

Antagonism over Trinity Western University's Proposed Law School: A Discourse Analysis of
the Decision-Making Processes of the Law Society of Upper Canada and the Law Society of
British Columbia

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Abstract

Antagonism over Trinity Western University's Proposed Law School: A Discourse Analysis of the Decision-Making Processes of the Law Society of Upper Canada and the Law Society of British Columbia

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In this dissertation, I examine the discourses of Trinity Western University (TWU) and the law societies of British Columbia and Upper Canada during the approval processes for TWU's proposed law school. TWU is an evangelical university with the stated goal of developing graduates with thoroughly Christian minds. At issue in the law school's approval was the university's religious code of conduct, or Community Covenant, which required students abstain from sexual intimacy outside of marriage between one man and one woman. Some opponents of the law school argued that the Covenant functioned as a discriminatory admissions policy against LGBTQ students and should therefore be considered by the law societies in deciding whether to approve TWU's law school.

Unlike much of the existing research, which has focused primarily on the decisions of the courts arising from the TWU law school controversy, this dissertation instead examines the decision-making process of the Law Society of Upper Canada and the Law Society of British Columbia. It asks whether their decisions produced a version of religion similar to that identified at other levels of Canadian constitutional law—one that is individual, an autonomous choice, and private—and, if so, how this version of religion emerges in their decision-making processes.

Using discourse analysis, I examine meeting transcripts and documents submitted by TWU to the law societies to assess the arguments made for and against approval of the proposed

law school. I analyze key concepts—including discrimination, the public interest, and the delineation of the public and private spheres—how these concepts are linked, and how the law societies' decisions to reject the law school solidified their dominant meanings. Although various versions of religion emerged in the law societies' debates, they refused to render a version of religion that was institutional, coercive, and public. By rejecting the law school, they instead rendered a version of religion consistent with that found at other levels of Canadian constitutional law: individual, an autonomous choice, and private.

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Table of Contents

<i>Chapter One: Introduction</i>	1
Research Questions & Problem	2
Research Context.....	4
Trinity Western University v British Columbia College of Teachers	10
Language Use.....	11
Overview of Chapters	12
<i>Chapter Two: Review of Literature</i>	15
Law Societies.....	16
Public Interest.....	20
The Public and Private Spheres	24
Freedom of Religion—An Argument for the Approval of TWU Law	31
LGBTQ Equality Rights—An Argument Against Approval of TWU’s Law School	34
Conclusion.....	37
<i>Chapter Three: Theoretical Framework</i>	39
Law and Religion as Cultures and Objects of Analysis	40
Elements in Law’s Rendering of Religion	43
Religion as Individual.....	43
Religion as an Autonomous Choice	45
Religion as Private.....	47
Depoliticization & Repoliticization	48
Critical Reflection.....	52
<i>Chapter Four: Methods</i>	58
Laclau & Mouffe’s Discourse Theory.....	58
Concepts	61
Discourse	61
Nodal Point.....	64
Floating Signifier.....	64
Intertextuality	66
Antagonism.....	67
Hegemonic Intervention	68
Summary of Key Concepts.....	69
Data.....	69
Conclusion.....	71
<i>Chapter Five: TWU’s Law School: An Individual or Institutional Question?</i>	73
The Main Question the Law Societies Were Trying to Answer.....	74
Duelling Public Interests.....	82
Discrimination Based on Religion or Sex(uality)?.....	92

A Series of Hegemonic Interventions.....	100
Conclusion.....	103
<i>Chapter Six: Signing the Covenant as a Choice or Coercion?</i>	<i>105</i>
The Community Covenant	105
Cascading Hegemonic Interventions	116
Conclusion.....	117
<i>Chapter Seven: What Counts as the Private Sphere or the Public Sphere?.....</i>	<i>120</i>
The Boundary of the Private & Public Spheres	121
To Impose or Not to Impose: Denial of the Law School as an Imposition of Values.....	129
A Handful of Hegemonic Interventions.....	137
Conclusion.....	138
<i>Chapter Eight: A Legal or Political Decision?</i>	<i>140</i>
The Law Society of British Columbia Resolution & Referendum Votes.....	141
Law and Politics as Intertwined Fields.....	142
Analytical Concepts.....	146
The Political and Politics.....	146
Power	148
Analysis.....	149
Authority and Political Power	150
Law, Politics, and the Political	156
The Members' and Benchers' Hegemonic Interventions.....	162
Conclusion.....	163
<i>Chapter Nine: Conclusion.....</i>	<i>166</i>
Discussion	167
Restating the Research Questions	167
Methodological Contributions.....	167
Findings	169
From the Law Societies to the Supreme Court.....	172
Overall Contributions	174
Limitations.....	174
Future Research	176
Conclusion.....	177
<i>Reference List.....</i>	<i>180</i>
Works Cited	180
Legal Sources Cited.....	190

Chapter One: Introduction

On April 10, 2014, a group of people—the board of directors, called Benchers—representing the Law Society of Upper Canada (now the Law Society of Ontario) gather at Osgoode Hall in Toronto, ON. It is 9 a.m. A number of Benchers attend the meeting by phone. The meeting is also webcast to the public, and rooms have been set aside for members of the public and the legal profession to watch the webcast. Also present at the proceeding are representatives of Trinity Western University (TWU). The following afternoon, at 3:28 p.m., in Vancouver, B.C., the Law Society of British Columbia (LSBC) also gathers both in-person and by phone. Present again are representatives of TWU, including university president Bob Kuhn. These are the first in a series of meetings held by the law societies of Upper Canada and British Columbia in the debate over the approval of Trinity Western University’s proposed law school.

Trinity Western University is a private evangelical university and an arm of the Free Church of Canada. It is a liberal arts college located in British Columbia with the stated goal of developing university graduates with thoroughly Christian minds (Trinity Western University, 2024a). Of particular concern during the approval process for the law school was TWU’s mandatory religious code of conduct, the Community Covenant, which required students abstain from sexual intimacy outside of marriage between one man and one woman (*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (Evidence, Appellant Vol. III, TWU Community Covenant at pp. 402–403) [TWU Community Covenant]). Some opponents of the law school argued that the Covenant functioned as a discriminatory admissions policy against LGBTQ students and should therefore be considered by the law societies when deciding whether to approve TWU’s law school. This dissertation explores the decision-making processes of the

law societies in the conflict over the approval of Trinity Western University's proposed law school.

Research Questions & Problem

I use the framework that Benjamin Berger developed in *Law's Religion: Religious Difference and the Claims of Constitutionalism* (2015) and "Law's Religion: Rendering Culture" (2007) to analyze the tensions between law and religion(s) in Canada. Specifically, Berger's theory takes Canadian constitutional law to be a culture that meets and conflicts with religious cultures in "instance[s] of cross-cultural interaction" like the conflict between Trinity Western University and the law societies (Berger, 2015, p. 18). Berger held that the law, as a dominant cultural force in such interactions, produces, or renders, a version of religion that is individual, an expression of autonomy, and private.

In "Law's Religion: Rendering Culture," (2007) Berger posited that while the discourse of the Supreme Court of Canada renders religion as individual, an expression of autonomy and choice, and private, other branches of government might produce a different version of religion (p. 281). While the law societies are not a branch of government, as administrative decision-makers, they hold delegated government power to regulate the legal professions of their respective provinces in the public interest. Holding delegated governmental power also means that the law societies must consider and balance the values of the *Charter of Rights and Freedoms* at stake in their decisions with their statutory objectives (Daly, 2023). In this dissertation, I explore if the law societies' decisions echo this pattern of a version of religion rendered by law as individual, an autonomous choice, and private, as reflected in Canadian constitutional law. I ask both *if* the law societies' decisions render religion in the same pattern and *how* this manifests in the law societies' decision-making processes.

I also consider how, as administrative decision-makers charged with balancing Charter values and statutory objectives to protect the public interest, the law societies gave meaning to the public interest and if it was linked more closely with freedom of religion or LGBTQ equality (*Canadian Charter of Rights and Freedoms* at s 15, Part 1 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, < <https://canlii.ca/t/ldsx>>) [Charter]). Additionally, in chapter eight, I continue my analysis of the Law Society of British Columbia's law school approval process by focusing on the LSBC members' involvement. The central question of this chapter is whether the LSBC's decision-making process was always political, or whether it became political through members' participation in the approval process. Here, "politics" is understood in a discursive sense, following Laclau and Mouffe (2001), as a process concerned with establishing social order and the management of conflict. To answer this question, I draw on discourse analysis, as developed from Laclau and Mouffe's political discourse theory; although this is an approach originally formulated to analyze the political field, I argue it is well suited to examining legal institutions and decision-making processes.

Much of the existing literature on the conflict over Trinity Western's law school takes up a position on the matter, either opposed to approval and arguing it would violate LGBTQ equality or in favour of approval and arguing it would be protected by freedom of religion and would add religious diversity to the legal profession (Craig, 2014; Newman, 2013; Pothier, 2014). The focus of this existing research has also been primarily on the decisions of the courts in the appeals that followed the decisions of the law societies. In contrast, there has been little investigation of the decisions of the law societies themselves, and none that proposes to analyse these decisions without trying to argue for a specific outcome. My research looks to help fill these gaps by examining the discourses of TWU and the law societies in the law societies'

decision-making processes. Rather than taking up a position for or against the law school, my analysis considers the antagonisms produced throughout the controversy and the resolution of those points of conflict. In the following sections of this chapter, I provide the context and an outline for the decision-making processes of both law societies. I then discuss how the *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 [*TWU v BCCT*] Supreme Court case was a significant point of reference for both law society decisions.

Research Context

In 2012, TWU applied to the Federation of Law Societies of Canada (FLS) to open a law school. The Federation is Canada's national association of law societies, with the goal of facilitating the sharing of information, the harmonization of policies, and the standardization of national standards (Federation of Law Societies of Canada, 2025). In 2010, Canadian law societies adopted a national academic standard or requirement, suggested by the Federation, that graduates of common law programs had to meet to enter law society bar admission or licencing programs. This requirement specifies the skills and knowledge graduates must attain, and a law school program must teach, to earn approval. The Canadian Common Law Approval Committee reviews common law programs to determine if they meet the national requirement. However, this is only one step in a law program's approval process. The program must also be approved by the relevant government authority and, importantly, by the provincial or territorial law society.

While the law societies mandated the Federation's Approval Committee to determine if a law degree program meets the national requirement, law societies still have the statutory authority to set policies for admission to the legal profession within their respective jurisdictions (Federation of Law Societies of Canada, 2013a; 2013b). Law Societies in Canada are charged to govern the legal profession in the public interest and ensure, among other things, that the public

is served by legal professionals who meet high standards of learning, competence, and professional conduct. In this role, each law society administers the bar admissions program in its own jurisdiction (Law Society of British Columbia, 2024; Law Society of Ontario, 2024a).

Trinity Western’s proposed law school provoked a particularly strong reaction from the legal community and public. At the centre of this reaction was TWU’s religious code of conduct, its mandatory Community Covenant, which required that “In keeping with biblical and TWU ideals, community members voluntarily abstain from [activity including] ... sexual intimacy that violates the sacredness of marriage between a man and a woman” (TWU Community Covenant at pp. 402–403). Concerns were raised by opponents of the law school that the Covenant discriminated against LGBTQ people. Some argued that the Covenant worked to ban LGBTQ students, with the result that LGBTQ people would have unequal access to the legal profession if TWU Law was approved. Other issues included whether TWU law students could be properly taught legal ethics, professionalism, and constitutional law from a Christian perspective. Supporters, however, argued that TWU was protected by freedom of religion and that it would be well placed to teach about ethical obligations.

To address issues that the FLS determined to be outside the usual mandate of the Approval Committee, it convened a Special Advisory Committee. The Special Advisory Committee assessed whether there was a public interest “issue that should be taken into consideration in determining the eligibility of future graduates of TWU’s proposed law school program to enroll in law society admission programs” (Federation of Law Societies of Canada, 2013a, p. 6). In the end, the Committee concluded that there was “no public interest reason to exclude future graduates of the program from law society bar admission programs” (Federation of Law Societies of Canada, 2013b, p. 19). The Committee based this decision on an earlier

Supreme Court case involving Trinity Western and its Covenant, *Trinity Western University v British Columbia College of Teachers*, which approved a teacher training program that required signing the Covenant, and concluded that there was no evidence the courts would decide differently in the case of the law school. The Committee also found that while the Covenant did create differential treatment for LGBTQ people, it did not ban them, and that there was no proof that TWU law school graduates would behave in a discriminatory manner (Federation of Law Societies of Canada, 2013b).

In December 2013, in light of the Special Advisory Committee's report and having considered if Trinity Western Law's proposed program met the national requirement, the Canadian Common Law Program Approval Committee granted TWU preliminary approval of its law school. Shortly thereafter, the B.C. Minister of Advanced Education approved Trinity Western's law school. Each law society's approval process of a new law program in their own jurisdiction is slightly different, and while some law societies delegate the approval of law programs to the Federation, others also undertake their own local processes. In the case of Trinity Western's law school, many law societies did, with hesitation, adopt the decision of the Federation. This included Alberta, Saskatchewan, Manitoba, Prince Edward Island, and the Yukon.

Several, however, registered concerns, with the Law Society of Alberta suggesting a review of criteria for law school approval and the adoption of a non-discrimination provision. The Law Society of Nunavut indicated it would wait for a decision by the Supreme Court in response to litigation originating from larger law societies, while the Law Society of Newfoundland and Labrador resolved to place "in abeyance" the question of whether graduates of TWU Law would be accepted for admission to that law society (*Trinity Western University v*

The Law Society of British Columbia, 2016 BCCA 423 at paras. 33–40 [*TWU v LSBC BCCA*]; Woolley & Salyzyn, 2019). The Nova Scotia Barrister’s Society (NSBS) debated and rejected TWU’s law school. This decision was appealed up to the Nova Scotia Court of Appeals, which ruled against the NSBS (*The Nova Scotia Barristers’ Society v. Trinity Western University*, 2016 NSCA 59 (CanLII), < <https://canlii.ca/t/gsn66>>).¹

Of specific interest to this research project, the Law Society of British Columbia (LSBC) met on April 11, 2014, to discuss if it would recognize TWU’s proposed law school. The LSBC Benchers voted 20 to 6 against a motion that declared,

notwithstanding the preliminary approval granted to Trinity Western University on December 16, 2013, by the Federation of Law Societies Canadian Common Law Program Approval Committee, the proposed Faculty of Law at Trinity Western University is not an approved Faculty of Law (*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (Evidence, Appellant Vol. VII, Law Society of British Columbia April Transcript at p. 1188) [LSBC April Transcript]).

As regulators of the legal profession in British Columbia, Benchers, i.e., the law society’s board of directors, voted against a motion that would have barred graduates from TWU’s law school from enrollment in British Columbia’s law society bar admissions program. However, complicating the question, LSBC members held a special general meeting (SGM) on June 10, 2014, and voted on an SGM Resolution that directed Benchers to reverse their decision. The SGM Resolution passed, and the LSBC Benchers met again on September 26, 2014, passing what became called the September motion; this resolved that a referendum of LSBC members be held as soon as possible to implement the SGM Resolution and declare the proposed law school

¹ The NSBS amended its regulations so that a law degree granted by TWU Law would not be recognized in Nova Scotia if the Barrister’s Society determined that the university granting the degree unlawfully discriminated in its admissions or enrollment policies on grounds prohibited by the *Nova Scotia Human Rights Act* or the Charter. The Court of Appeal of Nova Scotia concluded that TWU did not fall under Nova Scotia’s *Human Rights Act*, nor was it subject to the Charter, and that the amendment overextended the authority of the NSBS (*The Nova Scotia Barristers’ Society v. Trinity Western University*, 2016 NSCA 59 (CanLII) < <https://canlii.ca/t/gsn66>>).

at TWU not an approved faculty of law for the purpose of the LSBC's bar admissions program. The September motion specified that the referendum results would be implemented and binding on the Benchers if at least one-third of LSBC members voted and two-thirds voted in favour of the resolution. In October 2014, the members voted against approving the law school, with the LSBC Benchers meeting a final time to implement the results and reverse their initial approval.

