

NOTE

Forcing Open the Doors of Private Clubs: *Warfield v. Peninsula Golf & Country Club* — Did the Court Go Too Far?

INTRODUCTION

Private, voluntary associations of people are constitutionally protected by the freedom of association.¹ Courts and legislatures, however, limit that right.² When the exercise of one's

¹ See *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984)) (stating that First Amendment protects deep attachments to other individuals with whom one shares thoughts, experiences, beliefs, and personal aspects of one's life); *Hill v. National Collegiate Athletic Ass'n*, 865 P.2d 633, 656 (Cal. 1994) (noting that private citizens have right to associate with each other on mutually negotiated terms and conditions); see also Gerald L. Edgar, Note, *Roberts v. United States Jaycees: Does the Right of Free Association Imply an Absolute Right of Private Discrimination?*, 1986 UTAH L. REV. 373, 373-74 (noting that, although Constitution does not expressly guarantee right to freedom of association, courts began to formally recognize it as constitutional right in 1958); Cynthia A. Leiferman, Comment, *Private Clubs: A Sanctuary for Discrimination?*, 40 BAYLOR L. REV. 71, 99 (1988) (noting that freedom of association is judicially created doctrine).

² See *Hill*, 865 P.2d at 669 (holding that testing college athletes for drug use did not violate their privacy rights). The California Supreme Court stated that the common law right of privacy is not absolute under either the United States Constitution or the California Constitution. See *id.* at 648, 650. An expectation of privacy in a specific context must be objectively reasonable under the circumstances and must be considered in light of competing social interests. See *id.* at 648.

freedom to associate is discriminatory, states may regulate the freedom of association.³ While states may not regulate private discrimination, they may regulate discrimination by businesses.⁴ Although California strictly prohibits discrimination in business establishments, it does not otherwise prohibit discrimination by private groups.⁵ However, the California Supreme Court recently interpreted the term "business establishment" so broadly that it includes almost all private groups.⁶

In *Warfield v. Peninsula Golf & Country Club*,⁷ a 1995 decision, the California Supreme Court blurred the distinction between a business establishment and a public accommodation. Historically, courts have held that private clubs are truly private, and therefore the freedom of association protects private clubs' membership decisions.⁸ The *Warfield* court held that a private country club, although not a public accommodation, is a business establishment subject to California's public accommodations statute, the Unruh Civil Rights Act⁹ ("the Act").¹⁰ This statute prohibits discrimination based on race, color, sex, national origin, religion, ancestry, or disability.¹¹ Consequently, the court held that the Act prohibited the Peninsula Golf & Country Club ("the Club") from excluding women from its membership.¹²

³ See Edgar, *supra* note 1, at 377 (stating that right of association is not absolute: courts do not protect individuals and associations from casually associating with general public). Policy considerations against discrimination may outweigh the freedom of association. See *id.*; see also Thomas H. Sawyer, *Private Golf Clubs: Freedom of Expression and the Right to Privacy*, 3 MARQ. SPORTS L.J. 187, 195 (1993) (stating that no court decision has established right to discriminate as matter of law).

⁴ Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) (stating that people have constitutionally protected right to close their homes or clubs to any person based on personal prejudices).

⁵ See *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776, 791 (Cal. 1995) noting that Act does not apply to truly private social clubs).

⁶ See *infra* notes 196-203 and accompanying text (discussing breadth of *Warfield* decision).

⁷ 896 P.2d 776 (Cal. 1995).

⁸ See *Warfield*, 896 P.2d at 803 (Lucas, C.J., dissenting) (stating that courts traditionally protect private clubs' member selection policies).

⁹ CAL. CIV. CODE § 51 (Deering 1997).

¹⁰ See *Warfield*, 896 P.2d at 793.

¹¹ See CAL. CIV. CODE § 51; O'Conner v. Village Green Owners Ass'n, 662 P.2d 427, 432 (Cal. 1983) (Broussard, J., concurring) (*quoting In re Cox*, 474 P.2d 992, 999 (Cal. 1970)) (stating that legislature intended list to be illustrative and not all-inclusive).

¹² See *Warfield*, 896 P.2d at 798.

This Note examines the *Warfield* decision and discusses its future implications. Part I of this Note explores the legislative history of the Act,¹³ and the two approaches that California courts have developed to determine whether an organization falls under the Act.¹⁴ This Part also discusses the role that the freedom of association can play in courts' analyses.¹⁵ Part II examines the *Warfield* decision and reviews the court's rationale.¹⁶ Part III argues that the California Supreme Court incorrectly decided *Warfield*.¹⁷ Finally, Part IV proposes an alternative analysis courts should apply to determine whether an organization is public or private for purposes of the Act's application.¹⁸

I. BACKGROUND

A. *The Unruh Civil Rights Act*

Historically, California courts have had difficulty interpreting California's public accommodations statutes.¹⁹ The California Legislature passed the first public accommodations statute in 1897,²⁰ prohibiting discrimination in specific establishments, as

¹³ See *infra* notes 20-33 and accompanying text (discussing legislative history of Act).

¹⁴ See *infra* notes 34-63 and accompanying text (discussing two approaches used to determine whether organization is covered by Act).

¹⁵ See *infra* notes 64-100 and accompanying text (discussing interaction between Act and freedom of association).

¹⁶ See *infra* notes 101-38 and accompanying text (analyzing *Warfield* decision).

¹⁷ See *infra* notes 139-203 and accompanying text (arguing that that court wrongly decided *Warfield*).

¹⁸ See *infra* notes 204-08 and accompanying text (proposing alternative analysis).

¹⁹ See Harold W. Horowitz, *The 1959 Equal Rights in "Business Establishments" Statute — A Problem in Statutory Application*, 33 S. CAL. L. REV. 260, 274 (1960) (noting that cases interpreting California's public accommodations statute fail to apply Act consistently).

This Note uses the term "public accommodations statutes" to describe statutes prohibiting discrimination by establishments offering goods, services, or facilities to the public. These statutes typically guarantee equal access to all persons in places of "public accommodation." See Steven B. Arbuss, Comment, *The Unruh Civil Rights Act: An Uncertain Guarantee*, 31 UCLA L. REV. 443, 443 (1983) (describing public accommodations statutes).

²⁰ Ch. 108, 1897 Cal. Stat. 137 (amended 1959). See generally Ronald P. Klein, *The California Equal Rights Statutes in Practice*, 10 STAN. L. REV. 253 (1958) (discussing 1897 statute). The California Legislature modeled the 1897 statute after the Federal Civil Rights Act of 1875, ch. 114, §§ 1-2, 18 Stat. 335 (1875) (repealed 1883). See Arbuss, *supra* note 19, at 450 n.33 (noting that, between 1880 and 1900, 15 states, including California, enacted public accommodations statutes similar to first sections of repealed Civil Rights Act of 1875). The *Civil Rights Cases* invalidated that Act and held that the federal Constitution does not protect persons from acts by private individuals. The *Civil Rights Cases*, 109 U.S.

well as in general places of public accommodation or amusement.²¹ Courts struggled with the scope of the term "places of public accommodation" under the 1897 statute.²² Appellate court decisions concluded that a private cemetery,²³ dentist's office,²⁴ and private school²⁵ were not public accommodations,²⁶ permitting those establishments to discriminate against African-Americans.²⁷ As a result of the confusion in the appellate courts, the Legislature enacted the Unruh Civil Rights Act in 1959.²⁸

Unlike the 1897 statute, which prohibited discrimination in places of public accommodation or amusement, the 1959 Act prohibited discrimination in all business establishments.²⁹ When

3, 7 (1883). See generally Sawyer, *supra* note 3, at 188-92 (discussing history of federal civil rights statutes).

²¹ 1897 Cal. Stat. 137. The 1897 statute, as amended in 1919 and 1923, provided that:

All citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, hotels, eating houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances, and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens.

Ch. 235, § 1, 1923 Stat. 485 (amended 1959).

²² See Horowitz, *supra* note 19, at 274 (stating that courts did not consistently apply statute). The 1897 statute's application invoked criticism, especially after a string of unpopular decisions in the 1950s. *Id.*

²³ See Long v. Mountain View Cemetery Ass'n, 278 P.2d 945, 946 (Cal. App. 1955) (holding that private cemetery is not public accommodation).

²⁴ See Coleman v. Middlestaff, 305 P.2d 1020, 1022 (Cal. App. Dep't Super. Ct. 1957) (holding that dentist's office is not public accommodation).

²⁵ See Reed v. Hollywood Prof'l Sch., 338 P.2d 633, 637 (Cal. App. Dep't Super. Ct. 1959) (holding that private school is not public accommodation).

²⁶ See Warfield v. Peninsula Golf & Country Club, 896 P.2d 776, 784 (Cal. 1995) (stating that courts have concluded that public accommodations statute does not apply to private cemetery, dentist's office, or private school).

²⁷ See *id.* (noting that Long, Coleman, and Reed courts held that discrimination against African-Americans was permissible).

²⁸ Isbister v. Boys' Club, Inc., 707 P.2d 212, 215 (Cal. 1995) (stating that Legislature adopted Act because courts were interpreting 1897 statute too strictly).

