

# *North Coast Women's Care:* California's Still-Undefined Standard for Protecting Religious Freedom

Sumeet Ajmani†

Ever since reproductive technology became widely available to treat fertility problems, some physicians have tried to limit access to this technology for various reasons, including the age, marital status, and sexual orientation of patients.<sup>1</sup> In a landmark ruling, the California Supreme Court recently held that clinic physicians may not deny lesbians access to fertility treatment on the grounds that the procedure violated the physicians' religious beliefs.<sup>2</sup> The court found that neither the federal nor state constitutional rights to free exercise of religion exempted the doctors from following antidiscrimination provisions in California's Unruh Civil Rights Act (Unruh Act).<sup>3</sup> In reaching this result, the court held that the federal free exercise right did not justify noncompliance with a neutral and generally applicable law.<sup>4</sup> It went on to find that even if the state constitution granted stronger protection, the physicians' interests in religious freedom still did not overcome the state's compelling interest in ensuring equal access to reproductive treatment.<sup>5</sup> In so ruling, the court resolved the dispute at hand, but avoided answering the fundamental *legal* question of what level of

---

Copyright © 2009 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

† J.D. Candidate, University of California, Berkeley, School of Law, 2010; B.S., Stanford University, 2005. I am thankful to Professor Jesse H. Choper for his early guidance and advice. I am also indebted to the editors of the *California Law Review* for their excellent help in strengthening my piece. Finally, thanks to my wonderful family and friends, especially my parents, who patiently put up with my disappearances into "law school."

1. See *First Amendment – California Supreme Court Holds That Free Exercise of Religion Does Not Give Fertility Doctors Right to Deny Treatment to Lesbians*, 122 HARV. L. REV. 787, 787 (2008) [hereinafter *First Amendment*].

2. *N. Coast Women's Care Med. Group, Inc. v. San Diego County Super. Ct. (North Coast)*, 189 P.3d 959, 962 (Cal. 2008).

3. *Id.*

4. *Id.* at 967 (citing *Employment Div., Ore. Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990)).

5. *Id.* at 968 (citing *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 89 (Cal. 2004)).

protection the California Constitution guarantees for free exercise of religion.

In August 1999, Guadalupe Benitez first met with Dr. Christine Brody at the clinic of North Coast Women's Care Medical Group, Inc. (North Coast) to start fertility treatments.<sup>6</sup> At this meeting, Benitez mentioned to Dr. Brody that she was a lesbian.<sup>7</sup> Dr. Brody informed Benitez that if in the course of treatment intrauterine insemination (IUI) became necessary, she would be unable to perform the procedure due to her religious beliefs.<sup>8</sup> According to Dr. Brody, she also told Benitez at their initial meeting that her colleague, Dr. Douglas Fenton, shared her religious objections to performing an IUI procedure on an unmarried woman.<sup>9</sup>

Approximately one year later, after several unsuccessful alternative treatments, Benitez decided to try IUI.<sup>10</sup> Benitez initially wanted to undergo the IUI with fresh sperm donated by a friend. However, after Dr. Brody told her using fresh sperm could involve having to satisfy additional protocols due to the clinic's state tissue licensing requirements, Benitez decided to instead use frozen sperm from a sperm bank.<sup>11</sup> Dr. Brody made a note of this decision, but went on an out-of-state vacation soon afterward.<sup>12</sup>

While Dr. Brody was away, Dr. Fenton handled Benitez's medical treatment.<sup>13</sup> According to Dr. Fenton, Dr. Brody's latest notes were missing from Benitez's medical chart, resulting in his belief that Benitez still intended to undergo IUI with live, nonspousal donor sperm.<sup>14</sup> Dr. Fenton claimed that, due to his own religious objections, he asked a nurse to prepare the live sperm since she was the only person at North Coast besides him licensed and qualified to do so. However, the nurse also said it would go against her moral and religious beliefs.<sup>15</sup> Since no other doctor at North Coast was licensed to prepare fresh sperm, Dr. Fenton ultimately referred Benitez to an outside physician, which led to the case at hand.<sup>16</sup>

Benitez claimed that she had to beg her insurance provider to cover the "off plan" referral, and that even though her insurance ultimately did so, she still incurred substantially greater costs than she would have by continuing

---

6. *Id.* at 963.

