What's Public About Publicly-Funded Universities? The Law and Politics of Extending *Charter* Protections to Campus Expression

*Dax D'Orazio**

The law and policy of free expression on Canadian university campuses is in a state of flux. Despite universities comfortably avoiding the Charter *due to inconsistent provincial rulings and an insufficient connection to "government,"* Charter *applicability has gradually become a serious possibility. Two changes, in particular, indicate that the status quo of* Charter *avoidance on campus is evolving: a legal decision in Alberta concerning the pre-emptive curtailment of student expression due to security concerns (*UAlberta Pro-Life v University of Alberta*), and ministerial directives compelling post-secondary institutions to institute explicit free expression policies in Alberta and Ontario. This article analyzes the consequences of* Charter *avoidance — including the public-private dimension, which underlies debates about extending constitutional protections for expression to campus — and argues for* Charter *applicability in the public-oriented domains of campuses (i.e. quads and other common areas). The article begins by diagnosing a constitutive tension between reasonable limits on expression derived from constitutional law and additional institutional latitude to restrict expression as a result of administrative law. It does this through a conceptual mapping that contrasts expressive limits that apply generally and those that apply specifically on campus. Next, it argues that free expression is an important*

Le droit et les politiques de la liberté d'expression sur les campus universitaires canadiens sont en pleine évolution. Bien que les universités ne soient pas soumises aux dispositions de la Charte*, en raison de décisions judiciaires provinciales incohérentes et d'un lien insuffisant avec le « gouvernement », l'application de la* Charte *sur les campus est néanmoins progressivement devenue une sérieuse possibilité. Deux changements, en particulier, indiquent que le statu quo de la non-application de la* Charte *sur les campus universitaires est en train d'évoluer : un jugement en Alberta concernant la limitation préventive de l'expression des étudiants pour des raisons de sécurité (*UAlberta Pro-Life *v.* University of Alberta*) et des directives ministérielles obligeant les établissements postsecondaires à instituer des politiques explicites de libre expression en Alberta et en Ontario. Cet article analyse les conséquences de la non-application de la* Charte *— y compris la dimension publique-privée, qui sous-tend les débats sur l'extension aux campus des protections constitutionnelles en matière d'expression — et plaide pour l'applicabilité de la* Charte *dans les domaines publics des campus (c'est-à-dire les aires communes). L'article débute par diagnostiquer une tension entre les limites raisonnables d'expression dérivées du droit constitutionnel et la latitude institutionnelle supplémentaire pour restreindre l'expression*

* Dax D'Orazio is the Skelton-Clark Postdoctoral Fellow in Canadian Affairs in the Department of Political Studies at Queen's University and a Research Affiliate with the Centre for Constitutional Studies.

academic value, consistent with the essentially public and democratic essence of the university. Here, it makes the case that arguments against extending constitutional protections for expression to university campuses — based on a distinction between free expression and free inquiry — have the consequence of contributing to a private-oriented vision of the university. Lastly, the article analyzes relevant case law to argue that there are also compelling legal reasons for Charter *applicability, which would create necessary consistency across provincial jurisdictions and help address the constitutive tension that affects expressive limits on campus.*

en raison du droit administratif. Pour ce faire, il établit une cartographie conceptuelle, qui oppose les limites d'expression qui s'appliquent de manière générale à celles qui s'appliquent spécifiquement aux campus. Ensuite, il soutient que la liberté d'expression est une valeur académique importante, cohérente avec la nature essentiellement publique et démocratique de l'université. Il fait valoir que les arguments contre l'extension aux campus universitaires des protections constitutionnelles en matière d'expression — fondés sur une distinction entre la liberté d'expression et la liberté de recherche — ont pour conséquence de contribuer à une conception davantage privée de l'université. Enfin, l'article analyse la jurisprudence pertinente pour faire valoir qu'il existe également des raisons juridiques convaincantes en faveur de l'applicabilité de la Charte *sur les campus universitaires, ce qui créerait une nécessaire cohérence entre les juridictions provinciales et aiderait à résoudre la tension qui affecte les limites d'expression sur les campus.*

Contents

I. Introduction

Every single publicly funded university in Canada recognizes the value of free expression. Reflected in countless official mottos, public statements, policy documents, and collective agreements, free expression would seem to be a prerequisite for the core mission of the university: the pursuit of knowledge and truth. Despite this, the most robust protection for free expression in Canada, section 2(b) of *The Charter of Rights and Freedoms* (the *Charter*), scarcely applies at all.[1] Further complicating this seeming inconsistency is the fact that universities are sometimes able to legally restrict expression in excess of the "reasonable limits" allowed under constitutional law — mostly due to the greater deference that is owed to their decision-making within administrative law. This is a "puzzling state of affairs," since most associate university campuses with robust debate, dissent, and protest, all of which rely upon expressive protections.[2]

Up until very recently, the prospect of *Charter* applicability on campus tended to arouse the attention of a handful of scholars, advocates, and "watchdog" organizations. However, recent events have dramatically intervened to put a relatively understudied point of law at the forefront of the law and politics of free expression in Canada. The first of these events is more of a general phenomenon, one that unfolded on campuses across the United States and then arguably morphed into a distinct Canadian version.[3] This is the alleged campus crisis of free expression, which has generated unprecedented public attention over the past half-decade or so.[4] Even for those who dispute the existence of a "crisis" (myself included), university administrations sometimes struggle to navigate the fine line between ample latitude for campus expression and protection from potential expressive harms.[5]

1 *Canadian Charter of Rights and Freedoms,* s 2(b), Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act* (UK), 1982, c 11 [*Charter*]. *Section* 32(1) of the *Charter* sets out these parameters for applicability: "a) to the Parliament and the government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and the Northwest Territories;" and b) "to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

2 Michael Marin, "Should the Charter Apply to Universities?" (2015) 35:1 NJCL 29 at 29-30 [Marin, "Charter Apply to Universities?"].

3 Ira Wells, "The New Campus Puritanism" (May 2018), online: *Literary Review of Canada* <reviewcanada.ca/magazine/2018/05/the-new-campus-puritanism/> [perma.cc/4FKQ-TR5Z].

4 Dax D'Orazio, "Expressive Freedom on Campus and the Conceptual Elasticity of Harm" (2020) 53 Can J of Political Science 755.

5 Faisal Bhabha, "Unrest in Higher Education: An Uncertain Way Forward" (29 April 2021), online: *Centre for Free Expression* <cfe.ryerson.ca/blog/2021/04/unrest-higher-education-uncertain-way-forward> [perma.cc/EK7H-BCH8]. For an outline of the various challenges that universities face in regulating campus expression, see the report commissioned in response to events at York University in 2019, see The Honourable Thomas A Cromwell, "York University Independent Review" (30

In turn, the general (mis)perception of a crisis has influenced some significant changes in the law and politics of free expression across Canada.[6] When majority Conservative governments were elected in Ontario in 2018 and in Alberta in 2019, the alleged crisis soon became the object of public policy. Both provinces compelled post-secondary institutions to redouble their efforts in protecting expression by ensuring they abide by the "Chicago Principles," an American policy template that managed to migrate to Canada amid high-profile campus controversies and commensurate media coverage.[7] Policy changes are potentially afoot in Quebec, too, where the provincial government released a report responding to perceptions of waning academic freedom and recently tabled new legislation.[8]

Recent campus controversies have also led to some important legal decisions, the most significant of which emerged at the University of Alberta. In January of 2020, the Alberta Court of Appeal released its judgment in *UAlberta Pro-Life v University of Alberta*, finding that the university violated its students' free expression when it pre-emptively charged security fees for an event that was likely to be met with protest.[9] Although provincial courts have come to inconsistent conclusions about whether or not the *Charter* applies to universities, the *UAlberta* case strongly suggests that Canadian universities ought to more frequently consider the *Charter* when their decision-making affects or limits free expression on campus.

Together, these recent events call for more sustained analysis of the law and politics of extending *Charter* protections to campus expression. The vast

---

April 2020), online (pdf): *York University* <president.yorku.ca/files/2020/06/Justice-Cromwell's-Independent-External-Review.pdf> [perma.cc/7FX9-9MYU].

6 Kate Bezanson & Alison Braley-Rattai, "Introduction: Symbolic Politics, Constitutional Consequences" (2020) 29:2 Const Forum Const 1; Dax D'Orazio, "How and Why the Chicago Principles Came to Canada: Free Expression on Campus and the Closing of the "'Campus Crisis Feedback Loop'" (2022) 51:4 American Rev of Can Studies 533.

