

# **Effective Government Intervention in Campus Free Speech**

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i. Introduction

To any devotee of the liberal-democratic order, something should feel distinctly wrong about recent events at Berkley. Free speech is a necessary cornerstone of a free society, it prevents discoveries and opinions from obfuscation, allows injustices to be recognized, and for ideas to be discussed, developed, and criticized. So, the right to free speech should be valued, and therefore protected. Very few would disagree with the concept that free speech should be protected, and that we should avoid reflecting the atmosphere that is off-putting on many American university campuses.

One proposal recently aired in Canada, by now Conservative Party of Canada leader Andrew Scheer, was to withhold government funding to universities that do not respect the obligations of free speech. This is an impressive policy in its boldness. But is this policy one that should be pursued? That is a question that hinges on other questions, questions of whether it would be an effective policy, whether it is the most efficient policy to achieve the goals, and whether the costs associated with the policy are justified when weighed against the policy's effectiveness. This essay will assume the value of protecting free speech on campuses, and instead focus on the most appropriate and prudent methods to do so.

ii. Effectiveness

This policy has the potential to be highly effective. Withholding operating funds from a university creates a compelling ultimatum, as universities are structurally ill-suited to sustaining a financial loss, and could risk inability to pay personnel, which in turn creates a risk of lasting damage stemming from personnel loss to universities. Therefore, there would be an almost unquestionable acquiescence from educational institutions to the demands of the government, rather than risk long term damage to the institutions.

iii. An Alternative Legislative-Regulatory Approach

However, neither provincial nor federal governments should pursue this course of action. This action is not the most efficient manner of promoting free speech in universities. Universities are traditionally insulated from significant interference from the government, with the traditional model of an institution having a Board of Governors acting in good faith to oversee the operation of the university. They act within the authority granted by the legislation establishing the institution, and within the constraints of regulations by government ministries, which are generally limited in scope. If the values of free speech are of interest to a government, a more simple and less adversarial tool to use would be legislative or

regulatory scheme to protect free speech. In response to an imposition of government in this manner, Boards of Governors and University Senates can implement more detailed internal policy to achieve higher level outlines provided for in the regulations or laws.

An example of this method in action is the implementation of a sexual violence policy requirement instituted by the Ontario government. The new government regulation required institutions to implement a policy on sexual violence, including plans on how they intend to achieve certain goals, such as formalized processes to address complaints. A similar regulation could be implemented, requiring university policy to be established to formalize, for example, that public speaking engagements may only be cancelled by due and documented process, when it does meet a set of conditions. Regulation or legislation would further obligate universities to institute strategic plans to improve the ability of the university to accommodate free speech, establish reporting metrics, and publicly report on those metrics every year. The level of discretion afforded to the universities in metrics and process would be a decision to be made by the implementing government.

Non-performance on the part of an institution could be addressed in private from an appropriate minister to a Board of Governors, and further dissatisfaction with an institution's strategy could then be publicly addressed to the Board of Governors, with specific recommendations or requirements to meet. In the case this is not sufficient to engender sufficient action towards a campus supportive of free speech, then a motion may be introduced in the legislature to issue a fine to the institution, of a significant but not ruinous amount. The implementation of law or regulation also provides a clear legal basis for recourse for both parties, to encourage impartial enforcement of the law.

This policy does not perfectly address the matter of free speech. It is an approach that focuses heavily on institutional autonomy and a non-adversarial procedure. This alternative would obligate the Boards of Governors of institutions to integrate free speech into their management of their institutions, and they would be unlikely to not do so, due to their own obligations under the law. For most institutions, this model should lead to a significant improvement in the status of free speech on university campuses, and the model provides effective contingencies in case of failure of Boards of Governors or Senates to act in accordance with the regulations. This policy is not necessarily as immediately effective as withholding of government funding, but as will be explored in the next section, the model of withholding money is not a prudent solution.

#### iv. Issues with the Withholding Model

The Legislative-Regulatory Model described above has been introduced as an alternative to the Withholding Model. However, the reasons an alternative is needed have not yet been established. This section will outline some of the problems with the Withholding Model. As a note, when this section regards withholding funding, this is generally assumed to be student grants and loans where applicable for both federal and provincial governments, per-student operating grants on the part of provincial governments, and tri-agency research grant funding on the part of the federal government.

The first issue with this model is its threat or implied threat to the independence of educational institutions, in a way that a regulatory and institution-led scheme would not. The political ramifications of interference in this matter may lead to fallout on the part of the government that instituted it, and a risk of an outward politicization of the post-secondary institution as a whole, which is not beneficial for society, students, faculty, the government, or subsequent governments.