²⁹ CAL. CIV. CODE § 51 (Deering 1997). The statute provides in relevant part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." *Id.*; see Horowitz, *supra* note 19, at 261 (differentiating between 1897 statute and Act).

the California Legislature introduced the Act as a bill, it prohibited specific entities from arbitrarily discriminating on the basis of race, color, religion, ancestry, or national origin.³⁰ Those entities included all public or private groups, organizations, business establishments, schools, and public facilities.³¹ However, before the bill's passage, the Legislature deleted language in the Act listing specific types of entities within its purview,³² amending the Act to forbid discrimination in all business establishments of every kind.³³

B. *The Scope of the Act*

Before *Warfield*, the California Supreme Court developed two approaches to determine whether an organization fell under the Act.³⁴ The first approach involves a "business attribute" analysis,³⁵ and the second entails a "public accommodations" analysis.³⁶ The court developed the first approach by examining the scope of the term "business establishments" in *O'Conner v. Village Green Owners Association*.³⁷

1. *O'Conner v. Village Green Owners Association*: The Business Attribute Approach

In *O'Conner*, the Village Green Owners Association ("the Association"), composed of condominium owners, maintained a restrictive covenant limiting residency to persons over the age of eighteen.³⁸ The O'Connors gave birth to a child four years af-

³⁰ See A.B. 594, 1959 Reg. Sess. § 1 (Cal. 1959) (providing text of Act's first draft).

³¹ See *id.* Additionally, the bill prohibited discrimination in the purchase of real property or in obtaining the service of any professional person, group, or association. See *id.*

³² See Horowitz, *supra* note 19, at 265-71 & nn.31-39 (providing all drafts in full and detailing accompanying changes).

³³ See *id.* (providing full text of original Act).

³⁴ See *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 29 Cal. Rptr. 2d 580, 599 (Ct. App. 1994) (outlining Supreme Court's two approaches to determine if Act applies to private and public groups), *reh'g granted*, 31 Cal. Rptr. 2d 126 (Ct. App. 1994).

³⁵ See *infra* notes 38-45 and accompanying text (discussing court's development of business attribute analysis).

³⁶ See *infra* notes 46-63 and accompanying text (discussing court's development of public accommodations analysis).

³⁷ 662 P.2d 427 (Cal. 1983).

³⁸ See *id.* at 428.

ter buying their condominium.³⁹ The O'Connors challenged the covenant under the Act after the Association informed them that their son violated the covenant and asked them to move out.⁴⁰

To determine whether the Association was a business establishment under the Act, the court examined the Association's business-like attributes.⁴¹ Noting that the Association employed a property management firm and collected assessments from the owners to pay for its undertakings, the court concluded that the Association performed the "customary business functions" of a landlord in an landlord-tenant relationship.⁴² Consequently, the court concluded that the Association was functioning as a business establishment.⁴³ Therefore the Act's restrictions applied.⁴⁴ Accordingly, the court held the Association could not force the O'Connors to move.⁴⁵

2. *Isbister v. Boys' Club of Santa Cruz*: The Public Accommodations Approach

Two years after *O'Conner*, the California Supreme Court again addressed the scope of the Act and, in doing so, developed its public accommodations analysis. In *Isbister v. Boys' Club of Santa Cruz*,⁴⁶ the court determined that any entity within the 1897

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.* at 431.

⁴² See *id.* The dissent argued that the Association was not a business establishment because it had no patrons, tenants, or customers, and it was not entrepreneurial in nature. See *id.* at 436 (Mosk, J., dissenting). Additionally, the dissent noted that if the Association was a business establishment, then any residential home owner operated a business when she hired maintenance workers. See *id.*

⁴³ See *id.* at 431.

⁴⁴ See *id.* at 429-30. (noting that court had already determined that apartment complexes are business establishments in *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115 (Cal. 1982)). The court found that the Legislature intended the scope of the Act to include all groups specified in the Act as originally introduced. See *id.* at 430.

⁴⁵ See *id.* at 431.

⁴⁶ 707 P.2d 212 (Cal. 1985).

statute's purview is also within the Act's reach.⁴⁷ Thus, the *Isbister* court concluded that all places of public accommodation or amusement are business establishments.⁴⁸

In *Isbister*, the court found that an entity may fall within the scope of the Act regardless of whether it has any business-like attributes.⁴⁹ *Isbister* involved a private charitable organization that operated a community recreational facility open to any local boy for a nominal membership fee.⁵⁰ The Boys' Club was affiliated with the Boys' Clubs of America, Inc., which is a congressionally chartered organization.⁵¹ Members paid \$3.25 annually for access to a swimming pool, gymnasium, snack bar, and craft and game area.⁵² The Boys' Club excluded girls from membership.⁵³

The court held that the Boys' Club was a place of public accommodation or amusement based on several factors.⁵⁴ First, the court determined that the Boys' Club's primary function was to offer recreational facilities.⁵⁵ Second, the only selection criteria for membership was that the Boys' Club's users be male.⁵⁶ Third, the Boys' Club's members had no control in running the organization.⁵⁷ Fourth, relations among the members took place in public view and were not continuous, personal, or social.⁵⁸ Thus, the court concluded that the Boys' Club was a public accommodation, which would have brought it within reach of the 1897 statute.⁵⁹ Finally, the court noted that the Boys' Club possessed some business-like attributes, but it did not rely on

⁴⁷ See Horowitz, *supra* note 19, at 289 (suggesting that Act should include all accommodations subject to previous statute, as well as some that previous statute may not have included).

⁴⁸ See *Isbister*, 707 P.2d at 217.

⁴⁹ See *id.* at 219.

⁵⁰ See *id.* at 214.

⁵¹ See *id.* at 215.

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *id.* at 217-18.

⁵⁵ See *id.* at 217.

⁵⁶ See *id.*

⁵⁷ See *id.* at 218.

⁵⁸ See *id.*

⁵⁹ See *id.* at 217 (noting that Act's definition of business establishments includes places of public accommodation or amusement).

these factors in reaching its holding.⁶⁰ Accordingly, the court held that the Boys' Club was a business establishment under the Act and could not exclude girls from its membership.⁶¹

O'Conner and *Isbister* represent two approaches to defining a business establishment under the Act. California courts may determine an entity's status by using either a business attribute approach under *O'Conner*, or a public accommodations approach under *Isbister*.⁶² If an entity is not a place of public accommodation or a business establishment, then it is not subject to the Act.⁶³

C. The Act and the Freedom of Association:

Curran v. Mount Diablo Council of the Boy Scouts of America

Some entities are neither public accommodations nor business establishments, and are therefore not within the Act's reach. An example is the Boy Scouts. However, in *Curran v. Mount Diablo Council of the Boy Scouts of America*,⁶⁴ the California appellate court determined that, even if the Act reached the Boy Scouts, the Boy Scouts' freedom of association prevented the court from applying the Act.⁶⁵

In *Curran*, Timothy Curran, a homosexual, wanted to become an adult Boy Scout troop leader.⁶⁶ The Boy Scouts would not consider his application because his advocacy of homosexuality conflicted with the Boy Scouts' standards for troop leaders.⁶⁷ Curran sued under the Act.⁶⁸

The court reasoned that a Boy Scouts council could refuse to select a homosexual for a leadership role.⁶⁹ The court based its holding on California Supreme Court precedent which applied

⁶⁰ See *id.* at 218-19.

⁶¹ See *id.* at 221.

⁶² See *infra* notes 116-17 and accompanying text (stating that courts may use two analytical approaches to determine whether organization is subject to Act).

⁶³ See *infra* notes 69-74 and accompanying text (discussing court's finding that Boy Scouts was neither business establishment nor public accommodation under Act).

⁶⁴ 29 Cal. Rptr. 2d 580 (1994), *reh'g granted*, 31 Cal. Rptr. 2d 126 (1994).

⁶⁵ See *id.* at 586.

⁶⁶ See *id.* at 585.

⁶⁷ See *id.*

⁶⁸ See *id.* at 581.

⁶⁹ See *id.* at 602. The court's opinion did not address whether the Boy Scouts could deny membership to a homosexual. See *id.* at 582-83.

the Act to not-for-profit organizations in only two circumstances.⁷⁰ First, when the organization has a business purpose, as in *O'Conner*, it is subject to the Act.⁷¹ Second, when the organization offers a traditional public accommodation, as in *Isbister*, it falls under the Act.⁷² The court held that the Boy Scouts is neither a business establishment⁷³ nor a public accommodation.⁷⁴

Despite its finding that the Boy Scouts was not subject to the Act, the court analyzed the Boy Scouts' constitutional right to freedom of association.⁷⁵ The court determined that applying the Act would violate the Boy Scouts' freedom to associate with whomever they choose.⁷⁶ According to the court, the Boy Scouts' freedom of association was more compelling than any state interest in eliminating discrimination.⁷⁷

The court conducted a two-prong analysis of the Boy Scouts' freedom of association.⁷⁸ First, the court found that the Boy Scouts was an expressive association⁷⁹ because it focused its

⁷⁰ See *id.* at 599.

