with many anti-gay hate crimes, wherein perpetrators evince 'the absolute intent to rub out the human being because of his sexual preference.' \textit{Id.} at 411-12 (citations omitted).
\bibitem{119} \textit{Dale}, 120 S. Ct. at 2456 (citing N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 14 n. 5 (1988); \textit{Duarte}, 481 U.S. at 549; \textit{Roberts}, 468 U.S. at 625).
\bibitem{120} \textit{Supra} note 111 and accompanying text.
\bibitem{121} \textit{Dale}, 120 S. Ct. at 2454. "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." \textit{Id.} at 2454.
\bibitem{122} \textit{Id.} at 2454. In \textit{Hurley}, the Court permitted the organizers of the St. Patrick's Day Parade, the South Boston Allied War Veterans Council, to exclude the Irish-American Gay, Lesbian, and Bisexual Group of Boston from marching in the parade because the forced inclusion would violate the organizers' First Amendment rights. \textit{Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston}, 515

http://open.mitchellhamline.edu/wmlr/vol27/iss3/17
different than the case at bar. James Dale never proposed, suggested, or intimated that he wanted to engage in any kind of gay activism while acting in his capacity as an assistant scout leader. He certainly never proposed to march in a Boy Scout parade pronouncing his sexual orientation. Obviously, it is absurd to liken Dale's desire to work as an assistant scoutmaster to that of a gay, lesbian, and bisexual's group desire to march in a parade.

Dale sought to work for the Boy Scouts while maintaining a lifestyle led with integrity about who he was. In other words, he did not plan on concealing his sexual orientation any more than he planned on proclaiming his sexual orientation. On the other hand, the Irish-American Gay, Lesbian, and Bisexual Group of Boston was formed for the purpose of marching in the parade and to demonstrate the support for these individuals within the community. Clearly, these cases are distinguishable and the Court's reliance is misplaced.

The Court's repeated statements about its hesitation to force the Boy Scouts' to accept Dale is trite, especially because the Court never exactly specifies what message the retention of Dale would convey. Not only does the Court repeat itself again and again, as

U.S. 557, 569-70 (1995). The Court correctly held that, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." Id. at 576.

123. Hurley, 515 U.S. at 570.

124. Lest one think that this research has been conducted in pursuit of promoting some previously held liberal agenda, I would counter this assertion arguing that the Court likely decided the Hurley case correctly even though in my mind there is no question that discrimination was involved in the facts of the case. Simply, it is true that the forced inclusion of a group in a parade might infringe on one's First Amendment rights. As the Court eloquently held in Pacific Gas, "one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say," Hurley, 515 U.S. at 573 (citing Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 11 (1986) (internal quotations omitted)).

125. Dale, 120 S. Ct. at 2453-55. In this part of the decision, the Court repeats in three separate places that the inclusion of Dale will force the Boy Scouts to send a message, which they choose not to send. It is not clear what exactly the offending message would be. Reliance on Hurley offers no help because Dale did not join the Boy Scouts for the purpose of showing acceptance of gays. Rather, is one to assume that a gay assistant scoutmaster teaches the Scout Oath and Law differently? If this is true, why didn't the Boy Scouts enter this in the factual record? Further, if a homosexual's presence in the organization so changes the message the Boy Scouts are sending as to violate its constitutional rights, why didn't anybody notice this obvious fact that the Boy Scouts were sending out a message that homosexual conduct was a legitimate form of behavior before the newspaper arti-
if to convince itself of the decision, but also there is blatant oversight of New Jersey's compelling interest in eliminating discrimination.\textsuperscript{126}

Perhaps this oversight is merely that, an oversight, or perhaps this case represents something more insidious in our society, apathy towards the rights of gays. It is hard to know what kind of role this apathy plays in the decisions of the Court; however some of the clues we do have about the Court's opinions suggest that there is an underlying misunderstanding toward gay issues.\textsuperscript{127}

