SOCIAL MEDIA, FREE SPEECH AND RELIGIOUS FREEDOM

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INTRODUCTION

Social media forms part of the fabric of 21st century global life. People the world over use it to disseminate any number of ideas, views, and anything else, ranging from the benign to the truly malign.[1] One commentator even diagnoses its ubiquity as a disease, and prescribes remedies for individual users and society as a whole.[2] Yet, despite such concerns, little direct governmental regulation exists to control the power of social media to spread ideas and messages. To date, this responsibility has fallen largely on social media platform providers themselves, with the inevitable outcome being a disparate patchwork of approaches driven more by corporate expediency and the corresponding profit motive than a rational comprehensive policy integrated at the national and international levels.[3] What little governmental control there is comes either

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[1] *See* GLENN HARLAN REYNOLDS, THE SOCIAL MEDIA UPHEAVAL at 1, 38, 63 (Encounter Books 2019); SARAH T. ROBERTS, BEHIND THE SCREEN CONTENT MODERATION IN THE SHADOWS OF SOCIAL MEDIA at 33-35 (Yale Univ. Press 2019).

[2] Reynolds, *supra* note 1, at 7, 63.

[3] *See* Sofia Grafanaki, *Platforms, the First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111, 147 (2018); Eugene Volokh, *Government-Run Fora on Private Platforms, in the @RealDonaldTrump User Blocking Controversy*, THE VOLOKH CONSPIRACY (July 9, 2019, 3:09 PM), https://reason.com/2019/07/09/government-run-fora-on-private-platforms-in-the-realdonaldtrump-user-blocking-controversy/; Fiona R. Martin, *After Defamation Ruling, It's Time Facebook Provided Better Moderation Tools*, THE CONVERSATION (June 30, 2019, 9:56 PM), https://theconversation.com/after-defamation-ruling-its-time-facebook-provided-better-moderation-tools-119526; Alana Schetzer, *Governments are Making Fake News a Crime—But it Could Stifle Free Speech*, THE CONVERSATION (July 7, 2019, 4:10 PM), https://theconversation.com/governments-are-making-fake-news-a-crime-but-it-could-stifle-free-speech-117654; Roberts, *supra* note 1; *see also Court of Public Opinions*, THE ECONOMIST (Jan. 30, 2020), https://www.economist.com/business/2020/01/30/facebook-unveils-details-of-its-content-oversight-board; Brent Harris, *Preparing the Way Forward for Facebook's Oversight Board*, FACEBOOK (Jan. 28, 2020), https://about.fb.com/news/2020/01/facebooks-oversight-board/; FACEBOOK, OVERSIGHT BOARD BYLAWS, V-6 (Jan. 2020), https://about.fb.com/wp-content/uploads/2020/01/Bylaws_v6.pdf. (As a result of increasing pressure, on January 28, 2020, Facebook released draft Bylaws establishing an Oversight Board—an independent body of experts—with authority to review and overturn decisions issued by its content moderators).

through the application of existing legislation of general application, never intended for use in controlling this fluid and constantly morphing medium,[4] or through judicial application of injunctive relief.[5]

The difficulty, of course, is that anything disseminated through social media is also a form of speech.[6] Reasonable people may disagree with or dislike what someone else is saying. As such, the limitations which may be imposed upon such speech, either by platform providers or by government, are gaining increasing attention, both from legislators and from scholars.[7] Recently, for instance, a number of national governments—Singapore, Germany, Malaysia, France, Russia, and Sri Lanka[8]—have turned their attention to the use of social media, and especially its use for the dissemination of "fake news," raising concerns about restricting free speech.[9] Nations that constitutionally protect free speech may provide both users and platforms of social media with some protection against these legislative encroachments.[10] In the United

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[4] *Id.*

[5] *See* Complaint at 1, Narcisi v. Turtleboy Digital Mktg., Inc., No. 1:19-cv-00329 (D.R.I. June 18, 2019). For a review of the case law dealing with injunctive relief in respect of social media, see Eugene Volokh, *Rhode Island Court Issues Temporary Restraining Order Requiring Blogger to Take Down All Posts About a Person*, THE VOLOKH CONSPIRACY (June 22, 2019, 9:54 PM), https://reason.com/2019/06/22/rhode-island-court-issues-temporary-restraining-order-requiring-blogger-to-take-down-all-posts-about-a-person/.

[6] *See, e.g.,* Allan G. Osborne, Jr. & Charles J. Russo, *Can Students be Disciplined for Off-Campus Cyberspeech?: The Reach of the First Amendment in the Age of Technology*, 2012 BYU EDU. & L. J. 331, 358-59 (2012); Charles J. Russo, *Social Networking Sites and the Free Speech Rights of School Employees*, SCHOOL BUSINESS AFFAIRS 38 (Apr. 2009).

[7] *See* Robert Diab, *Search Engines and Global Takedown Orders: Google v Equustek and the Future of Free Speech Online*, 56 OSGOODE HALL L. J. (forthcoming) (2019), https://ssrn.com/abstract=3393171; Grafanaki, *supra* note 3, at 121.

[8] As a representative example of such legislation, *see Protection From Online Falsehoods and Manipulation Act 2019*, No. 18 of 2019, (Singapore); *see also* Ellie Bothwell, *Singapore 'Fake News' law 'Threatens Academic Freedom Worldwide': Academics Fear Global Reach of new Singaporean Legislation Could Result in Censorship of International Academic Journals*, THE (Apr. 23, 2019), https://www.timeshighereducation.com/news/singapore-fake-news-law-threatens-academic-freedom-worldwide?; Donie O'Sullivan, *Sri Lanka Citing 'False News Reports,' Blocks Social Media After Attacks*, CNN BUS. (Apr. 21, 2019, 8:24 PM), https://edition.cnn.com/2019/04/21/tech/sri-lanka-blocks-social-media/index.html.

[9] Schetzer, *supra* note 3.

[10] Constitutional or quasi-constitutional protections for free speech are found in the *Canadian Charter of Rights and Freedoms*, §§ 1 and 2(b), pt. I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, and the *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, art. 19, and the *European Convention for*

States, attempts to prohibit either the dissemination or receipt of such information from governmental entities or actors may be a violation of free speech pursuant to the First Amendment to the *United States Constitution*.[11] The Supreme Court of the United States has held that "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press…do not vary when a new and different medium for communication appears."[12] This approach gained recent prominence with the United States Court of Appeals for the Second Circuit holding unconstitutional President Donald Trump's blocking of Twitter users from his account as a restraint on speech protected by the First Amendment. There, the Court wrote that "[a]s a general matter, social media is entitled to the same First Amendment protections as other forms of media."[13]

What about using social media for the spread of religious beliefs or ideas? Beliefs and ideas, too, constitute a form of speech,[14] capable of dissemination, including in the online environment.[15] Of course, in the same way in which it might regulate the use of the platform for fake news or any other content it dislikes, a provider may limit religious beliefs or ideas for any reason. Such beliefs or ideas range from genuine expressions of religious faith, to uses that "weaponize" social media by targeting specific groups for vilification, potentially crossing into the territory of hate speech.[16]

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the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art. 10 and 18, respectively.

[11] Packingham v. North Carolina, 137 S. Ct. 1730, 1731 (2017).

[12] Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 790 (2011) (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)).

[13] Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 237 (2d Cir. 2019). On the basis of the Second Circuit's decision, one former New York Democratic state lawmaker and a Republican Congressional hopeful announced that they are suing Rep. Alexandria Ocasio-Cortez (D-N.Y.) over being blocked from her personal Twitter account: Complaint at 1, *Hikind v. Ocasio-Cortez*, No. 1:19-cv-03956 (E.D.N.Y. July 9, 2019); *See also* John Bowden, *Ocasio-Cortez Sued Over Twitter Blocks*, THE HILL (July 9, 2019, 9:12 PM), https://thehill.com/homenews/house/452327-ocasio-cortez-sued-over-twitter-blocks; *See also* Grafanaki, *supra* note 3, at 111.

[14] *See, e.g.,* W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); United States v. Ballard, 322 U.S. 78, 86 (1944); Torcaso v. Watkins, 367 U.S. 488, 493 (1961); Am. Commc'ns Ass'n, C. I. O., v. Douds, 339 U.S. 382, 398 (1950); Bond v. Floyd, 385 U.S. 116, 131-32 (1966); Speiser v. Randall, 357 U.S. 513, 518 (1958); Baird v. State Bar of Ariz., 401 U.S. 1, 5 (1971).

[15] Charles J. Russo & Marcus Heath, *Teaching Blogging Redux: Post With Caution*, SCHOOL BUSINESS AFFAIRS 35 (Feb. 2016).

[16] Volokh, *supra* note 3.

But what if governments either took the same approach to social media religious speech as they are taking to fake news; or, indeed, what if the proposed restrictions on fake news extended so widely as to curtail or prevent such speech? Could that regulation constitute a violation of constitutionally protected rights to free speech or to freedom of religion or belief ("FoRB"), or both? Such concerns are not as fanciful as they might at first appear. A recent and ongoing Australian controversy involving Israel Folau, an Australian rugby player previously with the New South Wales Waratahs (in Sydney, Australia) and the Australian Wallabies, the national rugby union team, demonstrates why.

In April 2018, purporting to be acting on genuine Christian faith and belief as an active member of an Assemblies of God fellowship,[17] Folau responded to a question on his Instagram account concerning God's "plan for homosexuals" by writing, "Hell…unless they repent of their sins and turn to God."[18] Folau later wrote: "My response to the question is what I believe God's plan is for all sinners, according to my understanding of my Bible teachings, specifically 1 Corinthians 6:9-10".[19] On April 10, 2019, Folau posted an Instagram post and screenshot, quoting 1 Corinthians 6:9-10, which read: "WARNING Drunks, Homosexuals, Adulterers, Liars, Fornicators, Thieves, Atheists, Idolators HELL AWAITS YOU. REPENT! ONLY JESUS SAVES."

Following Folau's second Instagram post, Rugby Australia—the body with which Folau was contracted to play for both the Waratahs and the Wallabies—announced its intention to terminate his contract "in the absence of compelling mitigating factors."[20] Following a hearing on May 16, 2019, he was found to have breached

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[17] Rob Forsaith, *Folau Content After Ditching Mormonism*, THE SYDNEY MORNING HERALD (Nov. 8, 2011, 5:41 PM), https://www.smh.com.au/sport/folau-content-after-ditching-mormonism-20111108-1n597.html.

[18] *Gay People go to 'Hell', Says Australian Rugby Star Israel Folau*, SKY NEWS (Apr. 6, 2018, 6:38 AM), https://t.co/Epxb2ym5gO; *Israel Folau in Trouble Again as he Says 'God's Plan' for gay People is to go to 'Hell'*, THE 42 (Apr. 4, 2018, 12:41 PM), https://www.the42.ie/israel-folau-homophobic-slur-3939395-Apr2018/.

[19] Israel Folau, *I'm a Sinner Too*, PLAYERS VOICE (Apr. 16, 2019), https://www.playersvoice.com.au/israel-folau-im-a-sinner-too/; Carl R. Trueman, *Israel Folau, Unlikely Martyr*, FIRST THINGS (Apr. 23, 2019), https://www.firstthings.com/web-exclusives/2019/04/israel-folau-unlikely-martyr.

[20] Tom Decent, *Rugby Australia set to Sack Israel Folau for Anti-gay Social Media Post*, THE SYDNEY MORNING HERALD (Apr. 11, 2019, 6:12 PM), https://www.smh.com.au/sport/rugby-union/rugby-australia-set-to-sack-israel-folau-for-anti-gay-social-media-post-20190411-p51dar.html.

Rugby Australia's code of conduct.[21] On May 17, 2019, his four-year employment contract was terminated early.[22] In response, on June 6, 2019, Folau, claiming unlawful termination on the basis of religion pursuant to s. 772 of the *Fair Work Act 2009* (Cth), brought proceedings in the Fair Work Commission against Rugby Australia and the Waratahs.[23] The Fair Work Commission issued a certificate confirming failure of all reasonable attempts to resolve the dispute on July 19, 2019, leaving Folau with two weeks to proceed to the Federal Court of Australia, which he did on July 30, 2019.[24] On December 4, 2019, however, Folau and Rugby Australia issued a joint statement and apology, and announced that the parties had reached a confidential settlement.[25] In December 2019, the Anti-Discrimination Board of New South Wales announced an

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[21] On the use of such contracts, *see* Jerome Doraisamy, *Are Employment Contracts Increasingly Being Used to Control Employees' Lives?*, LAW. WKLY. (June 12, 2019), https://www.lawyersweekly.com.au/biglaw/25814-are-employment-contracts-being-used-to-control-employees-lives.

[22] Mike Hynter, *Israel Folau Sacked Over Social Media Posts After Panel Rules in Favour of Rugby Australia*, THE GUARDIAN (May 17, 2019, 4:17 PM), https://www.theguardian.com/sport/2019/may/17/israel-folau-sacked-after-panel-rules-in-favour-of-rugby-australia.

