

*Speech Matters: Getting Free Speech Right*

By Katharine Gelber

University of Queensland Press, 2011

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The central thesis of Katharine Gelber's *Speech Matters: Getting Free Speech Right* is that Australians, despite appearances to the contrary, are insufficiently committed to protecting and promoting free speech. Unfortunately, her own approach to free speech is a testament to this fact, although perhaps not in the way she intended. The book is, without question, a meticulously researched and excellent overview of the history of political speech in Australia and how contemporary attitudes reflect a certain ambivalence about the primacy of free speech. However, Gelber's defence of restrictions on certain types of speech is weak, and her particular understanding of the 'public sphere' is both ahistorical and untenable.

The central chapters of *Speech Matters* are the most convincing: Gelber describes in detail the history and culture of free speech in Australia, with several strong examples of ostensible support for free speech swiftly cast aside by political and cultural considerations. As Gelber notes, Australia lacks explicit federal protection of free speech, but does have a common law tradition of protecting certain types of speech, as well as a

combination of state and federal legislation, under which regulators have tremendous discretion to protect or curb speech. For Gelber, this opaque regime of speech related legislation neatly mirrors the prevailing attitudes towards free speech expressed by Australian society, that is, a tendency to respect free speech in the abstract but a too eager willingness to compromise on the particulars.

Gelber then describes how this willingness to compromise has manifested itself in issues concerning the Australian flag, anti-terror laws, hate speech, the right to protest, nuisance law suits, and various 'controversial' works of art. All these examples are, by and large, unimpeachable demonstrations of Australians getting free speech 'wrong.' The Blacktown city council's censorship

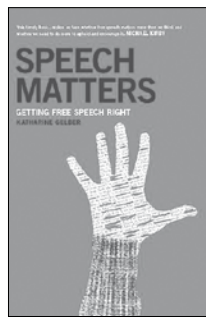
of an art exhibit called 'Weapons of Mass Distraction' comes across as particularly galling, especially the insistence that the artwork had not been censored but rather placed on a 'temporary pause.' Similarly, the brazen removal by police of an artwork consisting of a defaced Australian flag from a private gallery, based on nothing more than alleged public complaints, should raise the hackles of anyone with the slightest inclination towards protecting freedom of speech.

Gelber's seeming commitment to promoting and protecting free speech, as revealed in the various case studies in the book, is

undercut by her insistence that free speech need not be 'absolute' (as per the first amendment to the United States constitution, an approach Gelber dismisses as an international 'outlier'). Instead, it should be made 'right,' in effect, shifting the goal posts rather than widening them. To her credit, Gelber at least attempts a rigorous definition of what constitutes the speech that the state might rightfully seek to censor, and in doing so avoids the pitfall of merely ruling out speech that is 'offensive.'

In first arguing for why free speech matters, Gelber's lens is explicitly political. Free speech is important because an informed public engaged in 'critical reasoning' is necessary for democracy to flourish. Such critical reasoning takes place through political discourse (which Gelber defines as dialogue, discussion and debate) in the public sphere. Thus, the litmus test for limiting free speech is whether such speech 'might injure or harm discourse.' Drawing on the work of Martha Nussbaum and Amartya Sen, Gelber argues that speech which damages an individual's ability to develop their 'human capabilities' (defined by Nussbaum as the ability to think, imagine and reason; the ability to engage in social interactions; and so on) is speech that damages political discourse, and can thus rightfully be restricted.

It is on this point that Gelber's entire model collapses, as any public sphere based on such a reading of political discourse would be perpetually on the verge of collapse without the heavy, censoring hand of the state to



prop it up. She boldly asserts that 'it would not be possible to engage in social interaction if the society in which you live were imbued with prejudice and hatred toward you.' Not that it would be difficult, or painful, but simply *impossible*. I doubt that Gelber would think Martin Luther King, Jr. never engaged in 'social interaction,' but that is the conclusion to be drawn by taking her statement at face value.

Gelber further expands on the 'harms political discourse' approach to restraining free speech by limiting the kind of people who can possibly suffer harm as the result of unrestricted free speech. She notes in the chapter on hate speech that 'by definition,' hate speech is directed at those suffering prejudice; elsewhere, she remarks that such harm is suffered by marginalised communities. Without explicitly stating as much in the text, it is reasonable to assume that such an approach precludes a non-marginalised member of a majority group from ever being the victim of vilification. Leaving aside the merits and accuracy of this approach, it assumes that the demarcation between the marginalised and non-marginalised, or the majority and minority, is self-evident and shared by all members of a marginalised group.

As fraught as such an approach seems to be, it is a well-intentioned attempt at line drawing, a task that Gelber freely admits is difficult. Her case would have been strengthened immeasurably if she could have demonstrated that drawing a line at all is necessary. While *Speech*

*Matters* acknowledges the protection that the first amendment grants to political speech, it also denigrates such an approach as absolutist. However, if Gelber's formulation about harms to political discourse were true, it should have been trivial to show that political discourse in the United States has been irrevocably harmed by an absolutist approach to free speech. In her defence of certain restrictions on free speech, Gelber makes no attempt to quantify or even roughly gauge the extent of marginalisation and exclusion in the political discourse of the United States. My suspicion is that any attempt to do so would reveal that there are plenty of non-legal mechanisms (market-based or otherwise) that act as effective (but not compulsory) regulations in the public sphere. In seeking to protect the vulnerable from the effects of harmful speech, Gelber overestimates both their vulnerability and the ability of regulators to police speech effectively, while also drastically underestimating the robustness of the public sphere. While *Speech Matters* is an adroit analysis of how and why Australia has got free speech wrong, it fails to persuade that getting free speech 'right' is possible, or even worthwhile.

**Reviewed by  
Thomas Morgan**

*The Great Stagnation:  
How America Ate All the  
Low-Hanging Fruit of  
Modern History, Got Sick  
and Will (Eventually)  
Feel Better*

**By Tyler Cowen**

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Tyler Cowen will be well known to many *Policy* readers from his *Marginal Revolution* blog. He has written other books, but this one is different because it is short (15,000 words) and available only as an ebook. Being this short, it reads more like an old-fashioned pamphlet than a traditional book.

Cowen's notion of a Great Stagnation may not be readily grasped by most Australian readers after two decades of continual economic growth and rising real incomes, thanks largely to the Hawke and Keating reforms in the 1980s and early 1990s.

In the United States, as Cowen shows us, the story is quite different. It has had sluggish growth since the early 1970s, with the slowdown in median income beginning in 1973. In the 26 years from 1947 to 1973, real median US incomes (measured in 2004 dollars) increased by more than 100% from \$21,771 to \$44,381. In the following 31 years to 2004, they increased by a little over 20%.

Cowen's explanation for the slowdown is that over the last

