Protecting Religious Speech as Expressive Conduct in the Constitutions of Australia, United States, and India

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This article explores the protection of religious expressive conduct in the constitutions of Australia, the United States, and India. It contains four parts. The first examines the protection for religious free exercise or freedom of religion or belief. The second examines the protection of free speech which, when combined with the guarantee for free exercise, extends to cover religious expressive conduct. The third part considers the standards used in each jurisdiction for analyzing claimed violations of religious expressive conduct, so as to allow for a balance between the individual freedom and the community interest in being protected against individual excesses in the name of free exercise. The final part concludes with some brief comparative reflections on the approach taken by these three jurisdictions to the constitutional protection of religious expressive conduct.

INTRODUCTION

One of the difficulties associated with the free exercise of religion is determining the point at which freedom of conscience and belief moves from the internal forum, where it must be unlimited, into the external forum, where individuals seek to take action in the public sphere in pursuit of religiously held beliefs or views. Justice Owen Roberts wrote in *Cantwell v Connecticut* that "[f]ree [e]xercise…embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be."[1] Often associated with both freedom of conscience or belief and free exercise is the use of language, communication, or speech in order to further or give effect to religious objectives. The written constitutions of many western liberal states contain protection for freedom of conscience or belief, and typically also for speech of most kinds, including religious speech. But what about the borderland between speech and conduct that goes beyond "mere" speech? When does belief cross from the absolute internal forum to the external forum, of action, where it cannot be absolute? More importantly, though, can the speech that occurs in that borderland be protected as speech without the necessity of triggering any protection which might flow to full-fledged free exercise?

The borderland may be far less defined than we might otherwise think. Indeed, it may very well be the case that nothing like "mere"

1. Cantwell v. Connecticut, 310 U.S. 296, 303–4 (1940) (Roberts, J.).

speech even exits. Instead, speech may simply be another form of conduct. The philosopher J.L. Austin famously entitled his ground-breaking William James Lectures at Harvard University in 1955 "How to Do Things with Words",[2] by which was meant that "when we use language, we don't just communicate information or say things about how the world is; when we use language, we *do* things. We command, request, apologize, contract, convey, and admonish." In short, when we use speech, we use "language (both oral and written)…to perform actions."[3]

The constitutional protection of fundamental freedoms in most states typically views speech, especially when making a determination as to whether it can be protected pursuant to a right to free speech, the same way. In casting its net, it seems that most constitutional democracies see very little speech as merely speech alone; rather, when used in its constitutional sense, speech seems to be a form of conduct. Thus:

> If it is oral, it may be noisy enough to be disturbing, and, if it is written, it may be litter . . . Moving beyond these simple examples, one may see as well that conduct may have a communicative content, intended to express a point of view. Expressive conduct may consist in flying a particular flag as a symbol or in refusing to salute a flag as a symbol. Sit-ins and stand-ins may effectively express a protest about certain things.[4]

In the case of speech motivated by religious belief, it may be that in moving beyond the purely internal forum—belief alone with nothing more—one is already moving into what we call here "religious expressive conduct," a form of speech motivated by religious belief, but something less than what we might otherwise think of in relation to free exercise of religion. Do the protections for speech found in most constitutional democracies protect this religious expressive conduct as well? Put another way, do those protections extend to religiously motivated speech that crosses into conduct? We conclude in this article that such protections do extend that far, and we demonstrate how that is so through an assessment of three major constitutional liberal democracies: Australia, the United States, and India.

Why does it matter? The importance of protecting religious expressive conduct takes on increased significance in the face of potential restrictions on communal public worship that go beyond mere personal

2. *J.L. AUSTIN*, *HOW TO DO THINGS WITH WORDS:* THE WILLIAM JAMES *LECTURES* (J.O. Urmson ed., 1962).

3. Lawrence Solum, *Legal Theory Lexicon: Speech Acts*, LEGAL THEORY BLOG (July 4, 2021), https://lsolum.typepad.com/legaltheory/2021/07/legal-theory-lexicon-speech-acts.html.

4. CONG. RSCH. SERV, LIBR. OF CONG., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION – ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES 1183–4 (Johnny H. Killian & George A. Costello eds., 1992) (footnotes omitted).

prayer, such as when a believer attends a place of worship to join with others in worship at significant times, such as Friday for Islam, Saturday for Judaism, or Sunday for Christianity, to name only the monotheistic traditions.[5] In 2020, limitations of the kind that might restrict or limit religious expressive conduct took effect in most nations as the COVID-19 pandemic spread across the world. Governments implemented restrictions on a range of communal activities, including public religious worship. Just a few examples demonstrate the scope of the early steps taken by governments to combat the public health emergency. In Australia, every State and Territory imposed rules for public gatherings involving worship.[6] Similarly, in the United States, many individual States imposed restrictions of one form or another. In California, the governor declared a state of emergency on March 4, 2020, and two weeks later, on March 19, issued an executive order requiring residents to follow state public health directives, with no exception for public communal worship.[7] And in India, on March 16 2020, Delhi introduced a ban on gatherings of 50 or more people, which was followed by a nationwide lockdown implemented on March 24.[8]

But as the words of Justice Roberts quoted above make clear, free exercise cannot be absolute in the sense that all such restrictions placed on worship must necessarily fail for violating constitutional protections. The sorts of restrictions placed upon individuals and religious organizations in order to control the spread of COVID-19 may serve a legitimate purpose and, if they do, religious expressive conduct and free exercise must give way. Assuming, then, that we can conclude that it is a protected form of speech, when does that right yield to the community interest? Again, as with the right itself, we conclude that religious expressive conduct can be restricted or limited for justifiable state reasons or

5. *See, e.g.,* Virginia Villa, *Most states have religious exemptions to COVID-19 social distancing rules*, PEW RSCH. CTR. (Apr.27, 2020), https://www.pewresearch.org/fact-tank/2020/04/27/most-states-have-religious-exemptions-to-covid-19-social-distancing-rules/.

6. AUSTL. GOV'T DEP'T OF HEALTH, LIMITS ON PUBLIC GATHERINGS FOR CORONAVIRUS (COVID-19) (Australian Government Edition), https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/how-to-protect-yourself-and-others-from-coronavirus-covid-19/limits-on-public-gatherings-for-coronavirus-covid-19 (last updated Aug. 4, 2022).

7. Danielle N. Boaz, *Between "Essential Services" and Culpable Homicide: State Responses to Religious Organizations and the Spread of the Novel Coronavirus in 2020*, 8 J. OF L., RELIGION & STATE 129, 143 (2020); *see also* Christina H. Eikhoff et al., *Litigation Advisory: Constitutional Challenges to Pandemic Restrictions*, ALSTON & BIRD (Sept. 22, 2020), https://www.alston.com/en/insights/publications/2020/09/constitutional-challenges-to-pandemic/; Brian J. Buchanan, *Covid-19 and the First Amendment: A Running Report*, THE FREE SPEECH CTR. (Feb. 5, 2021), https://www.mtsu.edu/first-amendment/post/613/covid-19-and-the-first-amendment-a-running-report-jan-26.

8. Boaz, *supra* note 7.

concerns; and, as with the right, we show this through an assessment of the constitutions of Australia, the United States, and India.

The article contains four parts. Because the right to religious expressive conduct must be founded in the protection for free exercise of religion, we begin, first, with a brief assessment of the protection for that wider right in each jurisdiction. We begin with Australia as an example of a constitution which provides a narrow protection for freedom of religion or belief. This is contrasted with the constitutions of the United States and India, both of which provide robust protection for free exercise of religion. The second part explores the nature of free speech which, when combined with the protection for free exercise, can provide scope for religious expressive conduct as a protected form of speech. While Australia has not yet directly recognized a protection for this form of speech, we argue that such protection is inherent in its current constitutional protection for political communication. More importantly, both the United States and India provide models for the way in which the interest in religious expressive conduct is already expressly recognized. The third part considers the importance of setting a standard for assessing whether state infringements of religious expressive conduct may nonetheless survive constitutional scrutiny as being justifiable limitations imposed in furtherance of important state objectives. Each of the jurisdictions we consider provides well-developed standards for use by the courts in assessing claimed violations of religious expressive conduct. The final part concludes with some brief comparative reflections on the approach taken to balancing the individual interest in religious expressive conduct with the wider community interest to be free from individual excesses in the exercise of the right and to further legitimate state objectives, such as occurred at the height of the COVID-19 pandemic.

I. FREE EXERCISE

The constitutional protection of religious expressive conduct involves an interplay between the rights of free exercise and free speech. Each of the constitutions we examine in this article contain protection for both freedoms. And so it seems obvious that the best way to protect free exercise would be through constitutional protection for that right. Yet, first impressions can be misleading. The difficulty arises with respect to conduct that is predicated upon, or motivated by religious belief. As we noted above, while belief, by its very nature, cannot be regulated, conduct motivated by that freedom may give rise to a legitimate state interest in regulating action. This is known as the belief-conduct distinction.[9] The protection of free exercise, then, may be limited, restricted, or narrowed, both in terms of what it protects, and in the way

9. CONG. RSCH. SERV., LIBR. OF CONG., *supra* note 4, at 1007.

in which it may justifiably be limited by state action. In this Part, we briefly explore the protection for free exercise, and potential limitations in the scope of those protections, in each of Australia, the United States, and India, before turning in Part II to our main concern: the protection of religious expressive conduct.

A. Australia: Section 116

While the Australian Constitution lacks a comprehensive bill or charter of rights, among the five expressly enumerated rights scattered throughout the text,[10] one, section 116, protects free exercise:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.[11]

The language of section 116 contains four guarantees, including free exercise. Two limitations, however, hamper the effectiveness of this protection. First, lacking anything like the Fourteenth Amendment incorporation found in U.S. free exercise jurisprudence, section 116 applies only to the Commonwealth (or federal) government. This means that section 116 provides no protection at all against State prohibitions on free exercise.[12] Second, Australia's final appellate court, the High Court (the functional equivalent of the Supreme Court of the United States and of the Supreme Court of India), while providing a broad definition of religion,[13] has interpreted free exercise very narrowly,[14] in two ways: (i) the protection is "not, in form, a constitutional guarantee of the rights of individuals; . . . instead[, it] takes the form of express restriction upon the exercise of Commonwealth legislative power"[15] "and no more",[16]

10. AUSTRALIAN CONSTITUTION § 51 (against takings of property without just terms compensation), § 80 (for trial by jury on indictment for an offence against any law of the Commonwealth), § 92 (protecting freedom of trade, commerce, and intercourse within the Commonwealth), § 116 (freedom of religion), and § 117 (freedom from discrimination by one state against the residents of another).

11. AUSTRALIAN CONSTITUTION § 116.

12. JOHN QUICK & ROBERT RANDOLPH GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 1162 (rev. ed., 2015).

13. *See* Church of the New Faith v. Commissioner of Pay-roll Tax (Vict.) (1983) 154 CLR 120 (Austl.).

14. The High Court has interpreted free exercise only three times. *See* Krygger v. Williams (1912) 15 CLR 366 (Austl.); Adelaide Co of Jehovah's Witnesses v. Commonwealth (1943) 67 CLR 116 (Austl.); Kruger v. Commonwealth (1997) 190 CLR 1 (Austl.).

15. Att'y-Gen (Vict); ex rel Black v. Commonwealth (1981) 146 CLR 559, 605 (Austl.) (Stephen, J.).

16. *Id.* at 653 (Wilson, J.).

and, (ii) as Chief Justice Griffith wrote in *Krygger v Williams*, its scope applies only to:

> [T]he practice of religion—the doing of acts which are done in the practice of religion. To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec. 116….[17]

Thus, only laws that take as their express purpose the prohibition of free exercise,[18] and not neutral laws of general application, have the effect of infringing free exercise and so contravene the guarantee. Accordingly, free exercise, as found in section 116, is limited "to the internal forum, with no relevance to public acts;"[19] the protection for belief is full, that for conduct almost non-existent. One finds proof of this in one simple fact: no Australian law has ever been invalidated on the basis that it violated the free exercise guarantee of section 116.[20]

B. United States: First Amendment

The language of section 116 of the Australian Constitution is very similar to that found in the First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[21]

The similarity is for good reason. The framers of the Australian Constitution were admirers of the American Constitution. Andrew Inglis Clark, the most influential of the framers:

> profoundly admired American institutions from his youth . . . He was a federalist, as in more or less vague sense [the framers] all were; . . . he had closely studied, in scholarly literature and in the judgments of

17. Krygger v. Williams (1912) 15 CLR 366, 369 (Austl.) (Griffith, C.J.).

18. Adelaide Co of Jehovah's Witnesses Inc. v. Commonwealth (1943) 67 CLR 116, 132 (Austl.) (Latham, C.J.); Kruger v. Commonwealth (1997) 190 CLR 1, 61–2 (Austl.) (Dawson, J.), 130 (Gaudron, J.), 153 (Gummow, J.).

19. Michael Hogan, *Separation of Church and State: Section 116 of the Australian Constitution*, 53 AUSTL. Q. 214, 220 (1981); *see also* Anthony Gray, *Section 116 of the Australian Constitution and Dress Restrictions*, 16 DEAKIN L. REV. 293, 316 (2011).

