

# *Should Bakers be Forced to Bake Cakes for Same Sex Weddings?*

**Democracy and the Rights and Limits of Religion and Conscience in Contemporary Australia**

The 2015 CIS Acton Lecture on Religion and Freedom Presented by

**Archbishop Fisher**

on 14 October 2015



THE CENTRE FOR  
**INDEPENDENT**  
STUDIES





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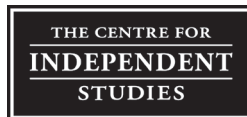
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CIS Occasional Paper 143



**2015**

Published October 2015  
by The Centre for Independent Studies Limited  
PO Box 92, St Leonards, NSW, 1590  
Email: cis@cis.org.au  
Website: www.cis.org.au

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National Library of Australia Cataloguing-in-Publication entry

Fisher, Anthony, 1960- author.

Title: Should a baker be forced to bake cakes for same sex  
weddings : democracy and the rights and  
limits of religion and conscience in  
contemporary Australia / His Grace the  
Most Reverend Anthony Fisher,  
Archbishop of Sydney.

ISBN: 9781922184559 (paperback)

Series: CIS occasional papers ; 143.

Subjects: Freedom of religion--Australia.  
Liberty of conscience--Australia.  
Freedom of expression--Australia.

Other Creators/Contributors:  
Centre for Independent Studies (Australia), issuing body.

Dewey Number: 323.442

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The year is 2025 – nine years after a plebiscite narrowly approved same-sex ‘marriage’ and Parliament amended the *Marriage Act* and many other laws to remove all references to ‘a man and a woman’, ‘husband and wife’ and ‘mother and father’. After an initial flurry of rather colourful same-sex ‘weddings’, numbers have now plateaued to only a few hundred each year. Sociologists debate the long-term effects on public understandings of marriage and family. Certainly there have been political ramifications: no major party allows dissenters on this issue; this caused some significant haemorrhaging from Parliament before the 2019 election; even for most ‘independents’ going against ‘the tide of history’ on this matter is regarded as disadvantageous.

While provisions in the *Marriage (Marriage Equality Amendment) Act* exempting Registered Ministers of Religion and Registered Places of Worship from taking part in ‘gay weddings’ have continued to stand in law, the High Court has ruled that section 116 of the Constitution does not protect faith-based schools from having to teach a ‘gay friendly’ state-imposed curriculum; continuing to teach that marriage is an opposite-sex union was held by a majority of the

Justices to be motivated by outmoded and bigoted attitudes and to be harmful to children. Already one Catholic bishop has been briefly gaoled for refusing to apply the state-approved 'LGBTIQQ Safety Protocols and Awareness Program' to the schools in his diocese; and parents at Jewish and Muslim schools have been advised that they may not withdraw their children from such programs. Many clergy and teachers in faith-based schools have been cowed with threats of prosecution for 'hate speech' if they teach that divine law limits marriage to people of opposite sex. There are also actions pending against Evangelical Christian and Maronite Catholic business owners for failing to provide photography, stretch limousine and hospitality services for 'gay weddings'. Greens and others have used this issue to chip away at the remaining 'exemptions' and 'benefits' enjoyed by churches and faith-based schools, hospitals and welfare agencies. Government schools in most states no longer allow Scripture classes and church-based adoption services were forced to close. Religious organisations are now required to extend spousal benefits to same-sex 'married' employees, have lost their charitable status, and now pay the same taxes and rates levied on any other business.

By 2025 public speeches and debates on same-sex 'marriage' and the like are rare as few organisations and venues are willing to risk the vilification that follows upon hosting them. The idea that marriage is a natural institution that precedes states and religions, that it is founded on sexual complementarity and oriented to family formation, is now regarded as unspeakable in the public square – though from time to time the usual suspects still raise it in their 'extreme right-wing' think-tanks, newspaper columns or pulpits.

Will all this come to pass in the decade ahead and, if so, what does it say about the quality of our democracy right now and about our nation's particular take on secularity and religious freedom? Many years ago, when I was still a young priest and academic, the commentator B.A. Santamaria asked me how it was that I was so optimistic about our culture. I responded that it was probably partly temperamental, partly my reading of the trends, and partly a matter of theological hope. He responded that he was not as naturally sunny in temper as I was, that he read the trends in our civilisation more pessimistically,



and that Christian faith only promises things will turn out for the best ‘in the end’: in the meantime things could get very bleak indeed!

In my paper tonight I will turn first to the political theology of Pope Francis asking “Is the Pope a watermelon and what is it he expects of democracies?” In Part 2 of my paper I will use that theology as a prism through which to examine the state of democracy in contemporary Australia. And finally in Part 3 I will ask how we might preserve a space for religious liberty in Australia.

## **Is the Pope a watermelon? Pope Francis on expecting more from democracies**

### ***i. Francis on constructing a natural and human ‘ecology’ that is pro-God, pro-creation and pro-people***

In his encyclical letter *Laudato Si’: On the Care of Our Common Home*, and a number of very recent speeches, Pope Francis has articulated the idea of an integral ecologism that is pro-God, pro-creation and pro-people, and what this might mean for politics as well as personal life, including respect for religious liberty.<sup>2</sup> For touching on matters such as anthropogenic climate change and other ill-effects of our technocratic, consumerist culture the Pope has been characterized by some as a watermelon – green outside and red within.<sup>3</sup> Yet no usual member of the watermelon commentariat would be so forthright in insisting that human beings are *not* pollution, their population growth *not* the problem;<sup>4</sup> that we must respect our natures as male or female and the implications for self-image, relationships and institutions such as marriage; that the ‘little ones’ most at risk are not merely the economically poor, but the unborn and the spiritually poor; and that we must seek not merely political or financial solutions but moral and spiritual ones and not expect governments to fix everything for us.

