

The Democratic Deficit: How Minority Fundamentalism Threatens Liberty in Australia

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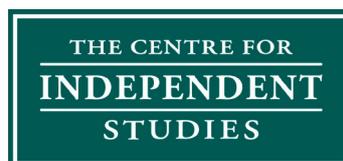
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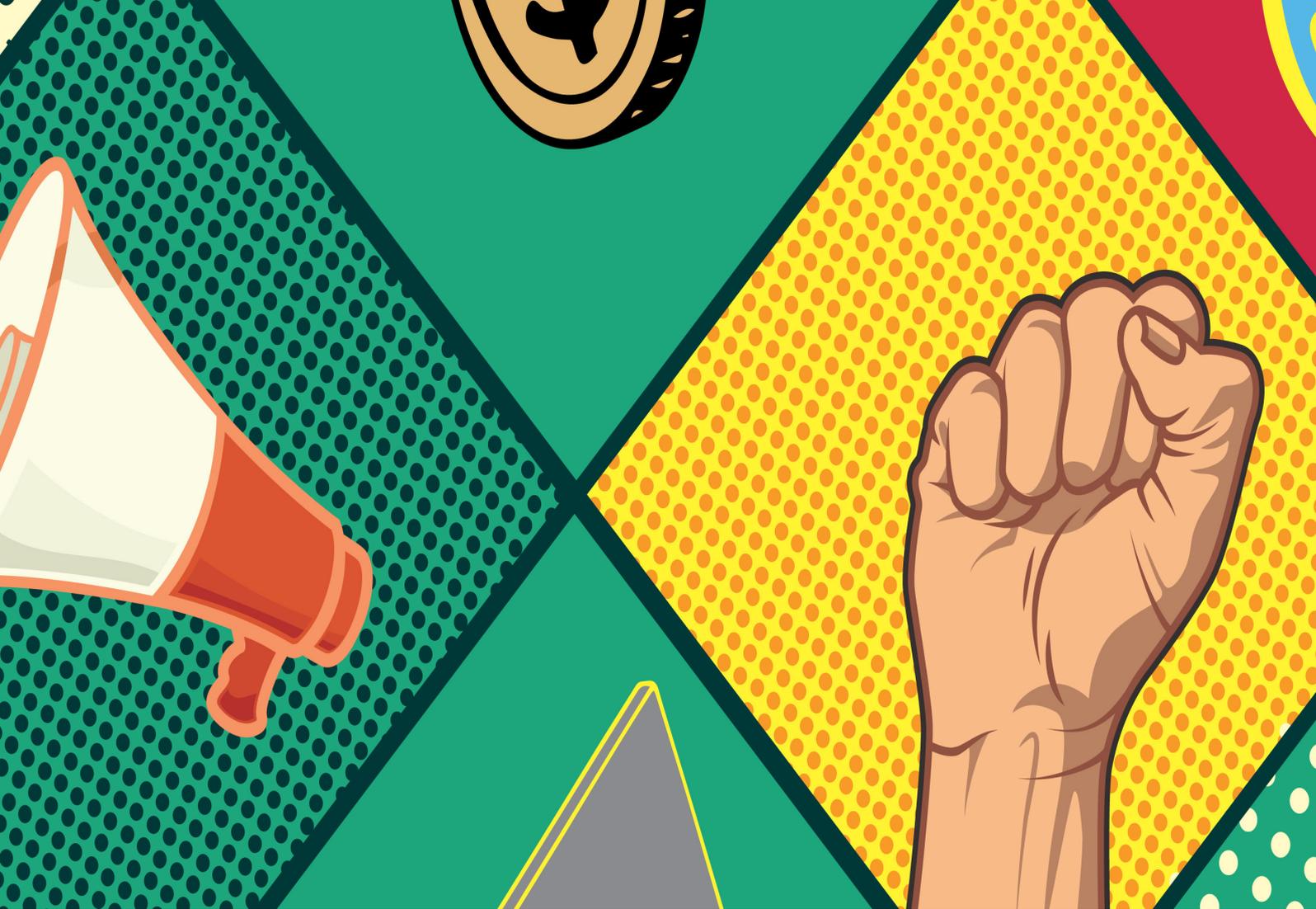
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All errors that remain are, of course, my own.



Executive Summary

We are faced with a new kind of fundamentalism – call it ‘minority fundamentalism.’ It has all the features of religious fundamentalism, such as:

- ideological fanaticism;
- intolerance of dissent; and
- a Manichaeian certainty about truth and falsehood.

Unlike religious fundamentalists, however, the minority fundamentalists don’t even pretend to affect concern for their opponents. Instead, their weapons of choice are hatred and vituperation. They deploy these weapons to wage war on ‘intolerance.’

“Australians should be treated the same,” declared Australian Greens senator Nick McKim during the 2016 federal election. ‘Non-discrimination’ has become the new behavioural norm, and groups like the Greens want to apply it with totalitarian thoroughness to everyone without exception.

The goal of the minority fundamentalists is to eradicate all forms of discrimination in the name of liberating those deemed to be oppressed. We are in the age of the new intolerance where intimidation, humiliation, censorship, and self-censorship are used to punish those who think differently.

Frequently cited categories of oppression include gender, race, ethnicity and sexual orientation, whose ramparts must be breached in the name of equality, for example:

- Campaigners such as the Safe Schools Coalition hold that social structures, such as gender, must be dismantled in the name of equality;
- Advocates for same-sex marriage insist that reform of Australia’s marriage laws is nothing less than a matter of justice;

Failing to ‘treat people the same’ is nowadays held to be an egregious error; enforcing a bland uniformity is seen as the only way to secure a new standard of inclusive justice and to assert the right to ‘equality.’

Newly-minted, fashionable rights, such as the right to equality, are often considered to be both incontrovertible and undeniable.

These rights are intended to address disadvantage and exclusion, but in doing so, they often threaten to trump any other right with which they might conflict.

Not everyone agrees with the objective of the Progressive Left to remake society and to stamp out the new secular 'sin' of discrimination.

Those who do not belong to excluded minority groups are finding that the shared assumptions underpinning a liberal democracy are under threat — even when they are guaranteed by law.

This leads to what is known as a *democratic deficit* — a growing discrepancy between our expectations and our experience of democratic institutions.

This widening of the democratic deficit is indicative of an increasing readiness on the part of self-appointed guardians of the moral and social order to privilege the sensitivities of the minority over those of the majority.

Democratic freedoms like free speech and freedom of religion are being eroded by identity politics whose 'equality' purports to buttress against tyranny but, in reality, threatens to foster it.

Minority fundamentalism poses a threat to the normal political and social functions that we take for granted.



Introduction: Is Diversity Silencing The Majority?

Think of it as a new form of fundamentalism. It's got all the features of the various religious fundamentalisms so despised by the progressive, secular Green-Left: ideological fanaticism, intolerance of dissent, and Manichaeic certainty about truth and falsehood. But unlike some religious fundamentalists, the new fundamentalists don't even pretend to affect measured amounts of pious concern for their opponents. Instead, the new fundamentalists deploy outrage and vituperation as their weapons of choice. This is the world-view of the 'minority fundamentalists' — so called by former prime minister John Howard — whose purpose is to eradicate all forms of discrimination in the name of liberating the 'oppressed'. It is the age of the new intolerance that is manifested by the minority fundamentalists; it has become so firmly established in western societies such as Australia that it is almost beyond question. Its playbook includes using intimidation, humiliation, censorship, and self-censorship to punish those who think differently.¹

Take, for example, the odd spat that broke out when retired Lieutenant-General David Morrison was appointed Australian of the Year in January 2016. Another finalist for the honour, RAAF reservist Group Captain Cate McGregor, a transgender ADF officer who was one of Morrison's former colleagues, launched an aggressive attack on him. She criticised his appointment as both weak and conventional because it did not go far enough to meet the needs and rights of LGBTI people both in the ADF and in wider Australian society. "I think I'll die

without seeing a trans Australian of the Year and I think that's terribly sad," McGregor said.² Morrison had taken issues such as the treatment of women and minorities very seriously when he was serving as army chief and pursued what has been described as "a crusade to change a culture in which he had been steeped since boyhood."³ But in attacking her former boss when he was made Australian of the Year, McGregor appeared to think that Morrison's crusade had not gone far enough; a mark of true success would have been to have stormed successfully the citadel of male chauvinism and oppression, and to have installed as Australian of the Year a transgendered person such as, say, McGregor herself.⁴ The opposition to Morrison's appointment by the National Australia Day Council is indicative of an increasing readiness on the part of self-appointed guardians of the moral and social order to privilege the sensitivities of the minority over those of the majority.

