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ANTONIN SCALIA, BARUCH SPINOZA, AND THE RELATIONSHIP BETWEEN CHURCH AND STATE

*Steven Goldberg**

INTRODUCTION

In a series of opinions interpreting the Free Exercise, Non-establishment, and Due Process Clauses, Justice Antonin Scalia has consistently held that the legislature determines the boundary between church and state in American law. While freedom of belief remains inviolate, external religious practices are subject to a remarkable degree of legislative control.

The breadth of Scalia's views becomes clear only when a variety of holdings in different areas are seen together. Only then do we see that legislatures decide whether church rituals will be exempt from general laws, whether public displays of civic religion serve societal goals, and whether church schools should even be allowed to exist as an alternative to the public schools.¹

One surprising outcome of this approach is that it is likely to lead Scalia to favor increased secular scrutiny of internal church matters. Under Scalia's approach, a church's decision to excommunicate a member could be challenged in a cause of action for slander or trespass if that decision affected the member's reputation or property.² Justice Scalia does not always defer to legislative choices when constitutional claims are raised. He has ruled, for example, that legislatures cannot ban the burning of the American flag,³ nor can they enact certain affirmative action programs.⁴ When the boundary between church and state is at

* Professor of Law, Georgetown University Law Center. I am grateful for comments from Larry Alexander, Lisa Heinzerling, Heidi Hurd, David Luban, Louis Michael Seidman, Girardeau Spann, and Mark Tushnet. I would like to thank Jennifer Cook and Jennifer A. Kennedy for their research assistance.

¹ See *infra* Part II.

² See *infra* Part III.

³ Scalia joined the majority opinions in *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990).

⁴ See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J.,

issue, however, he has consistently expressed the fear that the unelected federal judiciary is particularly ill-suited to making the basic choice between societal needs and those of a religious group. If the courts are to be involved, it must be at the behest of the elected legislature. The fundamental point is that the legislature, as the embodiment of sovereign power, must leave religious beliefs alone, but it must also have broad power to regulate religious practices and religion's role in public life.

As Scalia himself has noted, John Locke's writings provide support for the central role of the state in regulating religious activities.⁵ But the thinker who perhaps comes the closest to Scalia's views is Spinoza.

Baruch Spinoza, whose family fled the Inquisition and who was himself excommunicated from his Jewish congregation, developed a political philosophy which combined one of the first calls for freedom of religious belief with a strong endorsement of the secular sovereign's power over all external religious matters.⁶ A look at Spinoza's thought is illuminating because it demonstrates the power and the breadth of the argument that the sovereign must have the final say over external manifestations of faith. Reacting to the power of the church in his day, Spinoza feared that a just society could not exist if religious groups could control the behavior of individuals. While the sovereign had to respect private beliefs, only the sovereign could rationally structure external acts. Spinoza may have pointed the way Scalia is headed when Spinoza explicitly extended this principle to sovereign control over excommunication decisions.

Spinoza is not cited by Scalia, nor was Spinoza a direct influence on the framers of the Constitution.⁷ What we see instead when we look at Spinoza's and Scalia's work is the logical consequences that flow from certain basic assumptions about the relationship between church and state.

I begin with an outline of Spinoza's philosophy on church and state, followed by a demonstration that Scalia is headed in the

concurring).

⁵ See *City of Boerne v. Flores*, 521 U.S. 507, 540 (1997) (Scalia, J., concurring in part).

⁶ See *infra* Part I.

⁷ Spinoza's philosophical views were so controversial that after his death in 1677 he endured "a century of obloquy." S.H. MELLONE, *THE DAWN OF MODERN THOUGHT: DESCARTES, SPINOZA, LEIBNIZ* 53 (1930). See also MARGARET GULLAN-WHUR, *WITHIN REASON: A LIFE OF SPINOZA* 304-16 (1998) (providing a recent analysis of Spinoza's influence). Professor McConnell includes Spinoza in a long list of political thinkers who made a contribution, "however indirect," to the American approach regarding the relationship between church and state. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1430 (1990).

same direction. I conclude by considering how Spinoza and Scalia might react to recent litigation in South Dakota involving an excommunication from a close-knit religious community, the Hutterite Church.

I. SPINOZA'S VIEW OF RELIGIOUS FREEDOM

In 1623, Baruch Spinoza's father arrived in Amsterdam after fleeing the Inquisition in Portugal, which was even harsher than its Spanish counterpart.⁸ In both countries, Jews were forced to convert or leave.⁹ Those who did convert, were suspected, often with reason, of retaining their Jewish beliefs.¹⁰ They were relentlessly interrogated and tortured to see if their conversion had been genuine.¹¹ Therefore, many Jews fled to Amsterdam, where the Jewish community was afforded limited freedom.¹²

Spinoza grew up in Amsterdam's Jewish community, studying at the Hebrew school and attending services at the synagogue.¹³ At a young age, however, he began to develop controversial ideas. He believed, for example, that the Bible was not literally true, and he rejected the idea that God was a judge who punished or rewarded people.¹⁴ Apparently because of his refusal to recant such beliefs, he was excommunicated from the Jewish community.¹⁵ The Jewish leadership may in part have been motivated by a concern that the Amsterdam authorities would have punished the Jewish community for harboring someone with such dangerous beliefs.¹⁶

Working as an independent scholar, Spinoza had contact with Mennonites, Quakers, and prominent thinkers such as Leibniz.¹⁷ His own views remained too extreme to be openly discussed; indeed, virtually none of his work was published in his lifetime under his own name.¹⁸ In time, however, his work exerted an

⁸ See STEVEN NADLER, *SPINOZA: A LIFE* 3-4, 31-32 (1999).

⁹ See *id.* at 3-4.

¹⁰ See *id.* at 4.

¹¹ For a discussion of the Inquisition and its methods in Spain and Portugal, see CECIL ROTH, *A HISTORY OF THE MARRANOS* 29-145 (1932).