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.* at 599-600. The court determined that the Council did not have a significant business purpose. See *id.* The court stated that boys do not join the Boy Scouts for financial reward. See *id.* at 583. The trial court found, however, that the Boy Scouts was a business establishment. See *id.* The trial court determined that the term "business establishment" operated as an excluder, and the Act included all organizations except a "small, intimate, private club." See *id.* The trial court also noted that the Boy Scouts had approximately 13,500 members, non-selective membership policies, and contact with the public. See *id.*

⁷⁴ See *id.* at 601. In determining that the Council was not a public accommodation, the court compared the Boy Scouts to the Boys' Club in *Isbister*. See *id.* at 600-01. The court found that, although the Boy Scouts council owns recreational facilities, unlike the Club's facilities in *Isbister*, their operation is not the Council's principal activity. See *id.* at 600.

⁷⁵ *Id.* at 585-98.

⁷⁶ See *id.* at 597.

⁷⁷ See *infra* notes 78-95 and accompanying text (discussing court's analysis of state interest in eliminating discrimination).

⁷⁸ See *Curran*, 29 Cal. Rptr. 2d at 585-98; see also *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984) (stating that Supreme Court divided freedom of association into two components: freedom of expressive association and freedom of intimate association).

⁷⁹ See *Curran*, 29 Cal. Rptr. 2d at 584. Expressive association involves collective efforts on behalf of shared goals. *Roberts*, 468 U.S. at 622. It involves the right to associate to engage in protected First Amendment activities — speech, assembly, petition for the redress of grievances, and religion. See *id.* at 618. Courts recognize the right to associate with others in pursuit of a wide variety of social, political, cultural, economic, educational, and religious ends. See *id.* at 622.

activities on the specific purpose of instilling values in young men.⁸⁰ The court noted that the boys focused on scouting ideals,⁸¹ and the Boy Scouts encouraged them to incorporate those ideals into their everyday lives.⁸² According to the court, homosexuality was inconsistent with scouting values.⁸³ Consequently, the court held that forcing a Boy Scouts council to select a homosexual as a leader would violate its freedom of expressive association.⁸⁴

Second, the court determined that application of the Act would violate the Boy Scouts' freedom of intimate association.⁸⁵ The court noted that scouting activities occur in small, intimate troops consisting of twelve to thirty boys.⁸⁶ The relationship among troop members is continuous, close, and personal.⁸⁷ The court found that troops are selective,⁸⁸ and that the members' sole purpose is comradeship.⁸⁹ The court therefore concluded

⁸⁰ See *Curran*, 29 Cal. Rptr. 2d at 584. By reciting the Scout Oath and Law at every meeting, the boys promised to maintain their morality. See *id.* Additionally, the Scout handbook emphasized traditional marriage and fatherhood and discouraged premarital sex. *Id.* at 585.

⁸¹ See *id.* at 584-85. (emphasizing that scouting ideals are "recited, modeled, taught, positively reinforced, and demonstrated" throughout scouting activities).

⁸² See *id.*

⁸³ See *id.* at 588 (relying on trial court finding that Boy Scouts had long standing belief that homosexuality is immoral). The court noted that, other than a boy's parent, a scoutmaster may be the most influential person in his life. See *id.* at 590. Leaders counseled boys about sex and communicated the Boy Scouts' view on morality to them. See *id.* Therefore, the court found that allowing a homosexual to lead a troop may undermine the view that homosexuality is immoral. See *id.* at 591.

⁸⁴ See *id.* at 583 n.2 (affirming trial court's finding of interference with right to expressive association). The court determined that freedom of association necessarily includes freedom to disassociate. See *id.* at 586 (stating that freedom of association presupposes freedom not to associate). The freedom to associate also necessarily assumes that like-minded individuals associate to promote their shared philosophies. See *id.* Accordingly, the court concluded that forcing the Boy Scouts to allow a homosexual to lead a troop would violate its freedom of disassociation. See *id.*

⁸⁵ See *id.* at 597-98. Intimate association is a fundamental element of personal liberty. See *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). It is characterized by the decision to enter into intimate, personal relationships. See *id.* In the context of the freedom of association, intimate relationships are distinguished by relative smallness, selectivity in membership, and seclusion from others in critical aspects of the relationship. See *id.* at 619-20. Intimate relationships have an "intrinsic element of personal liberty." See *id.* at 620.

⁸⁶ See *Curran*, 29 Cal. Rptr. 2d at 598.

⁸⁷ See *id.*

⁸⁸ See *id.* (stating that troops are selective because members must subscribe to Scout Oath and Scout Law, and agree to live by them).

⁸⁹ See *id.* (stating that Boy Scouts differs from task-oriented youth groups, like little

that the Boy Scouts' freedom of intimate association sheltered it from the Act.⁹⁰ The court, however, stated that it must balance the right to freedom of association against other important state interests.⁹¹

The court noted that eliminating discrimination is an important state interest.⁹² However, according to the court, the state's interest extends only to cases involving equal access to public accommodations or commercial benefits.⁹³ The court found that, outside of that context, the state's interest is not compelling.⁹⁴ Thus, the court held that the state's interest was not sufficiently compelling to justify interference with the Boy Scouts' freedom of association rights.⁹⁵

Freedom of association issues are not necessarily involved in every case interpreting the Act.⁹⁶ However, those issues appear when the interests of a private organization are at stake.⁹⁷ In those cases, the court must first determine whether an entity is a business establishment or place of public accommodation.⁹⁸ It must then analyze the entity's freedom of association to determine if that entity may be exempt from the Act.⁹⁹ The

league, because members' sole purpose is comradery).

⁹⁰ See *id.* at 598-99.

⁹¹ See *id.* at 593.

⁹² See *id.* The state has a compelling interest to ensure equal opportunity for access to business establishments and public accommodations. See *id.* at 594. The court must weigh that state interest against the extent to which it will infringe on an individual's constitutional rights. See *id.* at 593. The court must find that the state advances an interest that is both compelling and unrelated to the expression of ideas to justify even limited regulation of associational activity. See *id.*

⁹³ See *id.* at 593-94.

⁹⁴ See *id.* at 594.

⁹⁵ See *id.* at 594-95 (noting that eliminating discrimination in business establishments is compelling state interest and *Curran* did not implicate that interest). The court stated that the state's compelling interest is to promote equality, not to eliminate the insult that accompanies discrimination. See *id.* at 594. Moreover, it found that every display of prejudice creates injuries. See *id.* The court noted that the state's equality interest does not address all injuries created by prejudice. See *id.* Therefore, the court concluded that not all discrimination raises compelling concerns, only those that implicate equality interests. See *id.*

⁹⁶ See *supra* notes 38-45 and accompanying text (noting that *O'Conner* exclusively involved business establishment analysis).

⁹⁷ See *infra* note 99 (discussing necessity of freedom of association analysis).

⁹⁸ See Edgar, *supra* note 1, at 378 (stating that court must first determine that entity is subject to public accommodations statute before analyzing entity's associational rights).

⁹⁹ See *id.* at 380 (noting that once court finds that entity is subject to public

California Supreme Court purported to apply this two-pronged analysis in *Warfield v. Peninsula Golf & Country Club*.¹⁰⁰

II. *WARFIELD V. PENINSULA GOLF & COUNTRY CLUB*

A. *Factual and Procedural Background*

Warfield involved a private country club that prevented women from joining as proprietary members.¹⁰¹ In 1981, a divorce settlement awarded Mary Ann Warfield a regular family membership at Peninsula Golf & Country Club ("the Club").¹⁰² Ms. Warfield asked the Club's board to transfer her ex-husband's membership to her.¹⁰³ The Club refused because its governing bylaws precluded issuing women proprietary memberships.¹⁰⁴ The Club offered Ms. Warfield a nonproprietary membership, which would have enabled her to use the facilities, but not to vote on Club policy.¹⁰⁵ Ms. Warfield declined the board's offer and, instead, filed suit against the Club, alleging a violation of the Act.¹⁰⁶

The trial court held that the Club was not a business establishment under the Act.¹⁰⁷ The court of appeal affirmed the trial court's decision, holding that the Club was a truly private organization within the meaning of the Act.¹⁰⁸ The appellate court reasoned that the Club was a nonprofit, recreational

accommodations statute, it considers entity's associational interests).

¹⁰⁰ 896 P.2d 776 (Cal. 1995). *See infra* notes 116-38 and accompanying text (discussing *Warfield's* business establishment and freedom of association analysis).

¹⁰¹ *See Warfield*, 896 P.2d at 782.

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.* The Club had 10 membership categories, but only a proprietary member had voting rights and owned an inchoate interest in the Club. *See id.* at 778 n.2. Proprietary membership was the only type of membership interest that carried a redemption value or that members could transfer through inheritance. *See id.* at 780.

¹⁰⁵ *See id.*; *see also id.* at 778 n.2 (discussing differences among membership categories available at Club).

