In *Boy Scouts of America v. Dale*, [1] the United States Supreme Court reversed the New Jersey Supreme Court’s application of its state’s public accommodations statute and held that a requiring the reinstatement of an openly gay scoutmaster to the Boy Scouts of America would violate the organization’s First Amendment freedom to engage in expressive association. [2] The Court based this holding on evidence provided by the Boy Scouts that the terms “clean” and “morally straight,” as used in the Scout Oath, mean “not homosexual.” [3] Thus, the Court concluded that disapproving of homosexual activity is a specific, expressive message of the Boy Scouts and that such expressive message would be undermined by forcing the inclusion of a gay member into the organization. [4]

The evidence on which the Court based this decision was scant. Although the Boy Scouts introduced certain documents to support its assertion of an antigay message, the source and extent of circulation of those documents were questionable, allowing for a reasonable conclusion that the documents did not truly represent any expressive message of the Boy Scouts. On the contrary, there was evidence that the Boy Scouts, in fact, take no position on homosexuality and that the group’s intention in excluding homosexuals was actually to discriminate based on nothing more than the individual’s status, something prohibited by New Jersey’s public accommodations statute. The Court was able to reach its decision because, rather than being required to look only at objective evidence, courts have broad discretion in determining what the expressive purpose, if any, of an organization is. [5] Such discretion allows courts to infuse their own biases and prejudices, either for or against the organization’s asserted expressive message, into their decisions, as arguably the Court did in *Dale*. To prevent this from happening, courts should adopt a clear statement rule: an organization that wishes to assert an expressive purpose that would require discrimination of a class protected by state law
should be required to present a clear statement, found in the organization’s written brochures, bylaws, official documents or other publications, of the organization’s discriminatory message.

Part I of this paper provides a brief history of public accommodations laws. Part II describes the freedom of association as a constitutional limitation on the application of public accommodations laws. Part III focuses on three Supreme Court cases that are instrumental in understanding the freedom of association and how to determine when a state’s attempt to enforce equality through its public accommodations statute outweighs that freedom. Given this backdrop, Part IV provides a more detailed analysis of the Dale decision. Part V concludes that in order for an organization to discriminate against any class of people specified in a state’s public accommodations law, that organization should have an expressive purpose, which would be undermined by the inclusion of a member of that class, that is expressed in a clear statement within the organization’s brochures, bylaws, oath, or other objective evidence for courts to review.

I. PUBLIC ACCOMMODATIONS LAWS

The concept behind public accommodations statutes derives from the common law duty of innkeepers and common carriers not to discriminate in offering such services. In 1883, the first federal effort at using a public accommodations statute to end discrimination in privately owned institutions that hold themselves out to the public was struck down by the Supreme Court as unconstitutional. Congress was more successful eighty-one years later with Title II of the Civil Rights Act of 1964. Title II prohibits discrimination on the basis of race, color, religion, or national origin in places of public accommodation, with “places of public accommodations” defined as “establishments affecting interstate commerce or supported in their activities by State action.”
State statutes, however, have more often been invoked and historically have been more effective in eliminating discrimination. Generally, state public accommodations laws are broader in the protected classes covered; most prohibit discrimination on the basis of race, color, religion, sex and national origin, while a minority of state public accommodations laws additionally prohibit discrimination on the basis of sexual orientation. State public accommodations laws also can be broader with respect to the organizations that are covered by the statutes, depending on legislative intent and judicial interpretation. While some states take a narrow view of what qualifies as a place of public accommodations, limiting the statutes’ coverage to institutions with actual fixed locations, some states take an expansive approach, reaching any organization that holds itself out to the public and gives general public access, regardless of the existence of an actual “place.” Still other states have limited what types of private organizations are covered by the public accommodations laws by limiting the prohibition on discrimination to business establishments.

II. FIRST AMENDMENT LIMITATIONS ON PUBLIC ACCOMMODATIONS LAWS

Although states’ efforts at eliminating discrimination through the passage of public accommodations laws is laudatory, it is not absolute and unqualified. Application of public accommodations laws is checked with constitutional limitations, particularly the constitutional freedom of association found in the First Amendment. The Supreme Court has articulated two types of association protected by the First Amendment: intimate association and expressive association.