Notably, even without the approval of the LSBC, TWU would still have been able to open a law school and graduates would have been able to practice law in other jurisdictions where TWU Law was an approved faculty of law. In British Columbia, individual graduates may have been able to apply to the LSBC's bar admission program through the process used by lawyers trained at law schools outside Canada (Federation of Law Societies of Canada, 2024; LSBC April Transcript). However, in response to the LSBC's decision, in December 2014, the B.C. Minister of Advanced Education revoked his approval of TWU's law school (CBC News, 2014; *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326 at paras. 12-15 [*TWU v LSBC* BCSC]; Woolley & Salyzyn, 2019).

Coinciding with the Law Society of British Columbia's first meeting, the Benchers of the Law Society of Upper Canada met on April 10, 2014, and again on April 24, to debate the approval of Trinity Western University's school of law. At the beginning of their second meeting, the LSUC Benchers heard directly from Trinity Western University President Bob Kuhn, who advocated for the approval of the law school. At the end of the second meeting, LSUC Benchers voted 28 to 21, with 1 abstention, against a motion that asked,

Given that the Federation Approval Committee has provided preliminary approval to the Trinity Western law program in accordance with processes Convocation approved in 2010 respecting the national requirement and in 2011 respecting the approval of law school academic requirements, should the Law Society of Upper Canada now accredit Trinity Western University pursuant to section 7 of by-law 4? (*Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33)

(Evidence, Appellant Vol. II, Law Society of Upper Canada April 24 Transcript at p. 385) [LSUC April 24 Transcript]).

As regulators of the legal profession in Ontario, Benchers voted to reject TWU's law school and blocked² graduates with degrees from TWU Law from the law society's bar admission program.

Trinity Western would challenge both decisions by the law societies in the courts, cases eventually decided by the Supreme Court of Canada in June 2018 (*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [*LSBC v TWU*]; *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 [*TWU v LSUC*]; Woolley & Salyzyn, 2019). The Court concluded that the law societies' decisions not to approve TWU's proposed law school proportionately balanced their statutory objectives to protect the public interest and TWU's freedom of religion guaranteed by the Charter. In reaching their decisions, the Court found that the law societies could consider TWU's admissions policies, along with the academic qualifications and competence of individual graduates, when deciding whether to approve the law school. The Court confirmed that it was within the scope of the law societies' duty to uphold the public interest to conclude that this included protecting equal access to the legal profession, diversity within the bar, and preventing harm to LGBTQ law students (*LSBC v TWU*; *TWU v LSUC*). Following the Court's decisions, Trinity Western ultimately decided to amend the Community Covenant so that it was no longer mandatory for students (Lindsay, 2018). However, at the time of the conflict, it was required that all students, faculty, and staff sign the Covenant that prohibited same-sex intimacy, which the Supreme Court had already acknowledged as discriminatory (if legal) to LGBTQ persons in *TWU v BCCT* (at para. 23).

² If the conflict between TWU and the law societies had not proceeded through the courts and TWU had decided to open a law school that was not recognized in Ontario, it is possible that graduates could have qualified for the bar admission program by obtaining a Certificate of Qualification issued by the National Committee of Accreditation, like lawyers trained in Quebec civil law or outside Canada.

Trinity Western University v British Columbia College of Teachers

As I mentioned previously, the FLS determined that the Community Covenant did create differential treatment for LGBTQ students, but as TWU Law met the national requirement for a new law program, there was no public interest reason to exclude graduates from law society admission programs. This determination was based in part on the Supreme Court's first decision involving Trinity Western, *Trinity Western University v British Columbia College of Teachers*, in which TWU had applied to the British Columbia College of Teachers (BCCT) for permission to take full responsibility for its teacher training program, of which students had previously completed their final year at a secular university (Federation of Law Societies of Canada, 2013b).

The BCCT denied TWU's application on the basis that it would not be in the public interest to approve a teacher training program offered at an institution that followed discriminatory practices. The BCCT was referring to the requirement that students sign the Community Standards (Covenant), which required them to "refrain from practices that are biblically condemned," such as "sexual sin, including premarital sex, adultery, homosexual behaviour, and viewing pornography" (Community Standards, 1995 as cited in *TWU v BCCT* at para. 4). The Court found that the BCCT had erred in rejecting TWU's application but that it did have jurisdiction to consider discriminatory practices in reviewing TWU's application. The Court noted that the Charter protects both equality rights and freedom of religion and that both rights must be reconciled.

In making this determination, the Court concluded that while LGBTQ persons might be discouraged from attending TWU, they would still be able to become teachers. Similarly, it found that without concrete evidence that training at TWU would foster discrimination in the

public school system, the religious beliefs of individuals at TWU should be respected. There was no reason teachers trained at TWU could not teach in public schools, as long as their private religious beliefs did not manifest as public misconduct in their professional roles (Orlova, 2017; Federation of Law Societies of Canada, 2013b; *TWU v. BCCT*).

The *TWU v BCCT* decision is central to my research, in that it not only was a factor for the FLS decision but also played a key role in the discourse of each law society during their decision-making processes. Whether *TWU v BCCT* applied as precedent in the context of the conflict over the approval of TWU's proposed law school, and thus to the decisions of the law societies, was unclear to Benchers. At issue for each law society was whether *TWU v BCCT* applied as precedent to their decision regarding TWU's law school or was determinative of the outcome in the context of the conflict between TWU and the law societies. However, while it is important as background, in the context of the law societies' decisions, and as a signifier in their discourses, the legal facts of the case are not in question; thus, I have chosen not to centre it as a signifier in my analysis. Rather, I analyse those signifiers whose meaning is unsettled or "floating" during the law societies' decision-making processes.

Language Use

Throughout this dissertation, I use the acronym LGBTQ to refer to persons who identify along a spectrum of sexualities and gender identities that do not fit within the categories of heterosexual or cisgender.³ Terminology relating to sexual orientation and gender identity is continually changing and evolving, and acronyms such as 2SLGBTQIAA+ (two-spirit, lesbian, gay, bisexual, transgender, queer, intersex, asexual, aromantic+) reflect the diversity and ongoing

³ Cisgender is a term that refers to person whose gender identity aligns with their sex assigned at birth (Brydum, 2015).

development of these communities and identities (Campbell & Hill, 2022). The language used to describe sexual and gender diversity is shaped by social, political, and socio-historical context, and I acknowledge that the acronym LGBTQ may not be a term with which all members of this community identify (Pelow, 2022; Wagaman et al., 2018). While my primary source materials use a variety of different terminology, including “lesbian,” “gay,” and “LGBT,” I use LGBTQ throughout this dissertation as a consistent analytical term that is familiar to general readers and inclusive of a broad spectrum of sexualities and gender identities.⁴

Overview of Chapters

In chapter two, I discuss the important literature on the TWU law school debate. I also introduce central concepts such as the public interest, the public and private spheres, and discrimination in the context of their use in the conflict between Trinity Western University and the Law Societies of Upper Canada and British Columbia.

In chapter three, I present my theoretical framework based on Benjamin Berger’s (2015) theory of the relationship between Canadian constitutional law and religion(s) as a cross-cultural interaction. This framework takes both law and religion(s) to be cultures, so that both must be taken as objects of analysis. As the dominant culture or discourse, the law in constitutional

⁴ I also use the LGBTQ acronym to acknowledge that although the debate around the approval of the law school focused on the exclusion of lesbian and gay students from marriage, the Covenant also (re)produces discrimination based on gender identity. As Templeton notes, the Covenant polices gender categories and reinforces the gender binary by framing sexual activity as either heterosexual or homosexual, an approach that presumes individuals are either male or female and does not account for transgender, gender-nonconforming, or intersex members of the TWU community. The framing of the law school debate as a conflict between freedom of religion and freedom from discrimination based on sexual orientation also relied on the assumption that individuals are either male or female and does not account for transgender, gender-nonconforming, or intersex persons. This does not address what happens if an individual does not fit in or identify with a binary gender category. This challenges the gender binary that the Covenant seeks to enforce and reveals an additional form of harm arising from its enforcement (Sawatzky, 2023; Templeton, 2015).

democracies renders a specific version of religion. I explain how law's version of religion is individual, an autonomous choice, and practiced or expressed privately.

In chapter four, I explore the methods I employ in my research, developed from Ernesto Laclau and Chantal Mouffe's (2001) discourse theory. I first situate Laclau and Mouffe's discourse theory ontologically, then introduce the specific tool set I developed for studying discourse in the legal field.

In chapter five, I begin my analysis by exploring if the decisions of the law societies in the approval processes of TWU's proposed law school rendered a version of religion that is individual. I examine how TWU and the law societies framed the primary question Benchers were tasked to answer, how the law societies defined their statutory mandates of protecting the public interest, how TWU interpreted those mandates, and how TWU and the law societies understood the concept of discrimination. I present the different ways these concepts are linked together to form arguments for and against the approval of the law school. I conclude that the law societies' final decisions to reject the law school rendered a version of religion that was individual. In this chapter, I also discuss how the law societies attributed meaning to the public interest associated with LGBTQ equality.

In chapter six, I discuss if the law societies' decisions produced a version of religion that is an autonomous choice. I explore the different ways in which Trinity Western University and the law societies framed the Community Covenant either as an autonomous choice and expression of religious belief or as coercion. I find that these different framings led to different versions of religion and conclude that the law societies' final decisions to deny the law school rendered a version of religion that is an autonomous choice.

In chapter seven, I continue my analysis by exploring if the law societies' decisions produced a version of religion that is private. I discuss how Trinity Western and the Benchers framed the boundary and point of transition between the private and public spheres, as well as how they framed the threat of denying the law school either as pressure to conform to secular values or be denied access to the public sphere or as not stopping TWU from opening a law school and therefore not restricting graduates' access to the public sphere. I show how these different framings led to different renderings of religion and conclude that the law societies' final decisions rendered a version of religion that is private.

In chapter eight, I consider the intersection between law and politics. I introduce the analytical concepts of politics, the political, and power to examine the LSBC's members' resolution and referendum votes. I explore if the involvement of the LSBC members in the law society's decision-making process shifted it from the legal field to the political or if it was already a part of politics. I assess how the Benchers framed the issue of who held the authority to approve the law school and how they framed the meaning of the resolution and referendum as legal and political. I find that because the Benchers could decide to shift the question from legal to political, the law society's decision-making process was always political.

Finally, in chapter nine, I summarize the central findings and contributions of this research, then discuss limitations and directions for future work.

Chapter Two: Review of Literature

To begin situating my research, this chapter explores relevant literature around the Trinity Western law school controversy. I start by examining the history and role of law societies as regulators of the legal profession, administrative decision-makers, and a self-regulating profession. In connection to this, I introduce the concept of the public interest as developed in Canada and defined in the mandates of the law societies. This is important because my research examines the meaning given to the public interest by the law societies and explores the potential tension between a law society's mandate to uphold and protect the public interest and its mandate to protect the interests of its members. I then introduce the different approaches to determining the public interest developed in *Trinity Western University v British Columbia College of Teachers*.

I also examine scholarship around the delineation of the public and private spheres in the Trinity Western law school controversy and consider different models of secularism that can help explain the shifting boundaries between private and public in the various discourses in the TWU law school decisions. While much of the existing literature on the public and private spheres, as well as the public interest, analyzes the decisions of the courts in the Trinity Western University law school conflict, my research examines the meaning of public interest and the delineation of the public and private spheres in the decisions of the law societies.

Next, I explore what can be called either the freedom of religion literature or the work of scholars arguing for the approval of TWU's law school. This work's central argument is that to deny the law school would severely infringe freedom of religion and lead to impoverished versions of religious freedom and diversity. Many scholars making these arguments wrote prior to most law society decisions regarding TWU's law school and therefore focused on the potential

decisions of unspecified law societies, or in one case, on how the decision of the Law Society of Upper Canada, in particular, might impact freedom of religion. In contrast, my analysis assesses and compares the meaning given to freedom of religion in the decision-making processes of both the Law Society of Upper Canada and the Law Society of British Columbia. Finally, I look at the literature of those opposed to TWU's law school, or the LGBTQ equality scholarship. This focuses on the ideas that to approve TWU Law would violate LGBTQ equality and that the Community Covenant was discriminatory to LGBTQ people in a way that was against the public interest. I explore how these concerns surfaced in the decision-making processes of the law societies.

Law Societies

This research project centres on the decision-making processes of the Law Society of Upper Canada in Ontario and the Law Society of British Columbia. As such, this section begins by explaining what a law society is and situates the law societies as independent professional bodies subject to the Charter as administrative decision-makers. It also briefly explores the history of the legal profession in Canada as a self-regulating profession that has relatively recently been mandated to protect the public interest.

Canada has 14 provincial and territorial law societies charged with regulating the legal profession in the public interest. Law societies are administrative decision-makers to whom their respective provincial or territorial governments have delegated power through founding statutes, which establish law societies as the self-regulating governors of the legal profession in their respective provinces or territories. These statutes also function as enabling legislation that grants law societies the power to make decisions and lays out the procedures for making them (Cowan,

2020; Rhode & Woolley, 2012). Each law society⁵ is governed by a board of directors called Benchers, comprising lawyers, paralegals, and lay persons. The law societies' duties include—but as I will expand upon, are not limited to—setting and promoting high standards of competence and professional conduct, investigating complaints, and disciplining members of the profession who violate the code of conduct. The law societies also have the power to recognize or refuse to recognize law degrees as coming from an accredited law school. This is a necessary requirement for a successful applicant in a law society licencing process (Cameron et al., 2015; Federation of Law Societies of Canada, 2025; Gittens & Associates, 2021; Law Society of Ontario, 2025a).

Holding delegated governmental power means that as administrative decision-makers, the law societies must consider what Charter values are at stake in making their decisions and balance these values against their statutory objectives. For the law societies, this involves regulating the legal profession in each province (Daly, 2023). In cases like the TWU law school controversy, where a decision is challenged and ends up before the courts, the courts use the *Doré/Loyola* framework to review administrative decisions and determine if the administrative decision-maker has infringed on any Charter rights. Of the *Doré* framework, Paul Daly (2023) contends that there are really two frameworks or elements: one for administrative decision-makers to assess Charter values and one for judicial review. Put another way, administrative decision-makers must take into account Charter values during their decision-making process, while the court that reviews their decision determines any infringement of a Charter right.

⁵ The structure of the Barreau du Québec is similar, but not identical, to the governing structures of the common-law law societies on which I focus. The Barreau did not intervene in either *TWU v LSUC* or *LSBC v TWU*.

To be justified, an administrative decision must have furthered the decision-makers’ “statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right” (*LSBC v TWU*, 2018, as cited in Daly, 2023, p. 301). In other words, administrative decision-makers must both take relevant Charter values into account when making their decisions and show that any interference with a Charter right is reasonable in the sense of furthering their statutory mandate (Daly, 2023; Dieleman, 2019). In the case of a Charter challenge, the reviewing court will then need to determine the following:

1. Whether the administrative decision engages the Charter by limiting Charter protections—both rights and values;
2. If so... whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play... [*sic*] The extent of the impact on the Charter protection must be proportionate in light of the statutory objectives (Dieleman, 2019, pp. 9–10).

There may be more than one outcome that reaches a proportionate balance, and if the administrative decision-maker’s decision “‘falls within a range of possible, acceptable outcomes,’ it will be reasonable” (*LSBC v TWU* at para. 79).

As administrative decision-makers, Canadian law societies exercise delegated governmental authority that makes them subject to the Charter. As independent professional governing bodies, however, they are also one of the last remaining “bastion[s] of unfettered self-regulation of the legal profession in the common law world” that includes England, Australia, and New Zealand, which have increased the role of non-lawyers in the regulation of the profession (Woolley, 2011, as cited in Rhode & Woolley, 2012, p. 2774). Historically, self-regulating professions originated as regulative bargains between professions and the state, with the understanding that the profession would be given autonomy as long as they used their power for the public good. State actors, such as the courts, view serving the public interest as something

that the body responsible for a self-regulating profession must do in exchange for the privilege of self-regulation. They understand self-regulation as protecting the public interest by raising the quality of service and expertise within those professions (Adams, 2016; Woolley & Salyzyn, 2019). In the 1797 *Act*⁶ that established the Law Society of Upper Canada, however, John Pearson (2015) finds only two references to the public interest. The idea that Canadian law societies are charged with regulating the legal profession in the public interest is, contrary to how many law societies present the idea, a relatively new one.

