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Mel Cousins
Alexander Blewett III School of Law

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Social security litigation[1] and health care litigation[2] have played prominent roles in the development of the jurisprudence concerning the religious clauses of the U.S. Constitution.[3] This note considers an interesting recent decision of the Montana Supreme Court that addressed the constitutionality of an extension of coverage under the Montana workers' compensation code to colonies of the Hutterite (or Hutterian or Hutterische) Brethren Church. In *Big Sky Colony v. Montana Department of Labor and Industry*,[4] the Montana Supreme Court, by a narrow majority, held the extension constitutional. The Court held that the extension of coverage did not breach the Free Exercise, Establishment, or Equal Protection Clauses of the U.S. Constitution.[5]

Following the Montana Supreme Court's decision, Big Sky Colony, Inc. (Big Sky Colony) unsuccessfully petitioned the U.S. Supreme Court for certiorari in this case.[6] There is little doubt the Court was correct to refuse certiorari as the main argument advanced—that the analytical approach adopted by the Montana Supreme Court was incorrect—had not been made in detail to the Montana Supreme Court. Nonetheless the issues concerning how to determine whether a law is "neutral" and "generally applicable" are interesting and are discussed in this note. Although the petition was ultimately unsuccessful, it would suggest that unanswered questions remain both in relation to the analytical approach to be adopted and in terms of the compatibility of

* Mel Cousins qualified as a barrister-at-law at the King's Inns, Dublin and has a PhD from Glasgow Caledonian University. He has worked as a social policy adviser to a wide range of organizations including the Asian Development Bank, European Commission, the World Bank, AusAID, and UN agencies in a wide range of countries including Albania, Azerbaijan, China, Jordan, Kyrgyzstan, Lithuania, Mongolia and Romania. He has written extensively on social security and social policy issues from both a legal and policy perspective and has lectured at NUI Maynooth and Trinity College, Dublin. Mel Cousins is attached to the School of social work and social policy at Trinity College Dublin and is involved in a range of ongoing social policy research at national and international level.

[1] *See e.g. Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Rev. Bd. of Ind. Empl. Sec. Div.,* 450 U.S. 707 (1981); *U.S. v. Lee*, 455 U.S. 252 (1982); *Bowen v. Roy*, 476 U.S. 693 (1986); *Hobbie v. Unempl. Apps. Comm'n of Fla.*, 480 U.S. 136 (1986); *Frazee v. Ill. Dep't of Empl. Sec.*, 489 U.S. 829 (1989).

[2] *See e.g. Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014) (brought under the Religious Freedom Restoration Act (RFRA) rather than the First Amendment).

[3] This is in contrast to the position under the European Convention on Human Rights where there have been relatively few such cases. *See Skugar v. Russia*, 40010/04, 3 December 2009.

[4] 291 P.3d 1231 (Mont. 2012), *cert. denied*, 134 S. Ct. 59 (2013).

[5] *Id.* at 1234.

[6] *Big Sky Colony, Inc. v. Mont. Dep't of Lab. & Indus.*, 134 S. Ct. 59 (2013) (denying certiorari).

various exclusions from the workers' compensations code and the Constitution. Part I of this note sets out the facts, while Parts II–V outline the ruling of the Montana Supreme Court relative to the Free Exercise Clause (Parts II and V), the Establishment Clause (Part III), and Equal Protection (Part IV). Part VI discusses the issues raised in the petition and Part VII concludes the note.

I. THE FACTS OF THE CASE

Big Sky Colony is a religious corporation established under Montana law and a community of the Hutterite Brethren Church.[7] All Colony members must belong to the Church and "agree to 'live a communal life and follow the teaching[s] and tenets of the [Church].'"[8] According to the record:

> a hallmark of the Hutterite religion is the communal lifestyle where religious exercise and labor are not divisible because '[a]ll labor and support provided by members to the Colony is done for their own personal religious purpose without promise or expectation of compensation. The performance of labor and support for the Colony is an act of religious exercise.' Hutterites eat meals, worship, work, and are educated entirely communally and they do not associate with 'non-members.' The Membership Declaration, to which every member of the Colony must subscribe, affirms each member's responsibility to relinquish current and future property rights to the Colony, and members are not permitted a wage or salary. In fact, the Hutterite faith prohibits the payment of wages for labor performed by its members.[9]

The Montana Department of Labor determined the Workers' Compensation Act did not apply to the Colony or its members as the Colony did not fall within the definition of "employer" as set forth in the Act, and the Colony's members did not fall within the statutory definition of "employee."[10] It appears complaints were made to the

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[7] *Big Sky Colony, Inc.*, 291 P.3d at 1234.

[8] *Id.* (quoting Big Sky Colony's Articles of Incorporation).

[9] *Id.* at 1247 (Nelson, J., dissenting).

[10] *Id.* at 1234 (majority). This determination appears to be correct although the Ninth Circuit, in a case involving a different Hutterite colony, determined that a colony member was an employee for the purposes of the federal income tax code. *Stahl v. U.S.*, 626 F.3d 520, 527 (9th Cir. 2010) (for final decision see 861 F. Supp. 2d 1226, 1231 (E.D. Wa. 2012)). It is arguable that the Ninth Circuit paid too much attention to the incidents of the members' work and too little attention to the fundamental relationship between members and the community. A number of district courts

Department of Labor and in response the Department proposed the relevant provisions of House Bill (HB) 119[11] "to address complaints received 'about Hutterite colonies competing with other Montana businesses, such as contractors, without having to provide workers' compensation insurance."[12]

Section 6 of HB 119 provides that the definition of "employer" under the workers' compensation code includes:

> a religious corporation, religious organization, or religious trust receiving remuneration from nonmembers for agricultural production, manufacturing, or a construction project conducted by its members on or off the property of the religious corporation, religious organization, or religious trust.[13]

Likewise the definition of "employee" was amended to include "a member of a religious corporation, religious organization, or religious trust while performing services for the religious corporation, religious organization, or religious trust . . . ."[14]

Although the wording of these clauses does not specify all particular religious groups, the evidence showed they would apply primarily (or exclusively) to the Hutterites. The Colony filed suit, arguing the definitions breached the Free Exercise, Establishment, and Equal Protection Clauses of the U.S. Constitution; the Ninth Judicial District Court agreed.[15] The district court ruled that Sections 6 and 7 were not neutral as the burdens imposed fell "only on the Hutterite religion," and therefore in violation of the Free Exercise Clause.[16] The court further determined Sections 6 and 7 were not generally applicable as the bill "unquestionably targets only the Hutterite religious practice of communal living."[17] Therefore, the court applied strict scrutiny, which led it to reject the Department's claim of any compelling state interest being served by Sections 6 and 7.[18]

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have come to the opposite conclusion which arguably makes better law. *Israelite H. of David v. U.S.*, 58 F. Supp. 862, 863 (W.D. Mich. 1945); *Wollman v. Poinsett Hutterian Brethren, Inc.*, 844 F. Supp. 539, 542 (D.S.D. 1994).

[11] 2009 Mont. Laws Ch. 112 (HB 119 is an omnibus measure covering a range of different changes to the workers' compensation code).

[12] *Big Sky Colony, Inc.*, 291 P.3d at 1248 (Nelson, J., dissenting).

[13] Mont. Code Ann. § 39–71–117(1)(d) (2013).

[14] *Id.* at § 39–71–118(1)(i).

[15] Or. Granting Petr.'s Mot. for S.J. at 24–25, *Big Sky Colony, Inc v. Mont. Dep't of Lab. & Indus.*, http://perma.cc/HW9L-68VN (http://www.becketfund.org/wp-content/uploads/2013/03/District-Court-Opinion.pdf) (Mont. 9th Dist. Ct. Sept. 6, 2011) (No. DV-10-4) (summarized by the Montana Supreme Court in *Big Sky Colony, Inc.*, 291 P.3d at 1235).

[16] *Id.* at 17.

[17] *Id.*

[18] *Id.* at 24.

Turning to the Establishment Clause claim, the district court applied the U.S. Supreme Court's test from *Lemon v. Kurtzman*.[19] The court first concluded that Sections 6 and 7 impermissibly "targeted a group defined by [its] religion."[20] Second, the primary effect of this impermissible targeting "would be to inhibit the Colony in the practice of their religion."[21] Finally, the court concluded that excessive entanglement with the state would ensue as it "appears evident that a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that only particular areas of Hutterite activities are scrutinized and that First Amendment rights are otherwise respected."[22]

The district court also ruled that Sections 6 and 7 violated the Colony's right to equal protection.[23] Sections 6 and 7, according to the court, "specifically identifie[d] religious organizations" and were "crafted to target a particular religious organization."[24] The separate classification created by Sections 6 and 7 "treats Hutterites differently from other religious organizations and further targets religious organizations generally."[25] This classification, according to the district court, failed to satisfy even the rational basis standard that applies to constitutional challenges to workers' compensation laws.[26] The Department appealed to the Montana Supreme Court.[27]

II. THE FREE EXERCISE CLAIM

The First Amendment to the U.S. Constitution provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[28] Justice Kennedy recently outlined the importance of free exercise of religion in the American constitutional tradition:

> In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free

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[19] 403 U.S. 602 (1971).
[20] Or. Granting Petr.'s Mot. for S.J. at 20.
[21] *Id.* at 21.
[22] *Id.* at 23.
[23] *Id.* at 25.
[24] *Id.* at 24.
[25] *Id.*
[26] Or. Granting Petr.'s Mot. for S.J. at 24.
[27] *Big Sky Colony, Inc.*, 291 P.3d at 1233.
[28] U.S. Const. amend. I.

> exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.[29]

From the 1960s to 1980s, the U.S. Supreme Court developed a "balancing" approach to its interpretation of the Free Exercise Clause. Under this approach, where it was shown a person had a claim involving a sincere religious belief, and a state action constituted a substantial burden on the person's ability to act on that belief, the state was required to show it acted in furtherance of a "compelling state interest" and had pursued that interest in the manner least restrictive, or least burdensome, to the exercise of the religion.[30] For example, in *Sherbert v. Verner*, the Supreme Court ruled that the denial of unemployment benefits to a member of the Seventh-day Adventist Church, on the basis that she refused to work on Saturdays, was an unconstitutional burden on the free exercise of her religion.[31] Conversely, in *United States v. Lee*, the Court rejected a claim for exemption from social security taxes by an Amish farmer, and held that the imposition of social security taxes was not unconstitutional.[32] The Court stated the social security system would be undermined if individuals were allowed to opt out of coverage, and further such a system would be difficult, if not impossible, to administer.[33] Thus, while accepting that Lee's claim involved a religious belief which was substantially burdened by state action, the Court upheld the law, as it involved a compelling state interest and Congress had accommodated the religious views of those who had objected to compulsory insurance.[34]

However, in *Bowen v. Roy*, the Court began to move away from the balancing approach.[35] *Bowen* involved the assignment of a social security number to a child whose Native American parents objected on religious grounds.[36] Here, the Court (by an 8–1 majority) did not apply a balancing analysis, but ruled that the Free Exercise Clause did not grant to an individual the right to dictate the conduct of the State's internal

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[29] *Burwell*, 134 S. Ct. at 2785 (Kennedy, J., concurring). Justice Kennedy went on to point out that "in a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult." *Id.*

[30] *Frazee*, 489 U.S. at 832–835.

[31] 374 U.S. at 408–409.

[32] 455 U.S. at 252.

[33] *Id.* at 259–261.

[34] *Id.* at 252–253.

[35] 476 U.S. at 693 (The U.S. District Court had upheld Roy's claims. *Roy v. Cohen*, 590 F. Supp. 600 (M.D. Penn. 1984); *see also* Jane J. Lawless, Jr., Roy v. Cohen*: Social Security Numbers and the Free Exercise Clause*, 36 Am. U. L. Rev. 217 (1986)).

[36] *Id.* at 695–696.

procedures.[37] Thus, the State could not be prevented from using the social security number (which had already been assigned to the child).[38] *Bowen* also involved the question as to whether the parents could be required to use the social security number when making a claim for benefits on behalf of their child.[39] Here the Court was divided.[40] Three members of the Court (Chief Justice Burger, joined by Justices Powell and Rehnquist) opined that the requirement to provide a social security number was not in breach of the Free Exercise Clause as it was facially neutral in religious terms, applied to all applicants for benefits, and promoted a legitimate and important public interest.[41] These Justices proposed a lower standard of review than the "compelling interest" test, and instead proposed (absent proof of intended religious discrimination) the state should only be required to show that a neutral and uniform provision is a reasonable means of promoting a legitimate public interest.[42] Three members of the Court (Justices O'Connor, Brennan, and Marshall), although agreeing that the State's use of a social security number fell outside of the protection of the Free Exercise clause, disagreed as to whether the parents could be required to use it.[43] Applying the existing balancing approach, the Justices contended that an exemption from the requirement to use the social security number should be granted and that this would "not demonstrably diminish the Government's ability to combat welfare fraud."[44] Thus, after *Bowen* it appeared that there was a new category of claims that were not protected by the Free Exercise Clause, *i.e.* those concerning the impact of the State's "internal procedures" on religious exercise. It was unclear whether the traditional *Sherbert* test still applied or whether a new (lesser) standard should be applied to general "neutral" laws.

This position was clarified in *Employment Division, Department of Human Resources of Oregon v. Smith*,[45] where the Court moved further away from the balancing approach albeit without overruling *Sherbert* and the line of cases that apply the *Sherbert* test.[46] *Smith*

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[37] *Id.* at 700–701.

[38] *Id.* at 701.

[39] *Id.* at 695.

[40] The formal outcome was that the decision of the lower court (that the parents could not be forced to provide a social security number for their child as a condition to eligibility for the benefits in question) was vacated. *Id.* at 712.

[41] *Bowen,* 476 U.S. at 701–712.

[42] Two Justices (Justices Blackmun and Stevens) agreed with the decision to vacate, but on the basis that the issue was moot or not ready for decision. *Id.* at 714 (Blackmun, J. concurring); *Id.* at 717, 724–725 (Stevens, J., concurring). Justice White dissented generally on the basis that the existing *Sherbert* test should be applied. *Id.* at 733 (White, J., dissenting).

[43] *Id.* at 724–733 (O'Connor, Brennan & Marshall, JJ., dissenting in part and concurring in part).

[44] *Id.* at 728.

[45] 494 U.S. 872 (1990).

[46] *See generally* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308 (1991); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109 (1990); James E. Ryan, Smith *and the Religious*

involved two Native Americans who were fired because of their use of a sacramental, hallucinogenic drug, and subsequently denied unemployment benefits.[47] The use of the drug in question was illegal under state law[48] (although the law was not enforced in practice against religious users).[49] Here (by a 5–4 majority) the Court rejected the application of the balancing test where the provision objected to was a generally applicable and otherwise valid law and where the burden on religion was not the object but only an incidental effect of the law.[50]

The Supreme Court's approach has led to a dichotomous two-tier approach under the First Amendment. Either a law is a "neutral [and] generally applicable law"[51] or strict scrutiny applies. In *Big Sky Colony* the Montana Supreme Court held that the law was facially neutral and served a secular purpose, imposing only an incidental burden on religious conduct.[52] In contrast to the district court, which saw HB 119 as ''unquestionably target[ing] only the Hutterite religious practice of communal living,"[53] the majority saw the law as simply extending the already broad coverage of the workers' compensation code. The Court held that "HB 119 simply adds to the scope of the workers' compensation system religious corporations that engage in commercial activities with non-members for remuneration through its expansion of the definition of 'employer.'"[54]

The majority noted that both state and federal precedent indicated there would be no difficulty in imposing coverage if the Colony's members were employees (under the normal definition of the term).[55] The court concluded that

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Freedom Restoration Act: An Iconoclastic Assessment, 78 Va. L. Rev. 1407 (1992); Marci A. Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 Cardozo L. Rev. 1671, (2011). Some state courts have continued to apply a balancing approach under state constitutional provisions. *Catholic Charities of Sacramento v. Super. Ct. of Sacramento*, 85 P.3d 67 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006).

[47] *Smith*, 494 U.S. at 874.

[48] Or. Rev. Stat. Ann. § 475.752 (West 2014).

[49] *Smith*, 494 U.S. at 911. The background to this case is rather more complex than can be outlined here and readers are referred to the decision and the various comments for further elucidation.

[50] This approach had been foreshadowed in Justice Stevens's brief opinion (concurring in the judgment) in *Lee*. 455 U.S. at 261–263. For a subsequent application of this approach in a social security and healthcare context, see *Catholic Charities of Sacramento*, 85 P.3d 67; *Serio*, 859 N.E.2d 459. For a recent summary application in the social security field, *see S.T. ex rel. Trivedi v. Napolitano*, 2012 WL 6048222 (S.D. Tex. 2012). The impact of *Smith* was, in part, reversed by the Religious Freedom Restoration Act (RFRA) of 1993. However, this is not relevant to the Montana case at hand as the RFRA does not apply to the states. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[51] *Smith*, 494 U.S. at 881.

[52] *Big Sky Colony, Inc.*, 291 P.3d at 1234–1240.

[53] Or. Granting Petr.'s Mot. for S.J. at 17.

[54] *Big Sky Colony, Inc.*, 291 P.3d at 1237 (citing Mont. Code Ann. § 39–71–117).

[55] *Id.* (citing *St. John's Lutheran Church v. St. Comp. Ins. Fund*, 830 P.2d 1271, 1277 (Mont. 1992)); *Id.* at 1239 (citing *S. Ridge Baptist Church v. Indus. Comm'n of Ohio,* 911 F.2d 1203 (6th Cir. 1990)).

