

Further thoughts on Gamwell's distinction between "substantive" and "formative" political principles and some of its implications:

I should want to say that all political principles are substantive in the sense that, or because, they can be validated, finally, only by substantive principles, moral as well as political. But some political principles that are substantive in this sense, or for this reason, are—while others are not—formative as well as substantive, in the sense that, or because, they regulate the procedures by which all political principles, formative as well as (merely) substantive, can alone be validated. They are the principles, in other words, regulative of the way of reason, or of full and free discourse, that has to be followed in order to validate any political principle or proposal.

Formative political principles suffice to specify the rights/liberties—private and public—that are the necessary conditions of the possibility of participating in full and free discourse. As such, these rights/liberties are properly stipulated in any well-framed democratic constitution, along with its stipulation of such things as the basic structure of government (in the case of the U.S.A., its compound structure); the basic procedures, institutions, and offices of government; and the ways and means of amending the constitution itself.

I should want to insist, however—even if against Gamwell—that a democratic constitution also properly includes specifying what he calls the basic, completely general right of emancipation necessarily implied by formative rights/liberties if they are not to be merely formal and empty. In other words, the constitution properly affirms that every citizen has the right to share, socially and economically, in the common good sufficiently to be able to make her or his own contribution to it by, among other things, exercising the formative rights/liberties that are necessary conditions of the possibility of following fully and freely the way of reason.

I would defend this insistence by arguing that for a democratic constitution not to stipulate but only to anticipate substantive justice is itself merely formal and empty

unless it means that not everything that may be produced by the political process is consistent with the constitution. To anticipate the actuality of full and free discourse about the common good is to mandate that, whatever else such discourse may or may not do, it must—in order to be constitutional—concern itself, above all, with providing or promoting for all citizens through statutory law the substantive conditions, social and economic, necessary to their full political equality. In this sense, *that* substantive justice is always to be pursued is not open to democratic debate, any more than that formative rights/liberties are always to be protected and promoted. This is so, at any rate, if "to anticipate," like "to presuppose," is to imply—not, to be sure, as "to presuppose" implies, by a definite or specific necessity, but by an indefinite or generic necessity only.

Therefore, I can agree with Gamwell that "affirming that all have substantive economic and social rights the state should secure is one thing, and stipulating those rights constitutionally is another" (1017). But I must insist that affirming *that* all have such "substantive economic and social rights," as distinct from stipulating *what* those rights actually are, also properly belongs in any well-framed democratic constitution.

I should also want to say that the First Amendment, as I read it, provides no reason why the state should abstain from all substantive, as distinct from formative, teaching concerning the beliefs and actions proper to democratic citizenship. Provided any beliefs that the state teaches, practical or theoretical, are themselves products of the way of reason and of democratic decision-making, and therefore remain subject to full and free political discourse, constituent or governmental, the state is entirely free to teach them without thereby violating the First Amendment by either establishing religion or interfering with the free exercise thereof.

(These thoughts have been provoked by my attempts to critically appropriate Franklin I. Gamwell's position in his essay, "The Question of Democracy," *DePaul Law Review*, 57, 4 (Summer 2008): 997-1020.)

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