20. *See* Paul Babie & Neville Rochow, *Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom*, 2010 BYU L. REV. 821 (2010).

21. U.S. CONST. amend. I.

> the United States Supreme Court, the growth and operation of the Constitution of the greatest of all federations.[22]

Drafting their constitution in the late nineteenth century, the Australian framers drew heavily on almost a century of American experience with the Bill of Rights, including free exercise as found in the First Amendment. Given the length and breadth of the American experience,[23] we might expect a strong bulwark against state intrusion—both federal[24] and, by way of Fourteenth Amendment incorporation,[25] State[26]—into both belief and, more importantly, religiously motivated conduct. An examination of the Supreme Court's application of the free exercise clause, however, reveals a remarkably narrow protection.

While the Supreme Court has never given a full definition of the meaning of "religion" for this purpose,[27] analysis of purported infringements of the free exercise clause begins with a determination that federal or State action has infringed either religious belief or religiously motivated conduct.[28] Provided, though, that it can be shown that religious belief or conduct is constrained, the analysis turns to whether there has been a burden, either direct or indirect, placed upon the belief or conduct.[29] As we have seen, belief is absolutely protected against any government action. The Supreme Court enunciated this position in *Reynolds*,[30] and has consistently restated it since.[31] What about religiously motivated conduct?

As we suggested above, the extensive experience with the free exercise clause leads to the assumption that governmental interference

22. J.A. LA NAUZE, THE MAKING OF THE AUSTRALIAN CONSTITUTION 13 (1972). *See also* RICHARD ELY, UNTO GOD AND CAESAR: RELIGIOUS ISSUES IN THE EMERGING COMMONWEALTH 1891–1906 (1976).

23. *See* JACK N. RAKOVE, BEYOND BELIEF, BEYOND CONSCIENCE: THE RADICAL SIGNIFICANCE OF THE FREE EXERCISE OF RELIGION (2020); HOWARD GILLMAN & ERWIN CHEMERINSKY, THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE (2020).

24. *See* Reynolds v. United States, 98 U.S. 145 (1878).

25. *See* Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 MD. L. REV. 309 (2017).

26. Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 OR. L. REV. 563, 570 (2006).

27. JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 341 (1986).

28. Russell W. Galloway, *Basic Free Exercise Clause Analysis*, 29 SANTA CLARA L. REV. 865, 869 (1989); *see also* Frasee v. Ill. Dep't of Emp. Sec., 489 U.S. 829 (1989).

29. Galloway, *supra* note 28, at 870–71.

30. *See* Reynolds v. United States, 98 U.S. 145 (1878).

31. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940); Braunfeld v. Brown, 366 U.S. 599 (1961); Sherbert v. Verner, 374 U.S. 398 (1963); Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 485 U.S. 660 (1988); *see also* GILLMAN & CHEMERINSKY, *supra* note 23, at 98–102; RAKOVE, *supra* note 23, at 137–41; Galloway, *supra* note 28, at 872.

with religiously motivated conduct might have a wide scope of protection. That assumption proves incorrect. In fact, the American jurisprudence is analogous to that found in Australia. Over the course of its history, the Supreme Court has approached neutral laws of general application in two ways. The first, which emerged in the early 1960s, largely with *Braunfeld v. Brown*, falls under the banner of "compelling state interest", which gave rise to a two-prong means-end strict scrutiny standard pursuant to which "the government must first prove that its conduct furthers a compelling interest, that is, that the conduct was undertaken for a purpose that is compelling (very important) and that the conduct comprises a substantially effective method for furthering that interest."[32] The government must then prove that its action was necessary, in the sense that it was the least onerous available alternative to achieve its objective.[33] Applying free exercise this way, exemptions are carved out in respect of neutral laws of general application. Some laws nonetheless survive this strict scrutiny,[34] including Sunday closing laws,[35] tax exemption laws,[36] uniform military dress requirements,[37] prison work regulations,[38] and the use of social security numbers in the distribution of food stamps.[39]

The second approach emerged from one of the Supreme Court's most controversial free exercise decisions: *Employment Division v. Smith*, which jettisoned the *Braunfeld* approach entirely. Justice Scalia wrote that "if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[40] Thus, in *Smith*, unemployment benefits were constitutionally denied to Native Americans fired from their jobs "as a result of 'misconduct' . . . involving action that violated the state's criminal anti-drug statutes."[41] Redolent of Chief Justice Griffith's judgment in *Krygger*, *Smith* meant that neutral laws of general application admit of no exemptions for free exercise concerns; to hold otherwise would "provide a wide range of *ad hoc* religious

32. Galloway, *supra* note 28, at 873–74.

33. *Id.*

34. GILLMAN & CHEMERINSKY, *supra* note 23, at 102–13; RAKOVE, *supra* note 23, at 141–62.

35. Braunfeld v. Brown, 366 U.S. 599 (1961).

36. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

37. Goldman v. Weinberger, 475 U.S. 503 (1986).

38. O'Lone v. Est. of Shabazz, 482 U.S. 342 (1987).

39. Bowen v. Roy, 476 U.S. 693 (1986).

40. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878 (Scalia, J.) (1990). *See* GILLMAN & CHEMERINSKY, *supra* note 23, at 113–20.

41. GILLMAN & CHEMERINSKY, *supra* note 23, at 113.

exemptions to a wide range of laws and regulations."[42] Gillman & Chemerinsky write that:

> *Smith* brought an end to the Court's 27-year experiment in extending greater protections to religious practitioners even when government action did not seem motivated by animus. Although the majority might have felt relief with not having to weigh or assess religious interests versus government interests, not everyone was happy with the Court's decision to set aside strict scrutiny in these cases.[43]

In response, in an attempt to restore something like the *Braunfeld* strict scrutiny standard, Congress enacted the Religious Freedom Restoration Act (RFRA). While a great deal of complexity now surrounds the standard applicable in the federal and state environments, that is beyond the scope of this article.[44] For present purposes, our concern is simply this: while the Free Exercise Clause appears to provide wide protection, in practice, that protection is widest in respect of belief, and narrows considerably as belief moves from the internal forum to become conduct in the external forum. The assumption, then—that US free exercise jurisprudence provides a wide protection in a way not found in Australian law—proves unfounded.

C. India: Articles 25-28

Part III of the Indian Constitution comprises a "bill of rights" containing comprehensive protection for rights,[45] including Articles 25–28 which, when taken together, protect freedom of religion or belief.[46] To understand the operation of these provisions, it is first necessary to consider Indian state secularism. While not mentioned anywhere outside the Preamble, it is understood that the guarantee against discrimination on the basis of religion in Article 15, combined with the free exercise protections, ensures that the state maintain a position of neutrality with respect to religion; it is this neutrality which is meant by the Indian maintenance of a secular state.[47] The Supreme Court of India confirmed this understanding of secularity in 1973 in *Kesavananda Bharati v. State of Kerala*,[48] and again, in 1975, in *Gandhi v. Narain*, when the Court wrote that "[t]he State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess,

42. *Id.* at 115.
43. *Id.* at 118.
44. *Id.* at 118–20; RAKOVE, *supra* note 23, at 162–76.
45. India Const., Part III, "Fundamental Rights," [as on May, 2022].
46. India Const. art. 25–28, [as on May, 2022].
47. Paul T. Babie & Arvind P. Bhanu, *Freedom of Religion and Belief in India and Australia: An Introductory Comparative Assessment of Two Federal Constitutional Democracies*, 39 PACE L. REV. 1, 6–9 (2018).
48. Bharati v. State of Kerala (1973) 4 SCC 225 (India).

practice and propagate religion."[49] Thus, while the Indian Constitution contains no Establishment Clause such found in the First Amendment in the United States and section 116 in Australia, the Indian federal and state governments are prohibited from establishing a state religion.[50]

Balanced against official neutrality or secularism is the protection for free exercise. While Article 25 protects "the right freely to profess, practice and propagate religion", the right is expressly "subject to public order, morality and health and to the other provisions of this Part [III]",[51] and the state may also: "(a) regulat[e] or restrict[] any economic, financial, political or other secular activity which may be associated with religious practice; [and] (b) provid[e] for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."[52] Article 26 extends these protections, again subject to the same limitations, to religious denominations. Together, Article 25 protects the individual and Article 26 the group.

We saw earlier that the right to free exercise necessarily narrows or constricts the further one gets from conscience and the internal forum and moves into conduct and the external forum. In Australia and the United States, that conclusion is a theoretical one, with the courts in each jurisdiction spelling out the parameters of that narrowing. In the Indian Constitution, however, it is an express matter of the text itself that free exercise, both individual and collective, is not absolute.[53] Moreover, for the purposes of applying these provisions, the Indian Supreme Court has defined religion quite broadly, as:

> [A] matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else, but a…doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.[54]

Because the Indian federal and state governments must ensure neutrality—secularity—it is necessary that any encroachment by an individual

49. Indira Nehru Gandhi v. Raj Narain (1975) 2 SCC 159, 664 (Beg, J.) (India).
50. Babie & Bhanu, *supra* note 47, at 9–10.
51. INDIA CONST. art. 25(1), [as on May, 2022].
52. INDIA CONST. art. 25(2)(a) & (b), [as on May, 2022].
53. Babie & Bhanu, *supra* note 47, at 10–11.
54. Comm'r of Hindu Religious Endowments v. Swamiar, (1954) SCR 1005 (India).

or a group in furtherance of free exercise is a state concern and, as such, must be regulated. The practical effect of this is that every Indian citizen enjoys two rights simultaneously: free exercise and secularity (in the sense of being free from the free exercise of others).[55]

Regulating free exercise involves a judicially-crafted distinction between matters which are considered integral and essential to the practice of a religion and those which are merely incidental to it. Acts or conduct falling in the latter category may be the subject of federal or state law and so give way as falling within the state's interest in retaining secularity.[56] What is clear is that while the Indian position is very similar to the Australian and American in the sense that free exercise is not merely a matter of conscience of the internal forum but must extend to conduct or acts as well:

> if religious practices run counter to public order, morality, health, or a policy of social welfare upon which the state has embarked, such practices must give way. The good of citizens as a whole prevails in any instance of conflict between the principles of the State and those of a particular religion.[57]

In each of the jurisdictions we consider in this article, free exercise operates only within a wider state interest in ensuring that the right does not adversely affect others. This state interest manifests itself in limitations which may be placed upon free exercise. In Australia and the United States, the standards used for determining the scope of permissible limitations are judicially crafted, while in India, the basis of the state's interest is textually located, with judicial interpretation of the relevant language providing further amplification of how the state may act permissibly to restrain free exercise. The result is the same in each case: while conscience and belief is an absolute right, free exercise is not. More significantly, in each case, free exercise finds itself hampered in some way: in Australia, the fact that section 116 applies only to the federal and not to the State governments; in both Australia and the United States because the free exercise right has limited effect in the face of neutral laws of general application; and in India, due to the requirement that the state balance secularity against free exercise.

There may be another way, however, to extend the protection for free exercise to the external forum—to one's public acts of worship rather than merely the holding of faith as a personal matter of the internal forum—and to extend that protection to legislative and executive action

55. Babie & Bhanu, *supra* note 47, at 11.

56. *Id.* at 17–18 (2018); *see also* Comm'r of Police v. Avadhuta, (2004) 12 SCC 770 (India); Faruqui v. Union of India, (1994) 6 SCC 360 (India); Quareshi v. State of Bihar, (1959) SCR 629 (India).

57. Babie & Bhanu, *supra* note 47, at 16 (citing State of Bombay v. Mali, AIR 1952 BOM 84 (India)).

taken by both the federal and state governments in each jurisdiction, including in relation to neutral laws of general application. The solution lies in religious expressive conduct. We argue that because free exercise and free speech interact, and because both involve thought, speech, and conduct,[58] it is possible to use the existing protections found in each constitution to protect religious expressive conduct. We turn, then, to an analysis of the free speech protections found in each jurisdiction.

II. FREE SPEECH

Each of the constitutions we consider in this article contains a protection for freedom of speech or expression. The United States and Indian constitutions contain express terms protecting free speech, while the Australian protection comes in the form of an "implied" or "unenumerated" freedom of political communication. As one might expect, the latter protection is somewhat more limited than that found in the express terms of the former constitutions. For that reason, we begin with the Australian approach, using the more fully developed jurisprudence found in the United States and India as a model for filling gaps in the current Australian law. Building upon the argument developed in this Part, we conclude that robust protection for free exercise may come, paradoxically, through the protection of religious expressive conduct.

A. Australia: Implied Freedom of Political Communication

As we have seen, the Australian Constitution lacks an American-style Bill of Rights. Instead, what rights are protected are found scattered throughout the text of the Constitution.[59] The High Court, beginning in 1977, supplemented these few express provisions with rights "implied" as a consequence of the federal democratic framework established by the text of the Constitution.[60] Justice Murphy gave this rationale for rights found by implication:

> Elections of federal Parliament provided for in the Constitution require freedom of movement, speech and other communication, not only between the States, but in and between every part of the Commonwealth. The proper operation of the system of representative government requires the same freedoms between elections. These are also necessary for the proper operation of the Constitutions of the States . . . which now derive their authority from Ch. V of the Constitution. From these provisions and from the concept of the

58. GILLMAN & CHEMERINSKY, *supra* note 23, at x.

59. *See* Babie & Rochow, *supra* note 20, at 822.

