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The Internet Down Under: Can Free Speech Be Protected in a Democracy Without a Bill of Rights

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THE INTERNET DOWN UNDER: CAN FREE SPEECH BE PROTECTED IN A DEMOCRACY WITHOUT A BILL OF RIGHTS?

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I. INTRODUCTION

A century of British rule before becoming independent; part of the country settled by prisoners; its legal roots taken from British common law; now a liberal democracy: this describes the United States and also describes Australia.[1] As large geographically as the United States, but not a tenth as populated, Australia, like the United States, has taken steps to limit access to pornographic material on the Internet. United States courts have rejected such laws; Australian Internet regulations remain in force. This difference in Internet regulation shows that liberal democracies may differ in their justifications for—and degree of granting—free speech.[2]

Australia's limitations on Internet content, adopted in 1999, exemplify the threats to free speech inherent in a democracy without a bill of rights or a constitutional provision specifically protecting free speech. This paper reviews United States court decisions giving the Internet a high level of First Amendment protection, traces the development of Australia's Internet legislation, explores the reasons Australia has not adopted constitutional free speech protection, and suggests

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1. *See generally* Erin Daly, *Idealists, Pragmatists, and Textualists: Judging Electoral Districts in America, Canada, and Australia*, 21 B.C. INT'L & COMP. L. REV. 261, 265-66 (1998).

2. For comparisons between Internet regulation in the United States and in other countries, see, for example, Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL OF RTS. J. 305 (1999); Lewis S. Malakoff, Comment, *Are You My Mommy, or My Big Brother? Comparing Internet Censorship in Singapore and the United States*, 8 PAC. RIM L. & POL'Y J. 423 (1999); John F. McGuire, Note, *When Speech Is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. Rev. 750 (1999); Kim L. Rappaport, Note, *In the Wake of* Reno v. ACLU: *The Continued Struggle in Western Constitutional Democracies with Internet Censorship and Freedom of Speech Online*, 13 AM. U. INT'L L. REV. 765 (1998).

reasons why Australia should consider a constitutionally embedded free expression provision.

II. INTERNET REGULATION IN THE UNITED STATES

Responding to public pressure to shield children from pornographic material on the Internet,[3] Congress adopted the Communications Decency Act ("CDA") as part of the Telecommunications Act of 1996.[4] In *Reno v. ACLU*,[5] the United States Supreme Court, saying the Internet should receive expansive First Amendment protection, found the CDA unconstitutionally vague and overbroad.[6] Justice Stevens, writing for the 7-2 Court majority, said Congress did not clearly define "patently offensive" and "indecent" which "will provoke uncertainty among speakers about . . . just what they mean."[7] Users might have censored themselves, the Court reasoned, suppressing their speech rather than communicating protected material which they incorrectly feared the CDA might have prohibited.[8] The community using the narrowest, most confining definitions would set the standard for the entire country.[9]

The Court dismissed the government's argument that the Internet should be subject to broad regulatory control, as is broadcasting because the Internet is a "unique" medium, different from broadcasting.[10] The Court noted that broadcasting's limited spectrum space makes broadcast frequencies scarce, but the Internet has no physical limitation preventing users from sending messages.[11] The Court also noted the Internet is less intrusive than is broadcasting.[12] The Court suggested parental control or blocking software would be constitutionally acceptable ways to prevent children's access to indecent material, and a more precisely and

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3. *See* McGuire, *supra* note 2, at 758, 760.

4. The CDA prohibited using the Internet to send not only obscene but also "indecent" or "patently offensive" material to people younger than 18 years old. The CDA also made it illegal for any person or ISP to allow dissemination of obscene or indecent material to minors over Internet facilities it controlled. Internet providers could defend themselves if they acted "in good faith" to take "reasonable, effective, and appropriate actions" to prevent minors from receiving indecent material through the Internet. Pub. L. No. 104-104, § 502, 110 Stat. 56 (1996).

5. 521 U.S. 844 (1997).

6. *See id.*

7. *Id.* at 871.

8. *See id.* at 872.

9. *See id.* at 877-78.

10. *See id.* at 867.

11. *See ACLU*, 521 U.S. at 870.

12. *See id.* at 869, 877.

narrowly drawn statute preventing children's access to indecent material on the Internet might be constitutional.[13]

After the Supreme Court found the CDA unconstitutional, legislators and other public officials continued trying to control Internet content. In 1998 Congress adopted the Child Online Protection Act ("COPA").[14] However, the United States Court of Appeals for the Third Circuit found the law likely to be unconstitutional.[15] The court said, "Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users."[16] Thus, "'a community standards' test would essentially require every Web communication to abide by the most restrictive community's standards."[17] Internet publishers likely would "severely censor" their content, or try to implement an age verification system.[18] However, the court said that some adults would not have ways to verify their age, so they would not have access to selected Internet content.[19] Also, some content found acceptable by certain communities might be shielded by an age verification system, preventing minors in those communities from accessing the content.[20] The court said the COPA, therefore, was likely overbroad and violated the First Amendment.[21]

Also, a federal district court ruled that public libraries must have a compelling reason to limit access to indecent Internet sites and must narrowly tailor restrictions so no constitutionally protected sites are

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13. *See id.*

14. Child Online Protection Act, Pub. L. No. 105-277, §§ 1401-1406, 112 Stat. 2681-736 to -741 (1998). The COPA prohibited commercial web site operators from making available to minors under 17 years old sexually explicit material that is "harmful to minors." *Id.* at § 1403. Violating the COPA could lead to a six months imprisonment and a $50,000 fine for each day of violation. *See id.* However, the COPA said a commercial web site operator would not violate the law if access to a site with material "harmful to minors" required using a credit card, adult access code, adult personal identification number, or some other method ensuring minors could not enter the web site. *See id.* A web site operator erecting this "electronic gate" could not be prosecuted under the law. *See id.* This defense was largely the same as the one Congress included in the CDA. *See supra* note 4.