7. *Id.*

8. *Id.* Although Benitez claimed Dr. Brody objected to performing an IUI on a *lesbian*, Dr. Brody's claim was "that her religious beliefs preclude[d] her from active participation in medically causing the pregnancy of *any unmarried woman*." *Id.* at 963 n.1.

9. *Id.* at 963.

10. *Id.* at 963-64.

11. *Id.* at 964.

12. *Id.*

13. *Id.*

14. *N. Coast Women's Care Med. Group, Inc. v. Super. Ct. of San Diego County (North Coast Women's Care)*, 40 Cal. Rptr. 3d 636, 640 (Ct. App. 2006).

15. *Id.*

16. *North Coast*, 189 P.3d at 964.

treatment at North Coast.<sup>17</sup> Benitez filed suit against Dr. Brody, Dr. Fenton, and North Coast, claiming that they discriminated against her on the basis of her sexual orientation in violation of the Unruh Act.<sup>18</sup> In their answer, the defendants asserted as an affirmative defense that their conduct was justified by the freedom of speech and freedom of religion protections of the federal and California constitutions.<sup>19</sup> The lower court granted Benitez's motion for summary adjudication of defendants' affirmative defense and the defendants appealed.<sup>20</sup>

The Court of Appeal reversed.<sup>21</sup> It first determined that the version of the Unruh Act in effect during the defendants' alleged misconduct should have been construed to prohibit discrimination on the basis of sexual orientation, but not to prohibit discrimination on the basis of marital status.<sup>22</sup> This meant a triable issue of material fact remained because the doctors were contending that their religious objections to performing an IUI for Benitez were based on her unmarried status, not her sexual orientation.<sup>23</sup> Thus, the court concluded that summary adjudication of defendants' affirmative defense was procedurally improper "because it effectively preclude[d] them from presenting any evidence at trial that their refusal to perform an IUI for Benitez was based on their religious beliefs regarding the propriety of performing the procedure for unmarried women."<sup>24</sup> The California Supreme Court reversed, holding that doctors could not assert free speech and free exercise of religion rights to "exempt them from . . . the Unruh Civil Rights Act's prohibition against sexual orientation discrimination."<sup>25</sup> The court first examined jurisprudence on the First Amendment right to free exercise of religion and ultimately concluded that, according to the modern U.S. Supreme Court standard from *Employment Division v. Smith*, "a religious objector has no federal constitutional right to an

---

17. *North Coast Women's Care*, 40 Cal. Rptr. 3d at 641.

18. *Id.*; see also Unruh Civil Rights Act, WEST'S ANN.CAL.CIV.CODE § 51 (West 2000) (prior to 2005 amendment) ("All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments. . . .").

19. *North Coast Women's Care*, 40 Cal. Rptr. 3d at 641. See also U.S. CONST. amend. I; CAL. CONST. art. I, § 4.

20. *North Coast Women's Care*, 40 Cal. Rptr. 3d at 641-42.

21. *Id.* at 638.

22. *Id.* at 643. While the language of the Unruh Act in effect during North Coast's alleged violation did not include either "marital status" or "sexual orientation" as prohibited bases of discrimination, prior decisions had extended it to cover sexual orientation, but not marital status. *Id.* In 2005, the Unruh Act was amended to explicitly "include both marital status and sexual orientation as prohibited bases of discrimination." *Id.* at 643 n.9. See also CAL. CIV. CODE § 51 (West 2005).

23. *North Coast Women's Care*, 40 Cal. Rptr. 3d at 642.

24. *Id.* at 647.

25. *N. Coast Women's Care Med. Group, Inc. v. San Diego County Super. Ct. (North Coast)*, 189 P.3d 959, 965 (Cal. 2008).

exemption from a neutral and valid law of general applicability.”<sup>26</sup> Furthermore, the California high court rejected defendants’ argument that their claim warranted strict scrutiny analysis because it involved “hybrid” free speech and free exercise rights, finding that “simple obedience to a law that does not require one to convey a verbal or symbolic message” does not abridge any speech right.<sup>27</sup> Applying this interpretation of the *Smith* standard to the case at hand, Justice Kennard made a comparison to *Catholic Charities of Sacramento, Inc. v. Superior Court* and determined that the Unruh Act was “valid and neutral.”<sup>28</sup> Thus, the defendants were not entitled to an exemption.<sup>29</sup>