¹² See Stuart HAMPSHIRE, *SPINOZA* 227-29 (1973).

¹³ See *id.*

¹⁴ See NADLER, *supra* note 8, at 131-38.

¹⁵ See *id.* at 116-54.

¹⁶ See *id.* at 148-53; see also HAMPSHIRE, *supra* note 12, at 229.

¹⁷ See NADLER, *supra* note 8, at 155-73. For Leibniz's reaction to Spinoza, see GULLAN-WHUR, *supra* note 7, at 304-05.

¹⁸ See JOSEPH RATNER, *THE PHILOSOPHY OF SPINOZA* xix-xx (1954).

important influence on philosophy in areas ranging from the question of determinism to political theory.¹⁹

Spinoza wrote explicitly on the proper relationship between the church and the secular state. The matter was of great practical importance in his time. In mid-seventeenth century Amsterdam, the secular government had some authority, but the Calvinist Church was enormously powerful.²⁰ Elsewhere at that time, the Catholic Church held even greater power.²¹ And, of course, Spinoza himself had seen how even the minority Jewish community could stifle free thought among its members.²² It is clear from Spinoza's work that he identified the secular authorities as a vital counterweight to the oppressive authority of the church and as offering the best opportunity for the flourishing of reason.²³ To Spinoza, the exercise of reason was the ultimate goal because it fostered self-preservation, the satisfaction of wants, and the means for understanding the natural order of the universe.²⁴

Spinoza believed that the "most natural" type of secular state, that was best at preserving the "freedom which nature grants to every man," was democracy.²⁵ While he believed other forms of secular government could succeed, he was the first modern political philosopher to call himself a democrat.²⁶ Democracies fostered liberty and fought irrationality because "in a democracy there is less danger of a government behaving unreasonably, for it is practically impossible for the majority of a single assembly, if it is of some size, to agree on the same piece of folly."²⁷

On the relationship of church to state, Spinoza began by asserting that the religious beliefs of individuals should be respected whether they represented majority or minority sentiments.²⁸ The secular state, he argued, lacked the power and

¹⁹ See, e.g., HAMPSHIRE, *supra* note 12, at 27-28, 177; LEWIS SAMUEL FEUER, *SPINOZA AND THE RISE OF LIBERALISM* (1987).

²⁰ See NADLER, *supra* note 8, at 12-14; see also HENRY E. ALLISON, *BENEDICT DE SPINOZA: AN INTRODUCTION* 226 (1987).

²¹ Galileo's trial, for example, took place in 1633. See IAN G. BARBOUR, *RELIGION AND SCIENCE* 15 (1997).

²² See GULLAN-WHUR, *supra* note 7, at 194.

²³ See HAMPSHIRE, *supra* note 12, at 200-01; see also STEVEN B. SMITH, *SPINOZA, LIBERALISM, AND THE QUESTION OF JEWISH IDENTITY* 154 (1997).

²⁴ See HAMPSHIRE, *supra* note 12, at 182.

²⁵ BARUCH SPINOZA, *TRACTATUS THEOLOGICO-POLITICUS* 243 (Samuel Shirley trans., 1991). For discussions and variant translations of this passage, see ALLISON, *supra* note 20, at 192; see also SMITH, *supra* note 23, at 136.

²⁶ See FEUER, *supra* note 19, at 106. For a critique of Spinoza's views on democracy, see ALLISON, *supra* note 20, at 203-04.

²⁷ SPINOZA, *supra* note 25, at 242.

²⁸ See *id.* at 280 ("[I]nward worship of God and piety itself belong to the sphere of individual right . . .").

therefore the right to change these beliefs.²⁹ This may seem like a modest proposal today, but it was an important proposition in its time.³⁰

But when religious beliefs turned into external practices, Spinoza believed the state had the authority to regulate those practices.³¹ Only the state could determine and enforce what was best for the population as a whole.³² Thus, the state would even have final authority over decisions by religious groups “to excommunicate or to accept [new members] into the church.”³³ For Spinoza, the welfare of the people “is the highest law. . . . [S]ince it is the duty of the sovereign alone to decide what is necessary for the welfare of the entire people . . . it follows that it is also the duty of the sovereign alone to decide what form piety towards one’s neighbor should take”³⁴

Spinoza further believed that the state should establish a kind of broad civic religion, that is, the state should foster belief in certain basic religious principles.³⁵ Other religions would be allowed to exist, but it was clear the state religion would be favored. For example, while the established state religion should build temples that would “be large and costly,” other religions would be limited to having temples that were “small . . . and on sites at some little distance one from another.”³⁶

There is less conflict than may appear between the established state religion and the limited, but real, freedom for religious minorities that Spinoza envisioned. The central principle of Spinoza’s civic religion was that everyone ought to love one’s neighbor, and thus everyone ought to perform acts of justice and charity.³⁷ For Spinoza, the civic religion was a means of fostering religious toleration, indeed that was the primary reason for having the government establish such a religion.³⁸

In sum, authority over religion was given to the secular state, rather than to the oppressive and irrational Church. There would be no Inquisitions into personal belief, and the state through its

²⁹ See SMITH, *supra* note 23, at 156-60.

³⁰ See *id.*

³¹ See NADLER, *supra* note 8, at 284.

³² See *id.*

³³ SPINOZA, *supra* note 25, at 286.

³⁴ *Id.* at 284.

³⁵ See ALLISON, *supra* note 20, at 226; HAMPSHIRE, *supra* note 12, at 200.

³⁶ BARUCH SPINOZA, A THEOLOGICO-POLITICAL TREATISE AND A POLITICAL TREATISE 368 (R.H.M. Elwes trans., 1951).

³⁷ See SPINOZA, *supra* note 25, at 224 (stating that everyone “must worship by practising justice and charity to their neighbour”); see also NADLER, *supra* note 8, at 280.

³⁸ See SMITH, *supra* note 23, at 116; ALLISON, *supra* note 20, at 226.

own civic religion would foster tolerance. However, when religion affected external behavior towards one's fellow citizens, the state had the ultimate authority to decide whether to step in.

