Australians' "Right" to be Bigoted: Protecting Minorities' Rights from the Tyranny of the Majority

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AUSTRALIANS' "RIGHT" TO BE BIGOTED: PROTECTING MINORITIES' RIGHTS FROM THE TYRANNY OF THE MAJORITY

> The essence of racial vilification is that it encourages disrespect of others because of their association with the racial group to whom they belong. That kind of stigmatisation and its insidious potential to spread and grow from prejudice to discrimination, from prejudice to violence, or from prejudice to social exclusion, is at the fundamental core of racial vilification. In a free and pluralistic society, every citizen is entitled to live free of inequality of treatment based upon a denial of dignity.[1]

INTRODUCTION

In March 2014, Australian Attorney-General George Brandis stated in Australian Parliament that, "People have the right to be bigots . . . . In this country people have rights to say things that other people find offensive or bigoted."[2] Brandis was defending the Free Speech Bill 2014 (FSB), which was introduced subsequent to the landmark *Eatock v Bolt* victory to repeal key provisions of the Racial Discrimination Act 1975 (RDA).[3] The RDA, one of Australia's few federal human rights laws, was introduced as a measure to combat racism.[4] Racism can be defined as a social construct promulgated by the majori-

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1. *Eatock v Bolt* (2011) FCA 1103, ¶ 225 (Austl.) (Bromberg, J.).

2. For coverage of Brandis' statement, see Gabrielle Chan, *George Brandis: 'People Have the Right to be Bigots,'* GUARDIAN (Mar. 24, 2014), http://www.theguardian.com/world/2014/mar/24/george-brandis-people-have-the-right-to-be-bigots.

3. Exposure Draft, Freedom of Speech (Repeal of s. 18C) Bill 2014 (Cth) (Austl.); *Racial Discrimination Act 1975* (Cth) (Austl.); *Eatock v Bolt* (2011) FCA 1103 (Austl.), http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html; Tim Leslie, *Explained: Racial Discrimination Act Amendments*, AUSTL. BROADCASTING CORPORATION (Mar. 24, 2014), http://www.abc.net.au/news/interactives/racial-discrimination-act/. *Eatock* signaled a landmark victory for Aboriginal rights under the *Racial Discrimination Act 1975* (Cth) (Austl.). For a detailed discussion of the RDA and the Australian system of parliamentary democracy's impact on human rights, see *infra* Part I. For a discussion of *Eatock v Bolt*, see *infra* Part II.

4. *Racial Discrimination Act 1975* (Cth) (Austl.).

ty group, premised on the belief that human races have "distinctive characteristics which determine their respective cultures," and that "one's own race is superior and has the right to rule or dominate others."[5] Racism is manifested directly and indirectly, and individually and institutionally, through "[o]ffensive or aggressive behaviour to members of another race stemming from such a belief" or a "policy or system of government based on it."[6] Research shows that Australian racism re-

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5. *Teaching Resources*, RACISMNOWAY (2015), http://www.racismnoway.com.au/teaching-resources/factsheets/9.html (citing The Macquarie Concise Dictionary 1996).

6. *Teaching Resources*, *supra* note 5. This Note considers Laura Pulido's framing of racism, which she laid out in the context of American environmental racism, as "a concept which signifies and symbolizes social conflicts and interests by referring to different types of human bodies" that "not only recognizes the physical, material, and ideological dimensions of race, but also acknowledges race as contributing to the social formation." Laura Pulido, *Rethinking Environmental Racism: White Privilege and Urban Development in Southern California*, 90 ANNALS ASS'N AM. GEOGRAPHERS 12 (2000). Pulido also frames "white racism" as "those practices and ideologies, carried out by structures, institutions, and individuals, that reproduce racial inequality and systematically undermine the wellbeing of racially subordinated populations." *Id.* By analyzing racism in terms of intention and scale, Pulido considers that while "an individual racist act is just that, an act carried out at the level of the individual . . . . that individual is informed by regional and/or national racial discourses, and his/her act informs and reproduces racial discourses and structures at higher scales." *Id.* Pulido distinguishes individual discriminatory acts and systemic white supremacy—a recognized form of institutional white dominance—from white privilege. *Id.* While arguably not as morally vile as institutional and overt racism, white privilege similarly undermines the wellbeing of people of color through

> the hegemonic structures, practices, and ideologies that reproduce whites' privileged status. [W]hites do not necessarily intend to hurt people of color, but because they are unaware of their white-skin privilege, and because they accrue social and economic benefits by maintaining the status quo, they inevitably do . . . . Because most white people do not see themselves as having malicious intentions, and because racism is associated with malicious intent, whites can exonerate themselves of all racist tendencies, all the while ignoring their investment in white privilege. It is this ability to sever intent from outcome that allows whites to acknowledge that racism exists, yet seldom identify themselves as racists.

Id. Applied to the issues addressed in this Note, Australian media personality Andrew Bolt's racist statements about Indigenous Australians were overtly discriminatory acts and also evince his white privilege. Their publication indicates that white privilege and supremacy pervades the Australian media.

mains a pervasive and insidious issue, one connected with Australian perceptions of nationhood.[7] Forty years since the RDA's inception, Australians still evince overt racism through individual discriminatory acts,[8] as well as covert and institutional racism that perpetuates white privilege and white supremacy.[9]

To achieve its purpose, the RDA prohibits overt racism in the form of racial vilification and hate speech, and codifies all Australians' rights to equality and freedom from discrimination.[10] While the RDA does not address covert racism, its condemnation of hate speech symbolized a new chapter for Australia, a country whose young history is marked by the systematic marginalization of Indigenous people,[11] foreign migrants,[12] and its Asia-Pacific neighbors.[13] Australia is legally bound by interna-

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His supporters' negation of how those statements perpetuate hateful social constructions of race also evince the white privilege of race-blindness, as does the Australian Parliament's subsequent proposals to repeal the RDA's key antidiscrimination measures.

7. *See, e.g.*, Kevin M. Dunn et al., *Constructing Racism in Australia*, 39 AUSTL. J. SOC. ISSUES 409 (2004).

8. *See, e.g.*, *infra* Part II.

9. Dunn et al., *supra* note 7.

10. *Racial Discrimination Act 1975* (Cth) (Austl.). "Racial vilification" or "racial hatred" occurs when a person or group performs an act in public that is likely to offend, insult, humiliate, or intimidate another person or people based on their race, skin color, nationality, or ethnicity. *Id.* s 18. This includes publishing racially offensive communications in print or on the internet, or making racist hate speech at public assemblies such as political demonstrations, sporting events, or on public transport. *Racial Discrimination Act: The Two-Minute Version*, AMNESTY INT'L AUSTL. (May 9, 2014, 3:33 AM), http://www.amnesty.org.au/indigenous-rights/comments/34515/.

11. *See, e.g.*, Mary O'Dowd, *Place, Identity and Nationhood: The Northern Territory Intervention as the Final Act of a Dying Nation*, 23 J. MEDIA & CULTURAL STUDIES 803 (2009).

12. For information on Australia's human rights violations with regards to asylum-seekers who arrive by boat, known as "boat people," see Jared L. Lacertosa, *Unfriendly Shores: An Examination of Australia's "Pacific Solution" Under International Law*, 40 BROOK. J. INT'L L. 321 (2014). For information on the White Australia Policy, see JAMES JUPP, FROM WHITE AUSTRALIA TO WOOMERA: THE STORY OF AUSTRALIAN IMMIGRATION (2d ed. 2007).

13. For examples of Australia's involvement in Indonesia's violent occupation of East Timor and West Papua, see Sam Pietsch, *Australian Imperialism and East Timor*, 2 MARXIST INTERVENTIONS, 2012, at 7, http://www.anu.edu.au/polsci/mi/2/mi2pietsch.pdf; Stuart Rollo, *Ending Our Programmatic Complicity in West Papua*, AUSTL. BROADCASTING CORPORATION: THE DRUM (Oct. 28, 2013, 12:59 AM),

tional laws including the International Bill of Rights and the Convention on the Elimination of All Forms of Discrimination,[14] and national laws including the RDA, to respect, protect, and fulfill peoples' rights to equality and freedom from discrimination, as well as their rights to freedom of opinion and expression.[15] Accordingly, its human rights framework permits unbridled freedom of opinion in the *forum internum* (one's internal beliefs) but allows proportional and necessary limitations to the freedom of expression in the *forum externum* (one's expressed beliefs) where such expression intrudes on others' rights to equality and to freedom from discrimination.[16] Consequently, while Australians are free to be bigoted under international and domestic human rights laws, those laws also guarantee Australians the right to be protected from discrimination, hate speech, and racial vilification through legal measures like the RDA.[17]

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http://www.abc.net.au/news/2013-10-28/rollo-west-papua-complicity/5049204. For example, in 2013 the Asian Human Rights Commission reported that Australia supplied two attack helicopters to the Indonesian military for use in its genocidal operation that killed over four thousand West Papuans in the late 1970s. *Id.*

14. *See infra* Part I (describing these and other additional laws that bind Australia). Beyond fulfilling its human rights obligations formally by passing laws, Australia must ensure people substantively enjoy their human rights. *See generally* Ed Bates, *History*, *in* INTERNATIONAL HUMAN RIGHTS LAW 15 (Daniel Moeckli et al. eds., 2d ed. 2014); Daniel Moeckli, *Equality and Non-Discrimination*, *in* INTERNATIONAL HUMAN RIGHTS LAW 160 (Daniel Moeckli et al. eds., 2d ed. 2014); Theo Van Boven, *Categories of Rights, in* INTERNATIONAL HUMAN RIGHTS LAW 148–49 (Daniel Moeckli et. al. eds., 2d ed. 2014); *Human Rights Explained*, AUSTL. HUM. RTS. COMMISSION, https://www.humanrights.gov.au/human-rights-explained-fact-sheet-5the-international-bill-rights (last visited Jan. 22, 2015, 10:00 AM).

15. For an overview of Australia's national human rights obligations, including the Racial Discrimination Act, see *infra* Part I.

16. The right to freedom of opinion is unlimited, since one's personally held beliefs in the *forum internum* do not prevent others from enjoying their rights to equality and nondiscrimination. Bates, *supra* note 14, at 20; Van Boven, *supra* note 14, at 148–49. However, the right to freedom of expression is appropriately limited, since one's expressed beliefs in the *forum externum* may prevent others from enjoying their rights to equality and nondiscrimination. *Id.*

17. Australia can and should limit the right to free expression in legally, legitimate, and proportional ways to

> protect the rights and freedoms of others . . . . In summary, a society which enjoys the freedoms under discussion is not one in which there

The FSB threatened to disrupt this balance of rights by removing protections against discriminatory expression. Fortunately, widespread criticism of the FSB by minority and affinity groups and their allies prompted Brandis to propose a less extensive RDA revision.[18] Further, by August 2014, Prime Minister Tony Abbott announced that his government was abandoning the FSB to instead focus on national security and promote unity within what he called "Team Australia."[19] Abbott effectively silenced the RDA debate until the January 2015 Charlie Hebdo Paris hostage attack, which gave Australian conservatives a new opportunity to promote revisions to the RDA.[20] In a show of "crass opportunism," conservative politi-

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> are no restrictions on their exercise. It is rather one in which the boundaries of freedom are openly debated and democratically resolved under the rule of law.

Kevin Boyle & Sangeeta Shah, *Thought, Expression, Association, and Assembly, in* INTERNATIONAL HUMAN RIGHTS LAW 217, 219 (Daniel Moeckli et al. eds., 2d ed., 2014). In other words, human rights are nonhierarchal and coexist equally, and thus free expression can be limited when it conflicts with other freedoms.

18. Emma Griffiths, *Racial Discrimination Act Changes Could Lead to Race Riots, Government Warned by Ethnic Groups*, AUSTL. BROADCASTING CORPORATION (Apr. 29, 2014), http://www.abc.net.au/news/2014-04-30/racial-discrimination-act-changes-could-raise-racial-tensions/5419102; Andrew Lynch, *Brandis, Bigotry and Balancing Free Speech*, AGE (Mar. 26, 2014), http://www.theage.com.au/comment/brandis-bigotry-and-balancing-free-speech-20140325-35gcj.html; James Massola & Mark Kenny, *George Brandis Forced to Rethink Discrimination Act Changes*, SYDNEY MORNING HERALD (May 28, 2014), http://www.smh.com.au/federal-politics/political-news/george-brandis-forced-to-rethink-discrimination-act-changes-20140527-392gn.html; Peter Hartcher & James Massola, *George Brandis Rolled on Changes to Racial Discrimination Act,* SYDNEY MORNING HERALD (Mar. 27, 2014), http://www.smh.com.au/federal-politics/political-news/george-brandis-rolled-on-changes-to-racial-discrimination-act-20140326-35iyh.html.

19. Emma Griffiths, *Government Backtracks on Racial Discrimination Act 18C Changes; Pushes Ahead with Tough Security Laws,* AUSTL. BROADCASTING CORPORATION (Aug. 5, 2014), http://www.abc.net.au/news/2014-08-05/government-backtracks-on-racial-discrimination-act-changes/5650030. Abbott coined the phrase "Team Australia" following concerns over "home-grown terrorist plotting," in an apparent attempt to allay outrage following the proposed RDA revisions. Anne Summers, *Tony Abbott's Team Australia entrenches inequality*, SYDNEY MORNING HERALD, Aug. 23, 2014, http://www.smh.com.au/comment/tony-abbotts-team-australia-entrenches-inequality-20140821-106sdk.html.

20. Shalailah Medhora, *Community Leaders Reject Calls to Revisit Changes to Racial Discrimination Act After France Attacks*, GUARDIAN, Jan. 12,

cians capitalized on the Charlie Hebdo solidarity movement for freedom of expression and renewed demands to revise the RDA in favor of promoting freer speech, and consequently more discrimination.[21] These demands coincided with the Australian Human Rights Commission's RDA@40 Conference 2015, celebrating forty years of combatting Australian racism through conciliation and litigation.[22]

Evidence shows that prejudicial discourse fuels violence and abuses human rights, and that Australia should vastly expand rather than retract its antidiscrimination framework, if it is to successfully protect against these rights abuses.[23] Contrary to popular misconception, limiting prejudicial public discourse through antidiscrimination and racial vilification laws does not encroach upon other, equally fundamental human rights.[24] Antidiscrimination laws do not impermissibly limit the freedom of

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2015, http://www.theguardian.com/australia-news/2015/jan/12/community-leaders-reject-calls-to-ease-ban-on-racial-insults-after-france-attacks.