The *North Coast* court then considered the doctors’ defenses under the state constitution and held that the defendants were not entitled to a religious exemption under the California Constitution’s free exercise provision.<sup>30</sup> Although the court had not yet determined the appropriate standard of review for article I, section 4 claims, the defendants’ claim failed even under strict scrutiny.<sup>31</sup> In this case, California had a “compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there [were] no less restrictive means for the state to achieve that goal.”<sup>32</sup> The

26. *Id.* at 965–66. In its analysis, the court cited *Employment Division, Oregon, Department of Human Resources v. Smith*, which held for no religious exemptions to a “neutral and valid law of general applicability” and repudiated prior Supreme Court tests requiring that the state demonstrate a compelling interest for applying a law that burdens the free exercise of religion. 494 U.S. 872, 885–89 (1990); *North Coast*, 189 P.3d at 965–66. *See also* *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (reaffirming *Sherbert* compelling interest test); *Sherbert v. Verner*, 374 U.S. 398 (1963) (applying a compelling interest test to a free exercise claim).

27. *North Coast*, 189 P.3d at 967 (quoting *Catholic Charities of Sacramento, Inc. v. Superior Court (Catholic Charities)*, 85 P.3d 67, 89 (Cal. 2004)). The “hybrid rights” theory is based on dicta in *Smith* stating “[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech.” 494 U.S. 872, 881 (1990). Lower courts have interpreted this language in various ways. *See* Jonathan B. Hensley, Comment, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119, 128–137 (2000) (describing different circuit approaches). In addition to determining that no speech right—and therefore no “hybrid right”—was implicated, the *North Coast* court expressed its skepticism that the “hybrid rights” theory could ever be a viable justification for invoking strict scrutiny. *See North Coast*, 189 P.3d at 967. In other words, the *Smith* “rule” is not entirely clear, but the *North Coast* court all but rejected any possibility of implying strict scrutiny analysis through *Smith* itself.

28. *North Coast*, 189 P.3d at 966–67; *see also Catholic Charities*, 85 P.3d at 94–95 (holding that a religiously affiliated nonprofit organization was not exempt on free exercise grounds from requirements of the Women’s Contraception Equity Act that employers provide prescription drug insurance coverage for contraceptives).

29. *North Coast*, 189 P.3d at 967.

30. *Id.* at 968. *See* CAL. CONST. art. I, § 4.

31. *North Coast*, 189 P.3d at 968 (quoting *Catholic Charities*, 85 P.3d at 91) (“Under strict scrutiny, ‘a law could not be applied in a manner that substantially burden[s] a religious belief or practice unless the state show[s] that the law represent[s] the least restrictive means of achieving a compelling interest.’”).

32. *Id.*

physicians could avoid conflicting with their religious beliefs by either refusing to perform the IUI for any North Coast patients or ensuring that every patient received “full and equal” access to the procedure from a non-objecting North Coast physician.<sup>33</sup> The court also rejected the defendants’ argument that language in the state constitution indicated a more demanding standard than strict scrutiny was required to evaluate free exercise claims.<sup>34</sup> Since the defendants’ claim failed under any possibly applicable standard, ranging from the *Smith* rule to strict scrutiny, the court noted that it did not need to determine yet which standard applied for state free exercise claims.<sup>35</sup>

Putting aside the debate over what *North Coast* actually accomplished in terms of ensuring equal access to reproductive assistance for homosexual patients,<sup>36</sup> the court’s decision not to determine the “as-yet unidentified rule” governing free exercise of religion claims under the state Constitution<sup>37</sup> extends a history of needless uncertainty over how much protection of the free exercise right the California Constitution guarantees. In the years since the *Smith* court changed the rules for evaluating federal free exercise claims,<sup>38</sup> the California Supreme Court has had multiple opportunities to respond with how it will judge free exercise claims under the state constitution.<sup>39</sup> On each of these occasions, the court has indicated that the California Constitution is “a document of independent force,” but has found it unnecessary to state just what that force is.<sup>40</sup> Furthermore, the court seems to have become less inclined to

---

33. *Id.* at 968–69.

34. *Id.* at 969. The defendants’ argument for an even stricter standard was based on the language in article I, section 4 stating that the “liberty of conscience” guaranteed by the provision “does not excuse acts that are licentious or inconsistent with the peace or safety of the State.” CAL. CONST. art. I, § 4. The *North Coast* court disagreed with defendants’ argument that this language “indicate[d] that religious objectors are free to disregard a particular state law unless doing so compromises the peace or safety of the state or is licentious.” *North Coast*, 189 P.3d at 969.