[23] David Mark, *Israel Folau to Take Rugby Australia to Federal Court Over Contract Termination*, MSN NEWS (June 6, 2019), https://www.msn.com/en-au/news/australia/israel-folau-to-take-rugby-australia-to-federal-court-over-contract-termination/ar-AACsUzt; Georgina Robinson, *Folau set to Seek $10 Million in Damages From Rugby Australia*, THE SYDNEY MORNING HERALD (June 7, 2019, 1:20 PM), https://www.smh.com.au/sport/rugby-union/folau-takes-fight-against-rugby-australia-to-fair-work-commission-20190606-p51v53.html.

[24] David Mark, *Israel Folau's Case is Heading to the Courts — So What Happens now?*, ABC NEWS (July 19, 2019, 7:17 PM), https://www.abc.net.au/news/2019-07-20/why-the-israel-folau-case-is-relevant-to-you/11282386; Samantha Maiden, *Talks Break Down Once and for all Between Israel Folau and Rugby Australia*, THE NEW DAILY (July 19, 2019, 8:22 PM), https://thenewdaily.com.au/news/national/2019/07/19/talks-break-down-between-folau-rugby-australia/; *see also* Anthony Forsyth, *Why the Israel Folau Case Could set an Important Precedent for Employment law and Religious Freedom*, THE CONVERSATION (June 11, 2019, 12:28 AM), https://theconversation.com/why-the-israel-folau-case-could-set-an-important-precedent-for-employment-law-and-religious-freedom-118455; *Israel Folau Lodges Claim Seeking $10 m Damages and Reinstatement by Rugby Australia*, THE GUARDIAN (July 31, 2019, 6:40 PM) https://www.theguardian.com/sport/2019/aug/01/israel-folau-lodges-claim-seeking-10m-damages-and-reinstatement-by-rugby-australia.

[25] Rugby Australia, *Joint Statement by Rugby Australia, NSW Rugby Union and Israel Folau* (December 4, 2019) https://australia.rugby/news/2019/12/04/if-joint-statement-dec.

investigation into a complaint that Folau had engaged in homosexuality vilification.[26]

In 2017, prior to Folau's first Instagram post, the Australian government had conducted a national postal survey on the question of changing Australia's marriage law so as to allow for same-sex marriage.[27] While the Wallabies expressed their support for same-sex marriage, Folau wrote on his Twitter account that "I love and respect all people for who they are and their opinions. [B]ut personally, I will not support gay marriage[]," [28] and later wrote that "I didn't agree with Bill Pulver [at the time CEO of Australian Rugby Union] taking a stance on the same sex marriage vote on behalf of the whole organisation, but I understand the reasons behind why he did."[29]

The events surrounding Folau's stated opposition to same-sex marriage, Instagram posts, termination, and legal proceedings have ignited a human rights debate firestorm in Australia. On one side stand those who support "free speech" and "religious expression" as part of FoRB, claiming that Folau's religious freedom has been violated.[30] On the other side stand those claiming that Folau's posts constituted a "weaponizing" use of social media, certainly vilifying, and potentially crossing into a category of hate speech targeting the LGBTQI+ community, and who support the fundamental principle of equality as the core of Australian anti-

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[26] Julian Drape, *NSW Board Accepts Complaint Against Folau*, THE SYDNEY MORNING HERALD (December 13, 2019, 6:55 PM) https://www.smh.com.au/sport/rugby-union/nsw-board-accepts-complaint-against-folau-20191213-p53jwj.html.

[27] *See* Paul Babie & Megan Lawson, *The Law of Marriage Equality in Australia – The Shortest Distance Between Two Points?*, 3 INTERFACE THEOLOGY 1 (2017).

[28] *SSM Survey: Israel Folau Breaks Ranks with Wallabies to Oppose Same-sex Marriage*, ABC NEWS (Sept. 13, 2017, 8:22 AM), https://www.abc.net.au/news/2017-09-13/israel-folau-backs-no-vote-a-day-after-aru-supports-yes/8942766.

[29] Israel Folau, *I'm a Sinner too*, PLAYERS VOICE (Apr. 16, 2019), https://www.playersvoice.com.au/israel-folau-im-a-sinner-too/.

[30] *See* Michael Sexton, *Free to do as we say*, THE AUSTRALIAN (May 9, 2019), https://www.theaustralian.com.au/commentary/free-to-do-as-we-say/news-story/d59f68ee9e2cf07152cc0083e96ac67d; Peter Kurti, *Something Amiss in Live-and-let-Live Australia*, AUSTRALIAN FIN. REV. (May 9, 2019, 11:00 PM), https://www.afr.com/business/sport/something-amiss-in-live-and-let-live-australia-20190509-p51lmp; *'Might as Well Sack me' - Tongan Thor Leaps to Samu Kerevi's Defence as Reds and Wallabies Star Apologises for Instagram Post*, RUGBY PASS (Apr. 30, 2019, 2:17 AM), https://www.rugbypass.com/news/might-as-well-sack-me-tongan-thor-leaps-samu-kerevis-defence-as-reds-and-wallabies-star-apologises-for-instagram-post/.

discrimination and human rights legislation.[31] For the latter group, the code of conduct in Folau's contract must be given priority.[32]

In this article we use Folau's case as a representative factual touchstone, altering the facts in one important respect: as opposed to Rugby Australia, which is not an Australian governmental entity,[33] taking action against Folau by terminating his employment, we ask what would occur if an Australian government, either Commonwealth (Federal) or State, legislated or took executive action so as to prevent such speech. Indeed, in the midst of the furore over Folau's case, simultaneous calls came from the two opposing camps: from those who supported Folau's religious freedom, for greater protections for such speech, in the form of "religious freedom" legislation at the Commonwealth level,[34] and

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[31] Kel Richards, *Folau's Faith Compelled him to Shout a Warning: Repent*, ANGLICAN CHURCH LEAGUE (June 1, 2019), http://acl.asn.au/folaus-faith-compelled-him-to-shout-a-warning-repent/; Andrew MacLeod, *The 'Tolerant' People Attacking Israel Folau are Breathtaking Hypocrites*, THE NEW DAILY (Apr. 21, 2019, 12:47 PM), https://thenewdaily.com.au/news/national/2019/04/20/attacks-against-israel-folau/?; Cait Kelly, *Teammates Take Their Support for Israel Folau Onto Instagram*, THE NEW DAILY (June 18, 2019, 9:59 AM), https://thenewdaily.com.au/news/2019/06/17/israel-folau-controversy/.

[32] On the tension between these two positions, *see* Gillian Triggs, *Are you for Israel Folau or Against? We Love a Simple Answer but This is not a Binary Case*, THE GUARDIAN (June 30, 2019, 9:41 PM), https://www.theguardian.com/sport/commentisfree/2019/jul/01/are-you-for-israel-folau-or-against-we-love-a-simple-answer-but-this-is-not-a-binary-case; Andrew West, *Israel Folau and the Tension at the Heart of Religious Freedom*, THE GUARDIAN (June 22, 2019, 6:47 PM), https://www.theguardian.com/sport/2019/jun/23/israel-folau-and-the-tension-at-the-heart-of-religious-freedom; Jack Anderson, *Explainer: Does Rugby Australia Have Legal Grounds to Sack Israel Folau for Anti-gay Social Media Posts?*, THE CONVERSATION (Apr. 29, 2019, 4:14 PM), https://theconversation.com/explainer-does-rugby-australia-have-legal-grounds-to-sack-israel-folau-for-anti-gay-social-media-posts-116170; Tracey Holmes, *Israel Folau's Sacking From Rugby Union Isn't the end. Sport Must Deal With Conflicting Human Rights*, ABC NEWS (Apr. 14, 2019, 9:26 PM), https://www.abc.net.au/news/2019-04-12/israel-folau-conflicting-human-rights-tracey-holmes/10996228.

[33] Australia, like the United States, is a constitutional federal democracy, consisting of the national, Federal, or Commonwealth government, the State governments of five contiguous mainland States (New South Wales, Queensland, South Australia, Victoria, and Western Australia), one offshore State (Tasmania), three contiguous mainland, or internal Territories (Australian Capital Territory, Northern Territory, and Jervis Bay Territory), and seven offshore or external Territories (Ashmore and Cartier Islands, Australian Antarctic Territory, Christmas Island, Cocos (Keeling) Islands, Coral Sea Islands, Heard Island and McDonald Islands, Norfolk Island). In this article, we are principally concerned only with the Commonwealth and the six State governments.

[34] *See* Anna Patty, *Religious Leaders Seek Freedom to Hire Believers*, THE SYDNEY MORNING HERALD (June 29, 2019, 12:01 AM),

from those who supported the priority of equality, for anti-vilification laws to limit or prohibit speech like Folau's.[35] Both responses squarely raise the issue of governmental action in respect of the use of social media for disseminating religious views or beliefs.

This issue is not limited to Australia. As the Folau controversy raged in Australia, debate over almost precisely the same issue emerged as the *Equality Act*[36] passed the U.S. House of Representatives but stalled in the Senate.[37] Would religious freedom legislation, such as the *Equality Act*, protect religious speech? Or, conversely, would it violate constitutionally protected speech? This is an unanswered question, in both the United States and in Australia. Here we explore these questions as they arise in the Australian setting.

The article contains four parts. Part I provides a brief overview of what is meant by "social media". This serves as

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https://www.smh.com.au/business/workplace/religious-leaders-want-freedom-not-a-right-to-discriminate-20190628-p52277.html. The Commonwealth government has announced it will introduce such protections: Sarah Martin, *Religious Discrimination Bill Will Safeguard People of Faith, Says Attorney General*, THE GUARDIAN (July 7, 2019, 2:00 PM), https://www.theguardian.com/world/2019/jul/08/religious-discrimination-bill-will-safeguard-people-of-faith-says-attorney-general; Tom McIlroy, *New Religious Freedom Laws Designed for Cases Like Folau: AG*, AUSTRALIAN FIN. REV. (July 24, 2019, 6:10 PM), https://www.afr.com/news/politics/national/new-religious-freedom-laws-designed-for-cases-like-folau-ag-20190724-p52a6e. Indeed, on December 10, 2019, partly in response to such calls, the Prime Minster of Australia released second exposure drafts of a suite of proposed "religious freedom" legislation: *Religious Discrimination Bill 2019* (Cth), *Religious Discrimination (Consequential Amendments) Bill 2019* (Cth), and *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* (Cth); *See* Prime Minister of Australia, *Government Will Protect Religious Freedoms by Getting the Law Right* (November 30, 2019), https://www.pm.gov.au/media/government-will-protect-religious-freedoms-getting-law-right; Australian Government, Attorney-General's Department, *Religious Freedom Bills – Second Exposure Drafts* (December 10, 2019), https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills-second-exposure-drafts.aspx.

[35] Jerome Doraisamy, *Anti-vilification Laws 'Urgently Necessary' in Wake of Folau Saga*, LAW. WKLY. (July 7, 2019), https://www.lawyersweekly.com.au/biglaw/26023-anti-vilification-laws-urgently-necessary-in-wake-of-folau-saga; Barry Healy, *The Liberal's Crazed 'Religious Freedom' Law*, GREEN LEFT WKLY. (June 6, 2019), https://www.greenleft.org.au/content/liberals-crazed-religious-freedom-law.

[36] *Equality Act*, H.R. 5, 116th Cong. § 1 (2019).

[37] Official Statement, *Church Expresses Support for 'Fairness for All' Approach*, NEWSROOM, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (May 13, 2019), https://newsroom.churchofjesuschrist.org/article/church-expresses-support-fairness-for-all-approach.

important background to our consideration of this medium of communication as used to disseminate religious speech of the type engaged in by Folau between 2017 and 2019.

Part II explores the protections that might be available to those engaging in social media religious speech. Our focus is the protection found in the *Australian Constitution*. We consider three issues. First, using the facts in Folau's case, was such speech in fact religious speech? Second, if it was, is it protected speech pursuant to the *Australian Constitution*? Finally, if protected, could an Australian government, either Federal or State, limit what we call in this article "social media religious speech"? Put another way, this third question concerns the justifiable limitations that might be placed on social media religious speech. While our focus is Australia, our conclusions bear relevance to other jurisdictions where speech is constitutionally protected.[38] Because the United States is a jurisdiction that protects such speech, we sometimes make reference to American law by way of comparison. Of greatest importance is whether, assuming governmental regulation of social media religious speech, and assuming that to be a violation of protected speech, such regulation can nonetheless constitute a reasonable limitation upon those rights so as to ensure the protection of the broader community.

Part III considers the legislative methods, either proposed or currently available, for possible use in the regulation of social media religious speech: "fake news" bans, anti-vilification laws, and the criminal law. We need to be clear at the outset, though, that we are in no way suggesting that Folau's posts in fact constituted any of the forms of speech that might be prohibited by any of those means. Instead, the facts of his case simply serve as a helpful representative factual touchstone, or hypothetical set of facts, which allow a consideration of these governmental means of potentially restricting or prohibiting social media religious speech.

In our Conclusion, we reflect upon whether Folau's Instagram posts would qualify as social media religious speech and, if so, whether the means available to Australian governments for

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[38] *See, e.g., Canadian Charter of Rights and Freedoms*, ss. 1 and 2, pt. I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, *UN General Assembly International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, art. 19, and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art. 10 and 18, respectively.

regulating such speech might nonetheless be considered justifiable limitations.