21. Jill Fraser, *Would Charlie Hebdo Cartoons be Banned in Australia?*, ANADOLU AGENCY, Jan. 13, 2015, http://www.aa.com.tr/en/world/would-charlie-hebdo-cartoons-be-banned-in-australia/84592; *see also* Medhora, *supra* note 20. In 2015, Abbott was replaced by fellow conservative Malcolm Turnbull as Prime Minister of Australia, who has publicly stated his support for narrowing the scope of the RDA in favor of freer speech. *Cory Bernardi Revives Calls for Changes to S 18 or Racial Discrimination Act*, AUSTL. BROADCASTING CORPORATION, http://www.abc.net.au/news/2015-05-18/bernardi-revives-calls-for-changes-to-racial-discrimination-act/6479312 (last updated May 18, 2015); Latika Bourke, *Malcolm Turnbull Rules Out Changes to Racial Discrimination Act*, SYDNEY MORNING HERALD, (Oct. 20, 2015), http://www.smh.com.au/federal-politics/political-news/malcolm-turnbull-rules-out-changes-to-racial-discrimination-act-20151020-gkdpkq.html (suggesting that RDA reform is still a possibility and likely priority among conservatives).

22. *RDA@40 Conference 2015 - 40 years of the Racial Discrimination Act*, AUSTL. HUM. RTS. COMMISSION (Jan. 1, 2015), https://www.humanrights.gov.au/our-work/race-discrimination/projects/rda40-conference-2015-40-years-racial-discrimination-act.

23. Amnesty Int'l Austl., *Written Contribution to the Thematic Discussion on Racist Hate Speech and Freedom of Opinion and Expression Organized by the United Nations Committee on Elimination of Racial Discrimination*, at 1, AI Index IOR 42/002/2012 (Aug. 28, 2012), http://www.ohchr.org/Documents/HRBodies/CERD/Discussions/Racisthatespeech/AmnestyInternational.pdf.

24. *See* Bates, *supra* note 14, at 20; Van Boven, *supra* note 14, at 148–49. *Contra* Ben O'Neill, *Anti-Discrimination Law and the Attack on Freedom of Conscience*, 27 POL'Y 3, 6 (2011).

consciousness or belief in the *forum internum*, from which no derogations are permitted.[25] Instead, antidiscrimination laws target discrimination and racial vilification occurring in the *forum externum*, or that which is outwardly expressed and therefore promulgates human rights abuses and violence.[26]

The Australian majority's confusion of free speech with hate speech, contextualized within the broader ongoing debate over augmenting Australia's human rights legal framework, endangers the human rights of Australia's minority communities. Since the RDA is a unique and necessary means of promoting equality and nondiscrimination,[27] its erosion would acutely impact Australian Aboriginal and Torres Strait Islander peoples, the traditional owners of Australia, who still do not enjoy full substantive equality and human rights protections.[28]

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25. Bates, *supra* note 14, at 20; Van Boven, *supra* note 14, at 148–49; *cf.* Ben O'Neill, *supra* note 24, at 6.

26. Bates, *supra* note 14, at 20; Van Boven, *supra* note 14, at 148–49.

27. *See* Zita Antonios, *Native Title and the Racial Discrimination Act*, AUSTL. HUM. RTS. COMMISSION (Nov. 19, 1997), https://www.humanrights.gov.au/news/speeches/native-title-and-racial-discrimination-act-zita-antonios1997.

28. *See infra* Part II. Acknowledging the enormous power language has to marginalize people, and to be respectful, fair, and accurate by using inclusive language, this Note capitalizes "Indigenous" and "Aboriginal" when collectively referring to the Aboriginal and Torres Strait Islander peoples, Australia's indigenous population. *See, e.g.*, *About*, RECONCILIATION AUSTL., https://www.reconciliation.org.au/about/ (last visited Jan. 27, 2016); *Inclusive Language*, MONASH UNIV., http://www.monash.edu/about/editorialstyle/writing/inclusive-language (last visited Jan. 27, 2016); *Indigenous Terminology and Style Guide*, AMNESTY INT'L AUSTL. (Apr. 2011), http://www.amnesty.org.au/resources/activist/Indigenous_Terminology_and_Style_Guide.pdf; *Questions and Answers about Aboriginal & Torres Strait Islander Peoples,* AUSTL. HUM. RTS. COMMISSION, https://www.humanrights.gov.au/publications/questions-and-answers-about-aboriginal-torres-strait-islander-peoples (last visited Feb. 1, 2016). However, this Note acknowledges that some find this terminology disrespectfully generic, and when referring to an individual about whom information is known and available, this Note will refer to her language or cultural group. *See, e.g.*, *Inclusive Language, supra* note 28. For the purposes of nondiscrimination laws like the RDA, this Note is sensitive to the problematic process of scoping the term "Indigenous people," and risks imposing an outsider's conception of Aboriginality on the people being discussed. Abdullah Al Farunque & Najnin Begum, *Conceptualising Indigenous Peoples' Rights: An Emerging New Category of Third-Generation Rights,* 5 ASIA-PAC. J. HUM. RTS. & L. 1, 4–5 (2004). This Note adopts the concept that Australian Indigenous peoples share a

Although the RDA's protections extend to all marginalized groups subject to racial vilification and group defamation, this Note focuses on the negative repercussions affecting Indigenous Australians as the traditional owners of Australian land and as arguably the most negatively affected by Australia's systemic racism.[29] Indigenous Australians, particularly peoples living in remote communities, continue to experience inhumane living standards comparable to those of the world's most impoverished nations due to systemic, intergenerational marginalization by Australia's non-Indigenous majority.[30] In stark contrast, non-Indigenous Australians enjoy one of the highest available standards of living; Australia was the only English-speaking Western democracy to resist the 2008 global financial crisis, and the United Nations Human Development Index ranks Australia as having the second best quality of life in the world.[31] This disparity between Indigenous and non-Indigenous Australians' qualities of life, and Australians' history of marginalizing Indigenous peoples, contextualizes the dangers of eroding the few legal provisions protecting Indigenous Australians' rights to equality and nondiscrimination.

"common history of oppression, subordination and subjugation either by the dominant minority group, or majority people or colonisers." *Id.* at 1.

29. *See infra* Part III for a discussion of the oppression of Indigenous Australians.

30. *Briefing Note for Countries on the 2015 Human Development Report: Australia*, U.N. DEV. PROGRAMME, http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/AUS.pdf (last visited Apr. 3, 2016) [hereinafter *Briefing Note*] (citing and explaining data from U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT (2014), http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf); Matthew Willis, *Indicators Used Internationally to Measure Indigenous Justice Outcomes,* INDIGENOUS JUST. CLEARING HOUSE (Aug. 8, 2015), http://www.indigenousjustice.gov.au/briefs/brief008.pdf. In stating that Aboriginal and Torres Strait Islander peoples are subjugated by Australia's non-Indigenous majority, this Note considers how every Australian who is not Indigenous and who lives their white privilege is at least complicit in, and arguably responsible for, the collective subjugation of Australian Indigenous peoples socially, institutionally, and systemically.

31. David Alexander, *How Australia Weathered the Global Financial Crisis While Europe Failed,* GUARDIAN (Aug. 28, 2013), http://www.theguardian.com/commentisfree/2013/aug/28/australia-global-economic-crisis; *Australia, Human Development Indicators*, U.N. DEV. PROGRAMME, http://hdr.undp.org/en/countries/profiles/AUS (last visited Apr. 3, 2016).

Furthermore, Australia's RDA controversy illustrates the limited capacity of Australia's current governance and human rights legal framework to adequately protect Indigenous peoples' rights.[32] Australia is now the only English-speaking Western democracy without an entrenched bill of rights or federal human rights law granting affirmative rights,[33] and its judiciary cannot overturn federal laws incongruous with human rights due to parliamentary supremacy.[34] Dedicated to its two-party system of populist democracy, Australia has long deferred to the will of its majority vote in developing social policy, often to the detriment of countermajoritarian minority rights.[35] Under this system of majoritarian policymaking, if Brandis' right to be bigoted supersedes Indigenous peoples' rights to equality and freedom from discrimination, Australia's compliance with the essence of its international human rights obligations—to protect countermajoritarian minorities from the tyranny of the majority—is seriously called into question.[36]

This Note argues that Australia will breach its obligations to protect peoples' rights to equality and freedom from discrimination if it allows majoritarian politics to repeal key provisions

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32. Kenneth J. Arenson, *An Entrenched Bill of Rights: A Protection for the Rights of Minorities*, 18 JAMES COOK U. L. REV. 28 (2011).

33. Nicholas Barry & Tom Campbell, *Towards a Democratic Bill of Rights*, 46 AUSTL. J. POL. SCI. 71, 71 (2011).

34. Arenson, *supra* note 32, at 28.

35. *Party System,* PARLIAMENTARY EDUC. OFF., http://www.peo.gov.au/learning/closer-look/parliament-and-congress/party-system.html (last visited Dec. 15, 2015); George Williams, *The Future of the Australian Bill of Rights Debate* (U.N.S.W. Law Res. Paper No. 2010-39, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1689355&download=yes.

36. Arenson, *supra* note 32; *Race Discrimination, 'Special Measures,' and the Northern Territory Emergency Response*, AMNESTY INT'L AUSTL. (Jan. 6, 2010, 12:45 AM), http://www.amnesty.org.au/indigenous-rights/comments/22327/ (describing federal legislation that encroaches on the human rights of Indigenous Australians). The "tyranny of the majority" is a concept introduced and popularized in the philosophical works of John Adams, JOHN ADAMS, 3 A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 291 (1788), Alexis de Toqueville, ALEXIS DE TOQUEVILLE, 1 DEMOCRACY IN AMERICA pt. 2 (Sanders & Otley eds., 1835), and John Stuart Mill, JOHN STUART MILL, ON LIBERTY 7 (1859). *See also* LANI GUINER, HARVARD LAW, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1995) (discussing the protection of minority rights through our system of democratic governance).

of its already limited human rights legal framework.[37] By entrusting the protection of minorities' rights in the process of majoritarian politics, Australia risks forsaking its international obligations to respect, protect, and fulfill the human rights of minorities, and especially Aboriginal and Torres Strait Islander peoples. This Note posits that Indigenous peoples' human rights are too fundamental to be made vulnerable by majoritarian vote, highlighting the importance of robust federal human rights laws and constitutionally enshrined bills of rights to protect human rights. Specifically, in the context of hate speech, Australia should augment and not shrink the RDA to best protect minorities from intergenerational Australian racism—in other words, from Australians' right to be bigoted.

In three Parts, this Note explores Australia's problem of abusive majoritarianism through the lens of the RDA controversy. Part I provides an overview of Australia's governance system and the key international, national, and state legal instruments establishing its obligations to ensure universal human rights to equality, nondiscrimination, freedom of belief, and freedom of expression. Chief among Australia's domestic laws is the RDA, which if repealed will render Australia's human rights framework fragile and ineffective. Part II considers how restricting the RDA would acutely undermine the rights of Indigenous Australians to equality and freedom from discrimination. Non-Indigenous Australians have systematically marginalized, subjugated, and discriminated against Indigenous Australians since the time of the British invasion and colonization. Since Australia lacks a constitutional bill of rights or federal human rights law, the RDA offers Indigenous Australians one of only a few precious remedies for Australia's pervading racism. Part III argues that instead of repealing key provisions of the RDA, Australia should augment its human rights framework at the federal and constitutional level, beginning with the RDA, to sufficiently protect marginalized minorities from the tyranny of the majority. To ensure Australia respects, protects, and fulfills its human rights obligations toward all Australians, and promotes substantive as well as formal equality for minorities and specifically Indigenous Australians, this Note con-

37. See *infra* Part I for a summary of the international and national laws giving rise to Australia's human rights obligations, specifically toward minorities and Aboriginal and Torres Strait Islander peoples.

cludes that Australia should not promote freer speech by repealing prohibitions against hate speech. Instead, Australia should expand the RDA and increase its human rights legal framework.

I. AUSTRALIA'S HUMAN RIGHTS FRAMEWORK

Australia's human rights obligations are robust, as is the legal framework through which Australia meets its obligations. While its Constitution includes only minimal human rights provisions, Australia is party to several key international human rights instruments, and has given local effect to many of their provisions through domestic legislation, including the RDA. Australia's national rights framework obliges Australia to respect, protect, and fulfill Indigenous Australians' rights to equality and freedom from discrimination, as well as individuals' rights to freedom of thought and expression. To ensure racial equality and to protect against discrimination, the RDA permissibly limits free expression by prohibiting hate speech and racial vilification. This Part examines Australia's Constitution, its system of government, and the international and national human rights framework giving rise to Australia's obligations toward minorities and specifically Indigenous Australians. It concludes that while Australia lacks a constitutional bill of rights or a federal human rights law, two of its states and territories have led the charge for an expanded human rights framework by passing state human rights laws—creating important testing grounds for law reform at the national level.

A. Constitution and System of Government

Through passing the Commonwealth of Australia Constitution Act 1901, six British colonial states federated to become the Australian Commonwealth led by a popularly elected legislature and headed by Queen Elizabeth II of the United Kingdom through her appointed representative, the Governor-General.[38] Australia has a parliamentary system of govern-

38. *Commonwealth of Australia Constitution Act 1901* (Imp) 63 & 64 Victoria, ch. 12 s 9 (U.K.); *see also Australia's System of Government,* AUSTL. GOV'T DEPT FOREIGN AFF. & TRADE, http://www.dfat.gov.au/facts/sys_gov.html (last visited Jan. 22, 2015); *Our Government,* AUSTL. GOV'T, http://www.australia.gov.au/about-australia/our-government (last visited Jan. 22, 2015).

ment comprising three branches: a legislature, judiciary, and executive.[39] Australia's six states and two mainland territories retain sovereign constitutions and branches of government, and states retain the power to make laws over matters not governed by the Australian Commonwealth under section 51 of the Australian Constitution.[40] Commonwealth law supersedes conflicting state and territory laws and the High Court can review state judicial decisions.[41]

Parliament, Australia's legislative branch, passes legislation within its constitutionally enumerated section 51 powers, and is comprised of the popularly elected Senate and House of Representatives.[42] Australians elect House Representatives using a majoritarian or "preferential" voting system, through which voters rank candidates in preferential order and elect Senators using a proportional representation voting system, which promotes fair representation of minority political parties.[43] Australia's complex and unique form of popular democracy also includes compulsory voting, among its many measures, to promote full and democratic representation.[44]

The House majority party appoints a Prime Minister to oversee Australia's executive branch, the Australian Government,

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39. *Australia's System of Government, supra* note 38; *Our Government, supra* note 38.