35. *Id.* at 968–69 (citing *Catholic Charities*, 85 P.3d at 91).

36. Compare Samuel Everett Jones, Note, *Much Ado About Nothing: The Significance of Benitez v. North Coast*, 11 J. GENDER RACE & JUST. 271, 299–302 (2008) (suggesting, before *North Coast* had been decided, that doctors could claim numerous other reasons for denying fertility treatment besides objections based on sexual orientation), with *First Amendment, supra* note 1, at 791–93 (noting that *North Coast* likely will improve access to fertility treatments, but may also eliminate general access because some doctors will choose not to perform IUI procedures at all).

37. See *North Coast*, 189 P.3d at 969 (quoting *Catholic Charities*, 85 P.3d at 91).

38. See *supra* notes 26–27. For a more thorough examination, see, e.g., Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651 (1991).

39. See *North Coast*, 189 P.3d at 968; *Catholic Charities*, 85 P.3d at 89; *Smith v. Fair Employment & Hous. Comm’n (FEHC)*, 913 P.2d 909 (Cal. 1996); see also CAL. CONST. art. I, § 24 (“Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.”).

40. *FEHC*, 913 P.2d at 930–31 (plurality opinion) (quoting *People v. Pettingill*, 578 P.2d 108, 118 (Cal. 1978)); see also *Catholic Charities*, 85 P.3d at 90–91. Perhaps tellingly, the *North Coast* court does not even quote the canonical “independent force” language in its determination that it was inappropriate to declare a governing standard in its ruling. See *North Coast*, 189 P.3d at

make any such judgment.

In *FEHC*, the California Supreme Court addressed for the first time the reach of the state constitution's free exercise clause in the wake of *Smith*.<sup>41</sup> A splintered court decided that a landlord could not cite free exercise of religion guarantees as a justification for housing discrimination against unmarried couples that violated California's Fair Employment and Housing Act (FEHA).<sup>42</sup> The plurality opinion was able to use the Federal Religious Freedom Restoration Act (RFRA)<sup>43</sup> to analyze the FEHA under strict scrutiny.<sup>44</sup> Having determined that the FEHA passed strict-scrutiny muster under the RFRA, the plurality concluded that "we need not address the scope and proper interpretation of California Constitution article I, section 4."<sup>45</sup> The dissenting opinions also did not address the federal or state constitutional issues because they determined the FEHA, as applied to the landlord, did not necessarily meet RFRA requirements; in other words, there was no reason to determine whether the FEHA went against the landlord's constitutional protections because it already violated the RFRA's statutory protections.<sup>46</sup> In fact, Justice Baxter criticized the plurality for failing its "obligat[ion] to further address petitioner's claims under the state Constitution in a meaningful manner."<sup>47</sup> For Justice Baxter, the plurality could not disregard the question of how much protection the California Constitution provides simply because it applied strict scrutiny to determine that *the RFRA* did not protect the landlord's religious freedoms.<sup>48</sup>

In *Catholic Charities*, with the RFRA declared unconstitutional, the California Supreme Court was forced to take a new tack in avoiding the state free exercise question. The case addressed the federal and state constitutionality of requiring that Catholic Charities of Sacramento, a public nonprofit corporation, comply with the California's Women's Contraception Equity Act (WCEA).<sup>49</sup> Catholic Charities argued that the WCEA violated its constitutional rights by forcing it to make an irreconcilable choice: provide prescription coverage for contraceptives to its employees or provide no prescription coverage at all, both of which ran against its religious and moral values.<sup>50</sup>

---

968.

41. 913 P.2d at 930-31.

42. *Id.* at 931 (plurality opinion).

43. Pub. L. No. 103-141, 1993 U.S.C.A.N. (107 Stat.) 1488, *invalidated* by *City of Boerne v. Flores*, 521 U.S. 507 (1997). The RFRA emerged as a congressional response to *Smith's* repudiation of the *Yoder* and *Sherbert* tests. *City of Boerne*, 521 U.S. at 512-13.

44. *FEHC*, 913 P.2d at 921-29 (plurality opinion).

45. *Id.* at 931 (plurality opinion).