7 Jamie Cameron, "Compelling Freedom on Campus: A Free Speech Paradox" (2020) 29:2 Const Forum Const 5.

8 Much of the recent debate in Quebec revolves around a specific academic freedom case at the University of Ottawa. See "Debate Continues Year after U of O Professor's Use of N-word in Class", *CBC News* (17 October 2021), online: <www.cbc.ca/news/canada/ottawa/ottawa-professor-uses-derogatory-word-1.6214139> [perma.cc/8F7M-ZNHV]. For the recently released report from the Government of Quebec, see Virginie Ann, "Quebec University Classrooms Should Not Be Safe Spaces, Says Academic Freedom Committee", *CBC News* (14 December 2021), online: <www.cbc.ca/news/canada/montreal/quebec-universities-not-safe-space-1.6285400> [perma.cc/PTT7-3RYE]. For the legislation tabled, see Josh Grant, "Quebec Moves to Shore up Academic Freedom with Controversial Bill", *CBC News* (6 April 2022), online: <www.cbc.ca/news/canada/montreal/academic-freedom-bill-tabled-1.6410128> [perma.cc/T2TW-PNGV].

9 *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 [*UAlberta Pro-Life*].

majority of previous scholarship analyzing the topic has hinged on legal interpretation, which is not unexpected. Both jurisprudence and scholarship has highlighted the institutional role and mission of the university as something intimately connected to the public sphere. Nonetheless, the fulcrums of these legal analyses remain a relatively narrow point of law: a sufficient connection between universities and "government" for the purposes of *Charter* application (i.e. government objectives, mandates, policies, programs, etc.).

By contrast, this article argues for a broader consideration of whether or not the *Charter* does (or ought to) apply to publicly funded universities by examining the consequences of *Charter* avoidance for university decision-making and by reviewing the orientation of the institution as a whole (which is essentially democratic and public). As such, the article slightly reframes the terms of the debate, shifting the *Charter* applicability question from strict legal interpretation to broader questions about the role of universities in a democratic society. To do this, the article asks whether the consequences of *Charter* avoidance — namely, additional latitude to restrict expression in excess of reasonable (public) limits — can be reconciled with the mission of publicly funded universities. Specifically, the article argues that *Charter* avoidance highlights a constitutive tension whereby university decision-making (as it concerns campus expression) is sometimes inconsistent with both the reasonable limits derived from constitutional law and the institutional orientation of publicly funded universities.

The analysis proceeds in three parts. The first section lays out the constitutive tension previously mentioned. It also includes a brief description of the hybrid nature of contemporary universities (between public and private) and a conceptual mapping of expressive limits, one that compares reasonable limits that apply generally and limits that result from *Charter* avoidance in university decision-making. The article argues that this constitutive tension has the consequence of endowing university decision-making with additional institutional latitude to restrict expression, a result of judicial review conforming to the standard of reasonableness found in administrative law. Further, the constitutive tension has consequences for the institution as a whole, highlighting a seeming inconsistency between the self-declared mission of the university and the actual practice and regulation of campus expression.

The second section makes the case that publicly funded universities are contingent upon expressive protections and are essentially public and democratic in their institutional orientation. Although this part of the argument may seem far from novel, public and academic debates about the limits of campus expression have often featured a distinction between free expression on the

one hand (understood as a democratic non-interference principle), and academic freedom or free inquiry (understood as an expressive protection contingent upon scholarly merit), on the other. The broad point underlying this distinction is that universities are bound by scholarly *judgment* whereas the public sphere is open without content-based restrictions (with some exceptions). It then naturally follows that constitutional protections would be inapt on campus, a view that the article contests. In particular, it challenges the argument that free expression is *not* an academic value, an argument made most powerfully and prominently by Stanley Fish.[10] Instead, the article argues that the distinction between free expression and free inquiry (as presented by Fish) mischaracterizes the public essence of universities and contributes to the constitutive tension when contrasted with the orientation of publicly funded universities.

The final section then analyzes relevant case law to make the case that limited *Charter* applicability can address the constitutive tension previously diagnosed, specifically in public-oriented spaces on campus. Over the past few decades, courts in Alberta, British Columbia, Ontario, and Saskatchewan have heard cases involving campus expression and *Charter* applicability. Courts in Alberta and Saskatchewan have gradually expanded the possibility of *Charter* applicability, while courts in British Columbia and Ontario have hewed closely to a narrow formulation of *Charter* applicability inherited from *McKinney v University of Guelph*.[11] Building upon the previous section, in tandem with extant scholarship on the topic, the article argues that *Charter* applicability is generally consistent with the institutional orientation of the publicly funded university, forming a sufficient connection to "government" for the purposes of *Charter* applicability. Lastly, the article entertains prominent normative objections to *Charter* applicability. While it finds that some of these objections have merit — especially those based on a presumed erosion of institutional autonomy — they are largely unpersuasive.

II. The Constitutive Tension Between Free Expression and *Charter* Avoidance

This article began with a stark contrast. Universities are understood as exemplars of free expression, in their own words and in the public consciousness.

10 Fish makes this argument most persuasively in a recent book. See Stanley Fish, *The First: How to Think About Hate Speech, Campus Speech, Religious Speech, Fake News, Post-Truth, and Donald Trump* (New York, NY: One Signal Publishers, 2019) [Fish, *The First*].

11 James L Turk, "Universities, the *Charter*, Doug Ford, and Campus Free Speech" (2020) 29:2 Const Forum Const 31 at 40-41; *McKinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545 [*McKinney*].

But universities also have additional latitude to restrict expression in excess of reasonable limits derived from constitutional law as a result of *Charter* avoidance. This section will describe this seeming inconsistency in greater detail by presenting a conceptual mapping that contrasts different expressive limits before showing that the constitutive tension between expressive limits creates a discursive liminal space, one in which the vast majority of campus controversies emerge.

Importantly, the seeming inconsistency at issue here is inconsistent only *in part*. As such, it is important to note that universities restrict expression in uncontroversial ways that significantly depart from expressive limits in the public sphere. Similarly, the university includes contexts in which expressive restrictions may be necessary (e.g. in classrooms), and in which they ought to be few and far between (e.g. in quads and/or common areas). Likewise, it is important to highlight the fact that universities are uncontroversially subject to reasonable limits on expression that apply generally. There is, therefore, no argument to be made that universities ought to tolerate expression that exceeds these reasonable limits (e.g. expression that violates criminal and civil hate speech prohibitions) in order to satisfy their commitments to free expression.

Debates about expressive limits on campus are further complicated by the fact that the university, as an institution, is the subject of some deep and long-standing disagreements about the ends to which it ought to strive. In this sense, lurking not far beneath the surface is an ongoing struggle to define and orient the university as a whole, a struggle that speaks to the hybrid nature of publicly funded universities.

On the one hand, universities boldly proclaim a mission of pursuing knowledge and truth that is intimately connected to the *public* sphere. Commensurate with this mission is an understanding that university activities serve a "higher" or "enlightened" purpose, cultivating civic virtues and nourishing the public good. Although on-campus realities have been unevenly reconciled with these lofty ideals and with the fact that the institution was often seen as an elite enterprise, universities have gradually become more demographically and epistemologically diverse,[12] and government funding generously flows to universities

12 Nonetheless, this work is unambiguously an unfinished project. See, for example, Roderick A Ferguson, *The Reorder of Things: The University and Its Pedagogies of Minority Difference* (Minneapolis: University of Minnesota Press, 2012); Roderick A Ferguson, *We Demand: The University and Student Protests* (Oakland: University of California Press, 2017); Marc Spooner & James McNinch, eds, *Dissident Knowledge in Higher Education* (Regina: University of Regina Press, 2018); Piya Chatterjee & Sunaina Maira, eds, *The Imperial University: Academic Repression and Scholarly Dissent* (Minneapolis: University of Minnesota Press, 2014).

because they are explicitly recognized as a pillar of civil society and essential to the sustenance of democracy.[13]

On the other hand, however, universities are sometimes stubbornly *private*, reflecting a gradual imbibing of new public management and public relations norms and principles.[14] In this context, universities often reflect the self-interest of competitive firms and an ethos of efficiency runs through much of their decision-making. This type of decision-making is often at odds with the democratic and public impulses of the institution. While it is a truism to say that universities must be endowed with generous autonomy in order to pursue knowledge and truth without undue constraint, autonomy can also be understood in ways that shield universities from public accountability and transparency, rendering the institution more private than autonomous.