Gender, race, ethnicity, sexual orientation, and religion are among the categories of oppression most likely to be considered the walls and ramparts to be breached in the name of compassion, inclusion, and equality. Who could possibly argue against the imperative to defend the vulnerable, the marginalised and the excluded? Yet to question that imperative, or to question the categories by which such people identify themselves, is to run the real risk of attracting vitriol and opprobrium from the proponents of 'compassion'.⁵ In public debate, the asserted sensitivities of the 'traumatised' individual now

regularly trump — or attempt to trump — competing claims made by community groups, by civil institutions such as the churches, or even by the state. The problem is that the protection of these heightened sensitivities is not simply concerned with upholding the civic virtues of tolerance and mutual acceptance. Rather, protection has become a political project concerned with ‘diversity’ — much larger in scope — which is engaged with a broader cultural war being waged not only on traditionalists and their values, but also on any who are sceptical about the putative claims of identity politics about injustice or oppression of specific groups.

Offense can be taken so quickly, and so absolutely. Peer into the future and imagine a time in Australia when a Christian bishop is imprisoned for having expounded the teaching of the church into which she was ordained; or a time when a Muslim imam is prosecuted for having preached a sermon favouring the teaching of the Qu’ran over that of Christian scripture; or a time when a journalist is convicted of inciting racial hatred for having questioned the implementation of the government’s immigration policy. All this might sound far-fetched and evoke the response that such events could surely not occur in an open democratic society in which individuals live in freedom under the rule of law. After all, we are used to vigorous — sometimes ill-tempered — public debate, and we know the outraged will take to social media to vent their spleen. But assumptions about freedoms of speech, conscience, and association comprise the very foundations of our common life, and we assume they undergird any candid exchange of views. Yet such assumptions belie the experience of people like Julian Porteous, Hobart’s Roman Catholic archbishop, who found his democratic rights and freedoms in danger of being trampled by new rights asserted under the state’s anti-discrimination law.⁶

When the Australian Catholic Bishops Conference, the peak body of the Roman Catholic Church in this country, decided to join the national discussion about same-sex marriage, it wrote a pastoral letter intended for distribution to all Australians. *Don’t Mess With Marriage* set out explicitly to defend the traditional Christian meaning of marriage and to rebut the arguments of same-sex marriage proponents. The bishops said they wanted to engage with the debate about the meaning of marriage, to explain the church’s teaching on marriage, and to emphasise the importance of “every man, woman and child... [being treated] with respect, sensitivity, and love.”⁷ Australian Marriage Equality’s national director, Rodney Croome, took exception to what the church was trying to explain. When Porteous distributed the pastoral letter to parents through the Catholic schools in his archdiocese, transgender activist and Greens candidate Martine Delaney resolved to take the archbishop to the state’s anti-discrimination commissioner, claiming the letter amounted to ‘hate speech’ because it denigrated same-sex relationships.⁸ In May 2016, however, Delaney withdrew the complaint against Porteous.⁹

Insider and Outsider Politics

Whether from an imagined future or based upon events such as those that occurred in Tasmania, these scenarios confront us with something that goes well beyond the customary exercise of individual freedoms. They represent imagined futures in a society where the shared experiences of injustice, discrimination and exclusion endured by certain social groups — for example, women, transgendered people, or members of a racial group — are asserted against the interests and experiences of those who don’t belong to those groups — or, rather, the majority. Injustice and discrimination are deemed to have taken root in the mainstream culture of the majority. Reform, therefore, demands that it is not enough simply to promote tolerance and diversity: the very values underlying those mainstream, root causes must be deposed. This is the tyranny of ‘identity politics’, the style of politics increasingly backed by law, characterised by heavy use of stigma and shame through the devices of social media technologies, and enthusiastically pursued by a progressive and culturally distinct sector of the community. The nature of identity politics will be considered in greater detail in the next section, but it is worth noting here that the phrase refers to a very wide range of political activity whose organising principles transcend political belief systems of the Right and Left, and those of party affiliation. Identity politics is fuelled by claims to shared experiences of injustice and is frequently advanced by the culture warriors, those whom writers such as Menzies Research Centre Director Nick Cater call ‘the insiders’:

“Politics for the insiders is a succession of causes rather than a practical application of principles to deal with shared challenges. They live in a closed world of moral absolutes: equality, rights, fairness, secularism and sustainability. There is no room for compromise... Responding to the insiders’ extortionate demands is a high-stakes game [for political leaders].”¹⁰

The democratic deficit gets wider

We are already engaged in such a ‘high-stakes game’. The dystopian vision of life in Australia evoked above, in which mainstream beliefs and values are subjected to the extortionate aggression of the marginalised or their political sponsors, is neither as imaginary nor as far-fetched as one might think. The prevalence of identity politics is making it harder for political leaders to address concerns of the mainstream for fear of offending and antagonising minority groups whose collective weight would only increase, of course, in the event that a number of minority groups form an alliance around an issue. Attempts, for example, to raise questions about issues such as Muslim integration in Australian society, or border protection and the management of illegal migration, or the gaps experienced between indigenous

and non-indigenous Australians, or same-sex marriage can quickly be frustrated by accusations of racism, bigotry, homophobia and misogyny.

Freezing debate about issues such as this serves effectively to widen what Sanford Levinson has described as the “democratic deficit” that has opened between governments and the governed. According to Levinson, a democratic deficit occurs when “ostensibly democratic organisations or institutions in fact fall short of fulfilling what are believed to be the principles of democracy.”¹¹ The deficit can arise due to lack of democratic accountability; it can also arise when eccentric or unreasoned decisions are made, often by a noisy minority that has gained ‘insider’ control of the democratic process, to the exclusion of the views and values of the majority. The recent controversy of the supposedly ‘anti-bullying’ campaign promoted by the Safe Schools Coalition (which will be discussed below) is a good example of such eccentric decision-making:

“Discussions of a democratic deficit may focus on the normative desirability of popular control over decisions that affect the public, quite independent of the quality of the decisions reached under the presumptively “undemocratic” system. Instead, however, they may emphasise the unfortunate

deficiencies of decisions that are reached under conditions that flunk one’s own theory of democracy.”¹²

This widening of the democratic deficit is indicative of an increasing readiness to privilege the sensitivities of the minority over those of the majority. It means that the normal political and social functions we have for so long taken for granted are under increasing threat; and the freedoms we thought we enjoyed as individuals in a democratic society — such as freedom of religion and freedom of speech — are actually being eroded by the process of identity politics that purports to act as a buttress against tyranny but, in reality, threatens to foster it.

A short history of the evolution of rights will be considered later in Section 3; at this stage, however, it is simply disappointing — but hardly surprising — to note that the way of thinking about rights which emerged in the 1970s, with the ostensibly benign intention of promoting justice and tolerance, should end up bearing illiberal fruit. Before turning to that, however, it is first important to examine more closely the genesis of minority fundamentalism; and second, its social and political impact.