> [t]he decision of the legislature to include in the definition of 'employer' religious corporations that voluntarily engage in commercial activities with non-members for remuneration fails to establish evidence of discrimination against religious organizations.[56]

III. THE ESTABLISHMENT CLAUSE

As set out above, the First Amendment prohibits the establishment of religion. The U.S. Supreme Court, in *Lemon v. Kurtzman*, established a three-prong test which requires that the government action must (i) have a secular legislative purpose; (ii) not have the primary effect of either advancing or inhibiting religion; and (iii) not result in an "excessive government entanglement" with religion.[57] However, the current status of the *Lemon* test is unclear. In *Cutter v. Wilkinson*,[58] the Supreme Court did not apply *Lemon*, but adopted a different approach.[59] In addition, while the Establishment Clause has been applied to acts seen as "hostile" to religion,[60] it is rather hard to see how targeting a religion would run afoul of this Clause without already infringing upon the Free Exercise Clause.

In any case, the Montana Supreme Court applied *Lemon* without addressing its status.[61] Under the first prong of *Lemon*, the majority found that the extension of coverage to members of religious organizations engaged in commercial activities with non-members for remuneration furthered the secular purpose of promoting the health, safety, and welfare of workers.[62] In doing so, the Court overturned the district court's determination that HB 119 was wholly motivated by an impermissible purpose.[63]

Turning to the second prong of *Lemon*, the Court concluded:

> No reasonable observer would construe the legislature's explicit inclusion in the workers'

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[56] *Big Sky Colony, Inc.*, 291 P.3d at 1240–1241.

[57] *Lemon*, 403 U.S. at 612–613.

[58] 544 U.S. 709 (2005).

[59] The Court did not discuss why it was not applying *Lemon*, though Justice Thomas described it as "discredited" in his concurrence. *Id.* at 726 n. 1. Other sources also indicate the *Lemon* test has fallen from grace. *See e.g.* Marci A. Hamilton, *The Establishment Clause During the 2004 Term: Big Cases, Little Movement*, 2005 Cato Sup. Ct. Rev. 159 (2005); Steven Goldberg, Cutter *and the Preferred Position of the Free Exercise Clause*, 14 Wm. & Mary Bill Rts. J. 1403, 1406–1407 (2006); Frank J. Ducoat, *Inconsistent Guideposts: Van Orden, McCreary County, and the Continuing Need for a Single and Predictable Establishment Clause Test,* 8 Rutgers J.L. & Religion 14, 15 (2007).

[60] *See* Frank S. Ravitch, *The Supreme Court's Rhetorical Hostility: What Is "Hostile" to Religion Under the Establishment Clause?* 2004 BYU L. Rev. 1031 (2004).

[61] *Big Sky Colony, Inc.*, 291 P.3d at 1241–1242.

[62] *Id.* at 1241.

[63] Or. Granting Petr.'s Mot. for S.J. at 19–20.

> compensation system of religious corporations that engage in commercial activities with non-members for remuneration, along with various other types of corporations and entities, as sending a message of disapproval of religion.[64]

Finally, the Court examined the "excessive entanglement" prong. Citing to several similar cases where the courts had rejected arguments a recordkeeping requirement would negatively affect the religious institution,[65] the majority concluded that the recordkeeping requirement—imposed to establish compliance with Montana's workers' compensation system—constituted a valid regulation of the Colony's commercial activities.[66]

Indeed such a conclusion is compelled by the authorities and the district court's contrary finding is unsustainable.[67] However, the Court's discussion is rather diffuse, and overlapping arguments are raised at different stages in the ruling. The Court also advances somewhat irrelevant arguments, such as the discussion of *Stahl v. United States*, a case in which the Ninth Circuit ruled that a member of another Hutterite colony was an "employee" for income tax purposes.[68] This is wholly irrelevant to the excessive entanglement issue being discussed.

IV. EQUAL PROTECTION

Finally, the Supreme Court considered the Colony's Equal Protection claim. The Colony argued HB 119 treated it differently than any other religious groups and treated religious groups differently from non-religious groups.[69] In fact, the Colony should have argued it was being treated the same as "different" groups. The Colony first argued that due to its rules preventing individual ownership of property, the law affected it differently than other religious groups.[70] The Court rejected this, stating

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[64] *Big Sky Colony, Inc.*, 291 P.3d at 1241.

[65] *Id.* at 1241–1243 (citing *Tony & Susan Alamo Found. v. Sec. of Lab.*, 471 U.S. 290, 303 (1953); *Stahl v. United States*, 626 F.3d 520, 521–522 (9th Cir. 2010); *Jimmy Swaggart Ministries*, 493 U.S. 378, 396 (1990); *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1210–1211 (6th Cir. 1990)).

[66] *Id.* at 1241–1242.

[67] *See e.g. Alamo Found. v. Sec. of Lab.*, 471 U.S. 290 (1985); *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203 (6th Cir. 1990); *U.S. v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000).

[68] *Stahl*, 626 F.3d at 521–522 (cited at *Big Sky Colony, Inc.*, 291 P.3d at 1242–1243) (The Ninth Circuit never even mentions the Establishment Clause.).

[69] *Big Sky Colony, Inc.*, 291 P.3d at 1244.

[70] *Id.* at 1244. Contrary to the Colony's argument, other religions do ban property ownership. *See e.g. Israelite House of David v. U.S.*, 58 F. Supp. 862, 863–864 (W.D. Mich. 1945).

> nothing prevents an injured Colony member from refraining to file a workers' compensation claim or returning any workers' compensation claim award to the Colony. More importantly, nothing in HB 119 or any other provision of the Workers' Compensation Act prevents the Colony from proceeding to excommunicate a member who receives compensation for lost wages and refuses to give the money to the Colony. HB 119 treats the Colony no differently than any religious groups that do not prevent ownership of property.[71]

It also rejected the argument that the Colony was treated differently than non-religious employers, holding

> HB 119 treats religious organizations no differently than any other employer under the workers' compensation system. A review of the complete list of entities that qualify as an 'employer' for purposes of the workers' compensation system reveals that the Workers' Compensation Act creates no separate classification under HB 119 that singles out religious groups for different treatment.[72]

The Court found that the Colony's failure to establish that HB 119 created similarly situated groups that receive unequal treatment ended its inquiry and meant that the Court did not need to evaluate whether the alleged disparate treatment was rationally related to a legitimate government interest.[73]

V. THE DISSENT

Three Justices dissented on the Free Exercise issue. The dissent did not refer to the Establishment Clause or Equal Protection arguments. The dissent—with some justification—criticized the majority for using "waves of generic statements that fail to account for the facts of this case, the arguments of the Colony, and the applicable legal tests."[74] The dissent argued the majority made "no effort to determine whether the challenged legislation constitutes a religious gerrymander, even though

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[71] *Id.* at 1244 (internal citations omitted).
[72] *Id.* at 1245.
[73] *Id.*
[74] *Id.* at 1246 (Rice, J., dissenting).

courts 'must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'"[75]

In contrast, the dissent determined, following *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, that the state had "enacted [HB 119] to define and *target* only the Hutterite religion for inclusion within the system,"[76] and that "the effect of HB 119 [was] to create a religious gerrymander that improperly single[d] out one religion."[77] Therefore, the dissent opined strict scrutiny should have applied.[78] Further, the dissent found no compelling state interest for the law.[79] Addressing the first justification advanced by the State, that HB 119 protected the "Uninsured Employers' Fund (UEF) from potential liability,"[80] the dissent found the justification baseless since "prior to HB 119, a claim could not have been filed by a Hutterite member against the UEF because the Colony was not an 'employer' subject to the Act."[81] As to the state's second justification, that HB 119 ensured "fair competition among businesses by eliminating the Hutterites' perceived advantage,"[82] the dissent found that "the [s]tate ha[d] provided no authority for the proposition that ensuring 'competitive fairness' among the state's businesses is an objective of the workers' compensation system."[83]

The state also advanced a third argument that "workers' compensation, like social security, 'serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants . . .' and this interest is advanced by HB 119's intention to correct the purported unfair competitive advantage the Colony has over other businesses."[84] The dissent argued that the workers' compensation code "currently exempts other areas of employment in agriculture, manufacturing, and construction that could affect the UEF or the viability of the workers' compensation system."[85] This "len[t] further credence that the Legislature's intent . . . was to pursue 'governmental interests only against conduct motivated by religious belief.'"[86]

The dissent also found that HB 119 was not "narrowly tailored" and "place[d] an impermissible burden on the Hutterite religion" by requiring injured employees to claim and receive benefits, although the

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[75] *Big Sky Colony, Inc.*, 291 P.3d at 1245 (Rice, J., dissenting) (quoting *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534 (1993)).

[76] *Id.* at 1246 (emphasis in original).

[77] *Id.* at 1250.

[78] *Id.* at 1249.

[79] *Id.* at 1251.

[80] *Id.* at 1250.

[81] *Big Sky Colony, Inc.*, 291 P.3d at 1251 (Rice, J., dissenting).

[82] *Id.* at 1250.

[83] *Id.* at 1251.