Examples of this private-oriented version of the university abound: the censure or removal of those who stray "off brand,"[15] the failure to disclose basic details of privately funded research,[16] and the capitulation to external pressure when it poses a material threat,[17] to name just a few. Bearing this hybrid nature of the institution in mind — as well as the public-private dimension lurking below the surface of debates about *Charter* applicability — this article's position is one that steadfastly aligns with the democratic and public purpose of the university.

As already mentioned, universities have additional institutional latitude to restrict expression due to *Charter* avoidance. This fact alone is unproblematic. The key issue, however, is whether this latitude is merited in all domains of campus expression, or just those where expressive restrictions are essential for the institution's purpose. Because the university is not exactly akin to the

13 Ronald J Daniels with Grant Shreve & Phillip Spector, *What Universities Owe Democracy* (Baltimore: Johns Hopkins University Press, 2021); William G Tierney, *Higher Education for Democracy: The Role of the University in Civil Society* (New York: SUNY Press, 2021).

14 James L Turk, ed, *The Corporate Campus: Commercialization and the Dangers to Canada's Colleges and Universities* (Toronto: Lorimer, 2000).

15 "Prof. Robert Buckingham Fired after Criticizing Saskatchewan University Plan", *CBC News* (14 May 2014), online: <www.cbc.ca/news/canada/saskatoon/prof-robert-buckingham-fired-after-criticizing-saskatchewan-university-plan-1.2642637> [perma.cc/9VBT-GU6W].

16 Daniela Germano, "Saskatchewan Judge Rules University Must Give Professor Oil and Gas Research Info", *CBC News* (10 February 2021), online: <www.cbc.ca/news/canada/saskatchewan/university-of-regina-oil-and-gas-research-ruling-1.5908284> [perma.cc/Y5KB-3UGN].

17 Masha Gessen, "Did a University of Toronto Donor Block the Hiring of a Scholar for Her Writing on Palestine?", *The New Yorker* (8 May 2021), online: <www.newyorker.com/news/our-columnists/did-a-university-of-toronto-donor-block-the-hiring-of-a-scholar-for-her-writing-on-palestine> [perma.cc/FYY2-E4FZ].

public sphere, some proprietary expressive limits are legitimate, particularly in contexts where expression is bound by employment relations:

> Expression may be subject to greater limits when it occurs in a particular institutional setting. Racial generalizations and insults may not breach the criminal ban on hate speech (which catches only a narrow category of extreme speech), but when they occur in the workplace or in schools they may be considered unlawful harassment or discrimination under anti-discrimination laws. Employees in a workplace are a captive audience who cannot easily avoid repeated insults from co-workers or managers. Different standards of civility or respect apply because the workplace is both closed and hierarchical and because it has a particular function that may be undermined by these forms of speech. The workplace is not a democratic forum, a place of free and open discourse, even if employees retain expression rights that are compatible with its function.[18]

In sum, university campuses reflect expressive limits closely tethered to their particular mission. The university's constituent parts may converge in a single institutional mission, but they are nonetheless characterized by different expressive domains, each with distinct legal obligations, applicable rules and policies, and norms and expectations. For example, an administrator's relationship with the institution (as an employee) is much different than that of a student (as a paid attendee). Nonetheless, the following analysis conceptualizes expressive limits without reference to these distinctions to both simplify the analysis and highlight the disjuncture between reasonable limits derived from constitutional law and additional institutional latitude gleaned from administrative law.

Despite widespread recognition that free expression ought to thrive on campus, universities invariably impose some proprietary restrictions on expression. For example, they can justly impose time, place, and manner restrictions, and they are by no means compelled to provide unrestricted or unlimited platforms for expression — even for those within their respective communities.

Cass R Sunstein outlines four different ways in which universities exercise expressive restrictions: content and subject restrictions, pedagogical and civility expectations, distinctions of quality (admissions, grading, etc.), and "viewpoint based" academic discretion related to advancement, promotion, tenure, etc.[19] All of these constitute merited examples of additional institutional latitude,

18 Richard Moon, "Understanding the Right to Freedom of Expression and its Place on Campus", *Academic Matters* (21 November 2018), online: <academicmatters.ca/understanding-the-right-to-freedom-of-expression-and-its-place-on-campus/> [perma.cc/AH8X-4UME].

19 Cass R Sunstein, "Academic Freedom and Law: Liberalism, Speech Codes, and Related Problems" in Louis Menand, ed, *The Future of Academic Freedom*, (Chicago: University of Chicago Press, 1996) 93 at 105-106.

restricting expression as prerequisites for scholarly objectives. By contrast, additional institutional latitude is unmerited when expression *not directly* connected to these scholarly objectives is restricted in public-oriented domains of campus. A typical example of this is when universities restrict ostensibly legal extra-mural expression in public-oriented spaces (on campus or online).

Figure 1: Expressive Limitations in Canada

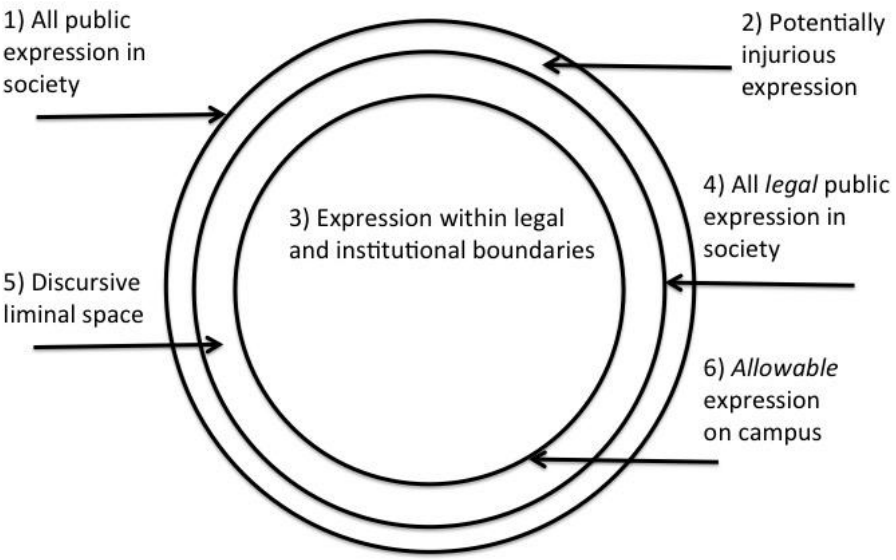

Figure 1 provides a conceptual mapping of comparative expressive limits. The figure as a whole represents all public expression in society, in the broadest sense possible (1). At the outer margin is expression that is generally recognized as harmful enough to warrant reasonable limits imposed by law, such as expression that would be classified as defamation or libel, "hate" under Canadian law (i.e. under section 319 of the *Criminal Code*), or a contravention of federal or provincial human rights legislation (i.e. anti-discrimination provisions) (2). Regulation of this type of expression is by no means consistent, but the threshold in each of these instances is a sufficient degree of harm that establishes a general boundary for applicable law and policy (4). Importantly, despite the presence of semi-constitutional protections for expression in some provincial human rights codes, the latter have not typically served as bulwarks for campus expression. Instead, federal and provincial human rights codes have sometimes experienced friction with constitutional protections for

expression.[20] In between these constitutionally reasonable limits (4) and institutional expressive boundaries on campus (6) is then what may be termed a discursive liminal space (5). Importantly, this liminal space is where universities can exercise their administrative latitude to restrict expression that is ostensibly legal (i.e. does not exceed constitutionally derived limits), but might fall outside of institutional limits based on applicable law and policy. Finally, the innermost margin represents expression that is well within both constitutionally derived reasonable limits and institutional limits (3).

Two important caveats apply to this conceptual mapping. First, expression that falls well within constitutional and/or institutional limits can still cause harm. The question is whether that harm is sufficient to justify an expressive restriction and/or remedy. This is precisely why the discursive liminal space highlighted here (5) animates so many cases and controversies associated with campus expression. When expression does not so easily fall within or outside legally prescribed expressive limits, there is often much effort expended to alter public perceptions and thus create some form of consensus about both the expression's potential negative effect and the merit of restrictions and/or remedies.