60. *See* Russell L. Weaver & Kathe Boehringer, *Implied Rights and the Australian Constitution: A Modified* New York Times, Inc. v. Sullivan *Goes down Under*, 8 SETON HALL CONST. L.J. 459 (1997–1998); Adrienne Stone, *Australia's Constitutional Rights and the Problem of Interpretive Disagreement*, 27 SYDNEY L. REV. 29 (2005).

> Commonwealth arises an implication of a constitutional guarantee of such freedoms, freedoms so elementary that it was not necessary to mention them in the Constitution….[61]

Using this rationale, while it rejected the implication of a right to equality,[62] the High Court narrowly accepted a due process right,[63] and more broadly established two rights fundamental to democracy: a right to vote,[64] and the freedom of political communication (a somewhat limited form of free speech).[65]

Found in the entirety of the Constitution, the implied freedom of political communication prohibits[66] both Commonwealth and state infringement, thereby overcoming the flaw with section 116's limited application only to the federal government.[67] And while at least one justice has recently questioned its theoretical rationale,[68] the High Court has

61. Ansett Transp Indus (Operations) Pty Ltd v. Commonwealth (1977) 139 CLR 54, 88 (Austl.) (Murphy, J.) (citations omitted).

62. *See* Leeth v. Commonwealth (1992) 172 CLR 455 (Austl.); Kruger v. Commonwealth (1997) 190 CLR 1 (Austl.); *see also* Stone, *supra* note 60.

63. *See* Kable v. Dir of Public Prosecutions for NSW (1996) 189 CLR 51 (Austl.).

64. *See* Att'y-Gen (Cth); Ex rel McKinlay v. Commonwealth (1975) 135 CLR 1 (Austl.); R v. Pearson; Ex parte Sipka (1983) 152 CLR 254 (Austl.); Roach v. Electoral Comm'r (2007) CLR 162 (Austl.); Rowe v. Electoral Comm'r (2010) 243 CLR 1 (Austl.).

65. As established by Nationwide News Pty Ltd v. Wills (1992) 177 CLR 1 (Austl.); Austl Cap Television Pty Ltd v. Commonwealth (1992) 177 CLR 106 (Austl.); Lange v. Austl Broadcasting Corp (1997) 189 CLR 520 (Austl.); McCloy v. NSW (2015) 257 CLR 178 (Austl.); *see also* Brown v. Tasmania (2017) 261 CLR 328 (Austl.).

66. Comcare v. Banerji (2019) 267 CLR 373, 164–166 (Austl.) (Edelman J.).

67. *See, e.g.*, Austl Cap Television Pty Ltd v. Commonwealth (1992) 177 CLR 106, 120 (Austl.) (Mason C.J.); Attorney-General (SA) v. Corp of the City of Adelaide (2013) 249 CLR 1 (Austl.); Brown v. Tasmania (2017) 261 CLR 328 (Austl.); Clubb v Edwards; Preston v. Avery (2019) 267 CLR 171 (Austl.); McCloy v. NSW (2015) 257 CLR 178 (Austl.); Spence v. Queensland (2019) 268 CLR 355 (Austl.); Unions NSW v. NSW (2019) 264 CLR 595 (Austl.).

68. In LibertyWorks Inc v. Commonwealth of Austl (2021) HCA 18, 249 (Austl.), Steward, J. wrote: "[I]t is arguable that the implied freedom does not exist. It may not be sufficiently supported by the text, structure and context of the *Constitution* and, because of the continued division within this Court about the application of the doctrine of structured proportionality, it is still not yet settled law. The division within the Court over so important an issue may justify a reconsideration of the implication itself. In that respect, it is one thing to proclaim the necessity of a freedom of political discourse given the type of representative and responsible government created by the *Constitution*; it is another thing entirely to make an implication about when and how that freedom may be legitimately limited. The continued division in this Court about how that latter task is to be undertaken is telling. It may suggest that the implied freedom cannot be adequately defined. However, no party submitted that the implied freedom did not exist. In such circumstances, it is my current duty to continue to apply it faithfully. Any consideration of the existence of the implied freedom should, if necessary, be a matter for full argument on another occasion." While he applied the freedom to the facts of that case, more recently, in Farm Transparency Int'l Ltd v. NSW (2022) HCA 23, [270] (Austl.), Steward, J. questioned whether "the implied freedom of political communication may fetter the

consistently affirmed the existence of the implied freedom as a central component of the constitutional panoply of express and implied fundamental freedoms.[69] Assessing a purported infringement involves two steps, first, a determination of the scope of the right itself and whether the speech in question falls within that ambit and, second, if an infringement is found, a consideration as to whether that violation can be justified. In this Part we consider the first step; in Part III we examine the second.

1. *Political Communication*

Four decisions of the High Court—*Nationwide News Pty Ltd v. Wills*[70] and *Australian Capital Television v. Commonwealth*,[71] as modified by *Lange v. Australian Broadcasting Corporation*[72] and *Coleman v. Power*[73]—identify the "implication of freedom of communication of information and opinions about matters relating to the government of the Commonwealth."[74] What, then, qualifies as political communication, or "speech" pursuant to the implied freedom? While the jurisprudence is somewhat limited,[75] the High Court has held that political speech broadly includes communication on *all* political matters.[76] Thus, the

legislative power of a State," citing Anne Twomey, *The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws*, 35 U. N.S.W. L.J. 625, 626 (2012). *See also* Michelle Sharpe, *Constitutional law – Implied Freedom of Political Communication*, PROCTOR (Aug. 18, 2021), https://www.qlsproctor.com.au/2021/08/constitutional-law-implied-freedom-of-political-communication/#.

69. *See* Austl Cap Television Pty Ltd v. Commonwealth (1992) 177 CLR 106 (Austl.); Nationwide News Pty Ltd v. Wills (1992) 177 CLR 1 (Austl.); Theophanous v. Herald & Weekly Times Ltd (1994) 182 CLR 104 (Austl.); Stephens v. W Austl Newspapers Ltd (1994) 182 CLR 211 (Austl.); Lange v. Austl Broadcasting Corp (1997) 189 CLR 520 (Austl.); Coleman v. Power (2004) 220 CLR 1 (Austl.); APLA Ltd v. Legal Serv Comm'r (NSW) (2005) 224 CLR 322 (Austl.); Hogan v. Hinch (2011) 243 CLR 506 (Austl.); Unions NSW v. NSW (2019) 264 CLR 595 (Austl.); Brown v. Tasmania (2017) 261 CLR 328 (Austl.); Clubb v. Edwards; Preston v. Avery (2019) 267 CLR 171 (Austl.); McCloy v. NSW (2015) 257 CLR 178 (Austl.); Spence v. Queensland (2019) 268 CLR 355 (Austl.); Comcare v. Banerji (2019) 267 CLR 373 (Austl.); LibertyWorks Inc v. Commonwealth of Austl [2021] HCA 18, [249] (Austl.); Farm Transparency Int'l Ltd v. NSW [2022] HCA 23 (Austl.).

70. Nationwide News Pty Ltd v. Wills (1992) 177 CLR 1 (Austl.).

71. Austl Capl Television Pty Ltd v. Commonwealth (1992) 177 CLR 106 (Austl.).

72. Lange v. Austl Broadcasting Corp (1997) 189 CLR 520, 559-62 (Austl.) (Brennan, C.J., Dawson, Toohey, Gaudron, McHugh, Gummow & Kirby, JJ.) (citations omitted).

73. Coleman v. Power (2004) 220 CLR 1 (Austl.).

74. Nationwide News Pty Ltd v. Wills (1992) 177 CLR 1, 72–3 (Austl.) (Deane & Toohey, JJ.).

75. On the potential for expanding the freedom, *see* Mitchell Landrigan, *Voices in the Political Wilderness: Women in the Sydney Anglican Diocese*, 34 ALTERNATIVE L. J. 177 (2009).

76. *See* Austl Cap Television Pty Ltd v. Commonwealth (1992) 177 CLR 106 (Austl.); *see also* Nationwide News Pty Ltd v. Wills (1992) 177 CLR 1 (Austl.);

freedom might allow for some limitations to be placed upon the common law and statutory definitions of defamation,[77] and extend to commercial speech, although in both cases, there must be some political content.[78] Protected speech may also extend beyond the parameters of purely electoral considerations, such as speech in the form of protest and assembly concerning the protection of the environment,[79] against cruelty to animals,[80] and against abortion.[81]

2. *Religious Expression*

Can the implied freedom extend to protect religious expression?[82] The very nature of a plural society seems to consist of citizens holding a diversity of political opinions founded on differing beliefs, ethics, and values. Religion plays a vital role in this diversity and so such speech may also have an important role to play in a democratic society, albeit perhaps not always constructively. If the implication of the freedom draws upon the Constitution as a whole, then the express protection for free exercise found in section 116 would suggest that religious speech may fall within the scope of political communication. Thus, religious expression, too, may form part of the political communication protected by the freedom. Two decisions of the High Court provide support for this proposition. In *Attorney-General (SA) v. Corporation of the City of Adelaide* (the "*Street Preachers Case*"), the Court wrote, in *obiter dictum*, that:

> [S]ome "religious" speech may also be characterised as "political" communication for the purposes of the freedom . . . Plainly enough, preaching, canvassing, haranguing and the distribution of literature are all activities which may be undertaken in order to communicate

Theophanous v. Herald & Weekly Times Ltd (1994) 182 CLR 104 (Austl.); Stephens v. W Austr Newspapers Ltd. (1994) 182 CLR 211 (Austl.); Lange v. Austl Broadcasting Corp (1997) 189 CLR 520 (Austl.); APLA Ltd v. Legal Serv. Comm'r (NSW) (2005) 224 CLR 322 (Austl.); Hogan v. Hinch (2011) 243 CLR 506 (Austl.); Unions NSW v. NSW (2019) 264 CLR 595 (Austl.); Brown v. Tasmania (2017) 261 CLR 328 (Austl.); Clubb v. Edwards; Preston v. Avery (2019) 267 CLR 171 (Austl.); McCloy v. NSW (2015) 257 CLR 178 (Austl.); Spence v. Queensland (2019) 268 CLR 355 (Austl.); Comcare v. Banerji (2019) 267 CLR 373 (Austl.); LibertyWorks Inc v. Commonwealth of Austl [2021] HCA 18, 249 (Austl.); Farm Transparency Int'l Ltd v. NSW[2022] HCA 23 (Austl.).

77. Theophanous v. Herald & Weekly Times Ltd. (1994) 182 CLR 104 (Austl.).

78. *Id.*

79. Brown v. Tasmania (2017) 261 CLR 328, [11]–[99] (Austl.) (Kiefel, C.J., Bell & Keane, JJ.).

80. Farm Transparency Int'l Ltd v. NSW [2022] HCA 23 (Austl.).

81. Clubb v. Edwards; Preston v. Avery (2019) 267 CLR 171, 37, [118–119] (Austl.) (Kiefel, C.J., Bell & Keane, JJ.), [135–214] (Gageler, J.), [247–249] (Nettle, J.), [355] (Gordon, J.), [409–456] (Edelman, J.).

82. *See* Mitchell Landrigan, *Can the Implied Freedom of Political Discourse Apply to Speech by or About Religious Leaders?*, 34 ADEL. L. REV. 427 (2014).

> to members of the public matters which may be directly or indirectly relevant to politics or government at the Commonwealth level. The class of communication protected by the implied freedom in practical terms is wide.[83]

In *Clubb v. Edwards; Preston v. Avery* ("*Clubb and Preston*") while the Court concluded that "[a] discussion between individuals of the moral or ethical choices to be made by a particular individual is not to be equated with discussion of the political choices to be made by the people of the Commonwealth as the sovereign political authority" it conceded that "even where the choice to be made by a particular individual may be politically controversial"[84] "the line between speech for legislative or policy change and speech directed at an individual's moral choice 'may be very fine where politically contentious issues are being discussed.'"[85] The Court therefore seemingly left open the possibility that speech concerning moral and ethical choices may, in some circumstances, gain the protection of the implied freedom. This, in turn, may mean that when taken together, the *Street Preachers Case* and *Clubb and Preston* leave open the possibility that religious expression may constitute political communication for the purposes of the implied freedom.

3. *Expressive Conduct*

Assuming that it includes religious expression, can the implied freedom extend to protect religious expressive conduct motivated by such speech? Two arguments support this proposition. First, existing High Court analysis implicitly recognizes the application of the implied freedom to expressive conduct. Three cases make this clear. *Brown v Tasmania*[86] dealt with a challenge to the *Workplaces (Protection from Protesters) Act 2014* (Tas), which was intended to limit "intentionally disruptive protest action that prevents or hinders lawful business activity."[87] Environmental protestors "were at different times present . . . to protest and raise public awareness of logging. [They] were directed to move by police who believed they were protesting in an area where doing so was prohibited by the [Act]. They were subsequently arrested

83. Att'y-Gen (SA) v. Corp of the City of Adelaide (2013) 249 CLR 1, [43]–[4] (Austl.) (French, C.J.), [73]–[4] (Crennan & Kiefel, JJ.).