I. SOCIAL MEDIA

Defining "social media" presents challenges. It is relatively easy to provide examples of social media applications (e.g. Facebook, Twitter). This is the approach typically taken by courts. The Supreme Court of the United States, for instance, defined social media broadly in *Packingham v. North Carolina*, giving as examples Facebook, LinkedIn, and Twitter.[39] In the recent decision of the United States Court of Appeals for the Second Circuit in *Knight First Amendment Institute v. Donald J. Trump*, the court takes the same approach, confirming that Twitter is an example of social media.[40]

Yet, for present purposes, we are concerned not with providing examples of social media, but describing generally what social media are in terms of facilitating the dissemination of ideas. Scholarly commentary proves helpful, although a distinction must be drawn between applications and content.[41] Kaplan and Haenlein offer important guidance in respect of the former, suggesting that social media can be defined as Internet-based applications which facilitate the creation and exchange of user-generated content.[42] The requirement that applications be Internet-based is critical; platforms which do not require Web-based (browser-based) connectivity, but function within a closed computer system (e.g. Instagram, Snapchat), are thus captured in the definition.[43] What applications or platforms do, then, is manage, or "curate" the speech of others. Grafanaki explains that

> [c]urating speech or expressive content can come in flavours, and there are several problematic issues when it comes to how these private entities curate speech. To make sense of them, [we must] mak[e] an important distinction. There are two different ways in which these private entities curate speech, which parallel their

[39] *Packingham*, 137 S. Ct. at 1737.
[40] Knight First Amendment Inst. at Columbia Univ., 928 F.3d at 230.
[41] *See* Grafanaki, *supra* note 3, at 129.
[42] Andreas Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, BUSINESS HORIZONS 53, 61 (2010).
[43] Both web-based and stand-alone applications enabling users to create and consume user-generated content fall within a social media definition.

> separate functions of *hosting* versus providing *navigation and delivery* of public expression.[44]

Grafanaki argues that the first way platforms curate online speech is through their content moderation policies, which determine whether specific content items can be hosted and continue to be hosted on the platform, while the second involves providing navigation through the infinitely growing quantity of available content.[45]

But we are concerned here with social media as a means of content creation—users of a platform generate (create and share) content of a religious nature—which is then curated by the social media platform. Carr and Hayes usefully observe that while social media supports active interpersonal engagement among users, it is the "mere perception of interactivity with other users" which delineates social media from other media forms.[46] It is also important to note that social networking sites, such as Facebook, are a type of social media distinct from blogs (personal webpages), content communities (e.g. Flickr, YouTube) or virtual game worlds (e.g. Second Life). Thus, while social networking sites are social media, not all social media are social networking sites.[47] The proliferation of technology, ease of access and corresponding expansion of technical knowledge, provides users with a powerful new media platform for disseminating content instantaneously.

In Australia, the content created by users, in its various forms (e.g. text-based, photos, videos) communicated using any Internet-based applications or platforms, is governed in a plethora of ways. Lawmakers have responded to evolving negative online conduct by reviewing existing state and federal laws to ensure their applicability in an online context, enacting new laws (criminal and civil) where gaps in the existing frameworks were evident, and implementing educative initiatives in an effort to limit harm to those exposed. But is such speech, if used for religious purposes, constitutionally protected? In order to answer that question, we must first determine whether religious speech itself is protected.

II. IS RELIGIOUS SPEECH CONSTITUTIONALLY PROTECTED?

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[44] Grafanaki, *supra* note 3, at 117.
[45] *Id.* at 117-18.
[46] C. Carr & R. Hayes, 23 *Social Media: Defining, Developing and Divining',* 23 ATLANTIC JOURNAL OF COMMUNICATION 46, 51 (2015).
[47] *Id.* at 49; *See also* J. Shelton & M. Rodriguez, *Social Media*, ENCYCLOPAEDIA OF SOCIAL WORK (online) (March 2019).

The constitutional protection of religious speech pursuant to the *United States Constitution* involves a consideration of the interplay of the free speech and FoRB components of the First Amendment.[48] In the same way, the Australian constitutional protection for such speech results through a singular hybrid of express and implied protections found in the *Australian Constitution*. In order to understand the protection of religious speech in Australia, it is therefore necessary to consider both the express protection for FoRB found in s. 116 and the freedom of political communication implied from the text of the *Constitution* as a whole. We consider each in turn.

A. Section 116

Section 116 of the *Australian Constitution* provides that:

> 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.

This establishes, as a textual matter, four guarantees, against (i) establishment of a state religion; (ii) the imposition of observance of a state religion; (iii) prohibiting the free exercise of any religion; and (iv) the requirement of a religious test for the holding of a Commonwealth office or public trust. And it indeed appeared, early in Australia's history, that these guarantees would be treated as individual rights given wide amplitude through judicial interpretation. In 1936, the Judicial Committee of the Privy Council (JCPC), at the time the United Kingdom judicial body charged with oversight of the development of law throughout the British Empire, including Australia, wrote that:

> It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general and their full import and true meaning can often only be appreciated when considered,

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[48] Christopher Ross, *The Alt-Right, the Christian Right, and Implications on Free Speech*, 20 RUTGERS J. L. & RELIGION 47 (2019).

> as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that "in interpreting a constituent or organic statute such as the [*Australian Constitution*]…, that construction most beneficial to the widest possible amplitude of its powers must be adopted"…. But that principle may not be helpful, where the section is…a constitutional guarantee of rights, *analogous to the guarantee of religious freedom in sec. 116*…. The true test must, as always, be the actual language used.[49]

Yet, once broken from the JCPC's tether between 1968 and 1986, and thus having sole responsibility for the interpretation of Australian law, the High Court of Australia moved off in its own direction, systematically rejecting a wide scope for s. 116, adopting a general interpretive approach to the provision[50] such that it is now taken as:

> …not, in form, a constitutional guarantee of the rights of individuals;…. Section 116…instead takes the form of express restriction upon the exercise of Commonwealth legislative power.[51]

> Section 116 is a denial of legislative power to the Commonwealth, and no more.[52]

Still, while perhaps not given as wide a scope of protection as the JCPC envisioned for it, and while it has received little judicial attention during the course of Australia's federal history, s 116 under the High Court's approach nonetheless provides important constitutional protections for FoRB in Australia. The first guarantee, prohibiting establishment, has been taken up by the High Court only once, in *Attorney-General (Vic); Ex rel Black v.*

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[49] *James v Commonwealth* (1936) 55 CLR 1, 43-44 (Austl.) (emphasis added and internal citations omitted).
[50] *See generally* RICHARD ELY, UNTO GOD AND CAESAR: RELIGIOUS ISSUES IN THE EMERGING COMMONWEALTH 1891–1906 (1976).
[51] *Attorney-General (Vic); Ex rel Black v Commonwealth* (*DOGS Case*) (1981) 146 CLR 559, 605 (Austl.).
[52] *Id*. at. 653 (Wilson, J.).

Commonwealth (*DOGS Case*),[53] in which the Court upheld the constitutionality of Commonwealth funding of religiously-affiliated private schools. Chief Justice Barwick wrote that:

> establishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic, in this instance, the Commonwealth. It involves the identification of the religion with the civil authority so as to involve the citizen in a duty to maintain it and the obligation of, in this case, the Commonwealth to patronize, protect and promote the established religion. In other words, establishing a religion involves its adoption as an institution of the Commonwealth, part of the Commonwealth "establishment."[54]

The establishment guarantee therefore prohibits the adoption of any religion as an institution of the state,[55] although not one which merely "touches or relates to" religion.[56] While it has never been judicially tested, the religious observance guarantee would likely be treated the same way.

The High Court has given the greatest attention to the free exercise guarantee. In *Krygger v. Williams*,[57] the Court found constitutional a provision of the *Defence Act 1903–1911* (Cth), which established part-time national service training and non-combatant duties for conscientious objectors. In rejecting Krygger's claimed infringement of free exercise,[58] Griffith CJ wrote that the guarantee protects against:

> prohibiting the 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

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[53] *Id.*
[54] *Id.* at. 582 (Barwick, C.J.); *see also id.* at 604 (Gibbs, J.), 612 (Mason, J.), 653 (Wilson, J.).
[55] *Id.* at. 582 (Barwick, C.J.), 604 (Gibbs, J.), 612 (Mason, J.), 653 (Wilson, J.).
[56] *Id.* at. 616 (Mason, J.).
[57] *Krygger v Williams* (1912) 15 CLR 366 (Austl.).
[58] *Id.* at. 369 (Griffith, C.J.).

> moral grounds, but it does not come within the prohibition of [s.] 116.…[59]

The High Court affirmed this approach in *Adelaide Co. of Jehovah's Witnesses Inc. v. The Commonwealth*.[60] Latham CJ explained that the word "for" in the guarantee "shows that the purpose of the legislation in question may properly be taken into account in determining whether or not it is a law of prohibited character."[61] A majority of the High Court confirmed this approach in *Kruger v. Commonwealth*, where,[62] in joint judgments, the High Court determined that the operative test for infringement was that a law have the "purpose of achieving an object which s 116 forbids."[63] That "purpose" "refers to an end or object which legislation may serve" and that "it is the Court which must decide whether the measure possesses the requisite character."[64] As such, a court must look "not to underlying motive but to the end or object the legislation serves."[65] The correct approach to the free exercise guarantee therefore posits that it is violated by the purpose, rather than the effect, of impugned legislation. Or, put another way, where the purpose of the impugned legislation is not to prohibit the free exercise of a religion, even where that might be its effect, s. 116 is not violated. This narrows the applicability of the free exercise guarantee "to the internal forum, with no relevance to public acts."[66]

Finally, *Williams v. Commonwealth*[67] considered the Commonwealth National School Chaplaincy Program ("NSCP"), which provided for Commonwealth funding for State school chaplains (who would provide religious advice in a spiritual context).[68] The Queensland Scripture Union, a Christian group, was engaged to supply chaplains. The appeal involved whether "school chaplain" in the NSCP guidelines—which required that a chaplain

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[59] *Id.*
[60] *Adelaide Co of Jehovah's Witnesses Inc. v Commonwealth*, 67 CLR 116, 131-132 (Austl.).
[61] *Id.* at 132 (Latham, C.J.).
[62] *Kruger v Commonwealth*, (1997) 190 CLR 1 (Austl.).
[63] *Id*. at 40 (Brennan, C.J.).
[64] *Id*. at 86 (Toohey, J.).
[65] *Id.* at 160 (Gummow, J.).
[66] Michael Hogan, *Separation of Church and State: Section 116 of the Australian Constitution*, 53(2) THE AUSTRALIAN QUARTERLY 214, 308 (1981); Anthony Gray, *Section 116 of the Australian Constitution and Dress Restrictions*, 16 DEAKIN L. REV. 293, 316 (2011) (discussing the constitutionality of a ban on certain religious apparel).
[67] *Williams v Commonwealth* (2012) 248 CLR 156 (Austl.).
[68] *Id*. at 285-86 (Hayne, J.).

be recognised "through formal ordination, commissioning, recognised qualifications or endorsement by a recognised or accepted religious institution or a state/territory approved chaplaincy service"[69]—imposed a religious test for a Commonwealth office.[70] In joint judgments, the High Court found that "chaplains engaged by [Scripture Union held] no office under the Commonwealth";[71] that Commonwealth funding was "insufficient to render a chaplain engaged by [Scripture Union] the holder of an office under the Commonwealth";[72] and that the *Constitution* required a "closer connection to the Commonwealth" in order for the religious test guarantee to be enlivened.[73]

While the judicial interpretation of the guarantees contained in s. 116 is no doubt narrow, what matters is that there is express protection for FoRB contained in the *Australian Constitution*. This is important background to the means by which religious speech may form part of the protections created by the implied protection for political communication.

B. Implied Freedom of Political Communication

Unlike the Bill of Rights in the *United States Constitution*, the *Australian Constitution* contains no such expressly enumerated rights in one self-contained, comprehensive document; what express rights do exist, such as s. 116, are scattered throughout the text, and are not comprehensive, nor applicable to both the Commonwealth and the States.[74] Since 1977, though, the High Court has added to these few express rights some "implied" freedoms found in the *Constitution* as a consequence of the federal democratic framework established by the text as a whole.[75] Justice Murphy, the first High Court justice to find these implied rights, gave this rationale for doing so; it remains the best explanation available:

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[69] *Id.* at 107 (Gummow and Bell, JJ.).
[70] *Id.*
[71] *Id*. at 109.
[72] *Id.*
[73] *Id.* at 110.
[74] *See* Paul Babie and Neville Rochow, *Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom*, 2010 BYU L. REV. 821, 822 (2010) (assessing opposition to comprehensive human rights protection).
[75] *See* Russell L. Weaver & Kathe Boehringer, *Implied Rights and the Australian Constitution: A Modified New York Times, Inc. v. Sullivan Goes Down Under*, 8 SETON HALL CONST. L. J. 459 (1998); Adrienne Stone, *Australia's Constitutional Rights and the Problem of Interpretive Disagreement*, 27 SYDNEY L. REV. 29 (2005).