¹⁰⁶ *See id.* at 782. Ms. Warfield declined the board's offer of a nonproprietary membership because she considered it second class membership. *See id.* The trial court sustained a demurrer to Ms. Warfield's amended complaint and dismissed the action. *See id.* Ms. Warfield appealed. *See id.* The court of appeal reversed the judgment and remanded the case to determine whether the Club violated the Act. *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See id.* at 793.

entity¹⁰⁹ and that the Club is private because it provides facilities only to members and their invited guests.¹¹⁰ In addition, the court noted that membership is highly selective and the Club strictly limited its membership to 350.¹¹¹

B. The Opinion

The California Supreme Court reversed the appellate court, holding that the Club was a business establishment within the meaning of the Act.¹¹² Next, the court determined that applying the Act would not significantly impact the Club members' freedom of expressive association¹¹³ or infringe upon its members' freedom of intimate association.¹¹⁴ Thus, the court concluded that the Club could not arbitrarily discriminate against Ms. Warfield.¹¹⁵

1. Business Establishment Analysis

In determining that the Club was covered by the Act, the *Warfield* court discussed both approaches used to determine whether an organization falls within its scope. The court first addressed whether the Club was a place of public accommodation under the *Isbister* public accommodation approach.¹¹⁶ The

¹⁰⁹ See *id.* at 798.

¹¹⁰ See *id.* at 783.

¹¹¹ See *id.*

¹¹² See *id.* at 798.

¹¹³ See *id.* at 797; see also *infra* notes 127-38 and accompanying text (detailing court's treatment of Club members' freedom of expressive association).

¹¹⁴ See *Warfield*, 896 P.2d at 797-98; see also *infra* notes 178-95 and accompanying text (examining court's rationale in its disposal of Club's freedom of intimate association claim). The court also held that applying the Act would not violate the members' right of privacy under the California Constitution. See *Warfield*, 896 P.2d at 798.

¹¹⁵ See *Warfield*, 896 P.2d at 798.

¹¹⁶ See *id.* at 790-91. Before the court determined that the Club was a business establishment, it examined the issue of whether, under the Act, private groups fell within the definition of business establishments. See *id.* at 783-87. The court first analyzed the scant legislative history of the Act. See *id.* at 783-84. After finding that the legislative history offered little guidance, the court turned to *Isbister* and *O'Conner* for assistance in interpreting the Act's statutory language. See *id.* at 785-87.

Through its analysis of *Isbister* and *O'Conner*, the court found that the Legislature intended courts to interpret "business establishments" broadly. See *id.* at 785. However, the court found that the Legislature did not intend to construe the term so broadly as to encompass all entities listed in the first version of the Act. See *id.* at 788. Instead, the court

court then employed the business attribute approach to determine that the Club was a business establishment.¹¹⁷

In applying the public accommodation approach, the court identified several relevant factors courts apply to determine whether an entity is a truly private club, or a place of public accommodation and therefore a business establishment.¹¹⁸ Of prime importance, the court noted, is the Club's selectivity of its membership.¹¹⁹ Other factors the court mentioned were the Club's size, the degree of members' control over the organization,¹²⁰ the degree to which club facilities are available to nonmembers, and whether the Club's purpose is business or social.¹²¹

Although the court described the relevant factors in detail, acknowledging precedent such as *Isbister*, the court did not apply them.¹²² Instead, it held that the Club was a business establishment merely because of its "regular business transactions" with nonmembers.¹²³ Based on the use of Club facilities by nonmembers at sponsored events approximately once per week,¹²⁴

stated that the Act covers a private group only if a court finds that it reasonably constitutes a public accommodation or business establishment. *See id.* at 788-89.

¹¹⁷ *See id.* at 792-93 (reasoning that Club falls within scope of Act because it regularly engages in business transactions with nonmembers).

¹¹⁸ *See id.* at 791-92. The court acknowledged that it relied on these traditional factors in past cases, such as *Isbister*. *See id.*

¹¹⁹ *See id.* at 792.

¹²⁰ *See id.* (noting that membership control over Club is particularly important with regard to admission of members).

¹²¹ *See id.*

¹²² *See id.*

¹²³ *See id.*

¹²⁴ *See id.* The court found that regular business transactions occurred through events including golf and tennis tournaments, wedding receptions, bar mitzvahs, fashion shows, and special luncheons and dinners. *See id.* at 804. Because of these activities, the court found that the Club was functionally equivalent to a "commercial caterer" or a "commercial recreational resort." *See id.* at 800. Caterers and resorts, the court asserted, are classic forms of business establishments. *See id.* at 800-01.

The court noted that at these events the Club received fees from nonmembers. *See id.* at 800. The court stated that the trial record did not indicate what proportion members, guests, or other sources paid for guest charges. *See id.* at 793. However, the court found that, in some instances, companies paid for their club member employees' guest charges. *See id.* Because it obtained payment from nonmembers for food, beverage, and use of the facilities, the court maintained that the Club was similar to a "commercial enterprise." *See id.*

The court also stated that the Club obtained income from fees and the sale of food

the court concluded that the Club fell within the Act's scope.¹²⁵ The Club, however, contended that applying the Act would violate its members' freedom of association.¹²⁶

2. Freedom of Association Analysis

The court rejected the Club's argument that applying the provisions of the Act violates its members' First Amendment rights.¹²⁷ In addressing this argument, the *Warfield* court turned to United States Supreme Court precedent¹²⁸ and concluded

and beverages to invited guests. *See id.* The court observed that the Club sold food and beverages at a marked-up price. *See id.* at 779. Finally, the court noted that the Club obtained indirect financial benefit from transactions with nonmembers conducted at the golf and tennis pro shops. *See id.* at 793. Although the Club considered the golf and tennis professionals who operated the pro shops independent contractors, the court noted that their operations were not distinct from the Club's operations. *See id.* at 779. The golf pros collected and remitted greens fees to the Club. *See id.* In addition, when scheduling lessons for nonmembers, the Club directed the golf and tennis pros to give members priority use of the Club's facilities. *See id.* Further, the court stated that the Club's retainer for the professionals' services was much lower than that it would pay without such "public commercial enterprises." *See id.* at 793.

¹²⁵ *See id.* at 792-93. The court acknowledged the Club's nonprofit status and noted that the Club did not intend to profit from its "regular and repeated business transactions." *See id.* at 793 n.11. However, it found that the Club's direct and indirect financial gain benefited the members financially because it allowed them to maintain the Club's facilities and pay lower dues. *See id.* at 793. The court offered, however, that private clubs that raised funds through only isolated activities — such as occasional car washes, garage sales, or auctions — may not be business establishments. *See id.* at 793 n.11.

¹²⁶ *See id.* at 794. The Club also contended that applying the Act would violate its members' right of privacy. *See id.* The California Constitution specifically protects the right to privacy. *See* CAL. CONST. art. I, §§ 1-3.

¹²⁷ *See Warfield*, 896 P.2d at 797. The court also held that applying the Act would not violate the members' right of privacy. *See id.* at 798.

¹²⁸ *See id.* at 794-98. The United States Supreme Court decided a trilogy of cases that courts generally perceive as the guide to deciding freedom of association issues. *See, e.g.,* *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 18 (1988) (upholding constitutionality of statute providing that organizations with more than 400 members, which provide meals and receive fees from nonmembers for business purposes, are public accommodations); *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 544 (1987) (holding organization that admitted members based on their business, professional, and institutional activity in community is business establishment under Unruh Civil Rights Act); *Roberts v. United States Jaycees*, 468 U.S. 609, 622-23 (1984) (holding organization promoting growth of men's civic organizations is public accommodation).

The Court, in *Roberts*, stated that one circumstance may implicate both expressive and intimate associational freedoms. *See id.* at 618. It found that relationships may lay anywhere on a spectrum from the most intimate to the most attenuated of relationships. *See id.* at 620. The Court listed factors relevant to determining where an organization's characteris-

that applying the Act would not violate the members' freedom of expressive or intimate association.¹²⁹ The court stated that the Club did not contend that it was organized for, or engaged in, expressive activities protected by the First Amendment.¹³⁰ Consequently, it concluded that applying the Act would not impact the members' freedom of expressive association.¹³¹

Further, the court found that applying the Act would not infringe upon the Club members' freedom of intimate association.¹³² The court found that the Club's size and its accessibility by nonmembers called into question whether the activities and characteristics of the Club's membership were of the type that the First Amendment protects.¹³³ However, most signifi-

tics place it on that spectrum. *See id.* Those factors include, but are not limited to, an organization's size, purpose, policies, selectivity, and congeniality. *See id.*

The Court noted that the clearest example of intrusion into a group's rights is forcing it to accept members that it does not want. *See id.* at 623. Intrusion impairs the members' ability to express the views that brought them together. *See id.* However, the Court concluded that a state's compelling interest in eradicating discrimination may justify any impact on the members' freedoms. *See id.*

In *Rotary Club*, the Court affirmed that "*Roberts* provides the framework for analyzing [an organization's] constitutional claims." *Rotary Club*, 481 U.S. at 544. To determine the nature of the constitutional protection, the Court stated that it would separately consider the effect of the Act on the members' freedom of intimate and expressive association. *See id.* at 544-45. To determine if the Rotary Club was entitled to constitutional protection, the Court considered its size, purpose, selectivity, and the extent to which it excludes others. *See id.* at 546.

In addition to the *Roberts* factors, the Court considered whether a public accommodations statute would affect individuals' ability to advocate their viewpoints. *See New York State Club Ass'n*, 487 U.S. at 13. In *New York State Club Ass'n*, the Court found that organizations subject to a public accommodations statute could exclude individuals who did not share their members' views. *See id.* Courts should give members the opportunity to demonstrate that they are organized for expressive purposes. *See id.* Members may be able to demonstrate that, if forced to include persons of a specified group, they could not advocate their own viewpoints. *See id.*

¹²⁹ *See Warfield*, 896 P.2d at 798.