40. *Australian Constitution* s 51; *How Government Works*, AUSTL. GOV'T, http://www.australia.gov.au/about-government/how-government-works (last visited Feb. 1, 2016); *Infosheet 20 – The Australian System of Government*, PARLIAMENT OF AUSTL, http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government (last visited Feb. 1, 2016) [hereinafter *Australian System of Government*].

41. *State and Territory Government*, AUSTL. GOV'T, http://www.australia.gov.au/about-government/how-government-works/state-and-territory-government (last visited Feb. 1, 2016, 2:25 PM).

42. *Australian Constitution* s 51; *Australian System of Government, supra* note 40.

43. *Voting – House of Representatives,* AUSTL. ELECTORAL COMMISSION, http://www.aec.gov.au/voting/How_to_vote/Voting_HOR.htm (last updated Feb. 25, 2014); *Voting – The Senate*, AUSTL. ELECTORAL COMMISSION, http://www.aec.gov.au/voting/How_to_vote/Voting_Senate.htm (last updated Mar. 30, 2016).

44. *Compulsory Voting,* AUSTL. ELECTORAL COMMISSION (May 18, 2011), http://www.aec.gov.au/Voting/Compulsory_Voting.htm.

and its agencies.[45] The head of Australia's judiciary, the High Court, is empowered to interpret laws and judge their applicability in individual cases, and to interpret both constitutional rights and the constitutionality of other branches' actions.[46] The High Court may challenge legislation's constitutionality after it is enacted,[47] and while the Constitution does not expressly empower the Court to overturn unconstitutional legislation, in practice the Court has exercised such a power without retribution from the other branches.[48] Ultimately, through Parliamentary supremacy, Australia limits the capacity of judicial lawmaking.[49] This means the rule of law is ultimately "dependent upon the grace of Parliament in the exercise of its sovereignty."[50] While more democratic than judicial supremacy, reliance on Parliament's self-regulation for rights protection isolates Parliament from an external, independent power check such as judicial scrutiny.[51]

The Constitutional framers chose to not pursue an entrenched bill of rights.[52] Rather than codifying universal individual rights, Australia's Constitution instead "contain[s] a clause that expressly permits the Commonwealth to make laws that discriminate on the basis of race. This clause in section 51(26) has never been removed, nor has another in section 25

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45. Although the Constitution does not require the appointment of a Prime Minister and establishes the Queen of England as the head of the legislature and the executive, in common practice Australia's Prime Minister leads the legislature's majority party and leads the Australian Government. *Australian Constitution* ss 5, 7 & 24; *see also, Australian System of Government*, *supra* note 40.

46. *Australian Constitution* ss 5, 7 & 24; *see also Our Government, supra* note 38; Emma Hoiberg, *A Human Rights Act for Australia: A Transfer of Power to the High Court, or a More Democratic Form of Judicial Decision-Making?* 16–17 (Oxford Student Legal Studies Paper No. 09/2012, 2012).

47. Andrew Byrnes & Catherine Renshaw, *Within the State, in* INTERNATIONAL HUMAN RIGHTS LAW 458, 470 (Daniel Moeckli et al. eds., 2d ed. 2014).

48. Hoiberg, *supra* note 46, at 16.

49. Dan Meagher, *The Principle of Legality as Clear Statement Rule: Significance and Problems*, 36 SYDNEY L. REV. 413, 432 (2014).

50. Arenson, *supra* note 32, at 38.

51. Self-regulation heightens the likelihood that systemic deficiencies and legislative gaps will persist. George Williams & Lisa Burton, *Australia's Exclusive Parliamentary Model of Rights Protection*, 34 STATUTE L. REV. 73, 90–91 (2013).

52. Williams, *supra* note 35. *See also* Meagher, *supra* note 49.

that recognises that the States may disqualify people from voting on account of their race."[53] Among the human rights provisions Australia's Constitutional framers did codify are the freedom of religion and the requirement that governments have "just terms" for property acquisition.[54] As Brandis explained to Parliament in 2014 during the RDA consultations, the Constitution also implies a "negative" right to free political communication, such that Parliament is not required to affirmatively promote this right through legislation,[55] and can only limit it if for a proportional and legitimate purpose such as public safety.[56]

B. International Human Rights Obligations

Australia, a sovereign Member State of the United Nations, adopted the International Bill of Rights (IBOR) in 1948 in the wake of the human rights atrocities committed during World War II.[57] The IBOR comprises the Universal Declaration on

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53. It was thought that antidiscrimination provisions would negate existing Australian laws limiting employment opportunities for Chinese migrants. Williams, *supra* note 35, ¶ 2.

54. *Australian Constitution* s 51(xxxi), 116; *see also,* Melissa Perry QC, *The Efficacy of the Human Rights Acts in the ACT and Victoria: Challenges and Lessons Learnt* 2–3 (2011), http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/MPerry_Paper.pdf.

55. *Australian Constitution* § 51(xxxi); *see also* Marie Iskander, *Balancing Freedoms: The Value of 18C of the Racial Discrimination Act*, 8 INDIGENOUS L. BULL. 19, 19 (2014).

56. *Right to Freedom of Opinion and Expression,* AUSTL. GOV'T DEP'T ATT'Y GEN., https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/RighttofreedomofopinionandexpressionA.aspx (last visited Dec. 11, 2015).

57. The IBOR was originally proposed as an appendix to the U.N. Charter, reflective of its framers' intent that all human rights be equally fundamental and nonhierarchical. Covenant on Civil and Political Rights, *opened for signature* Nov. 16, 1966, 999 U.N.T.S. 171 [hereinafter Civil and Political Rights Covenant]; Covenant on Economic, Social and Cultural Rights, *opened for signature* Nov. 16, 1966, 993 U.N.T.S. 3 [hereinafter Economic, Social, and Cultural Rights Covenant]; *see Fact Sheet No. 2 (Rev.1), The International Bill of Rights*, OFF. OF HIGH COMMISSIONER FOR HUM. RTS., http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf (last visited Apr. 3, 2016); Van Boven, *supra* note 14, at 143.

Human Rights (UDHR),[58] and two key human rights treaties and their protocols to which Australia consented to be bound: the International Covenant on Civil and Political Rights (ICCPR)[59] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[60] Australia's endorsement of

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58. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]. The UDHR was drafted by the 1945 Economic and Social Council, pursuant to the human rights concerns raised in the U.N. Charter. *See generally Universal Declaration of Human Rights,* LEGAL.UN.ORG, http://legal.un.org/avl/ha/udhr/udhr.html (last visited Apr. 9, 2016). The U.N. Charter was signed by virtually every Member State and aimed to foster international cooperation through joint and separate action to promote and encourage human rights. *Id.* While the U.N. Charter does not specifically enumerate what rights it protects, it nevertheless prohibits discrimination, a very fundamental protection that pervades all future human rights laws. *Id.* The UDHR begins to define human rights, incorporating U.S. President Franklin Delano Roosevelt's four fundamental freedoms articulated in his 1941 State of the Union Address: freedom of speech, freedom of worship, freedom from want, and freedom from fear. *Id.*; *see also Human Rights Explained*, *supra* note 14; Boyle & Shah, *supra* note 17, at 217–19. Incorporated in the UDHR's provisions are the rights to equality and nondiscrimination, and to free expression. *Id.* In this way the UDHR does not distinguish a hierarchy of rights and informs future binding treaties on the nature of human rights. *Id.* The UDHR is not a treaty, but has become international common law foundational to other binding treaties. *Id.*

59. For the Australian Treaty Series documentation ratification, see International Covenant on Civil and Political Rights, 1980 ATS No. 23 [hereinafter ACCPR]. The ICCPR was passed in 1966 and entered into force in 1976. *Id.* It requires signatory states to immediately "respect" and "ensure" their human rights obligations mostly through negative action, or by refraining from impinging on humans' rights. *Id.* Protections include those regarding the integrity of the person (freedom from torture and ill treatment and the right to life); the rights to freedom of thought, conscious, and religion (freedoms exercised in the *forum internum* or inside the person); the rights to freedom of opinion, expression, association, and assembly (freedoms exercised in the *forum externum* or outside the person); protections from arbitrary detention, inhumane detention conditions, and the guarantee to a fair trial. *Id.*

60. For the Australian Treaty Series documentation ratification, see International Covenant on Economic, Social, and Cultural Rights, 1976 ATS No. 5. The ICESCR was passed in 1966 and entered into force in 1976. *Id.* It requires signatory states to take steps through cooperation and to their maximum capacity to progress achievement of the human rights obligations imposed. *Id.*; *see also* Bates, *supra* note 14, at 471. Its provisions are more programmatic and promotional, such as the rights to an adequate standard of living, fair and free conditions of work and unionizing, to social security and insurance, to the highest attainment of physical and mental health, to educa-

these international laws amounts to a voluntary contractual commitment to respect, protect, and fulfill human rights for all individuals within its jurisdiction.[61] While the ICCPR and ICESCR are not self-executing, Australia has given local effect to many of their provisions through domestic legislation, including through the *Human Rights Commission Act 1986*.[62] Australia is also bound by the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) to which the RDA gives local effect,[63] and the morally-binding U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP).[64] In recognition of the unique indignity and human rights abuses that result from race-based discrimination, subjugation, exploitation, and colonialism, these treaties further

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tion, and to cultural and scientific participation and achievement. Bates, *supra* note 14, at 471.

61. Lacertosa, *supra* note 12, at 3.

62. Arenson, *supra* note 32, at 35–36; *See Human Rights Explained*, *supra* note 14. For examples of Australian legislation giving local effect to international obligations, *see Privacy Act 1988* (Cth) (Austl.); *Disability Discrimination Act 1992* (Cth) (Austl.).

63. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/6014, (Jan. 4, 1969). The CERD was passed in 1965 and entered into force in 1969. *Id.* It responds to alarming "manifestations of racial discrimination still in evidence" despite the growing international human rights legal framework. *Id.* State parties must "condemn racial discrimination" and "undertake to pursue by all appropriate means and without delay" complex policies to eliminate racial discrimination," including by banning segregation, apartheid, propaganda promoting ideas of racial superiority, substantive inequality before the law, and discriminatory barriers to the full realization of ICCPR and ICESCR. *Id.*; *see also* Michael Legg, *Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations*, 20 BERKELEY J. INT'L L. 387, 23 (2002).

64. Universal Declaration of the Rights of Indigenous Peoples, G.A. Res. 61/295, (Sept. 13, 2007) [hereinafter Declaration of the Rights of Indigenous Peoples]. UNDRIP was introduced by a 2006 resolution adopted by the U.N. General Assembly, as a result of a recommendation made by the U.N. Human Rights Committee. *Id.* It signifies a step toward consensus among Indigenous peoples and governments on how to ensure Indigenous peoples' dignity, survival, well-being, including through the full enjoyment of their civil rights, social, cultural, and economic rights. *Id.*; *see* Megan Davis, *Community Control and the Work of the National Aboriginal Community Controlled Health Organization: Putting Meat on the Bones of the UNDRIP*, 8 INDIGENOUS L. BULL. 11, 11–13 (2014). *See generally* Timo Koivurova, *From High Hopes to Disillusionment: Indigenous Peoples' Struggle to re(Gain) Their Right to Self-Determination*, 15 INT'L J. MINORITY & GROUP RTS. 1 (2008).

protect the human rights of indigenous peoples to equality and nondiscrimination.[65] These laws provide Indigenous Australians with heightened protections from prejudices that "fuel discrimination and other human rights abuses."[66] In effect, while it is true that this international human rights legal framework grants Australians the right to be bigoted through free thought, conscience, and religion, their right to outwardly express that bigotry is limited by Indigenous Australians and other minority communities' rights to equality and freedom from discrimination, as well as their rights to freely express their racial, ethnic, and cultural identities.[67]

International human rights are a meaningful standard against which to measure legislative performance, as state parties voluntarily contract to respect, protect, and fulfill their universality and indivisibility.[68] The U.N. monitors Australia's international human rights performance through reports submitted annually by the Australian Government, and through shadow reports submitted annually by civil society.[69] In the past, Australia has amended federal legislation in response to U.N. criticism, but recent governments are proving resistant to U.N. pressure.[70] As international human rights laws expand to better protect the rights of Indigenous people and minority groups, "the ultimate protection of indigenous rights depends

65. Amnesty Int'l Austl., *supra* note 23, at 1 (explaining how prejudicial discourse fuels violence and, consequently, human rights abuses).

66. *Id.*

67. ACCPR, *supra* note 59; UDHR, *supra* note 58.

68. Carolyn Evans & Simon Evans, *Evaluating the Human Rights Performance of Australian Legislatures: A Research Agenda and Methodology* (U. Melbourne L. School, Legal Studies Res. Paper No. 123, 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=771224; Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization,* 26 HUM. RTS. Q. 63 (2004).

69. For example, the U.N. Human Rights Committee (HRC) oversees adherence to the ICCPR. Koivurova, *supra* note 64; *see also* Legg, *supra* note 63, at 15 (explaining how the ICCPR Optional Protocol, to which Australia consented to be bound, gives individuals the right to complain to the HRC if Australia breaches their ICCPR rights); *Australia's Commitment to Children's Rights and Reporting to the UN*, AUSTL. HUM. RTS. COMMISSION (Oct. 2007), https://www.humanrights.gov.au/publications/australias-commitment-childrens-rights-and-reporting-un.

70. Williams & Burton, *supra* note 51, at 73–74.

upon [international human rights laws'] effective implementation at the national level."[71]

C. National Human Rights Obligations

Domestically, Australia has grappled with the scope of its human rights framework, and Parliament has not legislated a federal human rights act.[72] Recent controversy over the RDA, the latest chapter in an ongoing controversy known commonly in Australia as the "Bill of Rights Debate," is just one example of debates dating back to the 1940s pertaining to which government branch should have guardianship of human rights protections, and how extensively the current guardian, Australian Parliament, should codify human rights into laws.[73] While incomplete, Australia has a legal framework that implements many of its international human rights obligations and protects civil, political, economic, social, and cultural rights, including the right to live free from discrimination.[74] Together, these laws give local effect to Australia's international obliga-

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71. Farunque & Begum, *supra* note 28, at 28; *see also* Legg, *supra* note 63, at 42. While Australian Parliament comprises numerous political parties, it is dominated by two groups: the more conservative Liberal Party of Australia/National Coalition of center-right parties, and the more liberal Australian Labor Party. *Political Parties*, AUSTL. PARL. ED. OFFICE, http://www.peo.gov.au/learning/fact-sheets/political-parties.html (last visited Apr. 9, 2016 12:52 PM). Every Labor government has proposed to augment Australia's human rights framework. Williams, *supra* note 35. For example, the Whitlam Labor government introduced many of Australia's human rights policies, including the RDA. Arenson, *supra* note 32, at 43. Interestingly, Whitlam's countermajoritarian politics deadlocked Parliament and prompted Whitlam's removal from power only two years into his stewardship. Arenson, *supra* note 32, at 43.