> 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 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….[76]

In considering possible implications, the High Court has considered and rejected a right to equality,[77] narrowly accepted a due process right,[78] and more broadly accepted two rights fundamental to the democratic system of government adopted by the Constitution: a right to vote,[79] and a freedom of political communication.[80] This last freedom, the first to be recognised, and to date the most fully-developed, provides the foundation for the constitutional protection for religious speech in Australia.

1. "Speech": The Ambit of the Protection

In 1992, the High Court recognised the existence of an implied freedom of political communication in *Nationwide News Pty Ltd v.*

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[76] *Ansett Transport Indus (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88 (Murphy, J.) (Austl.) (citations omitted).

[77] *See Leeth v Commonwealth* (1992) 172 CLR 455 (Austl.); *Kruger v Commonwealth* (1997) 190 CLR 1 (Austl.); *see also* Adrienne Stone, *supra* note 75.

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

[79] *Attorney-General (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 Commissioner* (2007) 233 CLR 162 (Austl.); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 (Austl.).

[80] As established by *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (Austl.); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (Austl.); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (Austl.); *McCloy v New South Wales* [2015] HCA 34; *See also Brown v Tasmania* [2017] HCA 43.

Wills[81] and *Australian Capital Territory v. Commonwealth*,[82] which was modified in *Lange v. Australian Broadcasting Corporation* ("*Lange*")[83] and *Coleman v. Power*.[84] Together, those cases stand for the proposition:

> that there is to be discerned in the doctrine of representative government which the Constitution incorporates an implication of freedom of communication of information and opinions about matters relating to the government of the Commonwealth.[85]

Significantly, the High Court has since held that while the implied freedom of political communication is not an individual right, but a limitation on governmental power,[86] the freedom is nonetheless logically indivisible and, as such, applies to both the Commonwealth and the States.[87]

What, precisely, is the scope or ambit of the protection in the *Australian Constitution*? Or, put another way, what qualifies as communication, or "speech" pursuant to the freedom? Answering that question allows us to determine whether religious speech generally, and social media religious speech specifically, gains protection. However, because the topic tends not to receive direct treatment, either by commentators or by the courts, it is not easy to determine precisely what protected speech is.

The outcome of those cases in which a claim to constitutionally protected political communication has been upheld assist in establishing some parameters as to what qualifies as protected speech. Given the limited number of cases in which the High Court has considered this implied freedom, however, we might also look elsewhere for such judicial guidance. Thus, in the Court of Justice of the European Union "language needs to be understood in the context of historical events and social dynamics, and can often

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[81] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (Austl.).
[82] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (Austl.).
[83] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559-62 (Brennan, C.J., Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby, JJ.) (Austl.) (citations omitted).
[84] *Coleman v Power* (2004) 220 CLR 1 (Austl.).
[85] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72-73 (Deane and Toohey, JJ.) (Austl.).
[86] *Comcare v Banerji* [2019] HCA 23 164-66 (Edelman, J.) (Austl.).
[87] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 120 (Mason, C.J.) (Austl.).

convey a sense beyond their apparent meaning."[88] American First Amendment jurisprudence demonstrates what this might mean in practice:[89]

> 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."[90]

Thus, the First Amendment protects both actual and symbolic speech, such as the right not to speak (in this case, the right not to salute the flag),[91] of students to wear black armbands to school to protest a war,[92] to use certain offensive words and phrases to convey political messages,[93] to contribute money to political campaigns,[94] to advertise commercial products and professional services (with some restrictions),[95] to engage in symbolic speech, (such as burning the flag).[96] But it does not include the right to incite actions that would harm others,[97] to make or distribute obscene materials,[98] to burn draft cards as an anti-war protest,[99] to permit students to print articles in a school newspaper over the objections

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[88] *See* Paolo Cavaliere, *Preliminary Notes on the Pending Case Glawischnig-Piesczek v. Facebook Ireland Limited: Facebook, Defamation and Free Speech: A Pending CJEU Case*, EU LAW ANALYSIS: EXPERT INSIGHT INTO EU L. DEV. (May 17, 2019), eulawanalysis.blogspot.com/2019/05/facebook-defamation-and-free-speech.html.

[89] This list is drawn from *What Does Free Speech Mean?*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does.

[90] Grafanaki, *supra* note 3, at 151 (quoting Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 22 (2000)) (emphasis in the original).

[91] *W. Virginia State Bd. of Educ.*, 319 U.S. at 642.

[92] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

[93] Cohen v. California, 403 U.S. 15, 26 (1971).

[94] Buckley v. Valeo*,* 424 U.S. 1, 58 (1976).

[95] Virginia Bd. of Pharmacy v. Virginia Consumer Council*,* Inc., 425 U.S. 748, 770 (1976); Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977).

[96] Texas v. Johnson, 491 U.S. 397, 419 (1989); *See also* United States v. Eichman, 496 U.S. 310, 318 (1990).

[97] Schenck v. United States*,* 249 U.S. 47, 52 (1919).

[98] Roth v. United States, 354 U.S. 476, 485 (1957).

[99] United States v. O'Brien, 391 U.S. 367, 376 (1968).

of the school administration,[100] of students to make an obscene speech at a school-sponsored event,[101] or of students to advocate illegal drug use at a school-sponsored event.[102]

Still, while it is limited, the High Court, too, has held that political speech broadly includes communication on *all* political matters.[103] As such, the ambit of the protection might therefore allow for some limitations to be placed upon the common law and statutory definitions of defamation,[104] and extend to commercial speech, although not if without political content.[105] 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[106] and possibly protests against abortion.[107] Still, whether the freedom will ultimately be treated as broadly as the generalised freedom of speech found in the First Amendment remains to be seen.[108]

For present purposes, though, we are concerned with whether political speech includes within its ambit religious speech. Put another way, can religious speech have political purposes, thereby gaining the protection of the implied freedom?[109] Two High Court decisions provide guidance on this matter: *Attorney-General (SA) v. Corporation of the City of Adelaide* ("*Street Preachers Case*"),

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[100] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988).
[101] Bethel Sch. Dist. No.43 v. Fraser, 478 U.S. 675, 685-86 (1986).
[102] Morse v. Frederick, 551 U.S. 393, 397 (2007).
[103] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (Austl.); *See also 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 Austr Newspapers Ltd* (1994) 182 CLR 211 (Austl.); *Lange v Austr Broadcasting Corporation* (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 State of New S Wales* (2013) 88 ALJR 227 (Austl.); *McCloy v New S Wales* [2015] HCA 34 (Austl.); *Brown v Tasmania* [2017] HCA 43 (Austl.); *Unions New S Wales v New S Wales* (2019) HCA 1 (Austl.); *Spence v Queensland* (2019) HCA 15 (Austl.).
[104] *Theophanous v Herald & Weekly Times Ltd And Another* (1994) 124 ALR 1, 27 (Austl.).
[105] *Id.*
[106] *Brown v Tasmania* [2017] HCA 43, 11-99 (Kiefel, C.J., Bell and Keane, JJ.) (Austl.).
[107] *Clubb v Edwards; Preston v Avery* [2019] HCA 11, 37, 118-19 (Kiefel, C.J., Bell and Keane, JJ.), 135-214 (Gageler, J.), 247-49 (Nettle, J.), 355 (Gordon, J.), 409-56 (Edelman, J.) (Austl.).
[108] On the very widest possible ambit of the freedom, *see* Mitchell Landrigan, *Voices in the Political Wilderness: Women in the Sydney Anglican Diocese*, 34 ALTERNATIVE L. J. 177 (2009).
[109] *See* Ross, *supra* note 48.

and *Clubb v. Edwards; Preston v. Avery* ("*Clubb*"). In the former, the Court wrote, in *obiter*, that:

> some "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 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.[110]

Clubb involved two challenges to exclusion zones—one from Victoria and one from Tasmania—restricting communication and activities near abortion clinics. While the Court did not directly consider whether the speech of those challenging the laws which established those zones was religious, it can be assumed that it was at least motivated by religious or moral concerns. The Court held 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. That is so even where the choice to be made by a particular individual may be politically controversial.[111]

Yet, the Court conceded "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.'"[112] The Court left open the possibility that such speech may, in fact, constitute protected speech. These High Court

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[110] *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43-44 (French, C.J.) (Austl.); *see also id*. at 73-74 (Crennan and Kiefel, JJ.).

[111] *Clubb v Edwards; Preston v Avery* [2019] HCA 11, 29 (Kiefel, C.J., Bell and Keane, JJ.) (Austl.).

[112] Martin Clark, *Clubb v Edwards; Preston v Avery*, OPINIONS ON HIGH (April 18, 2019) https://blogs.unimelb.edu.au/opinionsonhigh/2019/04/18/clubb-case-page/ (quoting *Clubb v Edwards; Preston v Avery* [2019] HCA 11, 37 (Kiefel, C.J., Bell and Keane, JJ.) (Austl.).

pronouncements seem to allow for the possibility that religious speech may enjoy constitutional protection pursuant to the implied freedom of political communication.

Support for this conclusion may also be found in the fact that the text upon which the implied freedoms depend include the express protection of FoRB in s. 116. Arguably, then, the implication of a freedom of political communication must also include, to some extent, the freedom to communicate about religious matters, provided that the speech touches upon "political choices to be made by the people of the Commonwealth as the sovereign political authority." While the High Court has not explicitly so said, adverting to religious speech in *Street Preachers*, and the fact that the speech in *Clubb* was morally, if not religiously motivated, would tend to suggest that religious speech can be political speech for the purposes of the implied freedom. Moreover, because it is implied from the Constitution as a whole, it applies not only to the Commonwealth, to which s. 116 is limited, but also to the States.[113] The ambit of the implied freedom of political communication may be taken, then, to cover religious speech, whether the infringement is Commonwealth or State.

Of course, we are concerned here with the use of social media to disseminate one's religious beliefs. If the implied freedom applies also to religious speech, then it must also apply to the myriad ways in which such speech might be disseminated, including the multitude of ways in which content can be communicated using any means or medium of communication in the online environment (e.g. speech can be created via text, images, videos), including through social media. As such, we assume that the content contained in Folau's Instagram posts constitutes religious speech, or what we have called here social media religious speech. The question, then, is whether such speech can be justifiably limited by the state.

2. Justifiable Limitation

Freedom of religion or belief is not an absolute right. In *Cantwell v. Connecticut*, Justice Roberts wrote of the First Amendment that one must distinguish between "freedom to believe and freedom to act. The first is absolute, but, in the nature of things,

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[113] *Unions NSW v State of New South Wales* (2013) 252 CLR 530 (Austl.); *Attorney-General (SA) v Corp of the City of Adelaide* (2013) 249 CLR 1 (Austl.); *McCloy v New South Wales* (2015) 257 CLR 178 (Austl.); *Brown v Tasmania* (2017) 261 CLR 328 (Austl.); *Clubb v Edwards; Preston v Avery* [2019] HCA 11 (Austl.); *Spence v. Queensland* [2019] HCA 15 (Austl.).

the second cannot be. Conduct remains subject to regulation for the protection of society."[114] Using the levels of scrutiny analysis—rational basis, intermediate, or strict[115]—developed from the famous 'footnote 4' of *United States v. Carolene Products Co.*,[116] the Supreme Court has crafted a standard by which limitations imposed upon the rights of a religious group must take the least restrictive or narrowest means possible.[117] Such limitations must either demonstrate (i) a rational relationship to a legitimate governmental purpose[118] with a strong, but rebuttable, presumption of treating legislative limitations as constitutional,[119] or (ii) a compelling state interest,[120] in which case limits must be drawn as narrowly as possible.[121] Similarly, in the Australian context, Chief Justice Latham argued in respect of s. 116 that it must be "possible to reconcile religious freedom with ordered government".[122] The High Court has not, though, elaborated the standard by which such limitations are to be assessed.