15. *See* ACLU v. Reno, 217 F.3d 162, 179 (3d Cir. 2000). The Third Circuit affirmed the district court's grant of a preliminary injunction against enforcement of the COPA, finding, among other things, that the COPA would likely be held unconstitutional in a decision on the merits.

16. *Id.* at 175.

17. *Id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See ACLU*, 217 F.3d at 179.

blocked.[22] Although libraries may prohibit access to obscene content and child pornography on the Internet, blocking material "harmful to minors" may unconstitutionally prevent adults from having access to protected speech, the court said.[23]

III. INTERNET REGULATIONS IN AUSTRALIA

Since the mid-1990s, portions of the Australian public and government have expressed concern about the nature of material that may be accessed by means of online services, specifically in relation to the perceived ease of access to material that is unsuitable for children, such as pornography.[24] The stated fear was that the relatively easy availability of any form of content via the Internet would undo the complex system of controls and regulations Australia places on telecommunications, publishing, and broadcasting.[25] Intense lobbying by conservative elements[26] resulted in the adoption of the Broadcasting Services Amendment (Online Services) Act 1999 ("the Act"), regulating Internet content, specifically in relation to the perceived ease of access to material that is either illegal, pornographic, or unsuitable for children.[27]

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22. *See* Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 2 F. Supp. 2d 783 (E.D. Va. 1998).

23. *See id.* at 796. The library argued its reason for blocking sites was to protect children. The court agreed obscene material and child pornography are not protected expression and the library may block access to such content. *See id.* However, content "deemed harmful to juveniles" may include material acceptable for adults. *See id.*

24. *See, e.g., Porn Safeguards on School Internet Links*, AAP NEWSFEED, Nov. 2, 1997, *available in* LEXIS, AUST Library, ALLNEWS file.

25. The Broadcasting Services Act, 1992 (Austl.) ("BSA"), through the Classification Act, 1995 (Austl.), and related regulations, sets out classification schemes which are administered by Australia's Office of Film and Literature Classification ("OFLC"). The rating system is intended to keep materials of a sexual and violent nature from minors. Content advocating criminal behavior also is curbed or banned although the regulations do not limit racist or hate speech. As one commentator said, "[The definitions in the classifications schemes] come down to highly subjective assessments, at best. At worst, the definitions require a knowledge of the Federal classification scheme and the history of its application, which itself is best described as arcane." Peter Knight, *Recent Developments in Information Technology Law in the Asia-Pacific Region*, COMPUTER LAW., Mar. 1997, at 19, *available in* LEXIS, CMPCOM Library, CPLAWR File.

26. *See, e.g., The Complex Task of Keeping Sex and Sleaze Off the Net*, CANBERRA TIMES, Sept. 13, 1998, *available in* LEXIS, AUST Library, ALLNEWS file.

27. *See* Sen. Ian Campbell, *Second Reading Speech*, Broadcasting Services Act (Online Services) Bill 1999 (Aust.) (visited Aug. 7, 2000) <http://www.dcita.gov.au/nsapi-text/?MIval=dca_dispdoc&ID=3761>.

Some have hailed the Act, which took effect January 1, 2000, as a means of protecting Australia's children from an Internet full of pornography, neo-Nazis, pedophiles, and bomb-making recipes, but others have called it interventionist, censorial, and restrictive of free speech.[28] The Act establishes a complaint-based regime which empowers the Australian Broadcasting Authority ("ABA"), analogous to the Federal Communications Commission in the United States, to issue notices requiring illegal or highly offensive Internet sites to be taken down or for access to such sites to be prevented.[29] The Australian government's claimed intention in pursuing Internet regulation was set out in the Second Reading Speech introducing the Broadcasting Services Amendment (Online Services) Bill to the Parliament:

> [The legislation] will enact a regime which balances the need for the Government to meet legitimate community concerns about the publication of illegal and offensive material online, that is commensurate with the regulation of conventional media, while ensuring that regulation does not place onerous or unjustifiable burdens on industry and inhibit the development of the online economy.[30]

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28. *See, e.g.*, Electronic Frontier Association, *Internet Regulation in Australia* (visited Apr. 12, 2000) <http://www.efa.org.au/Issues/Censor/cens1.html>.

29. *See* Broadcasting Services Act, 1992 (Austl.), at Sched. 5, Pt. 4, Div. 3 (action to be taken in relation to complaint about prohibited content hosted in Australia); *id.* at Div. 4 (action to be taken in relation to complaint about prohibited content hosted outside Australia).

30. Sen. Ian Campbell, *Second Reading Speech*, Broadcasting Services Act (Online Services) Bill 1999 (Aust.) (visited Aug. 7, 2000) <http://www.dcita. gov.au/nsapi-text/?MIval=dca_dispdoc&ID=3761>. Despite this on-the-record rationale, the government's political reasons for passing the Act dealt with priorities not connected with online content. In March 1999, conservative Senator Brian Harradine of Tasmania refused to support the government's plan to raise $55 billion by selling into private hands Telstra, Australia's incumbent and already partially privatized telecommunications giant. At the time, the term of Senator Harradine, who held the balance of power in the otherwise evenly divided Australian Senate, was to expire on June 30, 1999. Senator Harradine's imminent retirement placed pressure on the government to ensure passage of its Telstra privatization plan prior to June 30, 1999. To guarantee this outcome, the government proposed a trade with Senator Harradine: It would enact laws that would, inter alia, regulate the content of online services, if Senator Harradine would vote for Telstra privitization. In May 1999, the Senate adopted Internet regulation; shortly thereafter, the Senate voted to offer one-third of Telstra for private purchase. *See, e.g.*, Ross Peake, *Telstra "Vote" Delayed as Time Runs Out*, CANBERRA TIMES, May 28, 1999, *available in* LEXIS, NEWS Library, PAPERS file; Michael Warby, *Senator Alston's Internet Censorship Bill Is Unlikely to Contain Pornography & Will Cost Australia Jobs*, CANBERRA TIMES, May 24, 1999, *available in* LEXIS, NEWS Library, PAPERS file. The legislation did not arise in a vacuum. In 1994 and 1995, the federal government issued a series of consultation papers and reports concerning the Internet. In August 1995, the Commonwealth Minister for