Second, the conceptual mapping is meant to convey expressive *limits*, which are based on actual, perceived, and/or reasonably anticipated harms (as reflected in law and policy). This mapping, therefore, does not completely encapsulate *all* potential expressive limitations. Structural or systemic factors may restrict or expand possibilities for expression in ways that are not self-evident. For example, those subject to contingent employment contracts may technically be the beneficiaries of expressive protections, but nonetheless practice self-censorship due to their precarious employment. Similarly, students may be bound by an institutional code of conduct that restricts their expression in excess of constitutionally derived expressive limits, but the campus environment might itself provide opportunities for expression well in excess of opportunities off campus. In this sense, while limits may be generally identifiable and comparable, they cannot reveal everything relevant about expressive capabilities in a particular setting.

Above all, the conceptual mapping illustrates two things that are important for this article's analysis and argument. First, free expression, when understood as a democratic non-interference principle, does not self-evidently apply to university contexts. In other words, universities may be exemplars of free

20 See, for example, Pearl Eliadis, *Speaking Out on Human Rights: Debating Canada's Human Rights System* (Montreal: McGill-Queen's University Press, 2014); Dominique Clément, *Debating Rights Inflation in Canada: A Sociology of Human Rights* (Waterloo: Wilfrid Laurier University Press, 2018).

expression, in general, although not precisely akin to a public square. The key question is therefore in which circumstances additional institutional latitude to restrict expression is merited and how decision-making that crosses this line can be reconciled with the mission of publicly funded universities.

Second, the conceptual mapping helps to explain why free expression on campus is the subject of such fraught public and academic debates. Because the constitutive tension — evidenced by the comparison of expressive limits — creates a discursive liminal space, universities are prone to disagreements about the harms associated with expression that is ostensibly legal but nonetheless (potentially) restricted on campus (in public-oriented domains). Notwithstanding the perception that universities are exemplars of free expression, which they mostly are, their decision-making latitude (as a result of *Charter* avoidance) to restrict expression in public-oriented domains is not easily reconciled with their broad mission. The result of this constitutive tension is that universities arguably bear the onus of demonstrating that expressive restrictions on campus are justified, not solely because they are broadly antithetical to their mission, but also because they are beneficiaries of both public funding and a significant degree of institutional autonomy.[21]

In the next section, the article responds to prominent arguments in defence of constitutional law's absence on campus and then moves onto relevant case law and normative arguments against *Charter* applicability, specifically.

III. Free Expression *is* an Academic Value

If the *Charter* does not apply to university campuses, "there is no legal guarantee of freedom of expression" in the context of their public-oriented domains.[22] Despite this fact, the status quo of *Charter* avoidance has aroused relatively little suspicion. Instead, there are more arguments in favour of the status quo in contemporary scholarship. In the wake of the alleged crisis of free expression on North American campuses, Stanley Fish has emerged as one of the most vocal representatives of the argument that free expression is *not* an academic value.[23]

21 According to Cameron, *supra* note 7 at 9: "the paradox of advanced education in Canada is that, in principle, colleges and universities are autonomous in their mission and pursuit of knowledge, but at the same time are dependent on public funding and subject to regulation by the state."

22 Michael Marin, "University Discipline in the Age of Social Media" (2015) 25:1 Educ & LJ 31 at 61 [Marin, "University Discipline"].

23 Stanley Fish, "Free Speech is Not an Academic Value", *The Chronicle of Higher Education* (20 March 2017), online: <www.chronicle.com/article/free-speech-is-not-an-academic-value/> [perma.cc/KGN8-QJBX].

Of course, Fish is writing primarily in an American context (i.e. "free speech"), which some may argue diminishes his relevance. However, despite obvious differences between the socio-legal contexts of Canada and the United States, Fish's argument applies to any publicly funded university within a jurisdiction that enjoys constitutional protections for expression. One might likewise argue that those writing within a Canadian context present similar arguments, which is true.[24] Nonetheless, the value of Fish's argument is that it clearly expresses the core approach of many who are skeptical about the merits of constitutional protections for expression on campus. In other words, Fish's key claims will overlap significantly with a wide variety of others, who are likewise skeptical about constitutional protections, but may disagree about smaller details.[25]

The idea of applying constitutional protections to expression on campus is, according to Fish, a complete perversion of the institution. This is because the vast majority of free expression cases and controversies are only nominally about free expression, if at all. His approach is grounded by both a distinction between free expression and free inquiry and a belief that expressive limits on campus are conditioned almost solely by professional conventions, norms, and responsibilities. This section will suggest that both of these groundings contribute to a private-oriented version of the university that one ought to reject.[26]

The first grounding of Fish's argument concerns the particular mission of the university, which Fish suggests requires freedom of inquiry but not necessarily free expression. In this regard, there is an obvious tension between free expression understood as a constitutional right (akin to a democratic non-interference principle) and an academic context in which expression is often contingent upon expertise, license, and merit. Whereas the state ought to be content neutral, universities are by nature active in content assessment:

> The right to speak in the scholarly conversation does not come with membership; it is granted only to those who have survived a series of vettings and are left standing

24 See, for example, Alison Braley-Rattai & Kate Bezanson, "Un-Chartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy" (2020) 29:2 Const Forum Const 65; Shannon Dea, "The Evolving Social Purpose of Academic Freedom" (2021) 31:2 Kennedy Institute of Ethics J 199.

25 One should also note that Fish (*The First, supra* note 10 at 71) believes that he takes a slightly less radical approach than Robert C Post. For the latter's version of a similar argument, see "There is No 1st Amendment Right to Speak on a College Campus", *Vox* (31 December 2017), online: <www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-campuses-milo-spencer-protests> [perma.cc/DP4X-ZTSH].

26 Although it may seem at first glance that Fish's argument applies more directly to privately funded universities in the United States, he explicitly mentions that his analysis applies more or less equally to both publicly funded and private universities. Fish, *The First*, *supra* note 10 at 67.

> after countless others have been sent out of the room. Determining who will *not* be allowed to speak is the regular business of departments, search committees, promotion committees, deans, provosts, presidents, and editors of learned journals.[27]

Fish argues that these separate missions lead to an important distinction; universities use *free inquiry* to create and disseminate knowledge, whereas the public sphere uses *free expression* to facilitate democracy. Freedom of inquiry, far from connoting state-based content neutrality, requires "the absence of any pre-decision about the worthiness or unworthiness of particular ideas."[28] Knowledge production and dissemination may grease the wheels of democracy, but its impetus is self-justifying and stands alone.[29]

The result of conflating these two principles (free inquiry and free expression) is that necessary distinctions based on merit are collapsed into a general non-interference principle. It is perhaps axiomatic that free expression is meant to promote a diversity of opinion without hierarchical power being invoked to make distinctions upon merit (and thus access). This might lead those with unmerited expression — ideas already widely discredited in their field — to view their lack of inclusion in academic life as a violation of their free expression. In sum, not all arguments, ideas, and voices are equal and/or equally deserving of attention and scarce academic resources:

> The proposition that speech, no matter what its content of effects, is per se a contribution to [knowledge production] subordinates academic concerns to the political concern of including as many voices as possible and by doing so denies the university a life of its own shaped and informed by its own protocols.[30]

While Fish is correct that we ought not understand free expression on campus as an overly broad non-interference principle, a too sharply drawn distinction between free expression and free inquiry tends towards a private-oriented university. First and foremost, the distinction elides the ways in which norms of scholarly merit have both varied significantly over time and have been invoked in ways that are arguably antithetical to free expression *and* free inquiry. To illustrate the former point, merit has often been invoked as an unsavoury gatekeeping mechanism that is only nominally connected to scholarship's actual contribution to knowledge production.

---

27 Fish, *The First, supra* note 10 at 64.

28 *Ibid* at 66.

29 Keith E Whittington, *Speak Freely: Why Universities Must Defend Free Speech* (Princeton: Princeton University Press, 2018) at 14.

30 Fish, *The First*, *supra* note 10 at 72.

Entire disciplines have been revolutionized as a result of greater diversity in scholarly contributions, a process that entailed a slow (and ongoing) democratization of knowledge production. Ultimately, then, it was free expression *and* free inquiry that aided the diversification of knowledge production. In fact, one could argue that those who had been long denied free inquiry due to rigid and centralized norms of scholarly merit made ample use of their free expression to further democratize the scholarly mission. Universities have also arguably expanded their social function over the past half-century. No longer the sole province of the elite, they are increasingly diverse and a means for social mobility.[31] Therefore, the distinction between expression and inquiry runs the risk of ignoring the degree to which norms of scholarly merit have been invoked in ways that were exclusionary and undemocratic.