This can be seen in Ontario, for example, where those sections of the *Law Society Act* relied upon by the Supreme Court in *TWU v LSUC* that mandated acting in the public interest were only added to the law society's founding legislation in 2007. Previously, the sole reference to the public interest in the *Act* was section 13, which affirmed that the Attorney General of Ontario would act as the guardian of the public interest in matters having to do with the legal profession. As for the Law Society of British Columbia, while its mandate was to uphold and protect the public interest by “preserving and protecting the rights and freedoms of all persons,” until its removal in 2012, the mandate also specifically included a provision to “uphold and protect the interests of its members” (*Law Society Act*, RSO 1990, c L.8 (as in force 2014), <<https://canlii.ca/t/527j8>>; *Legal Profession Act*, SBC 1998, c 9, s 3 (ii) (as in force 2012), <<https://canlii.ca/t/55hs5>> [LPA 2012]; Woolley & Salyzyn, pp. 91–2). As will become apparent in chapter eight, while the law societies are mandated to protect the public interest, the interest of the members means that the internal politics of the law societies can impact how they govern the legal profession and shape the decisions made in the interest of the public.

⁶ *An act for the better regulating the practice of law* (UK), 1796-97, c 14.

Based on contemporary founding statutes, law societies are, nevertheless, responsible for governing the legal profession in the public interest. As administrative decision-makers subject to the Charter, law societies must consider Charter rights and values and balance them against their statutory objectives when making decisions. However, they also remain a self-regulating profession, where interests and internal politics can drive decision-making and shift how Charter values are balanced against statutory objectives and how the public interest is defined. At its best, the meaning of public interest is often ambiguous and open to interpretation.

Public Interest

A concept that appears prominently throughout the decision-making processes of both law societies and in the submissions of Trinity Western University is that of the public interest. As will become apparent, however, both sides of the debate deployed arguments for the approval or rejection of the law school that used various and conflicting conceptions of the public interest. This section examines the development of the public interest as it relates to self-regulating professions and describes different approaches taken to determining the public interest.

To explore the meaning given to “in the public interest” as it related to self-regulating professions in Canada, Tracey Adams (2016) examined over 1,000 pieces of legislation, as well as drafts of bills and legislative debates. She concluded that from the earliest bills establishing self-regulating professions to the 21st century, it is impossible to determine a single definition of the public interest. Instead, understandings of the public interest continue to shift over time. In the 21st century, in Ontario and British Columbia, this has included an emphasis on reducing barriers to business and service costs. In Québec, ensuring high quality service and fair and effective disciplinary procedure was identified as central to the protection of the public.

For law societies, in particular, many, but not all, enabling statutes direct them to “uphold and protect the public interest in the administration of justice,” or to “uphold and protect the interest of [their] members” (*LPA* 2012 at s. 3.a-b (ii), as cited in Rhode & Woolley, 2012, p. 2773). However, the governing legislation of many law societies does not define the society’s public interest mandate even when it does address that mandate. In addition, most Benchers are elected by members of the profession and govern along with a small number of appointed Benchers, making them accountable to the profession rather than the public.

As I will discuss in chapter eight, this can lead to an overlap between law and politics in a law society’s administrative decision-making process, so that the outcome of a decision depends on the involvement and interest of members. While some governing legislation makes the power to act in the public interest the primary objective of the law society it regulates, others place protecting the interests of the profession first. For example, in British Columbia, the *Legal Profession Act* makes a primary object and duty of the law society to “uphold and project the public interest in the administration of justice.” This is done, in part, by preserving and protecting rights and freedoms; “ensuring the independence, integrity, honour and competency of lawyers”; “and “regulating the practice of law” (SBC 1998, c 9 (as in force 2014), <<https://canlii.ca/t/527wc>> at s. 3 (a–d).) In Nova Scotia, the purpose of the Barristers’ Society is defined as “to uphold and protect the public interest in the practice of law,” (*Legal Profession Act*, SNS 2004, c 28 <<https://canlii.ca/t/lc4c>> at s. 4 (1)).

In contrast, in Alberta, protecting the public interest is not specifically mandated, but the *Act* does provide the law society with the power to sanction any conduct that harms the reputation of the profession (Rhode & Woolley, 2012, p. 2773, footnote 68).⁷ As such, while

⁷ Most Canadian law societies’ founding legislation has now been amended to include the mandate to protect and uphold the public interest. The founding legislation of the law societies of Alberta, the Northwest

many law societies do mandate that Benchers govern in the public interest, it is difficult to untangle how Benchers, who are unaccountable to the public and elected by others within the profession, conceive of the public interest and if they place it before their professional interests. Scholars do agree that the definition of public interest is murky and continues to shift over time. Determining what *in the public interest* means is a complicated process that grants administrative decision-makers broad discretion (Adams, 2016; Mercer, 2018; Rekosh, 2005; Woolley & Salyzyn, 2019).

In the context of the TWU law school controversy, much of the existing research on the public interest has focused on the decisions of the courts in the various appeal cases. My research adds to these analyses by examining the antagonisms over the meaning of the public interest in the law societies' decision-making processes. Of those scholars analyzing the meaning of public interest in the Trinity Western court decisions, Alexandra Orlova (2017) looked at the two approaches taken by the Supreme Court of Canada in *Trinity Western University v British Columbia College of Teachers*. The first is offered by the majority and the other by Justice L'Heureux-Dubé in her dissent. L'Heureux-Dubé's approach also reappeared in the *Law Society of British Columbia v Trinity Western University* in the Ontario Superior Court of Justice and Court of Appeal cases.

The majority in *TWU v BCCT* concluded that having to sign the Community Covenant did not provide proof that a graduate of TWU's teacher training program would discriminate against an LGBTQ student in the public school system. Absent concrete evidence that graduates

Territories, and Nunavut uses more ambiguous language related to sanctioning conduct that would harm the best interests of the public or the legal profession (See *Legal Profession Act*, RSA 2000, c L-8, <<https://canlii.ca/t/56jc2>>, *Legal Profession Act*, SNWT 2023, c 28, <<https://canlii.ca/t/564d6>> and *Legal Profession Act*, CSNu, c L-30, <<https://canlii.ca/t/56jq9>>).

of TWU would discriminate against LGBTQ students, they could not be kept from teaching in the public school system. The majority invoked a distinction between what was permissible in private and in public, noting that while the Community Covenant created unfavourable treatment for LGBTQ students at TWU, it was not unlawful discrimination.⁸ If discriminatory religious beliefs become discriminatory public conduct, however, that would not be tolerated. In terms of the public interest, then, discriminatory beliefs and conduct in the private sphere were permissible but contrary to the public interest in the public sphere. Trinity Western relied upon this approach to determining the public interest in their submissions to the law societies, and several Benchers adopted it as well. However, those opposed to the approval of the law school articulated Justice L’Heureux-Dubé’s dissent in *TWU v BCCT* as a conflicting conception of the public interest.

Justice L’Heureux-Dubé concluded that signing the Covenant was an overt, if not illegal, act of discriminatory conduct against LGBTQ persons.⁹ As gatekeepers to the public profession of school teaching, the BCCT had a responsibility to ensure that members met the necessary requirements to teach in public schools *and* that equality was a central component in protecting the public interest. In other words, it was not unreasonable for the BCCT to treat signing the Covenant as a public expression of discrimination that could potentially affect¹⁰ the communities

⁸ Legal or lawful discrimination is the idea that religious organizations, including universities, are exempt from provincial human rights legislation that makes discrimination based on protected grounds such as sex and sexual orientation illegal. This means that they can legally prioritize the membership of some persons and exclude others. In terms of TWU, although the Community Covenant defines marriage as exclusively between one man and one woman, or excludes LGBTQ couples, it is exempt from provincial human rights legislation. The discrimination represented in the Covenant is thus “lawful.”

⁹ Justice L’Heureux-Dubé classified the discriminatory act of signing the Covenant as overt but not illegal because the *Charter of Rights and Freedoms* does not apply to private actors, such as Trinity Western, and the relevant human rights legislation makes exemptions based on freedom of religion.

¹⁰ By “potentially affect,” L’Heureux-Dubé meant that signing the Covenant was a public act of agreement with (not simply an expression of belief in) the discriminatory beliefs it expressed. As such, it was reasonable to assume that the message sent to communities in which graduates of the TWU might teach was that as teachers in the public school system, those who had signed agreed with these beliefs.

where TWU graduates would teach in a way contrary to the public interest (Orlova, 2017; *TWU v BCCT* at paras. 72–73). As my analysis shows in chapter five, different arguments in the law societies’ decision-making processes invoked both approaches to determining the public interest. However, my examination will also show that built upon L’Heureux-Dubé’s approach is a concept of the public interest that centres and extends the idea of the law societies as guardians of the public interest, charged with advancing diversity and equality.

Ultimately, the meaning of the public interest remains unfixed and continues to shift across time, place, and context, such that the courts could interpret the law societies’ mandates to protect the public interest in a variety of different ways. Alice Woolley and Amy Salyzyn (2019) examined these differences in the delineation of the public interest in the Supreme Court’s decisions in *TWU v LSUC* and *LSBC v TWU*, concluding that the majority and the dissent employed “considerable interpretive dexterity” to define the law societies’ public interest mandates as broad enough to consider issues other than professional competence or so narrow that only competence could be taken into account (p. 89). Orlova (2017) and Woolley and Salyzyn pointed toward unfixed and yet broad determinations of public interest at the level of the courts.

For Canada’s law societies, including those of Ontario and British Columbia, regulating the legal profession in the public interest is, relatively speaking, a new development, and actually doing so can be an unclear process. *TWU v BCCT* offers two approaches to decision-making in the public interest, which reappear in the discourses of the law societies during their decisions regarding TWU’s law school. Offering two different conceptions of the public interest, these approaches also involve different delineations of the public and private spheres.

The Public and Private Spheres

The concepts of the public and private spheres appear in the decision-making processes of the law societies and within TWU's submission without always being explicitly named, but they are almost always invoked in conjunction with the concept of the public interest. The idea of what is considered a public and a private space works to help delineate what is private religious belief and practice and what is public conduct. This, in turn, implies the contexts in which the consideration of the public interest would apply. As I explore in chapter seven, all sides deployed these concepts in a variety of ways during the conflict over whether to approve TWU's law school. However, the law societies and Trinity Western often saw the public and private spheres in divergent ways or understood the boundaries between public and private to be different. This section discusses different meanings or approaches to understanding the division between the public and private spheres that appear within the Trinity Western University law school controversy.

In the context of court decisions on religious freedom cases, such as those involving Trinity Western, the issue is not only to balance or reconcile competing Charter rights and religious interests but to determine the boundary between the public and private spheres. This is because, while religious belief and conduct are accommodated in public, discriminatory conduct based on religious beliefs is not (Brown, 2000; Daly, 2023). As administrative decision-makers, the law societies must therefore balance Charter values with their statutory objectives. In the TWU versus law society cases, this meant considering how best to advance the public interest while also protecting equality and freedom of religion. If part of protecting the public interest is protecting the value of LGBTQ equality and equal access to the legal profession, then as administrative decision-makers, the law societies must consider the point at which the religious

beliefs of the TWU community and its individual members cross from the private sphere to impact the public sphere.

Mark Witten (2016) provided what he called a classical liberal conception of the public sphere as a space of “state-related institutions and actors concerned with the ‘common good’ and the private as a sphere of discretionary activity protected from state interference” (p. 218). This is a “neutral” public sphere that must serve the public interest, in which the state cannot favour one religion or discriminate against different cultures. The private sphere is then understood as a space for private life, where both individuals and associations are free to pursue their conception of a good life. The private sphere extends beyond the individual home to places of worship, private organizations, and private schools.

In *Law Society of British Columbia v Trinity Western University* and *Trinity Western University v Law Society of Upper Canada*, in particular, the question became whether Trinity Western University, as a private institution applying to operate an accredited law school, would be fully insulated by the private sphere and free to govern itself by religious norms or whether its proposed law school would intersect with, and impact on, the public sphere, where such beliefs and practices infringed on equality norms and caused public harm (Moon, 2019; Witten, 2016). Witten (2016) analyzed the decision of the Ontario Superior Court in *LSUC v TWU* and concluded that the court’s decision expanded the meaning of the public sphere from that articulated by the majority in *TWU v BCCT*. In that case, Witten suggested, the Supreme Court determined that the public sphere where equality norms were primary was limited to the public school system and did not include TWU’s engagement with the BCCT as a state actor for accreditation. However, in the Ontario Superior Court’s decision, when TWU applied for approval of its law school, it engaged with the law society as a public licencing body, such that

the public sphere “enveloped places where the state regulates the private in the public interest” (p. 253).

The borders of the public and private spheres are in flux and constantly renegotiated, in part due to shifting norms and values. For instance, how courts understood these boundaries pre- and post-Charter, especially in relation to freedom of religion, was substantially different. In pre-Charter decisions, the exercise of religious belief was not limited to the private sphere. It remained protected in the public sphere but was bound by such restraints as the need to protect the public. Post-Charter, however, Brown (2000) argued that a trend emerges where the guarantee of religious freedom is used to push religion out of the public sphere. Rather than only the limitations necessary to guarantee the safety of the public, the courts interpret the freedom of religion and conscience in a way that removes religious views totally from the public sphere.

For example, David Brown suggested that in the British Columbia Supreme Court’s decision in *Chamberlain v School District #36* (Surrey), 1998 CanLII 6723 (BC SC) [*Chamberlain BCSC*], the court determined that a public body could not consider religiously based arguments when reaching a decision. In *Chamberlain BCSC*, the Surrey School Board had passed a resolution not to approve classroom materials that included gay families supported by the Gay and Lesbian Educators of B.C. (GALE). In response, GALE filed a court challenge to the Board’s resolution. B.C. Supreme Court Justice Saunders quashed the resolution, finding that it was contrary to the B.C. *School Act*, which maintained that schools “shall be conducted on strictly secular and non-sectarian principles” (R.S.B.C. 1996, c 412, s. 76(1), as cited in Brown, 2000, p. 603). Saunders found that the Board had breached this requirement because it had reached a decision significantly influenced by religious considerations. In other words, an

argument based on religious belief could not be the basis for its decision because public bodies must operate on secular principles.

Based on this framing of the division between public and private, the law societies' denial of TWU's law school can be seen as part of the process whereby religion must be kept out of the public sphere. Richard Moon (2015) pointed out that the law societies that denied approval to TWU's law school saw it as part of a process of selecting lawyers that would work in and influence the public sphere (p. 9). As I will demonstrate throughout chapters five, six, and seven, the question of whether the Community Covenant was an expression of personal religious beliefs or an admission criterion was of central importance in the law societies' decision-making processes. Considered as a representation of religious beliefs, the Covenant is primarily situated in the private sphere and part of freedom of religion and expression; however, as an admissions criterion, it crosses over to impact on the public sphere and legal profession in a way that, as my analysis explores, arguably affects the public.

TWU and some of the law societies' Benchers argued that as decided in *TWU v BCCT*, the religious beliefs of the TWU community should be protected and its graduates able to participate in public activities. Others, however, found that because TWU Law would be a gateway to the legal profession, the religious beliefs expressed in the Covenant would impact on the public sphere negatively and could not be accommodated. Indeed, Blair Major (2017) suggested that it is precisely an intersection with the public sphere that TWU was interested in. Major argues that the legal profession has a unique public nature that motivated TWU to become involved in legal education: "to train good, Christian lawyers who model the purity and integrity of Christian living in a public ... profession" (p. 183). Major argued that by opening a law school, TWU aimed to push further into the public sphere and "advance the goals of its

eschatological mission of social transformation” (p. 183). I will explore in chapter seven these conflicting understandings of what was protected by freedom of religion and where the boundaries of public and private lie.

These disparate views also reflect the two models of secularism Witten (2016) offered to explain how courts conceive the division between public and private spheres. The first, soft secularism, requires the state to be agnostic on religion and ultimate meaning. It functions as a process that adopts a set of shared values from a diverse populace, of which religious voices are a part and participants in the public sphere. Soft secularism acknowledges the communal aspects of religion and “shields private religious associations from public norms up to the point their practices” cause public harm (p. 224). Soft secularism does not quarantine religious beliefs and values in the private sphere, on the agreement that they do not infringe on competing rights and values and remain separate from the state. Soft secularism’s goal is to balance diverse worldviews, accommodating religion as long as equal respect is not compromised (pp. 222–224). An approach to the public and private spheres similar to soft secularism was evident in the Supreme Court’s *TWU v BCCT* decision and, as I will demonstrate in chapter six, was adopted in one argument articulated in the law societies’ decision-making processes. However, as will become apparent, in another discourse of the law societies, the close link between the division of public and private spheres and how *in the public interest* is understood influenced the deployment of something closer to what Witten calls a hard secularist approach to the division of the public and private spheres.