72. Williams, *supra* note 35, at 2; *see also* Hoiberg, *supra* note 46, at 18–22 (summarizing how Australian courts have addressed human rights at common law).

73. *See* Williams, *supra* note 35, at 2 –5; *see also,* Legg, *supra* note 63, at 5–9; *see also* Att'y Gen., *National Human Rights Consultation Report*, WWW.PANDORA.NLA.GOV.AU, https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/lets-talk-about-rights-human-rights-act-australia (last visited Apr. 9, 2016) [hereinafter *National Human Rights Consultation Report*].

74. This legal framework includes the following: *Australian Human Rights Commission Act 1986* (Cth) (Austl.); *Age Discrimination Act 2004* (Cth) (Austl.); *Disability Discrimination Act 1992* (Cth) (Austl.); *Racial Discrimination Act 1975* (Cth) (Austl.); *Sex Discrimination Act 1984* (Cth) (Austl.); and *Privacy Act 1988. See* Perry, *supra* note 54, at 3.

tions to end certain types of discrimination and to create substantive equality, by ensuring the rights of people in its jurisdiction are not subjected to discrimination in public life or by any Australian governments, their agencies, or their agents.[75]

First among Australia's human rights laws is the Whitlam government's pivotal RDA, upheld by Australia's High Court as constitutional in the landmark case *Koowarta v Bjelke-Petersen*.[76] The RDA bans racial discrimination by public and private actors in social and economic contexts, giving local effect to CERD.[77] The RDA aims to not only ban discrimination, but to also affirmatively promote equality.[78] Its passage symbolized Australia's condemnation of racism and its commitment to social change, a watershed moment in light of Australia's history of violence and subjugation of Indigenous people.[79] The RDA paved the way for the creation of the Office of the Race Discrimination Commissioner, the 1991 Royal Commission into Aboriginal Deaths in Custody, and the Human Rights and Equal Opportunities Commission Act 1986 (HREOC), creating the Aboriginal and Torres Strait Islander Social Justice Commissioner.[80] This racial vilification law and its enforcement mechanisms create a "residual weapon for combating the most odious" instances of "'group defamation,' on the basis of race and religion."[81]

Additionally, Parliament created human rights monitoring mechanisms through the Australian Human Rights Commission Act 1986 (the "1986 Act") and the Human Rights (Parlia-

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75. *Legislation,* AUSTL. HUM. RTS. COMMISSION, https://www.humanrights.gov.au/our-work/legal/legislation#ahrc (last visited Jan. 22, 2015).

76. *Racial Discrimination Act 1975* (Cth) (Austl.); Koowarta v. Bjelke-Petersen (1982) 153 CLR 168 (Austl.).

77. The RDA was not passed to implement the ICCPR, although several of its provisions are modeled on the CERD. *Id.*; Economic, Social, and Cultural Rights Covenant, *supra* note 57; Beth Gaze, *Has the Racial Discrimination Act Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000-2004*, 11 AUSTL. J. HUM. RTS. 7 (2005).

78. *Racial Discrimination Act 1975* (Cth) (Austl.).

79. Gaze, *supra* note 77, at 6–8.

80. *See id.* at 7.

81. David Rolph, *Racial Discrimination Laws as a Means of Protecting Collective Reputation and Identity* 10 (U. Sydney L. Sch., Legal Studies Research Paper No. 14/23, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2403584.

mentary Scrutiny) Act 2011.[82] The 1986 Act defines human rights pursuant to the ICCPR and charges the Australian Human Rights Commission with monitoring human rights compliance and incidences of discrimination, guiding Parliament and the courts on human rights law development and implementation, resolving complaints and disputes, and completing civic education.[83] The Parliamentary Scrutiny Act creates additional oversight by the Parliamentary Joint Committee on Human Rights, mechanisms to ensure that federal bills are introduced to Parliament with a statement of compatibility with human rights, mechanisms to ensure that existing federal laws comply with human rights, and a National Action Plan on Human Rights.[84] In addition to these antidiscrimination measures and enforcement mechanisms, courts have developed a de facto bill of rights in federal and state common law,[85] secured by Australia's legality principle that "absent clear words, Parliament does not intend to encroach upon fundamental common law principles."[86]

Notwithstanding this considerable human rights framework, its existence is politicized and thus weakened, since Parliament reserves the constitutional power to relegislate and to override judicial lawmaking.[87] Accordingly, there have been numerous attempts to augment Australia's national human rights framework.[88] Initially in the 1940s, Australian voters struck down Prime Minister Curtin's proposal to guarantee free speech and expression, and extend freedom of religion in section 116 of the Constitution.[89] Later, in the 1970s and 1980s,

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82. *Australian Human Rights Commission Act 1986* (Cth) (Austl.); *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (Austl.). The Parliamentary Scrutiny Act created the Parliamentary Joint Committee on Human Rights to review existing and proposed legislation and evaluate its compliance with the international human rights laws to which Australia is a party. Byrnes & Benshaw, *supra* note 47, at 471. This Note will consider the relative merits of the Parliamentary Scrutiny Act in Part III, *infra*.

83. *Legislation*, *supra* note 75.

84. *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (Austl.); Byrnes & Renshaw, *supra* note 47, at 471.

85. Meagher, *supra* note 49.

86. *Int'l Fin Tr v NSW Crime Comm'n* (2009) 240 CLR 319, 349 (Austl.).

87. Williams & Burton, *supra* note 51, at 90–91.

88. Williams, *supra* note 35, at 3.

89. *Id.* at 2–5; Legg, *supra* note 63, at 5–9; *see also National Human Rights Consultation Report*, *supra* note 73.

Prime Ministers Gough Whitlam and Bob Hawke respectively proposed human rights bills to locally enact the ICCPR, which Parliament struck down in both instances.[90] Most recently, Prime Minister Kevin Rudd initiated a formal inquiry on how to better protect Australians' human rights—resulting in a formal recommendation for an expanded human rights framework.[91] Efforts toward an expanded human rights framework collapsed after the 2010 Parliamentary elections, and have since been replaced with efforts to erode federal human rights laws like the RDA with the likes of the FSB.[92] As long as the Bill of Rights Debate lays dormant, the human rights of Indigenous Australians and other minority populations remain vulnerable to the will of Parliament's political agenda.

D. State and Territory Human Rights Obligations

Although on Australia's constitutional and federal levels it lacks a bill of rights, on the state level only the state of Victoria and the Australian Capital Territory ("ACT") have successfully passed human rights laws: respectfully Victoria's Charter of Human Rights and Responsibilities Act 2006 ("Vic Charter") and the ACT's Human Rights Act 2004 ("ACT HRA").[93] While neither act is constitutionally entrenched, nor has the power to supersede other inconsistent laws, they each protect civil and political rights by requiring: (i) the state legislature and executive to consider human rights provisions when making new

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90. Williams, *supra* note 35, at 2–5; Legg, *supra* note 63, at 5–9.

91. Williams, *supra* note 35, at 2–5.

92. *Accord id.*

93. *Charter of Human Rights and Responsibilities Act 2006* (Vic.) (Austl.); *Human Rights Act 2004* (ACT) (Austl.). *See also* Williams, *supra* note 35, at 3. The ACT HRA was the first expressly human rights law passed in Australia, passed by the ACT legislature after broad consultation by the Labor government to rebalance rights and responsibilities among the three branches of ACT government. Carolyn Evans, *Responsibility for Rights: The ACT Human Rights Act*, 32 FED. L. REV. 291, 292–93 (2004). Victoria is the geographically smallest state in mainland Australia, but is the second most populous, with most of the Victorian population living in the Melbourne metropolitan area. *3101.0 Australian Demographic Statistics, June 2015*, AUSTL. BUREAU OF STAT. (Dec. 17, 2015), http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0. The ACT is home to Australia's capital city, Canberra, as well as Parliament, and the Australian Government. *Canberra–Australia's Capital City*, AUSTL. GOV'T, http://www.australia.gov.au/about-australia/australian-story/canberra-australias-capital-city (last visited Mar. 3, 2016).

laws, (ii) the state judiciary to interpret laws consistent with human rights, and (iii) any public actors to act consistent with human rights.[94] Focusing on Indigenous Australians, the Vic Charter and the ACT HRA prohibit public authorities from denying people their rights to declare and practice their cultures, religions, or languages, but do not require affirmative cultural promotion or preservation.[95] As justified by the democratic process and in balance with the public interest, Victoria and ACT may undertake any "reasonably necessary" rights limitations.[96] The passage of the Vic Charter and the ACT HRA signaled an important shift in rights-based policymaking at the state level.[97] Both laws create a "culture of rights within parliament," empower the executive with oversight of enhancing rights protection, and reserve judicial oversight for breaches—allowing courts to reconsider precedent in light of human rights considerations.[98]

Since the recent introduction of these laws, relatively few opportunities have arisen to test their efficacy or federal constitutionality.[99] In *Momcilovic v The Queen*, the High Court considered whether the Vic Charter can require courts to consider legislation consistent with human rights, and whether courts can issue statements of incompatibility.[100] The High Court held that the Victoria legislature acted within its power by requiring courts to construe legislation in ways compatible with human rights, but the Court was divided on whether judicial state-

94. *Charter of Human Rights and Responsibilities Act 2006* (Vic.) (Austl.); *Human Rights Act 2004* (ACT) s 40(b) (Austl.); Evans & Evans, *supra* note 68, at 1, 45.

95. The Vic Charter specifically protects the rights of Aboriginal people to not be denied their kinship rights and their "distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs." *Charter of Human Rights and Responsibilities Act 2006* (Vic.) (Austl.); Evans & Evans, *supra* note 68, at 44–45. *See generally Human Rights Act 2004* (ACT) (Austl.).

96. Evans & Evans, *supra* note 68, at 157–58; *Charter of Human Rights and Responsibilities Act 2006* (Vict.) (Austl.); *Human Rights Act 2004* (ACT) s 28 (Austl.).

97. The Vic Charter broadly protects cultural rights while the ACT HRA more narrowly protects minority rights. Evans & Evans, *supra* note 68, at 1–2.

98. Evans & Evans, *supra* note 68, at 113–14.

99. *See generally id.*

100. Williams & Burton, *supra* note 51, at 89. *See also,* Perry, *supra* note 54, at 2.

ments of incompatibility cut too close to judicial legislating, which the Australian Constitution prohibits.[101] In effect, *Momcilovic* confirms state courts' power to declare when a state law is incompatible with human rights, but its effect on the same process at the federal level is unclear.[102] Proponents of an expanded federal human rights framework maintain that this split decision does not preclude Australian Parliament from developing a federal human rights act.[103]

II. INDIGENOUS AUSTRALIANS' RIGHT TO LIVE FREE FROM DISCRIMINATION

Australia's human rights laws, and in particular its antidiscrimination laws, create a crucial framework for overcoming Australia's endemic and oppressive racism. Undoubtedly, Australian racism has marginalized countless Australian and non-Australian minority communities since colonization.[104] Tragically, perhaps the most affected population are the traditional owners of Australian land: Aboriginal and Torres Strait Islander peoples. Notwithstanding commendable efforts toward reconciliation with Indigenous Australians, Australia is still failing to meet its human rights obligations toward Aboriginal and Torres Strait Islander peoples. Through the lens of the RDA controversy and the subsequent FSB proposal, it is apparent that absent a constitutional or federal bill of rights, restrictions to the RDA would remove from Indigenous Australians the few federal protections from discrimination to them. By no means do racial vilification laws rectify the depth and scale of Australia's oppression of Indigenous peoples. However, the RDA can ultimately provide unique and crucial protection

101. *Momcilovic v The Queen* (2011) 245 CLR 1 (Austl.); Fiona Chong, *Human Rights vs. The High Court: How Far Can the Charter Go?*, AUSTL. POL'Y ONLINE (Nov. 23, 2011), http://apo.org.au/commentary/human-rights-vs-high-court-how-far-can-charter-go.

102. Chong, *supra* note 101.

103. *Id.*

104. *See* Legg, *supra* note 63, at 1, 3 & 26–27; *National Human Rights Consultation Report*, *supra* note 73; Anna Cowan, *UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Northern Territory of Australia*, 22 PACIFIC RIM L. & POL'Y J. 247, 248 (2013) ("Colonization, development, and modern progress have resulted in widespread marginalization for [I]ndigenous peoples in Australia . . . ."); *Race Discrimination, 'Special Measures,' and the Northern Territory Emergency Response*, *supra* note 36.

against reproducing the innumerable and intergenerational human rights abuses Indigenous Australians have endured.[105] This Part explores the ramifications of eroding Australia's human rights framework, against the backdrop of Australia's racist oppression of Indigenous peoples.

A. Indigenous Disadvantage: Australia's History of Racist Oppression

Aboriginal and Torres Strait Islander peoples are the traditional owners of Australia and have lived there for at least fifty thousand years, with some estimating closer to sixty-five thousand years.[106] Since British colonization in the eighteenth century, Indigenous Australians have faced marginalization and oppression in all facets of life including through state-backed social and political exclusion, legalized enslavement, land deprivation, and constructive genocide.[107] Scholars posit that Australia continues its colonial relationship with Indigenous people in occupying Indigenous-owned land and failing to recognize Indigenous sovereignty.[108] As a result of intergenerational oppression, the National Aboriginal and Torres Strait Islander Social Survey and the Australian Census enumerations, backed by consensus from internationally recognized indicators, show that from birth to death Indigenous Australians experience staggering disparities across all indicators of quality of life compared with non-Indigenous Australians.[109]

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105. *Id.*; Amnesty Int'l Austl., *supra* note 23, at 1.

106. *Australian Indigenous Cultural Heritage*, AUSTRALIA.GOV, http://www.australia.gov.au/about-australia/australian-story/austn-indigenous-cultural-heritage (last visited Jan. 23, 2015).

107. Legg, *supra* note 63, at 1, 3 & 26–27. *See also National Human Rights Consultation Report*, *supra* note 73; Cowan, *supra* note 104 (stating, "Colonization, development, and modern progress have resulted in widespread marginalization for indigenous peoples in Australia . . . ."); AMNESTY INT'L AUSTL., *Race Discrimination, 'Special Measures,' and the Northern Territory Emergency Response*, *supra* note 36.