84. Clubb v. Edwards; Preston v. Avery (2019) 267 CLR 171, [29] (Austl.) (Kiefel, C.J., Bell & Keane, JJ.).

85. Martin Clark, *Clubb v Edwards; Preston v Avery*, OPINIONS ON HIGH (Apr. 18, 2019) https://blogs.unimelb.edu.au/opinionsonhigh/2019/04/18/clubb-case-page/ *(quoting* Clubb v. Edwards; Preston v. Avery (2019) 267 CLR 171, 37 (Austl.) (Kiefel, C.J., Bell and Keane, JJ.)).

86. Brown v. Tasmania (2017) 261 CLR 328 (Austl.).

87. Parliament of Tasmania, *Fact Sheet: Workplace (Protection from Protestors) Bill 2014* (Apr. 11, 2015), https://www.parliament.tas.gov.au/bills/bills2014/pdf/notes/15_of_2014-Fact%20Sheet.pdf.

and charged."[88] The High Court held that the legislation unjustifiably infringed the conduct of the protesters. In other words, the High Court implicitly found the political communication at issue—protest activity—to be a form of protected expressive conduct.[89]

In *Clubb and Preston* the High Court considered two pieces of legislation—one from Victoria and the other from Tasmania—aimed at restricting speech in a defined zone near abortion clinics. The majority found that the legislation justifiably limited speech within that zone as a consequence of the legislature seeking to protect against words "reasonably likely to cause distress or anxiety" rather than the mere discomfort or hurt feelings of others. Yet, what matters here is not that the conduct was found to be justifiably limited, but that the expression itself—again, protest activity—was not found to be beyond the protection of the implied freedom. The protest activity was a protected form of conduct, but one that could be justifiably limited given its effect on others within the defined exclusion zone around abortion clinics.[90]

Similarly, *Farm Transparency International Ltd v. New South Wales* involved trespass by protestors to set up optical surveillance devices in order to obtain for "publication . . . photographs, videos and audio-visual recordings of animal agricultural practices in Australia."[91] Again, the purported speech involved a component of conduct—trespass, recording, and distribution of recordings as part of protest activity.[92] This activity raised:

> the validity of…the [Act]…, which, subject to certain conditions and exceptions, respectively prohibit the publication of a record of the

88. Ingmar Duldig & Jasmyn Tran, *Proportionality and Protest:* Brown v. Tasmania (2017) 261 CLR 328, 39 ADEL. L. REV. 493, 494 (2018).

89. On October 13, 2022, the Environmental Defenders Office announced that it was bringing a challenge in the New South Wales Supreme Court to amendments made to the *Roads Act 1993* (NSW) and the *Crimes Act 1900* (NSW) by the *New South Wales Roads and Crimes Legislation Amendment Act 2022*, No 7—which create offences for protest activity causing damage or disruption to major roads or major public facilities—on the basis that the harsher penalties violate the implied freedom of political communication. The foundation of this argument, of course, depends upon the implied freedom of political communication protecting expressive conduct. Put another way, this challenge will directly confront the issue of protected express conduct implicitly recognized in Brown v. Tasmania. *See Meet the two climate-impacted Knitting Nannas using the law to protect our democratic freedoms in NSW*, ENVIRONMENTAL DEFENDERS OFFICE, https://www.edo.org.au/meet-the-two-climate-impacted-knitting-nannas-using-the-law-to-protect-our-democratic-freedoms-in-nsw/. Similar anti-protest legislation now exists in Tasmania—*Police Offences Amendment (Workplace Protection) Act 2022* (Tas.)—and in Victoria—*Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Act 2022* (Vict.).

90. Clubb v. Edwards; Preston v. Avery (2019) 267 CLR 171, 52-59 (Austl.) (Kiefel, C.J., Bell & Keane, JJ.), 315 (Nettle, J.).

91. Farm Transparency Int'l Ltd v. NSW [2022] HCA 23, 1-2 Keifel, C.J., & Keane, J.).

92. *Id.* at 1–2.

> kind [created in this case], and the possession of such record, where it has been obtained in contravention of provisions of…the…Act, which in turn would include the circumstances referred to above concerning the…plaintiff's conduct.[93]

Chief Justice Keifel and Justice Keane wrote that "[i]t cannot be doubted that cruelty to animals is an important issue for society and for legislatures such as the New South Wales Parliament, and that persons and groups such as the plaintiffs have sought to achieve changes to laws directed to that issue."[94] While the resolution of the case involved a technical reading of the *Surveillance Devices Act 2007* (NSW), what is clear is that the protest activity involving trespass in order to highlight cruelty to animals was implicitly found by the High Court to be protected by the implied freedom. Again, as with both *Brown* and *Clubb and Preston*, *Farm Transparency* confirms that expressive conduct can be brought within the ambit of protected speech in the implied freedom.

The second argument in favour of extending the implied freedom to religious expressive conduct comes from the judgments of one of the first to find the implied freedom itself: Justice Lionel Murphy. In a string of cases, Justice Murphy argued that in interpreting its own Constitution, Australia might draw upon American experience.[95] If that is so, then the American experience with the interplay of free exercise and free speech giving rise to a protection for religious expressive conduct may provide an argument for the proposition that the implied freedom of political communication includes expressive conduct, and more to the point, religious expressive conduct.[96] No further guidance exists in Australian law, however, as to how this might work in practice. As such, our assessment of the American approach to expressive conduct serves as a roadmap for future use in filling this gap in Australian law. We turn to that analysis in the next section.

B. United States: First Amendment

An extensive jurisprudence has built up around the meaning and application of the protection for free speech found in the First Amendment. It is beyond the scope of this article fully to review the current state of the law; suffice it to say that:

93. *Id.* at 3.

94. *Id.* at 4.

95. Att'y-Gen (Vict.); ex rel. Black v. Commonwealth (1981) 146 CLR 559, 619–30, 633 (Austl.) (Murphy J.), (quoting THOMAS JEFFERSON, WRITINGS 506 (Washington ed., 1859)).

96. Sarah Anne L. Cutler & Leslie L. Lipps, *Expressive Conduct*, 1 GEO. J. GENDER & L. 285 (2000); Katrina Hoch, *Expressive Conduct*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/952/expressive-conduct.

> doctrinally, core First Amendment protection involves *political speech*, meaning speech that is part of the public discourse. Non-political speech such as commercial speech, which gets limited protection, involves speech that conveys information to those participating in public discourse. Left unprotected are "those forms of commercial communications that do not serve to underwrite a public communicative sphere."[97]

Determining whether the First Amendment is triggered to protect the speech involves a:

> a multi-faceted inquiry. First, the court must determine whether the conduct at issue is protected speech under the First Amendment. Following the court's resolution in the affirmative, it will then inquire whether the regulation is a content-neutral or content-based restriction to ascertain the level of judicial scrutiny that should apply.[98]

Our concern here is with those instances in which speech animates action in the form of protected expressive conduct under the First or Fourteenth Amendment. As such, we outline those forms of speech that currently fall within protected expressive conduct, and the tests which the Supreme Court has developed to determine that protection, looking first at the general approach taken and then at those instances that involve religious connotations attached to speech.

1. *Protected Expressive Conduct*

American First Amendment jurisprudence establishes a distinction between actual speech, on the one hand, and symbolic speech—"statements made through the use of symbols rather than words"[99]—speech plus—"behavior used by itself or in connection with language to communicate a message"[100]—or expressive conduct—"nonverbal expression executed with the intent of communicating ideas"—on the other.[101] Thus, including spoken words, individuals may seek to convey a message or opinion about a particular thing through their conduct, which acts as an expression, usually approving of or disavowing a certain viewpoint, ideology, action or course of conduct.[102] In particular,

97. Sofia Grafanaki, *Platforms, the First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111, 151, (quoting Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 22 (2000)) (emphasis in the original)).

98. Cutler & Lipps, *supra* note 96, at 286–7 (footnotes omitted). *See* Wisconsin v. Mitchell, 508 U.S. 476 (1993).

99. Hoch, *supra* note 96.

100. *Id.*

101. Cutler & Lipps, *supra* note 96, at 286 (footnotes omitted). *See* Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503 (1969).

102. *See* Virginia. v. Black, 538 U.S. 343 (2003); W. Va. State Board of Educ. v. Barnette, 319 U.S. 624 (1943); *see generally* Cutler & Lipps, *supra* note 96, at 286–8.

"communication of political, economic, social, and other views is not accomplished solely by face-to-face speech, broadcast speech, or writing in newspapers, periodicals, and pamphlets."[103] There may be, then, beyond mere speech, "'expressive conduct', which might include picketing, patrolling, and marching, distribution of leaflets and pamphlets and addresses to publicly assembled audiences, door-to-door solicitation and many forms of 'sit-ins,'"[104] and "'symbolic conduct,' which includes such actions as flag desecration and draft-card burnings."[105] Significantly,

> because all these ways of expressing oneself involve conduct—action—rather than mere speech, they are all much more subject to regulation and restriction than is simple speech. Some of them may be forbidden altogether. But to the degree that these actions are intended to communicate a point of view the First Amendment is relevant and protects some of them to a great extent.[106]

The Supreme Court recognizes, then, a wide scope of protected expressive conduct.[107] Here, we consider, first, the general scope of that protection before considering, second, the place of religion and association within that protection, and, finally, the principal exceptions to the doctrine.

(a). General Scope – Content-based regulation of speech is generally prohibited.[108] Two cases reveal the general approach taken by the Supreme Court to the scope of protected expressive conduct. The first, *Tinker v. Des Moines Independent Community School District*, involved public school students who were suspended for wearing black armbands to express disapproval of U.S. involvement in the Vietnam War.[109] The Supreme Court found in favour of the students, famously noting that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[110] Writing for the Court, Justice Fortas formulated what is now known as the "substantial disruption" test, which provides that school officials cannot censor student expression unless they can reasonably forecast that the expression will create a substantial disruption or

103. CONG. RSCH. SERV., LIBR. OF CONG., *supra* note 4, at 1164.

104. *Id. See* John M. Olin, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118(8) HARV. L. REV. 2836 (2005).

105. CONG. RSCH. SERV., LIBR. OF CONG., *supra* note 4, at 1164.

106. *Id.*

107. Cutler & Lipps, *supra* note 96, at 286–7.

108. *See generally* Cutler & Lipps, *supra* note 96, at 286–8.

109. Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 504 (1969).

110. *Id.* at 506.

material interference in school activities or invade the rights of others.[111] Short of that, to permit the wearing of some symbols while banning one would facilitate "the prohibition of expression of one particular opinion."[112]

In *Texas v. Johnson*, a narrowly divided Supreme Court held that statutory provisions which prohibited desecrations of the U.S. flag were unconstitutional,[113] a position affirmed in *United States v. Eichman*.[114] In *Johnson*, the Court approved of the two-part test used for assessing expressive conduct which it had enunciated in *Spence v. Washington*:[115] "An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[116] Writing for the majority in *Johnson*, Justice Brennan noted that, although the U.S. flag was a "symbol of nationhood and national unity",[117] public interest could not be used to limit an individual's right to engage in expressive conduct, even where doing so may "provoke violence."[118] Justice Brennan concluded that it

> would be odd . . . that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence . . . [the accused's] expression of dissatisfaction was with the policies of this country, an expression which is situated at the core of our First Amendment values.[119]

Using this approach to expressive conduct, the Court has found that the right to free speech includes the right not to speak, including the right not to salute the flag,[120] to use certain offensive words and phrases to convey political messages,[121] to contribute money to political campaigns,[122] to advertise commercial products and professional

111. *Id.* at 514. *See* Hammond v. S.C. State Coll., 272 F. Supp. 947 (D.S.C. 1967); Dickey v. Ala. State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967), *vacated sub nom* Troy State U. v. Dickey, 402 F.2d 515 (5th Cir. 1968).

112. Tinker v. Des Moines Indep. Cnty. School Dist., 393 U.S. at 510–11 (1969).

113. Texas v. Johnson, 491 U.S. 397, 415 (1989).

114. United States v. Eichman, 496 U.S. 310, 315 (1990).

115. Spence v. Washington, 418 U.S. 405, 411 (1974).

116. Texas v. Johnson, 491 U.S. 397, 404 (1989) (Brennan, J.).

117. *Id.* at 397–8.

118. *Id*. at 409.

119. *Id.* at 409, 411.

120. W. Va. Bd. of Edu. v. Barnette, 319 U.S. 624, 642 (1943).

121. Cohen v. California, 403 U.S. 15, 20 (1971).

122. Buckley v. Valeo, 424 U.S. 1, 16 (1976).

services,[123] and to engage in symbolic speech, such as burning the flag.[124] Can the protection include religious expression?