¹³⁰ *See id.* at 797.

¹³¹ *See id.*

¹³² *See id.* at 797-98.

¹³³ *See id.* (noting that Club had 700 members, but because members' spouses and children shared benefits of membership, more than 700 people had unrestricted access to Club). *But see id.* at 803 (Lucas, C.J., dissenting) (stating that Club had only 350 members). When the *Warfield* court compared the Club to the organizations involved in *Roberts*, *Rotary Club*, and *New York State Club Ass'n*, it stated that the members' freedom of intimate association claim was unclear. *See id.* at 797. The Club's membership of 700 members was larger than most of the clubs involved in *Rotary Club*. *See id.* The Club's size was also above the 400 member threshold established under New York City's law in *New York State Club Ass'n*.

cant, according to the court, was that eliminating the men-only requirement would not fundamentally alter the Club's specific purpose.¹³⁴ Because the Club's nature would not change, the court stated that applying the Act would not intrude on the member's freedom of intimate association.¹³⁵

Although the court acknowledged that truly private clubs are not subject to the Act,¹³⁶ it held that applying the Act neither violated the members' freedom of expressive association nor the Club members' freedom of intimate association.¹³⁷ Because the Club conducted regular business transactions, the court stated that it was a "business establishment" under the Act and not a truly private club.¹³⁸ Therefore, in selecting its members, the Club could not discriminate based on race, color, sex, national origin, religion, ancestry, or disability.

III. ANALYSIS

The California Supreme Court wrongly decided *Warfield* for three reasons.¹³⁹ First, the court should have applied the *Isbister* factors to determine that the Club was not a place of public accommodation. Second, the court misapplied the business attribute approach when it held that the Club was a business establishment. Finally, the court should have given more deference to the Club members' freedom of association.¹⁴⁰ The

See id.

¹³⁴ *See id.* at 798. The Club's facilities and nonproprietary memberships had generally been open to women. *See id.* In this respect, the court stated that the Club was similar to the organizations involved in *Roberts* and *Rotary Club*. *See id.*

¹³⁵ *See id.* The court determined that application of the Act would not violate the members' state right to privacy under the California Constitution. *See id.* at 798. The court found that the California Constitution provides protection separate from the United States Constitution. *See id.* In fact, in some respects, according to the court, the California Constitution provides greater protection to the right to privacy. *See id.* However, the Club offered no authority suggesting that the California Constitution should protect the Club's membership policies. *See id.* Consequently, the court held that application of the Act would not violate the members' right of privacy. *See id.*

¹³⁶ *See id.* at 798.

¹³⁷ *See id.* at 797-98.

¹³⁸ *See id.* at 792-93.

¹³⁹ *Cf. id.* at 802 (Lucas, C.J., dissenting) (arguing that Legislature did not intend State to regulate activities of private social clubs). The dissent also charged that, by abandoning the traditional criteria used to determine whether an entity is a business, the majority usurped a legislative function. *See id.*

¹⁴⁰ *See infra* notes 178-95 and accompanying text (discussing members' freedom of asso-

court should have more thoroughly analyzed the issues presented in *Warfield* to provide guidance to other courts and organizations regarding the status of private clubs under the Act.¹⁴¹

A. *Abandonment of the Public Accommodation Approach*

The *Warfield* court failed to apply those factors that the *Isbister* court, and other courts, used to determine whether a club is a place of public accommodation.¹⁴² By ignoring these factors, the court did not determine whether the Club was a place of public accommodation.¹⁴³ Had the court applied the *Isbister* factors in its analysis, it would have concluded that the Club was not a place of public accommodation, and therefore not subject to the provisions of the Act.

These factors include the entity's selectivity of membership,¹⁴⁴ limits on the size of membership,¹⁴⁵ and the degree

ciation). *Warfield* also implicates the right of privacy. See *Warfield*, 896 P.2d at 794. Discussion of the right of privacy, however, is beyond the scope of this Note.

¹⁴¹ See *infra* notes 196-203 and accompanying text (discussing effect of *Warfield* decision on other organizations).

¹⁴² See *Warfield*, 896 P.2d at 792 (noting that there is no need to determine whether Club is truly private because Club's regular business activities bring it within scope of Act); see also Phillip S. Dingle, *Controversy at the Club: Will Private Discrimination Soon Be History?*, FLA. B.J., Dec. 1990, at 11 (stating that several cases illustrate general principles for differentiating private clubs from businesses or public accommodations, but no precise test exists); Hyman Hacker, *Private Club Membership — Where Does Privacy End and Discrimination Begin?*, 61 ST. JOHN'S L. REV. 474, 478-81 (1987) (listing cases and factors courts have applied to determine whether entities are private).

¹⁴³ See *Warfield*, 896 P.2d at 792 (noting that court did not need to determine whether Club was private rather than public).

¹⁴⁴ See *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969) (holding that club was not private because membership practices were selective only on basis of race); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1203-04 (D. Conn. 1974) (considering whether organization had formal membership procedures); *Warfield*, 896 P.2d at 791 (noting that courts consider selectivity in membership when determining whether entity is public or private). The *Warfield* court conceded that selectivity in the admission of members is usually of prime importance to courts. See *id.* at 792; Edgar, *supra* note 1, at 378 (stating that selectivity of membership is most important factor in assessing public or private nature of organizations). Courts also consider the reasons for rejecting new membership applications, the existence of formal membership standards, and the amount of membership dues. See *id.* at 378-79.

¹⁴⁵ See *Warfield*, 896 P.2d at 797 (acknowledging that courts consider size of groups to ascertain public or private nature of organization). See Julie A. Moegenburg, *Freedom of Association and the Private Club: The Installation of a "Threshold" Test to Legitimize Private Club Status in the Public Eye*, 72 MARQ. L. REV. 403, 424 (1989) (stating that courts consistently consider limits on size of membership in deciding whether group is private or public).

of membership control in governing the organization.¹⁴⁶ In addition, courts consider membership control over the selection of members,¹⁴⁷ the extent facilities are available to nonmembers,¹⁴⁸ and whether the entity's purpose is social.¹⁴⁹ Finally, courts consider whether members own the entity.¹⁵⁰

If the court had considered the Club's purpose and highly restrictive policies, it would have concluded that the club was social and thus private.¹⁵¹ The Club's process for selecting and admitting new proprietary members was very selective.¹⁵²

¹⁴⁶ See *Cornelius*, 382 F. Supp. at 1203-04 (considering degree of membership control over internal governance); *Wright v. Cork Club*, 315 F. Supp. 1143, 1150-53 (S.D. Tex. 1970) (considering whether members control organization); *Edgar*, *supra* note 1, at 379 (observing that when outside management controls organization and club takes on business-like characteristics, court will more likely determine that club is not private).

¹⁴⁷ See *Warfield*, 896 P.2d at 791 (noting that membership control over selection of new members is factor courts consider); see also *Edgar*, *supra* note 1, at 378-79 (noting that courts generally look to degree of member participation in selection process when evaluating selectivity).

¹⁴⁸ See *Cornelius*, 382 F. Supp. at 1203 (considering use of club facilities by nonmembers); *Wright*, 315 F. Supp. at 1151-52 (considering whether club limits use of facilities to members and bona fide guests); *Warfield*, 896 P.2d at 791 (listing extent to which facilities are available to nonmembers as one factor courts consider).

¹⁴⁹ See *Warfield*, 896 P.2d at 792 (acknowledging that courts consider whether entity's purpose is social or business to determine whether entity is public or private); see also *Edgar*, *supra* note 1, at 390 (stating that courts consider members' congeniality to determine if organization is private).

¹⁵⁰ See *Daniel v. Paul*, 395 U.S. 298, 301-02 (1969) (noting that member ownership is attribute courts traditionally associate with private clubs). Courts may consider additional factors when determining if an organization is private or public. See, e.g., *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438 (1973) (holding that club was not private because it had no exclusive purpose); *Cornelius*, 382 F. Supp. at 1203 (considering organization's history, substantiality of dues, advertising, and predominance of profit motive to determine whether it was private or public); *Wright*, 315 F. Supp. at 1151 (considering organization's nonprofit status and that members operated it solely for their own benefit in determining that organization was private).

¹⁵¹ See *infra* notes 152-60 and accompanying text (discussing Club's purpose and restrictive policies).

¹⁵² See *Warfield*, 896 P.2d at 803 (Lucas, C.J., dissenting). To assure social compatibility, an existing member must have sponsored a prospective member and a committee must have investigated and interviewed him. See *id.* at 781. The Club neither advertised membership applications, nor solicited them from the public. See *id.* Moreover, a nonmember could only apply for membership if an existing member sponsored him. Two existing members must have seconded that application.

