

I first thought that Ronald Dworkin's distinction between "fundamental" and "nonfundamental" rights was only another way of making Gamwell's distinction between "formative" and "substantive" rights. But I've since come to think that this can hardly be correct—for one reason because Gamwell himself speaks of "a *fundamental* substantive right" (*Politics as a Christian Vocation*: 95; italics added).

Anyhow, according to Michael Lynch's interpretation,

Broadly speaking, rights can be either fundamental or not. Fundamental rights differ from other rights by being, as Ronald Dworkin has put it, matters of principle and not of policy. A right is granted as a matter of social policy when a protection or an advantage is accorded to a person in order to advance some desirable social goal. . . . A fundamental right, on the other hand, is not a matter of policy. . . . Unlike rights justified by policy, which are justified because they are means to a worthwhile social goal, fundamental rights are justified either because they are directly necessary out of basic respect due to human persons, or because they are constitutive of any political system that accords basic respect to persons. In either case, the justification for fundamental rights is seen as enormously strong, perhaps even absolute; thus the tag 'inalienable.' As Dworkin puts it, rights of this sort trump other political concerns. You can't lose them just because the majority no longer wishes to respect them. . . . The whole point of having a fundamental or, as it is often put, 'human right,' is that it can't justifiably be taken away just because a government suddenly decides it would be convenient to do so" (*True to Life*: 165 f.).

Perhaps one way to put the matter is this: That only formative rights are to be "constitutionally stipulated," as Gamwell maintains, does not mean that only formative rights are "fundamental," in Dworkin's sense of the term. On the other hand, substantive rights may be "fundamental" in Dworkin's sense without being "constitutionally stipulated" along with properly formative rights as Gamwell understands them. Gamwell writes:

[T]he ultimate terms of political assessment may be restated as a fundamental substantive right: All individuals have a right to the greatest measure of general empowerment the state can provide or promote equally for all. . . . [But i]nsisting that all have a substantive right or set of rights the state should secure is one thing, and stipulating these rights constitutionally is something else. . . . A democratic constitution *anticipates* that the full and free discourse [it constitutes] will be successful and thus will, through statutory law, provide or promote for all the substantive conditions necessary to real equality in the political process itself. Democratic politics itself is not a substantive possibility unless the government fulfills its moral obligation by pursuing justice as general emancipation. . . . Because a democratic constitution

presupposes the ultimate terms of political assessment, the constitution itself implies that the principles of substantive justice are equally permanent [sc. with those of formative justice], even if it does not stipulate their content (95 f.).

Context makes clear, I believe, that what Gamwell understands by "*permanent* principles" are, in Dworkin's sense, "*fundamental* principles." In any case, Gamwell removes any doubt that substantive principles of justice are "equally permanent" with its formative principles.

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