(b). Religion – Religious expressive conduct most typically involves individuals seeking to rely on a particular religious belief or doctrine in order to abstain from a particular action or course of conduct which would violate that belief or doctrine. As a threshold matter, then, two decisions of the Supreme Court establish that when the protection sought relates to abstention as opposed to positive conduct—about which there tends to be heightened concern regarding the state making accommodations for religious exemption[125]—a greater level of First Amendment protection may exist.[126]

The origin of this position can be traced to *Minersville School District v. Gobitis*, which involved a claim by a member of the Jehovah's Witnesses that compelling the pledge of allegiance to the U.S. flag in a school setting violated the First Amendment. The Court held that compelling the pledge was constitutional.[127] Writing for the majority, Justice Frankfurter emphasized "national unity,"[128] finding that individual liberty and claims to a certain religious belief would not "relieve[] the individual from obedience to the general law not aimed at the promotion or restriction of religious beliefs."[129] In lone dissent, Justice Stone wrote that:

> The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them. . . The very essence of the liberty which they guarantee is the freedom of the individual from compulsion as to what he shall think and what he shall say….[130]

The Court reversed its position in *Gobitis* three years later. In *West Virginia State Board of Education v. Barnette*,[131] a member of the Jehovah's Witnesses challenged a statute compelling the pledge of allegiance and saluting the flag in a public school; parents of non-compliant children

123. Va. Bd. of Pharm. v. Va. Consumer Council, 425 U.S. 748, 762 (1976); Bates v. State Bar of Ariz., 433 U.S. 350, 351 (1977).

124. Texas v. Johnson, 491 U.S. 397, 404; *see also* United States v. Eichman, 496 U.S. 310, 315 (1990).

125. *See* Braunfeld v. Brown, 366 U.S. 599 (1961); Emp. Div., Dep't. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878 (1990); Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 389 (1990); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993); Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 830 (1989); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 138 (1987).

126. United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976).

127. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 597–98 (1940).

128. *Id.* at 586, 595–97, 603, 605.

129. *Id.* at 586, 594.

130. *Id.* at 604 (Stone, H., dissenting).

131. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

faced a small fine and possibly a jail term of 30 days or less, while the student faced possible expulsion.[132] In a 6-3 decision, the Court held unconstitutional both the compulsory flag salute and the pledge. Justice Jackson wrote that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in matters of politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."[133] And while the Court recognised the value of the pledge of allegiance in promoting national unity or cohesion, it emphasized that First Amendment protections cannot be disregarded lightly; indeed, in this case, to do so would "discount [the] important principles of our government as mere platitudes."[134]

Subsequent cases confirm *Barnette*'s conclusion that conduct motivated by religious belief constitutes protected expressive conduct. More importantly, though, in this way, even positive conduct may find protection, albeit in a more restricted form. The Supreme Court has consistently affirmed this in *Sherbert v. Verner*,[135] *Wisconsin v. Yoder*,[136] and *Wooley v. Maynard*.[137] In *Maynard*, a member of the Jehovah's Witnesses challenged the use of the New Hampshire State motto—"Live Free or Die"—on vehicle number plates after having violated a statute that made it an offence "knowingly [to] obscure the figures or letters of any number plate",[138] which included the State motto.[139] Maynard argued that:

> By religious training and belief, I believe my government—Jehovah's Kingdom—offers everlasting life. It would be contrary to that belief to give up my life for the State, even if it meant living in bondage . . . This slogan is directly at odds with my deeply held religious convictions . . . I also disagree with the motto on political grounds. I believe that life is more precious than freedom.[140]

The Supreme Court, in a 6-3 decision, held that the New Hampshire statute could not have the practical effect of mandating individuals to "use their private property as a 'mobile billboard' for the State's ideological message."[141] As such, "the right of individuals to a point of view different from the majority and to refuse to foster . . . an idea they find morally

132. *Id.* at 629.
133. *Id.* at 642.
134. *Id.* at 637.
135. Sherbert v. Verner, 374 U.S. 398, 403 (1963).
136. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).
137. Wooley v. Maynard, 430 U.S. 705, 714 (1977).
138. *Id.* at 707.
139. *As held in* State v. Hoskin, 295 A.2d. 454, 455 (N.H. 1972).
140. *Maynard,* 430 U.S. at 707.
141. *Id.* at 715.

objectionable"[142] attracted First Amendment protection as a form of expressive conduct.

What is clear, though, is that cases involving the permissibility of positive conduct motivated by religious belief present challenges for the courts in assessing whether to invalidate neutral laws of general application which conflict with the conduct of those professing a religious belief. Justice Rehnquist's dissent in *Maynard* highlighted this difficulty:

> The defendants' membership in a class of persons required to display plates bearing the State motto carries no implication and is subject to no requirement that they endorse that motto or profess to adopt it as matter of belief . . . The Appellants could place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto "Live Free or Die" and that they violently disagree with the connotations of that motto.
>
> Since any implication that they affirm the motto can be so easily displaced, I cannot agree that the state statutory system for motor vehicle identification and tourist promotion may be invalidated under the fiction that appellees are unconstitutionally forced to affirm, or profess belief in, the state motto . . . As found by the New Hampshire Supreme Court in Hoskin, there is nothing in state law which precludes appellees from displaying their disagreement with the state motto as long as the methods used do not obscure the license plates.[143]

In other words, there will often be other avenues for the expression of religious belief that do not require an exemption from a neutral law of general application.

This issue arose in stark terms in *United States v Ballard*.[144] The Ballards were charged with eighteen counts of fraud for soliciting over three million dollars from their religious followers based on religious views that they did not genuinely hold. In convicting the pair, the District Court instructed the jury to convict if the Ballards did not have a bona fide genuine belief in their own religious claims. The Supreme Court narrowly reversed on the basis that the District Court erred in directing the jury, as triers of fact, to make an inquiry into religious doctrines, essentially making those beliefs "subject to a trial." This, the court held, the First Amendment forbids.[145] Again, though, as in *Maynard*, we see the difficulty faced by courts in assessing the conflict between positive conduct predicated on religious belief and neutral laws of general application. In dissent, Chief Justice Stone and Justices Roberts and

142. *Id*.
143. *Id.* at 721–2.
144. United States v. Ballard, 322 U.S. 78, 86 (1944).
145. *Id.* at 87.

Frankfurter were convinced that the jury directions were appropriate. Chief Justice Stone wrote:

> I am not prepared to say that the constitutional guarantee of freedom of religion affords immunity from criminal prosecution for the fraudulent procurement of money by false statements as to one's religious experiences, more than it renders polygamy or libel immune from criminal prosecution . . . I cannot say that freedom of thought and worship includes freedom to procure money by making knowingly false statements about one's religious experiences.[146]

Justice Jackson, perhaps attempting to find a middle ground, wrote that:

> I should say the defendants have done just that for which they are indicted. If I might agree to their conviction without creating a precedent, I cheerfully would do so. I can see in their teachings nothing but humbug, untainted by any trace of truth. But that does not dispose of the constitutional question *whether misrepresentation of religious experience or belief is prosecutable*; it rather emphasizes the danger of such prosecutions . . . Prosecutions of this character *easily could degenerate into religious persecution* . . . I would dismiss the indictment and have done with this business of judicially examining other people's faiths.
>
> All schools of religious thought make enormous assumptions, generally on the basis of revelations authenticated by some sign or miracle. Some who profess belief in the Bible read literally what others read as allegory or metaphor, as they read Aesop's fables . . . If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer.
>
> William James, who wrote on these matters as a scientist, reminds us that it is not theology and ceremonies which keep religion going. Its vitality is in the religious experiences of many people. 'If you ask what these experiences are, they are conversations with the unseen, voices and visions, responses to prayer, changes of heart, deliverances from fear, inflowings of help, assurances of support, whenever certain persons set their own internal attitude in certain appropriate ways.' If religious liberty includes, as it must, the right to communicate such experiences to others, it seems to me an impossible task for juries to separate fancied ones from real ones, dreams from happenings, and hallucinations from true clairvoyance. Such experiences, like some tones and colors, have existence for one, but none at all for another. They cannot be verified to the minds of those whose field of consciousness does not include religious insight. When one comes to trial which turns on any aspect of religious belief or

146. *Id.* at 88–9 (Stone, J., dissenting).

> representation, unbelievers among his judges are likely not to understand, and are almost certain not to believe him.[147]

In other words, when conduct is motivated or animated by religious belief, the sincerity of those beliefs on the part of those claiming exemption from a neutral law of general application is a matter that a court must examine closely. A court must not too lightly reach a conclusion as to the truthfulness of the purported beliefs or the sincerity with which they are held by those who claim them. This is particularly so where the basis of such belief may be founded on subjective experience, and ". . .cannot be verified to the minds of those whose field of consciousness does not include religious insight"[148] or, perhaps, may not be verifiable at all. Each case, it seems, turns on its own facts.

In many instances, the religious expressive conduct of the individual will only have meaning in a group setting. The most obvious example of this is public worship in a church, synagogue or mosque (taking only the monotheistic means of communal religious expressive conduct). We turn now to an examination of the relationship between expressive conduct and association or gathering.

(c). Association – As interpreted by the Supreme Court, the First Amendment protects not only speech—actual and expressive—but also association. Association itself is further bifurcated into two types: "intimate" and "expressive". The former captures the right of individuals to maintain familial or private associations free from state interference—these include rights such as marriage, the raising of children, and the right to reside with family or friends. Our focus here, though, is expressive association—the right to associate for expressive religious, political, or social purposes.

Most of the expressive associative conduct which has received judicial attention involves either political or social purposes. Of course, as we noted earlier,[149] associative conduct which involves religious purposes will also animate the free exercise and establishment clauses of the First Amendment. For present purposes, given the paucity of specific analysis of cases emerging from a religious setting, we examine as representative of the judicial approach to expressive association those cases involving political and social activity.[150]

147. *Id.* at 92–3 (Jackson, J., dissenting) (emphasis added).

148. *Id.*

149. *See supra*, at Part I.B.

150. *See* Christopher Ross, *The Alt-Right, the Christian Right, and Implications on Free Speech*, 20 RUTGERS J. L. & RELIGION 47 (2019); Randall P. Bezanson et. al., *Mapping the Forms of Expressive Association*, 40 PEPP. L. REV. 23 (2012); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919 (2006); Hans Allhoff, *Membership and Messages: The (Il)Logic of Expressive Association Doctrine*, 15 U. PA. J. CONST. L. 1455 (2013).

The Supreme Court addressed political expressive association in *NAACP v. Alabama*, a case involving an Alabama statute conferring power on State executive bodies to probe and investigate organisations not officially registered. These powers included the imposition of penalties for organisations which failed to comply with requests to disclose relevant documentation for inspection. At issue were documents which would have resulted in the NAACP disclosing the names and personal details of its membership. The Supreme Court unanimously found the NAACP entitled to gather and associate without the interference permitted by the Alabama law.[151] While the Court supported state-sanctioned investigations of organisations suspected of unlawful activity, it stated:[152]

> [C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association . . . When referring to the varied forms of governmental action which might interfere with freedom of assembly . . . compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order.
>
> The inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.[153]

The Court emphasized that compelled disclosure of documents relating to the personal affairs of members violated First Amendment protections for expressive association. In *NAACP v. Claiborne Hardware Company.*[154] the Court confirmed this right to associate for the purposes of furthering a political purpose, writing that conduct through which an individual seeks to advance legitimate political ends through lawful means[155] clearly falls within the ambit of First Amendment protection.

The Court enunciated fully the right of expressive association in *Roberts v. United States Jaycees*, which raised the question whether an organization could rely upon its own regulations to restrict membership in violation of State anti-discrimination legislation.[156] The Court stated that "we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[157] In holding that the First

151. NAACP v. Alabama, 357 U.S. 449, 462–63 (1958).

152. *See* New York *ex rel*. Bryant v. Zimmerman, 278 U.S. 63 (1928); Dennis v. United States, 341 U.S. 494, 509–10 (1951).

153. NAACP v. Alabama, 357 U.S. 449, at 462.

154. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 919–20, 933 (1982).

155. *Id.* at 919, 933.

156. Roberts v. U.S. Jaycees, 468 U.S. 609, 613–17 (1984).

157. *Id.* at 622.

Amendment had not been violated in the case before it, the Court nonetheless confirmed that:

> The right to associate for expressive purposes is not . . . absolute. Infringements of that right may be justified by regulations adopted to (i) serve compelling state interests, (ii) unrelated to the suppression of ideas, [and which] (iii) cannot be achieved through means significantly less restrictive of associational freedoms.[158]

As *Jaycees* demonstrates, though, many instances of expressive association involve positions taken by organizations that violate federal or State anti-discrimination legislation. This interplay between association and discrimination can, on the view taken by the Court, lead to troubling outcomes—*Jaycees*, for instance, allowed discrimination against females. In *Boy Scouts of America v. Dale*, the Supreme Court provided similar constitutional cover for discrimination, this time on the basis of sexual orientation, writing that:

> public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one.[159]

Justice Stevens issued a strong dissent from the majority's establishment of a "constitutional shield",[160] thereby encouraging prejudice through the promotion of largely antiquated or "ancient" views.[161]

There seems little doubt that religious expressive conduct engaged in by groups may find the same protection afforded political and social groups as First Amendment expressive association. Not all conduct, however, falls within a protected category of expressive conduct— either speech or association. In the next section we consider how far the protection for expressive conduct animated by religious belief might extend.

158. *Id.* at 623, (applying Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 9193 (1982)); Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 124–25 (1981); Buckley v. Valeo, 424 U.S. 1, 25 (1976)*; see also* Hishon v. King & Spalding, 467 U.S. 69, 79 (1984).

159. Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000).

160. *Id.* at 700 (Stevens, J., dissenting).

161. *Id.* at 699 (Stevens, J., dissenting)*; see* Bowers v. Hardwick, 478 U.S. 186 (1986); Loving v. Virginia, 388 U.S. 1 (1967); Mathews v. Lucas, 427 U.S. 495 (1976).

2. *Non-Protected Expressive Conduct*

Some conduct may fall into one of three categories of non-protected expressive conduct. First, in relation to content-based bans,[162] a public school may justifiably limit expressive conduct where the conduct may affect a school's reputation. This may arise in the case of vulgar and overtly sexualised speech,[163] or where there is a wider public interest to protect, as occurs in relation to the publication of articles on divorce and teenage pregnancy in a school's internal newspaper,[164] or in the case of burning draft cards as an anti-war protest.[165] Second, no protection exists where there is a clear and present danger[166] of criminal conduct,[167] such as making or distributing obscene materials,[168] or for advocating illegal drug use at a school-sponsored event.[169] And, third, inciting violent actions that would harm others falls beyond the scope of protected expressive conduct.[170] As a representative example, given the potential for interplay with religious views,[171] we briefly consider this third category, in which two exceptions to protected expressive conduct arise: true threats and fighting words.[172]

Increasingly, with the advent of instantaneous forms of communication through news outlets, social media, email and text messages, greater potential exists for expressive conduct to reach very large audiences. In this environment, balancing tolerance for extreme views with the protection of the community against the potential for violence and civil unrest takes on great importance. The concern with preventing violence gives rise to the true threat exception, enunciated in *United States*

162. *See generally* Cutler & Lipps, *supra* note 96, at 286–8; CONG. RSCH. SERV., LIBR. OF CONG., *supra* note 4, at 1142–69; CONG. RSCH. SERV., LIBR. OF CONG., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION – ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES 1142–69 (Kenneth R. Thomas & Larry M. Eig eds., 2014).

163. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682–85 (1986).

164. Hazelwood v. Kuhlmeier, 484 U.S. 260, 276 (1988).

165. United States v. O'Brien, 391 U.S. 367, 382–83 (1968).

166. *See* CONG. RSCH. SERV., LIBR. OF CONG., *supra* note 4, at 1034–48.

167. *See* Cutler & Lipps, *supra* note 96, at 288–90; CONG. RSCH. SERV., LIBR. OF CONG., *supra* note 4, at 1142–69; CONG. RSCH. SERV., LIBR. OF CONG., *supra* note 162, at 1142–69. *See* Amitai Etzioni, *On Criminalizing Violent Speech*, 36 BYU J. PUB. L. 1 (2022).

168. Roth v. United States, 354 U.S. 476 (1957); Bethel Sch. Dist. #43 v. Fraser, 478 U.S. 675, 682–86 (1986). *See* Cutler & Lipps, *supra* note 96, at 291–5; CONG. RSCH. SERV., LIBR. OF CONG., *supra* note 4, at 1142–69; CONG. RSCH. SERV., LIBR. OF CONG., *supra* note 162, at 1142–69.

169. Morse v. Frederick, 551 U.S. 393, 401–10 (2007).

170. Schenck v. United States, 249 U.S. 47 (1919).

171. *See, e.g.*, Colette Langos & Paul Babie, *Social Media, Free Speech and Religious Freedom*, 20 RUTGERS J. L. & RELIGION 240 (2020).

172. *See* Cutler & Lipps, *supra* note 96, at 290–1; CONG. RSCH. SERV., LIBR. OF CONG., *supra* note 4, at 1142–69; CONG. RSCH. SERV., LIBR. OF CONG., *supra* note 162, at 1142–69.

v Kelner.[173] Kelner, who was convicted pursuant to a federal statute for "causing to be transmitted in interstate commerce a communication containing a 'threat to injure the person of another'",[174] argued on appeal that the speech in question amounted to no more than "political hyperbole."[175] The Second Circuit found that irrespective of whatever subjective intention Kelner might have had, "so long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied."[176]

In *Watts v. United States* the Supreme Court set out a four-part test for determining a "true threat."[177] First, the words must constitute a threat which is clear or unequivocal in the circumstances, and not otherwise qualified by some condition or state of affairs.[178] Second, the threat must be directed to a particular individual.[179] Third, the threat must "convey a gravity of purpose," in the form of a willingness and ability to carry out or execute it.[180] Finally, the threat must convey an "imminent prospect of execution," in the sense that it is about to or will almost certainly be carried out in the very near future.[181] Expressive conduct constituting a "true threat" loses First Amendment protection.

The "fighting words doctrine", established in *Chaplinsky v. New Hampshire*,[182] constitutes the second exception to protected expressive conduct. Chaplinsky, a practicing member of the Jehovah's Witnesses, in the course of publicly distributing literature concerning those beliefs, referred to the town marshal as "a damned Fascist [and a] God dammed racketeer."[183] State legislation made it an offence to use "offensive, derisive or annoying words."[184] The Supreme Court found that "the right of free speech is not absolute at all times and under all circumstances."[185] Instead, some words "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[186] Whether that is so in any given case involves a determination whether a "reasonable

173. United States v. Kelner, 534 F.2d 1020, 1025–27 (2d Cir. 1976).
174. *Id.* at 1020. *See* 18 U.S.C. §§ 2, 875(c).
175. *See* Watts v. United States, 394 U.S. 705 (1969).
176. *Kelner,* 534 F.2d 1020, 1027 (2d Cir. 1976).
177. *Watts,* 394 U.S. 705 (1969).
178. *Id.* at 708.
179. *Id.*
180. *Kelner,* 534 F.2d 1020, 1027 (2d Cir. 1976).
181. *Id.*
182. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).
183. *Id.* at 569.
184. *Id*. at 572.
185. *Id.* at 571.
186. *Id*. at 572.

person" would consider the speech or conduct to be fighting words.[187] The Court would later raise this threshold, in *Terminiello v. Chicago*, to speech or conduct which would be "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[188] The Court justified this change of standard on the basis that free speech, by its very nature, is likely to "invite dispute" as a necessary adjunct to the U.S. "system of government."[189]

Unlike the Australian setting, expressive conduct is a well-developed component of the American panoply of constitutional rights. We turn now to consider its place in the Constitution of India.

C. India: Articles 19 and 25

Article 19 of the Indian Constitution protects freedom of speech, with added protection for religious speech through its interplay with Articles 25–28. Thus, religious speech, as opposed to free speech alone, is protected only if it is exercised in furtherance of the propagation and practice of religious beliefs falling within the protection of Articles 25–28. Anything beyond that sphere of protection can only be protected under the general provisions of Article 19 as non-religious speech. Here we examine the operation of Article 19 and its extension to religious expressive conduct through the operation of Article 25.

1. *Speech and Expression*

Article 19(1)(a) of the Indian Constitution provides that "all citizens shall have the right to freedom of speech and expression." In general terms, the protection of speech includes expression through the communication of one's own conviction and opinions through words, writing, printing, pictures, or any other mode, including visible representation such as gestures and signs.[190] Justice Bhagwati, writing in *Maneka Gandhi v. Union of India*, concluded that Article 19 operates such that:

> If democracy means the government of the people, on the part of the people, it is obvious that every citizen must have the right to participate in the democratic process and allow him to intelligently exercise his rights to make a choice, a free and general discussion of public issues is absolutely essential.[191]

187. *Id.* at 573–4.

188. Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

189. *Id*. *See also* Bridges v. California, 314 U.S. 252 (1941); Craig v. Harney, 331 U.S. 367 (1947).

190. This draws upon early American authority in Lovell v. Griffin, 303 U.S. 444 (1938).

191. Maneka Gandhi v. Union of India, 1978 AIR 597 (India).

It is important to note that while Article 19 uses the word "citizens," Article 25 provides that "all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion." The difference between the two protections—citizens versus all persons—results in differential treatment for speech alone, protected only for citizens, and religious speech, protected for all persons. Judicial interpretation of the interplay of these provisions provides for those instances in which Article 19 will protect the speech of citizens, as distinguished from those instances where religious speech will be protected for all persons.

In some instances, though, Article 19 may provide auxiliary protection for religious speech. This occurs where speech is not in the strict sense religious—it is not for the propagation of one's beliefs—such as when a member of the Hindu tradition sings for God by chanting *mantras*, or when a member of the Muslim tradition performs *Namaz*. Such speech may have secular characteristics and, for that reason, fall within the scope of Article 19. Thus, both Articles 19 and 25 may be deployed to protect religious speech. Here we focus on the protection afforded by Article 25, drawing upon Article 19 to the extent that it provides auxiliary protection. Judicial interpretation has developed three tests for use in applying the protection of Article 25 to religious speech involving expressive conduct.

(a). Essential and Integral Part of Religion – Article 19 interacts with Article 25 so as to protect speech professing, practicing and propagating a religious belief. Judicial interpretation, though, adds the requirement that such communication, to gain the protection of Article 25, be an essential and integral part of a speaker's religion.[192] On the basis of this test, religious speech indistinguishable from political, social, or artistic speech may fall beyond the protection of Article 25. Without this requirement, even purely secular statements or conduct could claim the protection of religious practices found in Article 25.[193] If the relevant speech or conduct fails to satisfy this judicially-created test, it may gain protection only pursuant to Article 19 as political, social, or artistic speech and expression.

What, then, is a "religion" for the purposes of the essential and integral part of religion test? The Constitution itself leaves this term undefined, and judicial analysis treats it as "hardly susceptible to rigid

192. Rev. Stanislaus v. State of M.P., AIR 1977 SC 908 (India); S.P. Mittal v. Union of India, AIR 1983 SC 1, 77–78 (India); Swami v. State of T.N., AIR 1972 SC 1586, 11–12 (India); Digyadarshan Rajendra Ramdassji Varu v. State of Andhra Pradesh, 1970 SC 181, 10 (India); Sarala Mudgal v. Union of India, (1995) 3 SCC 635, 43 (India), *aff'd*, Lily Thomas v. Union of India, (2000) 6 SCC 224, 62 (India).

193. M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1204 (5th ed. Indian reprint, 2007).

definition."[194] Before 1870, little distinction was made in India between spirituality and religion;[195] since then, the former has come to mean the internal forum of individual belief, while the latter describes expression and conduct in the external forum which is motivated by inner belief.[196] Thus, in the current law, it has been broadly defined as "a matter of faith with individuals or communities . . . not necessarily theistic."[197] As such, the views of both atheists and believers—both falling within this broader definition of religion—gain the protection of Articles 25–28.

Using these definitions, the courts have applied Article 25 to specific factual matrices involving religious speech in the form of expressive conduct. *Acharya Jagdishwaranand Avadhuta, v. Commissioner of Police, Calcutta*,[198] for instance, involved a local administration which prohibited the performance by members of the Anand Marga tradition of a *Tandava* dance—a combination of speech and conduct—on public roads. The Supreme Court rejected the claim that the dance when performed in a public place was protected under Article 25 as an essential and integral part of religious practice. In *S.P. Mittal v. Union of India*,[199] the Supreme Court held that the preaching and propagation of the teachings of Sri Aurobindo constituted a personal philosophy as opposed to a religion and, as such, gained no protection as religious speech pursuant to Article 25. The relevant speech could, however, find protection under Article 19, but only in respect of citizens who claimed belief in and sought to preach and propagate the teachings of Sri Aurobindo.

(b). State Secularity – As we elaborated in Part I.C, the Constitution of India mandates formal state secularity. In addition to this, though, because religion has been defined to include atheist views, in order to maintain the state's formally neutral stance with respect to religion in public places, the Supreme Court in *Atheist Society of India v.*

194. Atheist Soc'y of India v. Gov't of Andhra Pradesh, AIR 1992 AP 310 (India).

195. *See* Vikram Zutshi*, It's Possible to be an Atheist and Practise a Religion; Many Religions Get Along Quite Well Without Gods,* TIMES OF INDIA (June 30, 2019), https://timesofindia.indiatimes.com/blogs/the-interviews-blog/its-possible-to-be-an-atheist-and-practise-a-religion-many-religions-get-along-quite-well-without-gods/.

196. *Id. See generally* PETER HEEHS, SPIRITUALITY WITHOUT GOD: A GLOBAL HISTORY OF THOUGHT AND PRACTICE (2018).

197. Comm'r of Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Sirur Mutt, 1954 AIR 282, 1954 SCR 1005 (India).

198. Acharya Jagdishwaranand Avadhuta, v. Commissioner of Police, Calcutta, 1984 SCR (1) 447 (India).

199. S.P. Mittal v. Union of India, 1983 SCR (1) 729 (India) (Sri Aurobindo, one of the Indian sages and philosophers, after a brilliant academic and administrative career, engaged for some time in political activities and revolutionary literary efforts before giving them up to pursue a life of meditation and integral yoga at Pondicherry, in Tamil Nadu, India).