The membership committee then reviewed the application. See *id.* The committee also required the prospective member to supply references, prior club membership information, and other personal and financial information. Further, the committee investigated the information and checked the prospective member's credit. In addition, the

Further, the Club strictly limited the number of proprietary members to 350,¹⁵³ and those members controlled governance of the Club.¹⁵⁴ The court should also have analyzed whether those relationships were intimate by determining the nature and purpose of the Club.¹⁵⁵

The court found that "virtually all" of the members who testified stated that they joined the Club for socializing and recreation.¹⁵⁶ The members stated that they did not consider the Club an adjunct to the business world.¹⁵⁷ Rather, they viewed the Club as an escape from that aspect of their lives.¹⁵⁸ The members designed the Club's extremely selective process of choosing new members to assure social compatibility.¹⁵⁹

membership committee interviewed a prospective member and his family at home and at his place of business. After conducting the investigation, the membership committee voted on the prospective member. If the application received two negative votes, the committee disqualified the member with no chance for reconsideration. *See id.* If the committee approved the application, the board of directors then sought input from all of the other proprietary members. *See id.* If any member objected, the application was sent back to the membership committee for further investigation. *See id.* If no member objected, the committee submitted the application to the board of directors for final approval. *See id.*

¹⁵³ *See id.* at 803 (Lucas, C.J., dissenting) (stating that Club's size was compatible with private club status). Because they owned and controlled the Club, the dissent considered only proprietary members to determine the Club's membership size. *See id.* The Club strictly limited membership to the 350 proprietary members who owned the Club. *See id.* at 780. Each proprietary member owned 1/350 of all the Club's assets and liabilities. *See* Appellant's Opening Brief on the Merits at 6, *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776 (Cal. 1995) (No. S031285). Proprietary members were the only class of members that could vote. *See Warfield*, 896 P.2d at 780.

¹⁵⁴ *See Warfield*, 896 P.2d at 780 (stating that proprietary members governed Club and made Club policy).

¹⁵⁵ *See supra* note 144 and accompanying text (stating that courts should determine nature and purpose of organization to determine if it is public or private); *cf.* *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 19 (1988) (O'Connor, J., concurring) (stating that club with more than 400 members may still be intimate in nature).

¹⁵⁶ *See Warfield*, 896 P.2d at 780. The majority of members who testified at the trial stated that they had neither transacted nor solicited business at the Club. *See* Respondents' Brief on the Merits at 5, *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776 (Cal. 1995) (No. S031285). The members who acknowledged that they had conducted business at the Club stated that business advantage did not motivate them to join the Club. *See id.* The two members who testified that some of their clients were also Club members "maintained that any resulting business relationship was incidental to the underlying social one." *See id.* at 6.

¹⁵⁷ *See Warfield*, 896 P.2d at 780.

¹⁵⁸ *See id.*

¹⁵⁹ *See id.* at 803 (Lucas, C.J., dissenting) (noting that purpose of Club's strict membership policy was to create close-knit organization).

Further, the relationship among members was continuous, personal, and social.¹⁶⁰ Therefore, the court should have ruled on the issue, concluding that the Club was a recreational and social group, not a public accommodation.

B. Misapplication of the Business Attribute Approach

The *Warfield* court's determination that the Club was a business establishment is based upon an overbroad application of the Act. Although the court stopped short of stating that *O'Connor* was controlling, it used factors set forth in *O'Connor* to determine that the Club had business attributes and was therefore a business establishment.¹⁶¹ However, even if the *O'Connor* business attribute approach is applicable to private clubs, the *Warfield* court misapplied the *O'Connor* factors in reaching its decision.¹⁶² The court thus broadened the scope of the Unruh Act to encompass private groups that should not be covered by the Act.

In *O'Connor*, the court determined that a homeowners' association was a business establishment because the Association performed all of the customary functions of a traditional landlord.¹⁶³ The court pointed out that the function of the association was to protect and enhance the community's economic value.¹⁶⁴ In hiring a property management firm and collecting assessments, the Association was engaged in commercial activities designed to increase the economic value of the property.¹⁶⁵

¹⁶⁰ See *id.*; cf. *Curran v. Mt. Diablo Council of the Boy Scouts of Am.*, 29 Cal. Rptr. 2d 580, 601 (Ct. App. 1994) (noting that success of Boy Scouts, and reason that organization attracts boys and parents, lies in sense of community among its members and leaders), *reh'g granted*, 31 Cal. Rptr. 2d 126 (Ct. App. 1994).

¹⁶¹ Compare *Warfield*, 896 P.2d at 792-93 (reasoning that Club is business establishment because its transactions with nonmembers are functional equivalent of commercial enterprise) with *O'Connor v. Village Green Owners Ass'n*, 662 P.2d 427, (Cal. 1983) (reasoning that Association is business establishment because it operates as landlord when it collects assessments, establishes rules, and carries out other traditional functions of landlord).

¹⁶² See *infra* notes 163-77 and accompanying text (arguing that *Warfield* court read *O'Connor* too broadly).

¹⁶³ See *O'Connor*, 772 P.2d at 431.

¹⁶⁴ See *id.*

¹⁶⁵ See *id.* (noting Association's business transactions and holding that Association functions as landlord).

Therefore, the Association had a commercial purpose and thus was deemed a business establishment.¹⁶⁶

The *Warfield* court indicated that the dominant consideration in the *O'Connor* business attribute approach is whether an organization engages in commercial activities.¹⁶⁷ However, in *O'Connor*, the individual commercial transactions are important only because they reveal the true nature of the purpose of the homeowners' Association.¹⁶⁸ The Association's commercial transactions merely demonstrated that the *relationship* between the Association and its members is predominantly commercial — analogous to a landlord-tenant relationship.¹⁶⁹

Rather than looking to the nature of the relationship between the organization and its members, the *Warfield* court relied upon specific "commercial" transactions to bring the Club under the Act.¹⁷⁰ It noted that the Club benefits from patronage of non-members and held that these transactions necessitated the conclusion that the club was a business establishment.¹⁷¹ However, the court's reasoning overlooks the fundamental difference between the *O'Connor* homeowners' association and the Club — the purpose of the Association was commercial while the purpose of the Club was social.

A membership in a country club is not analogous to a homeowner's relationship to an association. The Club was very selective as to who could become a member, and strictly limited the number of its members.¹⁷² In contrast, the Association in *O'Connor* was not selective as to membership.¹⁷³ Furthermore,

¹⁶⁶ See *id.* (reasoning that because Association functions as landlord, it is business establishment).

¹⁶⁷ See *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776, 792 (Cal. 1995) (finding that Club's commercial transactions are sufficient to bring Club within reach of Act).

¹⁶⁸ See *O'Connor*, 662 P.2d at 431 (noting that Association carries out all functions of landlord).

¹⁶⁹ See *id.*

¹⁷⁰ See *Warfield*, 896 P.2d at 793 (determining that Club is business establishment based on its regular business transactions with nonmembers).

¹⁷¹ See *id.* (concluding that Club's transactions with nonmembers bring it within scope of Act).

¹⁷² See *id.* at 803 (Lucas, C.J., dissenting).

¹⁷³ See *O'Connor*, 662 P.2d at 428 (noting that all residents of condominium complex were members of Association).

although both the Club and the Association collect fees, the Association's primary use of those fees is a commercial one — to carry out the functions of a landlord.¹⁷⁴ A country club's purpose, on the other hand, is to provide recreation and a place to engage in social relationships.¹⁷⁵ Finally, in *O'Connor*, the discriminatory restrictions prevented the injured party from entering into a commercial relationship with the Association.¹⁷⁶ In contrast, in *Warfield*, the Club's restrictions did not prevent Ms. Warfield from engaging in a commercial transaction. The restrictions only limited her ability to engage in a social relationship — club membership.¹⁷⁷

These fundamental differences compel the conclusion that the Club does not have a predominantly commercial relationship with its members. If the court had correctly applied the *O'Connor* approach, it would have concluded that the Club was not a business establishment and therefore not subject to the Act.

C. Members' Freedom of Association

The court's holding was also faulty because it failed to properly analyze the Club members' freedom of association.¹⁷⁸ The Club consistently maintained that its members had the right to freedom of association.¹⁷⁹ The Club declared that its central

¹⁷⁴ See *id.* at 431.

¹⁷⁵ See *Warfield*, 896 P.2d at 804 (Lucas, C.J., dissenting).

¹⁷⁶ See *O'Connor*, 662 P.2d at 428 (concluding that restrictions prohibited plaintiffs from residing in condominium complex).

¹⁷⁷ See *Warfield*, 896 P.2d at 806.

¹⁷⁸ See *infra* notes 184-95 and accompanying text (discussing Club's freedom of expressive and intimate association).