Hard secularism is its own worldview, with a distinct stance on what counts as a good life, and it considers religion(s) to be an irrational force that poses a threat to the institutions and actors of public life. Hard secularism goes beyond the separation of religion and government to

privilege secular norms like equality and autonomy in the public sphere, pushing religion completely from the public sphere and only tolerating it in private. In this framework, when religious associations that exist at the intersection of public and private spheres, like universities, ask the state to

tolerate their illiberal beliefs, hard secularism struggles to value religious *freedom* because the religious adherents do not seem truly free. It sees no reason not to extend the bounds of the public sphere—to insist that private associations behave in accordance with liberal norms (Witten, 2016, p. 226).

Witten (2016), Orlova (2017), and Major (2017) all examined the 2015 Ontario Superior Court of Justice decision in *Trinity Western University v The Law Society of Upper Canada* and found that the decision reflected this hard secularism (2015 ONSC 4250). They concluded that the decision of the Ontario Superior Court expanded the reach of the public sphere and strengthened the boundary between public and private spheres. The court constructs the Community Covenant, a private code of conduct, as causing public harm by threatening equality. Major noted that religion was limited to the private sphere alone, while Witten concluded that the court's reasoning was underpinned by a hard secularist approach that sees tolerance of religious views in public as a threat.

Unlike Witten (2016), Orlova (2017), and Major (2017), my research looks at the decisions of the law societies rather than those of the courts, as well as at how the discourses of TWU and the law societies delineated the division between the public and private spheres. As I explore in chapter seven, some law society Benchers did argue for space for TWU and its members to participate in the public sphere. However, I find that the final decisions of the law societies are similar to that of the Ontario Superior Court of Justice, in that TWU's law school did not, and would not, receive approval until it adhered more closely to non-religious, or secular, norms.

As administrative decision-makers charged with protecting the public interest, the law societies were bound to both uphold their statutory objectives, which included protecting LGBTQ equality, and balancing them with the Charter right of freedom of religion. Carrying out this duty depended in part on determining the boundary between the private sphere, in which TWU's religious beliefs and practices could not be infringed, and the point at which they crossed into the public sphere and thus impacted on the public in a way that could not be accommodated. Different models or approaches to delineating the public and private spheres suggest either leaving space within the public sphere for a plurality of voices, including religious ones, or completely pushing religion from the public sphere, recognizing it only as private. As the following section explores, several scholars would suggest that excluding TWU law and religious law students, as well as lawyers, from the public sphere harms freedom of religion and diversity.

Freedom of Religion—An Argument for the Approval of TWU Law

This section explores the literature analyzing and critiquing the decisions of the law societies and courts in the Trinity Western law school controversy. These studies argue that freedom of religion required the approval of TWU's proposed law school. The scholars making these arguments saw the decisions to deny the law school as resulting in a more limited or impoverished version of freedom of religion that did not allow for a diversity of values.

Dwight Newman (2013), writing in support of TWU, suggested that the debate over the law school often misses the positive contributions that the law school would have made. He argued that a religiously based law school opens the possibility for new forms of legal scholarship and practice, such as reconsidering models of dispute resolution. Scholars also maintained that a religious law school would increase the accessibility of legal education for

students who are not well served by secular law schools. By this, they meant less that a secular environment may be hostile to Christian students and more that topics may be approached differently in an environment that encourages religious faith (Muñiz-Fraticelli, 2016; Newman, 2013). As Victor Muñiz-Fraticelli (2016) pointed out, TWU did raise the point that its decision to open a law school was in part motivated by a desire to alleviate the disadvantage evangelical students face. He argued that religious institutions should not be justifiable only as remedial options once students face discrimination in secular law schools. Rather, if religious education is available in a pluralist society, as it is in Canada, it should be available to any group, whether they are a minority or not.

According to Newman (2013), the law societies, in their roles as gatekeepers, cannot exclude from the legal profession those who hold different perspectives on law and religious beliefs. He argued that one must view the Community Covenant, which he found much of the legal community opposed to, holistically, as a set of expectations about behaviour within a private religious community that had applied to be engaged in legal education. To suggest that every decision made by a licensing body like a law society supports the values of the program being approved would be incongruous: it would mean that religious education would only be permitted when religious doctrine aligned with non-religious and state values. If such an alignment of values was necessary before approval, diversity of values would be impossible (Muñiz-Fraticelli, 2016; Newman, 2013; Walsh, 2021). I explore this argument in chapters six and seven through an examination of the ways in which the Community Covenant was framed antagonistically, both as an exercise of religious choice and as a form of coercion, and how TWU saw rejection of the law school as a demand for conformity with a narrow set of non-religious values.

Similarly, scholars who argue that religious freedom required approval of TWU's law school hold that the introduction of the Charter narrowed the Supreme Court's interpretation of freedom of religion by shifting it away from a recognition of its collective and institutional aspects (Bateman, 2015; Brown, 2000; Muñiz-Fraticelli & David, 2015). These scholars argued that since the enactment of the Charter, the Supreme Court has privileged an individualized notion of freedom of religion that produces an impoverished rendering of religion, which in turn limits how courts can address conflicts that concern religious organizations. In *TWU v BCCT*, for example, the Court focused on whether the religious freedom of individual students attending TWU would have been negatively affected by the BCCT's decision not to accredit the teacher training program. Victor Muñiz-Fraticelli and Lawrence David (2015) argued that in considering the effect of the BCCT's decision only on individual students, the Court addressed merely a fraction of the religious freedom issues at stake and failed to answer the question of whether institutions had a right to freedom of religion under the Charter.

Thomas Bateman (2015), similarly, suggested that in *TWU v BCCT*, the Court failed to link the individual religious freedom of students to the associational context of the university in which it was exercised. This focus on the individual, he found, is visible in other levels of law. In the conflict over the approval of TWU's proposed law school, Bateman analyzed public submissions made to the Law Society of Upper Canada about TWU Law. He found that of the 202 briefs submitted, 79 supported TWU's application and 123 opposed it. Bateman argued that the Law Society of Upper Canada's decision, like the view of many law faculties and the courts, is representative of a narrow version of religious freedom that has "a desire to limit associational autonomy" (p. 79). Like Bateman, I examine the decisions of the law societies, albeit not only the Law Society of Upper Canada but also the Law Society of British Columbia. My research

adds to Bateman's analysis by examining the debates and discourse of the Benchers of the law societies.

This section has explored the literature from scholars writing in support of TWU's proposed law school, which advocated for a less limited interpretation of freedom of religion. A common concern for these scholars was that the decisions over TWU's law school would result in a more limited reading of freedom of religion. Such a restricted interpretation would understand religion as individual and private, potentially making secular norms required in religious associations—something that would stifle diverse voices and values. As I explore in my analysis, the law societies' understanding of freedom of religion did take the view that religion as beliefs and practices should stay individual and private. Whether this resulted in secular norms being enforced on religious associations, however, was a point of conflict between TWU and the law societies.

LGBTQ Equality Rights—An Argument Against Approval of TWU's Law School

This section examines the literature from scholars opposed to the approval of TWU's law school based on the variety of ways in which the Community Covenant and the religious beliefs it represented were discriminatory toward LGBTQ persons. These scholars argued that it was against the public interest mandates of the law societies to approve a law school with an institutional culture of discrimination. Signing the Covenant, they maintained, turned religious beliefs into public discriminatory conduct and created a hostile environment for LGBTQ students.

Scholars opposed to TWU's proposed law school centred their critiques on the ways in which they saw the Community Covenant and the religious beliefs enumerated within it as infringing on LGBTQ equality and rights (Cameron et al., 2015; Craig, 2013; Pothier, 2014).

Cameron et. al. (2015) suggested that the decision of the Law Society of Upper Canada not to approve the law school was legally correct and that to approve the law school would have gone against the law society's public interest mandate. That is to say, the denial of TWU law upheld the Law Society of Upper Canada's public interest mandate to protect the public from discrimination and supported the Charter right of equality. They found that the Law Society of Upper Canada, as subject to the Charter, could not have approved the law school without infringing LGBTQ equality rights and supporting discrimination against LGBTQ people.

Unlike Cameron et. al. (2015), Dianne Pothier (2014) and Lori Beaman (2005) brought attention to the problematic way the Community Covenant governed behaviour. Although Beaman was writing about the *TWU v BCCT* decision while Pothier was discussing TWU's potential law school, both scholars noted that the Covenant relied on the idea of "love the sinner, hate the sin," which functioned to normalize heterosexuality and produce LGBTQ sexualities as other and "sinful." They argued this created a general atmosphere of hostility toward sexualities other than heterosexuality and those involved in same-sex relationships, within or outside of marriage—something Pothier described as "blatant discrimination" (Beaman, 2005; Pothier, 2014, p. 2).

Pothier (2014) also argued that the problem was not the personal religious beliefs of the potential graduates of TWU's proposed law school but the "institutional culture of discrimination that imposes a religiously-based code of conduct on others and excludes on that basis [of institutionalized discrimination]" (p. 5). For Pothier, the individual beliefs of TWU graduates were less of an issue and could have been assessed by the National Committee on Accreditation, if there had been a concern about discriminatory religious beliefs. However, the Covenant functioned to exclude people from law school and the legal profession because of sexual

orientation. Denying the law school would stop TWU Law from imposing those standards on the public sphere but would not stop TWU members from following their own religious beliefs about sexual intimacy.

This distinction between concerns about the behaviour of individual graduates and worry over institutional discrimination and the imposition of religious belief and discriminatory behaviour on non-believers through the Community Covenant is something I explore throughout my analysis. As I show, in the decision-making processes of the law societies, the issue went beyond the expression of individual religious beliefs to an examination of how and when religious beliefs could impact on the public sphere.

Pothier (2014), Elaine Craig (2013), and Orlova (2017) argued that the requirement that all students enrolled at TWU sign the Community Covenant did make those students complicit in acts of discrimination against LGBTQ persons. Agreeing with Justice L'Heureux-Dubé in *TWU v BCCT*, Craig and Orlova contended that signing the Covenant would have been a public expression of discrimination by members of the legal profession and, as such, conduct that would harm the public interest (Craig, 2013, p. 163; Orlova, 2017, p. 66; *TWU v BCCT*). In addition, students were not only required to sign the Covenant but encouraged to take accountability for and report the conduct of others, which both Craig and Orlova argued creates an environment of hostility and could result in the expulsion of LGBTQ students from the university (Craig, 2013; Pothier, 2014; Thombs, 2020). Chapters five, six, and seven examine this theme of the environment potential LGBTQ law students would experience at TWU Law in the discourse of the law societies.

Unlike Craig (2013) and Pothier (2014), Orlova (2017) looked at the lower court decisions on TWU's proposed law school. This includes the British Columbia Court of Appeal's

conclusion in *Law Society of British Columbia v Trinity Western University* that the discriminatory potential of approving TWU's law school was not "discriminatory enough to warrant an official reprisal" (p. 65). The court maintained that there must be evidence of actual harm before finding discrimination. The religious beliefs that marriage should be between a man and a woman, excluding LGBTQ relationships, are not proof of harm until these beliefs become the basis for discriminatory conduct.

Orlova (2017) argued this decision was troubling because LGBTQ students will adjust their behaviour to avoid violence. Focusing on actual evidence of harm rather than considering perceptions of discrimination will "guarantee the perpetuation of a heteronormative educational environment where gay identities are silenced and, thus, deemed insignificant" (p. 65). There are certainly religious spaces that are open, supportive, and accepting of LGBTQ persons. However, as I note in chapter four, the presence and voices of LGBTQ students in the TWU law school debate were almost entirely silenced. Overall, the literature produced by scholars opposed to the approval of TWU's law school focused on the discriminatory nature of the Community Covenant and how this would have created differential treatment for LGBTQ students at TWU's law school. These scholars argued that it would be contrary to the public interest mandates of the law societies to approve TWU Law, as it would infringe LGBTQ equality.

Conclusion

In this chapter, I examined literature around the role of law societies as self-regulating professions and regulators of the legal profession charged with protecting the public interest. I introduced the concept of the public interest and the related ideas of the public and private spheres. Next, I reviewed the literature around freedom of religion and LGBTQ equality as it relates to the TWU law school conflict and the scholars who took up positions for or against the

approval of the proposed law school. Much of the literature, as I noted, was produced either prior to the law societies' decisions or as critiques of the decisions of the courts in *LSBC v TWU* and *TWU v LSUC*. My research seeks to fill the gap between the two by analyzing the decisions of the law societies and looking specifically at the decision-making processes of the law societies' Benchers. In the next chapter, I lay out the theoretical framework I derived from the work of Benjamin Berger (2015) to consider the tensions and points of cross-cultural interaction, or antagonisms, that emerged between the law societies and Trinity Western as law rendered religion in the law societies' decision-making processes.

Chapter Three: Theoretical Framework

In this chapter, I explore the theoretical framework developed by Benjamin Berger to explain and complicate the modern relationship in Canada between law and religion(s). Berger's framework was laid out in *Law's Religion: Religious Difference and the Claims of Constitutionalism* (2015) and "Law's Religion: Rendering Culture" (2007). I have selected Berger's theory specifically because, unlike others, it removes law from a neutral position and theorizes it as its own culture with a distinct set of categories, norms, and values. This makes the meeting of law and religion a cross-cultural interaction or, as I will show, a point of antagonism between conflicting discourses, where different understandings and expectations are at work between those who hear and decide a case, such as law societies or a court, and religious institutions or communities, such as Trinity Western.

Berger's (2015) theory also offered an explanation of the tensions, or what Laclau and Mouffe (2001) would call antagonisms, that arise between the cultures of Canadian constitutionalism and religion(s), which court decisions at least temporarily resolve. In the conflicts with Trinity Western University, including the original court case in 2001, the underlying cultural issues, beyond the question of the accreditation of a program at a university with a discriminatory Community Covenant, related to TWU as a religious university taking up a role in public life and to the acceptability of those educated at TWU playing public roles that require enforcing non-discrimination. When the Supreme Court decided, or made a hegemonic intervention in (to use Laclau and Mouffe's terminology), *TWU v BCCT*, it resolved these issues by distinguishing between religious belief and discriminatory conduct, holding that the BCCT had decided not to accredit TWU's teacher training program without evidence that there would be any discriminatory conduct caused by the mandatory Covenant (*TWU v BCCT*). Laclau and

Mouffe found that when an authority makes a hegemonic intervention in antagonisms like court cases, even though one discourse comes to dominate for a time, there is always the possibility that it will become unstable later (Jørgensen & Phillips, 2002; Laclau & Mouffe, 2001). Berger argued that this is what happened when the Court sidestepped the underlying cultural issues in *TWU v BCCT*, leading to the same antagonisms reappearing in the debate over the approval of Trinity Western's law school over 15 years later.

It is worth noting that Berger (2015) claimed not that Canadian constitutional law has incorrectly interpreted religion but that it has done so in line with its own cultural understanding. While this may lead to a thin or impoverished version of religious culture(s) and alienate religious groups from the culture of Canadian constitutionalism, Berger did not claim that the cases on which he built his framework were decided incorrectly or that they should have been decided differently. For judges and other decision-makers, Berger simply offered a series of steps that might aid in providing a less impoverished rendering of religion. As I explain next, Berger's approach allows both religion and law to be understood as cultural forms and, specifically, to be taken as discursive objects of analysis (Berger, 2007; 2015, p. 189).

Law and Religion as Cultures and Objects of Analysis

Berger's (2015) theory moved away from what he called the "conventional story" of the relationship of law and religion (p. 17). By the "conventional story," Berger meant how secular Canadian society and most legal scholarship frame religion as something cultural, while law is understood to be above and separate from culture. More specifically, law is commonly taken to be responsible for operationalizing Canadian society's commitment to pluralism and multiculturalism through tolerance and rights accommodation for religion. However, despite how often this "conventional story" is told, tension remains between religion(s) and law. Berger's

theory provides an alternative story of this relationship that does not allow the law to be viewed as neutral and separate from culture. Rather, law itself must be conceptualized as a culture itself—a culture of constitutionalism—with its own set of norms, values, practices, and categories. As such, Berger argued, the meeting of law and religion is not a problem that can be managed or solved through better laws; rather, it must be understood as “an instance of cross-cultural interaction and, as such, endlessly unstable and provocative” (Berger, 2015, p. 18). Framed as such, the culture of constitutionalism can no longer be viewed as separate from wider culture(s) but becomes a visible object of analysis in the interaction of law and religion.