II. SCALIA'S VIEW OF CHURCH AND STATE

Justice Scalia's view that the legislature should have remarkable latitude in determining the relationship between church and state received its fullest exposition in *Employment Division v. Smith*.³⁹ Scalia wrote the Court's opinion upholding the application of a state law banning peyote use in a religious ceremony.⁴⁰

Scalia began, as Spinoza did, with a ringing defense of an individual's freedom of religious belief: "the First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.'"⁴¹ But the free exercise of religion does not extend, Scalia held, to the performance of "physical acts" that contravene a neutral, generally applicable legislative enactment.⁴² Among the examples he gave of laws that could constitutionally be applied to outlaw sincere religious beliefs were laws against polygamy, child labor, draft evasion, wearing a yarmulke when in the military, and failure to obtain a social security number.⁴³ In short, all instances of the "performance of (or abstention from) physical acts" in the name of religion are subject to generally applicable, neutral legislative control.⁴⁴ Moreover, although not obligated to do so, legislatures have the power to exempt religious activities from its laws. For example, a legislature could ban peyote, or it could exempt religious uses of the drug without exempting other uses.⁴⁵ Neither the Free Exercise nor the Non-establishment Clause limits the legislature in making such judgments.

In locating this sweeping power in the legislature, Scalia rejected two alternative places where the power might be placed. First, neither churches nor religious individuals themselves could be given the authority to decide whether religious beliefs should

³⁹ 494 U.S. 872 (1990).

⁴⁰ *See id.* at 874.

⁴¹ *Id.* at 877 (citing *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)) (emphasis in original).

⁴² *See id.* at 877, 878-90.

⁴³ *See id.* at 879-84 (citing with approval *Reynolds v. United States*, 98 U.S. 145 (1879); *Prince v. Mass.*, 321 U.S. 158 (1944); *Gillette v. United States*, 401 U.S. 437 (1971); *Goldman v. Weinberger*, 475 U.S. 503 (1986); and *Bown v. Roy*, 476 U.S. 693 (1986)).

⁴⁴ *Id.* at 877, 878-90.

⁴⁵ *See id.* at 890.

overcome the law. This would fatally undermine the state, since it would “‘permit every citizen to become a law unto himself.’”⁴⁶ Citing Frankfurter, Scalia argued that “[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.”⁴⁷

In Spinoza’s day, when churches possessed vast, quasi-governmental powers, this assertion of secular supremacy over churches was a bold position. By the time of *Smith*, the reduced power of churches, combined with the multiplicity of religious beliefs extant in the United States, made this part of Scalia’s argument uncontroversial. The controversy came because Scalia rejected a second alternative place where the power to draw the boundary between church and state might be located—the unelected federal judiciary.

Prior to *Smith*, the federal judiciary had considerable power in this regard. Under *Sherbert v. Verner*,⁴⁸ government actions that substantially burdened a religious practice had to be justified by a compelling government interest. If the court believed no such interest existed, it would exempt the religious practice from the law.⁴⁹ Scalia rejected this approach. Judges had no authority to “weigh the social importance of all laws” against religious beliefs.⁵⁰ If the compelling state interest test were taken seriously, judges, confronting the diversity of American religious beliefs, would exempt individuals and groups from a wide range of laws, thus “courting anarchy.”⁵¹ Nor would matters be improved if the compelling state interest test were limited to conduct that was “central” to an individual’s religious beliefs.⁵² Judges lack the ability and the authority to decide when a religious practice is “central.” “What principle of law or logic,” Scalia argued, “can be brought to bear to contradict a believer’s assertion that a particular act is ‘central’ to his personal faith?”⁵³

Smith was enormously controversial because of its elimination of the judicial role in free exercise cases. Within a few years, Congress enacted and the President signed the Religious Freedom Restoration Act, which attempted to restore the pre-*Smith*

⁴⁶ *Id.* at 879 (citing *Reynolds*, 98 U.S. at 166-67).

⁴⁷ *Id.* (quoting *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594-95 (1940)).

⁴⁸ 374 U.S. 398, 406 (1963).

⁴⁹ *See id.*

⁵⁰ *Smith*, 494 U.S. at 890 (1990).

⁵¹ *Id.* at 888.

⁵² *Id.* at 886 (citation omitted).

⁵³ *Id.* at 887.

approach.⁵⁴ Under this statute, when a law is challenged on the ground that it substantially burdens a person's exercise of religion, the court must determine if the burden is in furtherance of a compelling governmental interest.⁵⁵ In *Boerne v. Flores*,⁵⁶ the Supreme Court struck down this statute on the ground that it exceeded Congress's power under Section 5 of the Fourteenth Amendment to enact legislation enforcing the Free Exercise Clause.⁵⁷

In *Boerne*, Justice Scalia took the occasion to reaffirm his support for *Smith*.⁵⁸ The facts of *Boerne* and Scalia's reaction to those facts demonstrate that his sweeping view of legislative power in this area is quite close to that of Spinoza's.

Boerne arose when a Catholic Church in Boerne, Texas needed to enlarge its building, which dated to 1923 and was built in a mission style that reflected the region's history.⁵⁹ The church had room for only 230 worshipers, meaning that 40 to 60 parishioners could not be accommodated at some masses.⁶⁰ When the Archbishop applied for a building permit so construction could begin, the Boerne City Council denied the application on the ground that enlarging the church was inconsistent with the city's historic landmark preservation plan.⁶¹ The church went to court under the Religious Freedom Restoration Act, arguing that the inability to accommodate parishioners for mass substantially burdened free exercise and that preserving this replica of the mission style was not a compelling government interest.⁶²

In *Boerne*, Scalia vigorously defended the *Smith* approach, under which the church must make its case before the representative branches of government, not the courts.⁶³ The historic record at the time the Constitution was written is consistent, Scalia argued, with the view that religious exercise is subject to any general law governing conduct.⁶⁴ This was in accord

⁵⁴ See *City of Boerne v. Flores*, 521 U.S. 507, 511-15 (1997).