Fish provides a number of examples in which the expression-inquiry distinction quite easily holds: an instructor cutting short a classroom discussion, an instructor's proposed course not aligning with department objectives, hiring and promotion decisions based upon scholarly merit, and students lacking formal training for curriculum decisions.[32] The exercise of good pedagogy and standards of scholarly merit *necessitate* the privileging of certain forms of expression over others, but the general ethos of epistemic openness permeates academic environments. Further, this openness is not the cloistered pursuit of a select few, but is an inherently public imperative because knowledge production serves society *at large* and not solely institutions of higher education. As such, universities are premised upon free expression in a way that significantly aligns with the democratic imperatives of the public sphere. If one's commitment to free expression is buttressed by the idea that there ought to be something resembling a free marketplace of ideas, the university is arguably the sole institution reflecting such a philosophical ideal.

Interestingly, in each of the examples referenced by Fish, a slightly different framing could highlight the precise *opposite* of his argument. Subject to standards of pedagogy and scholarly merit, students and instructors ought not to have their expression unduly constrained. Negative assessments of one's views by peers, colleagues, or instructors would certainly *not* constitute undue constraint, but the *inability* to express oneself, subject to normal academic constraints, is contrary to the free expression required for scholarly pursuits, irrespective of whether or not this is a *constitutional* question. According to Keith E Whittington:

31 Sigal Ben-Porath, *Free Speech on Campus* (Philadelphia: University of Pennsylvania Press, 2017).
32 Fish, *The First*, *supra* note 10 at 65.

> Free speech is important to universities because it is constitutive of the institution, not because it is imposed as a legal restraint by an outside force … Free speech is constitutive of a modern university because the principles of free speech are tools critical to sustaining the project of intellectual inquiry that expands our knowledge and conveys that knowledge to others.[33]

Fish's (and others') distinction might lead one to believe that if something cannot be expressed on campus, it is not because of some shortcoming within the institution but because the expression itself does not meet scholarly standards, or is in some other sense not relevant or deserving of attention. This has the additional result of privatizing knowledge production to a significant degree, so that academics become the sole epistemic authority subject only to their own disciplinary conventions. In this regard, the university imagined by Fish is autonomous to a significant degree and solely focused on one objective: knowledge production. No one has any right to free expression akin to a non-interference principle because the guiding principle of decision-making is scholarly *merit*. Those determined competent in their respective fields have decision-making authority whereas everyone else is a mere epistemic trainee. To put it mildly, this is an anti-democratic version of the university, which is precisely Fish's overarching point: universities do not need free expression because *they are not* democratic.

Interestingly, Fish describes free expression in the public sphere as a "political" concern, whereas free inquiry is a "professional" concern. This is the basis for the second grounding of Fish's argument: the belief that campus controversies are more often about the alleged transgression of professional boundaries than about general expressive boundaries. In his words:

> Different ideas about the purposes universities should serve will translate into different understandings of the actions appropriate to students, faculty, and administrators; while those different understandings will sometimes take the surface form of free-speech claims and counterclaims, the underlying debate is often less about free speech than it is about the scope and limits of academic performance on the part of various actors.[34]

Fish therefore reduces the entire equation to the question of collegial or professional obligations.[35] But from where do these obligations arise? Does the

33 Whittington, *supra* note 29 at 29.

34 Fish, *The First*, *supra* note 10 at 87.

35 This position is consistent with Fish's earlier writing. See, for example, Stanley Fish, *Save the World on Your Own Time* (New York: Oxford, 2012); Stanley Fish, *Versions of Academic Freedom* (Chicago: University of Chicago Press, 2014).

scholar, for example, pay allegiance to their employer (via a collective agreement), to their discipline (as part of an academic community), or to a broad mission of knowledge production (that transcends institution and discipline and is essentially *public*)?

There is no uniformity in the academic community in response to this question. The fact that universities are able to persist and prosper amid such competing visions is a sober reminder that they are inherently political. This recognition does not mean that everything within the university is a tireless struggle for power, but only that scholars ought to be attentive to the ways in which politics complicates the aspirational goals of the institution (in its own words) and what it *actually does*. Further, to say that expressive boundaries are conditioned solely by (or even mostly by) professional boundaries seems to miss the obvious point that scholars (and others within the university) have consistently jeopardized their status on campus not by transgressing professional boundaries, but by transgressing explicitly political boundaries.

It is clear that Fish is mostly concerned with specifically academic expression and, most importantly, what academics do and say in their professional roles. This raises the question of whether or not universities ought to protect the expression of students who are not directly engaged in knowledge production (as a professor evidently is). A brief examination of recent headlines reveals that some of the most high-profile controversies revolve around this type of student expression in common or public-oriented domains of campus. Fish argues that the hosting of such areas for student expression is by no means obligated — hosting decisions are a reflection of "political and economic realities"[36] — and that efforts to keep the peace, so to speak, amount to "management and crowd control."[37]

This approach is a profound mistake. The expressive venues of which students can avail themselves are not merely selling features in a competitive market for students. Rather, they are spaces in which students have struggled for increased expressive possibilities on campus and were only relinquished as a result of decades of organizing amongst various student movements. To place these venues beyond the realm of knowledge production or any meaningful democratic participation would both deny students their own free expression *and* free inquiry and, again, posit a private-oriented version of the university.

36 Fish, *The First*, *supra* note 10 at 68.
37 *Ibid* at 69.

Finally, it is worth contemplating the question of institutional legitimacy in light of Fish's argument. According to Fish, universities pursue knowledge production as their sole objective. To do this mission justice, they require extraordinary autonomy, even if they are reliant upon public funding. Universities thus face the peculiar circumstance of justifying their public existence for particularistic ends. Fish wholeheartedly believes that knowledge production is an end in itself, but the beneficiaries of this noble mission remain somewhat anonymous.

This tension raises an important question: why should the public subsidize, to an impressive degree, an essentially private institution that lacks meaningful democratic and public impulses? Given the enormous stress contemporary higher education is already experiencing — heightened amid populist waves and associated attacks upon " elites" and "experts" — positing the university as an inaccessible, undemocratic institution that nonetheless ought to be generously funded by the public is a curious position. To put it a different way, if the protection and promotion of free expression is sometimes considered as an essential condition of democratic legitimacy, scholars perhaps ought to ask about its role as a condition of the university's legitimacy. Answering this question necessarily requires free expression, as it is the constitutive principle of the institution and the reason why the legitimacy of the institution is conditional upon its *public* orientation.

IV. *Charter* Avoidance and the Function of Publicly Funded Universities

The previous section contested the argument that free expression is *not* an academic value. On a general level, that is the strongest argument against constitutional protections for campus expression. Nonetheless, as mentioned, the majority of analyses of *Charter* applicability have focused more on legal interpretation than on the consequences of *Charter* avoidance. Refreshing exceptions include Sarah E Hamill, Michael Marin, and Linda McKay-Panos, all of whom directly engage the public-private dimension at stake in this debate.[38] In this section, these two elements are brought together to address the constitutive tension diagnosed earlier, and to demonstrate that *Charter* applicability is firmly in line with the public orientation of the university. According to several legal scholars that have analyzed the issue (referenced below), *Charter* applicability is also consistent with jurisprudence on the subject.

38 Sarah E Hamill, "Of Malls and Campuses: The Regulation of University Campuses and Section 2(b) of the *Charter*" (2017) 40:1 Dal LJ 157; Marin, "University Discipline", *supra* note 22 at 50-53.

The contrast between competing visions of the university matters for the *Charter*, because it was created with the express purpose of enshrining constitutional protections that would regulate only the relationships between government and private citizens, not relationships between private citizens. Because government delegates its legislative authority to a significant degree throughout a vast web of administrative and regulative bodies and processes, the reach of the *Charter* is potentially broad.[39] Strict control by the government, therefore, would unduly restrict *Charter* applicability if used as a legal threshold for applicability. In early *Charter* jurisprudence, most notably *RWDSU v Dolphin Delivery Ltd*, the Supreme Court noted that non-government entities could also attract *Charter* application, pending a sufficient connection to "government," but without much elaboration.[40] The scope of potential *Charter* applicability has decidedly changed since then.

