

Some further thoughts in connection with my *Auseinandersetzung* with Gamwell:

1. Beyond my doubts about whether "religion" as used in the First Amendment may be correctly understood in Gamwell's extended sense of the term, there is the far from unimportant matter of what the First Amendment actually proscribes—namely, that "Congress shall make no law respecting" What it proscribes—and that explicitly—is not, as Gamwell seems to assume, "*constitutional* stipulation" of any substantive principle of justice, but, rather, "*congressional* stipulation" of any such principle—assuming, for the moment, his extended sense of "religion." Of course, he might be using "constitutional" in his phrase "constitutional stipulation" in a broad rather than a strict sense—to mean what is substantively rather than formally "constitutional." But I see nothing in what he says to confirm that he uses the term in this sense.

2. Suppose, for the sake of argument, that I'm right in my interpretation that "religion" in the First Amendment means "historical," or "empirical," religion, as distinct from "natural," or "rational," religion (to use Kant's terms in making the distinction). Suppose further that there's no other provision in the Constitution that proscribes stipulating any substantive principle of justice, whether Gamwell's principle of "justice as general emancipation" or any other. His inference from these suppositions, if I understand him correctly, is that the Constitution would then be "inconsistent with government by the people" (03/12/05). But would it, really? Could x be "inconsistent" with y unless x either asserted or implied that y was false? More specifically: isn't the requirement of government by the people already met if only the deliberative process constituted by the Constitution is "full" as well as "free," and so such that no terms of assessment, including any ultimate terms of assessment, are immune to contestation and, where necessary, critical validation by appeal to experience and reason? And isn't this requirement already met by the First Amendment, understood as proscribing both establishing religion and prohibiting the free exercise thereof, "religion" being taken in my strict sense rather than Gamwell's extended sense?

3. The distinction I make between "formal" and "material" fundamental moral and political principles is not to be confused with Gamwell's distinction between "formative" and "substantive" principles of justice. Just as "formal fundamental principles," as I understand them, are simply an explicit theory as to the logical status of the material moral and political principles by which the (constituent) lawmaker has to be guided, "material fundamental principles," as I understand them, include (what Gamwell calls) "substantive" as well as "formative" principles of justice. This, of course, is why I should not want to say that the political faith that, in my view, lies behind and is expressed in the U.S. Constitution is exhaustively expressed merely in its "formative" principles.

4. The framers/ratifiers of the U.S. Constitution clearly seem to have at least tacitly recognized Gamwell's distinction between "formative" and "substantive" principles of justice; and I entirely agree with him that having a preunderstanding that clearly includes this distinction is of real help in understanding and appreciating what they actually did and did not do in producing the Constitution—even if it would be hard, not to say impossible, to argue that they consciously intended to act in accordance with his distinction. But if I'm right, the all-important question for them was not whether a principle was, in Gamwell's sense, "formative" or "substantive," but whether it was, in their own sense, "natural," or "rational," or rather "historical," or "empirical." Correspondingly, their intent in the First Amendment was not to proscribe Congress's either establishing any substantive principle of justice or prohibiting anyone's freely arguing from such a principle, but rather to proscribe Congress's legislating either the "establishment" of ("historical," or "empirical") religion or prohibiting the "free exercise" thereof.

One may perhaps sometimes get the impression, especially from Jefferson and Madison, that the framers/ratifiers would have been only too happy to have been able to establish deism as the state religion of the United States. But I strongly incline to think, on the contrary, that they would have judged deism, understood determinately instead of heuristically, to be entirely on a par with any "historical," or "empirical," religion similarly understood. In other words, they were, to my mind, as opposed to either

establishing deism or prohibiting the free exercise of any religion other than deism as they were to either establishing any "historical," or "empirical," religion or prohibiting the free exercise of any such.

What makes me think I'm right about this, finally, is that I quite reject the conventional misunderstanding of Enlightenment thinkers generally, according to which they tended to judge the present, or the new, positively, even while judging the past, or the old, negatively. In my view, the cardinal principle of the Enlightenment is that *all* claims to validity, for the new no less than for the old, need to be critically validated by common human experience and reason whenever they become sufficiently problematic. But, then, establishing any religion, determinately understood, or prohibiting the free exercise of any such, even if it were the religion of deism, would contravene this cardinal principle. And I do not think for a moment that the framers/ratifiers would have ever been guilty of any such contravention.

The fact remains that their paramount concern in the First Amendment was distinctively different from Gamwell's. What they wanted to rule out was not substantive principles simply because they were substantive, but only any principles, substantive or formative, that were somehow immune to, or exempt from, critical validation, finally, on the basis of experience and reason. But, unless I'm mistaken, they did all that was necessary to this end by framing and ratifying the First Amendment interpreted straightforwardly without extending the meaning of "religion" as Gamwell interprets it.

5. Certainly, not the least advantage of my view is that it obviates any need to interpret the "justice," and so on explicitly called for in the Constitution and the Declaration as Gamwell interprets them, i.e., as being used either in a merely heuristic (and so, in his terms, "formative") sense or as designating merely properly "formative" rights/liberties as distinct from any properly "substantive" ones. Provided only that all such terms are to be understood, finally, on the basis of common human experience and reason, they may be accepted as having the straightforward "substantive" meaning

that some of them, at least—especially those used in the Preamble to the Constitution—clearly seem intended to express.

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