The new regulatory framework works on the principle that what is illegal offline should also be illegal online. The regulations classify Internet content in accordance with the Australian classification scheme for films, television programs, and computer games. Responsibility for implementing the Act and its co-regulatory scheme for Internet content regulation lies with the ABA. The ABA has the power to investigate public complaints about prohibited or potentially prohibited content.[31] The public may present complaints to the ABA through a "hotline."[32]

There are two standards for prohibited content depending on whether the content is hosted within Australia or overseas.[33] The regulations prohibit Australian-hosted Internet content[34] classified Refused Classification ("RC") or X by the Classification Board,[35] and

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Communications and the Arts directed the ABA to investigate the content of online services. In December 1995, the ABA released an Issues Paper soliciting public comments. *See* Australian Broadcasting Authority, *Investigation into the Content of On-Line Services, Issued Paper* (visited Feb. 20, 2000) <http://www.dca.gov.au/aba/olsissue.htm>. In July 1996, the new Minister for Communications and the Arts, Richard Alston, issued the ABA's report on regulating the Internet. *See* Australian Broadcasting Authority, *On-Line Services Investigation (June 1996)* (visited Aug. 18, 2000) <http://www.aba.gov.au/what/online/ols_report/index.htm>. A year later, Alston announced *Principles for Regulating On-line Services. See Department of Communications and the Arts, Principles for a Regulatory Framework for On-Line Services in the Broadcasting Services Act 1992* (visited July 1997) <http:// dca.gov.au/policy/framework.html>.

31. *See* Australian Broadcasting Authority, *Online Services Content Regulation: Overview of Regulatory Scheme* (visited July 9, 2000) <http://www.aba.gov.au/what/online/ overview.htm>.

32. *Id.*

33. *See* Broadcasting Services Act, 1992 (Austl.), at Sched. 5, Pt. 4, Div. 3 (action to be taken in relation to complaint about prohibited content hosted in Australia); *id.* at Div. 4 (action to be taken in relation to complaint about prohibited content hosted outside Australia).

34. The legislation defines Internet content as that which is kept on a data storage device and is accessed, or available for access, using an Internet carriage service, but does not include (1) ordinary electronic mail or (2) information that is transmitted in the form of a broadcasting service. *See* Broadcasting Services Act, 1992 (Austl.), Sched. 5, § 3 (definitions). Internet content does not include restricted access systems such as Intranets. Ephemeral content, such as newsgroups, chat rooms, and real time services such as streaming video and audio, is also excluded, except to the extent that they are stored or archived, given that it would not be possible to classify "live" material. However, this content will continue to be subject to section 85ZE of the Crimes Act, 1914 (Austl.), that provides for an offence for the knowing or reckless use of a carriage service in a manner which would cause offence to a reasonable adult in all the circumstances.

35. Prohibited content (RC or X material) includes material containing detailed instruction in crime, violence, or drug use; child pornography; bestiality; excessively violent or sexually violent material; and real depictions of actual sexual activity. *See* Broadcasting Services Act, 1992 (Austl.), at Sched. 5, Pt. 3, Cl. 10.

the regulations require content classified R[36] to be subject to a restricted access system to avoid prohibition. The regulations prohibit overseas-hosted Internet content classified RC or X but do not prohibit or require a restricted access system for R-rated content.[37]

Access to prohibited material hosted by Australian Internet Content Hosts ("ICH"s) will be restricted by take-down notices being issued to the relevant host.[38] These notices will require the host to cease carrying the relevant prohibited material.[39] The ABA may issue interim take-down notices in relation to potentially prohibited content if it believes that the content is likely to be classified RC, X, or R. Such notices apply pending classification by the Classification Board.[40] Access to prohibited material hosted outside Australia will be restricted by access-prevention notices being issued to Internet Service Providers ("ISP"s). The notices will require ISPs to take reasonable steps to prevent end-users accessing the prohibited material.[41]

As required by the law, Australia's online industry complied with the legislation by developing a series of codes of practice through the Internet Industry Association ("IIA"). The codes deal with a range of issues relating to the responsibilities of ISPs and ICHs.[42] A second IIA

Broadcasting Services Act, 1992 (Austl.), at Sched. 5, Pt. 3, Cl. 10.

36. Content classified R is not considered suitable for minors and includes material containing excessive and/or strong violence or sexual violence; material containing implied or simulated sexual activity; or material which deals with issues or contains depictions which require an adult perspective. *See* Australian Broadcasting Authority, *Online Services Regulation: Complaints About Internet Content* (visited Aug. 18, 2000) <http://www.aba.gov.au/what/online/complaints.htm>.

37. *See* Broadcasting Services Act, 1992 (Austl.), at Sched. 5, Pt. 4, Div. 4 (action to be taken in retaliation to complaint about prohibited content hosted in Australia).

38. *See* Australian Broadcasting Authority, *Online Services Content Regulation: Restricted Access Systems* (visited Aug. 18, 2000) <http://www.aba.gov.au/what/online/restricted.htm>; *see also* Broadcasting Services Act, 1992 (Austl.), at Sched. 5, Pt. 4, Div. 3, cl. 30.