Minority Fundamentalism

The key idea underlying identity politics, and the basis on which duties are imposed on other individuals, appears to be oppression: someone, as a member of some social group, living in some set of circumstances, somewhere experiences what they consider to be oppression at the hands of a dominant culture. Oppressive experiences, according to the Canadian philosopher Cressida Heyes, can take the form of cultural imperialism (such as stereotyping), violence, marginalisation, exploitation or powerlessness. The response to that oppression is an emerging political struggle against it. According to Heyes, who holds the Canada Research Chair in the Philosophy of Gender and Sexuality at the University of Alberta, “identity politics starts from analyses of oppression to recommend, variously, the reclaiming, redescription, or transformation of previously stigmatised accounts of group membership.”¹³

The use of the term ‘identity’ indicates that ‘identity politics’ refers both to an awareness of oneself and to the endurance over time of that awareness, as well as to some sense of an authentic self – of somehow being true to oneself. As Heyes has noted, identity politics — or ‘the politics of difference’, as she describes it — directs its attention to authenticity at the margins rather than in the mainstream:

“While doctrines of equality press the notion that each human being is capable of deploying his or her...moral sense to live an authentic life qua individual, the politics of difference has appropriated the language of

authenticity to describe ways of living that are true to the identities of marginalised social groups.”¹⁴

Heyes also notes that identity politics turns not so much upon observable, quantifiable factors as on the subjective experience of the one who claims to have been oppressed or discriminated against. “Thus identity politics rests on unifying claims about the meaning of politically laden experiences to diverse individuals.”¹⁵

Identity politics, therefore, is informed by the idea that human existence involves the exercise of hegemonic power, the workings of which must be disclosed and dismantled. Accordingly, an individual either belongs to a majority, exercising this power whether consciously or unconsciously; or to a minority, bearing the impact of this power as a victim. The disclosure and dismantling of hegemonic power require that the oppressor be silenced so the voice of the oppressed can finally be heard. It’s a process that John Howard, marking the 20th anniversary of his election victory in 1996, has likened to a ‘minority fundamentalism’: “There is a sense in which people are so frightened of being accused of being discriminatory or intolerant that they don’t speak the common sense view in the community.”¹⁶ Some, however, are willing to raise their voices and to resist the encroachment of fundamental democratic rights. Freedoms of religion, speech and conscience are foundational to Australian democracy; but even though many consider them matters of apparent common sense, their defence demands ever-attentive vigilance.

Don't Mess With Marriage?

"We have finalised a position for the duration of this term," the then prime minister Tony Abbott told a press conference in August 2015.¹⁷ The Coalition party room had decided to bind MPs on the issue of same-sex marriage until the federal election in 2016. But in order to allow wider discussion in the community and to give MPs the opportunity to gauge public opinion, Abbott, who remains a supporter of the traditional understanding of marriage, announced a plebiscite on same-sex marriage to resolve the issue. "It should happen through a people's vote rather than simply through a Parliament's vote," said Abbott, who didn't want the issue to be forced through by a cabal of insiders.¹⁸ Far better to have a community-wide debate and allow the people themselves to come to a decision about such a significant change to one of our society's foundational institutions.

A plebiscite, of course, is not the only way to consult the people. As same-sex marriage did not feature in the platforms of either major party in 2013, an attractive alternative to a plebiscite would have been to have taken the issue to the country and then act in accordance with a newly acquired mandate. A 2012 Galaxy poll commissioned by Australian Marriage Equality indicated that 64% of Australians believe same-sex couples should have the right to marry.¹⁹ Other polls have suggested the figure is as high as 72%.²⁰ Ultimately, it will be for the Australian people, through their elected representatives in the Parliament, to decide the scope of marriage. At the time of writing (June 2016), polls indicate a great deal of support for the proposal to be able to do so through the plebiscite.²¹

Since the announcement of the plebiscite, and notwithstanding a change of Prime Minister in September 2015, advocates of same-sex marriage, who purport to be in favour of an open debate about a change to the marriage law, have been strenuously opposed to the idea of a people's vote. Their arguments for having MPs rather than the public vote on the matter have ranged from a desire to avoid upsetting instances of "hate speech" to a sudden urge to save public money.²² Advocates expect their views to be heard, to be tolerated and even accepted; but they are quick to take offense at opposing views and then brand as hate speech those points of view that are not to their liking. Small wonder, then, that the Australian Christian Lobby's (ACL) call for the federal government to override state anti-discrimination laws to protect freedom of speech in the months preceding the promised plebiscite attracted great criticism. Indeed, the ACL was accused of actually wanting to promote hate speech.²³

Some religious leaders have urged politicians to defend the traditional meaning of marriage.²⁴ Others, however, have at times capitulated to the minority fundamentalists on the matter of same-sex marriage. Urging Prime Minister Malcolm Turnbull to put the question about a change to the *Marriage Act 1961* to a vote in Parliament rather than a plebiscite, some church leaders expressed the view that a plebiscite risks providing a platform for "disparaging LGBTI Australians and their families, leading to increased incidents of anxiety, depression and suicide," and could "discredit the voice of communities

more generally on public matters."²⁵ The threat of suicide is a powerful rhetorical device. Even in the absence of an established causal connection between issues of statutory drafting and depression, therefore, some religious leaders appear to prefer to fall silent because of the idea that someone, somewhere, might entertain the thought of taking their own life. So these religious leaders would rather we did not even *talk* about same-sex marriage.

The problem, as NSW Solicitor-General Michael Sexton SC has noted, is that anti-discrimination laws — which make it unlawful to offend, humiliate, intimidate, insult or ridicule a person on the basis of various attributes — could well make it legally impossible for groups opposed to same-sex marriage to put their case to the people:

"It would...be open to persons in same-sex relationships to complain they were offended by a "no" campaign in the course of the plebiscite that argued same-sex marriage was sinful in a religious sense or simply socially undesirable."²⁶

Given that someone is likely always to be offended by some other person's point of view, these sorts of provisions in anti-discrimination laws inevitably stifle public debate.

"Proponents of such laws suggest they are necessary to prevent 'hate speech'. No one argues that incitements to violence against sections of the community should not be unlawful. As it happens, such conduct has always been an offence under criminal law. But real 'hate speech' is a far cry from expressing opinions in the course of a vigorous political debate that some people may find offensive."²⁷

It is one thing for the law to protect individual reputations or to uphold the administration of justice, Sexton argues, but quite another for it to impose restrictions on speech in order to protect a person's feelings from being hurt. "How have we got to the position in Australia where laws might have to be suspended so there can be a proper public discussion of a serious social and political issue in a plebiscite or a referendum?"²⁸

A culture war waged around same-sex marriage would be likely to leave a lasting wound — after all, Australian Marriage Equality still has to win over the hearts of some 30% of the population, many of whom base their opposition to same-sex marriage on sincerely held beliefs, both religious and non-religious. This is not to argue that secular Australian society should allow religion to dictate the scope of the civil law of marriage; rather, it is to acknowledge that there are strong arguments — both religious and cultural — for holding that the civil law should continue to reflect the understanding of marriage common to all cultures across history. Although identical in terms of legal validity, religious marriage is, of course, very culturally distinct from civil marriage.

The principle of freedom of religion as set out in the UN Universal Declaration of Human Rights 1948, to which Australia is a signatory, upholds the right of the

individual to manifest his or her beliefs.²⁹ Accordingly, religious groups must continue to enjoy the freedom to define marriage for their own members in accordance with their own traditions, as the NSW Presbyterian Church is proposing to do by withdrawing altogether from any amended Marriage Act. At the same time, it is both unjust and illiberal for those advocating change to the civil law to attempt to impose on all people — believer and unbeliever alike — forms of marriage that contravene the tenets of faith.

Former Australian Human Rights Commissioner Tim Wilson — himself openly gay — has been one of the foremost defenders of religious liberty in the debate about same-sex marriage, arguing that it commands equal importance. Wilson holds that it is unjust for the marriage law to continue to exclude same-sex couples, but it is equally unacceptable for people of faith to be compelled by a change to the civil law to act against their consciences. The solution is to separate civil and religious traditions of marriage but treat them equally in law by having each recognised in the amended legislation, he says:

“Government wouldn’t be establishing a different legal tradition but merely be separately respecting religious tradition in law, as it already does. It would fulfil the need of religious communities that have always argued for relationship recognition that is ‘separate but equal’.”³⁰

Wilson’s contribution to the debate about same-sex marriage has been very significant and, if taken on board, is likely to help ensure that in the event of a change to the *Marriage Act 1961*, whether following a plebiscite or a free vote on the floor of the House of Representatives, religious believers will, at the least, feel that their convictions and faith traditions have been respected. Civil and religious traditions can be kept separate while treating them equally in law. But by denouncing those with whom they disagree as prejudiced denigrators, many same-sex marriage advocates give the lie to the very values of justice, equality and inclusiveness for which they profess to stand.