46. *Id.* at 954-55 (Kennard, J., concurring and dissenting); *id.* at 975 (Baxter, J., concurring and dissenting).

47. *Id.* at 977 (Baxter, J., concurring and dissenting).

48. *See id.* at 976-77 (Baxter, J., concurring and dissenting).

49. *Catholic Charities of Sacramento, Inc. v. Superior Court (Catholic Charities)*, 85 P.3d 67, 73-74 (Cal. 2004).

50. *Id.* at 74-76.

Establishing the rationale that *North Coast* would later adopt,<sup>51</sup> the majority disposed of Catholic Charities' free exercise claim by first deeming it invalid at a federal level under the *Smith* test<sup>52</sup> and then finding it unnecessary "to declare the scope and proper interpretation of the California Constitution's free exercise clause" because "the [WCEA] passes strict scrutiny."<sup>53</sup>

While *North Coast*'s treatment of California's free exercise provision might be consistent with these recent, similarly flawed rulings, the *North Coast* opinion is particularly concerning because it seems to mark the court's last real inclination to decide the law surrounding state free exercise. In *FEHC*, Justice Baxter garnered two votes for his criticism of the plurality's decision not to meaningfully address the plaintiff's free exercise claim under the state constitution.<sup>54</sup> By the time of *North Coast*, even Justice Baxter was content to "concur in the majority's reasoning, and in its result."<sup>55</sup> The *North Coast* court did, of course, discuss and decide the defendants' state constitutional claim, but it did not provide any substantive guidance on California constitutional law.

Moreover, the court had previously laid a foundation it could rely on to make a definitive statement about the state free exercise clause. In *Sands v. Morongo Unified School District*, a plurality of the court found that a public high school's invocations and benedictions during a graduation ceremony violated the Establishment Clauses of the federal and state constitutions.<sup>56</sup> In a concurring opinion, Justice Mosk defended the plurality opinion's choice of ruling on both federal and state grounds, writing that "[s]tate courts are, and should be, the first line of defense for individual liberties," and noting the strain on judicial economy of leaving the question unresolved.<sup>57</sup> Then-chief justice Lucas, writing a separate concurrence, disagreed on reaching the state establishment clause question because the federal Constitution granted the requisite protection, the California Supreme Court would be addressing similar issues shortly, and it would be beneficial to have the U.S. Supreme Court's construction of the "virtually identical" language in the First Amendment's

---

51. See *N. Coast Women's Care Med. Group v. San Diego County Superior Court* (*North Coast*), 189 P.3d 959, 966–969 (Cal. 2008).

52. *Catholic Charities*, 85 P.3d at 81–89.

53. *Id.* at 91.

54. *FEHC*, 913 P.2d at 975–77 (Baxter, J., concurring and dissenting).

55. *North Coast*, 189 P.3d at 971 (Baxter, J., concurring). Cf. *Catholic Charities*, 85 P.3d at 107 (Justice Brown served as lone dissenter, arguing that the court should adopt and apply a strict scrutiny test for state constitutional free exercise claims).

56. 809 P.2d 809, 821 (Cal. 1991) (plurality opinion).

57. *Id.* at 836 (Mosk, J., concurring). Justice Mosk stands in good company for his notion that state courts can and should use their independent state constitutions to provide additional protection for individual liberties in appropriate circumstances, as indicated by Justice Mosk's citation to writings of Justices Rehnquist and Brennan. *Id.* (citing *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977)); see also Choper, *supra* note 38, at 685–86 (arguing that the *Smith* rule took away too much protection of individual free exercise rights).

Establishment Clause.<sup>58</sup> However, even Chief Justice Lucas agreed that the interests of judicial economy might take precedence when the language and history of the state's constitution were clearly different.<sup>59</sup>