[84] *Id.* (quoting *Lee*, 455 U.S. at 258). It is unclear in what form this argument was made. The dissent presents it as part of the second justification.

[85] *Id.*

[86] *Id.* at 1252 (quoting *Lukumi Babalu*, 508 U.S. at 545).

making of such claims and the bringing of legal proceedings was contrary to the Hutterites' religious beliefs.[87]

VI. THE PETITION FOR CERTIORARI

The petitioners, who had acquired new counsel through the Beckett Fund for Religious Liberty, sought certiorari on two points:

> 1. Whether the Free Exercise Clause requires a plaintiff to demonstrate that the challenged law singles out religious conduct or has a discriminatory motive, as the First, Second, Fourth, and Eighth Circuits and Montana Supreme Court have held, or whether it is instead sufficient to demonstrate that the challenged law treats a substantial category of nonreligious conduct more favorably than religious conduct, as the Third, Sixth, Tenth, and Eleventh Circuits and Iowa Supreme Court have held.[88]
>
> 2. Whether the government regulates "an internal church decision" in violation of the Free Exercise Clause, when it forces a religious community to provide workers' compensation insurance to its members in violation of the internal rules.[89]

Leaving aside the merits of the argument, the U.S. Supreme Court was clearly correct to reject what was not only an attempt to appeal further the decision but to do so on substantially new grounds. As the Court has said "this Court does not decide questions not raised or resolved in the lower court[s]."[90] Taking the evidence in the light most favorable to the petitioners, and accepting that they are correct in distinguishing between an "argument" and a "claim,"[91] it is clear that the first argument in the petition for certiorari was not squarely raised in the lower courts.

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[87] *Big Sky Colony, Inc.*, 291 P.3d at 1252 (Rice, J., dissenting). One of the appellee's affidavits (Daniel Wipf's) stated that "Christians shall not sue one another at law nor sit in judgment of one another. Hutterites cannot make claims against others for wrongs done to them." *Id.* at 1248. The dissent did not seek to explain how such a statement came to appear in the affidavit of somebody who has taken legal proceedings against the state nor (more broadly) to explain the far from negligible number of proceedings involving members of the Hutterite Church (often as both plaintiffs and defendants in the same cause).

[88] Pet. for a Writ of Cert., *Big Sky Colony, Inc v. Mont. Dep't of Lab. & Indus.*, 2013 WL 1309087 at *i (U.S. Apr. 1, 2013) (No. 12-1191).

[89] *Id.* (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Empl. Opportunity Comm'n*, 132 S. Ct. 694 (2012).

[90] *Youakim v. Miller,* 425 U.S. 231, 234 (1976).

[91] Reply Br. for the Petrs., *Big Sky Colony, Inc v. Mont. Dep't of Lab. & Indus.*, 2013 WL 4761412 at *3 (U.S. Sept. 4, 2013) (No. 12-1191).

The second point on which certiorari was sought can be disposed of quickly. The U.S. Supreme Court issued its ruling in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Employment Opportunity Commission* after the hearing by the Montana Supreme Court in *Big Sky Colony*, but both sides briefed it.[92] The majority in *Big Sky Colony*, however, never even referred to *Hosanna-Tabor* in its judgment.[93] There is little merit in the arguments advanced by the petitioners that the (so-called) "ministerial exception" considered in *Hosanna-Tabor* should be considered to apply to *all* members of the Big Sky Colony. *Hosanna-Tabor* involved the freedom of a religious organization to select and dismiss its ministers.[94] Although the Court applied a broad definition of those protected by the "ministerial exception" in *Hosanna-Tabor*, it was careful to confine its decision to the facts of the case and never suggested that the exception should be expanded to all aspects of the internal governance of a religious organization.[95] As the State suggested in its Brief in Opposition of the Petition for a Writ of Certiorari in *Big Sky Colony*, this would be to "swallow the rule of law, leaving 'each conscience [a]s a law unto itself.' "[96]

The first issue, however, raises more substantive issues, which are discussed below. The petitioners argued that there is a "square, well-developed circuit split"[97] between courts that take the view the plaintiff must show that "*the challenged law singles out religious conduct or has a discriminatory motive*"[98] and another that holds it is "sufficient to demonstrate that *the challenged law treats a substantial category of nonreligious conduct more favorably than religious conduct*."[99] The

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[92] Pet. for a Writ of Cert., 2013 WL 1309087 at **31–32 ("While this case [*Big Sky Colony*] was pending in the Montana Supreme Court, this Court issued its decision in *Hosanna-Tabor*. Both parties briefed the issue . . . .").

[93] The dissent referred to *Hosanna-Tabor* in passing as "further support[ing] the premise that there is an impermissible burden on the free exercise of religion when a government action causes an 'internal impact' on religious beliefs." *Big Sky Colony, Inc.*, 291 P.3d at 1252 (Rice, J., dissenting) (citing *Hosana-Tabor*, 132 S. Ct at 706).

[94] *Hosanna-Tabor*, 132 S. Ct. 694 (*Hosanna-Tabor* considered whether a minister could bring an employment discrimination suit against her church. The majority held that the "ministerial exception" barred the suit, but stressed that it "express[ed] no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers." *Hosanna-Tabor*, 132 S. Ct. at 710.).

[95] *Hosanna-Tabor*, 132 S. Ct. at 710.

[96] Br. in Opposition, *Big Sky Colony, Inc. v. Mont. Dep't of Lab. & Indus.*, 2013 WL 4495964 at *5 (U.S. Aug. 20, 2013) (No. 12-1191) (quoting *Smith*, 494 U.S. at 889).

[97] Pet. for a Writ of Cert., 2013 WL 1309087 at *2.

[98] *Id.* at *i (emphasis added). A view claimed to be adopted by the First, Second, Fourth, and Eighth Circuits, and Montana Supreme Court. *See Strout v. Albanese*, 178 F.3d 57, 65 (1st Cir. 1999); *Skoros v. N.Y.C.*, 437 F.3d 1, 39 (2d Cir. 2006); *Bethel World Outreach Ministries v. Montgomery Co. Council*, 706 F.3d 548, 561 (4th Cir. 2013); *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008); *Big Sky Colony*, 291 P.3d at 1240.

[99] Pet. for a Writ of Cert., 2013 WL 1309087 at *i (emphasis added). A view which it was argued had been adopted by the Third, Sixth, Tenth, and Eleventh Circuits and Iowa Supreme Court: *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999); *Ward v. Polite*, 667 F.3d 727, 738–740 (6th Cir. 2012); *Shrum v. City of Coweta, Okla.*, 449

petitioners argued that the former approach focuses on the "neutrality" portion of *Lukumi Babulu*, without giving independent significance to the requirement of "general applicability."[100] In contrast, the latter maintain that the requirements of 'neutrality' and 'general applicability' are distinct.[101]

A. Is there a circuit split?

The short answer is, despite the efforts of the petitioners to present such a split, a fair analysis of the cited decisions indicate that there is no split and certainly not a 'square' or 'well-developed' one. Of course, under *Smith*[102] and *Lukumi Babulu*,[103] a "neutral" and "generally applicable" law does not breach the Free Exercise Clause. Conversely, a law that is not "neutral" and "generally applicable" is subject to strict scrutiny.[104] It is certainly true that the issue raised by the petitioners is important and there is an absence of consensus in the lower courts about the implications of decisions such as *Smith* and *Lukumi Babulu,* leading to the range of different approaches identified in the cases. However, the absence of any well-developed split is highlighted by the fact that—as the Brief in Opposition points out[105]—there is an almost total absence of discussion of such a "split" in the cases cited.[106]

On the one hand, those cases cited as part of the "treating non-religious conduct more favorably" group *all* make explicit reference to discrimination.[107] For example, as the Brief in Opposition points out, in *Fraternal Order*—the petitioners' 'leading case'—after considering the evidence of other exemptions to the challenged policy, Judge Alito (as he then was) concluded that the "decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of

F.3d 1132 (10th Cir. 2006); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234–1235 (11th Cir. 2004); *Mitchell Co. v. Zimmerman*, 810 N.W.2d 1, 16 (Iowa 2012). Also look at the cases referred to by the Iowa Supreme Court in *Mitchell Co*.

[100] Pet. for a Writ of Cert., 2013 WL 1309087 at *12.

[101] *Id.* at *13.

[102] *Empl. Div. of Or. Dep't. of Hum. Res. v. Smith*, 494 U.S. 872, 879 (1990).

[103] *Lukumi Babalu*, 508 U.S. at 523.

[104] *Id.* at 546.

[105] Br. in Opposition, *Big Sky Colony, Inc. v. Mont. Dep't. of Lab. & Ind.*, 2013 WL 4495964, at **4–5 (No. 12-1191 (2013)).