On Being Offended

The hegemony of minority fundamentalism is also being challenged in relation to the vexing issue of freedom of speech. In more recent times this has focused on calls to amend section 18C of the *Racial Discrimination Act 1975*, which makes it unlawful to do an act that is reasonably likely to offend, insult, humiliate or intimidate others on the grounds of race, colour or ethnicity.³¹

Some groups believe that s18C successfully balances freedom of speech and freedom from harm. In its submission to the Australian Law Reform Commission (ALRC), the Australia/Israel and Jewish Affairs Council (AIJAC) argued that Part IIA of the *Racial Discrimination Act 1975*, which includes s18C, “was ‘drafted to best balance the twin goals of maintaining maximum freedom of expression consistent with maintaining freedom from racial vilification’ and was the product of widespread public consultation and debate.”³²

AIJAC expressed specific concerns about the changing behaviour of organised racists groups, the rise of anti-Jewish aggression, and the importance of maintaining protections against Holocaust Denial.³³

The passage of the *Racial Discrimination Act 1975* by the Whitlam Government marked the beginning of the drive to legislate for various forms of non-discriminatory behaviour in Australia. It drew upon the International Covenant on Civil and Political Rights 1966 (ICCPR) to which Australia was a signatory. Although the *Racial Discrimination Act 1975* was intended as a means to eradicate racism, it has been very influential in setting the tone for subsequent debates about equality and social inclusion. Over time, it has been joined by other federal anti-discrimination laws which, taken together, prohibit discrimination on the basis of grounds that include race, colour, national or ethnic origin, sex, sexual orientation, gender identity, disability and age.³⁴ Conduct prohibited by any one of the anti-discrimination laws may limit freedom of speech or expression. It is s18C of the *Racial Anti-Discrimination Act 1975*, however, that has provoked the greatest concern about restrictions on liberty. Section 18C does not create a criminal offence, and there are exemptions provided in s18D which protects anything said or done reasonably and in good faith for purposes that include artistic work, academic work, and reporting on events or matters of public interest. Truth, however, is not a defence offered by s18D. These exemptions notwithstanding, s18C has proved especially controversial because of the prohibition against giving offence. In its recent report to the Attorney-General, the Australian Law Reform Commission noted:

“There are arguments that s18C lacks sufficient precision and clarity, and unjustifiably interferes with freedom of speech by extending to speech that is reasonably likely to ‘offend’. In some respects, the provision is broader than is required under international law, broader than similar laws in other jurisdictions, and may be susceptible to constitutional challenge.”³⁵

As the ALRC notes in its report, it appears to be not so much the notion of being offended that motivates defenders of s18C as an apparent fear of being vilified.³⁶ Vilification is stronger than offence, carrying with it the idea of extreme abuse and hatred of its object which might provoke hostility and even violence. Although s18C makes no reference to vilification, the open-ended meaning of ‘offend’ means that determination of the harm threshold is bound to be a subjective judgement; so words deemed offensive could quite easily also be deemed vilifying — that is, once I attest that I have been offended, it requires only a small step for me to attest that the offensive words have also vilified me. The ALRC did note, however, that concerns about the potential scope of s18C have often paid little heed to how the provision has actually been interpreted in practice by the courts, where broad interpretations of ‘offend’ have been rejected. Thus, in *Creek v Cairns Post Pty Ltd*, Kiefel J held that s18C requires the harm to be “profound and serious effects not to be likened to mere slights.”³⁷

Judicial remarks such as these have clearly not deterred some who believe they have suffered slights from bringing actions under s18C — most famously in the 2011 case of *Eatock v Bolt*. Nonetheless, the ALRC reported it was not satisfied that s18C had, in practice, caused unjustifiable interferences with freedom of speech but held that some attention to the clarity and precision of the section would help:

“Greater harmonisation between Commonwealth, state and territory laws in this area may also be desirable. While all Australian states and the ACT have racial discrimination legislation in many ways similar to the *RDA*, the approaches to racial vilification and other conduct based on race hate are not uniform.”³⁸

In *Eatock v Bolt*, the plaintiff, together with eight other applicants, brought an action against the journalist Andrew Bolt complaining that remarks Bolt published were offensively critical of individuals whom Bromberg J described in his judgement as “fair-skinned Aboriginal people”. It was claimed that the imputations of the remarks offended and insulted the plaintiff, who was an Aboriginal woman, and therefore contravened s18C. The plaintiff succeeded in her action because the defendant was found not to have met the standard of reasonable action carried out in good faith as required by s18D. Bromberg J held that s18C is concerned with consequences more serious than mere personal hurt or slight:

“It seems to me that s18C is concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public’s interest in a socially cohesive society.”³⁹

The public mischief lay in behaviour that threatened the social cohesion that the *Racial Discrimination Act 1975* sought to promote, and the Court found such behaviour could even be quite slight.⁴⁰

The decision in *Eatock v Bolt* inflamed a public discussion about how to strike an appropriate balance between protecting people from harm and maintaining the right to freedom of speech. In the course of this discussion about the broader social implications of the decision, there were many calls both to revoke and to retain s18C. On the one hand, opponents of s18C argue that the decision against Bolt poses grave threats to freedom of speech by giving minority groups who claim to have been offended the capacity to prevent open discussion of social and political issues. On the other, opponents of Bolt have maintained there is nothing in the judgment that prevents such commentary. Indeed, Bromberg J was very clear that he was not declaring it unlawful for a newspaper to deal with racial identification and the publications remain available online for archival purposes. Bolt was found to have breached s18C not for having dealt with the subject matter but “because of the manner in which that subject matter was dealt with.”⁴¹ This was what gave rise to the public mischief. This does, therefore, leave it open to a court in future

to place restrictions on freedom of speech not because of *what* has been said but because of *how* it has been said. The threshold for a breach of s18C appears to have become one of tone rather than of content — of style rather than of substance.

Antagonism between those who claim so-called ‘hate speech’ laws stifle free expression, and those who insist such laws serve not to restrict speech but to ensure that speech is conducted with respect and civility, is unlikely to be resolved any time soon. Continuing debate about the implications of *Eatock v Bolt* clearly indicates that those on either side of the issue believe their cause is both moral and just. In future, argument is likely to turn on the question of the civility of discourse. Indeed, because Bromberg J’s decision appears to leave open a way for applicants to seek restrictions on free expression on account of the style of debate, the standard for civility of discourse will need to be tested, and this standard may prove to be impossibly high. As an action under s18C does not allow for truth as a defence, it will be open to an aggrieved person to make any kind of claim about having been offended, insulted or humiliated. Legal academics Katharine Gelber and Luke MacNamara, who have examined public discourse in the wake of *Eatock v Bolt*, and who are sympathetic to the decision of Bromberg J, have foreshadowed the cultural campaign that will seek to ensure hate-speech legislation is understood as being concerned with upholding civility rather than with preserving freedom:

“Hate-speech laws facilitate the pursuit of private litigation to remedy public wrongs; the harm is never simply personal to the applicants. Yet, proceedings under federal racial vilification laws are in substance, if not in technical form, representative actions on behalf of a wider constituency — others who share the racial or ethnic attributes in question, and all those who embrace the values of equality and anti-discrimination.”⁴²