In some ways Pope Francis’ call to asceticism, and his attention to the local and personal, are very traditional. Much of what he says about ecology rebrands things long said under other labels such as ‘the natural and supernatural economies’, or under titles like avarice,

sobriety, temperance, fasting and conversion. Of course, there is a particular *Franciscan* attention to the limits properly imposed upon our ambitions by our natural environment and the needs of the poor. But where the papacy long resisted the democratizing impulses of the age, Francis like his recent predecessors seems to presume the moral superiority of democracies over other experiments in government and to be asking *more* of them.<sup>5</sup>

What is that *more*? One thing is *breadth of vision*. The starting point for *Laudato Si'* is “that human life is grounded in three fundamental and closely intertwined relationships: with God, with our neighbour and with the earth itself”<sup>6</sup>. Our natural and social ecologies are profoundly interconnected: true reverence for one (e.g. for forests or seals) must complement reverence for the other (e.g. fellow citizens, refugees, the unborn); neglect or misuse of one often overflows to the other; and all these interrelate in complex ways with our sense of transcendent value, of the supernatural ecology.<sup>7</sup> What is required, he thinks, is awareness of these interconnections, an ability to look beyond the immediate and comfortable, and a willingness to take courageous and farsighted action.

## ***ii. Francis on the potential and shortcomings of contemporary democracies***

Though widely acclaimed for his positive and non-judgmental manner, Francis can be a sharp critic and readily names the failures of contemporary democracies to address some natural and social challenges. All too often, he suggests, our leaders seem driven by the desire for short-term success and to be ready to appease various interests or their electorate with ‘bread and circuses’.<sup>8</sup> Such approaches lead not only to bad policy but also to disengagement by ordinary people from politics.<sup>9</sup> Continuing in this way, he warns apocalyptically, will make electorates cynical, hurt especially the poor, and leave future generations only “debris, desolation and filth”.<sup>10</sup> True statecraft, he insists, is *principled* statecraft: even in difficult times it respects rights, pursues the common good, and enables intermediate groups such as churches and families to play their essential subsidiary role.<sup>11</sup>

In the shadow of his encyclical, Francis recently took the challenge of true statecraft to a joint session of Congress.<sup>12</sup> High sounding visions and principles are not enough, he insisted. Statecraft is a *practical* art: it is intended to achieve things. “You are asked to protect, by means of the law, the image and likeness fashioned by God on every human face,” he said. Thus “a good political leader is one who, with the interests of all in mind, seizes the moment in a spirit of openness and pragmatism”, initiating improvements for others rather than merely protecting his/her own interests, “restoring hope, righting wrongs, maintaining commitments, and thus promoting the well-being of individuals and peoples.”

Francis further developed this call to a principled and practical statesmanship when he addressed the General Assembly of the United Nations.<sup>13</sup> Politics must be *people-centred*, he insisted. The “economic and social exclusion” of some by those lucky enough to possess much denies fraternity, offends against human rights and is irreverent toward creation and Creator. Constantly aware of the real people who stand “above and beyond” all plans and programmes, “government leaders must do all they can to ensure people have the spiritual and material means necessary to live in dignity and support a family.” This minimum includes not only food, housing and work, but also religious liberty and access to education, culture and the natural environment. A right relationship to “our common home” is premised upon a sense of universal fraternity and deep respect for the sacredness of every human person. Without such commitments, even great democracies will fail to deliver what human beings most need.

### ***iii. Francis on the spiritual and moral underpinnings of democracy***

Pope Francis next addressed these matters at the place where the Declaration of Independence was signed. I was there to hear him read from the lectern used by Lincoln for his Gettysburg Address. Citing that declaration and that great President, he highlighted the dignity and equality of every human being, “endowed by their Creator with certain inalienable rights” which governments exist not to invent but to protect. Each generation must re-appropriate, re-articulate and

re-enact those foundational values if democracy is to remain true to itself and achieve its high purposes.

In that speech as in many other places, Pope Francis identified *respect for the democratic ideal of religious liberty* as an essential pre-condition of peaceful coexistence, of an enriching pluralism, and of friendship and collaboration between people of different spiritual traditions. Democracies ignore religions at their peril. Religious communities play a crucial role in reminding democracies “of the transcendent dimension of human existence and our irreducible freedom in the face of any claim to absolute power.” Precisely because it reminds us that there is more to creation than ourselves, that we are creatures and not gods, religious faith well-lived provides the wherewithal to resist mandated orthodoxies and totalising ideologies.

If religion is to continue making this contribution to democratic societies it must not be reduced, the Pope said, “to a subculture without the right to a voice in the public square.” The right “to worship God, individually and in community, as conscience dictates,” is certainly part of what religious freedom means. “But religious liberty, by its nature, transcends places of worship and the private sphere of individuals and families” and must be respected and valued in the public square as well.<sup>14</sup> Reiterating what he has said on many occasions, the Holy Father recognized that in this ‘age of martyrs’ the religious liberty of Christians and other minorities is now openly attacked in places such as Syria, Iraq, Nigeria and North Korea; but it can also be compromised in contemporary democracies. Driving religion from the public square and hollowing it out from the inside by reducing it to rituals and private beliefs undermines democratic foundations. If democracies are to do great things they must maintain and renew their founding ideals.

Following his predecessors Pope Francis has set the bar high for democracy, emphasizing in particular *a visionary, principled and practical statesmanship that reverences God and people, especially the weak*. How, by those standards, are we faring in Australia?