⁵⁵ See *id.* at 515.

⁵⁶ 521 U.S. at 507 (1997).

⁵⁷ See *id.* at 512.

⁵⁸ See *id.* at 537-44 (Scalia, J., concurring in part). Scalia's concurrence here, in a land use case, makes clear that *Smith* was not limited to criminal laws that burden free exercise.

⁵⁹ See *id.* at 511-12.

⁶⁰ See *id.* at 512.

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *id.* at 537-44 (Scalia, J., concurring in part).

⁶⁴ See *id.* at 537. For a full exposition of the contrary view, see McConnell, *supra* note 7, at 1410-1517. For an argument that Scalia's general desire to treat religion as an ordinary participant in the political process is inconsistent with the Framers' intent, see Kathleen M. Sullivan, *Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 449,

with the “background political philosophy of the age (associated most prominently with John Locke). . . .”⁶⁵ The state is free not only to prohibit religious exercises in cases of “violence or force,” but in all cases where those exercises conflict with the general law.⁶⁶ Scalia also went beyond the historical record to defend once again, on institutional grounds, the result in *Smith*: “[S]hall it be the determination of this Court, or rather of the people, whether . . . church construction will be exempt from zoning laws? . . . It shall be the people.”⁶⁷

At first blush, the application of general zoning and historic preservation laws may seem rather distant from Spinoza’s view that the state can limit minority religions to temples that are “small . . . and on sites at some little distance one from another.”⁶⁸ After all, Scalia agrees with every other member of the Court that a legislature cannot openly single out and ban a minority religious practice on the grounds that it disagrees with that practice.⁶⁹ But the distance may be more apparent than real. The problem faced by the church in Boerne, Texas was the tip of an iceberg. Religious groups often maintain that zoning restrictions are imposed in an unfair way; indeed, they contend that minority religions fare less well than powerful ones when governmental authorities decide whether to permit expansion of a building, or additional parking, or worship services in a private home.⁷⁰ While the authorities do not admit that they are tougher on religious groups with little political power, they often appear to behave this way.⁷¹ The problem is so acute that after *Boerne*, Congress enacted a federal statute that attempts to restore the pre-*Smith* compelling state interest test in situations where religious exercise conflicts with land use restrictions.⁷² Congress hopes that the Court may be more receptive to this targeted approach than it was to the general effort to restore pre-*Smith* law, which the Court rejected in *Boerne*.⁷³

466-67 (2000).

⁶⁵ *Boerne*, 521 U.S. at 540 (Scalia, J., concurring in part).

⁶⁶ *See id.*

⁶⁷ *Id.* at 544.

⁶⁸ SPINOZA, *supra* note 36, at 368.

⁶⁹ *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558-59 (1993) (Scalia, J., concurring in part and concurring in the judgment).

⁷⁰ *See, e.g., Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution, House Comm. on the Judiciary*, 106th Cong. (1998) (prepared testimony of Douglas Laycock).

⁷¹ *Id.*; *see also id.* (testimony of Bruce D. Shoulson).

⁷² Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc (Supp. 2001); *see also* Michael D. Shear & Dan Eggen, *Church Zoning Eased, Raising Fear of Fights*, WASH. POST, Sept. 23, 2000, at B1.

⁷³ *See supra* note 70.

Justice Scalia is well aware that minority religions might fare poorly at times under *Smith*. His goal is not to pick winners or losers in individual disputes between church and state, but to defend a general institutional approach to the matter. As he wrote in *Smith*:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.⁷⁴

Like Scalia, Spinoza's central point was institutional. Whether a society ends up with large temples or small should be determined by the sovereign, which reflects what is best for the people, not by the churches themselves which may be fostering superstition and oppression rather than reason.

Of course, Scalia and Spinoza may have different motivations for making these similar institutional judgments. Scalia does not explicitly rely on the idea that legislatures are more rational than alternative institutions such as the courts, although he may believe they are. Scalia's focus is instead on legitimacy: legislatures are elected; federal judges are not. But he ends up in the same place Spinoza does.

When we turn from free exercise to non-establishment, it once again seems that the gap between Scalia and Spinoza is large. Scalia, after all, would never dispute that the Non-establishment Clause prevents the government from formally designating a state religion, even the sort of broad civic religion favored by Spinoza. However, once again the gap is narrower than it first appears.

Scalia had occasion to discuss the role of civic religion in *Lee v. Weisman*,⁷⁵ which concerned the constitutionality of a commencement prayer at a public middle school in Providence, Rhode Island. Providence school officials provided clergy who were invited to offer prayers with a pamphlet titled "Guidelines for Civic Occasions."⁷⁶ These guidelines recommended that prayers at events like commencement be written with "inclusiveness and sensitivity."⁷⁷ At the graduation ceremony in question, a Rabbi was given the pamphlet and was also advised

⁷⁴ *Employment Division v. Smith*, 494 U.S. 872, 890 (1990).

⁷⁵ 505 U.S. 577 (1992).

⁷⁶ *Id.* at 581.

⁷⁷ *Id.* (quotations omitted).

that his invocation and benediction should be “nonsectarian.”⁷⁸

The Rabbi’s prayers were designed to meet these standards. His invocation, for example, began:

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You⁷⁹

The Supreme Court found the offering of this prayer at commencement to be in violation of the Non-establishment Clause.⁸⁰ The Court found indirect public and peer pressure to make students who did not share the prayers’ sentiments stand or at least maintain respectful silence during the prayer.⁸¹ A dissenting student could reasonably believe that her own standing or sitting in silence could be misinterpreted as approval of the ceremony.⁸²

Justice Kennedy, in his opinion for the Court, recognized that the case could be seen as involving the use of a nonsectarian civic religion at a public function, but he believed that this should not change the outcome:

There may be some support, as an empirical observation . . . that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. . . . If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.⁸³

Justice Scalia, in dissent, noted the long history in the United States of public ceremonies which included prayers of thanksgiving, including a long history of prayers at public

⁷⁸ *Id.*

⁷⁹ *Id.* at 581-82 (citation omitted).