Many who advocate repeal of s18C, however, are equally committed to upholding the values of civility. They do not brook racism or any other form of offensive behaviour; they simply want to see the bad law of Part II of the *RDA* removed from the statute book. Common law freedoms of speech and association offer protection enough against insulting behaviour, whereas the sweeping provisions of s18C encroach unreasonably upon freedom. In their comprehensive analysis and evaluation of s18C, legal scholars Joshua Forrester, Lorraine Finlay and Augusto Zimmerman have proposed giving a reformed s18C a more narrow focus that confines operation of the law in three ways: first, to particular contexts such as employment or the provision of goods and services; second, to the expression or generation of hatred; and third, to the creation of a criminal offence with a standard of reasonable doubt. Under this proposal the state alone would be able to bring a criminal action.⁴³

The discourse around the appropriateness of s18C is continuing to shift from the realm of law to that of values, and from bearing the character of reason to that of emotion. This is likely to prove fertile soil in which the grievances of minority fundamentalists can take

root and sprout. As already noted, some defenders of statutory provisions such as s18C — including AIJAC and other Jewish groups — have specific and historically informed reasons for circumscribing racist speech, which have nothing to do with perceptions of social injustice.⁴⁴ Others, however, continue to find justification for hate-speech legislation in perceived imbalances of power between the poor and the rich, and between the minority and the majority.⁴⁵ These imbalances invariably lead to the conclusion that the oppressed are always vulnerable to the oppressors and that they bear the burden of negative stereotyping which can only be addressed, in turn, by yet more legislative regulation.

Anti-vilification and religious freedom

When the Abbott government was weighing arguments about amending or repealing s18C in 2014, members of the Jewish and Muslim communities mounted significant campaigns opposing amendment; but each community had a somewhat different motivation. As noted earlier, Jewish objections stemmed principally from the concern that any easing of the legislation would remove important checks on anti-Semitic speech, revive the discourse of Holocaust denial, and thereby endanger Jewish members of the community — especially school children, who had been subject to physical and verbal assault — going about their daily lives.⁴⁶ Muslim objections to review were, in general, based partly on a desire to protect individual Muslims from unreasonable behaviour and also to protect Islam itself from the denigration and insult it was felt it would have to bear were there to be a greater freedom to test the tenets of the faith in public debate. This argument was joined by Race Discrimination Commissioner Tim Soutphommasane who said:

“Any dilution of the Racial Discrimination Act risks sending a dangerous social signal. It risks encouraging people to believe that they could abuse others on racial grounds with impunity. The risk is that people may believe they can offend, insult or humiliate others because of their race but claim the absolute defence of free speech.”⁴⁷

Section 18C doesn't specify religion as one of the protected grounds of discrimination, but three states do have their own laws against religious vilification, all of which are very similar. In one of those states, Victoria, leaders of the Islamic community have resorted to litigation to silence any criticism or questioning of Islam.⁴⁸ In one prominent case, brought under s8 of the Victorian *Racial and Religious Tolerance Act 2001*, a group of Australian converts to Islam brought an action against a Christian pastor whom they claimed had vilified Islam by teaching about it before a Christian audience.⁴⁹ The decision of the lower tribunal in favour of the plaintiff was overturned on appeal, although settlement was eventually reached through mediation

rather than a final judicial ruling. In the course of his remarks, the appellate judge said:

“Section 8 does not prohibit statements about religious beliefs per se or even statements which are critical or destructive of religious beliefs. Nor does it prohibit statements concerning the religious beliefs of a person or group of persons simply because they may offend or insult the person or group of persons. The proscription is limited to that which incites hatred or other relevant emotion and s.8 must be applied so as to give it that effect.”⁵⁰

In other words, the test the law establishes is one of impact rather than motive; indeed s9 of the Act states that motive is irrelevant in determining whether or not a person has contravened s8. Nor is truth a defence, as it is, by contrast, in defamation cases. Once a complainant claims that an action has incited hatred, the burden of proof rests with the accused who must prove they have not committed an offence. Notwithstanding Nettle JA's remarks about the scope of s8, the question of whether or not an offence has actually been committed will still be determined by the court. Even if the court eventually rules against the complainant, the threat of litigation, together with the concomitant financial and emotional burden of legal action borne by the accused, can be enough to make a person think twice before acting.

One commentator who has warned of the danger of exploiting vilification laws is Zimmerman, who has raised concerns that such laws can be used by some to secure immunity from public scrutiny of their beliefs:

“This perceived desire to shelter any religious group from public scrutiny should be of great concern to every citizen, including those of religious persuasion. After all, it is not really clear why free speech should be restricted by the inflated sensitivities of any religious group. And yet, anti-vilification laws appear to ultimately serve as a sort of Islamic blasphemy law by stealth; a suspicion that is deeply reinforced when one considers that the Victorian [anti-vilification legislation] was enacted at the insistence of the influential Islamic Council of Victoria.”⁵¹

Anti-vilification laws are a demarcating tool used to great effect by a minority determined to limit utterances of 'hate speech' by the majority. In the case of Islam, threats of litigation inhibit discussions about such pressing topics as how best to integrate effectively the meaning of some Muslim beliefs and the place of Islam into Australia's open and democratic society; in the case of same-sex marriage, they inhibit debate about fundamental change to our societal foundations.



Rights and the Provenance of Identity

The character of identity politics continues a development in thinking about human rights that emerged in the aftermath of World War II with the proclamation of the Universal Declaration of Human Rights in 1948, and marked a new and distinctive way of thinking about rights. However, legal and philosophical reflection on human rights and the nature of the relationship between sovereign and subject began long before the twentieth century. During the Enlightenment, the idea of rights was conceived as a component of 'citizenship' whereby the individual enjoyed a certain standing within the political boundaries of the state, occupying what Samuel Moyn has described as "citizenship space."⁵² Within that space, rights were intimately bound to the twin notions of citizenship and the state, providing an element of the conceptual framework within which the individual expressed citizenship as a member of the state. Rights could be contested, and citizenship defined and refined.

However, during the 1970s — a decade that saw protest movements around the world concerned with the Vietnam War, the incarceration of 'prisoners of conscience' at the hands of totalitarian regimes, and apartheid in South Africa — 'human', as opposed to 'natural' rights emerged as a potent political force. There was, of course, always an appropriately strong moral and political component to these criticisms of civil and criminal injustice; yet this development marked, nonetheless, the emergence of a new generation of rights thinking. Only a very truncated account of the history of rights can be offered here, but a broad way of describing that history is in terms of three generations of rights: first, political and civil rights; second, social, economic and cultural rights; and third, collective rights concerned with minorities, development

and the environment — the generation with which this report is largely concerned.⁵³

It was this third generation that gave rise to the designation of rights as 'human' and effectively recast them not so much as a foundation of the citizen's relationship to the nation-state but as an entitlement to be claimed by the citizen against the state. These rights, recast as 'human', addressed new categories of oppression, such as gender and sexual orientation, which did not address political rights held in common by all citizens of the polity but rather sought to describe the rights of people who self-identified according to one or more group identities over and against those of the majority. These rights associated with identity politics are not asserted over and against the claims of the state but solely as a means of validating identity. When the surface of the pond of public life does not reflect perfectly all the components of the pond, it is attributed to the normative and oppressive character of the majority which must be overthrown. As Moyn has observed:

"There is no way to reckon with the recent emergence and contemporary power of human rights without focusing on their utopian dimension: the image of another, better world of dignity and respect that underlies their appeal, even when human rights seem to be about slow and piecemeal reform."⁵⁴

The focus of identity politics has thus shifted since it first emerged in the 1970s. The injustices being addressed now are more often social and cultural than they are

economic. Although there are frequent financial demands for additional government expenditure to address economic inequalities, the disparities pursued in the name of social and cultural equality tend to not call for redistributive remedies but for heightened awareness of race, gender, sexual orientation, and ethnicity.⁵⁵ Identity politics aims to combine diversity and freedom in the name of progress — cultural, social, political, and legal — to ensure the utopian ideal of ‘equality’ is attained.