39. Broadcasting Services Act, 1992 (Austl.), Sched. 5, § 30(1). Hosts must comply with all notices no later than 6 p.m. on the business day after the notice. *See id.* at § 48. ISPs and hosts who fail to comply with these notices are liable for fines of $27,500 per day in the case of a corporation, and $5,500 per day in the case of other people. *See* Campbell, *supra* note 27; *see also* Broadcasting Services Act, 1992 (Austl.), at Sched. 5, Pt. 4, Div. 3, cl. 30.

40. *See id.* at § 30(2).

41. *See id.* at § 40.

42. *See id.* at § 60. The codes include standards ensuring that children do not receive online accounts without the consent of a parent or responsible adult; giving parents and responsible adults information about supervision and control of children's access to Internet content; assisting parents and responsible adults to supervise and control children's access to Internet content; informing producers of Internet content of their legal responsibilities in relation to that content; informing customers about their

code for ISPs specifies that if the ABA investigates a complaint about prohibited or potentially prohibited content hosted outside Australia, it will notify the makers of the "Approved Filters" listed in the code and that ISPs will provide an "Approved Filter" to their subscribers.[43] The ABA has actively pursued complaints about online content,[44] while some Australians continue to voice objections to the legislation.[45]

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make complaints about Internet content; assisting customers to deal with complaints about unsolicited electronic mail that promotes or advertises an Internet site that enables end-users to access information that is likely to cause offence to a reasonable adult; assisting in the development and implementation of Internet content filtering technologies (including labeling technologies); giving customers information about the availability, use and appropriate application of Internet content filtering software; providing customers with the option of subscribing to a filtered Internet carriage service; and ensuring that, in the event that an industry member becomes aware that an Internet content host is hosting prohibited content in Australia, the host is told about the prohibited content. *See* Australian Broadcasting Authority, *Online Services Content Regulation, Register of Industry Codes & Industry Standards* (visited Aug. 18, 2000) <http://www.aba.gov.au/what/online/register_codes.htm#codes>; *see also* Broadcasting Services Act, 1992 (Austl.), at Sched. 5, Pt. 4, Div. 3, cl. 60 (describing matters that must be dealt with by industry codes and industry standards).

43. *See* Australian Broadcasting Authority, *supra* note 30, at 13.

44. As of August 2000 the Australian Broadcasting Authority had not released official data concerning the number of complaints about online material or actions the ABA had taken in response to complaints. However, an ABA representative said that as of June 30, 2000, approximately 200 complaints about Internet content had been registered with the agency. The majority of complaints concerned content on the World Wide Web, with the remainder being complaints about content in Usenet groups. Approximately one-third of the total number of complaints related to content hosted by Australian sites. After ABA investigation, makers of approved filters were notified about approximately 100 items of content hosted outside Australia, and approximately 60 items of content have been the subject of take-down notices issued to Internet content hosts. Approximately 80% of the prohibited content hosted by Australian sites, and approximately 50% of prohibited content hosted by non-Australian sites, was concerned with offensive depiction of a minor or pedophile activity. *See* Andree Wright, *Paper Presented to United States Commission on Protection of Children Online* (Aug. 3, 2000) (available at <http://www.aba.gov.au/what/online/international.htm>).

45. Strong criticism of Australia's content regulations has come from the Electronic Frontiers Australia and other groups. *See* Electronic Frontiers Australia, *Internet Regulation in Australia* (visited Aug. 18, 2000) <http://www.efa.org.au/Issues/Censor/cens1.html>. Eros, an adult goods and services industry association, is considering challenging the constitutionality of Australia's online content regulation laws. Eros is expected to argue that (1) the legislation contravenes laws allowing distributors of sexually explicit videos to send their wares from the Australian Capital Territory (the ACT, where Eros is headquartered) to anywhere in Australia by couriers or mail, and (2) the Internet censorship law breaches freedom of trade and communication. At present, adult video mail order businesses operating out of the Northern Territory of Australia and the ACT have thrived largely because of legislation facilitating trade across state borders. *See* Cosima Marriner, *Eros to Argue Net Censorship Law Restrains Trade* (visited Aug. 18, 2000) <http://www.newswire.com.au?0001/eros.htm>. Many organizations have moved their operations offshore,

Although some print, broadcast, and film material is banned under the classification scheme, most affected material simply is kept from children. The Internet regulation, however, requires that content falling into certain classifications be removed from sites altogether. Even adults no longer have access to it. The government's argument that offline and online material should be treated the same, then, is somewhat disingenuous.

IV. FREEDOM OF SPEECH IN AUSTRALIA

Australia, like the United States, has tried to limit children's access to pornographic material on the Internet. Australia's approach has been to require ISPs to remove content based on Internet users' complaints. There have been no legal challenges to the Australian legislation, and it is not clear there would be grounds compelling a court to reject the regulations. In the United States, courts consistently have rejected attempts to punish those providing children Internet access to pornographic material. Why have Internet content restrictions been overturned in the United States but not challenged in Australia? Perhaps because the United States has free speech protection embedded in its Constitution, but Australia does not.

As in the United States,[46] white settlement in Australia carried with it the 18th century English view of free speech—there was none. Only a year after the First Fleet landed,[47] the colonial government flogged a

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au?0001/eros.htm>. Many organizations have moved their operations offshore, including Electronic Frontiers Australia ("EFA"). *See* Electronic Frontiers Australia, *Home Page* (visited July 9, 2000) <http://www.efa.org.au/Welcome.html>. The EFA moved its web site to the United States two weeks before introduction of the legislation, although it was uncertain whether the legislation would have an impact on any part of its site. The EFA web site contains expansive material criticizing the Australian Government and the Internet legislation. *See* Roulla Yiacoumi, *EFA Moves Web Site to US*, NEWSWIRE (visited July 9, 2000) <http//www.newswire.com.au/9912/efaweb.htm>.

46. *See, e.g.*, LEONARD LEVY, EMERGENCE OF A FREE PRESS (1985).