Thus, a majority of the *Sands* court arguably stood for the proposition that the California Supreme Court should resolve state constitutional issues independently from federal ones when the following conditions are met: (1) significant differences in constitutional language and history; (2) a potentially different result from a ruling on the federal issue; and (3) a need for judicial economy.<sup>60</sup> Chief Justice Lucas argued against ruling on state constitutional grounds because the state claim was not different enough from the federal claim. The federal Constitution already disposed of the claim and similar claims (i.e., the state constitutional ruling would make no difference in the present result or in future cases).<sup>61</sup> California courts could thus benefit from further national debate or a U.S. Supreme Court ruling on the *similar* Establishment Clause language.<sup>62</sup> Justice Mosk, on the other hand, clearly felt the free exercise clauses in the California and U.S. Constitutions were different enough to warrant a ruling on state grounds.<sup>63</sup> Even discounting as extreme Justice Mosk's implication that state authorities should automatically be "controlling" on issues of individual liberties,<sup>64</sup> there remains considerable middle ground between Chief Justice Lucas's and Justice Mosk's views. Both seem to agree that when the state and federal constitutions differ enough, efficiency dictates a resolution of the state issue. In other words, satisfying the above-listed conditions provides a very strong basis, if not necessity, for deciding the state issue on its own grounds.

*North Coast* satisfied these conditions. As Justice Mosk previously pointed out, unlike the Establishment Clause, "the free exercise clause . . . of article I, section 4, is without parallel in the federal Constitution."<sup>65</sup> Secondly,

58. *Sands*, 809 P.2d at 835 (Lucas, C.J., concurring).

59. *Id.* (Lucas, C.J., concurring).

60. Obviously, these conditions are not completely independent. For example, "the need for judicial economy" is not an independent prerequisite but rather a perceived benefit of resolving the state constitutional issue assuming conditions (1) and (2) are met. Similarly, significant differences in constitutional language create the possibility of potentially different results. However, I enumerate the three conditions, establishing when a California constitutional claim is different enough from a federal constitutional claim to warrant independent treatment.

61. See *Sands*, 809 P.2d at 833 ("[O]ur judgment does not rest on the state Constitution . . ."); see also *id.* at 835 ("[I]f the state constitutional issue retains significance, it will resurface in another case."). Note that this argument parallels that presented by the dissents in *FEHC*. See *supra* notes 46-48 and accompanying text.

62. See *Sands*, 809 P.2d at 835 (Lucas, C.J., concurring).

63. See *id.* at 836 (Mosk, J., concurring). It is worth noting the special emphasis Justice Mosk places on the unique history and language of the "free exercise" clause of the California Constitution. See *id.* at 837 (Mosk, J., concurring); see also *infra* note 65 and accompanying text.

64. See *Sands*, 809 P.2d at 836 (Mosk, J., concurring).

65. *Id.* at 839 (Mosk, J., concurring); see also JOSEPH R. GRODIN ET AL., *THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE* 44 (1993) (suggesting that after *Smith*, "the state constitutional provision may play a greater role in [free exercise] cases").

the *North Coast* defendants *themselves* seemed to realize their claim for religious exemption depended on a favorable interpretation of the state constitution, as opposed to the Federal Constitution, even arguing that “the *Smith* rule appears to be in flux, which is the reason why this case should be decided on state constitutional grounds.”<sup>66</sup> Finally, *North Coast* was the third time since *Smith* that the California Supreme Court had the option of interpreting article I, section 4.<sup>67</sup> Lower courts will undoubtedly confront similar free exercise questions, but will lack a clear judicial standard for resolving them.

It is worth emphasizing this last point regarding lower courts with two very plausible examples of free exercise cases following *North Coast*. The first is a lawsuit brought by students against a private high school alleging that their expulsion for “non-Christian” homosexual conduct violated the Unruh Act’s sexual orientation antidiscrimination provisions.<sup>68</sup> Under the *Smith* rule, the school would not appear to have a free exercise exemption to the Unruh Act. However, the school could still conceivably try to claim an exemption under the California Constitution by arguing for a higher standard of review, thereby burdening lower courts for the fourth time with trying to discern California’s free exercise standard of review.<sup>69</sup>

Similarly, we can look at a second example that comes directly from Justice Baxter. He notes in his *North Coast* concurrence that, assuming strict scrutiny applies, the balance of competing interests might weigh in favor of a solo practitioner, as opposed to a clinical doctor, who denies fertility treatment to a lesbian couple.<sup>70</sup> In one sense, Justice Baxter may be hinting that strict scrutiny is in fact the appropriate standard. At the same time, however, his example illustrates that the *North Coast* opinion did not even clarify what framework a lower court should use in deciding a conceivable, and indeed quite similar, future case. If the lower court were to find that the state’s compelling interest did not justify the burden on a solo practitioner’s free exercise rights, it still would have no guidance on whether or not to declare the solo practitioner’s conduct illegal. A declaration by the *North Coast* court regarding a standard

---

66. Answer Brief on the Merits at 57, *N. Coast Women’s Care Med. Group, Inc. v. Superior Court of San Diego County*, No. S142892 (Cal. Dec. 21, 2006). The defendants spent approximately thirty pages arguing for strict scrutiny or stronger under the California Constitution, *see id.* at 23–56, but less than ten pages arguing for strict scrutiny under the First Amendment, *see id.* at 56–64.