## The state of democracy in contemporary Australia

### *i. Coup capital of the democratic world*

“Coup capital of the democratic world”: so Canberra was recently labelled by the BBC. Commentators have compared Australian government in the post Hawke-Keating-Howard period with a Tarantino film and dubbed leadership spills our national sport.<sup>15</sup> Without commenting on the quality of our Prime Ministers, six in eight years and four in only 27 months, changed mostly by representatives rather than electors, is extraordinary.<sup>16</sup>

Several commentators think our revolving door leadership is a sign of malaise in our democratic ideals and practice.<sup>17</sup> They have noted apathy, distrust, even cynicism, amongst ordinary people about politicians and their antics; complacency, intellectual torpor and other diminishment in debate and policy-making; decline in Cabinet process and teamwork, including internecine leaking that makes confident leadership and confidential discussion impossible; blindly adversarial and obstructionist postures by government, opposition and minority parties, that paralyse governments to effect the policies for which they are elected; governments that appeal to the basest fears rather than the noblest aspirations of their electorates (e.g. over refugee policy); electorates that punish their leaders who embrace sound policies that come with short-term pain (e.g. higher taxes or reduced benefits); over-responsiveness of representatives and commentators to opinion polls, the 24/7 news cycle and spin; and a ruthlessly anti-authoritarian media culture that discourages quality candidates from offering themselves for political service.<sup>18</sup>

### *ii. The need for a transcendent perspective*

This year marks the 800<sup>th</sup> anniversary of that *Magna Carta* which King John signed in the hope of buying collaboration from his rebellious barons and the barons signed in the hope of limiting state power with principles against arbitrary imprisonment, fines and the like. The charter is an important marker in the evolution of those ideals, dispositions and traditions of practice that underpin our version of

democracy. Here we meet the first stirrings of the notion that good government requires the consent of the governed.<sup>19</sup> As Lord Acton observed, following not Lincoln but Thomas Aquinas, “legislation ought to be *for* the people and *by* the people”.<sup>20</sup> Yet respect for the general will is not enough to ensure good government.<sup>21</sup> So the charter began to articulate the principles grounding various checks upon the evanescent will of electors and elected which have evolved since, such as constitutions, upper houses, cabinets and committees, the public service, the courts of law, natural justice, parliamentary conventions and protocols. Such principles are in need of rearticulation today, for as Lord Acton observed, though democracy is far to be preferred to tyrannies, the “one pervading evil of democracy” is that “the majority, or rather of that party that succeeds” can be tyrannical also.<sup>22</sup>

*Magna Carta* is, in fact, a rather religious document. Its self-described purpose is to honour God, exalt holy Church and better order the Kingdom. In it King John acknowledges that he rules ‘under God’ and that the rights and responsibilities recognized in the charter are God-given rather than his inventions; to fail to recognize them would, the document claims, imperil the king’s soul. The Constitution of Australia, though more modern, reflects the fact that our particular take on democracy, like that of Britain and the United States, is hugely influenced by our Judeo-Christian inheritance. It records that the decision “to unite in one indissoluble Federal Commonwealth under the Crown” relied upon three things: the consent of the people of the several states, the sovereign power of the king in parliament and, thirdly, “the blessing of Almighty God”.

Some would dismiss all this constitutional god-talk along with prayer in parliament as mere flourish to add gravitas or heirlooms of a by-gone age: Australia, they might say, ain’t that way anymore. In next year’s census the ‘no religion’ option will be placed at the top of religion-identifying question for the first time, as if it were now the default position; pundits expect a leap in the number identifying as ‘none’ from the 20% who did so in 2011 and a consequential decline in the 60% who identified as Christian.<sup>23</sup> There are other signs of fading religiosity in Australia and many people seem happy to identify as Christian, live as practical agnostics, but draw upon the inherited

spiritual-social capital of religious beliefs and practices, even as ideological elites seek to reduce that influence in law and culture.

John Emerich Edward Dalberg-Acton – the Lord Acton for whom our lecture is named – joined Edmund Burke, Alexis de Tocqueville, G.K. Chesterton and others in viewing the state as a partnership between the living, the dead and those yet to come, between science, art, virtue and religion, always working to improve the lot of the members. Though none of these was a fan of theocracy or ideology, they were equally wary of a democracy without respect for tradition and without a vision beyond the present. Just as a series of U.S. Supreme Court decisions have abandoned their ancestors' views on faith and law, life and love, so political elites and opinion-makers in Australia commonly press it in a more secularist direction.<sup>24</sup> In 1992 the American Court famously shunned all religious, customary or objectivist accounts of early human life and morality, declaring in *Planned Parenthood v Casey* that “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>25</sup> This year the court did the same for marriage. As Chief Justice Roberts said, dissenting in *Obergefell v Hodges*: today “the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?”

Much might be said about postmodernity’s denial of metanarratives and ‘thick conceptions of the good’ but let me mention just one effect I think worthy of consideration. It is often observed that for all the government’s *Intergenerational* reports ours is the least fertile generation in history and that for all the rhetoric about *Infrastructure* our generation is the least likely to construct any. I believe our failure to add much to the stock of rail, water, sewerage and other infrastructure inherited from our ancestors and our failure even to replace ourselves in population terms are connected. Projects of the scale of the Snowy Mountains Scheme required leaders and participants who cared deeply about the future: they knew it would be their descendants, not themselves, who would benefit. But our democracy today lacks

‘transcendent’ vision not just in the sense of a vision of the sacred but also of hope: a vision of a future for our descendants and an eternity in which unnoticed good will yet be rewarded. As children and grandchildren loom smaller in the public consciousness, we are less likely to sacrifice for their sake in politics or elsewhere. Whether agnostic liberalism or a more watermelon hued political correctness can provide our democracy the transcendent authority and horizon beyond self-interest it needs is yet to be demonstrated.