Proponents of identity politics usually eschew any notion of a past golden age. For example, those advocating for same-sex marriage do not present the early decades of the twentieth century as a paragon of generous tolerance to which contemporary society must aspire. Indeed, it is from the dark caves of the past that society must continue its journey of struggle to the sunlit uplands of liberation. Thus, the proponents are motivated by the utopian dream of redressing perceived injustices done to particular social groups and, in doing so, claim to take seriously the diversity of society and the individuals that comprise it. By advancing the interests of those who bear a specific identity, so the argument goes, not only is the unexceptionable existence of human diversity affirmed, but also the pursuit of ‘equality’ enhances the freedom of individuals to associate in various groups, and with those of various identities.

Contemporary human rights have thereby morphed from a concern for the rights and responsibilities of individuals living in particular communities — such as the nation state — into a series of global moral norms transcending all state and societal boundaries, based upon which an individual may not only claim protection from the arbitrary exercise of power but seek redress against perceived inequalities of power and opportunity. The exercise of this kind of ‘right’, which is exemplified by the claims of identity politics, does not merely require the reciprocal recognition that the rights-bearer has a duty not to encroach upon another; rather, in the course of demanding redress, the ‘right’ actually imposes duties on other individuals without any acknowledgement of reciprocity on the part of the rights-bearer.

Recall that the original purpose behind the invocation of natural rights, held regardless of social status, was to protect the individual from the exercise of arbitrary power and to enlarge the area within which an individual could exercise moral choice. Philosopher Roger Scruton is one thinker who has pointed to the ways in which the new rights of identity politics have narrowed moral choice, and in this way differ very markedly from this original invocation of rights:

“The new ideas of human rights allow rights to one group that they deny to another: you have rights as the member of some ethnic minority or social class that cannot be claimed by every citizen. People can now be favoured or condemned on account of their class, race, rank or occupation, and this in the name of liberal values... The rhetoric of rights has shifted from freedoms to claims, and from equal treatment to equal outcomes.”⁵⁶

Scruton draws a distinction between two kinds of rights. ‘Freedom rights’ allow an individual to establish a sphere of personal sovereignty — a fixed point of status, as it were — from which that person can negotiate behaviour in relation to others. Freedom rights, such as the right to free movement, and the right to life, limb and property, ground agreement; for without them, and the consequent sphere of sovereignty, there can be no defined position that one can compel others to acknowledge. Freedom rights “enable us to establish a society in which consensual relations are the norm, and they do this by defining for each of us the sphere of sovereignty from which others are excluded.”⁵⁷ A freedom right, therefore, safeguards sovereignty and creates a duty incumbent on others to respect it. Indeed, since such rights may make no specific demands of any individual, simply by doing nothing, one can respect the freedom right of another.

The second group of rights identified by Scruton are ‘claim rights’ and differ from the first group in that they cannot be observed or respected by non-invasion or non-action. Claim rights are asserted as a *claim* upon a non-specific benefit, such as education, health, a standard of living, or even compensation. They are simply demands that someone else do something or give something that the one demanding has an interest in being done or given. But where there is no historical relationship between the claimant and the one against whom the claim is made that justifies the imposition of any duty, Scruton argues, it will inevitably be the state to which the aggrieved looks for the fulfilment of that duty. This, he argues, is both morally unacceptable and economically disastrous:

“It is a direction that is diametrically opposed to that for which the idea of a human right was originally introduced — a direction involving the increase, rather than the limitation of the power of the state.”⁵⁸

Part of the covenant of citizenship is that the state both claims certain obligations and duties from the individual while at the same time assuming obligations toward the individual — such as upholding rights, protected by the rule of law, to freedom of property, freedom of speech, and freedom of religion. Yet as was noted earlier, the ‘rights’ expressed in the assertion of claims in the context of identity politics represent the imposition of an extended series of obligations and duties upon the state as well as upon other individuals. The victim asserts a claim on the basis of a presumed owed duty, but this ‘owed duty’ is neither negotiated nor reciprocal.

In summary, rights evolved as a way for the individual to express sovereignty over his or her own life and they were held regardless of social status or class. They have evolved now into a series of claims made not to protect oneself but to assert power over another group or groups. The result is that the liberal concept of the sovereign individual is in danger of being usurped; in its place is emerging one who bears an ‘identity’. The emergence of this new meaning is more than simply a shift in terminology; it represents a style of social engineering that poses a significant threat to liberty.



Mistakes about Equality and the Politics of Identity⁵⁹

One of the difficulties identity politics creates is that by defining an individual or a group in opposition to wider society, it invests diversity with the potential both to be socially divisive and to diminish liberty. Indeed, in an earlier report I argued that diversity and freedom are, in fact, largely incompatible political goals because of the friction that their pursuit generates: diversity is concerned with the rights of groups while liberty is concerned the rights of individuals.⁶⁰ Addressing the relationship between liberalism and multiculturalism, former Chief Rabbi of the United Hebrew Congregations of the Commonwealth, Jonathan Sacks, says:

“Liberalism and multiculturalism privatise identity: one by attributing it to the individual; the other to the ethnic or religious community. But there is, intentionally, no overarching structure of meaning holding it together.”⁶¹

Furthermore, as thinkers such as political scientist Chandran Kukathas have noted, inequality arises naturally and inevitably from the existence both of human diversity and of the freedom to associate in various groups and thereby to differentiate from others. Yet the tendency to differentiate is so deeply ingrained in human behaviour that it is difficult to see how any political effort can hope to eradicate it. According to Kukathas, “The diversity which results from association and differentiation makes equality unattainable... Any

serious attempt to suppress [equality] will require the disruption of individual lives and a denial of people’s wish to live by their own lights – according to conscience.”⁶²

Newly-minted, fashionable rights, such as the right to equality, are often considered to be both incontrovertible and undeniable. This is because the concept of equality has become associated with the idea of disadvantage such that those who bear any burden of incapacity are judged to be less equal in society.⁶³ Rights such as the right to equality are intended to address that disadvantage; but in doing so, they threaten to trump any right they might conflict with, such as the fundamental rights to freedom of religion and freedom of speech. Critics such as philosopher Roger Trigg, however, are sceptical. Trigg argues that “the language of equality...and human rights in general fills the vacuum left, at least in Europe, by the decline of institutional Christianity.”⁶⁴ Closer analysis of the concept of equality shows that it is not capable of bearing the ideological load placed upon it by its enthusiastic advocates.

Equality can be understood as the principle that ‘people who are alike should be treated alike’ and that ‘people who are unlike should be treated unlike.’ If a person is to receive equal treatment in a particular situation, it is because that person is like, or equal to, or the same as, another person who receives that treatment in the same situation. Although it commonly starts from an affirmation that all people are equal in inherent worth

as human beings, the concept of equality becomes more complex in its application. This is because any enquiry into similarity requires that the purpose for which the comparison is being made be specified.

For example, if it is claimed that the principle of equality means that women should be admitted as officers to the Australian Defence Force alongside men, the way in which women and men are alike must first be determined. Since they are clearly not alike in their ability to give birth, for example, there must be some other respect in which they are alike that makes them suitable for military careers. But in what respect are they alike for this purpose — is it in their potential to serve as leaders or in their capacity to think strategically? The challenge for a proponent of an equality argument is to identify this similarity by which an assessment of equality can be made. Once the similarity in respect to their suitability for military careers is identified, however, that would seem to suffice. It seems unhelpful, and indeed circular, to add claims about equality to the argument that people who are similar for the purposes of treatment X should both receive treatment X.⁶⁵

A claim about equality and equal treatment must be based on two elements: first, a determination of the respects in which two people are, in fact, alike; and second, on the basis of this determination, that one knows how they ought to be treated. But what, for the purposes of the principle of equality, does it mean to say that two persons (for example, male and female applicants to a military training academy) are alike? After all, no two people are alike in every single respect, but all people are alike in some respects. In which respects are people to be considered alike for the purposes, say, of equal treatment with regard to military training? This first element is much more contestable than is often realised, but it is an indispensable element of the principle of equality.