⁸⁰ *See id.* at 584-86.

⁸¹ *See id.* at 593.

⁸² *See id.*

⁸³ *Id.* at 589 (citations omitted).

commencement exercises.⁸⁴ Additionally, he argued that there was no coercion involved in simply standing or sitting quietly while such a prayer is given.⁸⁵ Most importantly, he concluded with a strong affirmation of the public value of nonsectarian prayer. Making precisely the argument Spinoza had made, he maintained that if the state chooses to foster civic religion it will be fostering toleration and religious liberty:

The Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also know that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. . . . The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.⁸⁶

Other opinions by Scalia interpreting the Non-establishment Clause are consistent with his dissent in *Lee*. He has, for example, supported giving the legislature power to decide whether to fund programs that include parochial schools,⁸⁷ or to celebrate religious holidays in the public square,⁸⁸ or to teach creation science in public schools.⁸⁹

So *Smith* and *Lee* go hand-in-hand. But the most dramatic demonstration of Scalia's belief in legislative supremacy in the church-state arena comes not in his interpretation of the Religion Clauses, but in his attack on a due process decision, *Pierce v. Society of Sisters*,⁹⁰ which is a cornerstone of religious freedom in the United States.

⁸⁴ See *id.* at 631, 633-36 (Scalia, J., dissenting).

⁸⁵ See *id.* at 637-39.

⁸⁶ *Id.* at 646.

⁸⁷ In *Mitchell v. Helms*, 530 U.S. 793, 801 (2000), Justice Scalia joined Justice Thomas' opinion upholding neutral aid programs that include religious schools, even if the aid is direct, divertible, and goes to pervasively sectarian schools.

⁸⁸ In *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part), Justice Scalia joined Justice Kennedy's opinion upholding the display of a crèche on the courthouse steps and a menorah in front of a government office building.

⁸⁹ See *Edwards v. Aguillard*, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting).

⁹⁰ 268 U.S. 510 (1925).

Stephen L. Carter has called *Pierce* “almost certainly” the Supreme Court opinion “most supportive of the survival of religious communities.”⁹¹ *Pierce* holds that parents have a constitutional right to send their children to private schools.⁹² Although *Pierce* never mentions freedom of religion, it has become the basis of a religious school option that is vital to millions of Americans.⁹³ The 1925 decision in *Pierce* was unanimous, and until Justice Scalia, no Supreme Court Justice had ever questioned it.⁹⁴

Pierce arose because Oregon, in 1922, enacted a law requiring that all children between the ages of eight and sixteen attend public school.⁹⁵ The law was triggered in large part by nativist opposition to Catholic practices and Catholic schools.⁹⁶ The constitutionality of the statute was challenged by a religious order which ran several Catholic schools and by the Hill Military Academy, a nonsectarian private school.⁹⁷ In *Pierce*, the Supreme Court unanimously held that the statute violated the substantive due process right of parents to direct the upbringing of their children.⁹⁸ Justice McReynolds’ opinion for the Court held that:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.⁹⁹

Pierce proved to be popular across the American political spectrum and with the Supreme Court as well.¹⁰⁰ While other substantive due process decisions, from *Lochner*¹⁰¹ to *Roe*¹⁰² have

⁹¹ STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY* 35 (1998).

⁹² See *Pierce*, 268 U.S. at 530.

⁹³ For a discussion of the importance of *Pierce* to parochial schooling, see STEVEN GOLDBERG, *SEDUCED BY SCIENCE: HOW AMERICAN RELIGION HAS LOST ITS WAY* 66-67 (1999).

⁹⁴ For a discussion of the popularity of *Pierce* in an article criticizing that decision, see Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

⁹⁵ See *Pierce*, 268 U.S. at 530.

⁹⁶ See WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927*, at 148-58 (1994).

⁹⁷ See *id.* at 160-61.

⁹⁸ See *Pierce*, 268 U.S. at 510.

⁹⁹ *Id.* at 535.

¹⁰⁰ See Woodhouse, *supra* note 94, at 997-98.

¹⁰¹ *Lochner v. New York*, 198 U.S. 45 (1905) (holding that state maximum hour legislation violated the Due Process Clause).

been enormously controversial, *Pierce* is one limitation on legislative power that has been unchallenged.¹⁰³

Unchallenged, that is, until Justice Scalia's opinion in *Troxel v. Granville*¹⁰⁴ in 2000, in which the Court struck down a legislative provision enacted by the State of Washington. Under the Washington law, "any person" may petition "at any time" for visitation rights and the court may grant such rights whenever it believes visitation will serve a child's best interest.¹⁰⁵ The litigation arose when grandparents petitioned to visit their deceased son's daughters.¹⁰⁶ The mother of the girls opposed the petition, but it was granted by a trial court.¹⁰⁷

The United States Supreme Court found that giving visitation decisions to a judge without any deference to the views of fit custodial parents was a violation of the parents' substantive due process right to raise their children.¹⁰⁸ While there was no majority opinion, the six Justices in the majority all relied on *Pierce*. Justice O'Connor's plurality opinion for four Justices cited *Pierce* for the proposition that "[t]he child is not the mere creature of the State."¹⁰⁹ Justice Souter's concurrence noted that under *Pierce*, "[e]ven a State's considered judgment about the preferable political and religious character of schoolteachers is not entitled to prevail over a parent's choice of private school."¹¹⁰ Justice Thomas' concurrence held that under *Pierce*, "parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them."¹¹¹ Two of the dissenting Justices did not question *Pierce*, although they argued it was not determinative in this litigation.¹¹²

Justice Scalia's dissent, however, directly challenged *Pierce*.¹¹³ He described it as stemming from "an era rich in substantive due process holdings that have since been repudiated," and as having

¹⁰² *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the Due Process Clause protects a woman's decision to terminate pregnancy).