Berger (2015) acknowledged that the ambiguity of the term *culture* can make it contentious but concluded that its use in a framework where the concern is defining a clearer starting point for an analysis means the issue is not whether a consensus exists “around the definition of the term but, rather, whether the particular use to which the term is put helps us see better” (Berger, 2015, p. 36). That is, what does considering law as its own culture, the culture of Canadian constitutionalism, in specific moments of interaction with religious culture(s), reveal? Nevertheless, having some working definition of culture is necessary. Berger referred to concepts offered by Mary Douglas, Clifford Geertz, and several other cultural anthropologists as those

practices, habits of thought, and organizing commitments that frame that experience and make it meaningful As Pierre Legrand puts it, culture is something like the “framework of intangibles within which an interpretive community operates.” Tomoko Masuzawa observes that, on this approach, cultures are imagined both “as an object *and* context of interpretation” (Berger, 2015, pp. 37–38).

In keeping with his suggestion that an exactly agreed-upon definition is not necessary, Berger offered a variety of conceptions of culture. When there is a disjunction in these frameworks, or differences in how they make sense of, for example, time, space, or jurisdiction, some of the tensions between the cultures of law and religion(s) become visible.

As suggested by Berger's (2015) various conceptions of culture and the nature of the descriptors he offers— "capaciousness," "unruliness," "unstead[iness]," and "indeterminacy"— the boundaries of culture as a concept and term remain in flux. Laclau and Mouffe's (2001) concept of discourse offered an alternative analytical tool to the idea of culture Berger sought to capture with his wide-ranging definitions. Laclau and Mouffe's (2001) discourse theory defined discourse as a temporary fixation of meaning around certain discursive points (nodal points), from which other signifiers acquire their meaning. Each signifier "is fixed as a moment through its relations to other [signifiers] (as in a fishing-net)" (Jørgensen & Phillips, 2002, p. 26). Both discourse and culture operate as temporarily fixed "system[s] of symbols" or patterns of meaning, where culture itself can be understood as a discourse or set of discourses struggling to come out as hegemonic (Berger, 2015, pp. 35–38; Jørgensen & Phillips, 2002; Masuzawa, 1998).

For Berger (2015), the intent behind the use of culture, or alternatively, the use of discourse, as an analytical tool is to position law as an object of analysis alongside religion: to examine how law shapes and gives meaning to religion and how law itself is experienced. Paul Kahn's call for a cultural study of law included an appeal for understanding the rule of law as a form of "social and political perception" that is in competition with others, working to shut out alternative perceptions (Kahn, 2011, as cited by Berger, 2015, p. 39). A discourse, per Laclau and Mouffe (2001), is an "established totality," or a perception of meaning that works to exclude all other potential meanings from the discursive field as it crystalizes to become hegemonic (Jørgensen & Phillips, 2002, p. 26). Those capable of producing more powerful discourses, perhaps what Berger might identify as majority culture, constitute social and political reality and exclude alternative cultural realities (Berger, 2015; Jørgensen & Phillips, 2002). Next, I will discuss the elements involved in how the culture of Canadian constitutional law renders religion.

Elements in Law's Rendering of Religion

Berger (2007) suggested that Canadian constitutional law produces a specific vision of religion that is understandable to and compatible with its own discursive or cultural assumptions, which are already informed by the modern political culture of liberalism. Law renders a unique conception of religion, which Berger revealed through an analysis of the discourse produced by the Supreme Court of Canada in its response to claims of religious freedom. However, it is important to note that Berger acknowledges that he is narrowing his analysis to focus on the discourse of the Supreme Court and that examining other sources might reveal a different rendering of religion. In my analysis, I will be examining the discourses of Trinity Western University and the law societies of Upper Canada and British Columbia, which means I will be able to assess whether similar or different renderings of religion are evident in these discourses. Berger also proposed that in constitutional democracies, the version of religion produced by law generally has a common pattern (Berger, 2007, 2015). Canadian constitutional law produces religion in terms of three reciprocally supportive elements: “(1) religion as essentially individual, (2) religion as centrally addressed to autonomy and choice, and (3) religion as private” (Berger, 2015, p. 66).

Religion as Individual

As Berger (2015) pointed out, the individual is the “dominant unit of constitutional rights analysis” (p. 67). As such, it is unsurprising that the law understands religion as an individual matter and can therefore conceptualize it within its analytical structure. The protection of religious freedom incorporated into the *Charter of Rights and Freedoms* reflects this structure, being based around the rights of individuals. In the specific context of the protection of religious

freedom, this can be seen in the Supreme Court's discourse in *Syndicat Northcrest v Amselem*, a case where several Jewish residents of the Syndicat Northcrest building in Montréal constructed temporary sukkahs on their balconies. Building bylaws prohibited construction on the balconies, however, and while some residents reached an agreement with the building management to have a shared sukkah on the grounds, other residents resisted, believing their religion required them to have a personal sukkah. These residents felt their religious freedom had been violated when they were denied the right to individual sukkahs and decided to challenge the building management in court, with the case eventually making its way to the Supreme Court (Berger, 2015; *Syndicat Northcrest v Amselem*, 2004 SCC 47) [*Amselem*].

The majority in *Amselem* held that religion involves “freely and deeply held personal convocations or beliefs connected to an individual’s spiritual faith and integrally linked to his or her self-definition and spiritual fulfilment” (*Amselem* at para. 39). The emphasis was on the individual’s personal beliefs and practices, not those of a community or group. As Berger emphasized, in the culture of Canadian constitutional law, religion becomes about individual belief and self-fulfillment rather than shared group beliefs, practice, and social bonds. While this does produce a diminished conception of religion, Berger found that the law is not incorrect in this view and that this vision of religion renders religion compatible with Canadian constitutionalism (Berger, 2007, 2015).

In terms of my own research, Trinity Western applied to the law societies for approval of its law school as a religious institution. That is, the religious beliefs and practices linked to TWU have institutional and communal aspects associated with TWU as an organisational entity, not just with its individual members. The way TWU and Benchers from both law societies considered religious belief and practices as shaping TWU as an educational institution reflects

these communal and associational elements of religion. This suggests that some Benchers considered whether TWU as an institution had a right to religious freedom or if it was the individual TWU community members' right to religious freedom that was at stake in the law societies' decisions. The Supreme Court has not yet provided a definitive answer as to whether institutions such as Trinity Western can have a right to freedom of religion under the Charter (Zoerb, 2020).

A common tactic in such cases is to pair an individual and institution or organization as complainants in a court challenge, which allows the courts to individualize claims and thus avoid dealing directly with the question of the rights of organizations and institutions to religious freedom. By the time the TWU law school controversy reached the courts, it involved a freedom of religion claim made by Trinity Western University and an individual complainant, Brayden Volkenant, a graduate of TWU's undergraduate program who was interested in attending TWU's proposed law school. (Kislowicz, 2017; Muñiz-Fraticelli & David, 2015; Swiffen, 2020–21). This same individualizing trend to claims of religious freedom is reflected in the arguments of some Benchers in both law societies, who focus on how a decision to reject the law school would impact the religious freedom of potential individual graduates. As I explore throughout my analysis, however, the law societies were concerned with how their decisions potentially engaged both the associational aspects of religious freedom and the religious freedom of individual members of TWU's community, suggesting an institutional framing of the freedom of religion, even as the law societies' decisions ultimately rendered law's conception of religion individual.

Religion as an Autonomous Choice

To return to the theoretical framework, the second element Berger (2015) identified was that law renders religion as an individual's autonomous choice. The first element of law's

rendering of religion, its individual nature, linked to the second through the concept of autonomy and individual liberty as goods that lead to human prosperity. Liberalism, Berger suggested,

takes the view that the individual is best able to flourish when left to exercise free choice with respect to the good. On this view of human flourishing, the obligations of the public are twofold: first, not to intervene with individual autonomy and, second, to intervene whenever free choice is constrained (p. 78).

This negative conception of liberty—rather than a positive conception requiring certain actions from the state—is built into the Charter, with rights protected from state action. Liberty, then, is the space in which a person exercises their personal autonomy and makes decisions that are fundamental to their sense of selfhood. Within this framing of autonomy and choice, freedom of religion reconceptualizes religion as just one choice a person might make during a process of self-definition and self-fulfilment. In this view, interfering with a person’s religious beliefs would be coercion and infringe on their freedom and liberty.

My own research finds that the discourses of the law societies, unlike Berger (2015), render religion itself prominently as a coercive element, with the Community Covenant limiting the individual autonomy and choice of potential LGBTQ students who might wish to attend TWU’s proposed law school (LSUC April 24 Transcript). However, they nonetheless also render religion as an individual’s choice, as in Berger’s framework. Most specifically, Benchers also argue that individual students who chose to attend Trinity Western University and follow the tenets of the Community Covenant should be free to follow their religious beliefs, as long as their actions do not harm LGBTQ individuals (*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (Evidence, Appellant Vol. II, Law Society of British Columbia September Transcript) [LSBC September Transcript]; LSUC April 24 Transcript).

Religion as Private

The third element in Berger's (2015) framework was the manner in which the culture of Canadian constitutional law renders religion as private. Berger argued that in liberalism, reason should hold sway in the public sphere, and actions driven by beliefs, interests, and emotions are relegated to the private sphere. Phrased differently, the private sphere is a space where personal choice and one's own sense of "the good" can function as a guiding principle for action, whereas in the public sphere, a logic of reasonableness guides decision-making. In public, a person's expectations, interests, and choices "must be acted upon in a reasonable manner, specifically in a manner that gives due regard to the parallel rights of others" (Berger, 2015, p. 92). If religion is taken as just one choice among others that an individual might make in their journey of self-definition, it is a personal choice that takes place in the private sphere, where individual choice and interests can serve as guides for decision-making. For Kahn, the division between public and private is this division between reason and choice: "Arguments among competing conceptions of liberalism are arguments over the location of the border of the public and private, that is, over the point at which there is a crossing from reason to unreason" (2005, as cited in Berger, 2015, pp. 91–92). Canadian constitutional law reflects this division in how the Charter applies to government decision-making and leaves the regulation of the private sphere to other mechanisms.

In Canadian constitutional law's rendering of religion, this division between public/private and reasonableness/choice is visible in how the law produces religion as a belief, one that an individual chooses to take part in. The Supreme Court has acknowledged the importance of religious practice, for instance, in their statement in *Reference re Same-Sex Marriage* that the "performance of religious beliefs is a fundamental aspect of religious practice"

(2004 SCC 79 at para. 57). Nevertheless, the law remains more comfortable with religion as belief and becomes more anxious when religious belief is accompanied by practices and edges closer to the public sphere (Berger, 2015, p. 93).

Thus, in *Trinity Western University v British Columbia College of Teachers*, the BCCT's original decision not to approve TWU's teacher training program was based on the idea that students who signed the discriminatory Community Covenant would also hold homophobic beliefs. Teaching in the public school system, teachers must uphold principles of equality and non-discrimination, and the BCCT was not convinced those trained at TWU would be able to do so. In making its decision, the Supreme Court was careful to negotiate between the dividing lines of public/private and reasonableness/interest, stating that "the proper place to draw the line ... is generally between belief and conduct" (para 36). The BCCT, the Court decided, had improperly made its decision because graduates of TWU could hold whatever religious beliefs they wanted privately, and there was no concrete evidence that those beliefs would carry over into public misconduct.

This decision is one example of how law attempts to render and confine religion as private. Berger concluded that the Court's ruling is indicative of the emphasis the constitutional imagination places on religion as private. "As belief only," Berger wrote, "religion is a preference of the personal. As conduct, it might seep into the realm of the public where interest and preference have a troublesome status" (2015, p. 94). When religion does seep into the public sphere, it can result in meetings with the law. Berger's assertion that such meetings of law and religion can be seen as cross-cultural interactions is a call for the re-politicization of the meeting of law and religion.

Depoliticization & Repoliticization

At minimum, this appeal for repoliticization is a call to recognize the social and historical power dynamics at work in these cross-cultural encounters. The conventional account of law's role—as neutral and separate from culture, and as a mechanism for managing religion—depoliticizes it and obscures the power dynamics at work within these interactions. Berger argued that the conventional story told about law is specifically a form of depoliticization, which, rather than resolving the tension between religious cultures and the Canadian constitutional legal culture, ends up masking it. Berger argues that

there are real harms for a diverse constitutional democracy to carry on in the thrall of a public story whose effect is to depoliticize by obscuring the cultural core of the interaction of law and religion. As a matter of sustaining a healthy democracy and valuing political respect, I suggest we do not live better under the conventional account (p. 152).

The depoliticization of the relationship between law and religion leads to a variety of negative effects, among them an overreliance on adjudication to manage conflict between religious and non-religious communities that in turn alienates religious communities and leads to disingenuous forms of political engagement or “proxy debates” (Berger, 2015, p. 164). The use of sanitized legal language removes the motivations of culture, emotion, and interest, so what is being debated and decided in the court of law is not really what is at issue. For example, in the first *Trinity Western* case, the underlying cultural tensions included the relationship of private Christian post-secondary education to public life, the training of public-school teachers by private institutions, and the role of human rights exemptions for religious institutions (Berger, 2015).

However, Berger (2015) argued, once the Court set the case within the terms of a section 2 Charter religious freedom claim, it could reconcile the issue by negotiating between private religious belief and public discriminatory conduct and avoid addressing any of the deeper

cultural issues, which resulted in their reappearance later in the *TWU v LSUC* and *LSBC v TWU* cases. Ignoring those deeper tensions and claiming the law is not cultural not only acts as a technology of depoliticization but also furthers the harms and tensions caused by the conventional story of the role the law plays. Acknowledging the cultural nature of the law and the commitments that put it at odds with religious cultures, Berger argued, is less alienating to religious communities.

As such, calling on the law to be more overt about its cultural stakes repoliticizes it and invites increased political engagement from religious individuals. Berger turned to Chantal Mouffe (2000, as cited by Berger, 2015) to explore how to open up the law to more traditional political engagement, citing the idea that it is better to have a “religious actor as an ‘adversary’ rather than an alienated ‘enemy,’ cast outside the common social practices” (p. 160). Berger was referring to Mouffe’s analysis that the we/they relationship of opposing groups or worldviews that form antagonisms is constitutive to political engagement, as well as her suggestion that rather than viewing this as an opposition that needs to be overcome—or an interaction that must be homogenized—democracy requires a reimagining of the we/they distinction in a way compatible with a recognition of the pluralism constitutive of modern democracy (Mouffe, 2005).

Mouffe (2005) suggested envisioning the possibility of “other political modes of construction of the we/they” interaction through the use of politics (p. 16). In alternatively imagined we/they interactions, while there is always the potential for interactions to be antagonistic, the opposing sides recognize the legitimacy of their opponents, and “while in conflict, they see themselves as belonging to the same political association” and share the same public space. This is a type of relation that Mouffe calls an “agonism” (p. 20). Mouffe suggests

that political processes and institutions are one avenue through which potential conflict can be addressed in a way that lets dissenting voices exist and be heard before true aggression develops.

Berger's (2015) framework suggested a series of steps through which judges, as actors in the Canadian constitutional culture, can establish legal institutions that function in a way that makes more space for religious "adversaries" rather than "enemies" (Mouffe, 2005). Berger called for fidelity to the culture of constitutional law, as well as for humility. By this, he meant that judges should be understood as "justified in claiming and expressing a certain commitment to the language, framing assumptions, and structural values expressed in the culture of Canadian Constitutionalism," but in a way that is aware of the cultural nature of the rule of law (Berger, 2015, p. 170). However, this must be tempered with a sense of humility and an awareness that law is not the only culture at work. Those that come before a judge are often operating from within their own valuable cultural frameworks. Recognizing this, Berger argued, induces a sense of humility.

Finally, he suggested the need for the cultivation of indifference. Legal tolerance can be understood as a kind of indifference, in that there are religious differences that the law tolerates (i.e., is indifferent to) and those that it does not. Cultivating indifference, then, means expanding this zone of indifference so that the religious differences that first appeared as "objectionable, or intolerable, might, with effort and reflection, be understood as untroubling to the law" (Berger, 2015, p. 178). The judge becomes an interpreter, re-describing culturally different practices in terms that make them legible to Canadian constitutional culture. The judge who succeeds in such an interpretation expands legal tolerance of religious difference and has also created a kind of openness to dissenting voices.