¹⁷⁹ See California State Club Ass'n & National Club Ass'n Application for Leave to File Brief of Amicus Curiae at 6-9, *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776 (Cal. 1995) (No. S031285) (arguing that Club promotes important social goals that freedom of association must protect); Respondents' Brief on the Merits at 28-30, *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776 (Cal. 1995) (No. S031285) (contending that applying Act would infringe upon members' rights of privacy and freedom of association); Respondents' Answer to Brief of Amici Curiae American Civil Liberties Union at 10-14, *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776 (Cal. 1995) (No. S031285) (arguing that Club has constitutional right to privacy and freedom of association rights). The Club contended that private clubs must be able to select members without undue governmental interference. See *id.* at 13. The Club maintained that exclusive control over the Club's membership policies was imperative to maintaining the fellowship and

purpose was to promote fellowship and congeniality in a recreational context.¹⁸⁰ The United States Supreme Court has stated that the First Amendment may protect social activities.¹⁸¹ Although the *Warfield* court determined that the Club did not state a purpose warranting First Amendment protection of its expressive activities,¹⁸² the court failed to duly consider the Club's freedom of expressive association.¹⁸³

The court also failed to adequately analyze the members' freedom of intimate association. The essence of private clubs is the intent to include only a select group of individuals.¹⁸⁴ Application of the Act to the Club effectively forces its members to associate with people with whom they do not necessarily wish to socialize.¹⁸⁵

Courts traditionally analyze organization members' freedom of association by considering several factors.¹⁸⁶ Those factors, such as membership and governance policies, are the same as those used to determine whether an organization falls under a public

congeniality central to its purpose. *See id.*

¹⁸⁰ *See* Respondents' Answer to Brief of Amici Curiae American Civil Liberties Union at 10-14, *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776 (Cal. 1995) (No. S031285); *cf.* *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 29 Cal. Rptr. 2d 580, 584 (Ct. App. 1994) (stating that expressive association involves collective efforts on behalf of shared goals), *reh'g granted*, 31 Cal. Rptr. 2d 126 (Ct. App. 1994).

¹⁸¹ *See* *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (stating that First Amendment protects right to associate in pursuit of wide variety of political, social, economic, religious, and cultural ends).

¹⁸² *See* *Warfield*, 896 P.2d at 797. The court ignored the fact that many types of expressive activities exist. *See* *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring) (stating that broad range of expressive activities exists and courts may have difficulty determining whether to protect association's expressive activity).

¹⁸³ *See* *Warfield*, 896 P.2d at 797 (finding that applying Act will not affect members because Club did not contend that members organized Club for expressive activities).

¹⁸⁴ *See* Leiferman, *supra* note 1, at 101-03 (stating that private clubs decide to include only certain individuals).

¹⁸⁵ *See id.*; *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting) (arguing that state may not dictate with whom citizens must associate). The government may not interfere with private clubs because the Constitution protects them with a "zone of privacy." *See id.*

¹⁸⁶ *See* *Roberts*, 468 U.S. at 620 (noting that relevant factors for determining members' freedom of association include organization's size, purpose, selectivity, commercial nature, and congeniality); *Hart v. Cult Awareness Network*, 16 Cal. Rptr. 2d 705, 710-11 (Ct. App. 1993) (considering organization's size, selectivity of members, and relationships among members to determine that members' freedom of intimate association was entitled to constitutional protection).

accommodations statute.¹⁸⁷ The *Warfield* court considered only two of the traditional factors — size of the organization and the extent to which facilities are available to nonmembers.¹⁸⁸ The court summarily concluded that applying the Act would not infringe on the members' rights because the membership was large and nonmembers used the facilities.¹⁸⁹

The court, however, avoided considering other factors that would have led it to conclude that the Club's members had strong freedom of intimate association claims.¹⁹⁰ For example,

¹⁸⁷ See Edgar, *supra* note 1, at 390-91 (stating that courts use same factors to decide business establishment and freedom of association issues). Edgar observes that a direct correlation exists between the freedom of association and whether a club is public or private. *Id.*

¹⁸⁸ See *Warfield*, 896 P.2d at 796-97.

¹⁸⁹ See *id.* The court analyzed this issue under the guidance of *New York State Club Ass'n*, *Rotary Club* and *Roberts*. See *supra* note 128. These cases provide guidance for analyzing freedom of association issues, but they are hardly analogous. *Roberts* and *Rotary Club* involved individual chapters of national organizations, existing solely to promote their members' business interests. See Leiferman, *supra* note 1, at 103 (discussing business clubs and stating that members' associational rights do not outweigh need to prevent economic inequality).

The *Roberts* Court considered the size and activities of the organization's individual chapters. See *Roberts*, 468 U.S. at 621. But the Court focused on the organization's selectivity in admitting members and its overall purpose. See *id.* The organization in *Roberts* permitted any man between the ages of 18 and 35 to join as a voting member. See *id.* at 613. The organization in *Rotary Club* admitted members based on their professional and business activities. See *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 540 (1987). Neither organization considered congeniality as a criterion for admitting new members. See *Rotary Club*, 481 U.S. at 546-47; *Roberts*, 468 U.S. at 621. In both cases, the Court found that the organizations' express purpose promoted career advancement. See *Rotary Club*, 481 U.S. at 542-43; *Roberts*, 468 U.S. at 626. Furthermore, the Court found that the organizations enabled their members to associate with others in the business community. See *Rotary Club*, 481 U.S. at 542-44; *Roberts*, 468 U.S. at 626. Therefore, they operated as extensions of their members' businesses. See *Rotary Club*, 481 U.S. at 542-44; *Roberts*, 468 U.S. at 626.

New York State Club Ass'n involved a constitutional challenge to New York City's public accommodations statute, which was designed to help organizations determine whether they were considered private or public. See *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 4 (1988). New York's statute, challenged by an association of 125 private clubs, provided specific characteristics that would make a club or organization public per se. See *id.* at 5, 8. The Court upheld the statute's constitutionality because it helped the City pinpoint organizations that were commercial in nature. See *id.* at 12. However, the Court noted that organizations may still be able to demonstrate that they are organized for an expressive purpose that deserves constitutional protection. See *id.* at 13. Note that *Warfield* involved neither a constitutional challenge nor a clear statute. See *Warfield*, 896 P.2d at 777-78. It did, however, involve a private club whose members' freedom of intimate expression deserved proper attention. See *id.* at 778.

¹⁹⁰ See, e.g., Moegenburg, *supra* note 145, at 429 (stating that membership policy is most

the court ignored how the Club selectively admitted new members and that its purpose was strictly social.¹⁹¹ The members owned, controlled, and governed the Club.¹⁹² The Club strictly limited the number of members to 350.¹⁹³ Its entire selection and governance procedures promoted the intimacy of its members.¹⁹⁴ The court, however, did not consider any of these compelling factors in reaching its holding.¹⁹⁵

D. Warfield's Impact on Other Organizations

By failing to make the proper analyses and inquiries, the *Warfield* court provided little guidance to social organizations for determining their status under the Act.¹⁹⁶ The Girl Scouts, Boy Scouts, sororities, fraternities, and other organizations may all be subject to the Act because of the *Warfield* court's rationale regarding regular business transactions.¹⁹⁷ A large majority of social organizations necessarily conduct regular business transactions,¹⁹⁸ as they employ people, maintain facilities, and conduct

important characteristic courts use to determine whether club should receive constitutional protection). The *Warfield* court failed to consider this factor. See *Warfield*, 896 P.2d at 797.

¹⁹¹ See *supra* notes 152, 156-60 and accompanying text (demonstrating that Club was very selective in admitting new members and that Club's purpose was recreational and social).

¹⁹² See *supra* note 153 and accompanying text (discussing member ownership and control of Club).

¹⁹³ See *supra* notes 153-54 and accompanying text (noting cap on number of members).

¹⁹⁴ See *supra* notes 156-60 and accompanying text (discussing purpose of Club).

¹⁹⁵ See *Warfield*, 896 P.2d at 797.

¹⁹⁶ See *id.* at 799 (Mosk, J., dissenting) (arguing that majority's analysis was faulty and it should have analyzed issues more thoroughly because many organizations depend on court's interpretation of Act); *id.* at 802 (Lucas, C.J., dissenting) (stating that majority's regular business transactions analysis raises questions for organizations who wish to conduct their affairs within law); *cf.* *Isbister v. Boys' Club, Inc.*, 707 P.2d 212, 226-27 (Cal. 1985) (Mosk, J., dissenting) (listing types of organizations threatened by court's limitations on what constitutes private organization).

¹⁹⁷ See *Isbister*, 707 P.2d at 226 (Mosk, J., dissenting) (listing organizations with membership policies that *Isbister* holding threatens). Justice Mosk argues that the majority's decision strikes a death knell for the Girl Scouts, Boy Scouts, fraternities, sororities, women's colleges, and similar organizations. *Id.*

¹⁹⁸ See *Roberts v. United States Jaycees*, 468 U.S. 609, 635 (1984) (O'Connor, J., concurring) (stating that many organizations cannot be purely expressive because they will collect dues from members, purchase printing materials, rent lecture halls, or serve cake and coffee at their meetings); *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 29 Cal. Rptr. 2d 580, 603 (Ct. App. 1994) (Staniforth, J., dissenting) (recognizing trial court's finding that Boy Scouts is large organization with business-like attributes), *reh'g*

business with nonmembers.¹⁹⁹ Therefore, many organizations are now considered business establishments under the *Warfield* rationale.

Although the *Isbister* court stated that its decision would not affect social organizations, the *Warfield* court offered no similar reassurances.²⁰⁰ Further, the *Warfield* court uses a definition of "business establishment" that includes many groups that would otherwise be considered truly private clubs.²⁰¹ The only limits *Warfield* provides is that organizations are not subject to the Act if they raise funds only through "occasional car washes."²⁰² In addition, social organizations may infer from *Warfield* that the Act applies to them if they receive any direct or indirect financial benefit from regular business transactions.²⁰³ Consequently, organizations that have traditionally been classified as private social organizations may in fact be business establishments under the Act.

granted, 31 Cal. Rptr. 2d 126 (Ct. App. 1994); Daniel L. Schwartz, Comment, *Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations*, 75 CAL. L. REV. 2117, 2130 (1987) (stating that sororities and fraternities conduct regular business transactions).