[106] The only example the petitioners could find is the Third Circuit which stated, "in contrast to our decision in *Fraternal Order of Police*, two other circuit courts have stated that the Free Exercise Clause offers no protection when a statute or policy contains broad, objectively defined exceptions …." Reply Br. for the Petrs., *Big Sky Colony, Inc v. Mont. Dep't of Lab. & Indus.*, at *7 (citing *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 167 (3d Cir. 2002)).

[107] Br. in Opposition, *Big Sky Colony, Inc. v. Mont. Dep't. of Lab. & Indus.* at **17–19 (citing *Fraternal Or.*, 170 F.3d at 365; *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012); *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006); *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1234 (11th Cir. 2004)). Indeed, the Iowa Supreme Court also refers to discrimination in *Mitchell Co*, 810 N.W.2d at 10 ("In other words, we ask whether 'religious practice is being singled out for discriminatory treatment.'").

discriminatory intent so as to trigger heightened scrutiny . . ."[108] So it is unclear whether even these courts see treating non-religious conduct more favorably as evidence of discrimination (*i.e.* the singling out of religious conduct) or as a free standing rule regardless of whether there is any intent to discriminate against religious conduct.

On the other hand, the Brief in Opposition argues the analysis in the cases that emphasize the "singling out of religious conduct" approach has been uniformly "cursory and shallow."[109] This is perhaps somewhat harsh and in a number of cases the issue has not been squarely raised (*e.g. Big Sky*) or the case has been decided on other grounds.[110] It is, however, correct that none of the cases on this side of the so-called split appear to be aware that there is a split and, therefore, none engage in any depth with the issues raised in the petition. In summary, while one can understand the petitioners' attempts to talk-up the differences in approach, one is driven to the conclusion that there is no well-developed circuit split on this issue.

B. What would be the correct approach?

A more interesting issue is the question as to which of the approaches discussed is correct. Let us first examine some of the key decisions.

1. Employment Division of Oregon Department of Human Resources v. Smith

In *Smith*, the Supreme Court first developed the notion of a neutral and generally applicable law.[111] As we have seen, this case involved a marked shift in the Court's free exercise jurisprudence away from the "balancing" approach seen in earlier case law, albeit without explicitly overruling its earlier judgments.[112] *Smith* involved an Oregon law that prohibited the "knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medical practitioner."[113] The majority opinion (authored by Justice

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[108] Br. in Opposition, *Big Sky Colony, Inc. v. Mont. Dep't. of Lab. & Indus.* at *18 (citing *Fraternal Or.*, 170 F.3d at 365).

[109] Br. in Opposition, *Big Sky Colony, Inc. v. Mont. Dep't. of Lab. & Indus.* at *19.

[110] *See e.g. Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) (the main focus of the argument was on the appellant's claims under RFRA and the Religious Land Use and Institutionalized Persons Act).

[111] *Smith*, 494 U.S. at 879 (although as we see below, the terminology predates *Smith*).

[112] The commentary is too extensive to cite here. For a recent new approach to the case which cites the earlier discussions, *see generally* Marci A. Hamilton, Employ. Div. v. Smith ***at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse***, 32 Cardozo L. Rev. 1671 (2011).

[113] *Smith*, 494 U.S. at 874 (the Iowa Supreme Court in *Mitchell County* was clearly incorrect to state that "*Smith* dealt with a law containing no exemptions." *Mitchell County v. Zimmerman*, 810 N.W.2d 1, 11–12 (Iowa 2012)).

Scalia) stated "if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[114] It went on to add that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[115]

The Supreme Court appears to have accepted (without any detailed discussion) that the law at issue in *Smith* was a neutral and generally applicable law.[116] Even though, as noted above, the law included a specific exemption for drugs prescribed by a medical practitioner, which the Court did not discuss *at all*. However, in the context of distinguishing earlier cases,[117] which had adopted a "balancing" approach between the right to free exercise and the objectives of government, the Court stated these earlier decisions stood for the proposition that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[118] The Court did not, however, give any consideration to whether the "prescription" exemption in the Oregon law might be considered such a "system of individual exemptions."[119]

2. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah

The Church of the Lukumi Babalu Aye proposed "to establish a house of worship."[120] The church practiced the Santería religion, wherein many rituals involve animal sacrifice. The city council, following an emergency meeting, adopted a city ordinance forbidding the "unnecessary" killing of "an animal in a public or private ritual or ceremony not for the primary purpose of food consumption."[121] The Supreme Court held that the ordinances were neither neutral nor generally applicable: rather, they applied exclusively to the church. As the law was targeted at Santería, the Court held that it was subject to

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[114] *Id.* at 878.
[115] *Id.* at 879 (citing *U.S. v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring)).
[116] *Id.* at 878–879.
[117] *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Thomas v. Rev. Bd. of Ind. Empl. Security Div.*, 450 U.S. 707, 719 (1981); *Hobbie v. Unempl. Appeals Commn. of Fla.*, 480 U.S. 136, 140 (1987).
[118] *Smith*, 494 U.S. at 884.
[119] *Id.*
[120] *Lukumi Babalu*, 508 U.S. at 526.
[121] *Id.* at 527.

strict scrutiny.[122] The Court found that the ordinance did not satisfy those requirements.[123]

In *Lukumi Babulu* the Court did consider the issues of neutrality and general applicability in more detail. Justice Kennedy authored the lead decision and spoke for the Court on all except those aspects of his judgment concerning whether it was appropriate to have to regard the subjective intentions of the legislators. However, on the distinction between neutrality and general applicability, Justice Scalia (with whom the Chief Justice agreed), although concurring, specifically noted that "[i]f it were necessary to make a clear distinction between the two terms, I would draw a line somewhat different from the Court's."[124]

Bearing these reservations in mind, let us turn to what the Court had to say. It first noted "[n]eutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied."[125] Justice Kennedy saw neutrality as forbidding "an official purpose to disapprove of a particular religion or of religion in general."[126] The principle implied that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[127] "If the object of a law is to infringe upon or restrict practices because of their religious motivation," Justice Kennedy concluded, "the law is not neutral."[128]

The law at issue in *Lukumi Babulu* had numerous exemptions and, as part of his consideration of neutrality, Justice Kennedy referred to the statement from *Smith* concerning a "system of individualized exemptions."[129] He concluded that, on the facts of the case, "[r]espondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment."[130]

Turning to general applicability, Justice Kennedy stated

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[122] *Id.* at 546.

[123] *Id.* at 547.

[124] *Id*. at 557 (Scalia, J., concurring in judgment) (in Scalia's view "the defect of lack of neutrality applies primarily to those laws that by their terms impose disabilities on the basis of religion (e.g., a law excluding members of a certain sect from public benefits); whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment.").

[125] *Id.* at 531 (majority). In his concurrence, Justice Scalia went further to state "the terms are not only 'interrelated,' but substantially overlap." *Lukumi Babulu*, 508 U.S. at 557 (Scalia, J., concurring in judgment).

[126] *Id.* at 532 (majority).

[127] *Id.* at 532.

[128] *Id.* at 533.

[129] *Id.* at 537.

[130] *Id.* at 537–538.

> "[a]ll laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause 'protect[s] religious observers against unequal treatment,[131] and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."[132]

"The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause."[133]

However, in this case, he concluded that it was not necessary to "define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights."[134] In particular, he pointed out that the laws at issue were under-inclusive to achieve the stated interests of the legislators.[135] However, as the Iowa supreme court later pointed out, "*Lukumi* provided some clarification of the contours of general applicability but, because of the extreme degree of gerrymandering involved, did not provide sufficient specificity to guide lower courts in cases where fewer exemptions are allowed."[136]

Thus it has been left to the lower courts to attempt to apply the concept(s) of neutrality and general application to more difficult factual circumstances. We will look here at two such examples.

3. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark

Fraternal Order was one of the first cases to develop the "system of exemption" comments in *Smith* and to apply them to require strict scrutiny.[137] The case concerned the policy of the Newark Police Department prohibiting the wearing of beards by officers.[138] Under that policy, exemptions were made for medical reasons, "but the Department

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[131] *Lukumi Babalu*, 508 U.S. at 542–543 (citing *Hobbie* , 480 U.S. at 148 (Stevens, J., concurring in judgment)).

[132] *Id.* at 542–543.

[133] *Id.* at 543.

[134] *Id.* at 543.

[135] *Id.* at 542–543.

[136] *Mitchell Co.*, 810 N.W.2d at 9. The Supreme Court more recently considered the impact of exemptions in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). However, as this case was decided under RFRA, the Court was applying strict scrutiny and the case is of little assistance on the issues considered here.

[137] *Fraternal Or.*,170 F.3d at 365.