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\begin{enumerate}
\item[126.] Supra note 114 and accompanying text. Cf. Romer v. Evans, 517 U.S. 620 (1996). In this case, the Court struck down an amendment to the Colorado Constitution. \textit{Id.} at 626. Amendment Two precluded all governmental entities from engaging in any activities that would protect a person from discrimination based on his or her sexual orientation. \textit{Id.} at 626-27. Here, the Court found that the amendment "lack[ed] a rational relationship to legitimate state interests." \textit{Id.} at 632. This Court, not more than five years ago, struck down a state constitutional amendment because it lacked legitimate state interest. \textit{Id.} Yet, in \textit{Dale}, the Court did not even mention, much less speculate what legitimate state interests New Jersey could and does have in eradicating discrimination against gays with its Law Against Discrimination. N.J. STAT. ANN. § 10:5 (West 1993).

\item[127.] Romer, 517 U.S. at 644 (Scalia, J., dissenting). "But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even 'animus' toward such conduct." \textit{Id.} at 644. In his dissent, Justice Scalia likens the animus towards homosexuals to that of the animus towards murderers. Does this make sense? Is it really true that people have the same type of moral disapproval towards one who takes another's life as they do towards a gay person? Surely, that cannot be true. In another illustrative opinion footnoted in the \textit{Dale} dissent, gays were defiled in the writings of the Court. In that case, the university had denied recognition to a student gay rights organization. The student group argued that in doing so, the university had violated its free speech and free association rights. The court of appeals agreed with that argument. A dissent from denial of certiorari, citing the university's argument, suggested that the proper analysis might well be as follows: "[T]he question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles sufferers be quarantined." \textit{Dale}, 120 S. Ct. at 2478 n.30 (Stevens, J., dissenting) (citing Univ. of Mo. v. Gay Lib, 434 U.S. 1080, 1084 (1978)). Here, in a dissent authored by Chief Justice Rhenquist, joined by Justice Blackmun, he likens a gay person to a person having measles. \textit{Id.} While most students of the law can appreciate useful analogies, is that a fair analogy? It is important to note that Justice Blackmun's opinion on this issue changed in later years. Just eight years later, Justice Blackmun dissented in \textit{Bowers}, defending the right of homosexuals to engage in sex in the privacy of their own homes. \textit{Bowers} v. \textit{Hardwick}, 478 U.S. 186, 214 (1986). In his famous dissent in this five to four decision,
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The Dale Court leaves the Boy Scouts with permission to ban homosexuals from membership in the organization. Until the Court grants certiorari to this issue again, that will be the law of the land. The real value of this article is not the criticism of the Court supplemented with a healthy dose of moral outrage. Rather, the question becomes, what happens next? In other words, do other laws exist that may offer some recourse to prevent the Boy Scouts from engaging in discriminatory practices? Here, our focus shifts from the Dale case to state civil rights laws that protect citizens from discrimination because of sexual orientation.

B. What Happens Next In Minnesota?

Everyday, more and more articles in the mainstream press appear about this now infamous Dale decision. Most of these articles wrote that, "depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do." Id. Perhaps more notable than Justice Blackmun's dissent is Justice Powell's change of opinion in Bowers. Justice Powell joined Justice White's majority opinion rejecting a right to privacy for consensual homosexual sex. JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. 524 (1994). Four short years later in 1990, while responding to a question at New York University Law School, Justice Powell said he now regretted his vote and believed that the dissent "had the better of the arguments." Id. at 530; see also Linda Greenhouse, Lewis Powell, Crucial Centrist Justice, Dies at 90, N. Y. TIMES, Aug. 28, 1998, at D19. His renouncement of his vote does not change the status of Bowers, it is still the law of the Court. However, his renouncement may indicate something more general about our present context. That is, four years down the road in 2004, perhaps one of the Justices in the Dale majority will realize that the dissent had the better of the arguments.