Combining FoRB and speech therefore creates complications. In the United States, the Supreme Court treats any limitations on speech as a matter of the type of speech under consideration, rather than as a separate inquiry. Thus, as we have seen above, some categories of speech are considered protected, while others are not. This results in a de facto "limitations" standard, although it is not clear whether religious speech is a matter of FoRB, and thus subject to limitations, or a matter of free speech, in which case it would need to be defined as a class of either protected or unprotected speech. Of course, this may be a meaningless distinction, as it is unlikely that religious speech would be treated as unprotected.[123] Still, when speech passes from religious speech animated by FoRB into hate

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[114] *Cantwell*, 310 U.S. at 303-04.
[115] *See*, Mario Barnes & Erwin Chemerinsky, *The Once & Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1076-90 (2011); Ashutosh Bhagwat, *Hard Cases and the (D)evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 963 (1998).
[116] United States v. Carolene Prod. Co., 304 U.S. 144, 152 n. 4 (1938) (Stone, J.).
[117] *See* Sherbert v. Verner, 374 U.S. 398 (1963); *see also* CHARLES J. RUSSO, THE LAW OF PUBLIC EDUCATION 11 (9th ed., 2015).
[118] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439-40 (1985).
[119] *See Hazelwood Sch. Dist.*, 484 U.S. at 273.
[120] Korematsu v. United States, 323 U.S. 214 (1944).
[121] Russo, *supra* note 6, at 111.
[122] GEORGE WILLIAMS, SEAN BRENNAN AND ANDREW LYNCH, BLACKSHIELD AND WILLIAMS AUSTRALIAN CONSTITUTIONAL LAW & THEORY: COMMENTARY AND MATERIALS 1175 (6th ed., 2014) (citing *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 132 (Latham, C.J.) (Austl.)).
[123] On the complicated interplay of FoRB and religious speech, *see* Ross, *supra* note 48.

speech, the line dividing it from protected speech may become relevant. In discussing the rise of the Alt-Right in the United States, for instance, Ross writes that:

> Under the First Amendment, the Alt-Right has a constitutional right to free speech and to rally for the causes they see fit. However, when citizens are meeting in the streets in violent affairs that may result in death, it begs the question, is there any way to stop it? As mentioned, universities, private businesses, and whole cities struggle to manage the tension between freedom of speech, dignity, and religion. Hate speech statutes have suffered constitutionally, and the courts are hesitant to allow bans on protected speech.[124]

The Australian approach might provide useful lessons for the application of free speech protections where FoRB and religious speech interact. In words reminiscent of the American approach to FoRB, Justice Murphy, writing in respect of the implied freedoms generally, said that they:

> 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). The freedoms may not be restricted by the [Commonwealth] Parliament or State Parliaments except for such compelling reasons.[125]

This general approach to the implied freedoms has been specifically applied to political communication. In *McCloy v. New South Wales* ("*McCloy*")[126] the High Court wrote that:

> The freedom under the Australian Constitution is a qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may "exercise a free and informed choice as electors." It is not

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[124] *Id.* at 97-98.
[125] *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88 (Murphy, J.) (Austl.) (citations omitted).
[126] *McCloy v New South Wales* (2015) 257 CLR 178 (Austl.).

> 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.[127]

In the High Court's most recent pronouncement on the implied freedom, Justice Edelman perhaps put best the approach to be used in assessing limitations which might be placed upon it: a court must balance the legislative purpose against the infringement of the freedom and, in considering that balance, must bear in mind why legislatures act in the first place. Justice Edelman wrote that:

> [a] reason why parliaments make laws is to shape behaviour. They can act prophylactically, by reference to possibilities and probabilities, as well as reactively. They can shape laws by reference to circumstances overseas. And they can, and often should, shape laws by reference to circumstances and conduct in other States. And, when legislating in response to the conduct of those who are not governed, "[t]here is no doubt of it; but in this country it is found good, from time to time, . . . to encourage the others."[128]

In other words, governments may legislate so as to limit, restrict, or even altogether prohibit a class of speech in order to shape behaviour. The issue is whether, in limiting speech, the government might go too far in attempting to achieve that objective. On that question, in *Unions NSW v. New South Wales*, the Court said that:

> 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 need not be. The domain of selections open to the Parliament was described as comprising those provisions which fulfil the legislative purpose with the least harm to the implied freedom. And

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

[128] *Spence v Queensland* [2019] HCA 15, 323 (Edelman, J.) (Austl.) (internal citations omitted, citing VOLTAIRE, CANDIDE (1759)).

> . . . there may be a multitude of options available to the Parliament in selecting the desired means.[129]

This is clearly relevant in the context of Folau's Instagram posts: can the government justifiably attempt to shape behaviour around such speech and, if so, how, and why? The High Court has established a test for making such determinations, and for balancing the respective interests involved.

Enunciated first in *Lange* and given its current authoritative form in *McCloy*, determining a violation of the implied freedom of political communication and assessing whether the violation constitutes a justifiable limitation involves a three-stage analysis:

> The question whether a law exceeds the implied limitation depends upon the answers to the following questions: . . .
>
> > 1. Does the law effectively burden the freedom in its terms, operation or effect?
> >
> > If "no", then the law does not exceed the implied limitation and the enquiry as to validity ends.
> >
> > 2. If "yes" to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to . . . as "compatibility testing".
> >
> > 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.

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[129] *Unions NSW v New South Wales* [2019] HCA 1, 47 (Kiefel, C.J., Bell and Keane, JJ.) (Austl.).

> If the answer to question 2 is "no", then the law exceeds the implied limitation and the enquiry as to validity ends.
>
> 3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what is referred to . . . as "proportionality testing" to determine whether the restriction which the provision imposes on the freedom is justified.

The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the 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, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

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.

If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be "no" and the measure will exceed the implied limitation on legislative power.[130]

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[130] *McCloy* (2015) 257 CLR 178, 2 (French, C.J., Kiefel, Bell, and Keane, JJ.) (Austl.) (footnotes and citations omitted). This has been affirmed in *Brown v Tasmania* (2017) 261 CLR 328, 123-31 (Kiefel, C.J., Bell and Keane JJ.), 236 (Nettle, J.) (Austl.); *Clubb v Edwards; Preston v Avery* [2019] HCA 11 (Austl.); and in *Comcare v Banerji* [2019] HCA 23, 164-66 (Edelman, J.) (Austl.).

The freedom itself, defined negatively, may require justifiable limitation so as to allow for restraint where the exercise of the freedom interferes with the liberty or freedom of others. The individual right exists, but because we live in community with others, it cannot be absolute. This is deeply significant to the question of religious speech generally, and that disseminated by social media specifically, as in Folau's Instagram posts.

In applying the *McCloy* test, the High Court has recently devoted attention to the community interests against which the freedom of political communication must be balanced in determining the justifiability of limitations. Or, put another way, the Court has asked what community interests might justifiably be given priority over the individual freedom of political communication. Two cases offer important guidance as to the balancing necessary to assessing the regulation of speech such as that posted by Folau on Instagram: *Brown v. Tasmania*[131] and *Clubb*,[132] both of which establish some important parameters concerning the limitations which may justifiably be imposed upon speech. For present purposes, we highlight four points. First, in both cases, the Court confirmed that limitations may be imposed to prevent harmful consequences to those who hear, receive, or are the subject of impugned speech. Second, those consequences may be divided between those which affect commercial activities, and those which affect natural persons. Thus, in *Brown*, Justice Nettle wrote that:

> [t]here should . . . be no doubt that the purpose of ensuring that protesters do not substantively prevent, impede or obstruct the carrying out of business activities on business premises and do not damage business premises or business-related objects is a purpose compatible with the system of representative and responsible government. The implied freedom of political communication is a freedom to communicate ideas to those who are willing to listen, not a right to force an unwanted message on those who do not wish to hear it, and still less to do so by preventing, disrupting or obstructing a listener's lawful business activities. Persons lawfully carrying on their businesses are

[131] *Brown v Tasmania* (2017) 261 CLR 328 (Austl.).
[132] *Clubb v Edwards; Preston v Avery* [2019] HCA 11 (Austl.).

> entitled to be left alone to get on with their businesses and a legislative purpose of securing them that entitlement is, for that reason, a legitimate governmental purpose.[133]

Thus, commercial activity may be a justifiable reason for restricting speech. The effect of speech on legal persons, corporations, and the natural persons who operate them may therefore be taken into account in considering the justifiability of limitations imposed on the implied freedom.

Third, in *Clubb*, the Court shifted the focus to natural persons, stressing the importance of protecting the dignity of those who must receive any speech otherwise protected in the first step of the *McCloy* test. The Court drew guidance from Aharon Barak, former President of the Supreme Court of Israel, who, writing extra-judicially, said that "[m]ost central of all human rights is the right to dignity. It is the source from which all other human rights are derived. Dignity unites the other human rights into a whole."[134] Building on this foundation, the majority wrote that:

> Generally speaking, to force upon another person a political message is inconsistent with the human dignity of that person. As Barak said, "[h]uman dignity regards a human being as an end, not as a means to achieve the ends of others." Within the present constitutional context, the protection of the dignity of the people of the Commonwealth, whose political sovereignty is the basis of the implied freedom, is a purpose readily seen to be compatible with the maintenance of the constitutionally-prescribed system of representative and responsible government. Thus, when in *Lange* the Court declared that "each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia," there was no suggestion that any member of the

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[133] *Brown v Tasmania* (2017) 261 CLR 328, 275 (Nettle, J.) (Austl.).

[134] AHARON BARAK, THE JUDGE IN A DEMOCRACY 85 (2006) (cited by the High Court in *Clubb v Edwards; Preston v Avery* [2019] HCA 11, 50 (Kiefel, C.J., Bell and Keane, JJ.) (Austl.)).

> Australian community may be *obliged* to receive such information, opinions and arguments.[135]

In *Clubb*, the High Court considered two pieces of legislation—one from Victoria, 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 those words "reasonably likely to cause distress or anxiety" rather than mere discomfort or hurt feelings, so as to protect the equanimity, safety, wellbeing, privacy, and dignity of others. The Court also noted that a distinction must be drawn between political debate voluntarily entered into and those where an individual is attending to a private health matter and may be in a vulnerable state.[136] Indeed, Justice Gageler wrote that speech within these zones could justifiably be restricted so as to establish "an atmosphere of privacy and dignity," and that that purpose "is unquestionably constitutionally permissible and, by any objective measure, of such obvious importance as to be characterised as compelling."[137] Justice Nettle comes closest to providing a test for determining the justifiability of such limitations:

> The protection of the safety, wellbeing, privacy and dignity of the people of Victoria is an essential aspect of the peace, order and good government of the State of Victoria and so a legitimate concern of any elected State government. . . .
>
> [The implied] freedom [allows one] to communicate ideas regarding matters of political controversy to persons who are willing to listen. It is not a licence to accost persons with ideas which they do not wish to hear, still less to harangue vulnerable persons entering or leaving a medical establishment for the intensely personal, private purpose of seeking lawful medical advice and assistance. A law which has the purpose of protecting and vindicating "the legitimate claims of individuals to

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[135] *Clubb v Edwards; Preston v Avery* [2019] HCA 11, 51 (Kiefel, C.J., Bell and Keane, JJ.) (Austl.) (quoting BARAK, *supra* note 134, at 86) (emphasis in the original).
[136] *Id.* at 52-59, 120-26 (Kiefel, C.J., Bell and Keane, JJ.), and 315 (Nettle, J.).
[137] *Id.* at 197 (Gageler, J.).

> live peacefully and with dignity" . . . is consistent with the implied freedom.[138]

Finally, the justifiability of limiting speech as a consequence of the harm it may cause others is highlighted by the fact that the High Court distinguished the protection of the privacy and dignity of others in *Clubb* from the outcome in *Brown*, where the Court found that the speech—protest aimed at protecting the environment—was not only protected, but also unjustifiably burdened. In *Brown*, the protest involved advocating on behalf of the environment and, as such, the impugned speech was not aimed at the privacy and dignity of *people* targeted by the messages.[139] This makes clear that the judiciary not only may but ought to take account of the harm caused to the privacy and dignity of others, thereby preventing speech which is nothing more than accosting or haranguing people, especially vulnerable people. Assuming, then, that Folau's Instagram posts would qualify as religious speech, and so as social media religious speech, and that such speech can be justifiably limited to protect the privacy and dignity of vulnerable people, it becomes necessary to consider the ways in which that may be achieved, both as a matter of current and of proposed legislative action.

C. Dignity: A Coda

Before we turn to the ways in which social media religious speech might justifiably be limited by the state, we pause for a moment to offer a coda on the growing importance of dignity in assessing those instances where competing rights must be balanced, especially those of speech and equality, as occurs in Folau's Instagram posts. Clearly the High Court understands the value of this important, but abstract, concept in assessing the limitations which may justifiably be imposed upon speech so as to prevent harm to those who must "receive" or otherwise bear the consequences of that speech. As we have seen, the concept was first identified by the former President of the Supreme Court of Israel, Aharon Barak, as early as 2006, as "the source from which all other human rights are derived. Dignity unites the other human rights into a whole,"[140]and

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[138] *Id.* at 258-59 (Nettle, J.) (citations omitted).
[139] *Clubb v Edwards; Preston v Avery* [2019] HCA 11, 82 (Kiefel C.J., Bell and Keane JJ.) (Austl.).
[140] BARAK, *supra* note 134, at 85 (cited by the High Court in *Clubb v Edwards; Preston v Avery* [2019] HCA 11, 50 (Kiefel, C.J., Bell and Keane, JJ.) (Austl.)).

it has been growing in international importance ever since, culminating in the December 2018 *Punta del Este Declaration on Human Dignity for Everyone Everywhere: Seventy Years after the Universal Declaration of Human Rights*.[141]

The judicial use of the concept will come as no surprise to American readers, schooled as they are by Justice Kennedy in the contours of the dignity of the individual. In *Planned Parenthood v. Casey*,[142] Justice Kennedy wrote that

> [t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[143]

Justice Kennedy further built upon this foundation in the trilogy of gay rights cases for which he may be best remembered:[144] *Lawrence v. Texas*,[145] *United States v. Windsor*,[146] and *Obergefell v. Hodges*.[147] In *United States v. Windsor*, Justice Kennedy wrote of same-sex marriage that "[t]he history of [the Defence of Marriage Act]'s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence."[148] Justice Kennedy also wrote that "[r]esponsibilities, as well as rights, enhance the dignity and integrity of the person."[149] In *Obergefell v.*

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[141] PUNTA DEL ESTE DECLARATION ON HUMAN DIGNITY FOR EVERYONE EVERYWHERE: SEVENTY YEARS AFTER THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (December 2018), https://www.dignityforeveryone.org/punta-del-este-declaration-2/.
[142] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U. S. 833 (1992).
[143] *Id.* at 851 (Kennedy, J.).
[144] Gary Feinerman, *Tribute: Civility, Dignity, Respect, and Virtue*, 71 STAN. L. REV. ONLINE 140 (2018), https://www.stanfordlawreview.org/online/civility-dignity-respect-and-virtue/.
[145] *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).
[146] *See generally* United States v. Windsor, 570 U.S. 744 (2013).
[147] *See generally* Obergefell v. Hodges, 135 S.Ct. 2584 (2015).
[148] *Windsor*, 570 U.S. at 770 (2013) (Kennedy, J.).
[149] *Id.* at 772.