¹⁰³ See Woodhouse, *supra* note 94, at 996-97.

¹⁰⁴ 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).

¹⁰⁵ *Id.* at 60.

¹⁰⁶ See *id.* at 60-1.

¹⁰⁷ See *id.* at 61.

¹⁰⁸ See *id.* at 60-80.

¹⁰⁹ *Id.* at 65 (O'Connor, J.) (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

¹¹⁰ *Id.* at 78-79 (Souter, J., concurring in the judgment).

¹¹¹ *Id.* at 80 (Thomas, J., concurring in the judgment). Justice Thomas said that he left "for another day" the possibility that all substantive due process cases should be overruled. *Id.* But his assertion that *Pierce* holds that "parents have a fundamental constitutional right to rear their children," and that he would "apply strict scrutiny to infringements of fundamental rights," along with his concurrence in the judgment makes clear that, unlike Justice Scalia, he is not presently ready to set aside *Pierce*. *Id.*

¹¹² See *id.* at 80 (Stevens, J., dissenting); *id.* at 93 (Kennedy, J., dissenting).

¹¹³ See *id.* at 92 (Scalia, J., dissenting).

“small claim to *stare decisis* protection.”¹¹⁴ While affirming in strong terms the right of parents to direct the upbringing of their children, he maintained that legislatures, not judges, should decide whether and how to protect that right:

[W]hile I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the state has *no power* to interfere with parents’ authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.¹¹⁵

In sum, state legislatures should set parental rights, since they can “correct their mistakes in a flash,” and are “removable by the people.”¹¹⁶ *Troxel* did not directly involve the right to send children to private schools, but Scalia’s attack on *Pierce* makes clear that he would leave this matter to the legislatures. Scalia, who graduated from a parochial high school,¹¹⁷ is not opposed to religious schooling; indeed, he wrote in *Troxel* that the parental right “to direct the upbringing of their children is among the ‘unalienable Rights’” set forth in the Declaration of Independence.¹¹⁸ But as with religious practices that violate the law or the presence of civic religion in the public square, he would leave the boundary between church and state to the legislature. Scalia’s position in this regard is strong, consistent, and strikingly similar to the views advocated by Spinoza.

III. CHURCH CONTROL OVER EXCOMMUNICATION: THE CASE OF THE HUTTERIAN BRETHREN

As we have seen, one consequence of Spinoza’s view on the relationship between church and state was that the sovereign should have the authority to review decisions by a church to excommunicate members. In Spinoza’s day, excommunication could carry enormous practical consequences: the dissenter might,

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 91-92 (Scalia, J., dissenting) (emphasis in original).

¹¹⁶ *Id.* at 93.

¹¹⁷ See Jeffrey Rosen, *Is Nothing Secular?*, N.Y. TIMES MAG., Jan. 30, 2000, at 44 (stating that Justice Scalia graduated from Xavier High School, a Jesuit academy in Manhattan).

¹¹⁸ *Troxel*, 530 U.S. at 91 (Scalia, J., dissenting).

for example, lose the ability to carry on his business.¹¹⁹ Since the state was, for Spinoza, the source of rational policies for serving the public good, it should have the authority to decide if an excommunication decision served that goal.¹²⁰

Would Justice Scalia reach the same result? It is standard teaching that courts will abstain from adjudicating cases involving the excommunication of church members.¹²¹ But Justice Scalia may be moving toward challenging that teaching.

Justice Scalia has not had the opportunity to write an opinion addressing this matter. The most recent Supreme Court decision involving an internal church dispute is the 1979 case of *Jones v. Wolf*,¹²² which did not involve excommunication and was decided before Scalia joined the Court. It is worth noting, however, that *Jones* would not pose a precedential barrier if Scalia chose to allow adjudication of an excommunication dispute. *Jones* involved a property dispute. The majority of a local Presbyterian congregation in Macon, Georgia voted to withdraw from the Presbyterian Church of the United States because of doctrinal differences.¹²³ Both the national church and the local majority claimed ownership of the church property.¹²⁴ The Georgia courts, applying neutral principles of law, examined such documents as the deed and the corporate charter of the local church, and concluded that, although the Presbyterian Church is a hierarchical body, ownership of the property should go to the local group.¹²⁵

When the Supreme Court took the case, it approved the Georgia court's use of the neutral principles approach.¹²⁶ This is consistent with the approach Scalia took in his opinion for the Court in *Smith* eleven years later, where he held that general principles of law do not lose their force because they are being applied to a religious group or a religious practice, such as the sacramental use of peyote.¹²⁷

But *Jones* was not an excommunication matter. Even those scholars who believe that *Smith* and other cases may foreshadow

¹¹⁹ See NADLER, *supra* note 8, at 123.

¹²⁰ See *supra* Part I.

¹²¹ See, e.g., Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 44-45 (1998).

¹²² 443 U.S. 595 (1979).

¹²³ See *id.* at 597-98.

¹²⁴ See *id.* at 598-99.

¹²⁵ See *id.* at 599-601.

¹²⁶ See *id.* at 602-06.

¹²⁷ In analyzing church property cases, Professor Greenawalt concludes that *Smith* lends support to the neutral principles approach taken years earlier in *Jones*. See Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1906 (1998).

greater judicial involvement in church matters are reluctant to apply that idea to excommunication.¹²⁸ Suppose that Scalia were confronted with a case in which a member of a church was excommunicated because she violated church teachings. Could she obtain legal redress?

Scalia would certainly recognize that there are free speech limitations to governmental control over church membership. After all, religious groups are not worse off in his view than other private organizations. Scalia has written that “private religious speech . . . is as fully protected under the Free Speech Clause as secular private expression [A] free-speech clause without religion would be *Hamlet* without the prince.”¹²⁹ So, just as the Boy Scouts can expel a member if keeping him on the rolls would undercut their expressive freedom because he advocates policies they oppose, so too a religious group could expel a member if keeping her on the rolls would undercut their expressive freedom.¹³⁰ Thus, if a member of a religious group were excommunicated because she spoke against church doctrine, the group would have a free association claim against government efforts to keep her in the church.