47. Prisoners America refused to accept settled Australia. *See* RUSSEL WARD, CONCISE HISTORY OF AUSTRALIA 47-51 (1992). Crime rose dramatically in 17th and 18th century Britain. At a loss for a solution, British legislators simply quadrupled the number of crimes punishable by hanging. *See id.* Showing some mercy, magistrates often sentenced prisoners to "transportation" instead of death, sending them to the Colonies. *See id.* But in 1776, the American colonies issued the Declaration of Independence. Although ignoring the rights of women, blacks and Native Americans, political leaders did argue that America no longer should be the storehouse for British criminals. *See id.* With little jail space left in Britain and public sentiment running against wholesale hangings, British authorities cast about for other places to send prisoners. *See id.* In 1787, they decided on Australia, and on January 26, 1788, the First

man for seditious libel.[48] Little changed for 100 years,[49] and Australia declined to include a free speech clause in its constitution which took effect in 1901.[50]

The Australian constitution,[51] despite being based to some degree on the American document, has "remarkably few constitutional guarantees of fundamental rights."[52] It establishes the branches of government and the relationship between the state and federal governments, and it shows a predominant regard for economic issues. But it fails to specifically protect individual rights, particularly ignoring freedom of speech and freedom of the press.

No single clear reason explains why framers of the Australian constitution did not include individual rights protections. Australian constitutional historians suggest several explanations, including Australia's legal system being based on British common law, reliance

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Fleet, with its cargo of more than 1000 criminals, their guards and provisions, landed at Sydney. *See id.*; *see generally* ROBERT HUGHES, THE FATAL SHORE 1-83 (1986).

48. John Callaghan told Australia's first governor, Arthur Phillip, that he had served his sentence, deserved to be freed and was due two years' provisions. An enraged Phillip asked Callaghan who had told him that. Callaghan replied that it was Phillip's lieutenant governor. Phillip called Callaghan a liar and put him on trial. Callaghan was found guilty of defaming the lieutenant governor and sentenced to 600 lashes. In fact, a letter from Phillip to the Home Office in London had said emancipated prisoners were entitled to two years' rations. *See* ROBERT PULLAN, GUILTY SECRETS: FREE SPEECH AND DEFAMATION IN AUSTRALIA 67-69 (1994).

49. *See* Robert Trager, *The Internet Down Under: Australia, Responsible Government and Not-Quite-Free Speech*, 2-4 (Apr. 18, 1998) (paper presented to National Media Ethics and Law Conference, on file with author). For recent examples, see Geoffrey de Q. Walker, *Ten Advantages of a Federal Constitution*, 73 AUSTL. L.J. 634, 642-43 (1999).

50. Five decades passed from the first serious suggestion that Australia form its colonies into a country until adoption of a national constitution. *See* JOHN A. LA NAUZE, THE MAKING OF THE AUSTRALIAN CONSTITUTION 1 (1972). Largely concerned with intrastate matters, Australian political leaders ignored national issues until threats of European countries sweeping through the South Pacific claiming lands for their own jolted the leaders into action. *See id.* at 2. That danger prompted an 1883 Sydney meeting which in itself accomplished little but did become a breeding ground for discussions resulting 15 years later in a constitution. *See id.* at 2-3.

51. For an overview of the Australian constitution, see JOHN WAUGH, THE RULES: AN INTRODUCTION TO THE AUSTRALIAN CONSTITUTIONS (1996), and William Rich, *Constitutional Law in the United States and Australia: Finding Common Ground*, 35 WASHBURN L.J. 1 (1995).

52. Timothy H. Jones, *Fundamental Rights in Australia and Britain: Domestic and International Aspects*, *in* UNDERSTANDING HUMAN RIGHTS 91, 92 (Conor Gearty & Adam Tomkins eds., 1996); *see* W.H. MOORE, THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA 615 (2d ed. 1910) *quoted in* Jones, *supra* at 97 ("It is not too surprising . . . that 'guarantees of individual right[s] are conspicuously absent' from the Australian Constitution.").

on "responsible" government, and the country's origins being steeped in racism.

A. Adherence to British Common Law

Leading Australian politicians and lawyers in the late 19th century believed the common law protected individual rights, and that no further protection was necessary.[53] Former Australian High Court Chief Justice Anthony Mason wrote, "[T]he founders accepted, in conformity with prevailing English legal thinking, that the citizen's rights are best left to the protection of the common law."[54]

However, unlike constitutional guarantees, common law assurances of personal rights can be swept away by legislative action. Common law protections are ephemeral, giving people little confidence they can express themselves freely.[55]

B. Dicey's Rule of Law

A.V. Dicey, a 19th century English jurist who coined the term "rule of law," argued for parliamentary sovereignty and, particularly, an independent judiciary.[56] Individual rights set out in a form of law superior to legislative bodies or courts—such as a written constitution—would preclude legislative and judicial bodies from exercising independent judgment. According to Dicey, "a sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment."[57] Under this view, the Australian Parliament could not substantively restrict subsequent parliaments.[58]

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53. *See* Anthony Mason, *A Bill of Rights for Australia?*, 5 AUSTRALIAN B.J. 79, 80 (1989).

54. *Id.* at 80.

55. *See* CONSTITUTION COMMISSION, I FINAL REPORT 468 (1988) (*cited in* Jones, *supra* note 52, at 92) ("[W]e think that the faith which many people appear to have in the common law as a safeguard of their freedoms is misplaced.").

56. *See generally* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. 1959).

57. *Id.* at 68 n.1.

58. *See, e.g.*, Mark W. Gobbi, *Enhancing Public Participation in the Treaty-Making Process: An Assessment of New Zealand's Constitutional Response*, 6 TUL. J. INT'L & COMP. L. 57, 63-64 (1998).