Students who belong to fraternities and sororities pay money for room and board. See *id.* Sororities and fraternities are like public business organizations because they provide members with business opportunities and members network and meet future business contacts. See *id.* at 2129, 2135. Sororities and fraternities are like restaurants because they serve food to members and nonmembers. See *id.* at 2127. They are like hotels or apartments because they provide students with housing. See *id.* at 2127-28. They are also like many places of recreation or amusement. See *id.* at 2128. Sororities and fraternities grant access to pool tables, ping-pong tables, and VCR's to members and nonmembers alike. See *id.* Therefore, they are analogous to pool halls, taverns, movie theaters, and other places of public accommodation. See *id.* Colleges have business-like attributes because they provide classes, living accommodations, and food. Cf. *Isbister*, 707 P.2d at 227 (Mosk, J., dissenting) (arguing that colleges are more like business establishments than are boys' clubs).

¹⁹⁹ See *Roberts*, 468 U.S. at 635 (O'Connor, J., concurring) (stating that most organizations are likely to touch matters of commerce); *Isbister*, 707 P.2d at 216-19 (discussing business-like attributes of private and public organizations).

²⁰⁰ See *Warfield*, 896 P.2d at 793 n.11 (stating that private club conducting only isolated fund-raising activities is not business establishment); *Isbister*, 707 P.2d at 220 n.14 (stating that private groups do not fall under Act simply because they offer recreational facilities to members or guests).

²⁰¹ See *Warfield*, 896 P.2d at 791-92.

²⁰² See *id.* at 791 (stating that, even if they possess characteristics of private clubs, organizations may be businesses subject to Act).

²⁰³ See *id.*

IV. PROPOSED SOLUTION

The *Warfield* decision not only provides little guidance to organizations attempting to ascertain their status, but its analysis will lead to undesirable results in future cases. The California Supreme Court should develop a more limited approach to determine whether organizations are private.²⁰⁴ The court should first decide whether an organization falls under the Act.²⁰⁵ If the court finds the Act applicable, it must then determine whether the Act unduly denies the organization's members of the First Amendment Freedom of Association.

In determining whether the Act applies to a particular organization, courts should consider the *Isbister* factors to determine whether an organization is a place of public accommodation.²⁰⁶ If the court finds that the organization is not a public accommodation, it should analyze whether the organization is a business establishment under the *O'Connor* approach. In applying this test, the court should consider whether the nature of the relationship between an organization and its members is commercial. If the relationship is not commercial, the court should find that the organization is not a business establishment, and is therefore not within the scope of the Act.

If the court concludes that the organization either is a public accommodation or a business establishment, should next analyze the organization's freedom of association.²⁰⁷ After analyzing

²⁰⁴ See Moegenburg, *supra* note 145, at 420 (arguing that ad hoc approach to determining whether club is private leads to inconsistent results).

²⁰⁵ See *id.* at 426 (stating that failure to initially determine whether organization's activity is commercial and thus subject to Act causes inconsistent results and wastes courts' time).

²⁰⁶ See *supra* notes 142-50 and accompanying text (arguing that court must first use factors to determine if organization falls under public accommodations statute); see also Moegenburg, *supra* note 145, at 429 (advocating use of all relevant factors). A more detailed application of factors would result in fewer appeals and provide advance notice to organizations of the requirements that they must meet. See *id.*

There are several questions courts should ask when reviewing a club's membership policies. See *id.* at 430. They should inquire into whether the club places greater emphasis on the quantity or quality of its members. See *id.* Courts should determine who actually selects new members and whether all of the existing members have a voice in the process. See *id.* They should take notice of whether the club solicits new members or whether an existing member must endorse any applicant. See *id.* Another important factor that courts should consider is who has control of the club. See *id.* Control relates to who regulates the club's operations and who pays for such operations. See *id.*

²⁰⁷ See Edgar, *supra* note 1, at 378 (maintaining that if court finds that organization falls

these considerations the court should determine whether the state's interest in eliminating discrimination outweighs the members' freedom of association.²⁰⁸

This method of analysis may elicit the argument that not all cases brought under the Act necessarily include freedom of association issues.²⁰⁹ However, the purpose of the Act is to prohibit business establishments from discriminating on the basis of race, color, sex, national origin, religion, ancestry, or disability.²¹⁰ If the court finds that an entity is not a public accommodation under *Isbister* or a business establishment under *O'Connor*, the court necessarily has concluded that the entity is private.²¹¹ Therefore, when the court decides a case under the Act, the defendant's freedom of association, whether meritorious or not, is at issue.²¹²

Critics of this approach may also argue that it is too rigid and that courts need discretion in deciding civil rights cases.²¹³

under public accommodations statute, it next considers whether members' freedom of association is protected).

²⁰⁸ See *Hill v. National Collegiate Athletic Ass'n*, 865 P.2d 633, 682 (Cal. 1994) (Mosk, J., dissenting) (stating that court should only abridge right to privacy when there is compelling public need). "Compelling" means the "need" is something actually required, not simply useful or desirable. See *id.* at 683 (Mosk, J., dissenting).

Commentators have suggested other tests for determining whether a club is private. See Moegenburg, *supra* note 145, at 420-32 (suggesting "Threshold Analysis" test for determining whether club is private). Moegenburg's test lists four separate threshold stages. First, determine whether the association is intimate or expressive. See *id.* at 421. Then determine if a state public accommodations or other state statute applies. See *id.* at 422. Third, decide whether the association is commercial or expressive. See *id.* at 426. Finally, consider the pertinent factors and characteristics of the entity. See *id.* at 429.

²⁰⁹ See, e.g., *Burks v. Poppy Constr. Co.*, 370 P.2d 313, 316 (Cal. 1962) (failing to apply freedom of association analysis in holding that housing developer was business establishment and, therefore, could not discriminate against African-Americans); *O'Conner v. Village Green Owners Ass'n*, 662 P.2d 427, 431 (Cal. 1983) (applying business establishment analysis exclusively).

²¹⁰ See *supra* notes 29-33 (discussing Act's scope).

²¹¹ See *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776, 790 (Cal. 1995) (stating that truly private clubs are not subject to Act).

²¹² See *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984) (finding that relationships that are not obviously business-like or distinctly intimate require careful freedom of association analysis).

²¹³ See *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 15 (1988) (noting that courts have discretion to interpret public accommodations statutes on case-by-case basis for organizations); Moegenburg, *supra* note 145, at 418-19 (stating that some courts liberally interpret public accommodations statutes to reach new definitions of public accommodations).

While this argument has merit, it fails to consider several factors. The suggested approach requires courts to consider the facts in each case, including an organization's characteristics.²¹⁴ Additionally, the approach compels courts to analyze the rights of all parties involved in litigation.²¹⁵ Finally, the approach allows courts to use their discretion in determining whether the state's interest in eliminating discrimination outweighs organization members' freedom of association.²¹⁶ Therefore, this method of analysis addresses all the parties' interests and incorporates the court's interest in exercising its discretion when deciding civil rights cases.

CONCLUSION

In applying the business establishment approach to a private club, *Warfield* defines the scope of the Act much too broadly.²¹⁷ *Warfield* eliminates almost all distinctions between truly private clubs and public business establishments. Because *Warfield* defined "business establishment" in a manner that includes almost all private groups, it has opened the gates to a potential flood of litigation. Additionally, the decision indicates the California Supreme Court's willingness to tread upon freedom of association rights.

²¹⁴ See, e.g., *Roberts*, 468 U.S. at 620 (listing factors — such as size, purpose, selectivity, and congeniality — that are relevant in determining whether organization is private); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969) (analyzing club's characteristics, such as selectivity of membership, to conclude that club was not private); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1203-04 (D. Conn. 1974) (using factors to determine that organization was not private).

²¹⁵ See, e.g., *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 544 (1987) (stating that court must consider both plaintiff's right to be free from discrimination and organization members' freedom of association); see also *supra* notes 179-95 and accompanying text (arguing that *Warfield* court inadequately analyzed Club members' freedom of association rights).

²¹⁶ See, e.g., *Roberts*, 468 U.S. at 623 (noting that states' compelling interest in eliminating discrimination may justify application of public accommodations statute; implicating members' freedom of association); see also *supra* notes 64-95 and accompanying text (discussing *Curran* court's finding that state's interest in eliminating discrimination could outweigh freedom of association rights).

²¹⁷ See *supra* notes 196-203 and accompanying text (discussing court's meager guidance for analyzing application of Act).

Although the State's interest in eliminating discrimination is compelling, the Legislature has offered no indication that it intended the Act to extend to private clubs. Because these clubs rely on the California Supreme Court's interpretation of the Act, the court should adopt a narrow approach to the Act — an approach that maintains the distinction between truly private clubs and business establishments. Therefore, the court should consider adopting the analysis suggested in this Note.

Sharon Swaim