But just as in Spinoza’s day, excommunication today can involve more than the simple statement, “your views are contrary to ours.” Suppose that church doctrine bars adultery, and a member is excommunicated with the public pronouncement that she had engaged in adultery. Suppose further that she claims that this pronouncement was made falsely by the church leadership; indeed, they knew it was false when they made it and they made it because of a private vendetta. This dissenter might go to court under the general state law authorizing suits for slander.

Everything Scalia has written suggests that he would allow this suit to go forward. Under Scalia’s *Smith* opinion, the legislature has the power to choose whether or not to exempt religious groups from its general law against slander. If it grants

¹²⁸ See, e.g., Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219 (2000). Professor Idleman ably surveys numerous considerations that suggest that courts may increasingly allow tort suits against religious entities, even when internal church policies are at stake. He regards it as an open question whether the United States Supreme Court will approve of this trend. See *id.* at 269-70. However, he suggests that excommunications matters stand on a special footing and are less likely to invite judicial involvement. See *id.* at 237-38.

¹²⁹ *Capitol Square Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (citations omitted).

¹³⁰ Scalia joined the Court’s opinion in *Dale* holding that the Boy Scouts had a First Amendment free association right to expel an assistant scoutmaster who publicly declared he was homosexual. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). This opinion noted that free association rights extended to religious groups. *Id.* at 647-48.

such an exemption, the Non-establishment Clause is not violated. But if no such exemption is granted, the lawsuit could go forward.¹³¹

Some Justices might believe that allowing this litigation would improperly “entangle” church and state under the Supreme Court’s decision in *Lemon v. Kurtzman*.¹³² But Scalia has never taken that approach. He has explicitly rejected the *Lemon* decision and has sharply dissented from opinions finding improper entanglement.¹³³ As *Smith* itself suggests, applying a neutral law to a religious practice is not improper entanglement; if there is no legislative exemption, it is the required approach.

There is an apparent paradox here. A strong thread in Scalia’s decisions upholding legislative primacy in resolving boundary disputes between church and state is the belief that the legislature is better suited than the courts to determine where that boundary should lie.¹³⁴ Thus, legislatures decide whether church rituals will be exempt from general laws, rather than courts making that decision under a compelling state interest approach to the Free Exercise Clause and legislatures decide whether to permit nonsectarian prayer at public events rather than courts making that decision under the Non-establishment Clause. Indeed, legislatures decide whether to permit church schools to exist as an alternative to public schools rather than courts making that decision under the Due Process Clause.¹³⁵

The paradox is that this very deference to the legislature can result in a new and surprising role for the courts in policing church conduct. For if the legislature decides not to exempt religious groups from ordinary rules of law like those governing defamation, then internal church matters can wind up in court. They cannot be thrown out through the use of doctrines, such as free exercise, non-establishment, or due process, that trump legislative choices.

But this paradox is more apparent than real. Scalia’s problem with judicial involvement in cases like *Sherbert v. Verner*,¹³⁶ *Lee v.*

¹³¹ See *supra* Part II.

¹³² 403 U.S. 602, 612-13 (1971). See also Greenawalt, *supra* note 126, at 1905-06 (“The entanglement worry fits very well with a strong ‘hands-off’ approach; courts should not become the adjudicators of religious matters.”).

¹³³ For Scalia’s rejection of *Lemon*, see *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398-400 (1993) (Scalia, J., concurring). For an example of Scalia disagreeing with a finding of entanglement, see *Texas Monthly v. Bullock*, 489 U.S. 1, 43 (1989) (Scalia, J., dissenting) (explaining that the court should not have found improper entanglement when Texas exempted religious periodicals from its sales tax).

¹³⁴ See *supra* Part II.

¹³⁵ See *supra* Part II.

¹³⁶ 374 U.S. 398 (1963).

Weisman,¹³⁷ and *Pierce v. Society of Sisters*¹³⁸ is that the unelected Court is placing its judgments above those of the democratically elected legislature in an area—church-state relations—where the Court lacks the ability or the authority to do so. Once the legislature has authorized a neutral cause of action, the courts can adjudicate individual cases involving religion as legitimately as they can any other private matter. Indeed, to do otherwise gives religion the sort of special judicial treatment that Scalia opposes.

Thus, in determining whether a court has jurisdiction of a challenge to an excommunication decision by a church, Scalia would first determine if such jurisdiction infringes on the church's free speech and association. If it does not, the court should be willing to apply any applicable neutral legislative rule, unless the legislature has stated that religious groups are exempt. In applying such a rule, the court may have to interpret church documents or teachings, not to determine if they are metaphysically true, but to carry out the legislative policies embodied in law.

Of course, difficult cases will arise under this approach. Whether applying a legislative norm infringes on associational freedom can be a hard question. A recent excommunication controversy involving the Hutterite Church illustrates what Scalia's approach would look like in practice.

The Hutterites are an Anabaptist group founded in 1528 in Central Europe.¹³⁹ Hutterites share with other Anabaptists, including the Mennonites and the Amish, certain fundamental beliefs such as adult voluntary baptism, the refusal to bear arms, and organizing the church itself as a community that follows Jesus' model in all areas of life.¹⁴⁰

From the beginning, Anabaptists faced persecution.¹⁴¹ After Spinoza had been excommunicated from the Jewish community in mid-seventeenth century Amsterdam, the circle of free thinkers with whom he discussed philosophical and religious ideas included Mennonites.¹⁴²

The Hutterites did not escape such persecution. Their

¹³⁷ 505 U.S. 577 (1992).

¹³⁸ 286 U.S. 510 (1925).