Similarly, Dicey opposed any form of a bill of rights.[59] Dicey's views strongly influenced the framers of the Australian constitution.[60]

C. Responsible Government

The English Westminster system, which gives parliament absolute sovereignty, is called "responsible" government, but by no means does this label imply government is responsible to the electorate. Rather, it describes the executive branch's responsibility to the parliament, the body from which the executive branch members are drawn. Because the Australians' English background made them very familiar with this governmental structure, they generally adopted responsible government as the system their country would use.[61]

But the adoption was not quite total. Australians felt comfortable with parliamentary responsible government but also wanted the constituent states to retain considerable power with a relatively weak central government.[62] Combining federalism and responsible government is not exactly mixing oil and water, but it is close at least concerning individual rights. Federalism tends to have a negative view of government, requiring that rights be ensured by clearly restricting governmental powers. Australian responsible government, on the other hand, reflects a positive view of government as protector of the people.[63]

In bringing these two governmental approaches together, the framers chose to rely on responsible government to assure individual rights rather than embedding protections in the constitution. Partially this choice was due to lay members of the constitutional conventions being confused by the lawyer-delegates' differing views on what would result from adopting specific rights guarantees.[64] More importantly, perhaps, was the belief that representatives elected under a system of

59. *See* Haig Patapan, *Rewriting Australian Liberalism: The High Court's Jurisprudence of Rights*, 31 AUSTL. J. POL. SCI. 225, 226 (1996).

60. *See* Haig Patapan, *The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia*, 25 FED. L. REV. 211, 219 (1997).

61. *See* BETH GAZE & MELINDA JONES, LAW, LIBERTY AND AUSTRALIAN DEMOCRACY 26 (1990).

62. *See* BRIAN GALLIGAN, A FEDERAL REPUBLIC 140 (1995) ("The Australian tradition . . . is premised on a . . . positive view of representative democracy and buttressed by a faith in the ability of democratic processes both to express the popular will and to protect individual rights."); *see also* MANNING CLARK, HISTORY OF AUSTRALIA 448-54 (Michael Cathcart ed., 1996).

63. *See id.* at 38-39.

64. *See* LA NAUZE, *supra* note 50, at 231.

responsible government would not turn against their constituents by stripping them of rights; suggesting otherwise was an insult.[65]

A century later, however, the process no longer works as envisioned.[66] The intent was that electors would choose members of parliament, who then would select those to run the executive branch, including a prime minister. Today, Australia's two dominant political parties control members of the House of Representatives and Senate, the winning party's leader becomes prime minister, and the executive branch dictates policies to the parliament. Legislation proposed by the prime minister is adopted essentially without question.[67] If ever parliament could have protected individual rights against attack by the executive branch, it can no longer.[68]

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65. *See* LA NAUZE, *supra* note 50, at 231. One delegate said, "Have any of the colonies . . . ever attempted to deprive any person of life, liberty or property without due process of Law? . . . People would say 'Pretty things these states of Australia; they have to be prevented by a provision in the Constitution from doing the grossest injustice.'" *Id.* (citing I *Convention Debates, Melbourne, 1898*, at 688). *See also id.* at 227 (quoting OWEN DIXON, JESTING PILATE AND OTHER PAPERS AND ADDRESSES 102 (1965). Former High Court Chief Justice Owen Dixon argued that if personal rights are protected by constitutional provisions, it can only be because of fears that political leaders will not respect people's liberties. But, he asked, why "should doubt be thrown on the wisdom and safety of entrusting to the chosen representatives of the people . . . , all legislative power, substantially without fetter or restrictions?" *Id.*; *see also* GALLIGAN, *supra* note 62, at 139 ("[T]he combined process of parliamentary representative democracy and responsible government were considered a sufficient protection.").

66. Indeed, there are calls to eliminate Australia's federalist system—eliminating the state legislatures. *See* Walker, *supra* note 49, at 635.

67. *See* Harry Evans, *Parliament: An Unreformable Institution?*, Senate Occasional Lecture, July 13, 1992 (*cited in* GALLIGAN, *supra* note 62, at 141) ("Instead of executive governments being responsible to parliaments, parliaments have become responsible to executive governments. The body which is supposed to be scrutinized and controlled by parliament has actually come to control the body which is supposed to be doing the scrutinizing and controlling—a reversal of roles."); Gerard Brennan, *The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response*, Paper presented to Conference on Human Rights, Canberra, at 8 (1992) (*cited in* GALLIGAN, *supra* note 62, at 141) ("A further danger to human rights and fundamental freedoms is posed by the dominance of the Executive Government, supported by its bureaucracy, over the Parliament. This dominance has undermined the theory that the Westminster model of responsible government effectively guarantees democratic control of executive power . . . ."); Jones, *supra* note 52, at 93-94 (The "rapid growth in the field of judicial review of administrative action in . . . Australia . . . is eloquent testimony to the fact that Parliament cannot be relied upon to ensure the accountability of the executive to the law.").

68. *See* Gerard Brennan, *The Impact of a Bill of Rights on the Role of the Judicary: An Australian Response*, Paper presented to Conference on Human Rights, Canberra, at 8 (1992) (*cited in* GALLIGAN, *supra* note 62, at 141) ("A further danger to human rights and fundamental freedoms is posed by the dominance of the Executive Government,

D. Australia and Racism

The Australian framers considered such phrases from the United States Constitution as "life, liberty or property," "due process of law" and "equal protection of the laws."[69] These and similar phrases which would have assured individual rights were rejected—in part because the framers believed the common law and responsible government protected these rights, but also because Australians did not want to grant rights to non-whites.[70]

Just as Americans swept aside Native Americans in settling the United States, Australian settlers did the same to Australia's Aboriginal people.[71] When the English arrived in Australia more than 200 years ago, Aborigines, who likely descended from people arriving on the continent about 50,000 years ago,[72] hunted, fished, and took wild vegetation as needed. They did not store food, since the hot climate did not permit them to and because they shared among themselves what food they had. Aborigines were an "egalitarian, classless society,"[73] and were nomads. They did not till fields or raise stock, but groups of Aborigines lived within specific areas.[74] To the English, the Aborigines' way of living justified settling Australia under the notion of *terra nullius*—"empty land;" or, in other words, the English argued no one lived in Australia, so they could occupy and own it.[75] Two centuries later, the Australian High Court rejected this contention.[76]

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supported by its bureaucracy, over the Parliament. This dominance has undermined the theory that the Westminster model of responsible government effectively guarantees democratic control of executive power . . . .").