***iii. The need for civil discourse: the case of the same-sex marriage ‘debate’***

Eight centuries ago rights talk was less fashionable than it is today: yet already people were aware of duties owed and grievances sustained. The first right recognised in the *Magna Carta* was religious liberty; the *ecclesia Anglicana* was to be free to order her affairs and enjoy her liberties ‘unimpaired’. We are heirs to the idea that religion, in the very broad sense of speculation about the higher order of things, or the ultimate ground of reality, and consequent honour of that or worship of those beyond the here and now, is a universal good. People should in general be free to seek and believe what they will religiously, and given latitude to worship and live according to their conscientious beliefs. This is *not* a case of making exceptions for benighted eccentrics, but a recognition of something essential to human flourishing and enriching for the community. So the right to the free exercise of religion is recognized in multiple international treaties.

I will not rehearse my case for marriage as traditionally understood and for retaining that understanding of marriage in our laws which I have offered on many occasions.<sup>26</sup> Tonight I would like to reflect instead upon the conduct of the public ‘debate’ on this issue so far and what this reveals about the state of our democracy.

When people like me and some of you enter the fray on marriage we now expect to be tagged “ultra-conservative”, “tedious imbecile”, “delusional nutter”, “evangelical clap-trapper” and even “nauseating piece of filth” not just in the anti-social media but even in the



mainstream. What is new is that such *ad hominem* hails not just from fevered activists and net trolls but from respected journalists and public figures. The ABC's *Q&A* programme intrudes the same-sex issue, whatever the published topic of the evening every time; but even when a whole episode is devoted to debating the question it is very clear that only one view will gain serious attention. A number of commentators have noted the biased reporting on the same-sex marriage issue in many media outlets and the refusal of some to allow even paid advertisements for the other side.<sup>27</sup> When the ABC's *Media Watch* said it was time to give both sides a hearing,<sup>28</sup> it was roundly scolded on the basis that hate has no rights and that it is 'false balance' to give the pro-traditional-marriage side any attention at all.<sup>29</sup>

Closed-mindedness is, of course, no monopoly of people engaging on same-sex 'marriage'. But I think the refusal to listen is presently mostly on one side. Those in favour of the traditional understanding of marriage know their opponents' slogans and arguments well: "tolerance and diversity", "love is love", "no to hate", hence "marriage equality". But advocates of 'gay marriage' seem to think no reasonable person *could* think other than as they do; that not only are they *right* on this issue, but that their opponents are *irrational* and operating out of blind traditionalism or, more likely, hatred.<sup>30</sup> This is surely one of the strangest aspects of the 'debate' so far: that the understanding of marriage found in pretty well every serious civilisation, legal system, religion and philosophy till recently – that marriage brings together a man and a woman as husband and wife to be father and mother of any children that follow from their marital union – is now *incomprehensible*, even *unspeakable*, for many of our intelligentsia, journalists, politicians and business leaders. As Brendan O'Neill observed, "a chokingly conformist climate" now prevails on this and many other issues in Australia, so that those who dare to disagree will be demonised, harassed and marginalized rather than refuted.<sup>31</sup> That the Catholic Archbishop in Tasmania has been taken to that state's anti-discrimination commission for distributing a joint bishops' pastoral letter on marriage is a sign of how far things have gone and are likely to go in the near future if not resisted.<sup>32</sup>

#### ***iv. Religious liberty at risk***

Same-sex ‘marriage’ proponent, Senator Penny Wong, has insisted that there is nothing to fear from ‘marriage equality’, that religious liberty will be unaffected, and that those who support traditional understandings of marriage are “stubbornly clinging to discriminatory laws” and only offer arguments that are “increasingly irrational”.<sup>33</sup> Such claims of bigotry and irrationality are strange given that Senator Wong herself opposed the redefinition until fairly recently. In any case, international experience of redefining marriage belies Senator Wong’s optimism about religious liberty. In the joint pastoral letter of Australia’s bishops many examples were given of individuals and groups who have suffered financial, social or legal sanction for holding to traditional marriage in places that have legislated for same-sex marriage or civil unions. Since that pastoral was published there have been more cases.<sup>34</sup> Ministers of religion and places of worship may receive niggardly ‘exemptions’ in such regimes, but ordinary believers and their businesses are given no leeway and even religious institutions such as schools, hospitals and welfare agencies are expected to tow the PC line. Some Australian civil liberties commentators fear that were same-sex ‘marriage’ legalised here the power of the state would be similarly mobilised against dissenters.<sup>35</sup> In the Tasmanian case the complainant seeks not only to have the Archbishop sanctioned but also to have all Church schools forced to promote LGBTI ‘awareness’, tolerance and behaviour.<sup>36</sup>

In early 2013, lesbian couple Rachel Cryer and Laurel Bowman asked the Oregon bakery *Sweet Cakes* to bake a same-sex wedding cake for them. Although bakery owners Melissa and Aaron Klein had always served all comers, they believed that baking a distinctively same-sex wedding cake would be facilitating a same-sex ‘wedding’ and explained that this would violate their religious beliefs that marriage is the union of a man and a woman. Cryer and Bowman filed a complaint that they had suffered discrimination based on sexual orientation and the government agency upheld that complaint. Meanwhile the baker couple faced vilification, boycotts of their business, violent protests and even death threats, and were forced to close their shop and work

from home. They were then fined \$135,000 and encouraged by the Tribunal to receive behaviour modification therapy so they could be rehabilitated.<sup>37</sup> Even if it would not have been unethical for such bakers to assist a same-sex ‘wedding’ in so remote a way, democracy degenerates into despotism when it licences such vilification of people’s conscientious beliefs.