¹³⁹ See Alvin Esau, *Communal Property and Freedom of Religion: Lakeside Colony of Hutterian Brethren v. Hofer*, in RELIGIOUS CONSCIENCE, THE STATE, AND THE LAW: HISTORICAL CONTEXTS AND CONTEMPORARY SIGNIFICANCE 98 (John McLaren & Harold Coward eds., 1999).

¹⁴⁰ See *id.*

¹⁴¹ See *Deerfield Hutterian Ass'n v. Ipswich Bd. of Educ.*, 468 F. Supp. 1219, 1223 (N.D.S.D. 1979).

¹⁴² See ALLISON, *supra* note 20, at 225; NADLER, *supra* note 8, at 167-68.

founder, Jacob Hutter, was burned at the stake in 1536.¹⁴³ In the late nineteenth century, Hutterites, fleeing continuing persecution in Europe, began to settle in the western United States and Canada. Today, there are about 35,000 Hutterites in this region, organized into roughly 350 colonies.¹⁴⁴

A distinctive feature of life in Hutterite colonies is a strictly communal approach to property, inspired by the Book of Acts, Chapters 2 and 4.¹⁴⁵ Under the Hutterite system, the members of each colony devote all of their time and labor to the colony and the church.¹⁴⁶ No individual holds title to real or personal property.¹⁴⁷ The church provides all necessities of life, including food, clothing, and shelter.¹⁴⁸

In 1999, the Supreme Court of South Dakota was called upon to resolve a dispute that arose in the colony known as the Tschetter Hutterian Brethren.¹⁴⁹ Since 1992, this colony, along with other Hutterite colonies, had been embroiled in a leadership dispute.¹⁵⁰ A book published in that year accused Reverend Jacob Kleinsasser, a leader revered in many colonies, of financial improprieties.¹⁵¹ In the Tschetter Hutterian Brethren, the majority rejected Reverend Kleinsasser, while a minority remained loyal to him.¹⁵²

On March 27, 1995, the majority of the Brethren expelled the minority from the colony and the church because the minority continued to insist on their loyalty to Reverend Kleinsasser.¹⁵³ But the minority refused to leave. Both factions remained at the colony, and each clearly disliked the others' presence.¹⁵⁴ Ultimately the minority brought a lawsuit, claiming that the larger group had committed a variety of torts and other offenses against them.¹⁵⁵

In a three to two decision, the Supreme Court of South Dakota dismissed the minorities' case.¹⁵⁶ Because the case was

¹⁴³ See Esau, *supra* note 139, at 98.

¹⁴⁴ See *id.*

¹⁴⁵ See *Decker v. Tschetter Hutterian Brethren, Inc.*, 594 N.W. 2d 357, 359-60 & nn.1, 2, 6 (S.D. 1999).

¹⁴⁶ See *id.* at 359.

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ See *id.* at 358-59.

¹⁵⁰ See *id.* at 360-61.

¹⁵¹ See *id.* at 360.

¹⁵² See *id.* at 360-61.

¹⁵³ See *id.* at 361.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.* at 361-62.

¹⁵⁶ See *id.* at 362, 365.

poorly pleaded and because extremely limited procedures had been followed before the trial court dismissed the complaint, it is hard to know exactly what went on at the colony.¹⁵⁷ The majority of the South Dakota Court felt that it did not need to know all the details because it viewed this as “a religious dispute rather than a secular dispute,”¹⁵⁸ believed that it could not become embroiled in ecclesiastical matters, and concluded that “[i]f there is an earthly forum for adjudication of Plaintiff’s allegations, it is not the secular courts of this State.”¹⁵⁹

The dissenting Justices emphasized that the complaint alleged that defendants cut off electricity to plaintiffs’ homes and assaulted plaintiffs by intentionally driving vehicles at them.¹⁶⁰ To the dissenters, allowing defendants to escape liability in their individual capacity was similar to sanctioning “the conduct occurring during the Crusades and the Inquisition, just because it purports to be done for religious beliefs.”¹⁶¹

It is not surprising that the majority would overlook the dangerous conduct alleged in this case. To the majority, this case involved expulsion from a church. If you are expelled, you can avoid these problems by leaving.¹⁶² To the dissent, the excommunication context did not end the inquiry.

There is no doubt that Spinoza would hold that secular authorities should resolve this dispute. For Scalia, the result might well be the same. Almost certainly the South Dakota legislature envisioned that an assault case could lie if one person drives a vehicle at another with intent to injure, even in the context of a religious dispute. It is also possible that the South Dakota legislature envisioned that a tort action would lie if one person cuts off electricity to another’s home, even if title to that home is held by the community as a whole. It might be necessary in such a case to examine church rules on what is meant by communal ownership, but that fact can hardly justify throwing out a case before it begins just because it arises in an excommunication context.

The communal property aspect of ownership in the Hutterite Church makes it difficult to separate the undoubted free association right of a church to control its membership from the

¹⁵⁷ See *id.* at 361-62. The dissent found that there had been “totally improper procedural short-cuts . . .” *Id.* at 366 (Sabers, J., dissenting).

¹⁵⁸ *Id.* at 362.

¹⁵⁹ *Id.* at 365.

¹⁶⁰ See *id.* at 367.

¹⁶¹ *Id.* at 366.

¹⁶² The majority analogized this case to one involving shunning. See *id.* at 363 n.10.

state's legitimate interest in protecting its citizens. But the separation may be possible. The majority of a church does not need to assault the minority to make clear that the minority has heterodox views. Of course, the legislature of South Dakota might conclude that it is prudent, because of a desire to allow this religious community to operate on its own, to exempt communities of this sort from various laws. But that decision, in Scalia's view, is for the legislature, not the courts.

Whatever the proper outcome for the Tschetter Hutterite Brethren, the broader implications of Justice Scalia's emerging approach to the relationship between church and state is clear. At least some excommunications will trigger secular involvement. Antonin Scalia will be at least part of the way toward Baruch Spinoza's approach to the Inquisition, to his own excommunication, and to the emergence of the rational secular state.