128. Dale, 120 S. Ct. at 2458.
129. The cities of Chicago, San Francisco, and San Jose, California have already informed local scout troops in those areas that they cannot use parks, schools, and other city sites for scouting functions. Kate Zernike, Scouts' Successful Ban on Gays is Followed by Loss in Support, N. Y. TIMES, August 29, 2000, at 1, available at http://www.nytimes.com/library/national/082900scouts-contribute.html (on file with author). This is a difficult issue for public officials around the country because they are caught in a precarious balancing act. On one side, they do not want to eliminate scouting as a valuable opportunity for boys of all ages or violate First Amendment principles. On the other side, if these public entities permit a group that bans gays to use public facilities, they risk violating state and/or city anti-discrimination statutes. Id. In fact, the American Civil Liberties Union filed a lawsuit against the city of San Diego on August 28, 2000 praying for a federal court to revoke a fifty year old contract that allows the Scouts to lease eighteen acres of city land for $1 per year. Id. As this article describes, the Supreme Court's Dale decision is not the end of this issue. The next section of this article will explore the situation in Minnesota.

130. Pat Doyle, United Way to Allow Exclusions by Donors, MINNEAPOLIS STAR
icles address the issue of private and public funding of the Boy Scouts of America. In light of these recent developments, two questions arise: 1) Can the state of Minnesota take any action? and 2) Should the state of Minnesota take any action? All sides in this matter can debate these questions vigorously, but this section of the article will address the legal basis for the answer to these questions.

1. Can The State Of Minnesota Take Any Action?

Minnesota, like eleven other states, has broad anti-discrimination laws that protect against discrimination based on sexual orientation. Minnesota's Human Rights Act is one of the

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TRIB., Sept. 6, 2000, at A1; Todd Nelson, United Way to Continue Supporting Boy Scouts, SAINT PAUL PIONEER PRESS, Sept. 6, 2000, at B1; Anna Quindlen, The Right to Be Ordinary, NEWSWEEK, Sept. 11, 2000, at 82; Zernike, supra note 129.

131. Supra note 130.

132. Supra note 130. In Minneapolis and St. Paul, Minnesota, the United Way instituted a new policy permitting donors to exclude specific organizations from receiving their money. Doyle, supra note 130. Referring to the Dale case, Bill Rodriguez, Vice President of Marketing for United Way of St. Paul said, "There is no doubt that the whole issue has helped precipitate this new policy ... it's not the lone factor, but it's a significant one." Id. The local Indianhead Boy Scout Council of St. Paul will continue to receive support from the local United Way, but donors will have the option to exclude the group, an option that was not available previously. Nelson, supra note 130, at B2. Further, the United Way of St. Paul's continued support is somewhat unique because according to Nelson's article, "Across the country, dozens of United Ways have cut off millions of dollars earmarked for the Boy Scouts, and several large companies such as Chase Manhattan Bank, Textron Inc. and Levi Strauss & Co. have followed suit." Id. Further, Connecticut has banned state employees from giving charitable donations to the Scouts through a state-run charity. Zernike, supra note 129. Other organizations have turned to alternative methods in an attempt to encourage the Boy Scouts not to discriminate. Id. Specifically, a United Way chapter in Rhode Island will require any Scout council seeking funding to sign a form stating that it will not discriminate. Id. But as one can imagine, the Boy Scouts of America's national organization is not willing to endorse this action. In fact, if the Boy Scouts allowed individual councils to sign non-discrimination pledges, this action could seriously impair the BSA's future ability to contend that it has always maintained that homosexuality is not compatible with scouting. Id.

However, even though troops that disobey the national policy of discrimination towards homosexuals could face eviction, local Boy Scout councils have asked the national group to reconsider its decision. See Quindlen, supra note 130 at 82; Zernike, supra note 129 at 4.