## **Preserving a space for religious liberty in Australia**

### ***i. The Australian take on secularity***

Tom Holland opens his book about the world around the year 1,000 AD with the fateful meeting between Pope Gregory VII and the Emperor Henry IV.<sup>38</sup> In an age of caliphs and Viking raiders, knights and bishops jockeying for power, feudal vendettas and the rest, Western Europe emerged as a distinctive culture and expansionist power. At the heart of this, Holland argues, were the disappointment of millennial hopes and the settling of a new relationship between ecclesial and civil authority that gave Christendom its particular energy and focus.

There are many views of the proper relationship between Church (various faiths and their agencies) and State (civil government and its departments). Secularism, *laïcité* or “the separation of Church and State” has many forms. What was essentially a millennial Christian contribution to our civilisation – reflected also in the great charter – has mutated in various ways and places.

In Western Europe today, as in the communist East of old, the tendency is to say that between Church and State *ne’er the twain shall meet*. Governments and courts increasingly exclude faith-based organisations from decision-making and service delivery. Dogmatic secularists ban Christmas decorations from public places, church bells from towers, crucifixes from schools or nurses’ necks, and any residual religious values in law and policy. Some want believers to renounce their most deeply held beliefs or stay silent about them in

the public square. Religion is thought to be so inherently backward, even dangerous, that the tag 'believer', let alone 'ultra-Catholic', disqualifies one from civil leadership.

If there are countries in which state or culture-imposed atheism is dominant, there are others in which religious leaders dictate terms to government and society, including to those who do not share their faith. In the nightmare of the Arab Spring turned Jihadi Winter extremists seek to impose the only 'pure' version of the only approved faith even on their co-religionists. While in Tom Holland's view it was Christendom that first distinguished the spheres of God and Cæsar, pope and emperor, to the great advantage of the development of the West, we know it suited many Christian leaders through the centuries to blur those lines; the same is so for some believers today. And there are still conceptions of Church and State that recognize no such line even to be blurred. In theocracies, as in secular tyrannies, either religion is in charge of everything or secular politics is, but no compromise between the two is possible.

As if supportive of this no compromise view the U.S. seems to have the two extremes at once, with lots of public religious rhetoric, as if being religious is expected, and various bans on public religion, as if irreligion was compulsory. Bakers are fined and marriage registrars gaoled for refusing to go along with same-sex marriage as if this were a dogma of the state religion. Richard John Neuhaus famously thought an 'iron curtain' or 'wall of separation' had been erected between Church and State in America, so that the nation's foundational ideals and people's deepest convictions are now regularly ruled 'out of bounds'; this leaves the public square so 'naked' that Americans are unable to engage in the properly *political* task of determining how to live together.<sup>39</sup>

Here in Australia we distinguish between the spheres of activity proper to Church and State, each with its proper inspiration and responsibilities, instrumentalities and methods. Church and State in this country mostly leave each other alone. So far no bakers have been required to put two brides atop their cakes. Where the spheres of Church and State overlap, Australians have been inclined to a healthy, pragmatic cooperation for the public benefit rather than iron curtains

or trench warfare. So we've had fruitful collaborations in law and policy, in provision of education, health and aged care, and various welfare services, in special religious education in government schools, chaplaincies to state institutions, state funerals etc.

The biggest religious gathering, youth gathering, gathering of any sort in the history of our country – World Youth Day 2008 – was an example of this. Every sector of our community co-operated in the planning and delivery: not Catholics or Christians only, or the private non-profit sectors only, but practically everyone. That said something powerful which our visitors commented upon: that Church and State, people of various religions and none, can 'live and let live', give each other 'a fair go', honour diversity, seek common ground, and work together in this country. But wherever religious liberty is at risk such coexistence and collaboration are also threatened.

## ***ii. Where to draw the line between claims of conscience and of law***

A member of the U.S. Equal Employment Opportunity Commission recently said that, sympathetic as she is to religious freedom, there's a 'zero-sum' game with respect to religious freedom and LGBT rights; instead of attempting to balance such competing liberties, society must opt for LGBT rights over religion every time.<sup>40</sup> Several Justices in *Obergefell* acknowledged that would be an inevitable effect of the decision to legalize same-sex 'marriage'.<sup>41</sup> Yet true democracy is a political order that acknowledges deeply held moral and religious convictions are important, permits differences in these matters and, as far as reasonable, allows expression of those differences in action or inaction on conscientious grounds. The democratic state concedes that people must obey both God and Caesar. That is why the various human rights instruments and their underpinning political philosophies acknowledge the right to hold different religious or moral convictions as a *non-derogable* right, and also rights to express those convictions in public and not be compelled to act against them, to be protected in this by the state and not denied it by powerful ideological, financial or majority-political interests.

Not that all claims of conscience will always be trumps: as the centrality of the human person and the common good grounds respect for conscience, it also requires that practices like child sacrifice be forbidden.<sup>42</sup> Beyond such extremes, considerable latitude is possible. But in post-modernity, having principles, internally consistent and embraced with passion over a long period, is not only less common but can seem unimaginative, even fanatical. The desire to ‘get along’ may mean we give each other space to ‘do our own thing’; but we are left suspicious of what the other person’s ‘thing’ might be and sceptical that there is any truth in matters of life and love. As conscience reduces to personal tastes, respect for its claims is harder to sustain.

Thus while totalitarian secularists will concede some pleas of conscience to oddballs, they aim to rid law and policy of any whiff of incense and are inclined to view conscience claims as marginal, even anti-social. Beyond a narrow field of worship, they would similarly reduce the scope of religious liberty.

