

Introduction: Symbolic Politics, Constitutional Consequences¹

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Free expression that leads to the vibrant exchange of ideas is thought to be the very lifeblood of a democratic society. It appears self-evident that campuses, where even the most resolute ‘truths’ not only *may* but even *should* be examined and re-examined, are the nucleus of such a society. Despite this, campus speech has become a flashpoint for competing — some would say irreconcilable — demands. On the one hand is the view that some speech should not be tolerated in an environment that must embrace diversity that is also a hallmark of our advanced liberal democracy, and which should aim for the equality of its members. Per this argument, some members of the university community are treated unequally when speech that tends to reinforce their marginalization as members of a sub-dominant group is permitted. This view may also extend to pedagogical practice, and so we might identify the debate as to whether certain words are *ipso facto* impermissible, regardless of their intended purpose.²

For others, the view that some speech may be restricted in the name of inclusivity or equality contradicts the very purpose of a university education. Here, restrictions on speech demonstrate a particular ideological predisposition (often termed “political correctness”) that seeks to silence, sanitize, or anesthetize opposing — often conservative — viewpoints. Per this

¹ The phrase “symbolic politics” is drawn from Stephen Newman’s article (this issue).

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² Randall Kennedy, “How a Dispute Over the N-Word Became a Dispiriting Farce” (8 February 2019), online: *The Chronicle of Higher Education* <www.chronicle.com/article/How-a-Dispute-Over-the-N-Word/245655> [perma.cc/HR2L-8EAV].

view, rather than fostering cultures of intellectual flourishing, universities increasingly quell intellectual and political debate, “coddling” rather than challenging young minds.³

Governments have stepped into the fray. Following on the heels of U.S. President Trump’s statements regarding withholding federal funds for public universities for perceived campus censorship,⁴ provincial governments in both Ontario and Alberta have taken measures to ‘protect’ campus speech⁵ with the view that universities lack the vibrant and free exchange of ideas that is the *sine qua non* of higher education. Whether there is in fact a dearth of free expression on campus is highly debatable; also debatable is whether our constitutional guarantee of freedom of expression under the *Canadian Charter of Rights and Freedoms* does, or should, have anything to say about it.

This issue of *Constitutional Forum* considers constitutional and adjacent concerns stemming from the politicization and issuing of directives regarding expressive freedom on campus. It opens with Jamie Cameron’s “Compelling Freedom on Campus: A Free Speech Paradox”, which scrutinizes such governmental manoeuvres from the perspective of *compelled*, rather than restrained, expression. Cameron calls for a reinvigoration of the ‘large and liberal’ view of freedom as the absence of coercion or restraint, adopted by the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.*, an early *Charter* case which dealt with perceived violation of religious freedom.⁶

Cameron traces the genealogy of the Chicago Statement of Free Speech principles, which emanated from an ad hoc speech committee at the University of Chicago, from an internal institutional governance mechanism to its mutation in Ontario and Alberta as an instrument of government regulation and coercion. Canvassing serious implications for institutional autonomy and academic freedom, Cameron asserts that the fact of compulsion in the mandating of free speech policies itself represents a grave violation of the *Charter’s* guarantee of freedom of expression.

3 Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind: How Good Intentions and Bad Ideas Are Setting Up a Generation for Failure* (New York: Penguin Press, 2018).

4 As Newman (this issue) notes, in March 2019 U.S. President Trump issued an executive order regarding free inquiry on campus at public universities, compliance with which was conditioned by a threatened loss of federal grants.

5 Ministry of Training, Colleges, and Universities, “Upholding Free Speech on Ontario’s University and College Campuses” (30 August 2018), online: *Government of Ontario Newsroom* <news.ontario.ca/opo/en/2018/8/upholding-free-speech-on-ontarios-university-and-college-campuses.html> [perma.cc/7VXR-K4RB]; Moira Wyton, “Post-Secondaries Across Alberta Adopt American-Flavoured Free Speech Policies” (17 December 2019), online: *Edmonton Journal* <edmontonjournal.com/news/politics/post-secondary-across-alberta-adopt-american-flavoured-free-speech-policies> [perma.cc/3YKC-ZC2E]. As Cameron (this issue) notes, the issue of campus speech was also part of the 2019 federal Conservative electoral platform. See Melanie Woods, “Conservative Platform Makes Free Speech Policies a Requirement for University Grants” (11 October 2019) online: *Huffington Post* <www.huffingtonpost.ca/entry/andrew-scheer-free-speech-conservative-platform_ca_5da10705e4b087efdbae5cb8> [perma.cc/9VZW-BPZY]; “Andrew Scheer’s Plan for You to Get Ahead” (2019) at 63, online (pdf): *Conservative Party of Canada* <cpc-platform.s3.ca-central-1.amazonaws.com/CPC_Platform_8.5x11_FINAL_EN_OCT11_web.pdf> [perma.cc/YQZ7-V5BG].0