133. The following provides an in-depth review of the type of protections against sexual orientation discrimination that are in effect in these twelve states. See MINN. STAT. ANN. § 363.03 subd. 1(1)(a)-(d) (membership in labor organizations); § 363.03 subd. 1(2)(a)-(c), (3)(a)(b), (4)(a)-(c) (employment); § 363.03 subd.
most comprehensive statutes legislating legal protection from discrimination because of sexual orientation in public accommodations, employment, housing, public services, access to education, and the granting of credit.134 Clearly, the Boy Scouts' eviction of

subd. 2(1)(a)-(c),(2)(a)-(c),(3)(a)(b), (4) (real property including housing); § 363.03 subd. 3(1) (public accommodations); § 363.03 subd. 4(1) (access to public services); § 363.03 subd. 5(1)-(3) (access to education); § 363.03 subd. 8(1) (granting credit) (West, WESTLAW through 1999 Reg. Sess.); CAL. GOV'T CODE § 12940(a) (employment); § 12940(b) (membership in labor organizations); § 12955(a)-(e),(h),(j)-(l) (different aspects of housing) (West, WESTLAW through 1999 Reg. Sess); CONN. GEN. STAT. ANN. §46a-81b(a) (acceptance into associations for licensed persons); §46a-81c (employment); §46a-81d(a) (public accommodations); §46a-81e (housing); §46a-81h(a) (equal employment in state agencies); §46a-81i(a) (services of state agencies); §46a-81j(b) (job recruitment and placement services provided by state agencies) (West, WESTLAW through Jan. 1, 2000); HAW. REV. STAT. § 378-2(1)(A) (employment); § 378-2(1)(D) (membership in labor organizations) (West, WESTLAW through 1999 Reg. Sess.); 2000 Me. Legis. Serv. Act of April 7, 2000, ch. 629, sec. 8.5, tit. 5, § 4571 (employment); sec. 9.5, tit. 5, § 4572(1)(A)-(C) (employment and membership in labor organizations); sec. 14.5, tit. 5, § 4582 (different aspects of housing); sec 17.5, tit. 5, § 4592(1)(2) (public accommodations); sec 18.5, tit. 5, § 4595 (granting of credit); MASS. GEN. LAWS. ANN. ch. 151B, § 4(1) (employment); § 4(2) (membership in labor organizations); § 4(3A) (insurance or bonding coverage); § 4(3B) (access to mortgages); § 4(5C) (6) (7)(7B)(8) (different aspects of fair housing); § 4(14) (granting credit) (West, WESTLAW through 2000 Sess.); NEV. REV. STAT. § 613.330(1)(a)(b), (2)(a)(b), (3)(a)(b), (4) (West, WESTLAW through 1999 Reg. Sess.) (employment); § 338.125 (1)(2) (contracts with the state); N.H. REV. STAT. ANN. § 354-A:7(l) (employment); § 354-A:7(II) (membership in labor organizations); § 354-A:10(1)-(V), (VII) (different aspects of fair housing); § 354-A:17 (public accommodations) (West, WESTLAW through 1999 Reg. Sess.); N.J. STAT. ANN. § 10:5-4, 10:5-12(f)(1)(2) (public accommodations); § 10:5-4, 10:5-12(a)(c) (employment); § 10:5-12(b) (membership in labor organizations); § 10:5-12(g)(1)-(3), (h)(1)-(3) (different aspects of housing); § 10:5-12(i)(1)(2), (k)(l) (financing of housing or real property); § 10:5-12(m)(1) (granting of credit) (West, WESTLAW through 1999 Reg. Sess.); R.I. GEN. LAWS § 11-24-2 (public accommodations); § 23-17.16-2(1) (in-home patient care); § 28-5-5 (equal employment); § 28-5-7 (employment); § 28-5.1-7(a) (state services); § 28-5.1-8(a) (state educational programs); § 34-37-4.3 (granting credit); § 34-37-1(a)(b) & 34-37-4(a)-(c) (different aspects of fair housing) (West, WESTLAW through 1999 Reg. Sess.); VT. STAT. ANN. tit. 3, § 961(6) (employment); tit. 9, § 4502(a) (public accommodations); tit. 21, § 1621(b)(8)(A) (membership in labor organizations) (West, WESTLAW through 1999 Sess.); WIS. STAT. ANN. § 36.12(1) (admission to state college system); § 38.25(1) (admission to state technical college system); § 111.36(1)(d)(1) (employment); § 118.13(1) (public school) (West, WESTLAW through 1999 Act 75); 2000 Wis. Legis. Serv. 150, Act of May 10, 2000, sec. 383, § 66.40(2m), sec. 447, § 106.04(1) (housing).