Alternatively, however, such a translation again risks alienating religious communities and flattening out the complex religious cultural motivations that brought a case before the law in the first place. Berger admitted that religious cultures may still be alienated by Canadian constitutional law and that legal tolerance has limits, such that conflicts that fail to be resolved by the courts need to be redirected to other “political institutions of civil society, each offering their own modes and limits of cross-cultural interaction” (p. 188). As I will discuss next, there are a few points of what might be called misalignment in Berger’s theory of how Canadian constitutional law renders religion, primarily as it relates to my own research.

Critical Reflection

Throughout *Law’s Religion: Religious Difference and the Claims of Constitutionalism*, Berger (2015) used the term “religion” in the singular even though it is clear he was examining a variety of different religions and spiritual practices, as well as the way the law renders those religions legible to the culture of Canadian constitutional law (Swiffen, 2020–21). Berger did, however, note that this rendering of religion has resonance with a description of genuine religious experience from Protestant philosopher William James (2009): “*the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine*” (p. 27, emphasis in original). James’s Protestant understanding of religion centres the individual, with personal commitments and experiences guiding conduct.

The law’s rendering of religion, Berger (2015) found, most closely aligns with that of “certain Protestant understandings” (p. 101), although he did not give any more specifics. Muñiz-Fraticelli and David (2015), however, argued that this emphasis on individual conscience originates in a distinctly radical form of Protestantism, to such a degree that “even Martin Luther

and John Calvin [were] opposed” (p. 1062). The closer a religious belief is to this form of Protestantism, the less likely it is to be seen as challenging or problematic to the courts and the more likely a religious freedom claim is to be successful:

The evocative suggestion is that the constitutional rule of law in a modern secular state is not indifferent to the form of religion that appears within it; rather, the extent and character of legal tolerance for religion may turn on a religion’s conformity with the law’s conceptual commitments about religion (Berger, 2015, p. 101).

Thus, while Berger used the term “religion,” he was in actuality examining a number of different religions. The closer they are to following the pattern of a Protestant understanding of religion, however, the more likely they are to be comprehensible to and compatible with how Canadian constitutional law renders religion. Specifically, the cases Berger examined include cross-cultural interactions between law and religions that include various denominations of Christianity—Hutterian Brethren, Evangelical Christian, Catholicism—as well as branches of Judaism, Sikhism, and Indigenous beliefs (Berger, 2015).

Of interest for my analysis are the religion and religious beliefs of Trinity Western University and its members. Trinity Western University is a Christian university founded by the Evangelical Free Churches of Canada and rooted in an evangelical Protestant tradition (Trinity Western University, 2024b). It is an arm of the church, with the mission to develop “godly Christian leaders: positive, goal-oriented graduates with thoroughly Christian minds; growing disciplines of Jesus Christ who glorify God through fulfilling the Great Commission, serving God and people” (*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (Evidence, Appellant Vol. III, Wood Affidavit at p. 388)).

Among the University’s “Core Values” is belief in both the Old and New Testaments, as inspired by the Word of God “without error in the original writings, the complete revelation of

His will for the salvation of men, and the Divine and final authority for all Christian faith and life” (*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (Evidence, Appellant Vol. III, TWU Core Values at p. 413) [TWU Core Values]). The University also affirmed the “full truth and authority of the Bible” and that the biblical scriptures are a final finished product “without error” that “can be relied on with full confidence as an authoritative guide to Gods [*sic*] message of salvation and the manner of living appropriate for Christian people” (TWU Core Values at p. 413).

TWU’s “Statement of Faith” comprised ten individual statements articulating a set of beliefs for the community and institution, including “God’s gospel alone addresses our deepest need,” “God’s gospel is now embodied in the new community called the church,” and “God’s gospel requires a response that has eternal consequences” (*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (Evidence, Appellant Vol. III, TWU Statement of Faith at pp. 399-400) [TWU Statement of Faith]). More specifically, it stated, “We believe that God will raise the dead bodily and judge the world, assigning the unbeliever to condemnation and eternal conscious punishment and the believer to eternal blessedness and joy with the Lord in the new heaven” (TWU Statement of Faith at p. 400).

The Community Covenant was another document that represented the religious beliefs of TWU as an institution, including the beliefs about sexual relationships and marriage to which the law societies objected in *TWU v LSUC* and *LSBC v TWU*. The Covenant stated that TWU is a community where students, faculty, and staff work and live together following biblical precepts in the belief that this will allow it to best fulfill its mission. The Community Covenant required members to commit themselves to cultivating such behaviour and beliefs as honesty, civility, generosity, and integrity; being responsible citizens; and observing modesty and appropriate

intimacy in relationships. Under the heading of Healthy Sexuality, the Covenant also stated that according to the Bible, “sexual intimacy is reserved for marriage between one man and one woman” (TWU Community Covenant at p. 404). The inclusion of this passage in the Covenant as part of a then required code of conduct expressing genuine religious belief was a point of conflict out of which *TWU v LSUC* and *LSBC v TWU* emerged.

That the law societies denied approval to TWU’s law school based on the discriminatory nature of the Community Covenant and TWU’s refusal to remove its definition of marriage from the Covenant due to its origins in the Bible reveals an important point of cross-cultural conflict that rests on concepts of time and the lasting impact of a court decision. It relates to the idea that in secular Canada and constitutional legal culture, the Supreme Court is understood as the highest authority, while for many religions, including evangelical Christianity and for Trinity Western, this is not the case (Berger, 2015; TWU Community Covenant). That is, while the Supreme Court may have the authority to rule on temporal, earthly matters, God is ultimately the highest authority, quoted in the Scriptures without error, believed in, and obeyed. Berger (2015) suggests time is what provides order to human perception and sense, such that different framings of time, or understandings of temporality, affect issues of religious freedom. Legal decisions have a long-lasting impact, but as *TWU v BCCT* itself illustrates, they can be overturned in a relatively short time span. For the members of Trinity Western, however, going against the word of God and changing the definition of marriage as articulated in the Scripture has eternal consequences (TWU Statement of Faith; TWU Community Covenant).

Another point of conflict lies in the elements identified by Berger’s (2015) theory of how Canadian constitutional law renders religion. The law renders religion as individual, yet the religious beliefs and freedom of religion at stake in TWU’s application to the law societies, as

well as the section 2(a) claim made in *TWU v LSUC* and *LSBC v TWU*, view it as an institution and as communal. The Community Covenant, for example, required that community members sign a solemn pledge placing themselves “under obligation on the part of the institution to its members, the members to the institution,” by agreeing to follow the code of conduct (TWU Community Covenant at p. 401). Paul Marshall (2021) argued that an institution has both a structural purpose or type and a mission or vocation, and that these should not be conflated.

In Trinity Western’s case, as a university, its purpose is to serve as an institution of higher learning, but its mission is to develop “godly Christian leaders ... with thoroughly Christian minds” (TWU Core Values at p. 429). This makes TWU itself a religious institution, as well as an educational one. Denying an institution’s religious freedom, or individualizing it down to its members, diminishes Trinity Western’s distinct Christian approach to education and means it cannot fulfil its religious mandate (Marshall, 2021; Muñiz-Fraticelli & David, 2015). That is, the fact that the culture of Canadian constitutional law renders Trinity Western’s religion individual, rather than recognizing it as collective, is a point at which these two different cultures clash and miscommunicate.

Berger’s (2015) framework also theorized that the culture of Canadian constitutional law produces religion(s) as private. A central point of conflict in the law societies’ decision-making processes was how to determine the boundaries between public and private and the place of religion within those spheres (Moon, 2019; Witten, 2016). For the law societies, it was unclear where the boundary between public and private fell in relation to the law school and its role as a public gateway to the legal profession. Trinity Western, meanwhile, argued for a completely different interpretation of the division between the public and private spheres (LSBC September Transcript; LSUC April 24 Transcript; TWU Community Covenant). Despite elements of

Berger's (2015) theoretical framework also being points of conflict, Berger's theory is useful, in that it starts by taking both law and religion as objects of analysis. It should be clear, however, that Berger has examined and identified how the culture of Canadian constitutional law renders religion(s) and not how a specific religion renders Canadian constitutional law. While the theory does make a move to remove law from its neutral and unquestioned space and place it in the field of analysis, Berger's theory does not also, for example, explore how evangelical or Sikh religion might render Canadian constitutional law.

Berger's (2015) theory of law and religion as cross-cultural interaction and cultural clashes also offers an explanation, if not an answer, for the "experiential gap" and the persistence of tensions between law and religion that remain even after a case has been decided and law has done its utmost to regulate religion (p. 22). In a sense, Berger's theory was not concerned with "solving" this tension but with reorienting the analyst to a better starting point when examining what happens when law and religion(s) interact. His framework did, however, offer an explanation as to why the tensions seen in *TWU v LSUC* and *LSBC v TWU* reappeared only seventeen years after the first Trinity Western case was decided, despite, on the surface, being concerned with the same issue of discrimination. The "conventional account" of the law as separate and neutral is a mechanism of depoliticization, one that works to (allegedly) move cross-cultural conflict from the political field into the supposedly neutral legal field. Berger offered the concept of depoliticization to explain the flattening out of cultural tensions and political issues, which are not addressed but merely masked by legal decisions—something that allowed the issues in the first Trinity Western decision to reappear in the Supreme Court in 2018.

Chapter Four: Methods

In this chapter, I discuss the methods developed and employed in my research. I begin by examining the ontological foundations of my methods and the sources from which I drew my analytical toolset. I explain the concepts I established based on Laclau and Mouffe's (2001) discourse theory, as well as my approach to data collection, my initial coding process, and the methods I used to identify overarching discursive themes.

Laclau & Mouffe's Discourse Theory

In this section, I introduce discourse theory, situate it as a social constructionist approach, and contextualize its use as a method in the context of the conflict between Trinity Western University and the law societies. Specifically, the methods I employ in my research originate from Ernesto Laclau and Chantal Mouffe's (2001) discourse theory, as interpreted by Marianne Jørgensen and Louise Phillips in *Discourse Analysis as Theory and Method* (2002). Beyond Laclau and Mouffe's discourse theory, Jørgensen and Phillips present other approaches to discourse analysis that are, like Laclau and Mouffe's, social constructionist in nature and assume to some degree that discourse is a practice that shapes the social world. Jørgensen and Phillips (2002) have placed these approaches on a theoretical continuum, with approaches like Laclau and Mouffe's, which do not distinguish between discursive and non-discursive phenomena, on the "left" and those like historical materialism, which sees social phenomena as non-discursive, on the far "right."

Other approaches covered in *Discourse Analysis as Theory and Method* (Jørgensen & Phillips, 2002) are closer to the middle of the continuum—particularly Norman Fairclough's critical discourse analysis, a weak social constructionist approach that sees discourse as only one dimension of social practice and therefore needs other social theories to study social phenomena.

However, importantly for the methods I use in my analysis, critical discourse analysis is also a social constructionist approach and theoretically close enough to Laclau and Mouffe's discourse theory that it is possible to borrow its analytical tools to supplement those drawn from Laclau and Mouffe.

Taking a stronger social constructionist approach, Laclau and Mouffe did not distinguish between discursive and non-discursive phenomena, such that they understand discourse itself as material, in that material objects have no meaning outside the discourse that constitutes them. In the context of my research, the law society decision-making processes that I examined did not require an approach that distinguished between discursively constructed phenomena and those that might exist outside of discourse, as per Fairclough (Jørgensen & Phillips, 2002; Sousa, 2010). Importantly, Laclau and Mouffe's discourse theory also provides the concept of sedimented discourse, or objectivity, which can be understood as a discourse that has become so natural and accepted as fact that people forget that it can be contested (Genç, 2023; Jørgensen & Phillips, 2002; Laclau & Mouffe, 2001).

In my analysis of the law societies' decision-making processes, the assumption that the law and the courts, rather than political deliberation, would eventually decide the question of the law school's approval became a sedimented discourse or objective and accepted truth. Trinity Western and the law societies assumed the law was a neutral mediator and authority that would decide the dispute. While Berger (2015) put pressure on the conception of Canadian constitutional law as neutral, and Laclau and Mouffe (2001) maintain that sedimented discourse is never actually settled. Trinity Western University and the law societies both accepted that the law and legal system were the natural and objective authority to reach a final decision on Trinity Western's law school.

Jørgensen and Phillips's (2002) interpretation of discourse theory is based primarily on Laclau and Mouffe's *Hegemony and Socialist Strategy* (2001), supplemented by a few additional texts written by Laclau alone, including "Discourse" (1993) and "Power and representation" (1993), and by Ernesto Laclau and Lilian Zac's "Minding the gap: The subject of politics" (1994). From a theoretical perspective, Laclau and Mouffe's (2001) ideas originate from the idea that discourse constructs the social world. They adopted a post-structuralist critique of structuralist linguistics, in that they see the creation of "meaning as a social process that is about the fixation of meaning, as if a ... structure existed" (p. Jørgensen & Phillips, 2002, p. 25). However, "owing to the fundamental instability of language, meaning can never be permanently fixed" (Jørgensen & Phillips, 2002, p. 6). Therefore, discourse theory understands the social world to be a discursive construction that can be analyzed using only the tools of discourse analysis.

However, discourse theory also has a very broad focus, which, while theoretically rich, provides a limited set of practical tools for analysis. This is why, from a practical perspective, I use Jørgensen and Phillips's (2002) interpretation of Laclau and Mouffe's (2001) work and the set of tools they consolidated for discourse analysis. Jørgensen and Phillips also suggested using a select number of concepts and strategies from critical discourse analysis to supplement the analytical toolset of Laclau and Mouffe's discourse theory. Although neither Laclau and Mouffe nor Jørgensen and Phillips provide a step-by-step guide to discourse analysis, Jørgensen and Phillips do offer an interpretation of concepts that one can use to analyze empirical material. However, I do not use the entire conceptual and theoretical toolset developed by Laclau and Mouffe in *Hegemony and Socialist Strategy*, or those outlined by Jørgensen and Phillips. Instead, looking both at *Hegemony and Socialist Strategy* and at Jørgensen and Phillips' interpretation of

Laclau and Mouffe's discourse theory, as well as at suggested supplemental concepts, I determined a more specific set of concepts. In the following section, I will introduce those specific concepts that I find best suited to studying the construction of meaning in the legal field.

Concepts

Discourse

I begin with a basic definition of discourse inspired by Laclau and Mouffe (2001), who defined this concept simply as the fixation or crystallization of meaning. In my research, I will focus on how meaning crystalized around contested legal concepts related to questions of freedom of religion, discrimination, and the public interest. However, in Laclau and Mouffe's discourse theory, any fixation of meaning, even when it appears to be crystalized, is always contingent or temporary. This definition is particularly apt for the study of the legal field, as the crystallization of meaning around a legal concept is always potentially at risk of being overturned; the definition of discourse is thus made more complicated. Discourse, then, is "established as a totality in which each [signifier] is fixed as a moment through its relations to other [signifiers] (as in a fishing-net). This is done by the exclusion of all other possible meanings that the [signifiers] could have had: that is, all other possible ways in which the [signifiers] could have been related to one another" (Jørgensen & Phillips, 2002, p. 26–27). For example, western legal discourse becomes dominant through the exclusion of meanings that signifiers like sovereignty, property, and justice have in alternative, indigenous legal discourses (Jørgensen & Phillips, 2002).

In my research, I found it necessary to distinguish different strands or levels of discourse as they develop and stabilize. I use the term *arguments* to indicate proposed meanings that form within each organization—TWU, LSBC, and LSUC—and conflict internally (and possibly

externally) with other arguments about the meaning of a signifier. Each institution also has an overall *discourse*. For example, for Trinity Western, if there is no internal conflict over the meaning given to the signifier of discrimination, then the meaning of discrimination as a signifier within TWU's discourse is internally hegemonic and has excluded all other possible meanings. Similarly, if a decision by a law society makes one meaning of discrimination dominant and (temporarily) excludes all other possible meanings, then this specific interpretation of discrimination is hegemonic within its discourse. However, the meaning of the signifier of discrimination within TWU's discourse, as compared to those of the law societies, may still be different, leading to multiple meanings of discrimination that are antagonistically related in the conflict overall. That is, the signifiers of discrimination in the law societies' discourses and in the discourse of TWU are antagonistic.