Hodges, Justice Kennedy said of the Bill of Rights that "these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[150] And of same-sex marriage itself:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.[151]

Whereas Justice Kennedy identifies dignity as attaching to the individual, what the High Court has done, and rather importantly, is reveal the truth that dignity attaches not only to the individual claiming a rights violation—in other words, as a negative protection—but also to others who may be affected by the conduct of the person claiming the negative protection of an individual right. Thus, quite apart from the speaker, the High Court makes clear that it is the listener whose dignity may be assaulted by some forms of speech, and which is therefore the legitimate subject of state action so as to prevent that outcome. On that basis, a limitation taking the protection of the dignity of others as its objective would appear to be justifiable.

This is not unlike the shift which is already occurring in the United States in respect to FoRB itself. In June 2019, the Federal prosecution of Scott Warren for succouring migrants in the Arizona desert coming from Mexico and Central America ended in a mistrial following his claim to be motivated by a spiritual conviction that he must help.[152] And on November 21, 2019, Warren was acquitted on

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[150] *Obergefell*, 135 S. Ct. at 2597 (2015) (Kennedy, J.).
[151] *Id.* at 2608.
[152] District Judge's Minutes in the United States District Court District of Arizona on June 11, 2019, United States v. Warren CR-18-00223-TUC-RCC (DTF), https://www.courtlistener.com/recap/gov.uscourts.azd.1081102/gov.uscourts.azd.1

all charges.[153] This case is significant for, rather than raising the standard invocation of FoRB, which tends to come from religious individuals or groups claiming exemptions from anti-discrimination equality provisions so as to discriminate on the basis of religiously held convictions, Mr. Warren claimed that same right, but on the grounds that it ought to allow him to assist such aliens and thereby avoid prosecution for harbouring and transporting illegal aliens, U.S. Federal crimes punishable by up to 20 years in prison.[154]

Mr. Warren has used the scope of FoRB to protect activities which would have been quite unlike the sorts of conduct for which right-of-centre religious groups had claimed its ambit throughout the course of its development. This transit of FoRB demonstrates the ways in which a concept or a right once thought to protect only in one set of circumstances can morph into something quite different, and unforeseeable, protecting in quite another set of circumstances: "one trouble with liberty is that you never know what people will do with it."[155] In the same way, dignity, then, is indeed a touchstone, not only for the person claiming the violation of a negative individual right, but also, and perhaps more importantly, for those affected by conduct said to be in furtherance of the individual right, even where those so affected are not themselves litigants. In fact, those circumstances in which those affected may otherwise have no other means of having their voices heard may be the paradigmatic case of invoking dignity in the context of justifiable limits. The High Court made so much clear in *Clubb*. It seems difficult to distinguish the facts there from those of Folau's Instagram posts.

The High Court thus makes an important, and novel, intervention in the ongoing development of the dignity concept. It comes not without its difficulties, however, for in doing so the High Court opens the possibility of a clash of competing dignitary

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081102.260.0.pdf; *see also* United States v. Hoffman, No. CR-19-00693-001-TUC-RM, 2020 U.S. Dist. LEXIS 19060 (D. Ariz. Jan. 31, 2020).

[153] District Judge's Judgement of Acquittal in the United States District Court District of Arizona in United States v. Warren, CR-18-00223-TUC-RCC (DTF), https://www.courtlistener.com/recap/gov.uscourts.azd.1081102/gov.uscourts.azd.1081102.412.0.pdf.

[154] *See* Bruce Clark, *I Can Do No Other*: *The Gripping Case of Scott Warren*, THE ECONOMIST (June 15, 2019), https://www.economist.com/united-states/2019/06/15/the-gripping-case-of-scott-warren (On July 2, 2019, Federal prosecutors announced they would seek a retrial). *See also* Bob Ortega, *Prosecutors to Retry Volunteer Worker Who Aided Migrants*, CNN (July 2, 2019, 8:33 PM), https://edition.cnn.com/2019/07/02/us/scott-warren-migrant-humanitarian-prosecution-invs/index.html.

[155] Clark, *supra* note 154.

interests as between those who claim the negative protection of an individual right, on the one hand, and vulnerable others whose privacy and dignity is affected by the conduct undertaken by the person claiming the individual right, on the other. This will require a balancing of dignitary interests in the same way that rights in conflict require balancing. How, precisely, that will be done, remains to be seen. Here we seek only to point out that those who seek to rely upon dignity in support of individual rights, as in the gay rights jurisprudence of Justice Kennedy, must understand the nuanced ways in which it is used by the High Court to defend vulnerable persons who may be subject to the conduct of those claiming individual rights violations. Both dignitary claims are entitled to protection, and we must remain alert to this fact as we consider the protection of religious speech and its justifiable limitation.

III. HOW SOCIAL MEDIA RELIGIOUS SPEECH MIGHT BE REGULATED

If, then, religious speech enjoys constitutional protection, the question becomes whether social media religious speech can be justifiably limited. To answer that, we must first consider the potential limitations that might be imposed upon such speech. Of course, social media religious speech, like all speech created and shared on social media, is curtailed where it infringes (i) the Rules/Terms of Service governing a social media site, or (ii) where it falls within the reach of valid governmental action. However, the constitutional protection of speech, in any state, applies only to the latter—actions taken to restrict it by government or governmental actors or entities, whether legislative or executive.[156] Still, while any actions taken as a matter of the former are beyond constitutional protections for free speech, they nonetheless form an important source of protections for such speech, and against its potentially harmful consequences. We briefly consider this "platform self-regulation" before turning to the ways in which state action may restrict social media religious speech.

A. Platform Self-regulation

Individuals seeking to use social media applications are required to agree to a set of rules that reflect the terms of service.

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[156] *See* Volokh, *supra* note 3.

The agreement outlines rights and obligations of the user and the particular social media service. The agreement defines the relationship between the parties. Relevant here are the directives defining how users can create and share content within the online community. It is important to note that the regulatory reach of these rules is often greater than that of the civil or criminal law.

Consider, for example, Facebook's "Community Standards" policy, which prohibits a wide range of user misconduct including "cruel and insensitive" speech.[157] While acknowledging that such content can be created in many forms and encompassing a wide spectrum of content, Facebook stipulates that "we have higher expectations for content that we call cruel and insensitive," including content that "targets victims of serious physical or emotional harm"; such content will be removed.[158] Moreover, depending on the severity and frequency of misconduct, a user's account may be suspended or disabled.[159] Given that Facebook determines the threshold for deeming content as "objectionable" in pursuit of a safe environment, the site self-regulates content which may otherwise fall outside the scope of civil or criminal law frameworks.

Self-regulation has clear applicability to social media religious speech. Content which comprises subtle derogatory remarks in regard to another user's religion or religious beliefs, but not amounting to "hate speech" (by way of a direct attack on another person's religious affiliation) or encroachment upon an existing law, may be considered by Facebook to be "cruel and insensitive" and may be removed.[160] On the other end of the spectrum, content which directly attacks another user on the basis of religion (using text, image or video footage) is likely to result in content removal by Facebook ("hate speech" violates Facebook's Community Standards)[161] and may also attract a legal response.[162] Social media sites, including Facebook, monitor content in an effort to remove material that breaches its Terms of Service.[163] Users also play a

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[157] FACEBOOK, COMMUNITY STANDARDS § 3(17) (2019), https://www.facebook.com/communitystandards/cruel_insensitive.
[158] *Id.*
[159] *Id.* at §4(2).
[160] *Id.* at § 3(17).
[161] *Id.* at §3(13).
[162] Note, Facebook was used as an example given its large user-base comprising of 2.38 billion monthly active users (based on 2019 data: statistica.com). Most large social networking sites have similar Rules as part of the Terms of Service.
[163] FACEBOOK, COMMUNITY STANDARDS, §3(13) (2019), https://www.facebook.com/communitystandards/hate_speech.

critical role in monitoring such material. Where a Facebook user is harassed on their Timeline by another user on the basis of their religious beliefs, the target can remove the content, report it to Facebook, and block the individual.[164] When harassed in this manner by a Group, the user can report the Group to Facebook and request removal of this kind of religious speech in addition to unsubscribing from the offensive Group.[165]

Still, it is important to note that freedom of speech and expression is fostered on social media. Users have a right to express their religious views and as long as religious speech does not directly target another user and violate the respective social media policy, such content will not be regulated, regardless of whether some people find the content unpalatable or subjectively offensive.[166]

Effective self-regulation is premised on (i) parties complying with their obligations under the policy derivatives, and (ii) taking a pro-active approach to monitoring and responding to harmful content. These actions serve to foster both free speech and a safe online environment within a provider's terms of service.[167]

B. State Action

1. "Fake News" Bans

Some jurisdictions are currently considering, or have already enacted bans upon "fake news" on social media. These laws could either be used to limit online religious speech, or modified so as to have that objective or effect. Very good reasons exist for such bans. Following the 2019 Easter attacks in Sri Lanka, in which more than 200 people died, the government took executive action temporarily to block all social media nationwide in order to stop "false news reports" that were circulating online.[168] The ban affected Facebook and Instagram, as well as YouTube, Snapchat, WhatsApp, and Viber, although not Twitter, which is not widely used in Sri Lanka.[169] Facebook had previously come under intense scrutiny following its use by the suspect in the New Zealand terror attacks of March 2019 to stream live video of the massacre. As a

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[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] FACEBOOK, TERMS OF SERVICE, §4(2) (2019), https://www.facebook.com/legal/terms.
[168] O'Sullivan, *supra* note 8.
[169] *Id.*

consequence, Facebook imposed its own limitations on live streaming.[170] And Sri Lanka had itself temporarily blocked Facebook and other platforms in 2018 on the basis that they were being used to incite violence.[171]

Earlier this year, in world-first legislation, Singapore enacted the *Protection from Online Falsehoods and Manipulation Act 2019*.[172] Section 7 provides that:

> (1) A person must not do any act in or outside Singapore in order to communicate in Singapore a statement knowing or having reason to believe that —
>
> (a) it is a false statement of fact; and
>
> (b) the communication of the statement in Singapore is likely to —
>
> (i) be prejudicial to the security of Singapore or any part of Singapore;
>
> (ii) be prejudicial to public health, public safety, public tranquillity or public finances;
>
> (iii) be prejudicial to the friendly relations of Singapore with other countries;
>
> (iv) influence the outcome of an election to the office of President, a general election of Members of Parliament, a by-election of a Member of Parliament, or a referendum;

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[170] Cade Metz & Adam Satariano, *Facebook Restricts Live Streaming After New Zealand Shooting*, N.Y. TIMES (May 14, 2019), https://www.nytimes.com/2019/05/14/technology/facebook-live-violent-content.html.

[171] O'Sullivan, *supra* note 8.

[172] *See* Ellie Bothwell, *Singapore "Fake News" Law Threatens Academic Freedom Worldwide*, WORLD U. RANKINGS (April 23, 2019), https://www.timeshighereducation.com/news/singapore-fake-news-law-threatens-academic-freedom-worldwide.

> (v) incite feelings of enmity, hatred or ill-will between different groups of persons; or
>
> (vi) diminish public confidence in the performance of any duty or function of, or in the exercise of any power by, the Government, an Organ of State, a statutory board, or a part of the Government, an Organ of State or a statutory board.

(2) Subject to subsection (3), a person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction —

> (a) in the case of an individual, to a fine not exceeding $50,000 or to imprisonment for a term not exceeding 5 years or to both; or
>
> (b) in any other case, to a fine not exceeding $500,000.

(3) Where an inauthentic online account or a bot is used —

> (a) to communicate in Singapore the statement mentioned in subsection (1); and
>
> (b) for the purpose of accelerating such communication,

the person who is guilty of an offence under that subsection shall be liable on conviction —

> (c) in the case of an individual, to a fine not exceeding $100,000 or to imprisonment for a term not exceeding 10 years or to both; or
>
> (d) in any other case, to a fine not exceeding $1 million.