108. *See, e.g.*, Amy Maguire, *Law Protecting Rights: Restoring the Law of Self-Determination in the Neo-Colonial World*, 12 LAW TEXT CULTURE, no. 1, 2008, at 12, 22 & 24.

109. *A Snapshot of the Northern Territory,* 1 COMMONWEALTH GRANTS COMMISSION REPORT ON INDIGENOUS FUNDING 33 (2001), https://cgc.gov.au/index.php?option=com_content&view=article&id=53:2001-indigenous-funding-inquiry&catid=39&Itemid=160.

For example, in 2015 Human Rights Watch reported that despite some improvements in socioeconomic and health indicators, compared with non-Indigenous Australians, Indigenous Australians live an average ten to twelve years less, experience nearly double the infant mortality rate, and "die at alarmingly high rates" from preventable respiratory illnesses and diabetes.[110] As of 2005, Indigenous people, compared with non-Indigenous people, were being incarcerated at a rate twelve times higher and experienced alcoholism at a rate that is twice the national average.[111] Indigenous youth incarceration rates

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110. HUMAN RIGHTS WATCH, WORLD REPORT 2015, at 74 (2015), https://www.hrw.org/sites/default/files/world_report_download/wr2015_web.pdf. Despite taking "some steps" toward a referendum to recognize Indigenous people in its Constitution, Australia "controversially established an indigenous advisory council while defunding the Congress of Australia's First Peoples." *Id.*

111. Jenna Gruenstein, *Australia's Northern Territory National Emergency Response Act: Addressing Indigenous and Non-Indigenous Inequities at the Expense of International Human Rights*, 17 PAC. RIM L. & POL'Y 467, 467–68 (2008). In 2001, the average life expectancy for Indigenous women was 63 years and for Indigenous men was 67 years, compared with all Australian women whose expectancy is 82 years and all Australian men whose expectancy is 77 years. *Questions and Answers about Aboriginal & Torres Strait Islander Peoples*, *supra* note 28. The Indigenous population's death rate was more than double that for the total Australian population, while the rate for Indigenous people aged thirty-five to fifty-four in Western Australia, South Australia, and the Northern Territory was five times that of the total Australian population. *Id.* Indigenous people are more likely than non-Indigenous people to die from assault, self-harm, accidents, and diseases of the respiratory system and endocrine, metabolic, and nutritional diseases including diabetes. *Id.* Of the Indigenous population over the age of fifteen, 25 percent of citydwellers and 8 percent of those living in remote areas completed high school – compared with 46 percent and 35 percent respectively for non-Indigenous people. *Id.* Just 5 percent of Indigenous Australians aged eighteen to twenty-four were attending university, compared with 23 percent of non-Indigenous Australians. *Id.* 20 percent of Indigenous adults were unemployed, compared with 7 percent of non-Indigenous adults. *Id.* In 2002, the national incarceration rate for Indigenous adults was about fifteen times higher than that for non-Indigenous adults. *Id.* Although Indigenous Australians comprise less than 3 percent of the national population, in 1992 they represented 14 percent of the incarcerated population and in 2002 they represented 20 percent. *Id.* In 2002, Indigenous young people were almost twenty times more likely to be in juvenile detention than non-Indigenous youth. *Id.* Indigenous people are more likely to die in prison custody than non-Indigenous Australians, and Indigenous women represent over 20 percent of all incarcerated women in Australia. *Id.* Finally, while domestic violence

are up to fifty times higher than the rate for non-Indigenous youth, and the Indigenous suicide rate is about six times higher.[112] The homelessness rate for Indigenous people is up to fourteen times higher, and the unemployment rate is about five times higher.[113] These conditions are compounded by many Indigenous Australians' limited or lack of access to services essential to the full enjoyment of their human rights, such as health care, food, water, and housing.[114]

It was not until a 1967 constitutional referendum that Aboriginal people were legally emancipated and granted full citizenship, giving rise to a new era of federal policymaking designed to overcome deep-rooted marginalization, protect human rights, and improve access to equal health, housing, and socioeconomic living standards.[115] Historically, Australia has had several chapters of federal Indigenous policy, each punctuated by the election of a Labor party-led government.[116] Although early policy initiatives turned over quickly with frequent changes in government, they made considerable inroads for Indigenous rights.[117] Today, Indigenous policy is moralistic and urgent in nature, focused on crisis response at the expense of intentional, rights-based development.[118]

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rates are difficult to track, "research suggests that Indigenous women and children are more than 45 times more likely to be victims of domestic violence and more than 8 times more likely to be victims of homicide." *Id.*

112. *What is Australians Together?*, AUSTRALIANS TOGETHER, http://www.australianstogether.org.au/about (last visited Feb. 1, 2016).

113. *Id.*

114. HUMAN RIGHTS WATCH, *supra* note 110, at 294.

115. *Australian Constitution* ss 51(xxvi), 127 (repealed 1967); Will Sanders, *Changing Agendas in Australian Indigenous Policy: Federalism, Competing Principles and Generational Dynamics,* 72 AUSTL. J. PUB. ADMIN. 157–58 (2013).

116. Amnesty Int'l Austl., *The NT Intervention and Human Rights* 16, https://www.amnesty.org/download/Documents/HRELibrary/sec010032010eng.pdf (last visited Mar. 5, 2016) (providing an historical overview of "the three interventions."). *See also* Sanders, *supra* note 115, at 156–57.

117. The Whitlam and Keating governments saw tremendous advances for Indigenous rights, particularly through land rights, multiculturalism, social inclusion, and increased social and essential services. *See, e.g.*, *Noel Pearson on Whitlam: A Friend Without Peer of the Original Australians*, AUSTRALIAN (Nov. 6, 2014, 8:07 AM), http://www.theaustralian.com.au/in-depth/gough-whitlam/noel-pearson-on-whitlam-a-friend-without-peer-of-the-original-australians/story-fnpxuhqd-1227113668920.

118. Sanders, *supra* note 115, at 167–68.

In one respect, recent federal Indigenous policy is promoting Indigenous rights. Just two months after being sworn in as Prime Minister, Labor leader Kevin Rudd issued a national apology to the Aboriginal and Torres Strait Islander peoples victimized throughout the twentieth century by Australia's Stolen Generations Policy.[119] Many criticized Rudd's apology since it offered no remedy or reparations, but many others welcomed the symbolic new chapter for Australian Indigenous rights.[120] By 2008, the Rudd government had signed a National Indigenous Reform Agreement through which the federal, state, and territory governments agreed that "overcoming Indigenous disadvantage will require a long-term generational commitment that sees major effort directed across a range of strategic platforms" in an effort to close the gap on Indigenous disadvantage.[121] In another respect, these efforts and achievements in promoting Indigenous rights did not neutralize the human rights abuses created by the Commonwealth's 2007 "intervention" into the Northern Territory ("NT"), through which the Australian Government introduced sweeping law reform, financial investment, social service programming, and supervisory federal government and military personnel into the NT's remote Aboriginal communities to address crisis levels of child abuse and neglect documented in the NT Government-commissioned *Little Children are Sacred Report*.[122]

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119. The Stolen Generations Policy was Australia's formal policy of employing Darwinian eugenic theory to homogenize Australia. *See* Legg, *supra* note 63, at 26–27. The policy involved forcibly removing Aboriginal children from their homes, educating them in boarding schools, and socializing them with non-Aboriginal Australians, with the goal of eliminating Aboriginality in future generations. *Id.* This constituted a constructive genocide. Although employed into the second half of the twentieth century, the Stolen Generations Policy did not come to national consciousness as a rights abuse until the Commonwealth issued the *Bringing Them Home Report* in 1997. *Id.*

120. *Id.*

121. COUNCIL OF AUSTL. GOV'TS, NATIONAL INDIGENOUS REFORM AGREEMENT (CLOSING THE GAP) 4 (2009), http://www.federalfinancialrelations.gov.au/content/npa/health_indigenous/indigenous-reform/national-agreement_sept_12.pdf; *see also Closing the Gap on Indigenous Disadvantage*, COUNCIL OF AUSTL. GOV'TS, https://www.coag.gov.au/closing_the_gap_in_indigenous_disadvantage (last visited Jan. 22, 2015).

122. In introducing its *Little Children are Sacred* report, the government-appointed NT Board of Inquiry explained,

Pursuant to the NT *Inquiries Act*, the NT Government convened a Board of Inquiry to deliver the 2007 *Little Children are Sacred Report* to assess and address reported rates of sexual abuse of Aboriginal children, and the connection of those rates to the unique barriers faced by NT Indigenous peoples to the full enjoyment of their human rights.[123] An overview of the NT context assists with conceptualizing these barriers. As of 2006, Indigenous people comprised about 30 percent of the NT population, the highest proportion of any Australian state or territory.[124] The NT also had the youngest Indigenous population,

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> Our appointment and terms of reference arose out of allegations of sexual abuse of Aboriginal children. Everything we have learned since convinces us that these are just symptoms of a breakdown of Aboriginal culture and society. There is, in our view, little point in an exercise of band-aiding individual and specific problems as each one achieves an appropriate degree of media and political hype . . . . What is required is a determined, coordinated effort to break the cycle and provide the necessary strength, power and appropriate support and services to local communities, so they can lead themselves out of the malaise: in a word, empowerment!

NT BOARD OF INQUIRY INTO THE PROTECTION OF ABORIGINAL CHILDREN FROM SEXUAL ABUSE, LITTLE CHILDREN ARE SACRED (2007), http://www.inquirysaac.nt.gov.au/pdf/bipacsa_ final_report.pdf [LITTLE CHILDREN ARE SACRED]. In response, the Howard Liberal government intervened in the NT immediately prior to the election of the Rudd Labor government. Amnesty Int'l Austl., *supra* note 116, at 4; Cowan, *supra* note 104, at 273.

123. The Board of Inquiry's Tasks were to:

> Examine the extent, nature and factors contributing to sexual abuse of Aboriginal children, with a particular focus on unreported incidents of such abuse. Identify barriers and issues associated with the provision of effective responses to and protection against sexual abuse for Aboriginal children. Consider practices, procedures and resources of NT Government agencies with direct responsibilities in this area (Family & Children Services and Police), and also consider how all tiers of government and non-government agencies might contribute to a more effective protection and response network. Consider how the NT Government can help support communities to effectively prevent and tackle child sexual abuse.

LITTLE CHILDREN ARE SACRED, *supra* note 122, at 4.

124. *Aboriginal and Torres Strait Islander Peoples*, AUSTL. BUREAU OF STATISTICS (May 24, 2012, 11:30 AM), http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Population~245 (citing 2006 Census data).

with about 40 percent under fifteen years old.[125] Over 70 percent of the NT's Indigenous population lived outside major towns, in approximately 640 discrete remote Aboriginal communities and outstations.[126] These remote populations have grown by about 40 percent since the 1980s and "simply do not have the same range, level and quality of public funded infrastructure and services that are provided in towns of similar size elsewhere in Australia."[127] As a result, these communities face unique difficulties in overcoming their "high comparative levels of socio-economic disadvantages" and their "limited capacity to engage in social and economic development opportunities."[128]

The enormous barriers to the attainment of human rights faced by Indigenous Territorians were exacerbated by the so-called "intervention."[129] As introduced above, the NT intervention involved the Australian Government's implementation of sweeping law reform, financial investment, social service programming, and supervisory federal government and military personnel in the NT's remote Aboriginal communities—as well as implementation of sweeping discriminatory policies denying Indigenous people their human rights to self-determination, equality, nondiscrimination, and their social and economic rights.[130] The intervention was created by the Northern Territory National Emergency Response Act 2007 (NTER). The NTER is one act within a package of five federal laws implemented swiftly and under great political pressure following the release of *Little Children are Sacred*—so swiftly that legislators deliberated on the six hundred-page package for only nine hours, with little consideration given to its human rights implications.[131] Under the pretense of emergency child and family protection, the NTER authorized a coercive, paternalistic, and authoritarian intervention that promulgated numerous human rights violations under CERD and UNDRIP, including the suspension of the RDA to legalize the NTER's discriminatory ele-

125. *A Snapshot of the Northern Territory*, *supra* note 109, at 33.
126. *Id.*
127. *Id.*
128. *Id.*
129. *See id. See also* Amnesty Int'l Austl., *supra* note 36.
130. Amnesty Int'l Austl., *supra* note 36.
131. Williams & Burton, *supra* note 51, at 65.

ments.[132] Simply put, the NTER violated Indigenous rights to self-determination.[133] It deprived Aboriginal people their land rights by dismantling the Northern Territory Aboriginal Land Rights Act 1976, and allowed the federal government to assume control over Aboriginal land and terminate the entrance permit system from which Aboriginal people previously earned royalties.[134] It mandated discriminatory public benefits income management and prohibited the possession or consumption of alcohol and pornography only in Aboriginal communities.[135] In return, the Australian Government increased investment in and service delivery to remote communities.[136] *Little Children are Sacred* did not recommend that Australia undertake these measures and instead recommended meaningful community consultation and engagement throughout Australia's development of an appropriate and responsive policy.[137]

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132. *Id.*; Amnesty Int'l Austl., *supra* note 116, at 4–6, 10–11; Amnesty Int'l Austl., *supra* note 36; O'Dowd, *supra* note 11 (arguing that the NTER was a pivotal moment in Australia's nationhood, culminating its oppressive colonial history and effectively rendering the NT as a separate nation-state); Cowan, *supra* note 104, at 273 (summarizing the NTER legislative process and background); *id.* at 276, 280 (enumerating the paternalistic elements of the NTER); *id.* at 278 (criticizing how the NTER contravenes Australia's human rights obligations including through CERD and UNDRIP); Paula Gerber, *The Damning UN Report on Child Protection in Australia,* RIGHT NOW (July 10, 2012), http://rightnow.org.au/topics/children-and-youth/the-damning-un-report-on-child-protection-in-australia/; Emma Partridge, *Caught in the Same Frame? The Language of Evidence-based Policy Debates about the Australian Government 'Intervention' into Northern Territory Aboriginal Communities*, 47 SOC. POL'Y & ADMIN. 399, 400 (2013).

133. UNDRIP promotes the right to Indigenous self-determination, an obligation Australia cannot meet through such coercive, paternalistic legislation. Kanchana Kariyawasam, *The Significance of the UN Declaration on the Rights of Indigenous Peoples: The Australian Perspectives*, 11 ASIAN PAC. J. HUM. RTS. & L. 1, 6, 12 (2010); Cowan, *supra* note 104, at 248–50 ("There is no disputing that Australia was faced with an extremely serious and complex situation, and that drastic action was urgently needed to protect the rights of Aboriginal peoples, particularly children and women, in NT communities . . . . Unfortunately, Australia's methodology and approach were seriously flawed from a human rights perspective.").