Among legal scholars who have analyzed the issue, there seems to be modest consensus that the *Charter* ought to apply to university campuses. The more important question seems to concern the degree to which it ought to apply, which stands in stark contrast to the lack of uniformity in jurisprudence across Canada. This modest consensus also stands in stark contrast to the insistence of university administrations that the *Charter* ought not apply.

Dwight G Newman sees *Charter* applicability as a potential solution to the woes encountered by universities. According to him, "the *Charter* may actually be a means of saving them and their own values from themselves."[41] Sarah E Hamill argues for limited applicability: "under certain circumstances, there ought to be *some* space on campus which is open."[42] Michael Marin maintains that "the *Charter* should apply to universities because they implement specific government policies and programs, and exercise statutory authority that has a significant public dimension."[43] Franco Silletta advocates for "broad" applicability of the *Charter*, consistent with legal tests drawn from relevant case law: "sufficient governmental control, statutory authority, and specific governmental objectives."[44] Likewise, Krupa Kotecha argues for a "flexible and contextualized approach" that "should, in several circumstances, lead to the conclusion

39 Turk, *supra* note 11 at 39.

40 *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174.

41 Dwight G Newman, "Application of the Charter to Universities' Limitation of Expression" (2015) 45: 1-2 RDUS 133 at 155.

42 Hamill, *supra* note 38 at 161.

43 Marin, "*Charter* Apply to Universities?", *supra* note 2 at 56.

44 Franco Silletta, "Revisiting *Charter* Application to Universities" (2015) 20 Appeal 79 at 92-93.

that universities are subject to the *Charter*."[45] Linda McKay-Panos goes even a step further, asserting that the *Charter* ought to apply to the "activities of non-invited individuals (even non-students)," reflecting what she calls a "broader view on the value of expression."[46] For her, and others who share the same approach, section 1 analysis is amply qualified to reconcile competing institutional considerations like safety and anti-discrimination.

Universities, however, find themselves consistently opposing *Charter* scrutiny of their decision-making, in part aided by an early Supreme Court precedent that helped establish the scope of section 32(1). In *McKinney v University of Guelph*, the Supreme Court found that universities did not have a strong enough connection to " government," the crucial prerequisite for *Charter* applicability.[47] The *McKinney* case is widely recognized as exempting internal university decision-making from *Charter* scrutiny and, as a result, "university administrators have revelled in the sanctity of an elite position above *Charter* challenges."[48] In every single major case that has involved potential *Charter* applicability since, institutions have both clung to *McKinney* and argued that the *Charter* will seriously erode their institutional autonomy.

While the potential financial costs incurred by greater *Charter* scrutiny are an obviously unwelcome burden,[49] legitimate questions may be asked about whether those costs are merited, or if they would shift institutional decision-making in a positive direction. As it stands, most universities enjoy significant deference to their decision-making in judicial review proceedings, specifically through the application of a standard of "reasonableness" that is used in administrative law when the institution in question has discretionary statutory authority and a particular institutional mission (i.e. education).[50]

Regardless, *McKinney* was decided upon an issue far removed from the context of expressive limits and its relevance has drastically waned over time. What *McKinney did* decide, more accurately, is that the relationships between contracting parties within a university setting (e.g. via a collective agreement) are *not* subject to the *Charter*. That decision, therefore, always left open the possibility of *Charter* applicability in wholly different university contexts.

45 Krupa M Kotecha, "*Charter* Application in the University Context: An Inquiry of Necessity" (2016) 26:1 Educ & LJ 21 at 39.

46 Linda McKay-Panos, "Universities and Freedom of Expression: When Should the *Charter* Apply?" (2016) 5:1 Can J of Human Rights 59 at 61.

47 *McKinney*, *supra* note 11.

48 Newman, *supra* note 41 at 136.

49 *Ibid* at 148.

50 See, for example, *Dunsmuir v New Brunswick,* 2008 SCC 9.

Provincial courts have garnered conflicting lessons from *McKinney*, some further elucidating sufficient conditions for *Charter* applicability, others foreclosing the possibility based on a much more narrow reading.[51] In this regard, Kotecha draws a distinction between the case law in Alberta/Saskatchewan and Ontario, associating the seminal cases in the former with a "purposive approach" (reflected in *Pridgen v University of Calgary*,[52] *Saskatchewan Human Rights Commission v Whatcott*,[53] and *Wilson v University of Calgary*[54]) and the seminal cases in the latter with a "restrictive approach" (reflected in *Lobo v Carleton University*,[55] *AlGhaithy v University of Ottawa*,[56] and *Telfer v University of Western Ontario*[57]).[58]

But even for those courts and institutions relying upon *McKinney*, its significance has drastically waned, leading some scholars to ask whether or not it still provides the potent shield for *Charter* avoidance that it once did.[59] Marin is worth quoting at length on this point:

> [S]ince [*McKinney*] the Supreme Court has made significant strides in clarifying the standard of review applicable to decisions of public bodies that raise a constitutional question. Consequently, the underlying rationale of *McKinney* is arguably obsolete. Moreover, the *Charter* should not be viewed as a threat to institutional autonomy. The application of constitutional values to university decisions by an independent and impartial judiciary is not synonymous with government intervention.[60]

Although the Supreme Court has not yet had an opportunity to further clarify its position on *Charter* applicability with a case more specifically focused on campus expression since *McKinney*, the Court has heard other cases that have further elucidated the scope of section 32(1), in particular. The most important of these is *Eldridge v British Columbia (Attorney General)*.[61] Here, the Court found that while a "public purpose test" would be insufficient, private entities are subject to the *Charter* if they are "implementing a *specific* governmental policy or program."[62] Therefore, private entities can invite *Charter* review only

51 Hamill, *supra* note 38 at 160.
52 *Pridgen v University of Calgary*, 2012 ABCA 139 [*Pridgen*].
53 *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11.
54 *Wilson v University of Calgary,* 2014 ABQB 90.
55 *Lobo v Carleton University*, 2012 ONSC 254.
56 *AlGhaithy v University of Ottawa*, 2012 ONSC 142.
57 *Telfer v The University of Western Ontario*, 2012 ONSC 1287.
58 Kotecha, *supra* note 45 at 32-39.
59 Craig Jones, "Immunizing Universities from *Charter* Review: Are We 'Contracting Out' Censorship?" (2003) 52 UNBLJ 261 at 273.
60 Marin, "Charter Apply to Universities?", *supra* note 2 at 54.
61 *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577.
62 *Ibid* at para 43.

for those elements that, for example, relate to a "specific statutory scheme or a government program."[63]

According to Krupa, the current *Charter* applicability test includes three prongs: the actor must be exercising delegated statutory authority, a subject of government control, and carrying out activities that further a government objective.[64] While the first two prongs are prone to narrow readings likely to exempt universities from *Charter* scrutiny, the third prong features "considerable latitude" for courts to examine the connection between a private entity's activities and state prerogatives.[65] Although statutory authority highlights some obvious public elements in higher education, Marin argues that a sole focus on something like enabling legislation might miss the broader governmental role of universities. Instead, he argues that "broader analysis of the legislative, regulatory, and policy framework within which universities operate" reveals that universities are "instruments of government policy."[66]

Despite *Eldridge* presenting a formula that strongly suggests that universities are at least open to *Charter* applicability, some provincial courts have nonetheless read *Eldridge* very narrowly. In *Lobo v Carleton University*, for example, the Ontario Superior Court of Justice focused heavily on statutory authority and drew a limiting distinction between "extra-curricular" advocacy and the state's hand in higher education.[67] However, in spite of judgments like *Lobo*, the latitude of courts in interpreting section 32(1) is unambiguously open. In the absence of a definitive ruling, there is still modest momentum behind the idea that universities "owe their existence to governmental action," despite them lacking something akin to formal governmental control.[68]

In a separate case — *Greater Vancouver Transportation Authority v Canadian Federation of Students*[69] — the Supreme Court found that private entities could invite *Charter* scrutiny if and when their activities "can be said to be governmental in nature."[70] Therefore, it is possible that the framework of *Eldridge* will gradually supplant narrow readings of *McKinney* going forward, especially given that two Canadian provinces have solidified the putative connection be-

63 *Ibid* at para 44.
64 Kotecha, *supra* note 45 at 30.
65 *Ibid*.
66 Marin, "Charter Apply to Universities?", *supra* note 2 at 41.
67 Hamill, *supra* note 38 at 177-178.
68 Jones, *supra* note 59 at 274.
69 *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 [*Greater Vancouver Transportation Authority*].
70 *Ibid* at para 16.