69. *See* LA NAUZE, *supra* note 50, at 229.

70. *See* Hilary Charlesworth, unpublished thesis, Harvard University (1985), at 108-09, *quoted in* MURRAY R. WILCOX, AN AUSTRALIAN CHARTER OF RIGHTS? 209-10 (1993) ("Australian drafters . . . understood the potential of [an individual rights] guarantee too well. They saw, for example, that the inclusion of a guarantee of equal protection in the Australian Constitution could lead to the invalidation of colonial legislation that denied various rights to non-Europeans.").

71. *See generally* Matthew C. Miller, Comment, *An Australian Nunavut? A Comparison of Inuit and Aboriginal Rights Movements in Canada and Australia*, 12 EMORY INT'L L. REV. 1175, 1177-96 (1998).

72. *See* Richard G. Roberts et al., *Thermoluminescence Dating of a 50,000-year-old Human Occupation Site in Northern Australia*, NATURE, May 10, 1990, at 153.

73. WARD, *supra* note 47, at 15.

74. *See* HUGHES, *supra* note 47, at 10, 17, 273.

75. *See* HENRY REYNOLDS, ABORIGINAL SOVEREIGNTY at x, xv (1996).

76. *See* Mabo v. Queensland (1992) 175 C.L.R. 1 (holding that Aboriginal people in northeast Queensland have "native title," i.e., title to lands traditionally inhabited, but title may be extinguished if undertaken consistent with state and federal laws); *see also* Miller, *supra* note 47, at 1197-1209.

The European settlers killed Aborigines in many ways. First, they brought diseases that were formerly unknown in Australia and that wiped out many natives;[77] later, they massacred Aborigines.[78] Brutalizing Aboriginal people was not confined to the 18th and 19th centuries. White Australians massacred dozens of Aborigines in the 1920s.[79] Between 1910 and 1970 Aboriginal and Torres Strait Islander children were "forcibly removed from their families" under state and federal laws, put into institutions or missions, placed in foster homes or adopted by white families.[80] At the beginning of the 21st century, Australian Aborigines largely still "languish in poverty."[81]

The "white Australia" policy, which began during the 1850s when gold fever hit the country, "stemmed largely from passions aroused by the presence of foreigners on the goldfields."[82] After that, "racist attitudes, the legislation aimed at excluding coloured people, continued to increase."[83] The first plank of the Australian Labor Party's 1890 platform was "Universal White Adult Suffrage."[84]

The constitutional conventions reflected these attitudes. Delegates were not about to incorporate rights protection into the constitution if there was any possibility these assurances could extend to non-whites: "As participating politicians, many [framers] were aware of the potential dangers of provisions preventing discrimination on grounds of race and promoting equality."[85]

The white Australia policy has been dissolved, and Australia recognized Aborigines as citizens in 1967.[86] However, Australian attitudes toward Asian immigrants and Aborigines, exemplified by current Prime Minister John Howard's fervent opposition to the High Court decision giving Aborigines certain land rights[87] and the recent

77. *See* HUGHES, *supra* note 47, at 91.

78. *See* WARD, *supra* note 47, at 77, 105-06, 126-31.

79. *See id.* at 261-62.

80. AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME (1997).

81. *See* John Pilger, *Australia*, OBSERVER, Mar. 22, 1998, at 5; *see also* MANNING CLARK, HISTORY OF AUSTRALIA 653 (Michael Cathart ed., 1996).

82. WARD, *supra* note 47, at 143.

83. *Id.*

84. *Id.* at 189.

85. PETER BAILEY, HUMAN RIGHTS: AUSTRALIA IN AN INTERNATIONAL CONTEXT 51 (1990).

86. *See* Gianni Zappala & Stephen Castles, *Citizenship and Immigration in Australia*, 13 GEO. IMMIGR. L.J. 273, 274, 281 (1999).

87. Wik Peoples v. Queensland (1996) 187 C.L.R. 1 (Austl.) (permitting Aboriginal people to claim certain rights in land over farming, ranching, or mining leases).

popularity of the racist politician Pauline Hanson,[88] indicate the country has not put its racism entirely behind it.

E. Rejecting Bills of Rights

Since the 1940s, there have been a number of attempts to add a bill of rights to the Australian constitution,[89] but none has succeeded. One argument against embedding protections in the constitution is that legislators should not be inhibited by unneeded constitutional provisions—some say this inhibition would be "anti-democratic."[90] Another contention is that it would lead to "undesirable social engineering."[91] For example, could protecting people from being executed without a jury trial lead to a ban on abortions? Some have suggested that protecting a specific right limits freedom to the guaranteed right.[92] Also, the strength of Australians' belief in states' rights militates against using the federal constitution to protect individual freedoms.

F. Implied Freedom of Expression

Although there is no embedded freedom of expression in the Australian constitution, there is an implied protection for communication about political affairs.[93] The High Court of Australia found this right in a series of cases beginning in 1992.[94]

In *Nationwide News v. Wills*[95] the Court observed that because the Australian constitution is based on representative government, it necessarily includes an implied freedom of expression about political and governmental matters. In an accompanying case, *Australian Capital*

88. *See, e.g.*, Thomas L. Friedman, *Honey, I Shrunk the World*, N.Y. TIMES, Sept. 12, 1999, § 4, at 19.