Government of Andhra Pradesh[200] found that allowing the practice of religious performance of worship at state functions such as the laying of foundation stones for public buildings, or exhibiting religious symbols such as photos or idols in state offices was tantamount to encouraging religious sentiments.[201] The Court drew a distinction on the basis of the capacity in which those who engaged in such rituals did so: persons participating in public functions perform rituals in their individual capacity depending on their own religion and religious faith, with the state neither directing the observation of the ritual, nor prohibiting them. To interfere with the performance of religious rituals by participants at public functions would itself amount to a violation of the fundamental right guaranteed by Article 25.

(c). Coercion to Hear – Just as one must be acting on the basis of an essential and integral part of one's religion, the religious speech and conduct in question cannot constitute a "coercion to hear" what others do not want to hear.[202] Thus, in *Church of God (Full Gospel) in India v. K.K.R. Majestic Colony Welfare Association*, the Supreme Court held that the use of microphones and loudspeakers and beating drums which may result in disturbance to the peace and tranquillity of a neighbourhood constitutes a coercion to hear and, as such, cannot be treated as an essential and integral part of a religion.[203]

2. *Expressive Conduct*

Assuming that the tests for its application are satisfied, can Article 25 apply to expressive conduct motivated by religious belief? Answering this question involves an examination of the interplay between Articles 25(1) and 19(1)(a). The Supreme Court addressed the issue in *Bijoe Emmanuel v. State of Kerala*,[204] in which the fundamental duty contained in Article 51 concerning the use of the national anthem conflicted with a claimed religious belief.[205] A circular issued by the Director of Public Instructions made it mandatory for all children to sing the anthem in

200. Atheist Society of India v. Government of Andhra Pradesh, AIR 1992 AP 310 (India).

201. The same issue arose in the recent decision of the Supreme Court of the United States in Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

202. Moulana Mufti Syed Md. Noorur Rehman Barkati v. State of W.B., AIR 1999 Cal 15 (India). This issue also arose in the United States in Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

203. Church of God (Full Gospel) in India v. K.K.R. Majestic Colony Welfare Ass'n, AIR 2000 SC 2773 (India).

204. Bijoe Emmanuel v. State of Kerala, 1987 AIR 748 (India).

205. INDIA CONST. art. 51A(a), [as on May, 2022], provides: "It shall be the duty of every citizen of India to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem[.]"

public schools. Three children belonging to the Jehovah's Witnesses were expelled for refusing to sing on the ground that it violated tenets of their religious faith. The Kerala High Court (the equivalent of a US State Supreme Court) held that it was a fundamental duty to sing the anthem and that failure to do so would endanger security by encouraging a tendency to ignore the mandates of the Constitution. Religious expressive conduct running counter to public order, morality, health, or a policy of the government to uphold the sovereignty, integrity, and unity of the nation must give way for the greater good of the community. On appeal, the Supreme Court reversed, holding that no person can be compelled to sing the anthem "if he has any genuine, conscientious objection."[206] The Court wrote that:

> the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Personal views and reactions are irrelevant. If the belief is genuinely and conscientiously held it attracts the protection of art. 25 but subject, of course, to the inhibitions contained therein.[207]

In other words, to hold otherwise would be to infringe the protection of speech in Article 19(1)(a) which guarantees, in addition to a positive right, a negative right to remain silent. The Supreme Court has subsequently affirmed this interpretation in *Shyam Narayan Chouksey v. Union of India*, in which it held that all movie theatres must play the national anthem before the feature film and that all present in the hall are obliged to stand so as to show respect subject to an exception for conscientiously held beliefs.[208]

Assuming that a violation of the right to expressive religious conduct can be found, the further question arises as to whether that infringement nonetheless constitutes a justifiable limitation. In Part III, we consider that issue as it arises in each jurisdiction.

III. JUSTIFIABLE LIMITATION

The words of U.S. Supreme Court Justice Owen Roberts remind us that freedom of religion or belief is not an absolute right: "Conduct remains subject to regulation for the protection of society."[209] As we might expect given the different foundation for the protection of religious speech in each of the jurisdictions analyzed in this article—Australia's is entirely judicially created, the United States' and India's is textually founded, although using different language—we find three different

206. Bijoe Emmanuel v. State of Kerala, 1987 AIR 748 (India).
207. *Id.*
208. Shyam Narayan Chouksey v. Union of India, (2018) 2 SCC 574 (India).
209. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (Roberts, J.).

approaches to the regulation of expressive conduct. Australia's, given the source of protection through implications drawn from the constitutional text, is entirely judicially crafted, as is the United States, which is a supplement to the textual protection found in the First Amendment. The express text of the protections found in India's Constitution, however, also contain limitation provisions, with the task of giving meaning to those provisions left to the judges. We consider each approach in turn.

D. Australia: Structured Proportionality

In *Spence v. Queensland*, Justice Edelman reminded us that in taking legislative action with respect to speech or conduct, governments "make laws . . . to shape behaviour. They can act prophylactically, by reference to possibilities and probabilities, as well as reactively."[210] In some instances, though, government action is justified; in others, it overreaches. Either way, as concerns free exercise, as Chief Justice Latham wrote, it is for the courts to "reconcile religious freedom with ordered government."[211] And the implied freedoms, including political communication:

> are not absolute, but nearly so. They are subject to necessary regulation (for example, freedom of movement is subject to regulation for purposes of quarantine and criminal justice; freedom of electronic media is subject to regulation to the extent made necessary by physical limits upon the number of stations which can operate simultaneously).[212]

In *McCloy v. New South Wales*,[213] the High Court found that the implied freedom of political communication itself:

> is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.[214]

In *Unions NSW v. New South Wales*, the Court synthesized the current law in this proposition: "it is the role of the Parliament to select the means by which a legitimate statutory purpose may be achieved. It is the role of the Court to ensure that the freedom is not burdened when it

210. Spence v. Queensland (2019) 268 CLR 355, [323] (Austl.) (Edelman, J.).

211. Adelaide Co of Jehovah's Witnesses Inc v. Commonwealth (1943) 67 CLR 116, 132 (Austl.) (Latham, C.J.).

212. Ansett Transp Indus (Operations) Pty Ltd v. Commonwealth (1977) 139 CLR 54, [13] (Austl.) (Murphy, J.).

213. McCloy v. NSW (2015) 257 CLR 178 (Austl.).

214. *Id.* at [2] (French, C.J., & Kiefel, Bell & Keane, JJ.).

need not be."[215] The implied freedom, then, may require justifiable limitation so as to allow for restraint where the exercise of the freedom it protects interferes with the liberty or freedom of others. But because we live in community, it is the judicial role to mediate the boundaries between and relations among its members.

In *McCloy v. New South Wales*,[216] the Court expounded a three-step test for assessing the justifiability of infringements of political communication:

> 1. Does the law effectively burden the freedom in its terms, operation or effect?
>
> …
>
> 2. If "yes"…, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?[217]
>
> …
>
> The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.
>
> . . .
>
> 3. If "yes…," is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?[218]
>
> . . .
>
> The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to this test—these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:
>
> *Suitable*—as having a rational connection to the purpose of the provision;
>
> *Necessary*—in the sense that there is no obvious and compelling alternative, and no reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

215. Unions NSW v. NSW (2019) 264 CLR 595, [47] (Austl.) (Kiefel, C.J., Bell & Keane, JJ.).

216. McCloy v. NSW (2015) 257 CLR 178 (Austl.).

217. This version of the question was substituted by Brown v. Tasmania (2017) 261 CLR 328, [104] (Austl.) (Kiefel, C.J., Bell and Keane, JJ.).

218. *Id.*

> *Adequate in its balance*—a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.[219]

If any question is answered in the negative, the inquiry is at an end and the legislation or action in question cannot be justifiable—it is, in other words, unconstitutional. The Court makes it clear that in assessing the justifiability of a limitation, it seeks to balance the importance of the individual's interest in political communication in a democratic system with the community's interest that such speech not offend the rights or dignity of others.

E. United States: Protected Categories and Strict Scrutiny

What seems clear from First Amendment jurisprudence concerning religious expressive conduct is that a court must engage sequentially in two inquiries. The first assesses whether the relevant speech or expressive conduct is protected and has been infringed by government action. If it is, the inquiry turns to the standard to be applied for determining whether that infringement can be justified.

It is probably impossible to identify with any precision the precise standard that the court will apply in a given case involving violation of free speech or expressive conduct. Instead, "complexities inherent in the myriad varieties of expression encompassed by the First Amendment guarantees of speech, press, and assembly probably preclude any single standard for determining the presence of First Amendment protection."[220] A vast of array of conflicting and confusing standards has grown up, including the doctrines of content-based regulation,[221] content-neutral and time, place, and manner regulation,[222] incidental impact,[223] secondary effects,[224] public forum,[225] prior restraint[226] and clear and present danger,[227] and the tests of vagueness[228] and overbreadth,[229]

219. McCloy v. New South Wales (2015) 257 CLR 178, [2] (Austl.) (French, C.J., and Keifel, Bell, and Keane, JJ.). *See also* Brown v. Tasmania (2017) 261 CLR 328 (Austl.).

220. *See* CONG. RSCH. SERV, LIBR. OF CONG., *supra* note 162, at 1051–52.

221. Cutler & Lipps, *supra* note 96, at 296–98.

222. *Id.* at 299.

223. *Id.* at 300–01.

224. *Id.* at 301–02.

225. *Id.* at 303–09.

226. *See* CONG. RSCH. SERV, LIBR. OF CONG., *supra* note 162, at 1029–33, 1142–49; Cutler & Lipps, *supra* note 96, at 302–03.

227. *See* CONG. RSCH. SERV, LIBR. OF CONG., *supra* note 162, at 1034–48.

228. *Id.* at 1164–70.

229. *Id.*

and the standards of scrutiny.[230] The most that can be said about these standards and tests is that *some* standard or test must be applied. Here, though, we consider only one of the available approaches—strict scrutiny.

The three levels of constitutional scrutiny—rational basis, intermediate, and strict[231]—developed from the famous footnote 4 of *United States v. Carolene Products Co.*[232] Crafted by judicial interpretation, levels of scrutiny analysis establishes the standard by which limitations imposed upon the rights of a religious group must take the least restrictive or narrowest means possible.[233] Such limitations must either demonstrate: (i) a rational relationship to a legitimate governmental purpose[234] with a strong, but rebuttable, presumption of treating legislative limitations as constitutional;[235] or (ii) a compelling state interest,[236] in which case limits must be drawn as narrowly as possible. Strict scrutiny appears to be the level of analysis most frequently applied to violations of a protected category of religious expressive conduct.[237] Yet, as applied to religious expressive conduct, or free speech or free exercise generally, strict scrutiny appears to result in an outcome that is "strict in theory and fatal in fact."[238]

F. India: Internal Textual Limitation Clauses of Articles 19(2) and 25(1) and (2)

Unlike the Australian and American approaches to determining the justifiability of limitations imposed upon expressive conduct, the Indian Constitution contains express provisions for analyzing violations, with judicial interpretation providing guidance as to their application. Thus, both Articles 19 and 25, in terms, provide that the freedoms of speech and of religious speech are not absolute. Article 19(2) provides that:

230. *Id.*

231. *See* Mario Barnes & Erwin Chemerinsky, *The Once & Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1076–88 (2011); Ashutosh Bhagwat, *Hard Cases and the (D)evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 963 (1998).

232. United States v. Carolene Prod. Co., 304 U.S. 144, 152 (1938) (Stone, J.).

233. Sherbert v. Verner, 374 U.S. 398 (1963). *See also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007); Eugene Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, 144 UNIV. PA. L. REV. 2417 (1996).

234. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

235. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

236. Korematsu v. United States, 323 U.S. 214 (1944).

237. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2019); Fallon, *supra* note 233; Volokh, *supra* note 233; CONG. RSCH. SERV, LIBR. OF CONG., *supra* note 4, at 1142–69; CONG. RSCH. SERV, LIBR. OF CONG., *supra* note 162, at 1142–69; Cutler & Lipps, *supra* note 96, at 295–309.

238. Winkler, *supra* note 237.

> Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [the sovereignty and integrity of India,] the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.[239]

Article 25(1) is expressly "subject to public order, morality and health and to the other provisions of . . . Part [III]", and clause (2) adds that:

> Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—
>
> (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.
>
> (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.[240]

While the provisions concerning public order and morality[241] (which also apply to public health[242]) are common to both, the limitations provisions of Article 19(2) create a wider scope for government regulation of speech than do those of Article 25. The question therefore arises as to which provisions should be applied to religious speech—those of Article 19(2) or those of Article 25(1) and (2). The Supreme Court has taken the view[243] that religious speech can be treated as speech falling within Article 19(1)(a) for the purposes of regulating it through the application of Article 19(2). Doing so ensures that the protection of religious speech under Article 25 does not extend to protect hate speech between two groups practicing different religions.[244]

239. India Const. art. 19(2), [as on May, 2022].

240. India Const. art. 25(1), cl. 2, [as on May, 2022].

241. Virendra v. State of Punjab, AIR 1957 SC 896 (India); Ramji Lal Modi v. State of Uttar Pradesh, AIR 1957 SC 620 (India); State of Rajasthan v. G. Chawla, AIR 1959 SC 544 (India).