134. Amnesty Int'l Austl., *supra* note 116, at 5–6, 12–13.

135. *Id.* at 4–6.

136. *Id.*

137. *Id.* at 8; Partridge, *supra* note 132, at 400 (explaining why the Intervention was passed, what were its racist elements, and its reinstatement of the RDA in 2010).

The U.N. criticized the NTER for its punitive and discriminatory provisions pertaining only to Aboriginal people and recommended that the Australian Government undertake more effective and meaningful engagement with Aboriginal and Torres Strait Islander peoples in developing policies that affect them.[138] In response to widespread political pressure, Australia eventually reinstated the RDA in the NT but exempted the discriminatory elements of the NTER as a permissible "special measure."[139] The 2010 follow-up report to *Little Children are Sacred*, entitled *Growing Them Strong, Together*, proposed the persisting need for radical child welfare system reform notwithstanding the intervention, as did a 2012 report by U.N. Committee on the Rights of the Child, which noted that "serious and widespread discrimination faced by Aboriginal and Torres Strait Islander children" inhibits their access to basic services and causes their over-representation in Australia's criminal justice system;[140] today, there exists only limited evidence of the intervention's success.[141] Government investment

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138. U.N. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention*, U.N. Doc. CRC/C/AUS/CO/4 (Aug. 28, 2012); Williams & Burton, *supra* note 51, at 65; Amnesty Int'l Austl., *supra* note 116, at 4–6, and 14; *Amnesty Int'l Austl.*, *supra* note 36 (regarding the CERD Committee and U.N. Special Rapporteur's concern over the discriminatory elements of the RDA); Paula Gerber, *Australian Must do Better at Protecting Children's Rights*, CONVERSATION (June 25, 2012 12:15 AM), http://theconversation.com/australia-must-do-better-at-protecting-childrens-rights-7876 (explaining how the U.N. Committee on the Rights of the Child criticized the NTER in a 2012 report).

139. The RDA special measures exception permits discrimination in the context of affirmative action designed to augment benefits for disadvantaged people. However, the NTER introduces discriminatory and harmful measures that contravene Australia's human rights obligations under CERD and UNDRIP without augmenting benefits, on balance, for Indigenous Territorians. Gruenstein, *supra* note 111, at 469 and 480.

140. DEP'T OF THE CHIEF MINISTER, GROWING THEM STRONG TOGETHER: PROMOTING THE SAFETY AND WELLBEING OF THE NORTHERN TERRITORY'S CHILDREN 11–14 (2010), http://digitallibrary.health.nt.gov.au/prodjspui/bitstream/10137/459/1/CPS%20Report%202010.pdf; U.N. Comm. on the Rights of the Child*, supra* note 138, at 7; Gerber, *supra* notes 132, 138.

141. Despite the neutral and adverse effects of the intervention, in 2015 Prime Minister Turnbull did report positive progress being made in the areas of Indigenous health and education. Austl. Gov't Dept. of the Prime Minister & Cabinet, *Closing the Gap: Prime Minister's Report 2016,* at 3 (2016), http://closingthegap.dpmc.gov.au/assets/pdfs/closing_the_gap_report_2016.pd

and policy reform is certainly necessary for closing the gap on Indigenous disadvantage, but "[t]he bottom line is that the socio-economic problems in the NT will never be solved without genuine empowerment, and commitment to an ongoing partnership," none of which the intervention was designed to achieve.[142]

Before sufficient time passed to meaningfully measure progress on closing the gap, an internal political upset destabilized Prime Minister Rudd's leadership of the Labor Party, and Prime Minister Gillard assumed power of the Party and consequently of Parliament.[143] The Gillard Government tabled the Rudd Government's work toward a federal human rights act and passed the Stronger Futures in the Northern Territory Act 2012, extending all of the discriminatory, coercive, and paternalistic provisions of the NTER and once again chilling the Bill of Rights debate.[144] In 2013, the conservative Abbott government assumed parliament and effectively resumed the debate, then in favor of removing rights through the proposed (and later reneged) FSB, a proposal reinvigorated under the current Turnbull Government.[145]

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f. Over the last several years, at marginal rates, Indigenous mortality rates have declined, child life expectancy has increased, educational attainment has increased, and the employment gap for university graduates has decreased. *Id.* at 3–4; *see also* Close the Gap Campaign Steering Comm., *Close the Gap Progress and Priorities Report 2015*, at 1–2 (2015), https://www.humanrights.gov.au/sites/default/files/document/publication/CTG_progress_and_priorities_report_2015.pdf. Nevertheless, the intervention still created numerous human rights concerns, including the intervention's highly discriminatory nature.

142. Cowan, *supra* note 104, at 308.

143. Emma Rodgers, *Gillard Ousts Rudd in Bloodless Coup*, AUSTL. BROADCASTING CORPORATION (June 23, 2010, 8:36 PM), http://www.abc.net.au/news/2010-06-24/gillard-ousts-rudd-in-bloodless-coup/879136.

144. *Stronger Futures in the Northern Territory Act 2012* (Cth); Amnesty Int'l Austl., *supra* note 116, at 15.

145. Emma Griffiths, *Tony Abbott Sworn in as Australia's 28th Prime Minister*, AUSTL. BROADCASTING CORPORATION, http://www.abc.net.au/news/2013-09-18/tony-abbott-sworn-in-as-australian-prime-minister/4965104 (last updated Sept. 18, 2013 9:36 PM); Bourke, *supra* note 21; *Cory Bernardi Revives Calls for Changes to S 18 or Racial Discrimination Act*, *supra* note 21.

B. The Freedom of Speech Bill: A Threat to the Right to Live Free From Discrimination

Australian racism is rampant, and is promulgated by majoritarian voters toward unpopular minorities.[146] Australia achieved widespread consciousness of this racism in the 1970s when it introduced a national policy of promoting multiculturalism, and passed the RDA among other antidiscrimination laws.[147] Antidiscrimination laws aim to protect collective identity, through federal and state measures and common law protections, under the premise of "reputation as dignity," which posits that group defamation is harmful to the humanity and inherent dignity of perceived group members.[148]

In 1995, the Keating Government passed the Racial Hatred Act 1995, through which Parliament adopted key RDA provisions, section 18B through section 18E.[149] These provisions expanded the RDA by prohibiting behavior that is reasonably likely to offend, insult, or humiliate people on the basis of their "race, colour or national or ethnic origin."[150] Specifically, section 18 prohibits direct discrimination "because of" race, thereby restricting the freedom of expression.[151] Artistic, academic, and scientific works were exempted, as well as "fair and accurate" news reports made reasonably and in good faith on mat-

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146. *See generally* Laksiri Jayasuriya, *Understanding Australian Racism*, 45 AUSTL. U. REV. 40 (2002).

147. *Id.* at 40–41.

148. Cases addressing defamation and racial vilification, such as *Bropho v HREOC* and *Eatock v Bolt,* confront the difficult legal questions of how to define group defamation when people are individuals rather than a unitary conglomerate or homogenized group. Rolph, *supra* note 81, at 2–3, 8, 10, 12–13; Jayasuriya, *supra* note 146 ("[Racism] refers mainly to the social meanings attached to the racialised groups, by others – the dominant groups.").

149. Rolph, *supra* note 81, at 1–2; Leslie, *supra* note 3.

150. *Racial Discrimination Act* (Cth) s 18B–E. Legislators updated the RDA in 1995 largely in response to three national inquiries: [1] the Royal Commission into Aboriginal Deaths in Custody, [2] the National Inquiry into Racist Violence, and [3] the Australian Law Reform Commission Report into Multiculturalism and the Law. These reports evidenced the strong connection between public racist conduct and racial violence. *Racial Discrimination Act: The Two-Minute Version*, *supra* note 10. The provisions of RDA section 18 comport with the High Court's requirement that limits to political communication be both proportional and necessary, such as for public safety. *Lange v. ABC* (1997) 189 CLR 520 (Cth) (Austl.).

151. *Racial Discrimination Act* (Cth) s 18.

ters of public interest.[152] Under these provisions, victims of racial hatred or vilification can lodge a complaint with the AHRC for remedy, before having to seek legal remedy through the courts, which can be difficult and costly.[153]

In 2009, the Federal Court of Appeals tested RDA section 18 in *Eatock v Bolt,* in which several prominent Aboriginal figures, including women's rights leader and artist, Pat Eatock,[154] won their complaint against controversial media personality Andrew Bolt for his racist assertions published in four print and online articles entitled, *It's so hip to black*, *White fellas in the black, One of these women is Aboriginal*, and *Aboriginal man helped*.[155] Bolt's articles featured photographs of prominent Aboriginal people and alleged that fair-skinned Aboriginal people are not truly Aboriginal, and that Aboriginal people selectively and opportunistically embrace their Aboriginality only

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152. *Racial Discrimination Act: The Two-Minute Version*, *supra* note 10.

153. Amnesty International Australia reports that between 2012 and 2013, the AHRC's action on RDA complaints was so effective that less than three percent of complaints went on to court. *Id.*

154. Pat Eatock was born on December 14, 1937, in Redcliffe, Queensland. *Eatock, Pat (1937-2015),* NAT'L LIBR. OF AUSTL., http://trove.nla.gov.au/people/728096?c=people (last visited Apr. 6, 2016). Her father, Roderick Eatock, was Aboriginal and English, and her mother, Elizabeth Stephenson Anderson, immigrated from Scotland. *Id.* Pat experienced discrimination in school, and was an activist at the Aboriginal Embassy and Women's Liberation movements in Australia's capital of Canberra. *Id.* In 1972, Pat Eatock became the first Aboriginal person to run for Federal Parliament, and in 1973 she became the first nonmatriculated mature aged student at the Australian National University. Pat Eatock also worked as a civil servant, academic lecturer, and filmmaker, before passing away of ill health in 2015. *Id.*

155. *Eatock v Bolt* (2011) FCA 1103 (Austl.), http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html. In four articles attacking affirmative action and questioning whether several Aboriginal public figures were truly deserving of their respective jobs, prizes, and awards, Bolt mocked, derided, and cynically discussed his subjects to make them feel "offended," "upset," and "remorseful." *Id.* ¶ 412. The court found that Bolt engaged in impermissible racial vilification by referring to his subjects as "political Aborigine" and "professional Aborigine," and by asserting that he must "surrender my reason and pretend white is really black," and that "[s]eeking power and reassurance in a racial identity is not just weak . . . ." *See id.* ¶ 414; *see also* Sarah Joseph, *Free Speech, Racial Intolerance and the Right to Offend: Bolt Before the Court*, 36 ALTERNATIVE L. J. 224, 225 (2011); Darryn Jensen, *The Battlelines of Interpretation in Racial Vilification Laws*, POL'Y MAG., Winter 2011, at 14.

for personal gain.[156] *Eatock v Bolt* illuminated a pervading, racist perspective held by some non-Aboriginal Australians that Australian aboriginality turns on the absence of non-Aboriginal ancestry in one's family, and on signifiers like one's skin color and physical appearance.[157] Challenging aboriginality and doubting an Aboriginal person's identity in this way racistly imputes that "people's assertions of Aboriginality are motivated, at the very least, by opportunism," given the "government funds and other lucrative opportunities" available to (or which non-Aboriginal Australians perceive to be available to) Aboriginal people.[158] Bolt, as a non-Indigenous Australian, thus made an overt, discriminatory assertion that Aboriginal people, who non-Aboriginal people perceive to lack the appropriate signifiers of aboriginality, only claim their Aboriginality for opportunism—an especially vile exercise of Bolt's white privilege and supremacy given Australia's attempted constructed genocide of Aboriginal people through its former Stolen Generation Policy.[159]

The court ruled that Bolt breached RDA section 18 when he published this racially vilifying text because he did so in bad faith with the intended and reasonably likely effect of offending, insulting, or humiliating Aboriginal people, who for the purposes of the act, are "a race and have common ethnic origin."[160] The *Eatock v Bolt* decision drew support from the political left, including many Aboriginal activists and allies, but drew criticism from the political right, eventuating in Abbott's commitment to repeal key RDA provisions.[161] Although

156. *Eatock v Bolt*, FCA 1103, ¶¶ 13, 15 & app. 1A. 1B; *see also* Jensen, *supra* note 155, at 14; *Bolt Breached Discrimination Act, Judge Rules*, AUSTL. BROADCASTING CORPORATION (Sept. 28, 2011, 9:05 AM), http://www.abc.net.au/news/2011-09-28/bolt-found-guilty-of-breaching-discrimination-act/3025918.

157. *Eatock v Bolt*, FCA 1103, ¶¶ 16–25; Rolph, *supra* note 81, at 9. Bolt posited his racist theory that he only considers a person Aboriginal if there are no white people in her family tree and if she has dark skin, and since emphasizing racial differences is "racist" and socially undesirable, individuals with mixed genealogy only identify as Aboriginal for personal gain. *Eatock v. Bolt*, FCA 1103, at 360—363.

158. Rolph, *supra* note 81, at 9.

159. For a discussion of the Stolen Generations, see *supra* note 119.

160. *Id.*; Jensen, *supra* note 155, at 16, 19 (detailing how Bolt breached RDA s 18c).

161. *Explained: Racial Discrimination Act Amendments*, *supra* note 3.

the RDA is one of the few federal laws providing legal redress for those experiencing hate-based discrimination in Australia, the Abbott government proposed to eliminate section 18 and severely limit the remedies available to those who are targeted by racial vilification and hate speech.[162]

In the interest of ending what Brandis calls "political censorship," the FSB and the Turnbull government's renewed proposal seek to narrow liability to only those who say or do racist things that "vilify" or "intimidate" others.[163] Under an ordinary reasonable Australian standard, rather than by the standards relative to a particular group, the FSB proposes narrow definitions for "vilify" and "intimidate."[164] Racist words or acts would "vilify" only if they incite racial hatred in others or encourage them to "join in the hatred," and they would "intimidate" only if they instill a fear in others of being harmed physically—not emotionally or psychologically.[165] In effect, racial hatred becomes permissible, particularly in the Northern Territory, which lacks an alternative antidiscrimination law.[166] Such provisions would ignore racial hatred that causes nonphysical harms, or that which occurs in isolated environments, as well as the unique histories of people like Indigenous Australians whose experience with egregious racial hatred should give rise to a unique standard of what constitutes an experience of racial vilification or intimidation.[167] Their passage would send a message to Australia that racial hatred and hate speech are now culturally tolerable, and Australian states and territories with-

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162. *Racial Discrimination Act 1975* (Cth). Other relevant antidiscrimination human rights laws deal narrowly with public employment. *See, e.g.*, *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) (Austl.); *Anti-Discrimination Act 1977* (NSW) (Austl.). While Gaze argues that RDA section 18c should construe "offend" and "insult" more narrowly, Gaze seems to support provisions addressing "humiliation" and "intimidation" that appropriately give local effect to the ICCPR. Gaze, *supra* note 77, at 3. Gaze appears to agree with the result in *Eatock* because Bolt made his assertions in bad faith.