89. *See* Robert Trager, *A "Responsible Press" and a "Responsible Government:" The Australian Experience*, 22-25 (Oct. 17, 1997) (paper presented to Hutchins Commission 50th Anniversary Symposium, on file with author).

90. *See* BAILEY, *supra* note 85, at 57.

91. *See id.*

92. *See id.*

93. *See generally* David S. Bogen, *The Religion Clauses and Freedom of Speech in Australia and the United States: Incidental Restrictions and Generally Applicable Laws*, 46 DRAKE L. REV. 53 (1997); Gerald N. Rosenberg & John M. Williams, *Do Not Go Gently into That Good Right: The First Amendment in the High Court of Australia*, 1997 SUP. CT. REV. 439.

94. *See* Russell L. Weaver & Kathe Boehringer, *Implied Rights and the Australian Constitution: A Modified* New York Times, Inc. v. Sullivan *Goes Down Under*, 8 SETON HALL CONST. L.J. 459 (1998); Daly, *supra* note 1, at 315-20.

95. (1992) 177 C.L.R. 1 (Austl.).

Television Ltd. v. Commonwealth,[96] the Court extended the protection to expression about state and territory political affairs.

Two years later, in 1994, the Court extended the implied protection to state and territory defamation laws in *Theophanous v. Herald & Weekly Times Ltd.*,[97] where the Court protected the freedom to comment about candidates' qualifications for office, political parties, public bodies, and those who hold public office. This doctrine was applied to state and territory office-holders and candidates in a companion case, *Stephens v. West Australian Newspapers Ltd.*[98]

Despite some apparent softening of these positions[99] and changes in High Court justices, the Court did not overturn *Theophanous* when it had an opportunity to do so. In *Lange v. Australian Broadcasting Corp.*,[100] the Court affirmed the implied protection for political speech, but said a law would be overturned only if (1) it limits such expression and (2) it is not reasonably appropriate and does not serve a legitimate goal compatible with the country's system of representative and responsible government.

G. An Opportunity to Enhance Australia's Free Speech Protection

Although most Australians no doubt assume they possess a general right of freedom of speech, there is only an implied guarantee of freedom of political communication under the country's constitution.[101] Unlike the United States's constitution, which has an express guarantee of free expression, Australia's constitution implies only a restriction on the exercise of parliamentary powers to make laws curtailing the freedom of political communication. As the Arts Law Centre of Australia has argued, this difference permits the Australian government to take legislative action primarily aimed at protecting children from Internet pornography, but which in fact is an unconditional prohibition of Internet content freely available to adults in other media.[102]

Fear of the Internet is endemic among political leaders in most countries, including the United States and Australia. The First Amend-

96. (1992) 177 C.L.R 106 (Austl.).
97. (1994) 124 A.L.R. 1 (Austl.).
98. (1994) 124 A.L.R. 80 (Austl.).
99. *See* Cunliff v. Commonwealth (1994) 124 A.L.R. 120 (Austl.); Langer v. Commonwealth (1996) 134 A.L.R. 400 (Austl.).
100. (1997) 145 A.L.R. 96 (Austl.).
101. *See supra* text accompanying notes 93-100.
102. *See* Delia Brown, *Online Legislation Is an Iron Curtain*, COMM. UPDATE, May 1999, at 13.

ment limits political attempts to control Internet content in the United States, but there is no similar brake on politicians in Australia. However, even without a clearly stated free speech provision in its Constitution, Australia should look at the other side of the coin and see the breadth of information and discussion available through an unfettered Internet.[103] Particularly, it should recognize that free and open discussion can lead to an appreciation of differences among people—including racial differences[104]—while engendering an understanding that Australia's inhabitants have much in common. Inasmuch as there will be hate speech and obscene material on the Internet, not all Internet content should be protected, as not all content in any medium should be insulated from government action. But Australia should be very careful to limit material on the Internet no more than it does content in other media.

Indeed, Australia should go further. The country claims to be concerned with children having access to sexual and violent content. Based on the same fears now heard in Australia, the United States Congress passed the repressive Communications Decency Act as part of the Telecommunications Act of 1996,[105] but the United States Supreme Court ruled the CDA violated the First Amendment.[106] Because Australia has no First Amendment analog, the country's High Court currently has no clear grounds on which to overturn regulations and legislation if Australia, through its system of responsible government, adopts overly severe restrictions on Internet content.

V. CONCLUSION

An implied protection for political speech will hardly shield the great variety of material found on the Internet that might be subject to sanctions under the Australian scheme. The Internet has forced many countries—both within their borders and internationally—to rethink their approaches to banning, punishing, protecting, and encouraging communication. This is the time for Australia once again to consider

103. *See* Jonathan Wallace & Michael Green, *Bridging the Analogy Gap: The Internet, the Printing Press and Freedom of Speech*, 20 PUGET SOUND L. REV. 711 (1997); Stephen C. Jacques, Comment, Reno v. ACLU: *Insulating the Internet, the First Amendment and the Marketplace of Ideas*, 46 AM. U. L. REV. 1945 (1997).

104. *See* Margaret Chon, *Radical Plural Democracy and the Internet*, 33 CAL. W. L. REV. 143 (1997).

105. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56 (1996).

106. *See ACLU*, 521 U.S. at 849 (1997).

the efficacy of a constitutionally embedded protection for free speech.[107] That guarantee not only will allow the Internet to achieve its potential in Australia, it will ensure all Australians and all Australian media have the full extent of free speech a liberal democracy should grant—or at least freedom of expression similar to that enjoyed in the United States.

107. *See* Ronald J. Krotoszynski, Jr., *The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression*, 1998 WIS. L. REV. 905, 907 ("[A]doption of a free speech guarantee in nations observing the rule of law should restrict the government's ability to censor or otherwise restrict expressive activity; constitutional guarantees of free speech should significantly expand the protection afforded to expressive activities.").