[138] *Id.* at 360.

refuse[d] to make exemptions for officers whose religious beliefs prohibit[ed] them from shaving their beards."[139] Judge Alito ruled the policy violated the Free Exercise Clause.[140] The Third Circuit did not consider in any detail the issue of whether the policy was neutral and/or generally applicable. Rather, it moved directly to the *Smith* comments on a "system of individual exemptions."[141] It rejected the argument that "because the medical exemption is not an 'individualized exemption,' the *Smith/Lukumi* rule [did] not apply."[142] The court explained

> [w]hile the Supreme Court did speak in terms of 'individualized exemptions' in *Smith* and *Lukumi,* it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.[143]

Judge Alito concluded that "the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny . . ."[144]

4. Mitchell County v. Zimmerman

The Iowa Supreme Court took this approach to perhaps its outmost limits (to date) in *Mitchell County*.[145] The case involved a Mitchell County road protection ordinance that forbade driving a tractor or vehicle equipped with steel or metal tires or wheels fitted with cleats, ice picks, studs, spikes, chains, or other projections of any kind on the highways.[146] Members of the Mennonite Church are forbidden from driving tractors unless their wheels are equipped with steel cleats and

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[139] *Id.*
[140] *Id.*
[141] *Id.* at 365.
[142] *Id.*
[143] *Fraternal Or.*, 170 F.3d at 365.
[144] *Id.*
[145] *Mitchell Co..*, 810 N.W.2d 1.
[146] *Id.* at 4 (citing Mitchell County, Iowa, Mitchell Co. Road Prot. Ordinance (Sept. 22, 2009)).

argued that the ordinance was in breach of their Free Exercise rights.[147] The Iowa Supreme Court upheld this claim.[148]

In contrast to *Fraternal Order*, the Iowa court did consider, in detail, the concepts of neutrality and general applicability. However, in contrast to the U.S. Supreme Court in *Lukumi Babulu* (but perhaps more logically), the Court discussed the *Smith* "system of exemptions" in the context of general applicability rather than neutrality.[149] The Mennonites argued the ordinance was not generally applicable because it included exceptions that undermined its purpose and demonstrated its under-inclusivity.[150] In particular, the ordinance allowed tire chains of reasonable proportions when required for safety because of snow, ice, or similar conditions; and tires with inserted ice grips or tire studs "from November 1 of each year to April 1 of the following year, except that a school bus and fire department emergency apparatus was allowed to use such tires at any time."[151] The court concluded that the limited (and unexplained) exemption for school buses and fire department vehicles led to an "underinclusion of the ordinance [that] undermines its general applicability."[152] This is perhaps a rather extreme conclusion on the facts of the case but the analytical approach of the Court is nonetheless interesting.

5. Discussion

On the basis of this discussion, one view is that there is a lack of clarity about how the concepts of neutrality and general applicability are to be understood and applied. The Supreme Court in *Smith* did not consider these issues in any detail while in *Lukumi Babulu* the ordinances challenged were so clearly gerrymandered that the answer was relatively easy. Nor have the subsequent lower court decisions developed a clearer analytical approach. As we have seen, the Third Circuit in *Fraternal Order* moved straight to the "system of exemption," deleting "individualized," without discussing how this fits within the concepts of neutrality and generally applicability. In contrast, the Iowa Supreme Court located the "system of exemption" under general applicability rather than neutrality. A range of issues remain to be clarified.

First, we need to be clear about the threshold issue of the type of "religiously motivated" conduct protected by the First Amendment. It is clear that questions about what constitute religious beliefs are a matter

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[147] *Id.* at 3.
[148] *Id.*
[149] *Id.* at 11–12.
[150] *Id.* at 15–16.
[151] *Mitchell Co.*, 810 N.W.2d at 16.
[152] *Id.*

for the religions and that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[153] However, such protection is not open-ended. In *Strout v. Albanese,*[154] the First Circuit stated that a claim by Roman Catholic parents concerning attendance at a religious school was not protected by the Free Exercise clause as this covers "the observation of a central belief or practice."[155] The court pointed out that "[f]actually speaking, education at a parochial school is not such a belief, for the Roman Catholic Church does not mandate it."[156] Similarly, it might have been argued that even if the Mennonite Church forbids the driving of tractors on roads unless they have steel cleats,[157] the driving of tractors on roads is not a "central belief or practice" of that Church.

In the *Big Sky Colony* case, the system of "community of goods" whereby all Hutterites renounce any claim to real or personal property and transfer all their property to the Colony does appear to be a central aspect of their faith, as does the voluntary sharing of labor.[158] However, it is clear that it is not this "internal" conduct that is targeted by the Montana law but rather the "external" economic activities of the Colony. If the Colony carried out such activity using the normal economic form of employment (employer–employee) it would, of course, be covered by the workers' compensation legislation.[159] Should the Free Exercise Clause protect economic activity simply because the form which is takes is "religiously motivated?"[160]

Second, a clearer understanding of the concepts of neutrality and general applicability and the extent to which they are interrelated (or overlap) is required. Third, the *Smith* "system of individualized exemptions"[161] was a rather obvious attempt to dispose of some inconvenient precedents and should not be seen as the basis for a new doctrine. However, exemptions from a law are clearly important when looking at whether a law is neutral and generally applicable. Despite their different contextualization, both *Fraternal Order* and *Mitchell County* shared a similar analysis, viz. they both used

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[153] *Thomas v. Rev. Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 714 (1981).

[154] *Strout v. Albanese*, 178 F.3d 57, 65 (1st Cir. 1999).

[155] *Id.* (citing *Hernandez v. Comm'r,* 490 U.S. 680, 699 (1989)).

[156] *Id.* (citing *Hernandez*, 490 U.S. at 699 (citing *Catechism of the Catholic Church* 537–538 (1994) (stating that parents' responsibilities for religious education for religious education takes place primarily in the home and that choosing a religious school is a right but not an absolute duty))).

[157] Although the source of this in the King James Bible is rather obscure.

[158] Pet. for Cert., *Big Sky Colony, Inc.*, 2013 WL 1309087 at **3–4.

[159] ***U.S. v. Lee***, 455 U.S. 252 (1982).

[160] A further threshold issue, not considered here, is whether (assuming such conduct is protected) the imposition of workers' compensation laws constitutes a 'substantial burden' on such conduct.

[161] *Smith*, 494 U.S. at 884.

> a two-step analysis to evaluate the potential underinclusiveness or non-generality of the challenged ordinance. It first identified the governmental purposes that the ordinance was designed to promote or protect and then asked whether it exempted or left unregulated any type of secular conduct that threatened those purposes as much as the religious conduct that had been prohibited. If a law allowed secular conduct to undermine its purposes, then it could not forbid religiously motivated conduct that did the same because this would amount to an unconstitutional 'value judgment in favor of secular motivations, but [against] religious motivations.' However, if the governmental entity could show that exempted secular conduct was sufficiently different in terms of its impact on the purpose of the law, the exemption would not render the law under-inclusive.[162]

Arguably, even if such an approach was to be accepted, additional leeway should be allowed to governmental organizations to decide whether an exemption undermines the main objective than was allowed in *Mitchell Co.*, but the general analysis seems helpful.
However, it must be recalled that the jurisprudence of the Supreme Court provides little support for the conclusion arrived at in, for example, *Mitchell Co*. In *Lee*, the Supreme Court stated "it would be difficult to accommodate the comprehensive social security system with [a] myriad [of] exceptions flowing from a wide variety of religious beliefs."[163] In that case, the law excluded self-employed persons but not employers such as Mr. Lee.[164]

However, the Court held that the question of where to draw a line in relation to exemptions was a matter for Congress.[165] As we have seen, in *Smith* itself, the Court ignored the fact that a medical exemption applied to the law. Indeed one might argue that the conclusions of the Montana Supreme Court in *Big Sky Colony* are much more consistent with the general approach of the Supreme Court in *Smith* than is the approach of the Iowa Supreme Court.

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[162] *Mitchell Co.*, 810 N.W.2d at 12.

[163] *Lee*, 455 U.S. at 259–260; *See generally*, J.G. Harwood, *Religiously-Based Social Security Exemptions: Who Is Eligible, How Did They Develop, and Are the Exemptions Consistent with the Religion Clauses and the Religious Freedom Restoration Act (RFRA)?* 17 Akron Tax J. 1 (2002). In general, the lower courts have subsequently shown little interest in applying tighter controls. *See e.g. Droz v. Commr*, 48 F.3d 1120, 1124 (9th Cir. 1995) (upholding restriction limited to members of religious sects with objections to social security and excluding those with personal religious objections).

[164] *Lee*, 455 U.S. at 259–260.

[165] *Id.* at 260–261.