163. *Exposure Draft, Freedom of Speech (Repeal of s. 18C)* (Cth) s 1 (Austl.); *Racial Discrimination Act: The Two-Minute Version*, *supra* note 10; Bourke, *supra* note 21; *Cory Bernardi Revives Calls for Changes to S 18 or Racial Discrimination Act*, *supra* note 21.

164. *Racial Discrimination Act: The Two-Minute Version*, *supra* note 10.

165. *Id.*

166. *See generally id.*

167. *Id.*

out alternative protections would be left vulnerable to human rights abuses.[168] The FSB would also permit unfettered racist rhetoric in the "public discussion of any political, social, cultural, religious, artistic, academic or scientific matter," allowing individuals like Bolt to continue to publish racist discourse and reproduce the centuries of racial vilification and oppression that Aboriginal people have experienced.[169]

Free speech is an important human right, but hate speech is not. What FSB proponents fail to acknowledge is that the RDA does not universally ban race-based discourse, but instead "requires [racial discrimination] to be balanced against the public interest in freedom of expression . . . . [it] provides protection against racially offensive behavior subject to the important protections of freedom of expression."[170] Laws like the FSB would weigh this balance in favor of hate speech, rather than free speech, at a time when Australia is already failing to meet its obligations to protect the universal human rights of minority targets of hate speech, including Indigenous Australians.[171] Despite tabling the FSB in 2014 to promote unity within what Abbott called "Team Australia," popular support for promoting free speech in light of the 2015 Charlie Hebdo attacks is providing a new platform for members of the Abbott government to rehash their complaints about the RDA.[172] If passed, "Team Australia" would secure its right to be bigoted, and the individuals and minorities harmed by that bigotry would have few legal protections.[173]

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168. *Id.*

169. *Id.*; *see also Racial Discrimination Act 1975* (Cth) (Austl.).

170. Rolph, *supra* note 81, at 3.

171. *See, e.g.*, Emma Griffiths, *Closing the Gap: Tony Abbott Delivers Mixed Report Card on Indigenous Disadvantage,* AUSTL. BROADCASTING CORPORATION (Feb. 11, 2014, 10:56 PM), http://www.abc.net.au/news/2014-02-12/abbott-delivers-closing-the-gap-update/5254188.

172. Griffiths, *supra* note 19; Shalailah Medhora, *Community Leaders Reject Calls to Revisit Changes to Racial Discrimination Act After France Attacks*, GUARDIAN (Jan. 12, 2015), http://www.theguardian.com/australia-news/2015/jan/12/community-leaders-reject-calls-to-ease-ban-on-racial-insults-after-france-attacks; Jill Fraser, *Would Charlie Hebdo Cartoons be Banned in Australia?*, ANADOLU AGENCY (Jan. 14, 2015), http://www.aa.com.tr/en/world/would-charlie-hebdo-cartoons-be-banned-in-australia/84592.

173. *Racial Discrimination Act: The Two-Minute Version*, *supra* note 10.

III. SOLUTIONS: PROTECTING OTHER HUMAN RIGHTS FROM THE RIGHT TO BE BIGOTED

While the RDA is only one human rights law addressing one form and manifestation of Australian racism, the importance of its unique protections and the recurring calls to restrict it represent a key challenge to protecting human rights within Australia's democratic system: the likelihood that majoritarian voters will compromise the human rights of countermajoritarian minorities.[174] In other words, the RDA controversies exemplify how the political priorities of Australia's majority electorate, such as a campaign to promote free speech in light of the Charlie Hebdo attacks, compromise human rights for racial minorities like Indigenous Australians who already struggle to enjoy substantive equality with non-Indigenous Australians.[175] Australia has long resisted both a constitutional amendment entrenching human rights and a federal human rights act; this makes it imperative that Australia seize every opportunity to preserve its existing human rights framework. This Part argues that a more robust human rights framework would enable Australia to better protect human rights. Australia should decrease its reliance on majoritarian democracy as a primary means for protecting human rights, especially for minorities like Aboriginal and Torres Strait Islander peoples. Moreover, Australia should increase its human rights framework, beginning with expanding and refining the RDA.

A. Majoritarian Democracy is an Insufficient Means for Protecting Human Rights

International human rights laws and national bills of rights are designed to insulate certain rights from forces like majoritarian democracy and the market.[176] The very essence of an en-

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174. *See* Arenson, *supra* note 32, at 28, 30–31, 42.

175. *See, e.g.*, *A Snapshot of the Northern Territory*, *supra* note 109; *Briefing Note*, *supra* note 30; *Australia, Human Development Indicators*, *supra* note 30. Interestingly, France launched law reform aimed at curbing hate speech and racism in the wake of the Hebdo attacks. *See* Angelique Chrisafis, *France Launches Major Anti-Racism and Hate Speech Campaign*, GUARDIAN (Apr. 17, 2015, 11:30 AM), http://www.theguardian.com/world/2015/apr/17/france-launches-major-anti-racism-and-hate-speech-campaign.

176. Susan Alberts et al., *Democratization and Countermajoritarian Institutions: The Role of Power and Constitutional Design in Self-Enforcing Democracy* at 2–4 (2010),

trenched bill of rights is its supremacy, its ability to override inconsistent law, and its protection from alteration or elimination through normal legislative processes.[177] Operating on the international consensus that human rights are possessed universally, indivisibly, and equally by all people by virtue of their being human, treaties and bills of rights entrench rights that are so important that no executive, judicial, or legislative action should interfere with them.[178] Such laws are especially important for the human rights of minorities, so that their rights "can only be altered through an arduous process that is designed to make it resistant to the temporal whims of the electorate."[179] Protecting minority rights from being overlooked, reduced, or even abused by majoritarian rule through a bill of rights conveys "society's judgment that certain rights are too important to make their continued existence dependent upon the will of a simple majority of the electorate."[180]

While countries like the United States and Canada check the power of majoritarian democratic legislating by empowering their judiciaries to overturn legislation or regulation that encroaches on entrenched human rights, Australia has opposed a constitutional or statutory bill of rights since its federation.[181] Australia has resisted giving its judiciary guardianship of human rights protections, instead pursuing a more populist democratic approach of entrusting its elected legislature with creating human rights laws for the courts to enforce.[182] Australia holds close to its constitutional framers' intent that Parliament maintains supremacy in lawmaking, refuting the U.S. or Canadian models of constitutionally entrenched bills of rights,

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https://www.researchgate.net/publication/260290262_Democratization_and_Countermajoritarian_Institutions_The_Role_of_Power_and_Constitutional_Design_In_Self-Enforcing_Democracy.

177. Arenson, *supra* note 32, at 30.

178. *See e.g. Human Rights Explained: Fact Sheet 5: The International Bill of Rights*, AUSTL. HUM. RTS. COMMISSION, https://www.humanrights.gov.au/human-rights-explained-fact-sheet-5the-international-bill-rights (last visited Jan. 22, 2015, 10:00 AM); Bates, *supra* note 14, at 30; Van Boven, *supra* note 14, at 143.

179. Arenson, *supra* note 32, at 28, 30.

180. *Id.* at 31.

181. Hoiberg, *supra* note 46, at 9-11; Arenson, *supra* note 32, at 28; *see also Human Rights Law (Parliamentary Scrutiny) Act 2011* (Cth) (Austl.).

182. *Id.*

and the United Kingdom's less invasive endorsement of judicial guardianship of human rights in statutory interpretation.[183] Previous attempts to entrench human rights have proven unsuccessful, and the Australian Constitutional amendment process is rarely invoked.[184]

Unfortunately, the controversies surrounding the RDA and NTER exemplify how Australia's model neither sufficiently protects human rights, nor promotes substantive democratic governance, especially for Aboriginal and Torres Strait Islander peoples. In Australia's model, parliamentarians naturally respond to their constituents' priorities when choosing what bills to propose and promote, and bill proposals are unlikely to

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183. Rosalind Dixon, *A Minimalist Charter of Rights for Australia: The U.K. or Canada as a Model?* (Chicago Pub. L. & Legal Theory Working Paper No. 285, 2009), http://chicagounbound.uchicago.edu/public_law_and_legal_theory/; *see also* Arenson, *supra* note 32, at 28.

184. Arenson, *supra* note 32, at 31. For example, a bill of rights was proposed in the Australian Constitutional Conventions but was democratically rejected to prevent undermining several discriminatory laws in effect at the time impacting on Aboriginal peoples and Chinese people in Australia. *See* infra note 53; *see A Bill of Rights for Australia – But do we need it?*, LAW AND JUSTICE FOUNDATION, QLD. CHAPTER –YOUNG PRESIDENTS ASS'N (Dec. 14, 1997), http://www.lawfoundation.net.au/ljf/app/&id=/a60da51d4c6b0a51ca2571a7002069a0. In 1929 and 1959, two constitutional inquiries proposing a bill of rights were defeated, as well as a 1942 referendum to prohibit the limitation of freedom of expression. In 1988, a Constitutional Commission's recommendation for a federal human rights charter and bill of rights protections included the right to a jury trial and to freedom of religion were defeated by a peoples' referendum. Federal Parliament has twice considered enacting a non-constitutional bill of rights but both Human Rights Bill proposals lapsed in the face of controversy and resistance. Despite the federal laws discussed in Part II comprising Australia's human rights legal framework, recent decisions of the High Court point to the need for a bill of rights to protect human rights and ensure substantive equality, especially in light of Australia's ratification of the ICCPR First Optional Protocol. *See A Bill of Rights for Australia – But do we need it?*, LAW AND JUSTICE FOUNDATION, QLD. CHAPTER –YOUNG PRESIDENTS ASS'N (Dec. 14, 1997), http://www.lawfoundation.net.au/ljf/app/&id=/a60da51d4c6b0a51ca2571a7002069a0 (discussing various High Court cases identifying or creating human rights gaps in the Constitution, including: the *Dugan* case concerning habeas corpus and capital punishment, the *McInnes and Dietrich* cases concerning the criminal defendants' right to counsel, and the landmark *Mabo v Queensland [No. 2]* case regarding the proper consideration of international human rights law in resolving legislative ambiguities and developing common law).

receive parliamentarian support, or to make their way from communities to the Parliament floor, without considerable popularity.[185] As a result, especially "[w]here the rights of minorities are concerned, particularly unpopular minorities, the chances of generating the necessary public support for protective legislation are remote."[186] Where legislative gaps have inevitably occurred, Australia's judiciary has answered the call by creating a de facto common law bill of rights through its jurisprudence.[187] The RDA exemplifies the insufficiency and unaccountability of such a model, even if resisting a constitutionally entrenched bill of rights appeared more democratic at first; instead, expanding Australia's human rights framework by legislatively formalizing the adjudicative powers that the judiciary is already exercising could prove the most democratic (and effective) human rights framework of all.[188]

Australia's most recent but unsuccessful effort to entrench human rights involved federal legislation passed by the Rudd Government. In 2008, the Rudd Government convened a National Human Rights Consultation Committee (NHRCC) to scope the creation of a federal human rights act.[189] The NHRCC consulted widely and reviewed over thirty-five thousand submissions (of which over 85 percent supported a federal human rights act), and the NHRCC ultimately recommended that Australia legislate a federal human rights act akin to that of the United Kingdom, giving the High Court authority to declare federal laws incompatible with human rights.[190] Australia never implemented this recommendation; instead, it subsequently formalized Parliament's exclusive oversight of human rights through the Parliamentary Scrutiny Act, creating par-

185. Arenson, *supra* note 32, at 42.

186. *Id.*

187. Meagher, *supra* note 49.

188. Hoiberg, *supra* note 46, at 11–12.

189. Kirsty Magarey & Roy Jordan, *Parliament and the Protection of Human Rights*, PARLIAMENT OF AUSTL., http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook43p/humanrightsprotection (last visited Jan. 23, 2015).

190. *See* Hoiberg, *supra* note 46, at 1. Nearly all of the 35,000 submissions to the 2010 human rights consultation committee supported a national human rights act. *See* Arenson, *supra* note 32, at 29. However, the Australian Human Rights Commission reported in 2014 that this recommendation was, regrettably, never implemented. *Id.*

liamentary committees with persuasive oversight of human rights and the power to issue persuasive statements of compatibility.[191] Critics question to what extent committees with only persuasive authority can meaningfully protect human rights, and whether Parliament is actually the best body in which to entrust exclusive guardianship of minority rights given its previous performance.[192] The Parliamentary Scrutiny Act may only perpetuate Parliament's struggle to meaningfully fulfill the scope of human rights, making it "difficult to create a strong rights-respective culture within parliament and [weakening] the position of rights compared to other interests."[193] Several years later, the RDA and FSB controversy exemplifies the persisting salience of the NHRCC's findings on the need for more federal human rights legislation.

Australia cannot assume that what is popular will be just, and its commitment to respect, protect, and fulfill international human rights will become impossible when popular policies deny minorities adequate human rights protections.[194] The impact of restricting the RDA, for example, symbolizes the dangers inherent in politicizing human rights. Australian voters' rights to free speech and freedom of conscience—in essence, their right to be bigoted—can and should be promoted through

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191. *See Human Rights Law (Parliamentary Scrutiny) Act 2011* (Cth) (Austl.)*;* Williams & Burton, *supra* note 51, at 71–72, 78–79. The Parliamentary Scrutiny Act defined human rights according to definitions in the international human rights laws, to which Australia is party, rather than expressly defining a list of included rights like the Vic Charter and the ACT HRA. Williams & Burton, *supra* note 51, at 71–72. The Parliamentary Scrutiny Act does nothing to address the volume of legislative proposals addressed by Parliament that renders Parliament vulnerable to ignoring minority rights and abrogating human rights in emergencies. Further, Parliament's three yearly reelections remains insufficient to politically correct for unjust legislating. *Id.* at 58; Meagher, *supra* note 49, at 70–71 (detailing the introduction of the Parliamentary Scrutiny Act and the key recommendations from the 2008 Brennan Committee).

192. Williams & Burton, *supra* note 51, at 63, 89.

193. *Id.* at 62.