As will become apparent throughout my analysis, for Trinity Western's discourse, there was often no internal conflict over the meaning of signifiers. My analysis of Trinity Western's discourse is based primarily on Trinity Western's *Written Reply Submission with Respect to Accreditation of the TWU School of Law* [*Reply Submission*] and a speech to the Benchers of the Law Society of Upper Canada by TWU President Bob Kuhn on April 24, 2014. The voices or articulations of LGBTQ Trinity Western students are limited in the discourses evident within the law societies' approval processes. The arguments of Trinity Western University students, as well as faculty apart from President Kuhn, are also largely missing. Brayden Volkenant, the student plaintiff in *TWU v LSUC*, for example, was present at LSUC's April 24, 2014, meeting but did not speak. Trinity Western did submit several affidavits from TWU alumni from *Loke v Minister of Advanced Education of British Columbia*¹¹ to the Law Society of British Columbia following

¹¹ In *Loke v British Columbia (Minister of Advanced Education)*, 2015 BCSC 413 (CanLII), Trevor Loke challenged the B.C. Minister of Advanced Education's decision to permit TWU to grant law degrees as unconstitutional under

the LSBC member vote to reject the law school, but although the affidavits do present the views of TWU alumni, they are curated so as not to appear contentious over subjects such as TWU's following the Covenant and to support the approval of the law school (*Loke v British Columbia (Minister of Advanced Education)*, 2015 BCSC 413 (CanLII) (Affidavits Volkenant, Strikwerda, Davies, Cook, Cowan, Legaree, Herbert)).

Paige Thombs (2020), however, conducted research at Trinity Western in 2018 on the evolution of the Community Covenant. Interviewing students, faculty, and staff, Thombs identified a continuum of opinions indicating there was no singular understanding of the Covenant, but rather one Covenant understood in multiple ways. Considering the clause around marriage being exclusive to one man and one woman, some interviewees felt that the Covenant was discriminatory and wanted it eliminated completely, while others felt pride in TWU's traditional Christian values. Thombs concluded that there were two simultaneous versions of TWU—a private one where members held no singular set of religious beliefs and opinions and a public one that was consistently presented as aligned with traditional Christian beliefs. Thombs noted that those presenting TWU publicly, such as the administration or those speaking to the media, presented the university as one cohesive body (p. 143). The content I analyze from TWU (as well as the alumni affidavits) falls within this public category of discourse or, alternatively phrased, is a type of discourse intended to be consumed by the public. As such, my analysis of TWU's discourse as presented to the law societies appears internally stable.

In contrast, although the law societies' decision-making processes were open to the public, they also evidence the debate that took place during their sessions. My analysis of both

the *Charter of Rights and Freedoms*. The British Columbia Supreme Court concluded that as the Minister had already revoked approval of the law school, the issue was moot (*Loke v British Columbia (Minister of Advanced Education)*, 2015 BCSC 413 (CanLII) at paras 1–2; 98–110).

law societies' discourses is based on the transcripts of their meetings and discussions, and it includes disputes and what can be described as processes intended to allow for the articulation of conflicting arguments. The law societies' discourses, therefore, often appear internally unstable and do not become (momentarily) stabilized as nodal points until the Benchers' votes on the approval of TWU's law school.

Nodal Point

This brings me to the concept of nodal points, one of the most frequently employed and important concepts used to identify discourses. A discourse starts to solidify or crystalize around a nodal point, which Laclau and Mouffe call "a constructed centre" and a "privileged discursive point" (Laclau & Mouffe, 2001, p. 112). That is, nodal points are privileged signifiers around which other signifiers are organized and from which they acquire their meaning. Every discourse has several nodal points that organize it and, when taken together, indicate the web or net of meaning that it specifically articulates (Jacobs, 2019). In the legal field, identifying nodal points can reveal where opposing sides in a conflict, such as the majority and dissent in a legal opinion, discursively agreed. In my own research, for example, Trinity Western and the law societies' discourses aligned around the nodal point that the law societies were public regulatory bodies subject to the *Charter of Rights and Freedoms*.

Floating Signifier

When there is conflict over the meaning of a signifier, a discursive point cannot be considered a nodal point but is instead a floating signifier. Analytically, differentiating between nodal points and floating signifiers reveals when discourses are in conflict or do not agree over the meaning of a signifier versus when a "stable" and hegemonic meaning has temporarily

emerged. For example, Matthys et al. (2021) examined the lack of clarity around the meaning attributed to palliative care, especially in relation to how it was defined in relation to curative, end-of-life, terminal, and supportive care. They identified autonomy as a floating signifier, or as a signifier with an unfixed definition that different discourses struggle to invest with meaning (Jørgensen & Phillips, 2002, p. 28–29). A palliative care discourse gave autonomy a meaning that emphasized the social embeddedness of the individual and “taking control” of advanced care planning.

Matthys et al. (2021) also identified a right-to-die discourse in which palliative care itself was a choice an autonomous individual could make regarding the end of their life. In the right-to-die framing of autonomy, palliative care was an alternative treatment option that could be adopted or refused depending on the will of the patient (p. 2750). The meaning of autonomy was contested between a palliative care discourse that emphasized social embeddedness and the patients taking control of their care plan and a right-to-die discourse that framed autonomy as an autonomous individual exercising their right to accept palliative care, or not.

To clarify, floating signifiers are signifiers that do not have a fixed meaning and are subjects of a discursive struggle to invest them with such a specific meaning. So, at points of antagonism, or discursive conflict, different discourses attempt to fix the meaning of a floating signifier and transform it into a nodal point (Jørgensen & Phillips, 2002; Laclau & Mouffe, 2001). As analytical tools, then, both a floating signifier and a nodal point are necessary to examine the identifying points of discursive conflict and determine when discourses transition from a struggle for supremacy to a single hegemonic discourse.

For example, Arash Beidollahkhani (2022), in his research on the online resistance discourse to the Islamic Republic of Iran (IR), identified subversion as an important nodal point

in the discourse of anti-IR groups operating on Twitter (now called X). That is, internal to the anti-IR groups' discourse, subversion had a consistent meaning and operated as a nodal point. The meaning of subversion within the discourse of the anti-IR groups, however, was antagonistic to the official hegemonic discourse of the Islamic Republic. That is, the meaning that the Islamic Republic discourse gave to subversion as a signifier was different from that of the anti-IR groups. Thus, the two discourses conflicted over the meaning of subversion, unfixing its meaning and turning into an external floating signifier that the two discourses struggled to restabilize into a nodal point.

External and *internal* are not terms Laclau and Mouffe (2001) use but indicators I developed to better examine the relationship between strands of discourses and the process of how a discourse becomes hegemonic. I use these terms to identify when a signifier is *internally* either stable or in conflict within the discourse of one institution, while also being, in relation to the discourse of another institution—that is, *externally*—similarly either stable or in conflict. For example, in TWU's discourse, there was no conflict over the meaning of the signifier *public interest*, while within the discourses of each law society, conflict did exist. This means that within TWU's discourse, the public interest was an *internal* nodal point, but in relation to the law societies' discourses, it was an *external* floating signifier; meanwhile, within the law societies' arguments, it was an *internal* floating signifier.

Intertextuality

I have also included a concept from Fairclough (1992, as cited in Jørgensen & Phillips, 2002) that works alongside Laclau and Mouffe's concept of articulation. Articulation, specifically, is "every practice that establishes a relation between elements such that the identity of the elements is modified" (Jørgensen & Phillips, 2002, p. 28). For Laclau and Mouffe (2001),

every discourse is made up of a series of articulations, that is, various combinations of signifiers, that changes and shifts with each “articulation.” Articulation is how Laclau and Mouffe conceptualize both social and discursive change—each articulation reproduces but also shifts previous discourse. Similarly, Fairclough’s concept of intertextuality is the idea that all discursive articulations draw from earlier articulations and influence historical change and development and vice versa. Change is produced when one uses existing discourses in new ways.

A particularly extreme form of this that I find useful for analyzing legal documents and transcripts is manifest intertextuality. Manifest intertextuality occurs when texts explicitly draw from other texts through quotations and citations, producing links in an intertextual chain or web of texts, each of which draw on and reiterate aspects of other texts. One way that intertextuality is specifically visible within the legal field is how cases and statutes are cited and drawn on to support different arguments—that is, how precedent is used—to shift legal discourses (Jørgensen & Phillips, 2002). Articulation and intertextuality are visible in how evidence is cited and reproduced within the decision-making processes of the Law Societies of British Columbia and Upper Canada and within the evidentiary records of the court cases. For example, TWU’s original application to the law societies, a speech by LSBC’s president, and submissions by interested third parties to TWU and the law societies are all articulations that became part of an intertextual chain, and evidence in the TWU cases, which might be cited in another case or academic article, also becomes part of an intertextual chain.

Antagonism

Unlike intertextuality, antagonism is a concept developed by Laclau and Mouffe in *Hegemony and Socialist Strategy* (2001). Beidollahkhani (2022), writing about discourse theory, called antagonisms discourses that are in opposition to each other (p. 1024). Laclau and Mouffe

generally discuss antagonisms between identities—such as worker versus Frenchman—as social antagonisms, but they also use the term *antagonism* without distinguishing it from other kinds of discursive conflicts. Jørgensen and Phillips (2002) indicate that antagonisms can be found where discourses collide or, in cases of identity, where discourses that constitute different identities make contrasting demands that mutually exclude each other. Laclau and Mouffe’s conception of this idea is based around identity formation, but other scholars have used it to examine a wider variety of conflicting discourses, and it is useful for conceptualizing conflicts between entities, like the discourses produced through the law societies’ decision-making processes (Genç, 2023). For example, Beidollahkhani identifies an antagonism between anti-IR subversion discourses that construct a post-Islamic Republic political system as secular-democratic and the Islamic Republic discourse that incorporates religion into the political system of Iran.

Examples of antagonisms are also evident in administrative and court decisions, as one can see each case as responding to a legal antagonism that is resolved by a hegemonic intervention. As they proceed through the legal system, these conflicts over meaning, or antagonisms, can also be understood as articulations taking place within broader social antagonisms, such as those between sexuality and religion or religion and law, that are momentarily resolved by the courts’ hegemonic interventions.

Hegemonic Intervention

A hegemonic intervention, then, explains the tentative resolution of discursive antagonisms, such as those involved in the conflict between TWU and the law societies. Laclau developed the concept of hegemonic intervention after the publication of *Hegemony and Socialist Strategy*, based on his and Mouffe’s idea of hegemony (Laclau, 1993; Laclau & Mouffe, 2001). Hegemony is the discursive struggle over meaning that takes place within

politics so that, for a time, one perspective or worldview comes to dominate others. However, the fixation of meaning can never fully be complete, or as Laclau and Mouffe point out, hegemony would have nothing to hegemonize (Gustafsson, 2016; Jørgensen & Phillips, 2002).

This leads to the concept of the hegemonic intervention, which I find particularly useful in describing the discursive effect of decisions rendered by the courts and administrative decision-makers like the law societies within their specific fields. Hegemonic interventions take place where antagonisms occur, and they intercede with authority to force the removal of one discourse from the discursive field so that another overpowers it and “alternative understandings of the world are suppressed, leading to the naturalisation of one single perspective” (Jørgensen & Phillips, 2002, p. 37). For example, when a court gives a verdict, this is a hegemonic intervention that (re)asserts one discourse as dominant over another. In my own research, the antagonism continued from the law societies to the Supreme Court, such that there was a series of continuing antagonisms with hegemonic interventions from the lower courts that led to a larger hegemonic intervention by the Supreme Court.

Summary of Key Concepts

In the above section of the chapter, I have introduced the methods I developed from Ernesto Laclau and Chantal Mouffe’s *Hegemony and Socialist Strategy* (2001), as interpreted by Marianne Jørgensen and Louise Phillips in *Discourse Analysis as Theory and Method* (2002). I presented the specific tool set that I developed and extracted from discourse theory and which I will employ to study the construction of meaning in the legal field.

Data

In this section, I review the process and different stages of my data collection and analysis. I began by searching and retrieving texts for analysis from the websites of the Law Ontario and the Law Society of British Columbia, the Federation of Law Societies of Canada, and the Supreme Court of Canada. All documents I obtained were freely available to the public, and those I requested from the Supreme Court Record Centre are available as part of the *Trinity Western University v Law Society of British Columbia* and *Law Society of Upper Canada v Trinity Western University* dossiers (case books).

Using Dedoose analytical software, the first stage of my analysis involved reviewing and tagging code words and phrases in several documents from the case dossiers and others offering content related to Trinity Western University's proposed law school. This included material from the evidentiary record and documents like the submissions from interested third parties to the law societies. For the second stage of analysis, I selected seven primary documents based on the highest number of sections marked for further analysis and the highest number of applied codes or signifiers (Jørgensen & Phillips, 2002).

Dedoose helped me identify several emerging discursive trends using a Code Application chart. The chart tracked the number of times a specific code or set of codes were applied to a data set and identified LGBTQ discrimination, religious discrimination, the public interest, and the public sphere as points for further analysis.

At my third stage of analysis, I determined that I would need to further narrow my primary data set for in-depth examination and decided to focus on the decisions of the law societies. For analysis, I selected the transcripts from the Law Society of Upper Canada's April 10 and April 24, 2014, meetings; the transcripts from the Law Society of British Columbia's April 11 and 26, 2014, meetings; and Trinity Western's *Written Reply Submission with Respect to*

Accreditation of the TWU School of Law, as submitted to the Law Society of Upper Canada. The latter document was a response to questions raised by Benchers during the Law Society of Upper Canada's meeting on April 10, 2014. It lays out the background of Trinity Western as a university, the legal history and relevance of *Trinity Western University v British Columbia College of Teachers*, and issues related to freedom of religion and equality rights. Although it was specifically responding to LSUC, the *Reply Submission* addresses issues raised by both law societies and frames all the key signifiers engaged in the law societies' decision-making processes regarding TWU's law school. As such, I am taking the *Reply Submission* as representative of TWU's discourse in relation to the discourses of both law societies.

For further insight into TWU's arguments and perspective, I also examine the *Report of Dr. Gerald Longjohn* on TWU's Community Covenant and TWU's *Introductory Statement to TWU Core Values Series*. Although I cannot definitely determine when the law societies would have gained access to these documents, they were publicly available by the time the conflict reached the British Columbia Supreme Court (*TWU v LSBC BCSC*). My third stage of in-depth analysis involved rereading and further coding these specific documents, extracting specific excerpts based on the code categories of public interest; LGBTQ equality; freedom of religion; the public sphere; the private sphere; power; politics; equality; autonomy; and the individual. From there, I began writing and further developing my analysis.

Conclusion

In this chapter, I have introduced and explained the methods I use in my research and analysis, drawn from Laclau and Mouffe's discourse theory as interpreted by Jørgensen and Phillips in *Discourse Analysis as Theory and Method* (2002) and supplemented by several concepts from Fairclough's critical discourse analysis. The concepts I developed in this chapter

are a select number chosen to be part of an analytical toolset for studying the legal field. I have explained my decision to use discourse theory, whose original purpose was to examine discourse in the political field, to analyze discourse in the legal field and shown how the study of law and politics should be considered not separate but interconnected. Finally, I reviewed my data collection process and the initial stages of my analysis process. In the next chapter, I examine how the law societies and Trinity Western understood what I call the central question in the approval process of TWU's law school, and how that was linked to varying interpretations of the public interest and discrimination.

Chapter Five: TWU's Law School: An Individual or Institutional Question?

“What is the public interest if not, among other things, eradication of discrimination?” (LSUC April 10 Transcript at p. 71).

In this chapter, I explore if the decisions of the law societies in the approval processes of TWU's proposed law school rendered a version of religion that is individual similar to that found at other levels of Canadian constitutional law. This chapter also examines how, as administrative decision-makers charged with balancing Charter values and their statutory objectives to protect the public interest, the law societies gave meaning to the public interest and came to associate it more closely with freedom of religion or LGBTQ equality. To do so, I examine the following signifiers: *the main question*, or the framing of the primary question the Benches were tasked to answer; the approach to defining the law societies' statutory objectives of protecting the *public interest*; and the law societies' and TWU's understanding of *discrimination*. I explore how the law societies and TWU attributed meaning to the main question they needed to answer in approving TWU's law school and whether this meaning focused on the training and competency of individual TWU law graduates or on the wider impact of the Community Covenant. I then show the different ways that TWU and the law societies linked the meaning of the main question to the public interest, and whether it related only to the education and competency of graduates or whether it also incorporated consideration of the Covenant.