A. Freedom of Intimate Association

The significance of the freedom of intimate association is recognized particularly in small, familial settings. This freedom stems from the important role that close relationships play in shaping each individual’s identity. Thus, the government is prevented from engaging in
action that would purport to regulate how family members or members of small, selective organizations relate to one another. Although familial associations are probably the best example of an intimate association protected by the First Amendment, these are not the only types of intimate associations. Factors that the Court has articulated as useful in determining whether an organization is “intimate” enough to be protected by the right are size, purpose, policies, selectivity, congeniality, and other relevant traits. [21]

B. Freedom of Expressive Association

The freedom of expressive association is implicit in the First Amendment and stems from an understanding that the individual freedoms guaranteed in the First Amendment and the rest of the Bill of Rights would be less meaningful without a corresponding right to associate for those purposes. [22] Thus, the government’s ability to regulate groups that organize for cultural, political, religious, social, economic, and educational purposes is limited. [23]

Implicit in recognizing a freedom to associate for certain purposes is a freedom not to associate. [24] In fact,

“[t]here can be no clearer example of an intrusion into the internal structure or affairs of an organization than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together.” [25]

This, then, is the constitutional right implicated by states’ attempts to end discrimination through public accommodations laws.

The tension between the freedom of expressive association and public accommodations laws has been described as a balance between freedom and equality, two fundamental values in our society. [26] In the interests of maintaining the integrity of both of these values, the Court has articulated a balancing test for determining when one takes precedence over the other: an organization that is sufficiently public to be covered by a state or federal public accommodations
statute may discriminate only if the expressive purpose of that organization would be substantially burdened by the forced inclusion of an unwanted member. [27] This raises a two-prong test: first, the organization must establish that it indeed has a protected, expressive purpose and second, there must be some nexus between that expressive purpose and the organization’s exclusionary policy such that the expressive purpose would be frustrated by inclusion of a member from an excluded group. [28] In implementing this balancing test, the Court acknowledged that the freedom of association is not absolute and may be impinged if the state has a compelling interest, unrelated to the suppression of ideas, that cannot be achieved through means less restrictive of associational freedoms. [29]

III. THE ROBERTS TRILOGY

The Court first addressed the tension between the freedom of association and public accommodations statutes in 1984 with Roberts v. United States Jaycees, [30] in which the court first articulated the test for determining when the interest in equality overcomes an organization’s freedom to associate. Within four years of that decision, the Court was faced with two more cases in which it had to expand upon and clarify this test. [31]

A. Roberts v. United States Jaycees

Local chapters of the United States Jaycees in Minnesota, after having their charters revoked for admitting women as full voting members, filed charges against the national Jaycees organization for violation of the Minnesota Human Rights Act. [32] The Court, after discussing the two forms of association protected by the Constitution and after articulating the balancing test for determining when associational rights outweigh the interest in equality, held that the Jaycees constitutional rights were not violated by applying Minnesota’s public accommodations law to require the admission of women as members. [33]
The Court concluded that the right at issue in this case was not the freedom of intimate association because the Jaycees was a very large organization that was not highly selective in admitting members.[34] Because the organization’s goals were “educational and charitable purposes” and because the Jaycees regularly participated in lobbying, fundraising, and other similar activities, the Court found the Jaycees to engage in expressive activity worthy of constitutional protection.[35] However, the Court disagreed with the Jaycees’ contention that admission of women as full voting members would impair the organization’s ability to engage in such expressive activity. The Court opined that the Jaycees’ exclusion of women was based on “archaic and overbroad assumptions”[36] about women’s abilities and that such discrimination “deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.”[37] Thus, the Jaycees’ expressive message was not closely connected to its policy of excluding women solely on the basis of their status as women. Furthermore, requiring the admission of women in no way hindered the Jaycees from excluding individuals that espoused different philosophies or ideologies that conflicted with the organization’s expressive message.[38] The Court accepted that the forced inclusion of women might result in some intrusion on the Jaycees’ constitutional rights, but such intrusion was minimal in comparison to the state’s compelling interest in eradicating discrimination against women. [39]