## Conclusion

The year is 2025 – nine years after the plebiscite to redefine marriage was defeated, partly because most Australians still treasured marriage as traditionally understood, partly because they thought government had no business regulating other friendships, partly because they were convinced a mature democracy does not rush into such important decisions and partly because they feared ‘marriage equality’ would make Australians *less equal* in matters of faith and conscience. Rather than taking the divisive turn proposed back in 2015, other signs of respect for people with same-sex attraction have been embraced by most Australians. Terms like ‘man and wife’ and ‘mother and father’ survive in law and practice, and new measures help support marriages and marriage-based families. A robust but courteous debate continues, but most agree the decade-long exercise of patience and respect in pursuit of a moral consensus in this area has demonstrated democratic maturity and strengthened, not diminished, common life.

In this 2025 faiths still play a major role in our community as providers of much human and supernatural support, of formation in crucial moral and political values, and as providers of charitable services in education, health and aged care, welfare and the like. Believers feel supported rather than threatened by the state in holding their high ideals and there is healthy dialogue between people of different faiths and between believers and ‘nones’. Australians are proud of their historic ‘compact’ between Church and State, freedom of conscience and the rule of law – all the more so in a world where many countries take a less tolerant direction and whole populations have suffered persecution, exile or death as a result. Most agree we should resist totalizing ideologies that would seriously upset that historical balance. Most want our bakers to be left to bake good cakes, unencumbered by such dogmatism.

My more sanguine 2025 required people back in 2015 to embrace the mission of not only rebuilding the nation’s physical infrastructure but also renewing its spiritual capital so that it might be visionary, principled and practical, with a right reverence for God and people – to use Pope Francis II’s inherited tests of democratic health. Having and following principles, internally consistent and embraced with passion but also publicly contestable, is not only regarded as epistemically and psychologically defensible but also as socially and politically essential. Forming people in such ideals and giving them confidence in their application was something to which the Church devoted much energy in the intervening decade. Teachers, scholars, lawmakers, commentators and other thoughtful individuals have made important contributions to renewal of our democracy. “Liberty,” as Lord Acton observed, “is not the power of doing what we like, but the right to do what we ought.”<sup>43</sup> In the 2010s and 2020s we realized that only by renewing our social-spiritual capital could we ask *what that ought is that we should do* with our liberty and then be able *to do it*.

## Endnotes

- 1 I acknowledge with gratitude the assistance of Mr David Collits and Dr Michael Casey in preparing this paper.
- 2 Pope Francis, *Laudato Si': Encyclical Letter on the Care of Our Common Home* (2015), esp. ch 4. On Pope Francis' politics more generally, see Austin Ivereigh, "Uncovering the hidden key to Pope Francis' politics," *New Spectator* December 2014 and *The Great Reformer: Francis and the Making of a Radical Pope* (Allen & Unwin, 2014). On the background Catholic teaching on politics see Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (2004).
- 3 In fact *Laudato Si* 61 acknowledges that the Church has no magisterium on matters of scientific or economic fact: "On many concrete questions, the Church has no reason to offer a definitive opinion; she knows that honest debate must be encouraged among experts, while respecting divergent views." Again, at 188: "There are certain environmental issues where it is not easy to achieve a broad consensus. Here I would state once more that the Church does not presume to settle scientific questions or to replace politics. But I am concerned to encourage an honest and open debate so that particular interests or ideologies will not prejudice the common good."
- 4 *Laudato Si* 50 (quoting Pontifical Council for Justice and Peace, *Compendium* 483).
- 5 E.g. *Laudato Si* 116.
- 6 *Laudato Si* 66.
- 7 *Laudato Si* 5, 139, 155, 162.
- 8 *Laudato Si* 57, 178, 181.
- 9 *Laudato Si* 197.
- 10 *Laudato Si* 161.
- 11 *Laudato Si* 53, 156-9, 175, 179, 181, 197, 232. Following the Second Vatican Council he defines the common good as "a central and unifying principle of social ethics... the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfilment." (156, citing Vatican Council II, *Gaudium et spes: Pastoral Constitution on the Church in the Modern World* (1965), 26).
- 12 Pope Francis, *Address to the Joint Session of the United States Congress*, 24 September 2015.
- 13 Pope Francis, *Address to the General Assembly of the United Nations Organization*, 25 September 2015.
- 14 Pope Francis, *Address on Religious Liberty and Immigration*, Independence Mall, 26 September 2015.
- 15 Troy Bramston, "Abbott v Turnbull: Leadership merry-go-round becomes the norm," *Australian* 15 September 2015 and "Revolving-door PMs