134. MINN. STAT. ANN. § 363.03 (West, WESTLAW through 1999 Reg. Sess.) For more detailed information, supra note 133 and accompanying text. It is also interesting to note that Hennepin County, which includes the city of Minneapolis, Minnesota was the first county to enact gay rights legislation in 1974. See Note, Constitutional Limits on Anti-Gay-Rights Initiatives, 106 HARV. L. REV. 1905,
Dale on the basis of his sexual orientation alone is discrimination under Minnesota law. In City of Minneapolis v. Richardson\textsuperscript{135}, the Minnesota Supreme Court interpreted the Minnesota Human Rights Act's use of the word "discrimination" to mean, "distinction in treatment of individuals based upon impermissible or irrelevant factors such as race, color, creed, sex, etc."\textsuperscript{136} The court went on to explain that to establish discrimination, it is necessary to show that someone else in a similarly situated position that does not possess the irrelevant trait is treated preferentially.\textsuperscript{137} In the instant case, Dale would have to show that he was treated differently than someone who was heterosexual in order to establish discrimination. Obviously, this is not difficult to do considering that the Boy Scouts admit that it discharged Dale because of his sexual orientation.\textsuperscript{138}

Establishing discrimination alone is not enough for the State of Minnesota to take action under statutory construct. Simply, Minnesota would have to prove that the Boy Scouts discriminate against gays and this discrimination violates a specific provision of the Minnesota Human Rights Act. The most logical assertion that the state could make is that the Boy Scouts' discriminatory policy violates the public accommodations provision of the Act.\textsuperscript{139} This might sound hauntingly familiar to the Dale case, and we know that the Supreme Court spoke on this issue and declared that private organizations have a constitutional right to discriminate against gays which should be granted deference over a state's anti-discrimination public accommodation laws.\textsuperscript{140}

\textsuperscript{135} 239 N.W.2d 197, 201 (Minn. 1976).
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 202.
\textsuperscript{138} Dale, 120 S. Ct. at 2450.
\textsuperscript{139} MINN. STAT. ANN. § 363.03 subd. 3(a)(1) (West, WESTLAW through 1999 Reg. Sess.). The statute reads in relevant part, "It is unfair discriminatory practice: to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex ...." Id.
\textsuperscript{140} Dale, 120 S. Ct. 2446. It is important to note that the Supreme Court has, in the past, held that private organizations that discriminate are not without consequence. See Bob Jones Univ. v. United States, 461 U.S. 574, 603-604 (1983). In Bob Jones, the University believed that the Bible forbade interracial dating and marriage. Id. at 580. In adherence of these tenets, the University excluded African-Americans until 1971. Id. Subsequently, from 1971 to May 1975, the University only accepted applications from African-Americans married to other African-Americans. Id. Finally, in May of 1975, the University abandoned its discrimina-
First, it is possible Minnesota would have come to the conclusion that the Boy Scouts are not a private organization, thus rendering it susceptible to the public accommodations statute. In *Wayne v. Mastershield*, the Court of Appeals of Minnesota recently held that the determination of whether an entity is public or private "hinges on two criteria: (1) the selectiveness of the group in the admission of members; and (2) the existence of limits on the size of the membership." In *Wayne*, Judge Toussaint held that apartment complexes are not places of public accommodations under the Minnesota Human Rights Act. On the other hand, the court in *United States Jaycees v. McClure* held that the United States Jaycees is a place of public accommodation because of the absence of selection criteria, and the seemingly limitless membership goals.