B. Board of Directors of Rotary International v. Rotary Club of Duarte

A local chapter of the Rotary Club in California filed a lawsuit against its national organization for revoking the local chapter’s charter after it admitted women into the chapter, based on a provision in the Rotary Club Constitution prohibiting the admission of women as members.[40] The local chapter claimed that the provision prohibiting women violated California’s public accommodations law, the Unruh Civil Rights Act.[41] The Court balanced the associational interests of the Rotary Club against the state’s interest in eradicating
discrimination and, as in Roberts, held that the Rotary Club’s constitutional rights were not violated by application of California’s public accommodations law to require the admission of women as members. [42]

The Rotary Club attempted to convince the Court that, unlike the Jaycees, the Rotary Club was a smaller, more selective organization and thus was entitled to protection of its freedom of intimate association. The Court disagreed, noting that even if the local chapters were small, there was no limit to the number of members in any chapter. [43] Additionally, the Court found that even if membership was open only to business people and professionals, the organization’s activities were highly publicized and open to the public. [44] As with Roberts, the Court found an expressive message in the Rotary’s Club’s activities but held that that message would not be hampered and that the organization would not have to abandon its basic goals were women allowed to be members. [45]

C. New York State Club Association v. City of New York

In this case, the organizations that comprised the New York State Club Association sought to invalidate New York’s Human Rights Law as unconstitutional. [46] The organizations wishes went unheeded, however, as the Court upheld the constitutionality of the public accommodations law. The Court found that the statute did not implicate the freedom of intimate association, as most of the clubs within the New York State Club Association were very large and not selective. [47] Additionally, and differing from the Court’s reasoning in Roberts and Rotary Club, the Court found that the statute did not implicate the freedom of expressive association. The Court stated that most large groups are not organized for any specific expressive purposes that would be jeopardized in the absence of an exclusionary policy. [48]

IV. THE DALE DECISION
This case began in 1990 when James Dale, an assistant scoutmaster of a local New Jersey Boy Scouts troop, had his adult membership revoked. Although Dale was “by all accounts, …an exemplary scout,” and had achieved all of the Boy Scouts highest honors, the Boy Scouts determined suddenly that he was unfit to be a Scout. This determination came about after the Boy Scouts learned, through a newspaper article, that Dale was gay and was a leader in the Rutgers University Lesbian/Gay Alliance. Dale filed suit against the Boy Scouts for violating New Jersey’s public accommodations statute which prohibits discrimination on the basis of sexual orientation in places of public accommodations. The case was heard by the New Jersey supreme court, which concluded that, under the state’s expansive interpretation of “places of public accommodations,” the Boy Scouts was subject to the public accommodations statute and that the Boy Scout’s revocation of Dale’s adult membership violated that statute. The Supreme Court, however, disagreed.

The Court began its analysis with a review of the Roberts trilogy and the freedom of expressive association. The Court confirmed that the Boy Scouts engage in general expressive activity, by seeking to instill certain values enumerated in the Boy Scouts mission statement and in the Scout Oath, such as trustworthiness, courage, and loyalty, in its members. Additionally, the Boy Scouts asserted that the organization teaches its members that homosexual conduct conflicted with the Scout Oath values of moral straightness and cleanliness. The Court, without inquiring further, determined that this, in fact, was a specific, expressive message of the Boy Scouts. Although the Court did not believe it was required to look to anything more than this single assertion by the Boy Scouts, it did review certain written documents that had been introduced as evidence. Because the Court used a de novo standard of review, it conducted an independent review of these documents, rather than reviewing the New Jersey courts’ treatment of them. The first was a 1978 position statement, signed by the Boy Scouts’ president and by the Chief Scout Executive, that outlined the official position of the Scouts on homosexuality as one of exclusion of openly gay individuals.
Court also reviewed four more position statements, all dating from 1991 and 1993, that stated that homosexual conduct was inconsistent with the Scout Oath requirements of being morally straight and clean and that homosexuals do not provide appropriate role models for Scouts. [60]

