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# Monistic and Dualistic Paths to Radical Secularism: Comments on Tushnet

*Ralph C. Hancock\**

## I. INTRODUCTION

Parts of Mark Tushnet's essay might provide a useful corrective to what he calls a "sky is falling"<sup>1</sup> response to the already infamous *Smith*<sup>2</sup> decision. It is well to be reminded that religious claims were more often denied than honored under the Supreme Court's "compelling state interest doctrine,"<sup>3</sup> and that religious interests are not entirely without legal resources ("various statutory and state constitutional grounds")<sup>4</sup> under the new regime. More fundamentally, Tushnet reminds us of the illusory character of any tidy legal separation between political and religious interests or purposes. To maintain boundaries between the state and religion, someone (presumably the Supreme Court, conditioned by its sense of the "mainstream" of public opinion) must in the end decide what qualifies as a "compelling state interest," and indeed what qualifies as "religion."<sup>5</sup>

One might conclude from such observations that respect for these boundaries from the political side must ultimately depend, not upon some tidy legal dichotomy between "secular" and "religious," but upon a general public respect for religion or for the purposes served by religion. An inevitable corollary of

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1. Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 B.Y.U. L. REV. 117, 118.

2. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

3. *See, e.g.*, Tushnet, *supra* note 1, at 122.

4. *Id.* at 123.

5. *See* Tushnet's discussion of the "three levels of free exercise law," *id.* at 134.

this view—as the founders of Brigham Young University learned the hard way—is that public respect tends to be limited to the conventionally respectable.

But these are not Tushnet's conclusions, and his aim is certainly not to contribute to the security or scope of religious freedom by broadening or informing the public's respect for religion. For this would require an articulation of some sense of the meaning of "religious" ends as at once distinct from secular purposes and as legitimate objects of public protection.<sup>6</sup> But Tushnet is determined not to know what religion is.

## II. THE REDUCTIONIST ARGUMENT

For Tushnet, religion is always becoming, always in process. Religion has no stable meaning, and so we can never maintain that religion has been compromised or subjugated. A religion may seem to have succumbed to external, secular pressure, but this appearance vanishes when we understand that no ground exists for the distinction between the religious and the secular. The very definition of "religion," or of any particular religion, is a matter of ongoing "dialogue" and "negotiation" between or among historical forces. From this point of view, the very concept of coercion vanishes, for there is *no-thing* to coerce; the legitimacy of power cannot be judged from the standpoint of any stable religious commitments. State coercion is on the same plane with social pressure, and each is as entitled as any other force-factor to contribute to the ongoing redefinition of "religion," to the "dialogue" and "negotiation" through which religion is ever becoming.

Is religion becoming better? Consistent with his historical relativism, Tushnet claims he is unable to pass judgment on this matter. Indeed, the question only makes sense in his framework as a question about how religion or a religion at some future point in the endless flux of dialogic or negotiated development might evaluate an earlier point in this process. Tushnet insists that he takes "no position on the authenticity of either Georgetown's pre- or post-litigation interpretation of what its religious commitments require."<sup>7</sup> But this pose is not

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6. This is no easy task, but Tocqueville has provided a model of how the argument, political but not utilitarian, neither dogmatic nor relativistic, might be developed. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer ed. & George Lawrence trans., 1969).

7. Tushnet, *supra* note 1, at 133 n.37.

convincing. A theory which reduces religion to the successive and contingent products of political bargaining or to the outcome of a blind interaction of social forces can hardly claim to do justice to, or even give respect to, a religion's claim to represent (however imperfectly) a permanent and transcendent truth. If freedom of religion is merely the freedom of another "interest group," then there is no point in calling it freedom of religion. (Moreover, in a political arena conceived as a contest of force-factors where nothing is sacred, there may be cause to worry about the viability of *any* freedom.) Tushnet invites religion to a supposedly fair fight, where all that is distinctive in religion must be left at the door, and all remaining weapons can only be taken up in the name of secular interests.

In any case, Tushnet does not work very hard at sustaining this pose of impartiality, but clearly tips his hand in a number of passages. Thus he seems to take for granted that being forced to negotiate with secular interests can bring a religion to understand what its "commitments really are . . . . [S]uch efforts will enhance the institution's religious commitments through clarification of those commitments."<sup>8</sup> Although religion is a process of negotiation and dialogue, it is apparently possible for the "Enlightened" to discern when that process is moving in the right direction (clarifying "real" commitments), and when it is not (clinging to old-fashioned ideas of morality as anchored in transcendent truth). Tushnet's feigned impartiality to the outcome of struggles to define a particular religion's commitments (e.g., the Catholic church's position on the status of homosexuality) is a very thin mask for his promotion of a liberationist viewpoint. Pretending not to notice that contemporary efforts to "redefine" religious commitments have a persistent common theme—the attack on traditional moral restraints—he is puzzled as to "why the outsider's perspective is relevant."<sup>9</sup>

This question may be framed more bluntly: Why should Mormons care about how Catholicism—or a certain jurisdiction of Catholicism—redefines itself? The plain answer is that Mormons, Catholics, and many others have a common interest in resisting government-sponsored encroachments into their institutions and ways of life by a radically secular, liberationist antiethic. Within the horizon of Tushnet's reduction of religion

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8. *Id.* at 131.