> (4) Subsection (1) does not apply to the doing of any act for the purpose of, or that is incidental to, the provision of —
>
> (a) an internet intermediary service;
>
> (b) a telecommunication service;
>
> (c) a service of giving the public access to the internet; or
>
> (d) a computing resource service.[173]

Such bans understandably raise fears about the potential for restricting freedom of speech. The reach of the legislation, allowing for extensive executive action[174] in the public interest,[175] and applying to acts both inside and outside of Singapore, are an important part of this concern.[176] As yet, though, this comprehensive approach to online speech in the form of fake news has not been followed in other jurisdictions. Moreover, the Singaporean approach, even if taken, may not directly interfere with religious speech, such communication being limited only when

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[173] *Protection from Online Falsehoods and Manipulation Act 2019*, pt 7, (Act No. 26/2019) (Austl.).

[174] *Id.* at pt 3.

[175] Section 4 defines "public interest" as:

> For the purposes of this Act and without limiting the generality of the expression, it is in the public interest to do anything if the doing of that thing is necessary or expedient —
>
> (a) in the interest of the security of Singapore or any part of Singapore;
>
> (b) to protect public health or public finances, or to secure public safety or public tranquillity;
>
> (c) in the interest of friendly relations of Singapore with other countries;
>
> (d) to prevent any influence of the outcome of an election to the office of President, a general election of Members of Parliament, a by-election of a Member of Parliament, or a referendum;
>
> (e) to prevent incitement of feelings of enmity, hatred or ill-will between different groups of persons; or
>
> (f) to prevent a diminution of public confidence in the performance of any duty or function of, or in the exercise of any power by, the Government, an Organ of State, a statutory board, or a part of the Government, an Organ of State or a statutory board.

[176] Bothwell, *supra* note 172.

it falls within the definition of an online falsehood. Instead, in most jurisdictions, what limitations do exist emerge through the interaction of existing legislation which may allow for executive action; this is the approach found in Australia, to which we now turn.

2. Laws of General Application

In this section, we consider existing Australian law that applies generally to speech or to speech in the online environment, and so may have the potential to limit, restrain, or prohibit social media religious speech. We divide this into three parts: first, the Office of the eSafety Commissioner established by the Commonwealth in 2015; second, anti-vilification laws found in some Australian States; and finally, the criminal law, both Commonwealth and State.

(a). Commonwealth eSafety Commissioner

Established by the Commonwealth pursuant to the *Enhancing Online Safety Act 2015* (Cth), the Office of the eSafety Commissioner functions as a central point of contact for online safety issues and operates as a civil enforcement mechanism for managing serious instances of cyberbullying (targeting children under 18 years of age), image-based abuse, and for removing illegal content.[177] As such, either the legislation establishing the office or the executive action taken by the eSafety Commissioner could have the effect of limiting, restricting, or prohibiting social media religious speech.

One of the Commissioner's primary roles is to communicate with social media partners (who voluntarily agree to work with the Office) to remove cyberbullying material, which is classified as material an ordinary reasonable person would consider seriously threatening, intimidating, harassing or humiliating.[178] This function is critical in managing the potential harm caused by public victimization. Where a complaint has been received, the Commissioner may make a formal written request for content removal.[179]

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[177] *See* eSafety Commissioner, Our Legislative Functions, https://www.esafety.gov.au/about-us/who-we-are/our-legislative-functions.
[178] *Enhancing Online Safety Act 2015* (Cth), pt 4 (Austl.).
[179] *Id.*

Enforcement powers depend on the statutory classification of the service provider. Where the service is classified as a Tier 1 service (e.g. Snapchat, Flickr), the Commissioner has no powers for enforcement of content removal.[180] However, where a Tier 1 service repeatedly fails to comply with the Commissioner's removal requests over a 12-month period and demonstrates a disregard for basic online safety requirements, the Commissioner can recommend that the service be reclassified as a Tier 2 service.[181] Tier 2 services are obligated to comply with the Commissioner's removal requests.[182] Civil penalties, such as the issuing of a court ordered injunction and/or a monetary fine, can be imposed for non-compliance.[183] Notably, large social media services (e.g. Facebook, Instagram, and YouTube) are classified as Tier 2 services.[184] A person under the age of 18 who is cyberbullied on the basis of religion can make a complaint using the online portal. Removal of negative religious speech (and other cyberbullying material) is one way of minimising harm experienced by the victim.

The image abuse reporting mechanism available to all Australians provides victims with a range of self-help options and enables the Commissioner to advocate for the removal of intimate, nude or sexual images upon receipt and assessment of a report.[185] "Images" include photos, photoshopped or altered, video, and drawn pictures.[186] Where image-based abuse has a religious character, this mechanism becomes relevant in regard to the regulation of social media religious speech.

The Office of the eSafety Commissioner also investigates reports in regard to offensive and illegal online content and takes action in collaboration with other agencies and law enforcement, where the material is prohibited under the Australian Government National Classification scheme.[187] Content such as child sexual abuse, pro-terrorist content and content that promotes, incites or instructs crime or violence—Refused Classification ("RC") content—is prioritized. This response mechanism is highly relevant where social media religious speech might consist of pro-terrorist content, or where violence is incited or instructed on religious grounds.

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[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Enhancing Online Safety Act 2015* (Cth), pt 4., divs 2 and 3 (Austl.); *see also id.* at pt 6.
[184] *Id.*
[185] *Id.* at pt 4, divs 2 and 3.
[186] *Id.* at pt. 5A and 6.
[187] *Id.* at s 80.

(b). Anti-vilification

While Australia does not have a federal religious vilification law,[188] three Australian States—Queensland,[189] Tasmania,[190] and Victoria[191]—have anti-vilification laws encompassing religious speech. The legislation in each State is similar, defining "religious vilification" generally to include any conduct, including online conduct, that incites feelings of hatred against, serious contempt for, revulsion or severe ridicule of, a person or class of persons on the ground of their religious belief or activity.[192] Conduct may consist of one act or a series of acts.

All jurisdictions have common exemptions.[193] Thus, targets who are vilified on religious grounds may seek legal redress under the respective civil law frameworks. It is important to note, though, that the High Court has recently confirmed that State and Territory tribunals, such as the Victorian Civil and Administrative Tribunal, have no jurisdiction to impose penalties on residents of other Australian States or Territories.[194] This outcome potentially limits recourse for victims in Queensland, Tasmania, and Victoria targeted on the grounds of religion by individuals residing in a different Australian jurisdiction. While this difficulty can be overcome where the enabling legislation provides for such matters to be heard in a court,[195] in the absence of such jurisdiction, residents outside of Queensland, Tasmania, and Victoria cannot be held to the same legal standard for religious speech as residents of

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[188] It is possible for religious speech to be encapsulated by *Criminal Code Act 1995* (Cth) ss 80.2A and 80.2B (Austl.) where violence against a targeted group or members of a group is urged.
[189] *Anti-Discrimination Act 1999* (Qld) ss 124A, 131A (Austl.).
[190] *Anti-Discrimination Act 1998* (Tas) s 19 (Austl.).
[191] *Racial and Religious Tolerance Act 2001* (Vic) ss 8, 25 (Austl.).
[192] *Id.* at s 8(1); *Anti-Discrimination Act 1999* (Qld) s 124A(1) (Austl.); *Anti-Discrimination Act 1998* (Tas) s 19 (Austl.).
[193] *Racial and Religious Tolerance Act 2001* (Vic) ss 11, 12 (Austl.); *Anti-Discrimination Act 1999* (Qld) s 124A(2) (Austl.); *Anti-Discrimination Act 1998* (Tas) pt. 5 (Austl.). The *Racial and Religious Tolerance Act 2001* (Vic) (Austl.) does not provide an exception for the publication of material in circumstances in which publication would be subject to a defence of absolute privilege in proceedings of defamation. It does, however, provide an exception for conduct carried out for a genuine religious purpose, although a religious body cannot rely on the exception where conduct is not engaged in reasonably and in good faith.
[194] *Burns v Corbett* [2018] HCA 15 (Austl.).
[195] New South Wales, for instance, provides for this in the *Justice Legislation Amendment Act (No 2) 2017* (NSW) (Austl.).

the three States which have religious vilification laws in place. In addition to these protections, however, Victoria and Queensland have also criminalized "serious religious vilification" which involves extreme conduct promoting "the strongest forms of dislike towards a person or group because of their religious beliefs or activities."[196]

Australia's religious vilification laws seek to: (i) promote tolerance for different religions, religious practices, or beliefs; (ii) support the maintenance of order in society (by limiting inflammatory religious speech); and, (iii) protect individuals targeted on the basis of their religious affiliation from potential harm. Still, there has been some, albeit limited, scholarly debate surrounding the legitimacy and merits of such measures. Augusto Zimmerman, for instance, contends that the laws are unconstitutional in that they "unreasonably compromise the constitutional right to freedom of political communication, which is a basic right of the citizen as derived from our system of government and implied in the Australian Constitution."[197] Others have commented that the laws may have a potential chilling effect on religious speech. Carolyn Evans notes that the statutory definitions of religious vilification are quite general, and that it can be difficult to determine the breadth of conduct encompassed within existing definitions.[198] This, in turn, may curb legitimate criticism of religions, religious practices, or beliefs.[199] Based upon our consideration of the standards by which to assess the justifiability of such limitations, however, it is at least arguable that such legislation would be found to comprise legitimate regulation, and thus be found constitutional. Still, until the High Court considers the constitutional validity of religious vilification laws, they will continue to play a role in the regulation of religious speech both within and outside the cyber domain. Social media religious speech remains, therefore, actionable under the respective frameworks.

(c). Criminal Law

The criminal law, too, plays a role in regulating social media religious speech. Conduct will only be found to be criminal where it

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[196] *Racial and Religious Tolerance Bill 2001* (Vic) Explanatory Memorandum, cl 25 (Austl.).
[197] Augusto Zimmerman, *The Unconstitutionality of Religious Vilification Laws in Australia*, 2013 BYU L. REV. 457, 504 (2013).
[198] CAROLYN EVANS, LEGAL PROTECTION OF RELIGIOUS FREEDOM IN AUSTRALIA 190 (2012).
[199] *Id.* at 191.

falls within the scope of an existing offence. As such, a matrix of both Commonwealth and State laws may apply. We consider each in turn.

(i). Commonwealth

Menace, harass or cause offence—The *Criminal Code Act 1995* (Cth) ("CCA 1995") provides for a Commonwealth offence for misuse of telecommunications.[200] A person commits this indictable offence by using a carriage service, including making a telephone call, sending a message by facsimile, sending an SMS message, sending an email, creating or sharing content on social media, to menace, harass or cause offence to a victim.[201] The subjective intent of the perpetrator is irrelevant. Instead, conduct need only be regarded as offensive based on what a reasonable person would regard as offensive in the circumstances.[202] Therefore, it is possible for this provision to regulate a very broad range of content, including offensive religious speech created and shared on social media.

Notably, successful prosecution under this offence requires proof that the accused was aware that conduct could be viewed as menacing, harassing or offensive.[203] As such, it is possible for an eccentric or unreasonable person who is not capable of forming an awareness of risk to escape conviction for creating or sharing offensive social media religious speech.

Sharing of abhorrent violent material—In 2019, the CCA 1995 was amended to provide for a new suite of Commonwealth offences regulating the sharing of abhorrent violent material using a carriage service.[204] These new laws have particular relevance to social media religious speech where it comprises abhorrent violent material, such as inciting violence against members of a particular religion or a terrorist attack on religious grounds.

The legislation was prompted by the New Zealand terrorist attack on March 15, 2019. As noted earlier, in that case, social media was used to (i) stream the attack in real-time and (ii) subsequently share the footage across various social media sites.[205] Pursuant to the amendments to the CCA 1995, Internet service

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[200] *Criminal Code Act 1995* (Cth) s 474.17 (Austl.).
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.* at ss 474.30-474.45.
[205] Metz & Satariano, *supra* note 170.

providers hosting and content services are legally required to refer details of "abhorrent violent material" that records or streams conduct in Australia to the Australian Federal Police ("AFP") within a reasonable time after becoming aware of the material.[206] Social media is taken to fall within the category of "content services."[207] The purpose of this offence is to alert the AFP to both the abhorrent violent conduct and the accessibility of the material online to ensure prompt responses can be carried out in an effort to minimize violent propaganda, terror, further violence, harm and distress.[208] It is irrelevant whether the service providers are based within or outside of Australia, although when the conduct occurs in a foreign country, proceedings can only proceed with written consent of the Attorney-General of Australia.[209]

The CCA 1995 amendments also make it an offence for content and hosting services, within or outside of Australia, to fail to remove such content accessible in Australia.[210] Removal is to occur promptly, as noted by the statutory reference to "expeditious removal." [211] Given that this is not defined more explicitly, whether or not removal was indeed expeditious is determined on a case-by-case basis in light of all of the particular circumstances.[212] Ultimately, the purpose of this provision is to limit the accessibility and sharing of abhorrent violent material.[213] Again, the Attorney-General's written consent is required prior to commencement of a proceeding under this provision.[214] Unlike social media, Internet

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[206] *Criminal Code Act 1995* (Cth) s 474.33 (Austl.). Section 474.31 defines abhorrent violent material as audio and/or visual material that records or streams abhorrent violent conduct engaged in by one or more persons and is material that reasonable persons would regard as being, in all the circumstances, offensive and is produced by a person who is, or by two or more persons each of whom is: a person who engaged in the abhorrent violent conduct; or a person who conspired to engage in the abhorrent violent conduct; or person who aided, abetted, counselled or procured, or was in any way knowingly concerned in, the abhorrent violent conduct; or a person who attempted to engage in the abhorrent violent conduct. It is irrelevant if the material was altered or if it occurred within or outside of Australia.
[207] *Enhancing Online Safety Act 2015* (Cth) s 9 (Austl.).
[208] *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019* (Cth), Explanatory Memorandum, 16, 19 (Austl.).
[209] *Criminal Code Act 1995* (Cth) s 474.42(1) (Austl.).
[210] *Id.* at s 474.34.
[211] *Id.* at s 474.34(1)(d).
[212] *Id.* at s 474.34.
[213] *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019* (Cth), Explanatory Memorandum, 21 (Austl.).
[214] *Criminal Code Act 1995* (Cth) s 474.42(3) (Austl.).

service providers are not required to comply and a range of defences are available.[215]

The CCA 1995 also provides the eSafety Commissioner with additional powers, including the power to issue a content or hosting service with written notice that their service hosted abhorrent violent material accessible in Australia.[216] As such, social media services hosted within or outside of Australia will be notified as to the existence of the prohibited material, thus prompting expeditious removal so as to prevent prosecution.