Although the majority accepted these position statements unquestioningly, there was certainly evidence that these statements did not, in fact, represent the expressive message of the Boy Scouts – evidence that the Court chose to ignore. The 1978 position statement turned out to be nothing more than an internal memorandum circulated only to a few members of the Boy Scouts Executive Committee. [61] This “position statement” was never circulated to the public and was never included in any brochures or other written literature of the organization. Furthermore, the other policy statements from 1991 through 1993 were written after Dale’s membership had been revoked, [62] thus obviously not providing any relevance as to what the Boy Scouts’ position on homosexuality was at the time Dale was kicked out of the organization. Even if those position statements had been issued prior to Dale’s revocation, these statements were unsigned and there was no evidence as to how widely distributed they were. [63] Thus, these “position statements” are not as solid an expression of the Boy Scouts’ message as the majority would lead one to believe.

Quite to the contrary, there was evidence that the Boy Scouts take absolutely no position on homosexuality whatsoever. Although the Boy Scouts claimed to teach its members that homosexuality is inconsistent with being morally straight and clean, the Boy Scouts Handbook tells Scouts that any discussion of sexual matters should take place with parents or spiritual leaders. [64] Scout leaders are specifically told to avoid such discussions and to steer any Scouts who raise questions on sexual matters to other sources for information. [65] This avoidance of sexual matters thus appears to relate to discussion of both heterosexuality and homosexuality.
The majority, however, refused to entertain any of this contrary evidence, which it was free to do since the standard of review the Court adopted was *de novo*. Rather, it continued its opinion with a discussion of another Supreme Court cases discussing public accommodations laws, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*. [66] In *Hurley*, the Court validated a parade organizer’s right to exclude a gay, lesbian and bisexual organization from marching in the parade behind its organization’s banner. The Court held that application of Massachusetts’ public accommodations law to force the parade organizer’s to allow the group to march would violate the parade organizer’s First Amendment rights.

Again, the majority opinion would lead one to believe that application of *Hurley* is appropriate and completely consistent with the Court’s earlier discussion of the *Roberts* trilogy. The fact is, however, that *Hurley* is simply not applicable to this issue. *Hurley*, rather than dealing with an organization’s freedom of association, dealt with the parade organizer’s freedom of *speech*. Admittedly, there is a higher burden to justify regulation of speech than there is to justify regulation of expressive association, which the Court already recognized not to be an absolute right. [67] In *Hurley*, the objection was that forcing the parade organizer’s to permit the gay organization to march behind its banner, which conduct in itself was speech that conveyed a message, would alter the parade’s message. [68] The Court noted that the parade organizer’s were not attempting to exclude individuals based on their status. [69] Homosexuals were not excluded from marching in the parade as part of other approved marching groups; it was anybody, whether homosexual or heterosexual, marching behind the gay organization’s banner that the parade organizer’s objected to, because the banner itself was speech that the parade organizer’s did not agree with or want to disseminate. [70]

This, however, was not the issue in *Dale*. Of course, were James Dale actually expressing any verbal message to Scouts about homosexuality, the Boy Scouts would certainly be justified in revoking his membership because such conduct violates the Boy Scouts’ policy of not discussing
sexual matters with Scouts. However, that is not what happened. James Dale never expressed any message except the messages that the Boy Scouts advocated: trustworthiness, courage, loyalty, honesty, moral straightness, cleanliness, etc. Rather, the Boy Scouts revoked Dale’s membership solely because of his status as a gay man, claiming that just by being gay, Dale “expresses” a message. It was this type of blatant discrimination that the New Jersey legislature was attempting to end with its public accommodations statute.

V. THE CLEAR STATEMENT RULE

An organization seeking to discriminate in violation of a state’s public accommodations laws should be required to have a clearly defined policy of discrimination, discernible from express evidence which may be objectively reviewed, such as brochures, bylaws, etc., in order to escape compliance with the state’s anti-discrimination laws. Requiring a clear statement of the organization’s discriminatory, expressive purpose would lead to more objective, less biased, and ultimately more predictable results in cases were courts must determine a group’s expressive message.