6 *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 18 DLR (4th) 321.

The explicitly political context of the campus speech issue is considered in the two articles that follow: Stephen Newman's "Ford, Trump, and the Politics of Campus Free Speech" and James Turk's "Universities, the *Charter*, Doug Ford, and Campus Free Speech", with both authors concluding government responses to the campus speech 'crisis' serves a political agenda first and foremost. Newman's analysis traces the politics of campus speech, focusing on the symbolic politics of U.S. President Trump's executive order on campus speech and Ontario Premier Ford's Directive. It notes the significant differences in constitutional contexts, assessing the treatment of campus speech codes in American courts and querying the evidence regarding the volume of free speech incidents on campuses in North America. Newman cautions there is no easy path while navigating the stormy relationship between the values of free expression and inclusion; the left-right partisanship of campus speech debates poses a normative challenge to unsettling political and ideological entrenchment on both sides in service of a reasoned defense of controversial speech.

James Turk considers the Ontario Directive and its consequences in relation to the institutional autonomy of universities, academic freedom, and the *Charter*. Contra the Ontario provincial government's claims that expressive freedom on campus is endangered, Turk asserts that there is "more freedom of expression on university campuses than anywhere else in Canada." Centering his analysis on recognition that free speech is not absolute, but subject to legitimate limits, he recalls that free expression on campus grows from community discussion, debate, and engagement, and must contend with the recognition of other demands and values. Turk concludes that there is considerable potential to enhance free expression without jeopardizing either academic freedom or institutional autonomy on campus, via the application of the *Charter* to aspects of Ontario universities, which he contends is a likely outcome of Ontario's campus speech Directive.

The final two papers in this special issue consider academic freedom, and, to different extents, their intersections with expressive freedom and institutional autonomy. In "Academic Freedom, Canadian Labour Law, and the Scope of Intra-Mural Freedom" Michael Lynk considers an under-examined aspect of academic freedom: intra-mural expression, or the right of faculty members and librarians to criticize the university and its leadership. Lynk notes that academic freedom is regulated distinctly in Canada as a negotiated right secured through collective bargaining, with courts rarely addressing its scope and legislation being largely silent. Canvassing the uneven treatment of intra-mural expression in Canadian arbitral decisions on the basis that universities are treated in some respects like any other workplace (*comme les autres*), and at other times like unique workplaces (*d'un genre spécial*), Lynk proposes that arbitral decisions must give consistently strong content to intra-mural speech as a "salient" aspect of the academic freedom that underpins the mission of the University. Lynk asserts that the right to criticize, as an integral part of academic freedom, merits generous protection inclusive of blunt and even intemperate dissent.

In "UnChartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy" Alison Braley-Rattai and Kate Bezanson reflect on one of the potential consequences of the Ontario Directive on campus speech: to make the *Charter* applicable to those aspects of Ontario's universities that are animated by free speech concerns. They suggest that the intersections of expressive freedom, academic freedom, and institutional autonomy are undertheorized in the academic literature

and (minimal) case law, and require a more nuanced elucidation of the differences, conflicts, and tensions among these related, yet distinct, concepts in the unique landscape of university campuses, particularly if the *Charter* is to apply.

This brief introduction cannot, of course, do justice to the nuanced and sophisticated analyses offered by these varied contributions; nor can this small collection canvass all that there is to canvass on this necessarily broad topic. However, we believe that this collection provides valuable insights into some key aspects of the campus speech issue, in some of its political and constitutional dimensions. We are honoured that the contributors chose to share their time and talents, and we invite you, the reader, to consider each article in turn.