tween higher education and government via ministerial directives related to campus expression.[71] If greater specificity in implementing a government objective was required in previous legal analyses, the ministerial directives in Alberta and Ontario will likely have the consequence of closing this gap, despite their symbolic nature.[72]

In the absence of something definitive from the Supreme Court, the decision in *Pridgen v University of Calgary* stands as the most direct and compelling analysis of the issue. As Marin highlights, *Pridgen* addressed issues at play in many other cases involving university discipline (as well as new issues arising from social media), including some that were high profile but nonetheless did not result in judicial review.[73] In *Pridgen*, the Alberta Court of Appeal agreed with a lower court's decision that the University of Calgary's disciplining of two students (among others) for "non-academic misconduct" (a result of them posting disparaging commentary about one of their instructors online) violated their section 2(b) *Charter* rights.[74]

Although the majority decision has had the consequence of heralding greater potential application of the *Charter* on campus — by connecting statutory authority and university decision-making — the legal analysis took place within the confines of administrative law (and therefore subject to a standard of reasonableness). However, the minority decision, written by Justice Paperny, endures as perhaps the most comprehensive analysis of *Charter* avoidance to date. Justice Paperny explicitly entertained *Charter* applicability in the context of university disciplinary proceedings by connecting enabling legislation, the University of Calgary's disciplinary process, and the implementation of government objectives. *Pridgen* suggests, therefore, that "at the very least, universities must apply *Charter* values in carrying out their coercive and governmental activities," subject to the reasonable limits permitted under section 1.[75] Further, the case illustrates the consequences of *Charter* avoidance for both decision-making that affects expressive boundaries and the orientation of the institution as a whole. On both fronts, the University of Calgary's disciplinary proceedings reflected latitude to restrict campus expression clearly in excess of

71 Cameron, *supra* note 7; Turk, *supra* note 11.

72 Stephen L Newman, "The Politics of Campus Free Speech in Canada and the United States" (2020) 29:2 Const Forum Const 19.

73 Marin, "University Discipline", *supra* note 22 at 32.

74 *Pridgen*, *supra* note 52.

75 Jennifer Koshan, "Face-ing the *Charter*'s Application on University Campuses" (13 June 2012), online (blog): *ABlawg* <ablawg.ca/2012/06/13/face-ing-the-charters-application-on-university-campuses-5/> [perma.cc/E5Z8-3FT5].

expressive limits derived from constitutional law and in an expressive context far removed from scholarly objectives (i.e. social media).

Cases in which universities restrict extra-mural student expression are perhaps the best examples of both the constitutive tension and the efforts among universities to posit a private-oriented version of their campuses. On the latter point, this private-oriented version is not merely an abstract or theoretical matter, but an institutional logic that often governs the administration of physical space. Hamill makes the case that because of their often-dramatic history of contestation, university campuses are more analogous to "streets, parks, and public squares" than to what is typically considered private property (e.g. a mall).[76] Unsurprisingly, then, when universities suddenly renege on the imputed openness of their public-oriented domains, it tends to invite suspicion if not criticism. For Hamill, the often-ignored aspect of these expressive controversies is the fact that the purpose of ostensibly private spaces is to *invite* the exchange of expression. In her words: "It is not just that university property is compatible with free expression but that free expression is central to the property in question."[77]

Canadian universities have also restricted student expression that occurs closer to campus and is situated in the discursive liminal space mentioned earlier. Both Carleton University and the University of Ottawa once disallowed a student group's poster that was critical of Israel.[78] More recently, Queen's University claimed that it could discipline students for misogynistic expression that took place off campus but ran afoul of its students' non-academic code of conduct.[79] Professors, too, have faced consequences for expression on and off-campus that is either clearly within reasonable limits (e.g. the case of Steven Potter[80]), or liminal in the sense that it is not self-evidently outside of those limits (e.g. the case of Rima Azar[81]).

76 Hamill, *supra* note 38 at 182.

77 *Ibid*.

78 "Protesters March over Poster Ban at Carleton", *CBC News* (26 February 2009), online: <www.cbc.ca/news/canada/ottawa/protesters-march-over-poster-ban-at-carleton-1.856851> [perma.cc/ZBV3-E557].

79 Steph Crosier, "Signs Prove 'Misogyny, Gender-Based Violence Alive and Well'", *Kingston Whig Standard* (19 October 2021), online: <www.thewhig.com/news/local-news/signs-prove-misogyny-gender-based-violence-alive-and-well> [perma.cc/JX2S-XHVZ].

80 "Investigation into Potter Case Finds McGill Violated Academic Freedom", *Canadian Association of University Teachers* (24 November 2018), online: <www.caut.ca/latest/2018/11/investigation-potter-case-finds-mcgill-violated-academic-freedom> [perma.cc/7MDL-XBSL].

81 Marie Sutherland, "Mount A Suspends Professor After Investigation into Complaints About Blog", *CBC News* (6 May 2021), online: <www.cbc.ca/news/canada/new-brunswick/mount-allison-suspension-professor-1.6016047> [perma.cc/5P2S-VDKC].

A recent case — *UAlberta Pro-Life v University of Alberta*[82] — illustrates the additional latitude at the disposal of universities in restricting expression in public-oriented areas of campus as a result of *Charter* avoidance. The case centers on the University of Alberta "quad," a space that features a variety of student events and is frequently the site of lively debate, dissent, and protest. Pro-Life UAlberta, a student group motivated by opposition to abortion, organized a demonstration in 2015 that attracted a significant amount of counter-demonstrators that blocked the group's display with signs featuring counter-messages. Events that followed resulted in two appeals of previously dismissed applications for judicial review of the University of Alberta's decision-making: one related to the university's decision not to discipline students (counter-demonstrators) and another related to the university's decision to demand a pre-emptive security fee from Pro-Life UAlberta to organize a subsequent demonstration.

Complaints were made to the university administration alleging that counter-protestors violated applicable provisions of the *Student Code of Conduct* (i.e. interfering with others' free expression). The administrator for student discipline found that no violation of the *Code* occurred, since "the protestors neither prevented the appellants from speaking nor prevented anyone from accessing the group's materials."[83] The final institutional decision on the matter concluded that while the counter-protest rendered it more difficult for others to access the message, the obstruction was akin to counter-expression rather than obstruction. The Alberta Court of Appeal agreed, dismissing the appeal of the group's previously unsuccessful application for judicial review.

The more important issue, however, is whether the university could impose a preemptive security fee for organizing a subsequent demonstration that was reasonably expected to require security costs incurred by the university. The university's demand for $17,500 from Pro-Life UAlberta directly raised the question of whether students were beneficiaries of the *Charter* in the most publicly oriented domain of campus.

The Court explicitly stated that one could not deduce from the university's purported dedication to free expression that the *Charter* ought to apply in a straightforward manner.[84] At issue is whether the university constitutes "government" for the purposes of section 32(1) of the *Charter*, which is determined by "enquiring into the nature of the entity or by enquiring into the nature of its

82 *UAlberta Pro-Life*, *supra* note 9.
83 *Ibid* at para 15.
84 *Ibid* at para 120.

activities."[85] Importantly, the Court sought clarity on whether the *Charter* applied *only* in the realm of campus expression and not more broadly.[86] The Court then relied upon *Greater Vancouver Transportation Authority* to try to discern "an area of government policy and objectives that the University can be said to be implementing for the state more broadly and not just for internal University objectives."[87] Here, the Court found that the *Charter* protects "freedom of expression by students on University grounds," a stark contrast to the history of the Canadian courts' *Charter* avoidance.[88]

According to the Court, the previous judge who dismissed the group's application for judicial review had "applied the wrong test, did not allocate the burden of proof correctly, and adopted misconceptions as to factors to be considered."[89] In arriving at this decision, the Court recognized that the "[e]ducation of students is a goal for society as a whole and the University is a means to that end, not a goal in itself."[90] While not clear on whether or not such a case exemplifies the "heckler's veto," the Court did say that preemptive security costs "escalated the status of potential objectors … above the expresser's position," which seems to indicate a lack of content neutrality on the part of the university administration.[91] The argument from the university that the anti-abortion messages were self-consciously designed for controversy (and thus provocation) was deemed unpersuasive, at least as a rationale for imposing its own institutional expressive limits.[92]

The consistent position among universities facing similar legal disputes is that constitutional protections for expression in public-oriented domains may amount to an untenable positive obligation to support student expression outside of the institution's core mission of education. On this point, the Court was vague but did state that the university did not have obligations to ensure the *effectiveness* of the student group's message or to uniformly enforce its *Code* in response to disruptive behaviour.[93] Like *Pridgen*, this case illustrates the degree to which *Charter* avoidance allows universities to restrict expression in excess of reasonable limits derived from constitutional law, in

85 *UAlberta Pro-Life*, *supra* note 9 at para 128, quoting *Greater Vancouver Transportation Authority, supra* note 69 at para 16.
86 *UAlberta Pro-Life*, *supra* note 9 at para 128.
87 *Ibid* at para 139.
88 *Ibid* at para 148.
89 *Ibid* at para 215.
90 *Ibid* at para 148.
91 *Ibid* at para 183.
92 *Ibid* at para 185.
93 *Ibid* at para 214.

addition to directly bearing upon their institutional orientation between public and private.