A second and related issue with the model is that it would open a door to potential overreach by governments. There is an obligation on the part of the universities to protect free speech, which they do sometimes fail to do so adequately. Nevertheless, universities should be viewed as partners in education, not as subordinates. By withholding funding, the image of universities as bodies subordinate to the government. This may create a political precedent for future governments to withhold funding on the basis of matters with which they do not agree, and those issues could be unsavoury, such as withholding funding if a university is home of a specific school of thought, for example, a research group that suggests non-anthropogenic effects on climate change. A government could make a politically advantageous argument that public money should not be spent on trying to harmfully refute what is already recognized as fact. And while many may believe that the research hypothesized here is unlikely to unearth evidence to challenge the established school of thought, in the interest of free inquiry, the ability to conduct research should not be impeded by funds being withheld. This can and should be seen as rampant power abuse on the part of a government, but the door would have been opened by a previous government, and persecution of minority opinions often comes without significant political fallout. Thus, there is an issue in normalizing withholding funds, and while the intent of one government may be to promote free speech and inquiry, its tools to do so may be used to the opposite effect by future governments. This risk of silence to inquiry far outweighs the benefits of promoting free speech under even a more principled government, especially when a strong alternative model is possible.

A third issue is that of the power to withhold. If a government were to decide to withhold funding, it would likely take the form of a decision of the executive branch, under a directive of a minister for post-secondary education, to a ministry to withhold the funding. This would give the government an extraordinary power to withhold funding that was approved in the budget, providing an executive power over

funding, a power vested in the legislature. An executive stepping into matters which are the purview of the legislative branch is not as large an issue as the issues above, but it does merit some consideration, and should be addressed so that the power of the executive to withhold approved funding is not normalized.

There is a remedy to the above issue, to only withhold funding subject to a vote of the legislature. This however, creates subsequent issues. One is that this once again brings the post-secondary sector quite visibly into the political arena, causing a politicization of the issue, and decreasing public trust in our institutions, similar as one might see currently in the United States of America. Secondly, this requirement creates a degree of time latency, where withholding government funding may be a budget issue, creating up to a year of uncertainty. At the very least, significant debate would be required, creating a not unsizeable amount of time between the events that started the debate and the decision being made. A debate to restore funding would be equally as lengthy and politicized as well.

Furthermore, the Withholding Model is far more reactionary than a proactive Legislative-Regulatory Model, potentially reacting more to specific events than trying to create a positive overall environment. This creates an incentive for universities to avoid headlines, not to take a hard look at the free speech environment on their campuses, which is what effective policy should be seeking to achieve.

Finally, the Withholding Model would likely have a reasonable legal basis for its operation. Governments are empowered, to a considerable degree, to direct the affairs of university and withhold their spending if they so choose. Universities would have little legal basis to fight a government attempting to withhold funding, whether in the name of free speech, or in other matters, and as already described above, this could prove to be an undesirable flaw.

A Legislative-Regulatory approach would provide clearly outlined objectives in legislation or regulation, providing a basis for the courts to interpret whether institutions have acted in good faith to achieve the objectives. The constructive approach of a Legislative-Regulatory approach also means that specific governments may choose to communicate more ambitious targets to institutions that still fall under the law or regulation, meaning a government can still set high targets, with documented objectives, that courts could consider in their evaluations in case of government-institutional dispute. This remedy to the judiciary makes the Legislative-Regulatory Model a less politicized and more procedurally impartial approach than the Withholding Model, which would be more prone to government abuse.

v. Conclusion

The intent of the Withholding Model of free speech enforcement is based in a desire to see university campuses be more receptive to free speech. This essay does not seek to dispute that it would reduce the number of incidents of cancelled speeches or campuses restricting free speech. However, the Withholding Model does have flaws, including its potential for abuse and its politicization of free speech. The Legislative-Regulatory model as proposed in this essay would provide a larger incentive for a productive, collaborative and non-confrontational approach that would actually incentivize a holistic approach to improving attitudes and practices towards free speech on campuses, not in trying to minimize headlines. This would be a productive and superior model, and though it might not immediately remedy all free speech issues on university campuses, it would move towards that goal without the issues surrounding the Withholding Model.

This essay hopes to make the case that if a government was truly interested in promoting the values of free speech on Canadian university campuses, that they would realize that the Legislative-Regulatory approach provides the best and most constructive option. This model takes steps to depoliticize free speech, provide an objective framework for progress, and engage institutions not as adversaries or subordinates, but collaboratively and as partners who also have a stake in a healthy state of free speech, inquiry and discourse.