When enacting the new federal laws, lawmakers were conscious of Australia's implied constitutional right to freedom of political communication. Discourse prior to enactment included an assessment of human rights implications.[217] The most notable discussion of this is found in the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019* (Cth) Explanatory Memorandum, in which it was suggested that the laws struck an appropriate or acceptable balance between competing rights, noting that "where [the Bill] seeks to restrict those rights, it does so in a fashion that is necessary and proportionate . . . ."[218] The statute also makes clear that the new federal laws are not intended to infringe the implied freedom of political communication.[219] This is consistent with our analysis of justifiable limitations in Part II.B.2.

(ii). State

Because Australian States and Territories bear responsibility for their own criminal laws, one finds variation among jurisdictions as to the offences applicable to religious speech. Specific offences are, though, common across most Australian jurisdictions. For that reason, we consider South Australia as a representative example.

Unlawful threats—It is unlawful for a person intentionally to make someone fear that a threat to kill or harm them will or is likely to be carried out, or to be recklessly indifferent as to whether such a

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[215] *Id.* at s 474.37.
[216] *Id.* at ss 474.35–474.36.
[217] *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019* (Cth), Explanatory Memorandum (Austl.).
[218] *Id.* at 5-11.
[219] *Criminal Code Act 1995* (Cth) s 474.38 (Austl.).

fear is aroused.[220] Thus, in the absence of a lawful excuse,[221] it is a crime to use social media to communicate a threat to kill or injure another person, or to be indifferent to the possibility that the target may experience such a fear, on the grounds of the target's religion or religious practices or beliefs. The threat does not need to be directed at the target personally (e.g. through a social media messenger application or the target's personal Facebook Timeline), meaning that the threat could be posted to a publicly accessible, general area of a social media service.[222] Factors such as the form of the communication, the context in which the content was communicated or posted, and the accused's subsequent behaviour will be taken into account when drawing an inference as to the fault elements of the offence, namely intention or recklessness.[223]

Assault—A threat to apply force to a person based on the person's religious affiliation may constitute "assault."[224] The threat may be communicated to the target via social media either directly or indirectly in any form. There is no requirement to prove an intention to harm. Rather, this offence requires that there are reasonable grounds for the target to believe that there is a real possibility of immediate bodily harm.[225]

Unlawful stalking—Where religious speech communicated on social media occurs on two separate occasions, and where the perpetrator intends to cause the target of such speech serious physical or mental harm, or intends to cause the target serious apprehension or fear, the offence of unlawful stalking may apply.[226] Single offensive posts on social media do not meet the requirement for repetition. The requirement for physical or mental harm to constitute "serious" may mean that emotional harm in the form of momentary emotional reactions (e.g. grief, distress, anger) is not sufficient.[227]

Interestingly, "fear" has been interpreted broadly in South Australia to encompass fear for one's reputation, fear of embarrassment, and fear for one's personal safety.[228] This increases the breadth of religious speech posted on social media encompassed

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[220] *Criminal Law Consolidation Act 1935* (SA) s 19(1) (Austl.).
[221] *Id.* at s 19(2).
[222] *Id.* at s 19(1).
[223] *Id.*
[224] *Id.* at s 20(c).
[225] *Id.*
[226] *Id.* at s 19AA.
[227] *Criminal Law Consolidation Act 1935* (SA) s 19AA (Austl.).
[228] *Police v Gabrielsen* [2011] SASC 39, 14 (Austl.).

under this South Australian stalking provision—two or more offensive posts intended to cause the target fear of embarrassment may be comprised of images, including doctored images, videos or text-based content.

Filming—State "indecent" filming offences regulate filming of a person in situations where the person would reasonably expect privacy.[229] It is also an offence to distribute or threaten to distribute images, still and moving, obtained by indecent filming.[230] Unless religious speech also depicts the victim, as the subject of the film, engaging in a private act, such as a sexual act or using a toilet, the victim's private parts, or in a state of undress, it is unlikely that indecent filming legislation would apply in the context of regulating social media religious speech.[231]

A filming offence which may have greater relevance vis-à-vis religious speech is "humiliating or degrading" filming.[232] This offence makes it unlawful to film a person being subjected to or being compelled to engage in a humiliating or degrading act without the subject's consent,[233] and to distribute humiliating or degrading film without the subject's consent.[234] Bystanders who encourage, support or assist in a humiliating or degrading act can also be charged.[235] Consider a victim being spat upon because of their religious affiliation, such as a victim wearing a hijab; the act of spitting on the victim and the making of derogatory comments related to the victim's religion and religious dress is filmed and subsequently posted to YouTube. Friends of the person spitting on and degrading the victim wearing the hijab shout remarks encouraging the conduct. The person who subjected the victim to the humiliating or degrading acts, the person who filmed and posted the film, and the friends encouraging the conduct might all be charged with the offence of humiliating or degrading filming. Of course, in addition to the offence itself, the victim could also report the material to YouTube and request immediate removal for a breach of YouTube's Terms of Service (Community Guidelines).

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[229] *Summary Offences Act 1953* (SA) s 26 D (Austl.).
[230] *Id.* at ss 26 D, 26 DA.
[231] *Summary Offences Act 1953* (SA) ss 26 D, 26 DA (Austl.).
[232] *Id.* at s 26 B.
[233] *Id.* at s 26 B(1). Humiliating or degrading filming is filming of a person being subjected to a humiliating or degrading act. A humiliating or degrading act is an act of violence/assault or an act a reasonable adult would consider to be humiliating or degrading to the subject. It amounts to more than minor embarrassment.
[234] *Id.* at s 26 B(2).
[235] *Id.* at s 26 B(3).

CONCLUSION: IS SOCIAL MEDIA RELIGIOUS SPEECH CONSTITUTIONALLY PROTECTED?

Having considered the ways in which religious speech made through social media might be regulated by state action, we consider here whether such speech falls within the ambit of protected speech pursuant to the implied freedom of political communication and, if so, whether its regulation by government can be treated as a justifiable limitation. We began with Israel Folau's Instagram posts as a representative example of social media religious speech. While few of the means of limiting such speech canvassed in Part III may apply directly to those facts, some may—and, indeed, as we noted earlier, there are already calls for new legislation which might directly address Folau's social media religious speech. Either way, the broad outlines of what we consider here represent the stages of inquiry that a court must undertake in analysing the potential justifiability of limitations, whatever those might be, imposed upon social media religious speech, whatever form that might take.

A. Burdening the Freedom

There seems little doubt that most religious speech, and certainly Folau's Instagram posts, would fall within a protected class of speech pursuant to the First Amendment to the *United States Constitution*—either actual or symbolic speech, or both—and because it fails to incite actions that would harm others or otherwise constitute illegal activity. There is slightly less certainty about the ambit of the implied freedom in the *Australian Constitution*.

In *McCloy*, the High Court established a three-stage test for determining the justifiability of limitations imposed upon the implied freedom, the first of which involves determining whether the law effectively burdens the freedom in its terms, operation, or effect.[236] The touchstone of the freedom, at least as it is currently defined, is communication that touches on political or governmental matters. Following the *Street Preacher's Case*, some religious speech may be characterised as political communication. Preaching, canvassing, haranguing, and the distribution of literature are all

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[236] *McCloy* (2015) 257 CLR 178, 2 (French, C.J., Kiefel, Bell and Keane, JJ.) (Austl.) (footnotes and citations omitted). This has been affirmed in *Brown v Tasmania* (2017) 261 CLR 328, 123-31 (Kiefel, C.J., Bell and Keane, JJ.), 236 (Nettle, J.) (Austl.).

activities which may be undertaken in order to communicate to members of the public matters which may be directly or indirectly relevant to politics or government. The High Court's analysis in *Clubb*—that matters of morality, and so potentially of religion, may also constitute political communication if dealing with political choices to be made by the people of the Commonwealth—bolsters this conclusion. The fact that Folau had made clear his opposition to same-sex marriage during the ongoing political debate about its legalisation in 2017 may mean that his posts could be treated as religious speech for the purposes of the implied freedom. Even if it was not so connected to a political stance, we nonetheless assume here that a court would so treat it—in the way in which it treated the communication in *Clubb*—as falling within the ambit of the freedom for the purposes of analysing the justifiability of limitations, and therefore to provide guidance to governments in respect of either existing or contemplated legislation to limit such speech.[237]

Assuming that it is protected speech, would the existing legal position in Australia burden the freedom? The High Court rarely identifies the test for determining a burden; instead, it seems to assume that if the affected speech is treated as political communication, then any interference with that speech is treated as a burden placed upon it. We make the same assumption here, that most of the means by which governments might limit such speech canvassed in Part III would burden the freedom in its terms, operation, or effect. As such, we turn to that part of the inquiry which involves heavy lifting for the courts: whether the burden imposed constitutes a justifiable limitation upon the freedom.

B. Justifiable Limitation

The real work of the courts is not to determine whether speech falls within the ambit of the protection and whether it is burdened, but whether the limitations which impose the burden are nonetheless justifiable. Having concluded that the current Australian limitations could burden social media religious speech, satisfying stage one of *McCloy*, a court would be faced with determining whether stages two and three of the test would be satisfied in justifying that burden. Here we provide nothing more than a broad overview of what a court would look at in assessing

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[237] *See Clubb v Edwards; Preston v Avery* [2019] HCA 11 (Austl.), 52-59, 120-26 (Kiefel, C.J., Bell and Keane, JJ.) (Austl.).

those two stages. Of necessity, our analysis must be general, given the range of laws that might burden the implied freedom. We do no more than assess the factors a court must consider.

It seems very likely that a court would find the sorts of limitations which we canvass in Part III to satisfy stage two of the *McCloy* test—that the purpose of the law and the means adopted to achieve that purpose are legitimate—in the sense that they are compatible with the maintenance of the constitutionally-prescribed system of representative government found in Australia. This involves compatibility testing, or determining whether the means adopted for achieving the legitimate purpose would adversely impinge upon the system of representative government. That there would be no adverse impinging on the system of representative government seems almost certain in the case of social media religious speech. We assume that a court would find little difficulty in determining that stage two would be satisfied by a government in respect of the sorts of limitations we have canvassed.

Finally, a court must consider, in stage three, whether the law is reasonably appropriate and adapted to advance its legitimate purpose. This involves proportionality testing to determine the extent of the burden and whether it is justified, which in turn involves determining whether the law is suitable, necessary, and adequate in its balance. By "suitable," it is meant that there is a rational connection to the purpose of the provision; by "necessary," that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; and, by "adequate in its balance," a criterion requiring a value judgment consistent with the limits of the judicial function, that there be a balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

It depends on one's perspective whether limiting social media religious speech of the type found in Folau's Instagram posts, either by one of the means we canvass in Part III which might be applicable, or by a proposed law burdening that freedom yet to be enacted will meet the requirements of stage three. As the High Court itself has noted, balancing the interests at stake is a value judgment, and reasonable people can disagree. That makes pertinent our consideration of the concept of dignity in Part II. It seems that dignity is where the battle lines will be drawn in determining the justifiability of social media religious speech: on one side of the line, the dignity of the individual who seeks protection for claimed religious speech, on the other, the dignity of

those affected by the speech—in the case of Folau's Instagram posts, the LGBTQI+ community and their interest in being able, as Justice Nettle put it in *Clubb*, "to live peacefully and with dignity."[238] It is at least arguable, on our analysis, that limitations which take as their purpose that objective would seem justifiably to limit the implied freedom in the case of social media religious speech in Australia.

Is social media religious speech constitutionally-protected speech within the ambit of the *Australian Constitution's* implied freedom of political communication? Very likely. Can it be justifiably limited so as to satisfy the judicially-established three-stage test in *McCloy*? It all depends upon the concept of dignity, and the dignitary interest upon which one places the greater emphasis. But at the very least, making that assessment requires that one take into account the dignity not only of the speaker, but also of the spoken to. Only in that way can an assessment be made which takes account of, and values, the dignity of every member of the community.

[238] *Id.* at 258-59.