Only when there is agreement about the first element of the principle of equality (that one knows how two people are alike) is it possible to make a decision about the second, normative element and decide how people

who are alike are to be treated. Some scholars note that this opens the principle of equality to the criticism that it is circular:

“[Equality] tells us to treat people alike: but when we ask who ‘like people’ are, we are told they are ‘people who should be treated alike.’ Equality is an empty vessel with no substantive moral content of its own.”⁶⁶

Unless the purpose for which the comparison is being made can be specified, it is difficult for an enquiry into similarity to make much progress. This is one of the reasons the debate about same-sex marriage is so fractious. Proponents of same-sex marriage argue that a non-heterosexual couple should be permitted to marry, and base their arguments for marriage equality on claims about a similarity between non-heterosexual and heterosexual couples.⁶⁷ Those with a religiously informed objection to same-sex marriage — but who do not, it must be noted, necessarily object to civil unions — hold that no such similarity exists. Those objectors do not accept that non-heterosexual and heterosexual couples are alike, and they do not accept the normative claim that they should be treated alike.⁶⁸ Hence, neither side is able to find much, if any, common ground because so much of the argument is constructed around the philosophically questionable concept of equality.

Even so, the ideal of equality retains a powerful hold on the imagination of identity warriors who continually equate equality with justice. This is a particular feature of the debate in Australia about so-called marriage ‘equality’ where those in favour of a change to the *Marriage Act 1961* to allow same-sex couples to marry portray themselves as just, compassionate and tolerant. In aggressively advancing the cause of marriage equality and promoting the idea of inherent unfairness, advocates of marriage equality have made use of a greatly expanded and fashionable notion of a ‘right’ to equality without first testing the adequacy of its philosophical foundation. They have also attempted to use the concepts of justice and equity to shut down debate and discussion.



Democratic Debt and Deficit: The Threat of Minority Fundamentalism

New fashionable rights, such as the presumed 'right' to equality, do not attach to individuals but to identifiable minority groups who claim the status of victim. Speaking at a conference on Marxism in April 2015, Safe Schools Coalition Victoria director Roz Ward explained her work to establish the controversial Safe Schools Coalition program in that state. The Safe Schools Coalition Australia, funded in part by the federal government, describes itself as "a national coalition of organisations and schools working together to create safe and inclusive school environments for same sex attracted, intersex and gender diverse students, staff and families."⁶⁹ Advocates of the program say it is simply intended to counter bullying in schools. But according to Ward, the Coalition was necessary because in order "to smooth the operation of capitalism the ruling class has benefited, and continues to benefit, from oppressing our bodies, our relationships, sexuality and gender identities alongside sexism, homophobia and transphobia."⁷⁰ One year later, Ms Ward even conceded that the Safe Schools Coalition program is part of a broader Marxist strategy to change society.⁷¹

Minority rights are increasingly being asserted over against those of the majority in our democracy in the style of politics I have described as 'minority fundamentalism'. An identified minority, whether defined in terms of race, gender, ethnicity or religion, is deemed vulnerable because of a power imbalance that, in turn, generates

the conviction that a minority is, in some way, owed something by the majority. In the course of describing what he calls the rise of 'postmodern progressives' in the United States of America, political scientist Joshua Mitchell has argued that contemporary identity politics is distinctive for its deployment of notions of debt and indebtedness:

"Identity politics offers up a calculus of debt based on the presumption of fault (and its associated logic of victimhood) and wagers that debate can be repaid through a political scheme of compensations and affirmative action."⁷²

According to Mitchell, this debt calculus in turn fosters both envy and the desire for retribution that is directed to developing policies to secure equality of outcomes. The matter of fault and the hope for equality are extremely difficult to disentangle, warns Mitchell. "It is... no easy matter to determine whose fault can be paid off, so to speak."⁷³

The idea that a majority group is in some nonspecific way 'indebted' to one or more minority groups in the population is so powerful that it can seriously distort public debate about policy. One clear example of this distortion — vigorously countered, it must be said, by pressure groups such as the Australian Christian Lobby — is the way that charges of homophobia and

hate-speech pervert open discussion about the merits of amending the law to allow same-sex marriage.⁷⁴ The threat of being brought before an anti-discrimination commission for having ostensibly offended or humiliated an opponent proved to be very real for some people, such as Porteous. But the reach of statutory anti-vilification measures such as s18C — or the equivalent provision on the statute books of the States — extends well beyond restricting debate about the rights of LGBTI people to get married.⁷⁵

Majoritarian decision-making can be the only effective basis for overcoming social and political disagreement in a healthy democracy where all sides believe they are correct. As the legal scholar James Allan has remarked:

“Any commitment to democracy is a commitment to process and procedure and reciprocity, and secondarily or indirectly to the possibility of convincing others (and so, because of the reciprocal nature of commitment, to being convinced yourself) and to counting all voters’ views equally.”⁷⁶

In other words, as Allan notes, the democratic process in which competing views vie for acceptance will inevitably entail dining on humble pie from time to time. Democracy is process; but this majoritarian process is weakened as the democratic deficit widens and, with it, democratic accountability. Institutions intended to serve the majority interests of the citizenry thus become

increasingly alienated from those whose interests they should be concerned to defend, as minority views prevail without regard for the views or values of others. The odd appointment of Morrison as 2016 Australian of the Year is a small but significant example of the actions of an alienated elite. While decisions or appointments such as that may be an affront to the common sense of those whom Cater describes as being “outside the bubble”, they are powerless to do much about them “since they are made by officials outside the democratic process.”⁷⁷

The leader writer at *The Spectator Australia* was unequivocal about the problem we face: “It’s not too much of a stretch to say that these days it is political correctness that is ‘killing our country’. Or at least, killing its soul.”⁷⁸ The editorial argued that the problem we confront in Australia is the mounting failure — or even refusal — to strike an appropriate balance between the norms governing social order and those governing the personal behaviour of the individual. Some commentators, such as *The Australian’s* legal affairs editor Chris Merritt, attribute this lack of balance to the capture of the human rights forum by the Left of politics, a development that has led to a highly entrenched and politicised situation. According to Merritt, a number of legal academics “believe this tendency has become so entrenched that Australia has an illegitimate hierarchy of rights at odds with the balanced approach favoured by international human rights treaties.”⁷⁹

Conclusion: Grievance and the Threat of Minority Fundamentalism

"No one living in a democracy can expect to be on the winning side of every social policy argument," insists Allan.⁸⁰ Even when one is convinced of the justice and substance of one's cause, it may well be that that argument is defeated by the democratic process. Such an outcome does not invalidate democracy; it ensures that democracy remains healthy, affording proponents of a cause every opportunity to make their case to the majority. The tendency in contemporary Australia, however, is for minority advocates to force their way through and accuse their majoritarian opponents of bigotry, vilification, and the rest when they don't get their way rather than allowing what Allan calls "letting-the-numbers-count majoritarian democracy" deliver the best results — which it does, on average, over time.⁸¹ One of the dangers posed by laws such as s18C restricting freedom of speech is that they suppress the kind of debate essential to a democracy. "The only way democratic institutions acquire legitimacy is by channelling the mind of the public," says CIS Senior Research Fellow Jeremy Sammut in his criticism of s18C. "The public mind is formed by free discussion of issues, as different interests compete to shape and define its collective meaning through the political process. Laws restricting free speech are therefore the antithesis of democracy, and they represent the end of politics in a free society."⁸²

This is how the rise of identity politics and the entrenchment of a series of newly-created rights intended to enforce the interests of specific minority groups in pursuit of notions of 'equality' and 'justice' for the 'oppressed' has had such a serious impact on the health of Australian democracy. One of the reasons for this impact is the ratchet-effect of creating new rights. In order to create a right by legislation — for example, the right not to be insulted or offended which was created by s18C — an established liberal democratic principle or tradition, such as commitment to the freedom of speech, must usually be set aside or curtailed. Yet when the operation of the new right is challenged (as has been the case with s18C both before and after *Eatock v Bolt*),

defenders of the right wrap themselves in the mantle of tradition and convention to resist that challenge. It's a two-step process that has been described by one American jurist as a one-way left-oriented ratchet.⁸³

As rights asserted by the proponents of identity politics ratchet to the left, so the shared social and cultural values upon which the institutions of democracy depend for their health are weakened because they become detached from the cultural and historical roots. This goes to the paradox that lies at the heart of identity politics and its preoccupation with ideas such as anti-discrimination. Individuals need to be members of a class or group in order to enjoy their newly realised status of 'victims'; and the benefits accruing to their new identity status are not to be lightly discarded.