From these cases, the standard for the determination in Minnesota policy and allowed unmarried African-American students to enroll. *Id.* However, the University instituted a disciplinary rule resulting in expulsion for students involved in a dating or marital relationship with someone “outside their own race.” *Id.* at 580-81. In response to these discriminatory (and repugnant) policies, the Court affirmed the Internal Revenue Service’s revocation of Bob Jones University’s tax-exempt status under § 501(c)(3). *Id.* at 605. Here, the Court demonstrated that private organizations with flagrantly discriminatory policies are not necessarily entitled to the same benefits as other non-discriminatory organizations.

141. 597 N.W.2d 917 (Minn. Ct. App. 1999). Because the potential for research in this area is vast and outside the scope of this paper, I focused on the Indianhead Council of the Boy Scouts of America because its headquarters are located in St. Paul, Minnesota, the same city as William Mitchell College of Law. The Indianhead Council Communications Director, Kent York, very recently stated that it has never used sexual orientation as a basis for selecting or dismissing scout leaders. Nelson, *supra* note 130, at B2. In addition to the absence of sexual orientation as a criteria for selection for adult leaders, the Indianhead Council’s website states that its primary strategic vision for the year 2001 is to be recognized as “a highly effective and accessible contemporary youth development organization.” *Strategic Vision—Indianhead Scouting 2001*, at http://www.indianhead.org/about/mission.html (last visited Sept. 7, 2000). From this widely disseminated information, it is arguable that the Boy Scouts, specifically the Indianhead Council, are not particularly selective about its membership, nor is it concerned with the size of the organization. In fact, on the home page, the header of the page states that “Indianhead Scouting/BSA: Serving youth in Minnesota Counties of Ramsey, Washington, Chisago, Rice, Scott, Dakota, Le Sueur, Anoka, and the Wisconsin Counties of Pierce, St. Croix, Polk, and Burnett.” *Indianhead Scouting/BSA*, at http://www.indianhead.org/ (last visited on Sept. 7, 2000). Nowhere on the website is there mention of either selection criteria for scouts and volunteer leaders, or mention of a limit to the amount of total members in the organization. *Id.*

142. *Wayne*, 597 N.W.2d at 921 (citing U.S. Jaycees v. McClure, 305 N.W.2d 764, 770 (Minn. 1981)).
143. *Wayne*, 597 N.W.2d at 922.
144. *McClure*, 305 N.W.2d at 771, 774.
nesota of a private organization is clear. Applying this standard to the Boy Scouts, it is not at all implausible that the Boy Scouts could be deemed a public organization.

Second, even if Minnesota concluded that the Boy Scouts are a private organization and it can discriminate, the Minnesota Human Rights Act certainly prohibits the state from giving a private discriminatory group special privileges.\(^{145}\) The granting of these special privileges would violate the Minnesota Human Rights Act because Minnesota would be violating its own law.\(^{146}\) Therefore,

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145. An in-depth look at these special privileges is outside the scope of this article; however, upon closer examination of these privileges, one would likely find that many Boy Scout troops are sponsored by public entities, such as public schools. This information is derived from the Boy Scouts' contention in its brief to the Supreme Court that fewer than ten percent of troops are chartered to public institutions. See United States Supreme Court Pet'rs Br. at 3, Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000). In this brief, the Boy Scouts assert that ninety percent of troops are chartered by private organizations, and then offer no explanation for the other ten percent of troops except to say that, "fewer than 10 percent are chartered to public institutions." Id. Hence, assuming that Indianhead Council would likely have a similar breakdown, it is fair to say that public institutions sponsor approximately ten percent of the Council's troops. More telling than the number of publicly owned and operated troops would be the number of members in different types of troops. It is my contention, and further research is needed, that one would find that the publicly sponsored troops are disproportionately larger in size than the privately sponsored troops. In other words, a Boy Scout troop affiliated with a St. Paul middle school is likely to have a much broader base of potential members, and therefore a much larger membership than a church sponsored troop. The significance of this is that in using this ten percent figure, the Boy Scouts attempt to dismiss the public nature of its organization yet again. As the Indianhead website offers, "[e]ach chartered organization using the Scouting program provides a meeting place and adult volunteer leadership for its BSA units." Supporting Scouting, at http://www.indianhead.org/joining/support.html (last visited Sept. 7, 2000). Here, it is clear at the very least, a public school would open its premises to allow a meeting of the Boy Scouts.