A clear statement rule has many advantages. From a public standpoint, a clear statement requirement would enable those considering joining the group to make an informed decision about becoming a member given the group’s exclusionary policy. The fact that the Boy Scouts has already been involved in lawsuits related to its policy of excluding homosexuals [71] but still has not explicitly included such a policy in its literature perhaps indicates that the organization realizes that an explicit policy of exclusion could be unattractive to potential members.

A clear statement rule is advantageous from a judicial perspective as well. Requiring an objective, clear statement of discrimination would prevent organizations from manipulating the courts and tailoring their messages to fit whatever their particular litigation needs may be at the time. [72] Such a rule would also preclude courts from injecting their own prejudices and biases
into their determinations of what an organization’s expressive message is. [73] This would be true regardless of whether the message were something that the courts would be inclined to agree with or to disagree with. For example, courts would probably unanimously agree that the Ku Klux Klan’s message of racism and white supremacy is reprehensible. However, because the organization so obviously and objectively espouses such a message of hate, courts have to accept it as the expressive message of the organization that would be hindered by application of public accommodations laws to force the Ku Klux Klan to accept non-white members. Because this message is so entrenched in the written brochures of the organization, not even a statement from the organization’s leader that the Ku Klux Klan does not necessarily stand for white supremacy could convince a court that white supremacy was not its expressive message. [74]

The idea of requiring more than a group’s labeling of its activities to determine what in fact is that group’s activity is not a new judicial concept. The law dealing with government agencies and when the actions of agencies are sufficiently final to be reviewed by a court deals with just this issue. Basically, the Administrative Procedure Act of 1946 (APA) [75] limits the ability of a court to review any agency action to situations in which the agency action is final and there is no other adequate remedy. [76] The APA does not define what constitutes final agency action is; therefore, a primary issue in agency review cases is whether any agency action is final so as to allow judicial review. [77]

The lack of any definition of final agency review in the APA seems to invite abuse by government agencies, who can simply declare that the actions in which they engage are not final in order to evade judicial scrutiny. Courts responded to this issue by determining that whether the statutory finality requirement was met depended upon the practical effect of the agency actions and whether “they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.” [78] Thus, that an agency labels its actions as not final is not conclusive of whether or not it actually is final.
Similarly, an organization’s labeling of its discrimination as its expressive purpose should not be conclusive of whether or not such discrimination truly represents its expressive purpose. Rather, before allowing an organization to hide behind the protections of the First Amendment in order to discriminate, the organization should be required to put forth written statements, which a court can objectively review, describing what the organization’s expressive purpose is.

A clear statement rule has one distinct disadvantage in that it provides a very simple solution to groups wishing to discriminate for none other than exclusionary purposes – they simply need to articulate the policy. However, the many advantages that a clear statement rule would provide outweigh this disadvantage.

While the Court in Dale recognized that courts should not reject an organization’s expressive message simply because they may disagree with that message, the majority in that case seemed still to violate the court’s supposed neutral stance: the majority seemed to accept the Boy Scouts’ purported expressive message for no better reason than that it agreed with that message. Requiring that the organization present objective evidence of any expressive message would force the courts to look beyond such biases and give them a better perspective from which to determine whether, in fact, the organization’s expressive message is what the organization asserts it is, regardless of how the court itself might feel about that message.

CONCLUSION

With this decision, the Supreme Court essentially upheld the Boy Scout’s right to engage in discrimination for no other purpose than to be discriminatory, thereby undermining the efforts of the New Jersey legislature to eliminate discrimination against a class that it and a majority of its constituents believe is worth of protection. Instead of respecting New Jersey’s determination that homosexuals are a suspect class and upholding the state’s praiseworthy goal of openness and tolerance, a majority of the Court, injected its own prejudices against homosexuals to
determine the existence of an expressive purpose that, from an objective viewpoint, simply did not exist.