VII. CONCLUSIONS

A. Free Exercise

The unusual nature of *Big Sky Colony* arises from the fact that it falls between what might appear to be two exclusive categorizations: on the one hand, neutral and general laws and, on the other, laws targeting specific religious groups. Had the Hutterite members been employees (or self-employed) in the general sense of the terms, there would clearly have been no difficulty in bringing them within the scope of the workers' compensation scheme regardless of any religious objections they might have to such a law.[166] However, despite the neutral phrasing of the law

[166] There are numerous federal and state decisions to this effect including *Lee*, 455 U.S. 252 (Amish employer obliged to pay social security taxes); *Hatcher v. Commr*, 688 F.2d 82, 84 (10th Cir. 1979); *Jaggard v. Comm'r*, 582 F.2d 1189, 1189–1190 (8th Cir. 1978), cert. denied, 440 U.S. 913, (1979); *Varga v. U.S.*, 467 F. Supp. 1113 (D.Md. 1979), aff'd, 618 F.2d 106 (4th Cir.1980) (self-employed persons obliged to pay federal employment tax despite personal religious objections to paying contributions or receiving benefits); *Olsen v. Commr*, 709 F.2d 278 (4th Cir. 1983) (minister obliged to pay self-employment tax); *Bethel Baptist Church v. U.S.*, 822 F.2d 1334 (3d Cir. 1987) (religious body required to pay social security contributions in respect of employees); *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203 (6th Cir. 1990) (church required to pay premiums into a public workers' compensation program on behalf of its employees); *U.S. v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000) (religious body obliged to pay federal employment taxes in respect of employees); *Droz v. Commr*, 48 F.3d 1120, 1124 (9th Cir. 1995) (self-employed person obliged to pay Social Security tax despite religious objections); *Victory Baptist Temple v. Indus. Comm'n*, 442 N.E.2d 819 (Ohio 1982), cert. den., 459 U.S. 1086, (1982) (religious body obliged to pay workers' compensation premiums in respect of employees); *Koolau Baptist Church v. Dep't. of Lab.*, 718 P.2d 267 (Haw. 1986) (exaction of unemployment insurance taxes from church does not contravene the First Amendment); *Employ. Div. v. Rogue Valley Youth for Christ*, 770 P.2d 588 (Or. 1989) (religious organization obliged to pay unemployment compensation taxes in respect of employees); *St. John's Lutheran Church v. State Comp. Ins. Fund*, 830 P.2d 1271, 1277 (Mont. 1992) (church obliged to pay workers' compensation premiums in respect of pastor); *Newport Church of Nazarene v. Hensley*, 56 P.3d 386 (Or. 2002) (church minister entitled to unemployment compensation though questioned whether this decision may be affected by the recent Supreme Court decision in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Employ. Opportunity Comm'n*, 132 S.Ct. 694 (2012)). The courts have routinely upheld the converse position, *i.e.*, the exclusion of religious employees from insurability. *See e.g.* the recent case of *Spicer v. Texas Workforce Comm'n*, 480 S.W.3d. 526 (Tex. App. 2014) in which the Texas Court of Appeals held that the exclusion of a person in the employ of a church from unemployment compensation was not a breach of the Establishment Clause, did not violate his rights of free exercise of religion, and was not in breach of the equal protection guarantee. A similar outcome has been arrived at in cases such as *Rojas v. Fitch*, 127 F.3d 184, 188 (1st Cir. 1997) (exclusion of employee of religious employer (the Salvation Army) from unemployment compensation did not violate the Establishment Clause or the Equal Protection Clause); *Von Stauffenberg v. Dist. Unempl. Comp. Bd.*, 459 F.2d 1128, 1130–1133 (D.C. 1972) (per curiam) (exemption of religious and charitable organization (again Salvation Army) from District of Columbia unemployment compensation statute did not violate Establishment Clause or the Equal Protection Clause); *Saucier v. Emp't Sec. Dep't.*, 954 P.2d 285, 288–289 (Wash. 1998) (exemption of church (Salvation Army) from Washington's unemployment compensation statute did not violate Establishment Clause – following *Rojas*); *In re Klein*, 585 N.E.2d 809, 811–814 (N.Y. 1991) (exemption of persons performing duties of religious nature at place of worship from New York unemployment compensation statute did not violate Establishment Clause or Equal Protection Clause); *Konecny v. D.C. Dep't of Employ. Servs.*, 447 A.2d 31, 33–37 (D.C. 1982) (exemption of churches from District of Columbia unemployment compensation statute did not violate Establishment Clause).

(and, indeed, the theoretical possibility that it might apply to other religious groupings), it seems clear that the particular provision challenged was targeted at members of the Hutterite faith and burdened their religious beliefs.[167] Should this attract strict scrutiny?

There does not appear to have been a Supreme Court case directly on point. *Lukumi Babalu*—upon which the *Big Sky Colony* dissent relied—was a decision in which, despite the neutral wording of the ordinance challenged, the Court found intent to target the religious activities of a particular religious belief. The Court stated that "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."[168]

The majority in *Big Sky Colony* considered the nature of the burden on religion as an issue separate to neutrality and general applicability.[169] Although, in the light of the Supreme Court's discussion in *Lukumi Babalu*, it appears it was, more correctly, an aspect of neutrality. There the Court held "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . ."[170]

However, in *Big Sky Colony* (and unlike *Lukumi Babalu*) the activities targeted were clearly *economic* and not religious. The fact that the particular manner in which the Hutterite colonies carry out their economic activities is impacted by their religious beliefs arguably does not convert "receiving remuneration from nonmembers for agricultural production, manufacturing, or a construction project" into a religious activity. Nor was there any suggestion whatsoever of any religious animus against the Hutterite religion.[171] As the Montana Supreme Court

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[167] Indeed following *Tony and Susan Alamo Found. v. Sec. of Lab.*, 471 U.S. 290 (1985), one might take the view that the law does not burden religion at all. In that case, the Supreme Court stated that "the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights. Petitioners claim that the receipt of 'wages' would violate the religious convictions of the associates. The Act, however, does not require the payment of cash wages . . . Since the associates currently receive such benefits in exchange for working in the Foundation's businesses, application of the Act will work little or no change in their situation: the associates may simply continue to be paid in the form of benefits. The religious objection does not appear to be to receiving any specified amount of wages. Indeed, petitioners and the associates assert that the associates' standard of living far exceeds the minimum. Even if the Foundation were to pay wages in cash, or if the associates' beliefs precluded them from accepting the statutory amount, there is nothing in the Act to prevent the associates from returning the amounts to the Foundation, provided that they do so voluntarily. We therefore fail to perceive how application of the Act would interfere with the associates' right to freely exercise their religious beliefs." 471 U.S. at 303–305, (internal footnotes and citations omitted). This seems a rather extreme view and is difficult to reconcile with *Lee*, 455 U.S. at 257 (and its progeny) in which the Court accepted that religious belief was burdened.

[168] *Lukumi Babalu*, 508 U.S. at 534.

[169] *Big Sky Colony, Inc.*, 291 P.3d 1231.

[170] *Lukumi Babalu*, 508 U.S. at 533 (citing *Smith*, 494 U.S. at 878–879).

[171] Although the status of intention is rather unclear. In *Lukumi Babalu*, Justice Kennedy (who gave the opinion of the court but not on this point) considered the intent of the legislators to be

majority points out, the workers' compensation scheme already applies to the commercial activities of other religious groups (insofar as they are carried out by way of an employee–employer relationship) and it is common practice across the world for legislatures to bring specific groups who approximate to an employee–employer relationship within the scope of social security and workers' compensation coverage.[172] Therefore, at least as the case was originally presented, the majority was arguably correct in its conclusions, even if it relied excessively on general principles and did not sufficiently explain why this was not a "religious gerrymander." As such, the law would satisfy the requirement of being a "neutral and generally applicable law." As the Supreme Court said in *Lee*, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[173]

Insofar as the dissent relied on *Wisconsin v. Yoder* (in which the Supreme Court held the requirement for Amish children to attend compulsory education past 8th grade was in breach of the Free Exercise Clause), this case is obviously entirely different on the facts and, in any case, *Yoder* is now very much an outlier in the Supreme Court's jurisprudence.[174]

Is this position altered by the arguments advanced in the recent petition? Accepting for the purposes of argument that it is sufficient that the challenged law treats a substantial category of nonreligious conduct more favorably than religious conduct, does the Montana law do so? There are 26 explicit exceptions to the Montana workers' compensation code.[175] Due to the failure to advance the specific argument presented in the recent petition before the Montana courts, these were not considered by the Supreme Court majority.[176] The exemptions include domestic

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relevant though Justice Scalia (concurring) (with whom Chief Justice Rehnquist agreed) argued that "subjective motivation'" should not be investigated. *Lee*, 508 U.S. at 558.

[172] For the United Kingdom, for example, *see* N.J. Wikeley, A.I. Ogus, & Barendt's *The Law of Social Security* (Oxford University Press 2002).

[173] *Lee*, 455 U.S. at 261.

[174] *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Smith* the Court tried to reconcile its new approach with that adopted in cases such as *Yoder* by creating what has become known as the hybrid-rights approach, *i.e*., by arguing that such cases was decided on the basis of the Free Exercise Clause in conjunction with other Constitutional protections such as parental rights. But Justice O'Connor and Justice Souter argued that the two approaches were inconsistent and the hybrid-rights doctrine has gained little acceptance in subsequent decades. *Smith*, 494 U.S. at 891 (1990) (O'Connor, J., concurring); *Lukumi Babalu*, 508 U.S. at 566–567 (Souter, J., dissenting). For an argument that *Yoder* should now be overruled *see* G. Raley, *Yoder Revisited: Why the Landmark Amish Schooling Case Could—And Should—Be Overturned*, 97 Va. L. Rev. 681 (2011); while for doubts as to the factual basis of the decision *see* W.A. Fischel, *Do Amish One-Room Schools Make the Grade? The Dubious Data of Wisconsin v. Yoder* http://perma.cc/XC4X-ZCSU (http://www.dartmouth.edu/~wfischel/Papers/Amish_School_UCLR_feb12.pdf) (March 31, 2011).