146. If Minnesota were to seek an injunction to disallow the Boy Scouts from being sponsored by public institutions because of its discriminatory policy, this would be a case of first impression in Minnesota. However, based on the statutory language prohibiting discrimination in public accommodations, Minnesota would likely succeed in obtaining relief. Minn. Stat. Ann. § 363.03 subd. 3(1) (West, WESTLAW through 1999 Reg. Sess.). Simply, schools are obviously places of public accommodation and if the state allows the premises and the name of a public school to be used in conjunction with a discriminatory group's activities, the state is violating its own law. The following cases uphold other provisions (besides sexual orientation) of the Minnesota Human Rights Act: Dep't of Human Rights v. Spiten, 424 N.W.2d 815, 820-21 (Minn. Ct. App. 1988) (upholding prohibition of racial discrimination); Minnesota v. Parkshore Estates, Inc., 415 N.W.2d 269, 270 (Minn. Ct. App. 1987) (upholding prohibition of age discrimination); Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784, 793 (Minn. Ct. App. 1985) (holding that discrimination based on sexual orientation is a violation of Minneapolis Civil
Minnesota can take action. The state can rescind all special privileges granted to the Boy Scouts because in continuing to allow the Boy Scouts to use our public schools, parklands, and other public venues, Minnesota is putting its imprimatur on the Boy Scouts’ discriminatory policy.\(^ {147}\)

The Boy Scouts will argue that any prohibition on its use of public schools or parklands is unconstitutional.\(^ {148}\) While the Court has held that content discrimination is unconstitutional in granting the use of a public forum, both of the leading cases in this area have involved religious organizations.\(^ {149}\)

Two important issues distinguish these cases from the *Dale* case. First, in *Rosenberger*, the Court writes in great detail about the critical role that religion has played in our human history and uses this as one justification for forbidding content discrimination.\(^ {150}\) Surely today, the Court would not laud the value of the history of homophobia as a reason for allowing the Boy Scouts to use school premises.

Second, neither of these cases involved a state with statutes aimed at eliminating the actions in question.\(^ {151}\) In contrast, Minnesota does have a statute aimed at eliminating discrimination. Further, in *Lamb’s Chapel*, the Court recognized that it is of “considerable” importance to evaluate a state’s interest in this type of use of state property.\(^ {152}\) Yet, the Court ignored its own advice, like in *Dale*, and never considered New York’s interest in restrictions on the use of its property.\(^ {153}\)

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Rights ordinance).

\(^ {147}\) As defined, the term imprimatur signifies “a general grant of approval; commendatory license or sanction.” BLACK’S LAW DICTIONARY 760 (7th ed. 1999).

\(^ {148}\) *Rosenberger* v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 831-835 (1995) (holding that a university cannot refuse to pay publishing costs of newspaper because it contains religious editorials, if it has fund established to pay for student publications); Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 390 (1993) (holding that a public school who opens its doors for use of the public cannot disallow certain groups to use the premises because of the content of its message).

\(^ {149}\) *Rosenberger*, 515 U.S. at 822-23; *Lamb’s Chapel*, 508 U.S. at 388.

\(^ {150}\) *Rosenberger*, 515 U.S. at 831.

\(^ {151}\) Conversely, Minnesota does have an anti-discrimination statute aimed at reducing sexual orientation discrimination. MINN. STAT. ANN. § 363.03 (West, WESTLAW through 1999 Reg. Sess.).