The use of a clear statement rule to assist courts in determining what an organization’s expressive purpose truly is will help alleviate some of the biases that judges might be susceptible to infuse into their opinions, particularly in First Amendment cases in which appellate courts are permitted to review the evidentiary record using a *de novo* standard of review. First Amendment freedoms are unquestionably some of the most important rights guaranteed to individuals in the United States. However, the right to be free from discrimination is also an incredibly important state and national right. A clear statement rule enables these two compelling, yet sometimes opposing, interests to be balanced in a fair and unbiased manner.

[2] *Id.*
[3] *Id* at 2452.
[4] *Id.*
[5] *See id.* at 2451. Rather than being bound by the New Jersey supreme court’s evidentiary record, he Court used a *de novo* standard of review, stating that because First Amendment issues were involved, the Court was “obligated to independently review the factual record to ensure that the state court’s judgment does not unlawfully intrude on free speech.” *Id.* The result is that courts can vary greatly in their opinions of what the evidence shows an organization’s expressive purpose to be, as happened in this case.


[9] *Id.*
[10] *Id.*


[16] Id.

[17] Id.

[18] The freedom of association is not an enumerated right in the First Amendment but rather is implicit in the First Amendment’s guarantees, as discussed infra Section IA-B.


[20] Id. at 619.

[21] Id. at 620.

[22] Id. at 618.

[23] Id.

[24] Id. at 623.

[25] Id.


[27] Roberts, 468 U.S. at 617-29.


[29] 468 U.S. 609, 623. It is in this balancing, then, that it becomes relevant whether the unwanted member is a member of a “suspect class.”

[30] Id.


[32] Roberts, 468 U.S. at 612-5.; see also Minn. Stat. § 363.03 (1982). This is Minnesota’s public accommodations law.

[34] Id. at 621.

[35] Id. at 626-7.

[36] Id. at 625.

[37] Id.

[38] Id. at 627.

[39] Id. at 628.


[43] Id. at 546.

[44] Id.

[45] Id. at 548-9.


[47] Id. at 12.

[48] Id. at 14.


[50] Id.

[51] Id.

[52] Id.


[55] Dale, 120 S.Ct. at 2451-2454. Apparently, the Court agreed with the New Jersey court’s determination that the Boy Scouts’ large size and nonselectivity precluded any rights under the freedom of intimate association. The Court also seemingly agreed that the Boy Scouts is a place of public accommodation under New Jersey law, although it noted that New Jersey’s supreme court is the only court thus far that has come to such a conclusion. See id. at 2456. Because state interpretations of what qualifies as a place of public accommodation can vary so greatly, this paper will simply accept the assumption that the Boy Scouts is a place of public accommodation without further discussion of the pros and cons of such an argument.

[56] Id. at 2452.
[57] Id. at 2453.

[58] Id.

[59] Id.

[60] Id.

[61] Id. at 2463 (J. Stevens, dissenting).

[62] Id. at 2464 (J. Stevens, dissenting).

[63] Id.

[64] Id. at 2462 (J. Stevens, dissenting).

[65] Id.


[69] Id. at 572.

[70] Id.


[73] Id.


This arguably would still not be enough in certain circumstances. For example, in *Roberts* and *Rotary Club*, both organizations had express policies, in their written brochures and mission statements, that stated the groups were open only to men. However, this was not enough for the Court, given the states’ compelling interest in eliminating discrimination against women. This result stems from the fact that women are a “suspect class” such that discrimination against them is subject to heightened scrutiny. The same is not true for homosexuals. Thus a clear statement rule is necessary, not to prevent discrimination against suspect classes, which presumably the courts will take care of in its exercise of heightened scrutiny, but to prevent discrimination against other classes of people that may be included in any given state’s anti-discrimination laws.

*Dale*, 120 S.Ct. at 2452.

*See id.* at 2471 (J. Stevens, dissenting).

The reader should note that the Court’s majority in *Dale* was the narrowest possible at 5-4. In a dissenting opinion, Justice Stevens, joined by the other 3 dissenting justices, strongly objected to the majority’s subjective review of the evidence and argued that states should be given more deference with respect to their commendable social goals. *See Dale*, 120 S.Ct. at 2459.