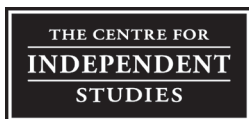
- not healthy for the nation,” *Australian* 28 September 2015; Nick Bryant, “Australia: Coup capital of the democratic world,” *BBC News* 14 September 2015; Jacqui Maddock, “Malcolm Turnbull’s turn as PM has world scratching its head,” *Huffington Post Australia* 15 September 2015; Toby Manhire and Toby Morris, “What’s with all the political turmoil in Australia? That is the question,” *Radio New Zealand News* 16 September 2015; Emma Manser, “‘Coup capital’ and onions: the world reacts to Lib spill,” *New Daily* 15 September 2015; Gregory Melleuish, “To avoid relegation, Turnbull must restore an authority missing since Howard,” *The Conversation* 15 September 2015; Nick Pearson, “The handful of countries that have had more leadership changes than Australia,” *Ninemsn* 16 September 2015; Rohan Smith, “Australia labelled the ‘coup capital of the democratic world’ after leadership spill,” *news.com.au* 15 September 2015; Tony Wright, “Five PMs in five years? Old hat, like treachery: ask Malcolm Turnbull’s father-in-law,” *Sydney Morning Herald* 16 September 2015.
- 16 Though Mr Turnbull has so far fared better in the media, he has already suffered hostile leaks and was jeered at a recent party gathering when he claimed the Liberals are free of factionalism, outside influence and backroom deals: Matthew Doran, “NSW Liberals groan as Malcolm Turnbull tells gathering party is not ruled by factions,” *ABC News* 10 October 2015.
- 17 Paul Kelly has addressed this most fully in: *Triumph and Demise: The Broken Promise of a Labor Generation* (Melbourne: MUP, 2014), ch 33; “Democracy under threat as trust in system broken,” *Australian* 4 May 2015; “Nation’s choice: to reignite hope or sink into deeper conflict,” *Australian* 29 August 2015; “Negative politics the biggest enemy of reform,” *The Australian* 23 September 2015. Other commentators, writing from diverse political positions, include: Hon. Tony Abbott, *Press Statement following Retirement as Prime Minister*, 15 September 2015; James Allan, “I come to praise Tony, not to bury him,” *The Spectator Australia* 19 September 2015; Australian Catholic Bishops Conference, *For Those Who’ve Come Across the Seas: Justice for Refugees and Asylum Seekers* (Social Justice Statement 2015-16); Troy Bramston, “Abbott v Turnbull: Leadership merry-go-round becomes the norm,” *Australian* 15 September 2015 and “Revolving-door PMs not healthy for the nation,” *Australian* 28 September 2015; Leslie Cannold, “Good reason to worry about our democracy,” *Sydney Morning Herald* 5 December 2011; Michael Davis, “When it’s party v. principle,” *Quadrant* 8 October 2015; Tim Dunlop, “Three things must change for a healthier democracy,” *The Drum (ABC)* 17 October 2014; Kevin Donnelly, “We are a Christian nation under threat,” *The Drum (ABC)* 22 May 2015; Michael Gordon, “Liberal leadership: Can Malcolm Turnbull end the era of the disposable Prime Minister?” *Sydney Morning Herald* 15 September 2015; Brendan O’Neill, “Lesson for Tony Abbott: think like an elite or quit public life,” *the Australian* 19

- September 2015; Margot O'Neill, "Poll data reveals Australia's waning interest in politics, decline in support for democracy," *ABC News* 12 August 2014; Nikki Savva, "Turnbull must stay true to his word," *Australian* 17 September 2015; Angela Shanahan, "Politics divorced from the people," *Australian* 26 September 2015; Greg Sheridan, "Turnbull has to deliver stability," *Australian* 1 October 2015.
- 18 Press Statement of Prime Minister Tony Abbott, Parliament House, 15 September 2015. Philosopher Roger Scruton has warned against public policy being determined on the basis of online petitions, mass emailings and "Twitter storms". Assuming what people click in an online petition reliably reflects their best judgments, let alone what they really need, is to misunderstand human nature. Humans, he suggests, are "not creatures of the moment" but rely on advice, discussion and reflection to determine their best interests and make their decisions. "Why MPs have a duty to resist online petitions," *The Spectator*, 15 August 2015.
  - 19 Clause 14 of the Charter required a parliament to be summoned "to obtain the general consent of the realm for the assessment of an aid [i.e. a tax]".
  - 20 Lord Acton, *Lectures on the French Revolution* (London: MacMillan, 1910); cf. St Thomas Aquinas, *De Regno ad regem Cypri* l.3; *Summa theologiae* I-II 90.3.
  - 21 Thus Art Spander: "The great thing about democracy is that it gives every voter a chance to do something stupid." George Bernard Shaw: "Democracy is a device that ensures we shall be governed no better than we deserve." Sir Winston Churchill: "It has been said that democracy is the worst form of government except all those other forms that have been tried from time to time." Oscar Wilde: "Democracy means simply the bludgeoning of the people by the people for the people." Jon Stewart: "You have to remember one thing about the will of the people: it wasn't that long ago that we were swept away by the Macarena."
  - 22 Lord Acton, *The History of Freedom in Antiquity* (1877). He continues: "The ancient writers saw very clearly that each principle of government standing alone, is carried to excess and provokes a reaction. Monarchy hardens into despotism. Aristocracy contracts into oligarchy. Democracy expands into the supremacy of numbers... But the lesson of their experience endures for all time, for it teaches that government by the whole people, being the government of the most numerous and most powerful class, is an evil of the same nature as unmixed monarchy, and requires, for nearly the same reasons, institutions that shall protect it against itself, and shall uphold the permanent reign of law against arbitrary revolutions of opinion."
  - 23 Lucy Battersby, "Census change: Is Australia losing its religion?" *Sydney Morning Herald* 28 August 2015; Roy Williams, *Post-God Nation? How Religion Fell Off the Radar in Australia - and What Might be Done to Get it Back on*