\(^ {152}\) *Lamb’s Chapel*, 508 U.S. at 391.

\(^ {153}\) *Id.*
2. Should The State Of Minnesota Take Any Action?

No one contests that the Boy Scouts are a valuable organization to many youth. However, allowing the Scouts to continue to use Minnesota’s public resources in a different way than other organizations are permitted sends an undeniable message that the state implicitly approves of the Boy Scouts’ policies. From the enactment of the first ordinance protecting gay rights in 1974 to the addition of sexual orientation as a protected class to the Minnesota Human Rights Act in 1993, Minnesotans know and value the importance of eradicating discrimination.

V. CONCLUSION

“If we would guide by the light of reason, we must let our minds be bold.” Being bold is sometimes difficult and sometimes unpopular, but being bold signifies holding your ground with confidence. Minnesota should be bold and prohibit the Boy Scouts from using the state’s resources to spread its message of intolerance.

A particularly troublesome argument contends that disallowing the Boy Scouts to use school premises and the revocation by

154. Although the Indianhead Council contends that it has never dismissed a Scout leader because of sexual orientation, the Council’s harassment policy may tell another story. Nelson, supra note 130 at 2B. “It is the Indianhead Council’s policy to maintain an environment free from unlawful discrimination. The Indianhead Council absolutely prohibits harassment on the basis of race, color, religion, gender, national origin, age, disability, status with respect to public assistance or marital status by its staff, volunteers, and members.” Indianhead Council of the Boy Scouts of America Harassment Policy, at http://www.indianhead.org/resource/policy/harassment.html (last visited Sept. 7, 2000). Although the Council’s assertions of non-discrimination based on sexual orientation are likely true, its harassment policy does not reflect this supposed commitment.

155. MINN. STAT. ANN. § 363.03 (West 1991 & Supp. 2000); Note, supra note 134, at 1908 n.23 (citing LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., A NATIONAL SUMMARY OF ANTI-DISCRIMINATION LAWS 6, 12 (1991)).


157. The Boy Scouts are a great organization in most Americans’ minds helping hundreds of thousands of youth every year. It simply has a bad policy. Ideally, the Boy Scouts would recognize the harm of its policy on its own, or at least in response to its diminished financial support. If the Boy Scouts were to change its position on gays, it could avoid this whole issue, which, according to the Scouts themselves, is exactly what they want to do. Nelson, supra note 130, at B1. “This whole issue of sexual orientation is something we’d rather not be involved in.” Id.
corporate sponsors will only affect inner city youth. 158 Suburban troops are self-supporting and the members can easily pay for uniforms and equipment. 159 However, the inner city youth will suffer because corporations fund its troops. 160 If these unfortunate facts are true, this just demonstrates that the Boy Scouts' policy hurts not only gays but also hurts inner city youth in continuing to enforce its discriminatory policy. The reason this argument is troublesome is because it shifts the blame onto the government and corporations. Instead of faulting the Boy Scouts for a bad policy, the author argues that corporations should simply look the other way, and continue to support the Boy Scouts.

As more and more funding dries up for the Boy Scouts and pressure mounts against the organization to change its policy, there are strong indications that the Boy Scouts are responding. 161 For example, in St. Paul, Minnesota, the Indianhead Council has touted the fact that sexual orientation "has never been a basis for selecting or dismissing leaders." 162 In New York, one of the local Boy Scout Councils wrote a letter to the Schools Chancellor pledging, "not to discriminate against gays." 163 Both of these Boy Scout responses came in the wake of the loss of support and funding. Clearly, the Boy Scouts have noticed.

It is imperative to realize that the Boy Scouts have a constitutional right to freedom of expressive association. The Boy Scouts can discriminate against gays. However, the Boy Scouts should be prepared to contend with legal, financial, and ethical challenges that are sure to boldly persevere.

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159. Id.
160. Id.