242. During the COVID-19 pandemic, in In re Alarming Newspaper Report Regarding Kanwar Yatra in State of U.P., the Supreme Court of India took the matter *Sou Motu* (Suo Motu Writ (C) No. 5 of 2021) of *Kanwar Yatra* (an expression of faith and belief) and barred the Uttar Pradesh Government from allowing the *Kanwar Yatra* on the basis that "[t]he health of the citizenry of India and their right to 'life' are paramount. All other sentiments, albeit religious, are subservient to this most basic fundamental right," https://main.sci.gov.in/supremecourt/2021/15729/15729_2021_32_37_28606_Order_19-Jul-2021.pdf.

243. DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA 3454 (8th ed. 2008).

244. Subhash Desai v. Sharad J. Rao, AIR 1994 SC 2277 (India).

Instead, through the application of Article 19(2), such speech can be curtailed on the ground that it is injurious to national security or safety.[245]

Using this approach, judicial analysis has carved out three major classes of religious expressive conduct in which the state may justifiably impose limitations: elections, parliamentary speech, and the establishment of religion.

1. *Elections*

In *Kihoto Hollohan v. Zachillhu,* the Supreme Court held that the Preamble to the Constitution establishes democracy and the rule of law as important parts of the basic constitutional structure; free and fair elections serve as a necessary adjunct to that structure.[246] Acting pursuant to Part XV of the Constitution—which establishes the power to provide electoral machinery—the national Parliament enacted the Representation of the People Act, 1951 (RPA).[247] The RPA prohibits the use of religious speech during an election,[248] the constitutionality of which the Supreme Court considered in *S.R. Bommai v. Union of India*.[249] Chief Justice Gajendragadadkar reasoned that to allow religious speech during an election would be to vitiate the secular nature of the Indian democracy.[250] Justice Sawant analyzed the text of the relevant RPA provisions themselves, which prohibited the appeal to any religion or the attempt to seek votes in the name of any religion.[251] For Justice Sawant, to allow otherwise would subvert the constitutional features of the Indian secular democracy.[252] While such speech would otherwise come within the ambit of the protection for religious speech in Article 25, through the application of the limitations provisions in Article 19(2)—as a matter of

245. DAS BASU, *supra* note 243, at 3455.

246. Kihoto Hollohan v. Zachillhu, 1992 SCR (1) 686 (India).

247. Raghbir Singh Gill v. Gurcharan Singh Tohra, 1980 AIR 1362 (India).

248. Representation of the People Act, 1951, § 123(3) deems a corrupt practice to be: "The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate[.]" Similarly, §3A deems a corrupt practice "The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate."

249. S.R. Bommai v. Union of India, (1994) 3 SCC 1 (India).

250. *Id. See also* Kultar Singh v. Mukhtiar Singh, AIR 1965 SC 141 (India).

251. S.R. Bommai v. Union of India, (1994) 3 SCC 1 (India).

252. *Id.* at 236 (Sawant, J.).

"decency"—the RPA was found to be a justifiable limitation on religious expressive conduct during elections.[253]

The Supreme Court applied the same principle in *Manohar Joshi v. Nitin Bhaurao Patil*,[254] which involved the statement of a candidate made during an election public meeting that "the first Hindu State will be established in Maharashtra", and also that in order to save "Hindutva", one should vote for Bhartiya Janta Party ("BJP") (a national party) candidates. The Supreme Court found both statements to be constitutionally protected, the former because it was, at best, an expression of a hope and so, "however despicable . . . it cannot be said to amount to an appeal for votes on the ground of . . .religion."[255] In respect of the latter statement, the Court observed that Hindutva is understood not as religious fundamentalism but as a way of life or a state of mind and so was used as a synonym for an "Indianization" which would remove differences between all cultures.[256]

Widely critiqued,[257] *Manohar Joshi*, which had dealt with the majority Hindu tradition, left open the question whether the *S.R. Bommai* test applies to minority or dissenting groups.[258] In a matter raised pursuant to its *sua sponte* or *suo motu* jurisdiction,[259] the Supreme Court upheld *S.R. Bommai*, but gave little additional guidance as to its broader applicability to all religions.[260] Still, Chief Justice Thakur reiterated that:

> the State being secular in character will not identify itself with any one of the religions or religious denominations. This necessarily implies that religion will not play any role in the governance of the country which must at all times be secular in nature. The elections to the State legislature or to the Parliament or for that matter or [sic] any other body in the State is a secular exercise just as the functions

253. Subhash Desai v. Sharad J. Rao, AIR 1994 SC 2277 (India). *See also* Jamuna Prasad Mukhariya v. Lachhi Ram, [1955] 1 SCR 608 (India); Yeshwant Prabhoo v. Prabhakar K. Kunte, (1996) 1 SCC 130 (India).

254. Manohar Joshi v. Nitin Bhaurao Patil, 1996 SCC (1) 169 (India).

255. *See* Yeshwant Prabhoo v. Shri Prabhakar Kashinath Kunte, 1996 AIR 1113 (India).

256. *Id.*

257. Lekha Rattanani & Padmanand Jha, *Endorsing Hindutva*, OUTLOOK INDIA (Feb. 6, 2022), https://www.outlookindia.com/magazine/story/endorsing-hindutva/200472.

258. Gautam Bhatia, *Religious Speech*, *in* OXFORD HANDBOOK OF FREEDOM OF SPEECH 513 (Adrienne Stone & Frederick Schauer eds. 2021).

259. Pursuant to India Const. art. 32 and 131, [as on May, 2022], which allows the Supreme Court proactively to consider matters on its own motion. *See* Juhi Sharma, *What Is Suo Moto/Sua Sponte*, LEGAL AID (July 6, 2020), https://legalaid.co.in/general-legal/what-is-suo-moto-sua-sponte/.

260. Harish V. Nair, *Hindutva is Not a Religion, But a Way of Life and a State of Mind: Supreme Court Refuses to Overturn Its 1995 Judgement*, DAILY MAIL INDIA (Oct. 25, 2016), https://www.dailymail.co.uk/indiahome/indianews/article-3872368/Hindutva-not-religion-way-life-state-mind-Supreme-Court-refuses-overturn-1995-judgement.html.

> of the elected representatives must be secular in both outlook and practice. Suffice it to say that the Constitutional ethos forbids mixing of religions or religious considerations with the secular functions of the State.[261]

This tends to suggest that while the *S.R. Bommai* test applies to all religions, it remains an open question how far the definition of Hindutva, applied in *Manohar Joshi,* might extend so as to protect religious minorities which, during elections, claim religious expressive conduct as signifying the "way of life" of the secular nation.

2. *Parliamentary Speech*

Articles 105 and 194 of the Constitution protect freedom of speech for members sitting in the national Parliament and the state legislatures.[262] These protections are absolute—and so operate in addition to the general protections for speech in Articles 19 and 25[263]—"enabl[ing] members to express themselves freely . . . immunizing them from any fear that they can be penalized for anything said within the [Parliament or a legislature]."[264] The question that arises, of course, is whether the *religious* speech of a member gains this absolute protection if made in Parliament or a legislature.

In *Tej Kiran Jain v. Sanjiva Reddy* disciples of *Jagadguru Shankaracharya* made remarks concerning untouchability[265] during the 1969 World Hindu Religious Conference held at Patna (the capital of the State of Bihar). On April 2, 1969, a discussion took place in the Lok Sabha (the lower house of the Indian Parliament) in which derogatory words were spoken against the *Shankaracharya.* In considering whether the speech was protected as Parliamentary speech, the Supreme Court emphasized the constitutional immunization of anything said during Parliamentary sittings, including religious speech.[266]

261. Abhiram Singh v. C.D. Commachen, (2017) 2 SCC 629 (India). *See also* Mohd. Aslam v. Union of India, (1996) 2 SCC 749 (India).

262. India Const. art. 105(1), [as on May, 2022], provides: "Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament", and art. 194(1) reads: "Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State."

263. P.V. Narasimha Rao v. State, AIR 1998 SC 2120 (India).

264. M.P. JAIN, INDIAN CONSTITUTIONAL LAW 90 (8th ed. reprint 2018).

265. Prohibited by India Const. art. 17, [as on May, 2022], which reads: "'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law."

266. Tej Kiran Jain v. Sanjiva Reddy, AIR 1970 SC 1573 (India).

P.V. Narasimha Rao v. State took a narrower view, finding that the immunity extends only to speech actually made by those voting within Parliament; the immunity would not, for instance, protect those members who abstained from a vote.[267] These two cases establish the proposition that a member delivering a speech in Parliament is protected by Articles 105 and 194; the same member giving the identical speech outside of Parliament, however, would be subject to the operation of Articles 19 and 25. Such speech occurring outside of Parliament may therefore be justifiably limited by the state.[268] Still, there are limits even to speech made in Parliament: it may not, for instance, protect the performance of a religious ceremony by a member in Parliament.[269]

3. *Establishment*

As we have seen,[270] the Constitution of India establishes a secular polity,[271] with Articles 25 and 26 striking a balance between secularism and religious belief and faith.[272] This balance requires a principle of non-interference and neutrality on the part of the state so as to prevent state support for or prohibition of religious practice. This ensures that the state remains neutral with respect to the place, protection, promotion, and prohibition of religious communication in public places.

Hindu Front for Justice v. Union of India applied this principle.[273] The Supreme Court found that the failure to provide a place for worship of a person's choice in a public place—here, the location of a state High Court—denied the right to practice and profess religion and so violated Article 25. Thus, space must be made for all religions and for none—for this reason, limitations aimed at ensuring the implementation of state secularity and neutrality constitute justifiable state action which restricts religious expressive conduct.[274]

267. P.V. Narasimha Rao v. State, (1998) 4 SCC 626, 109, 133–37, 143 (India) (Agrawal, Bharucha, and Ray, JJ.).

268. *See* M.V. PYLEE, OUR CONSTITUTION, GOVERNMENT AND POLITICS 52 (2000).

269. Poulomi Ghosh, *All-faith Prayer Marks Foundation Stone-laying Ceremony of new Parliament Building*, HINDUSTAN TIMES (Dec. 10, 2020), https://www.hindustantimes.com/india-news/all-faith-prayer-marks-foundation-stone-laying-ceremony-of-new-parliament-building/story-DJvjM-dUX6OYg04pxYUd5SN.html.

270. *See supra,* at Part I.C.

271. India Const., *amended by* The Constitution (Forty-second Amendment), 1976, changed the description of India from a "sovereign democratic republic" to a "sovereign, socialist *secular democratic* republic." (emphasis added).

272. A.S. Narayana Deekshitulu v. State of Andhra Pradesh, (1996) 9 SCC 548 (India).

273. Hindu Front for Justice v. Union of India, AIR 2017 All 168 (India).

274. *See* In re Abdul Ali, (1883) 7 Bombay (India); Amir-ud-din v. Khatun Bibi, (1917) ILR 39 All. 371 (India); Shayara Bano v. Union of India, (2017) 9 SCC 1 (India).

CONCLUSION

Conceiving of religious expression as a form of expressive conduct, combining elements of both speech and conduct, opens the possibility of a wider scope of protection for the free exercise of religion. In the face of restrictions which might be placed by the state upon the expression of one's beliefs, allowing for this expanded understanding of religious speech provides another avenue of protection where the protection of free exercise might be constrained, such as in Australia, or where other limitations restrict the scope of a stand-alone protection for free exercise. In two of the jurisdictions we considered—the United States and India—the constitution allows for free exercise to be understood this way, while in the third, Australia, that possibility certainly presents itself as an element of the implied freedom of political communication.

In each of the three jurisdictions, judicial analysis proceeds in a three-stage inquiry. The first involves determining the existence of the right itself and its ambit or scope. In each jurisdiction the right either clearly exists as a matter of the constitutional text—in the United States in the First Amendment and in India in Articles 19 and 25—or, as in the third, Australia, it is capable of existence, although it has not yet been recognised, in the conjunction of section 116 and the implied freedom of political communication. In the second stage of analysis, a court must determine whether the right, if recognized, has been infringed by state action. In each jurisdiction, the courts are well-versed in making these determinations.

But, perhaps most importantly, in the third stage of analysis, the court must determine whether the infringement is nonetheless justifiable as furthering legitimate state objectives or purposes. The protection afforded religious expressive conduct, as with most fundamental rights, is not absolute; instead, it is susceptible to justifiable limits and it is for the courts to determine the justifiability of such infringement in each case. In the jurisdictions examined here, a test or standard exists. In two, the standard is judicially crafted—in Australia, *McCloy* structured proportionality, and in the United States, one of myriad approaches to assessing infringements of the First Amendment may be used, most often strict scrutiny. In the third jurisdiction, India, express limitations provisions are contained in the internal structure of Articles 19 and 25, with judicial interpretation supplementing their application.

It is this third stage of analysis that matters most. Without it, the application of the right becomes problematic—only with an approach for assessing the justifiability of limitations can the right to religious expressive conduct develop properly so as to balance the core protection of that individual (and sometimes communal) right against the interests of the wider community. It is clear in the judicial analysis of free speech generally, and religious expressive conduct specifically, that in each jurisdiction the courts understand their paramount duty within the

constitutional framework as being one of balancing these competing interests. Religious expressive conduct, when recognised as constitutionally protected, makes possible some limited protection for free exercise against state encroachments, while at the same time allowing for that protection to be balanced against the need to safeguard the community against individual excesses.