9. *Id.* at 132.

to the negotiated or coerced transvaluation of values, the verdict of history is not hard to read in advance. If his collapsing of truth with negotiation and even coercion prevails, then it will obviously be impossible to regard Georgetown's new accommodation of homosexuals as "unauthentic—a mere submission to coercive state pressure."<sup>10</sup> The alternative—Tushnet's real view, the view from the perspective of our liberated future—is "that we will see the old position as unauthentic—resting on a thoughtless failure to consider the implications of the church's fundamental commitments and faith when approaching problems that were unforeseen by those who formulated the old position. . . . a thoughtless adherence to a mindless tradition."<sup>11</sup> For Tushnet, any belief that does not understand itself as the contingent result of blind social or political forces can only be regarded as irrational or "thoughtless."

### III. THE ARGUMENT FROM RADICAL DUALISM

For any thoughtless people who may not have been sufficiently reassured by Tushnet's monistic reduction of religion to a process of secular evolution, he goes on to supply a defense of *Smith* in the language of radical dualism. On this view, the religious and the secular are seen as "two domains of life that ought to be kept separate."<sup>12</sup> Relying upon "[o]ne reading of James Madison's *Memorial and Remonstrance*," Tushnet defends *Smith* as consistent with Madison's "sectarian" argument that "[t]he religion . . . of every man must be left to the conviction and conscience of every man."<sup>13</sup> *Smith* puts an end to the "idolatry"<sup>14</sup> of the "compelling state interest" regime, in which secular judges presumed to decide what was essential to a religion. Tushnet's dualism is considerably less friendly to religion than Madison's, simply because Madison conceived of the legitimate scope of government as rather severely restricted by individual rights, whereas Tushnet construes rights in such a way as to invite the indefinite expansion of the scope of government. Thus, the

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10. *Id.* at 133.

11. *Id.*

12. *Id.* at 136.

13. *Id.* (quoting JAMES MADISON, RELIGIOUS FREEDOM: A MEMORIAL AND REMONSTRANCE 5 (Lincoln & Edmonds 1819)).

14. *Id.* at 137-38.

good news for believers is not that free exercise will be respected, but that it will be violated on nonreligious grounds!

Here Tushnet's argument is impossible to parody, and it is difficult to believe that he intends it to be taken seriously by believers in institutional religion. Perhaps he finds it hard to conceive that any such "thoughtless" people still exist, at least among his audience of legal scholars. Tushnet proposes that believers be content to acknowledge the *power* of secular government to regulate religious institutions in any way it likes, as long as this power is not confused with religious *authority*.<sup>15</sup> Tushnet fearlessly (or heedlessly) pursues this argument to its conclusion: if *Smith* results in the persecution of religion, then this persecution may serve to remind the religious that the territory of the state must ever be distinct from the territory of God.<sup>16</sup> Persecution purifies religion, and Tushnet's state is ready to help.

Here we begin to see that Tushnet's monistic argument (religion is a dimension of the historical process) and his dualistic argument (religion and politics are radically distinct realms) are actually two sides of a single, progressive-liberationist coin. The privatization of religion, taken to the extreme, leaves the believer without any connection with publicly acknowledged meanings; the transcendent to which private "conscience" appeals is divorced from the communal human reality in which the person lives and breathes. Any substance of private belief thus appears groundless and evanescent; the only stable content of belief is a belief in progress, which can only be defined negatively as the liberation from thoughtless restraints. This is the effectual truth of Tushnet's reduction of religion to the condition of being "at risk."<sup>17</sup>

#### IV. CONCLUSION

It would be wrong to give Tushnet credit or blame for originality in this mobilization of Christian dualism in the service of secular progress. It has been three hundred years since Locke called Christianity's bluff: "Your Kingdom is not of this world? Fine—you have the 'other world,' we'll take this

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15. *Id.*

16. *Id.* at 139.

17. *Id.*

one."<sup>18</sup> And, although it would be hasty to make Locke, or even a Lockean Madison and Jefferson, the sole authors of the American understanding of religious freedom, there is no point in denying that Locke's argument played a role in the genesis of the First Amendment. But this implies all the more reason for friends of religious freedom today to reconsider the implications of such a radicalization of religious dualism. When Christ said, "render unto Caesar," he surely did not mean to authorize everything a modern, progressive Caesar might command to "render unto Me."

Tushnet helps friends of religious freedom to see that, in facing the challenge of contemporary secularism, they can no longer rest content with the Jeffersonian belief, perhaps inherited or appropriated from the spirit of Protestant Christianity, that "the mind is made free." No doubt in some eternal sense this is true. But if freedom is to mean something other than the "liberation" of bodily appetites or formless (if ultimately conformist) "self-expression," then our children will need religious institutions to prepare them to understand such higher meanings. Thus, we can no longer take for granted what was often only silently assumed by the Founders of our religious freedom: that the defense of such freedom implies a common and public recognition, not of any particular orthodoxy, but of the real ethical difference between higher and lower.

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18. See John Locke, *Letter Concerning Toleration*, reprinted in MARIO MONTORUI, *JOHN LOCKE ON TOLERATION AND THE UNITY OF GOD* 7 (1983); Ralph C. Hancock, *Religion and the Limits of Limited Government*, 50 REV. POL. 682, 683-84 (1988).