- (Sydney: Harper Collins, 2015), 9 argues Australia's religious belief is at its lowest ever level. Also: "Fewer Aussies Giving More to Charity," *ProBono Australia* 12 July 2014.
- 24 576 U. S. \_\_\_ (2015). The decision was described by one commentator as "judicial tyranny" and contrary to the "deliberative democracy" provided for in the US Constitution by Ryan T Anderson, *Truth Overruled: The Future of Marriage and Religious Freedom* (Washington DC: Regnery, 2015), 61. As Chief Justice Roberts put it: "the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?" (Roberts at 2-3, 11, 23).
- 25 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992).
- 26 "Same-sex 'marriage': Evolution or deconstruction of marriage and the family?" St Mary's Cathedral Hall, 22 July 2015 [www.sydneycatholic.org/people/archbishop/addresses/2015/2015722\\_1232.shtml](http://www.sydneycatholic.org/people/archbishop/addresses/2015/2015722_1232.shtml); "The public goods of marriage, or why Church and state should protect and support real marriage and family," in Kenneth Whitehead (ed), *The Church, Marriage and the Family* (South Bend: St Augustine's Press, 2007), 53-74; "Same sex marriage undermines purpose of institution," *Australian* 1 June 2015; "Don't mess with marriage," *Catholic Outlook* May 2012, 2; "Powerful forces determined to bully us into submission on marriage," *Catholic Weekly* 19 July 2015, 4-5, 12-13.
- 27 Wendy Squires acknowledged but defended the bias in "Yes, the media is biased on the issue of same-sex marriage," *Mamamia* 18 August 2015; "Marriage Alliance angry after channels 'refuse to run ads against gay-marriage'" *SBS* 7 August 2015.
- 28 "Media Watch," *ABC*, Episode 29, 17 August 2015; "Media Watch Dog: Same ABC opinions on same-sex marriage" *Australian* 14 August 2015.
- 29 Emily Moulton, "Q&A recap: Same-sex marriage, relevance of royal commissions and corporate tax practices," *news.com.au* 18 August 2015. See also R Hini, "'You Tedious Imbeciles,'" *The Catholic Weekly* 30 August 2015, 1, 10-11.
- 30 E.g. Michael Kozoi, 'We should call arguments against marriage equality what they really are – hatred,' *Sydney Morning Herald* 6 July 2015.
- 31 Brendan O'Neill, "The new dark ages, where the perfectly normal are branded bigots," *The Australian* 19 August 2015. Justice Alito, dissenting in *Obergefell*, feared the majority court decision would "be used to vilify Americans who are unwilling to assent to the new orthodoxy... Those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools." 576 U. S. \_\_\_ (2015) Alito J at 6-7.

- 32 See Archbishop Julian Porteous, *Statement in Response to Reports of a Complaint Lodged with the Office of the Anti-Discrimination Commissioner*, 28 September 2015.
- 33 Senator Penny Wong in Debate on Same-Sex Marriage, Parliament House, Canberra, 29 July 2015.
- 34 Anderson, *Truth Overruled*, ch 4.
- 35 “This is a legislative Trojan Horse that would allow LGBTI folk of various and divergent sexual proclivities to mobilize the power of the state against any persons or institutions (especially religious ones) that they could claim were discriminating against them”: Merv Bendle, “Turnbull and Conservatism’s Rekindling,” *Quadrant Online* 16 September 2015.
- 36 “Anti-gay marriage booklet sparks complaint,” *SkyNews.com.au* 28 September 2015; “Tasmanian woman in same sex relationship lodges anti-discrimination complaint against Catholic Church booklet template,” *ABC AM Program* 28 September 2015.
- 37 Ryan Anderson and Leslie Ford, “Bake us a cake, or else!” *Heritage Foundation* 18 February 2014 [www.heritage.org/research/commentary/2014/2/bake-us-a-cake-or-else](http://www.heritage.org/research/commentary/2014/2/bake-us-a-cake-or-else); Lisa Bourne, “Oregon Christian bakers fined \$135k respond by sending home-baked cakes to LGBT activists,” *LifeSite News* 20 August 2015.
- 38 Tom Holland, *The Forge of Christendom: The End of Days and the Epic Rise of the West* (New York: Anchor Books, 2008).
- 39 *The End of Democracy? II: A Crisis of Legitimacy* ed by Mitchell S. Muncy, intro J Budziszewski (Dallas: Sence Publishing Co, 1999), 10.
- 40 Cited in Anderson, *Truth Overruled*, 56.
- 41 See: Ryan Anderson, ‘Will marriage dissidents be treated as bigots or pro-lifers?’ *The Federalist* 14 July 2015; S P Bailey, ‘Here are the key excerpts on religious liberty from the Supreme Court’s decision on gay marriage,’ *Washington Post* 26 June 2015; M Branaugh and S Ogles, ‘What churches and clergy should note from the same-sex marriage ruling,’ *Christianity Today* 26 June 2015; M Caspino, ‘Does Supreme Court’s marriage decision protect religious entities?’ *National Catholic Register* 26 June 2015; E Green, ‘How will the U.S. Supreme Court’s same-sex-marriage decision affect religious liberty?’ *Atlantic Monthly* 26 June 2015.
- 42 Vatican Council II, *Dignitatis humanae: Declaration on Religious Freedom* (1965), 7 agreed: “Society has the right to defend itself against possible abuses committed on the pretext of freedom of religion. It is the special duty of government to provide this protection.” cf. *Catechism of the Catholic Church*, n. 2109.
- 43 Lord Acton, “The Roman question” *The Rambler* January 1860. He later observed: “By liberty I mean the assurance that every man shall be protected in doing what he believes his duty, against the influence of authority and

majorities, custom and opinion. The state is competent to assign duties and draw the line between good and evil only in its own immediate sphere. Beyond the limit of things necessary for its wellbeing, it can only give indirect help to fight the battle of life, by promoting the influences which avail against temptation – religion, education, and the distribution of wealth.” *The History of Freedom in Antiquity* (1877).



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How important is religious liberty and freedom of conscience in modern statecraft and nation-building? Do they foster social cohesion and mutual respect, or are they sources of division and vilification in diverse societies? Long seen as bedrock foundations of the democratic-liberal state and the common good, freedom of conscience and religion are increasingly under threat and treated with suspicion in contemporary Australia. In reflecting on how we resolve competing claims of conscience and law, the 2015 Acton Lecture given by His Grace the Most Reverend A. Fisher, Archbishop of Sydney will also defend the continuing importance of conscience and religious liberty in democracy today.

*In Laudato Si, Pope Francis says: “True statecraft is manifest when, in difficult times, we uphold high principles and think of the long-term common good. Political powers do not find it easy to assume this duty in the work of nation-building.” [Para.178]*



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CIS Occasional Paper 143  
ISBN 978 1 922184 55 9  
ISSN 0155 7386

[www.cis.org.au](http://www.cis.org.au)