194. Australia's representative parliament is not truly majoritarian, since elected leaders represent Australian voters' interest in the legislative process. The favorability of incumbent representatives during elections compounds the likelihood that minority rights will be overlooked once will become perpetually overlooked, which other liberal democracies such as the United States and Canada correct through an entrenched bills of rights. Arenson, *supra* note 32, at 33–34.

the process of popular democracy.[195] However, a majority group's rights to freedom of conscience and expression cannot lawfully or ethically eclipse minorities' rights to equality and freedom from harmful and discriminatory hate speech.[196] Evidence of persisting Australian racism and Indigenous disadvantage illustrate the dangers inherent in politically-driven rights protections; minority groups' inalienable rights to equality and nondiscrimination are easily threatened by the will of the majority when, for example, that majority votes for freer speech to express its bigotry. Without an entrenched bill of rights or a comprehensive federal human rights law insulating human rights from these kinds of swift and significant shifts in majoritarian politicking, countermajoritarian minorities' rights suffer.[197]

When governments leave rights protection wholly to the political process of electing legislators who codify rights through laws, they risk the tyranny of the majority becoming abusive toward minority rights. Under its current human rights framework, the few federal laws codifying Australia's nonderogable human rights obligations have become precariously vulnerable to dissolution.[198] When juxtaposed with the grave injustices the Australian government has imposed on Indigenous peoples, the contours of Australia's parliamentary supremacy demonstrate the dangers of relying on majoritarian democracy as an exclusive means for protecting universal human rights.[199] As the NHRCC concluded, an expanded rather than a restricted legal framework would provide better protections for Australia's countermajoritarian minorities—especially Indigenous Australians.[200] The Australian "Bill of Rights Debate" continues to reemerge because for many Australians, especially Indigenous Australians, human rights violations are the norm

195. *See, e.g.*, Boyle & Shah, *supra* note 17, at 217, 219.

196. Free speech is an implied constitutional right. Parliament can affirmatively promote free speech, but should not remove protections from hate speech. Iskander, *supra* note 55, at 19.

197. Arenson, *supra* note 32, at 31.

198. *Racial Discrimination Act: The Two Minute Version*, *supra* note 10.

199. *See* Arenson, *supra* note 32, at 31.

200. *See* Hoiberg, *supra* note 46, at 1; Arenson, *supra* note 32, at 29.

and not the exception, and because addressing these violations will require expansive legal protections.[201]

B. Expanding the Australian Human Rights Framework, Beginning with the RDA

Discriminatory discourse fuels violence and abuses human rights, and should be prohibited through antidiscrimination and racial vilification laws.[202] These legal protections do not encroach upon the equally fundamental human right to freedom of expression.[203] Rather than impermissibly limiting the freedom of consciousness or belief in the *forum internum*, antidiscrimination laws target racial vilification occurring in the *forum externum*, or that which is outwardly expressed, since the violence it promulgates improperly encroaches on others' human rights to equality and freedom from discrimination.[204]

Notwithstanding the legality and importance of the RDA, Australia's recently repeated proposals to repeal several of its key provisions jeopardize one of the few racial discrimination protections available to Indigenous Australians, and subvert Australia's commitment to closing the gap on Indigenous disadvantage. In the absence of entrenched human rights, the RDA stands as an essential measure for protecting Indigenous Australians' rights to equality and freedom from discrimination. Given Australia's history of oppression, the evidence that hate speech fuels discrimination and violence, and the evidence that human rights laws work to protect rights, any proposed

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201. Australian Parliament has the capacity to protect human rights, but when

> dominated by majoritarian interests, powerful special interest groups, and party politics[,] [t]his can mean that Parliament is unlikely or unwilling to protect the rights of unpopular minorities or those who lack political power. These weaknesses can become particularly pronounced when one political party holds majority in both houses. In such cases, the government can usually have problematic legislation enacted with little resistance.

Arenson, *supra* note 32, at 54 and 93; *see also* Williams, *supra* note 35, at 5–6.

202. Amnesty Int'l Austl., *supra* note 23, at 1; *see supra* note 65.

203. *See supra* note 24.

204. *Id.*

restrictions to the RDA should be abandoned in favor of the RDA's expansion.[205]

While racial vilification laws like the RDA are only one method for promoting Indigenous Australians' human rights to equality and freedom from discrimination, they "represent an important recognition by the state that acts of racial vilification inflict real and serious harm upon its victims, and left unchecked, have the capacity to undercut the vibrant but fragile multicultural community that has developed in Australia."[206] Accordingly, when Attorney-General George Brandis and others propose to repeal RDA provisions for freer speech in Australia and to better protect the rights of so-called "Team Australia," they confuse the issue of whose rights need protecting.[207] The non-Indigenous Australian majority has never struggled to enjoy their human rights, as their majority vote in the democratic process ensured the adequate protection of those rights without the need for a bill of rights or federal human rights act. However, to protect the universality and indivisibility of human rights for everyone, including and especially Indigenous Australians, "the rights of minorities must take precedent over the right of the electorate to impose its will in the form of ordinary legislation."[208] Legislation like the FSB does not aim to promote freer speech for all; it promotes hate speech against minorities. While Australia's international and national human rights obligations provide for the human right to freedom of expression, Australia may (and, arguably, must) proportionally restrict that freedom to "serve overriding government objections such as the prevention of violence."[209]

Since hate speech and racial vilification incite violence, and because Australian racism has promulgated acute violence against Indigenous Australians in particular, Australia should not let the tyranny of its majority voters remove key RDA pro-

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205. Williams, *supra* note 35, at 6–12.

206. Racial vilification laws are one method for promoting nondiscrimination and equality through government policy; community education in school and among the general public, as well as affirmative action also aim to prevent and redress the very real harms caused by racist words and conduct. Meagher, *supra* note 49, at 225–26, 251.

207. "Team Australia" was coined by former Prime Minister Tony Abbott. *See* Griffiths, *supra* note 19.

208. Arenson, *supra* note 32, at 31.

209. *Id.* at 45–46.

visions essential to minorities' rights to equality and freedom from discrimination. The RDA has given rise to an increasing number of antidiscrimination actions for minority groups and individuals, providing meaningful recourse for those harmed by racial vilification.[210] Indigenous Australians in particular have won several landmark antidiscrimination claims relating to issues of native land-title.[211] The RDA's protections are not and should not be the sole measures through which Australia works to end discrimination and create racial justice—a goal requiring increased public education and non-legal, grassroots movements for social change—but these victories illustrate how the RDA is an important step toward meeting Australia's obligations to protect human rights for all.[212]

Rather than repealing these protections, the Commonwealth could instead consider several options to augment and improve the RDA. First, critical legal and sociological theory has expanded enormously since the RDA's 1975 introduction, and the RDA has been sparsely reviewed or updated to reflect changes in sociological and legal antidiscrimination theory.[213] Antidiscrimination theory has expanded beyond a focus on overcoming disadvantage, to challenging privileged groups to recognize and own up to their supremacy, privilege, and power—allowing them "to recognize disadvantage as something distinct from their own experience."[214] Antidiscrimination theory also recognizes nuanced diversity between and within minority groups not currently accounted for by the RDA's construct of "race," which treats minority groups as homogenous, unified entities.[215] Moreover, the RDA does not currently address issues of indirect discrimination, which, since the RDA's passage, has been recognized by the U.S. Supreme Court in *Griggs v. Duke*

210. Gaze, *supra* note 77, at 9.

211. For an overview of landmark cases under the RDA, see *Guide to the Law – Landmark Cases Under the Racial Discrimination Act 1975,* AUSTL. HUM. RTS. COMMISSION, https://www.humanrights.gov.au/guide-law-landmark-cases-under-racial-discrimination-act-1975 (last visited Jan. 22, 2015).

212. Gaze, *supra* note 77, at 17.

213. *Id.* at 4.

214. *Id.*

215. *Id.*

Power Co. and by the U.K. Parliament in the Sex Discrimination Act 1975 and Race Relations Act 1976.[216]

Second, although Australia's antidiscrimination laws have achieved much for the advancement of the rights of women and people with disabilities, the RDA's capacity to curb racial discrimination has not been fully realized, particularly for Indigenous people.[217] Studies show that RDA racial discrimination cases have low rates of compensation and conciliation.[218] To increase access to justice, Australia should either mitigate or remove the economic barriers preventing Indigenous complainants from bringing actions successfully.[219] Moreover, Australia's federal bench comprises almost all white justices, who appear to regard themselves as racially neutral, but who also appear unwilling or unable to recognize racial discrimination unless it is severe or overt.[220] Especially when evaluating RDA claims brought by Indigenous people, these "racially neutral" judges "must take account of the experience of the disadvantaged."[221] Procedurally, the RDA should account for the dangers of "race neutrality" and the economic barriers to justice faced by many minorities, especially including Indigenous Australians.

Third, the haste with which Australia passed the NTER, and the rights abuses that followed, exemplify how the RDA's exceptions and "special measures" for permissible discrimination are too expansive.[222] Parliament reinstated the RDA in the NT, but exempted the highly discriminatory nature of the NTER

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216. *Id.* at 8. Employee plaintiffs in *Griggs* sought review from the U.S. Supreme Court of a lower court decision that their employer's requirements of a general intelligence test or high school diploma did not amount to covert discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e. *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). The Court held for the employees, finding that the Act "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431.

217. Gaze, *supra* note 77, at 22 ("[T]he major achievements of the RDA [for Indigenous Australians] are the opening up of native title . . . and to some extent the area of racial vilification.").

218. *Id.* at 10. Litigants have been discouraged from bringing RDA complaints because federal courts generally award litigation costs against the losing party, and damage awards are relatively low. *Id.*

219. *Id.*

220. *Id.* at 22.

221. *Id.*

222. Amnesty Int'l Austl., *supra* note 116, at 15.

through the RDA "special measures" clause.[223] In effect, Indigenous Australians in the NT continue to be the target of highly discriminatory federal policy infringing on their rights to self-determination, land rights, equality, and nondiscrimination.[224] The RDA "special measures" provision should encompass an exception that is limited in scope, which prevents allowing pretextual and abusive policies through Parliament.[225]

Finally, Australia could also amend several specific provisions of the RDA, since after many years of jurisprudence indeterminacy in statutory interpretation still persists.[226] For example, the Commonwealth could seek bipartisan support in clarifying RDA terms for courts such as "good faith," "unreasonable," "offend," and "insult."[227] Many key provisions of the RDA would improve from greater precision and clarity, which could allay opponents' criticisms that the RDA is overly broad, invites too much judicial legislating in statutory interpretation, and unnecessarily chills or impacts permissible speech.[228] Rather than removing key provisions from the RDA, proponents and opponents could compromise through clarifying legislative definitions that also clarify parliamentary intent.[229] Accordingly, Parliament could "incorporate the notion of racial hatred into the harm threshold" based on a classic defamation standard, to alleviate concerns that citizens and judges misunderstand the scope of racial vilification.[230] If necessary, less egregious racial vilification could remain "unregulated" by clearer statutory definitions, since the less serious the harm caused, the more subjective the notion of whether harm occurred be-

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223. *Id.*

224. *Id.*

225. Meagher, *supra* note 49, at 241, 253 (critiquing the RDA's free speech defenses as overly board). *See also* Amnesty Int'l Austl., *supra* note 116, at 15.

226. Meagher, *supra* note 49, at 251.

227. Joseph, *supra* note 155, at 229 (arguing that Parliament should narrow the RDA section 18c provisions for "offence" and "insult").

228. For example, the RDA's current provisions invite court subjectivity regarding what constitutes offensive or insulting speech, and how to define when such speech is made in good versus bad faith. As discussed earlier in this Note, many Australians challenge the constitutionality of transferring too much interpretive power to the judiciary, which is less democratically representative of Australia's majority. Meagher, *supra* note 49, at 227–28.

229. *Id.*

230. *Id.* at 252.

comes.[231] Furthermore, Australia could expand the definition of vilification to more clearly include religion in its prohibitions of direct and indirect vilification.[232] While these suggested improvements to the RDA are not exhaustive, they illustrate several options to expand and improve rather than restrict this key human rights law.

CONCLUSION

Human rights are an indivisible package for all, including for minorities and for Aboriginal and Torres Strait Islander peoples. In order to comply with its international and domestic obligations to protect and increase Indigenous peoples' rights, Australia must respect, protect, and fulfill all their human rights—not just those rights prioritized by Australia's majority.[233] Antidiscrimination laws are not only designed to protect individuals' rights to access goods and services of a public nature—they are designed to respect, protect, and fulfill the universal bundle of human rights central to human dignity, arising from the very essence of peoples' humanity.[234]

Overcoming Indigenous disadvantage and Australian racism will prove a multigenerational challenge, requiring concerted social and policy reform led and informed by immediate stakeholders.[235] In the immediate term, Australia's human rights legal framework should be expanded, or at the very least be preserved. Recent proposals to strip away the few antidiscrimination provisions available to Indigenous Australians by repealing RDA provisions illustrates the limitations of an abusive majority that democratically undervalues the universality of human rights. The RDA controversy in light of

> [t]he experience of Indigenous Australians is a warning against a lackadaisical approach to a right of equality. If the suffering of Indigenous Australians can prompt the creation of entrenched rights against discrimination, and for equality, then those rights will be for the protection of everyone . . . The average Australian, not just politicians, judges, lawyers and

231. *Id.*
232. Gaze, *supra* note 77, at 21.
233. Amnesty Int'l Austl., *supra* note 116, at 15.
234. O'Neill, *supra* note 24, at 3.
235. *See generally* DEP'T OF THE CHIEF MINISTER, *supra* note 140.

> human rights activists, must feel the urgent need for a right to equality.[236]

Accordingly, Australia should improve and expand the RDA rather than restrict it by revisiting earlier proposals for a federal or constitutionally entrenched human rights law.[237] With more comprehensive human rights protections in place, Australia would better meet its obligations to protect the human rights of Indigenous Australians and all minorities, and of all the individuals under its jurisdiction.

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236. Legg, *supra* note 63, at 43.

237. *Id.*

* B.A., summa cum laude, The George Washington University (2009); J.D., Brooklyn Law School (Expected 2016). For Zac, whose enduring commitment to fighting for social justice, and whose unfailing belief in the possibility of social change, inspire me every day. I am forever grateful to you for raising my social consciousness, and for selflessly supporting me throughout this journey. Your love and partnership have helped me become a truer and better me. Thank you. And thank you, our endlessly generous families, for making all of this possible. Thanks also to Professor Samuel Murumba for inspiring my Note topic and discussing my early draft, and to my law school and Journal colleagues for collaborating with me, challenging me, and teaching me. All errors or omissions are my own.