67. *See supra* note 39 and accompanying text.

68. *Doe v. Cal. Lutheran High Sch. Ass’n*, 88 Cal. Rptr. 3d 475, 477 (Ct. App. 2009).

69. In the actual case, the school chose not to argue that any of its free exercise rights were violated, “apparently recognizing that [*North Coast*] would be adverse authority on that point.” *Id.* at 485 n.7. I am not as convinced as the appellate court that *North Coast* is clearly adverse—under strict scrutiny analysis, equal access to private education may not be as compelling an interest as equal access to medical treatment. Regardless, the court did not need to address this argument and rather held the school was exempt because it was not a “business establishment” within the meaning of the Unruh Act. *See id.* at 477.

70. *N. Coast Women’s Care Med. Group, Inc. v. San Diego County Superior Court (North Coast)*, 189 P.3d 959, 971 (Cal. 2008) (Baxter, J., concurring).

could have alleviated this problem.

Ultimately, the *North Coast* court had substantial footing on which to establish any standard of review it thought appropriate. As Justice Brown pointed out in *Catholic Charities*, multiple states with similar constitutional language have applied a strict scrutiny standard.<sup>71</sup> On the other hand, New York has recently ruled that it would follow a *Smith*-like standard in reviewing state free exercise claims.<sup>72</sup> Also, as mentioned above, numerous commentators and critics have discussed the wisdom of the *Smith* rule, especially as it pertains to antidiscrimination laws.<sup>73</sup> Thus, even given the relative novelty of *North Coast*'s factual premise, the court was not wandering blindly in uncharted areas. Weighing liberty-of-conscience interests against equality interests is undoubtedly a difficult task, and not one the court should undertake hastily. However, because of the importance of this question, the *North Coast* court should have at least clarified what scales of justice California courts should use to balance these fundamental values.

---

71. *Catholic Charities of Sacramento, Inc. v. Super. Ct. (Catholic Charities)*, 85 P.3d 67, 107 (Cal. 2004) (Brown, J., dissenting). While I have tried to remain mostly agnostic as to which standard the *North Coast* court should have chosen, I do believe strict scrutiny is the most appropriate. Even if strict scrutiny is no longer "fatal" and "a state's interest is compelling if the state says it is," see *id.* at 105, there is value in the state and court declaring in a determinative fashion that equal access to medical treatment is a societal priority. The court's fundamental message is strengthened because the outcome of the case actually turns on it. In other words, rather than simply saying the doctors' conduct is illegal under any standard, the court could have properly and precedentially defined the compelling interest so as to make clear that any conduct even *similar to* the doctors' is illegal, or at least only justifiable if an unavoidable exercise of individual rights. Furthermore, I agree with concerns that the *Smith* rule may place too much reliance on legislatures rather than courts to create exemptions for individual free exercise liberties. See, e.g., Choper, *supra* note 38, at 685-86.

72. *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 467 (N.Y. 2006). For additional support, the California Supreme Court could even use the historical basis of the California Constitution. See GRODIN, *supra* note 65, at 43 (noting that the California Constitution's free exercise language "is based on the constitution of New York").

73. See, e.g., Michael P. Moreland, *Religious Free Exercise and Anti-discrimination Law*, 70 ALB. L. REV. 1417 (2007); John Ott, *Should Catholic Charities Have to Pay for Contraceptive Drugs?*, in *SANCTIONING RELIGION?: POLITICS, LAW, AND FAITH-BASED PUBLIC SERVICES* 89 (David K. Ryden & Jeffrey Polet eds., 2005); Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston Was Victim to the Clash Between Gay Rights and Religious Freedom*, 15 DUKE J. GENDER L. & POL'Y 297 (2008); Cass R. Sunstein, *Sexual Equality vs. Religion: What Should the Law Do?*, BOSTON REVIEW ONLINE, Oct./Nov. 1998, <http://www.bostonreview.net/BR23.5/Sunstein.html>.