[175] Pet. for Cert., *Big Sky Colony, Inc.*, at *7.

[176] The dissent did refer to them concluding "[t]hese exemptions are contrary to the governmental interests asserted by the State, and lend further credence that the Legislature's intent,

workers; independent contractors; sole proprietors; members of partnerships, limited liability partnerships (**LLP**), and **limited liability companies (LLC)**; real estate, securities, or insurance salespersons; railroad workers; timers, referees, umpires, or judges at amateur athletic events; newspaper carriers; freelance correspondents; cosmetologists and barbers; horseracing jockeys and trainers; petroleum land professionals; officers or managers of ditch companies; certain common carriers or motor carriers; athletes; and musicians;[177] persons "performing services in return for aid or sustenance only," and any "member of a religious order in the exercise of duties required by the order."[178] In general, these exemptions are secular (with the obvious exception of members of religious orders).

If the two-stage analysis outlined above is applied the first step would be to identify the purpose of the workers' compensation scheme.[179] The second would be to decide whether these secular exemptions undermine the purposes of the workers' compensation code to the same extent as the religiously motivated conduct. Some of the exemptions clearly have little relevance to the inclusion of the Hutterian colonies. As the Brief in Opposition argued, "[i]t is hard to see how exemptions for horse-racing jockeys, barbers, baby-sitters, news correspondents, insurance salesmen, cosmetologists, athletes, musicians, and the like should have any relevance to the State's interests in this case."[180]

While some of the other exemptions may raise more substantive issues, it is impossible to know precisely what justifications would have been advanced by Montana for these exclusions.[181] The petitioners argued that, for example, secular communes, a Catholic monastery, or other religious order could engage in farming just like the Hutterites without providing workers' compensation.[182] However, as the Brief in Opposition pointed out, the state is not aware of any such secular commune.[183] Nonetheless, the Montana authorities might be well advised to review the existing exclusions (and inclusions) to ensure that they are constitutionally valid and to forestall any further litigation.

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as demonstrated above, was to pursue 'governmental interests only against conduct motivated by religious belief.'" *Big Sky Colony*, 291 P.3d at 1251–1252 (Rice, J., dissenting). As can be seen, this is a rather different argument to that now advanced by the petitioners.

[177] Mont. Code Ann. § 39–71–401(2)(a)–(z).

[178] *Id*. at § 39–71–401(2)(h), (t).

[179] An issue discussed if perhaps not greatly clarified by the Montana Supreme Court in this case.

[180] Br. in Opposition, *Big Sky Colony, Inc.*, at *31.

[181] For a discussion of the issues *see* Br. in Opposition, *Big Sky Colony, Inc.*, at **30–32.

[182] Pet. for Cert., *Big Sky Colony, Inc.*, at *19.

[183] Br. in Opposition, *Big Sky Colony, Inc.*, at *32. Interestingly an amicus brief filed by two Catholic Abbeys would suggest that at least some Catholic monasteries do engage in substantial economic activities, though to what extent this occurs in Montana and how it compares with the Hutterite activities is unclear. Br. of Belmont Abbey and the Abbey of New Clairvaux as Amici Curiae in Support of Petrs, *Big Sky Colony, Inc.*, 2013 WL 1868350.

B. Strict Scrutiny

If, for the purposes of argument, we took the view that HB 119 did require strict scrutiny, could it satisfy that test? Arguably no. Strict scrutiny would require that the state show that inclusion in the workers' compensation scheme was, first, "essential to accomplish an overriding governmental interest."[184] The courts have readily accepted that compulsory social insurance and workers' compensation cover is a compelling state interest.[185] However, these decisions have always been in the context of attempts to obtain exemptions from general laws rather than, as in this case, an objection to a specific law requiring the inclusion of a group in a general scheme.[186] While the state has a compelling interest in applying general laws to employers and employees, it is more difficult to argue that there is a compelling interest in extending such laws to analogous situations especially where, as in this case, the evidence indicates that most of those covered will not benefit from the scheme because of their religious beliefs.

C. Establishment Clause

The Establishment Clause arguments are barely tenable. Assuming *Lemon* still represents good law, and despite the view taken by the district court, it would be difficult for an impartial observer to accept that the legislation did not have a secular purpose; or that it did have the primary effect of either advancing or inhibiting religion. The entanglement argument is frankly untenable and there are several precedents rejecting such an argument in more or less identical circumstances.[187]

D. Equal Protection

In relation to the Equal Protection claim, as we have seen, the Colony argued HB 119 treated it differently from other religious groups and that it treated religious groups differently from non-religious groups.[188] Arguably, however, it treated the Colony the same as other religious groups by including it in the workers' compensation scheme and treated religious and non-religious groups equally by including all

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[184] *Lee*, 455 U.S. at 257.
[185] *Id.* at 252, 258–259.
[186] *Id.* at 254–255.
[187] *Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290 (1985); *Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203 (6th Cir. 1990).
[188] *Big Sky Colony*, 291 P.3d at 1244.

(or the vast bulk of) such groups in the scheme.[189] The Colony might, more correctly, have argued that it was being treated the same as "different" groups in that its inclusion in workers' compensation had a particular impact on it because of the particular structure of work relations arising from its religious beliefs.[190] However, there is little merit in such a claim. Although the inclusion might have a particular impact on the Hutterite colonies because of their communal lifestyle and refusal to accept benefits, there is little to indicate that their inclusion in workers' compensation would have a greater impact on the free exercise of their religion than did the inclusion in the social security scheme of Amish employers or the numerous others who held sincere religious objections to social security (or workers' compensation) coverage.[191]

A number of possible rationales for HB 119 are mentioned in the judgment. First, the majority referred to promoting the health, safety, and welfare of workers by providing workers' compensation coverage.[192] Of course, it may be that a majority of those covered will not wish to avail themselves of such coverage but, on the other hand, it is clear that persons from time to time leave the Hutterite colonies and, at the very least, workers' compensation will be available to such workers who would otherwise be left without any protection. The Department also argued that the law helped to ensure fair competition among businesses.[193] Ultimately, of course, whether or not this is an objective of the Montana scheme is a question of Montana law but, in principle, there would appear to be no reason why this should not be a legitimate objective of workers' compensation and the dissent rather dismissed the argument out-of-hand.[194]

E. Ultimate Conclusion

Big Sky Colony highlights the importance and continued saliency of religion in U.S. law and politics. The Montana Supreme Court was arguably correct in its ruling that the inclusion of Hutterite colonies, which voluntarily engage in commercial activities with non-members for

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[189] The dissent argued that the fact that the workers' compensation scheme currently exempted some areas of employment from workers' compensation undermined its argument that there was a compelling state interest to include Hutterite colonies. *Big Sky Colony*, 291 P.3d at 1251–1252 (Rice, J., dissenting). While this might be relevant under strict scrutiny, under- and over-inclusiveness is clearly not relevant under rational basis review.

[190] The courts, and not just in the U.S., have been slow to accept such arguments, which perhaps explains why the case was advanced under the more familiar 'similarly situated' basis.

[191] The courts have not accepted that the fact that a person will refuse to accept benefits on religious grounds provides any basis for allowing a free exercise claim. *see Varga v. U.S.*, 467 F.Supp. 1113 (D.Md.1979), aff'd, 618 F.2d 106 (4th Cir.1980).

[192] *Big Sky Colony*, 291 P.3d at 1241.

[193] *Id*. at 1250–1251 (Rice, J., dissenting).

[194] Equally, issues as to whether bringing the Hutterite colonies within the scope of workers' compensation was an effective means of ensuring fair competition are primarily ones for the legislature and subject to considerable judicial deference under rational basis review.

remuneration, in the workers' compensation scheme did not show evidence of discrimination against religious organizations.[195] Therefore, as a neutral and generally applicable law, it did not breach the Free Exercise Clause of the U.S. Constitution. While neutral language may disguise a "religious gerrymander"—as it did in *Lukumi Babalu*—the "targeting" of a specific group's economic activities does not become a "religious gerrymander" simply because it engages in some way the group's religious beliefs.

However, while one cannot predict the answers, the issues raised in the subsequent petition would suggest that there are questions which remain to be answered both in relation to the analytical approach to be adopted by the courts and in terms of the compatibility of various exclusions from the workers' compensations code with the Constitution. The Montana (and indeed other) authorities might be well advised to review the inclusions and exclusions that have developed over time to establish whether they would meet the challenge of future litigation.

[195] *Big Sky Colony*, 291 P.3d at 1240–1241.