In the same way that universities have argued that the relationship between academics and the institution is essentially contractual (and thus private), they have also argued that the relationship between students and the institution is essentially contractual. Nonetheless, there is a clear public interest at stake in student expression on campus.[94] Although students are not technically beneficiaries of academic freedom with consummate collective agreement protections, universities themselves consistently assert that satisfying their particular mission involves wide latitude for student expression. More specifically, universities carry out government prerogatives in the sense that their delivery of higher education is premised upon public accessibility, subject to reasonable norms of merit. Unduly restricting student expression, therefore, potentially militates against two "statutory mechanisms," according to Marin: the wide discretion afforded to universities in matters of student discipline (as a result of vague enabling legislation) and their wide discretion in managing access to physical spaces on campus, both of which may unduly impinge on accessibility.[95]

When publicly funded universities attempt to justify decision-making that restricts expression — sometimes explicitly repelling *Charter* applicability — they inevitably portray their campuses as private fora in which the relationship between institution and individual is of a contractual nature. This is at odds with both the self-declared mission of the university and the foundation of the university's legitimacy in the eyes of the public. For example, in a University of Alberta factum from the case analyzed above, the university presented a legal position consistent with Fish's argument, arguing that enabling legislation does *not* require the university to provide extra-curricular expressive venues for students, even in public oriented campus domains, and thus does not invite *Charter* scrutiny.[96] Although provincial courts have come to inconsistent conclusions about this type of *Charter* avoidance, similar positions among Canadian universities highlight the degree to which the public orientation of the institution as a whole is at stake in this burgeoning jurisprudence.

The larger problem, however, is the inconsistency of provincial rulings on the applicability question, especially if one assumes, quite reasonably, that institutions of higher education across Canada bear roughly the same connection to "government" for the purposes of the *Charter*, despite differences

94 Marin, "Charter Apply to Universities?", *supra* note 2 at 51.
95 *Ibid.*
96 *UAlberta Pro-Life*, *supra* note 9 at para 146.

in the language of enabling statutes. To a large degree, at least *some Charter* applicability would address this problem.[97] At the moment, students at the Universities of Alberta, Calgary, and Regina will experience greater expressive protections than students at other Canadian universities, and without much good justification.[98] Until the Supreme Court has a chance to hear a case that could provide guidance on provincial uniformity, expressive limits will continue to vary by institution and province.[99]

V. Conclusion

Charter avoidance at university campuses across Canada is a curious phenomenon. Universities have often allied themselves with human rights agendas and, in their own words, recognize free expression as integral to their institutional purpose. Therefore, it would strike most as inconsistent that universities so consistently repel constitutional protections for expression, even in public-oriented campus domains. Normative arguments buttressing this status quo position typically fall into three non-exclusive categories.

First and foremost, there are merited concerns that increased external scrutiny — in the form of either *Charter* applicability or government intervention — would constitute an unnecessary intrusion into university affairs. Most of these concerns are unmerited, as *Charter* scrutiny would address the constitutive tension between reasonable limits derived from constitutional law and institutional latitude and do so in a consistent manner with the aid of a section 1 analysis. This is prudent on two levels. First, *Charter* applicability is less concerned with the imposition of coercive government oversight than it is with ensuring consistency in the delivery of a public good (higher education) across Canada. Second, given that the enabling statutes of most universities are relatively vague and thus suggestive of wide decision-making discretion, constitutional guarantees in public-oriented campus domains are warranted and in line with the self-declared mission of the university.

More specific concerns about a potential erosion of academic freedom are more worthy of consideration, since it is at least conceivable that constitutional

97 Katherine Creelman, "Free Expression: Do Canadian Universities Make the Grade?" (23 October 2017), online: *Centre for Constitutional Studies* <www.constitutionalstudies.ca/2017/10/free-expression_-do-canadian-universities-make-the-grade_/> [perma.cc/CE4X-2FR8].

98 McKay-Panos, *supra* note 46 at 94.

99 Atrisha S Lewis, Adam Goldenberg & Marco Fimiani, "Free Speech on Campus is Subject to the Charter — but Only in Alberta" (20 January 2020), online (blog): *McCarthy Tetrault* <www.mccarthy.ca/en/insights/blogs/canadian-appeals-monitor/free-speech-campus-subject-charter-only-alberta> [perma.cc/PXL6-FPRN].

protections for expression will fit awkwardly with norms of scholarly merit. There is, for example, much debate about whether or not academic freedom ought to be grounded in constitutional law (as it is in the United States) or in contractual labour relations (as it is in Canada).[100] On this point, James L Turk offers persuasive reasons why academic freedom is *not* at stake in these debates. For Turk, institutional autonomy itself does not naturally tend towards expressive protections; threats to academic freedom often emanate from *within* institutions; academic freedom protections are best protected via collective agreements; the *Charter* need not apply to *all* university decision-making; and *Charter* applicability would still occur in a context of balancing *Charter* considerations with an administrative standard of "reasonableness."[101] To this lengthy list of sound reasons, one might mention only one additional reason: that constitutional protections can significantly remedy the constitutive tension diagnosed earlier, a move that would appreciably bolster the legitimacy of the institution in the public eye and introduce necessary legal consistency across provincial jurisdictions.

Second, universities obviously have financial self-interest at stake. Due to the hyper-competitive nature of higher education at the moment, scarce resources cannot be squandered on unnecessary legal challenges. As such, financial disincentives likely go a long way in explaining the legal position of universities in some of the cases previously mentioned. Nonetheless, as the relevant case law amply demonstrates, there is *already* a legally grounded impetus for universities to take into consideration the *Charter* if and when their decision-making relates to expressive limits and their public function as providers of accessible education. Considering the fact that *Charter* applicability is unsettled law, one might also make the case that an expeditious resolution would decrease unpredictability (i.e. legal risk), increase consistency in institutional decision-making across provincial jurisdictions, and therefore conserve scarce resources in the long-term. This is especially the case considering the potential for *Charter* applicability has only gained momentum with time.

Lastly, *Charter* applicability may be interpreted as a boon for those on campus who seek greater protections for potentially harmful expression. It certainly has not helped the case for *Charter* applicability that anti-abortion activists seem to be consistently testing these expressive and legal limits on campus and elsewhere. Nonetheless, reasonable limits are rarely tested by those safely

100 Michael Lynk, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression" (2020) 29:2 Const Forum Const 45.

101 Turk, *supra* note 11 at 43-44.

within either the mainstream of public opinion or our collective comfort levels. It would be a profound mistake to renege upon the university's broad commitment to free expression to limit the public airing of just one particularly offensive form of expression. Further, *Charter* protections for expression are subject to reasonable limits and Canadian jurisprudence explicitly entertains speculative harms arising from expression, which ought to comfort opposition to *Charter* applicability on the grounds of harm mitigation.[102] Ironically, those opposed on these grounds are in the awkward position of bolstering a private-oriented version of the university while ostensibly striving for greater accessibility and equity.

In all three categories, therefore, arguments against *Charter* applicability lack merit and substance. Nevertheless, these arguments will unfortunately carry the day until the Supreme Court has an opportunity to substantially re-address the gradually crumbling shield of *Charter* avoidance that has been derived from *McKinney*.

102 Cara Faith Zwibel, "Reconciling Rights: The *Whatcott* Case as Missed Opportunity" (2013) 63:1 SCLR 313 at 330-333; Jamie Cameron, "A Reflection on Section 2(b)'s Quixotic Journey, 1982-2012" (2012) 58:1 SCLR 163; Emmett Macfarlane, "Hate Speech, Harm, and Rights" in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2021).