Milton Friedman once famously warned that "the society that puts equality before freedom will end up with neither; the society that puts freedom before equality will end up with a great measure of both."⁸⁴ The weakening effect of identity politics is that it prioritises equality over freedom and, in doing so, locks people into specific categories at the expense of individual liberty — all in its pursuit of democratic egalitarianism.⁸⁵ As Zimmerman has remarked:

"In the long run, values such as democracy and the rule of law depend on a firm element of public morality that incorporates a serious commitment to the protection of basic individual rights, as well as a commitment to principles and institutions of the rule of law."⁸⁶

The politics of identity has become the artillery ranged against the walls of liberal democracy, resisting reason, and attesting that before any other discussion or argument stand the assertions "I am" and "You are" — which are beyond the reach of compromise or negotiation. Hence, disagreement is stigmatised as phobia and the provisionality of life in a plural society is rejected as symptomatic of deeper bigotries: choice spawns error, and freedom threatens to lead us astray.⁸⁷

Endnotes

- 1 For more on the tactics of the intolerance, see Eberstadt, M., 'The New Intolerance', (*First Things* March 2015) <http://www.firstthings.com/article/2015/03/the-new-intolerance>
- 2 Wroe, D., 'Australian of the Year: Catherine McGregor sorry after saying David Morrison choice was 'weak'', (*The Sydney Morning Herald*, 27 January 2016) <http://www.smh.com.au/federal-politics/political-news/australian-of-the-year-catherine-mcgregor-says-david-morrison-choice-was-weak-20160127-gmf5g2.html#ixzz49R19fdVQ>
- 3 Lyons, J. 'Australian of the Year David Morrison not ready to beat a retreat', (*The Weekend Australian*, 30 January 2016) <http://www.theaustralian.com.au/news/inquirer/australian-of-the-year-david-morrison-not-ready-to-beat-a-retreat/news-story/73cf1c9e24e198df4abfd2e075e743fd?sv=e17dcb1f44f028013325dd61b881ea19>
- 4 Wroe, D., as above.
- 5 A notable example of what can happen when such categories are questioned occurred in the 'Andrew Bolt' case (*Eatock v Bolt* [2011] FCA 1103) which will be considered in greater detail in Section 2 below.
- 6 Section 19 of the Tasmanian *Anti-Discrimination Act 1998* states: "A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of (a) the race of the person or any member of the group; or (b) any disability of the person or any member of the group; or (c) the sexual orientation or lawful sexual activity of the person or any member of the group; or (d) the religious belief or affiliation or religious activity of the person or any member of the group.
- 7 Australian Catholic Bishops Conference, *Don't Mess With Marriage*, (ACBC: 2015), 5 (accessed at <https://www.catholic.org.au/>)
- 8 Abbey, D., 'Catholic leader's defence', *Hobart Mercury* (14 November 2015)
- 9 'Discrimination case against bishops withdrawn' Catholic Communications, Sydney Archdiocese, 6 May 2016. https://www.sydneycatholic.org/news/latest_news/2016/201656_413.shtml. See also <http://www.abc.net.au/news/2016-05-05/martine-delaney-withdraws-case-against-church/7388474>
- 10 Cater, N. 'Malcolm Turnbull just not progressive enough for insiders', *The Australian* (16 February 2016) <http://www.theaustralian.com.au/opinion/columnists/nick-cater/malcolm-turnbull-just-not-progressive-enough-for-insiders/news-story/a681175bf09ca5e23e1e7027beb37fd8>
- 11 Levinson, S. 'How the United States Constitution Contributes to the Democratic Deficit in America', (55 *Drake Law Review*, 859-60, 2007).
- 12 Levinson, S., as above.
- 13 Heyes, C. 'Identity Politics', *Stanford Encyclopedia of Philosophy*, 4 <http://plato.stanford.edu/entries/identity-politics/>
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- 32 *Australian Law Reform Commission*, 'Traditional Rights and Freedoms – Encroachments on Commonwealth Laws', Report 129 (December 2015), 4.185
- 33 AIJAC Submission on Freedom of Speech (Repeal of S.18C) Bill 2014, http://www.aijac.org.au/media/uploads/AIJAC_Submission_on_Freedom_of_Speech_Repeal_of_S.18C_Bill_2014.pdf
- 34 *Racial Discrimination Act 1975, Sex Discrimination Act 1984, Disability Discrimination Act 1992, and Age Discrimination Act 2004*.
- 35 ALRC, as above, 4.176
- 36 ALRC, as above, 4.178
- 37 *Creek v Cairns Pty Ltd* (2001) 112 FCR 352, quoted in ALRC, as above, 4.189.
- 38 ALRC, as above, 4.208, 4.215. Not all commentators are convinced by the ALRC's report. Professor James Allan, a stern critic who rejects ALRC's call for new anti-vilification legislation, has described the report as "yet another court-centred, international law obsessed report that is more likely to worsen free speech in this country than to fix it." See Allan, J., 'Fools Gold: The Australian Law Reform Commission is wrong', *The Spectator Australia*, (12 March 2016), iv
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- 49 *Islamic Council of Victoria v Catch The Fire Ministries Inc* [2004] VCAT 2510
- 50 *Catch The Fire Ministries Inc & Ors v Islamic Council of Victoria* [2006] VSCA 284, per Nettle JA (para 15)
- 51 Zimmerman, A., 'The Intolerance of Religious Tolerance Laws', *Quadrant*, (July-August 2013)
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- 60 See Kurti, P., *Multiculturalism and the Fetish of Diversity* (St Leonards NSW: Centre for Independent Studies, 2013)
- 61 Sacks, J., *The Home We Build Together: Recreating Society* (London: Continuum, 2007), 19
- 62 Kukathas, C., *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: OUP, 2003), 214, 215.
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- 74 See the website of the Australian Christian Lobby for a comprehensive account of the group's activities and campaigns: <http://www.acl.org.au/>
- 75 See for example the case of QUT staff member Cindy Prior who brought an action in the Federal Circuit Court in early 2016 alleging racial vilification under s18C. The case had previously failed to resolve at the Australian Human Rights Commission. Thomas, H., 'QUT Oodgeroo Unit race-row lab staffer 'aggressive'', (*The Australian* 23 February 2016) <http://www.theaustralian.com.au/higher-education/qut-oodgeroo-unit-race-row-staffer-aggressive-unpleasant/news-story/eb18db9c689a7d6e4215ca5264571552>
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- 77 Cater, N., as above.
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- 79 Merritt, C., 'Left hijacks human rights arena', *The Australian* (23 January 2015) <http://www.theaustralian.com.au/business/legal-affairs/left-hijacks-human-rights-arena/news-story/9603ea0ac7e2f674992503611223353a>
- 80 Allan, J., as above, 165
- 81 Allan, J., as above, 166
- 82 Sammut, J., as above.

- 83 The phrase belongs to Robert Bork: 'In memoriam – Antonin Scalia', *The New Criterion* (March 2016) <http://www.newcriterion.com/articles.cfm/-i-Antonin-Scalia--1936-2016-i--8360>
- 84 Friedman, M., from *Free to Choose*, Episode 5, 'Created Equal', (PBS Television, 1980), http://www.freetochoosemedia.org/broadcasts/freetochoose/detail_ftc1980_transcript.php?page=5. I am grateful to Dr Michael Ondaatje for reminding me of this quote.
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- 86 Zimmerman, A., as above.
- 87 Mitchell, J., 'Age of Exhaustion', *The American Interest*, (10 October 2015), <http://www.the-american-interest.com/2015/10/10/age-of-exhaustion/>

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