I examine the respective meanings of the main question, public interest, and discrimination as signifiers because of how, when linked together, they produce discourses that emphasize either the individual TWU graduates or the way that religious beliefs were institutionalized and impacted LGBTQ people as a group and subsequently the public sphere. Each of these discourses renders a different version of religion, and by analysing the law societies' decision-making processes, it is possible to see which becomes (temporarily)

hegemonic. I will demonstrate how some Benchers articulated a discourse that would have rendered religion institutional, but it was ultimately refused within the processes of both law societies. My analysis of how the law societies framed discrimination as contrary to the public interest is key to answering my second research question: whether the law societies more closely linked the public interest to the Charter rights and values of freedom of religion or of LGBTQ equality.

The Main Question the Law Societies Were Trying to Answer

In this section, I examine how the main question before Benchers in the approval of TWU's law school was framed in the processes of both law societies and by Trinity Western. I will show how TWU's discourse was characterised by one unified meaning for the main question, while the debate within both law societies involved antagonisms that were eventually settled through hegemonic interventions.

One framing of the main question that was evident in TWU's discourse and advanced by some Benchers from both law societies understood the main question to be narrowly focused on the training and competence of law school graduates. Alternatively, some Benchers in both law societies understood the main question more broadly to include considering the possible discriminatory impact of the Covenant on access to legal education and the legal profession for LGBTQ individuals and LGBTQ people as a group. As such, while TWU's discourse and one of the arguments evident in the law societies' processes produced a shared meaning of the main question, there was also an antagonism between TWU's discourse and the other argument made by Benchers from both law societies.

In its *Written Reply Submission with Respect to Accreditation of the TWU School of Law*, the TWU administration presented the main question Benchers needed to answer as whether its

law school graduates would receive adequate training to practice law. Within TWU's discourse, the Benchers' decision did not include any consideration of the discriminatory impact of the Community Covenant. Rather, Trinity Western contended,

The only matter to be decided by Convocation is whether TWU graduates will be recognized the public interest mandate of the LSUC is to ensure that the public has access to quality and reliable legal services. Given that the matter of accreditation arises only in the context of approving TWU graduates, the public interest concern must centre on whether such graduates will be adequately prepared, educationally and professionally, to practise law in Ontario (*Reply Submission* at paras. 32–33).

Internal to TWU's discourse, this meaning of the main question was a nodal point, that is, there was a single consistent meaning attributed to the signifier of the main question before the law societies in that discourse, with no antagonistic meanings. Trinity Western argued that the main question before the Benchers was whether TWU law's graduates would be effectively prepared to practice law. TWU was clear that this meant the Benchers could evaluate the graduates' preparation to practice law but not the Community Covenant and any questions of discrimination or equality that it implied. In considering the preparation of graduates, TWU's discourse emphasized that its law school curriculum would cover Canadian equality law and professional ethics, including equality based on sexual orientation.

In making this argument, TWU noted in the *Reply Submission* that during the Law Society of Upper Canada's initial meeting on April 10, 2014, Benchers did not consider the courses and content of TWU's law school curriculum. TWU argued that this implied the law society did not dispute that the TWU curriculum would train students to practice law adequately. Thus, the Benchers' opposition to the law school was not based on the law program itself: "Very little, if any, mention was made of these facts [the quality of the curriculum] at the April 10, 2014, Convocation. TWU understands this to mean that these facts are accepted by Convocation and beyond any reasonable dispute" (*Reply Submission* at para. 8). As this excerpt shows, TWU

used intertextuality, or citing from the LSUC Benchers' own arguments, as evidence that Benchers were not worried about graduates' competence, including potential discriminatory behaviour on their part while working as lawyers. TWU presented Benchers' lack of concern with the curriculum as support for its framing of the main question at stake in the law societies' decision: that the recognition of TWU's law school depended on assessing its curriculum and not on any questions of equality or discrimination implied by the Community Covenant.

For some Benchers from both law societies, however, the concern was not if TWU's law program and training of graduates would be adequate. Instead, these Benchers voiced concerns that in approving the law school, LGBTQ people would face unequal access to legal education and differential treatment at TWU Law as a result of the Community Covenant. That is, some Benchers framed the decision to approve or reject TWU's law school around the discriminatory impact of the Community Covenant on prospective LGBTQ students, whom it might deter, as well as those already enrolled at TWU. For example, in the first meeting of the Law Society of Upper Canada on April 10, one LSUC Bencher, Falconer, voiced a common issue among Benchers who shared this concern:

I don't worry that a TWU grad is going to go out there and be any more prejudiced or discriminatory than half of the judges or anybody else I've encountered in my life. You folks will get it as right or wrong as the rest of us. I worry about steamrolling those who are in no position to protect themselves and for reasons that confound me (*Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 (Evidence, Appellant Vol. I, Law Society of Upper Canada April 10 Transcript at p. 118) [LSUC April 10 Transcript].

This quote reflects a theme that appears in the arguments made by some Benchers of both law societies: they were not worried about individual TWU law graduates' discriminatory behaviour but that the Community Covenant would create unequal access to legal education and discriminatory treatment of law students at TWU. In this framing, the individual or personal

religious beliefs of TWU students and graduates were not the issue, and Benchers did not believe that the conduct of TWU's program would make graduates any more likely to be discriminatory than graduates from other universities.

Rather, as Bencher Maclaren argued during the Law Society of British Columbia's second meeting on September 26, 2014, Benchers needed to determine if "the discriminatory conduct of [TWU] law is an acceptable infringement of the equality rights of LGBTQ people" (LSBC September Transcript at p. 271). This was a sentiment that came up often in the arguments of Benchers from both law societies: that the main question Benchers had to answer was if they could approve a law school with a discriminatory Covenant in place. Thus, some Benchers from both law societies contended that in making their decision to approve or reject TWU's law school, Benchers needed to consider if the Covenant would create a discriminatory context within TWU's law school.

Other Benchers agreed that individual TWU Law graduates were no more likely than graduates from any other university to act in a discriminatory manner in their professional duties but nonetheless held that Benchers also needed to consider if TWU's law school could be approved with limitations on equal access to education, and subsequently to the legal profession, for LGBTQ people as a group. At the second meeting held by the Law Society of Upper Canada on April 24, 2014, Bencher Mercer contended that, as they had brought up at the law society's initial meeting,

our jurisdiction was not merely to consider the quality of TWU law school graduates. I expressed the view that the faith of members of our diverse society and our democratic institutions depends on the rule of law and equal access, that that requires no limitations to entry to the practice of law other than learning, training and character (LSUC April 24 Transcript at pp. 260–261).

This quote represents a theme in the arguments of some Benchers from both law societies, namely that the Benchers had to consider not only the quality of education and competency of TWU law school graduates but also the question of whether, in requiring students to sign the Covenant as a condition of entry to law school, the Covenant institutionalized discrimination by restricting access for LGBTQ people and reduced the diversity of the legal profession (LSBC April Transcript at pp. 1182–1183). In this view, the questions Benchers were tasked to answer went beyond the impact of the Covenant on individual prospective LGBTQ students or those facing differential treatment at TWU Law to assess the Covenant’s wider impact on the public sphere.

From this perspective, the main question that Benchers tasked themselves to answer was different than that presented by TWU. They were asking if, in assessing the law school, they should consider how the Covenant created unequal access to legal education and differential treatment for LGBTQ individuals at TWU Law, and how, as a condition of enrollment, the Covenant also had a broader overall effect that shaped access to legal education and the legal profession. Specifically, Benchers making this argument framed the decision to approve or reject TWU’s law school around whether to consider the Community Covenant and its discriminatory impact on LGBTQ persons or to exclude the impact of the Covenant from their assessment. Therefore, the framing of the main question in the law societies’ decision-making processes was different from that presented by TWU, which focused only on law school graduates’ preparedness to practice law.

However, several other Benchers from both law societies made an antagonistic argument that any assessment of TWU Law, and its graduates, should be based only on the training students received from the law program. For example, during the LSBC’s April 11, 2014,

meeting, the Benchers referred to in the transcript as PR drew a parallel between the assessment of foreign-trained law students and that of TWU Law graduates who applied for entry to the Law Society of British Columbia. PR argued,

There is no examination as to any covenants or rules of those [foreign] law schools. We seem to have no difficulty admitting foreign-trained lawyers without looking behind their law degrees. We look at whether or not they've met their academic requirements, we do not look at the belief system at the law school, the existence of covenants, we look at their academic training (LSBC April Transcript at p. 1157).

As this excerpt shows, a theme in the arguments of some Benchers was that they should approve law school graduates if they met the academic requirements set by the law societies. Benchers also noted that there was no evidence that individual graduates of TWU's law school would not be properly prepared to practice law (LSBC April Transcript at pp. 1157; 1176). In this framing, the main question before Benchers was whether TWU's law school competently trained graduates to practice law; it did not include consideration of the discriminatory impact of the Covenant.

Additionally, several Benchers contended that the religious beliefs represented in the Community Covenant were part of TWU's students' exercise of freedom of religion. These Benchers referred to the Supreme Court decision in *TWU v BCCT*, where the majority of the Court concluded that signing the Community Covenant alone was not concrete proof that a TWU graduate would discriminate against LGBTQ students in their role as a teacher. Without proof that a graduate would act in a discriminatory way, the religious beliefs of TWU's students should be respected (*TWU v BCCT*). Based on the Supreme Court's decision in the BCCT case, some Benchers argued, it was unlikely that LGBTQ equality rights could trump the right to freedom of religion in the law societies' own balancing of LGBTQ equality and religious rights. For example, LSUC Benchers Murchie stated,

So as we all know, the Supreme Court of Canada [in *TWU v BCCT*] considered equality rights in respect of the Trinity Western Covenant and they concluded that freedom of religion was not accommodated if accreditation was denied, and they went on to conclude that the proper place to draw the line was between belief and conduct, and as Trinity Western has pointed out ..., there is no evidence that anyone graduating from Trinity Western law school would, in fact, behave in a discriminatory manner it seems to me that the Supreme Court of Canada has already balanced the rights of the LGBT community and we can't ignore their clear determination that denying to accredit TWU would be a denial of religious accommodation (LSUC April 24 Transcript at p. 306).

This quote represents a theme in the arguments made by some Benchers from both law societies: while the Covenant might create differential treatment for LGBTQ persons, the Supreme Court had already balanced the Charter rights and values at stake in the law societies' decisions in *TWU v BCCT* and determined that the Covenant was justified by the freedom of religion of the students at TWU (LSUC April 24 Transcript at p. 289). Therefore, these Benchers argued, although the Covenant discriminated against LGBTQ students, there was nothing unlawful about applying a religiously motivated set of behavioural standards, something protected by freedom of religion. This argument is like TWU's, in that the university also held that there was nothing unlawful about the Covenant (*Reply Submission* at para. 99). As such, the main question signifier is given a shared meaning in TWU's discourse and in one argument advanced by Benchers in both law societies. In this view, the Covenant is simply an expression of individual beliefs, and the individual religious beliefs of law graduates are not relevant to their standard of education. Further, Benchers who advanced this argument found any discrimination against LGBTQ people was justified by the TWU Law graduates' freedom of religion.

Interestingly, while the two arguments advanced by Benchers of both law societies were antagonistic over the meaning of the main question before them, they both rendered a version of religion that was ultimately individual. However, each took different interpretive paths to reach

that conclusion. Specifically, Benchers who argued for the approval of the law school framed the main question such that only the education and competence of TWU Law graduates were relevant. In particular, they saw signing the Covenant as an expression of personal religious belief, and on its own, not proof of discriminatory conduct by a lawyer in their professional role. Through this argument, Benchers produced a version of religion that was centred on an individual's religious belief. Conversely, Benchers who framed the main question as involving how the Covenant would affect LGBTQ individuals' interest in and experience at TWU Law, as well as how the Covenant institutionalized religious beliefs into a discriminatory admissions policy, produced a version of religion that had both individual and institutional elements.

More specifically, the argument that the Covenant might deter LGBTQ individuals from applying to TWU Law, and that it institutionalized discriminatory religious beliefs in a way that restricted access to the legal profession for LGBTQ people as a group, rendered religion simultaneously institutional and individual. By denying the law school approval, the Benchers ultimately rejected the institutional elements of religion and rendered religion individual. Stated differently, in suppressing the possibility of the law school, Benchers were willing to recognize as protected by freedom of religion only those aspects of religion that were individual and did not affect LGBTQ people as a group or LGBTQ people in the public sphere.

In this section, I have examined and compared how Trinity Western University and the law societies framed the main question to be answered by Benchers in the approval processes of TWU's law school. Trinity Western and the law societies agreed that graduates of the law school would be adequately trained to practice law, but the main question still functions as a floating signifier. Trinity Western framed this question as being about the preparedness and competence of graduates and not the discriminatory impact of the Community Covenant. Some Benchers

agreed that the main question should focus on graduates' training and not the Community Covenant. Other Benchers argued, however, that assessing TWU's law school should also include consideration of the Covenant.

In this sense, the main question functions as an internal floating signifier within the law societies' discourses and as an external floating signifier between TWU's discourses and the discourse that became hegemonic within the law societies' processes. Notably, while the arguments made by Benchers advance conflicting signifiers of the main question, both produced versions of religion that in the end were individual. These different understandings of the main question were linked to the signifier of the public interest, but as I will show in the next section, the public interest was also given different meanings.

Duelling Public Interests

In this section, I examine and compare the meanings of the public interest advanced within the discourses of the law societies and Trinity Western. Further, I show how these meanings are linked to the different framings of the main question signifier discussed above. Specifically, TWU articulated a narrow interpretation of the public interest signifier, limited to considering the education and competence of graduates. A similar meaning is also evident in one argument made by Benchers in the law societies' decision-making processes. In contrast, an interpretation of the public interest taken broadly to include protecting the public from discrimination and advancing diversity also develops within the discourses of both law societies and ends up dominating their decision-making processes. As such, the public interest is a significant point of antagonism and a floating signifier, both between TWU and the law societies and within the law societies' discourses.

Trinity Western's discourse considered the meaning of the law societies' mandates to protect the public interest to apply only in a limited and specific context. For instance, responding to Benchers' arguments in LSUC's April 10, 2014, meeting that the law society had a different public interest mandate than the British Columbia College of Teachers in *TWU v BCCT*, Trinity Western argued that LSUC did not have the statutory authority to consider the public interest in relation to the Community Covenant. In its *Reply Submission*, TWU argued that the LSUC's public interest mandate was limited to ensuring that the public had access to qualified, reliable legal services:

the *Law Society Act* mandates the LSUC to ensure that "all persons who practice law in Ontario ... meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide." It is in this regard that the LSUC considers the "public interest" (*Reply Submission* at para. 58).

This excerpt represents TWU's consistent formulation of the public interest signifier, which framed the law societies' public interest mandates as limited only to considering the adequacy of the education and preparedness of TWU Law graduates. Consistent with its framing of the main question that Benchers were tasked to answer, TWU argued it was outside the scope of LSUC's public interest mandate to assess whether the Community Covenant's impact was discriminatory. Assuming this meaning of the public interest, TWU argued it would not be against the public interest for the law societies to approve its proposed law school. With no conflict over the meaning of the public interest within TWU's discourse, the signifier was a nodal point.

This meaning of the public interest signifier within TWU's discourse is linked with the meaning of the signifier of the main question: if the law society's mandate to regulate the legal profession in the public interest was limited to making sure TWU's law school was fit to prepare graduates professionally and ethically to practice law, the main question in its decision-making

process should not consider the Covenant at all. TWU emphasized this point in its *Reply Submission*, arguing that

[it is] not about whether it is in the public interest to recognize or approve the Community Covenant or TWU itself LSUC must focus on the graduates and ask whether it is contrary to the public interest to admit those individuals to the practice of law in Ontario (*Reply Submission* at paras. 31–32).

This quote reflects a dominant theme in TWU’s discourse in regard to its framing of key signifiers: it was outside of the law societies’ mandates to consider the Covenant in their assessment of TWU’s law school. In this framing, the question of whether the differential treatment of LGBTQ persons arising from the Community Covenant was harmful to the public interest was excluded from the law societies’ assessment processes (LSUC April 24 Transcript).

While the meaning of the public interest signifier was clearly a nodal point with a consistent meaning within TWU’s discourse, both law societies were conflicted over the meaning of the public interest in the context of their mandates. In this sense, one can understand the public interest both as an external floating signifier, when considered in relation to TWU’s discourse, and as an internal floating signifier, when considering the different arguments within the discourses of the law societies. In other words, within the discourses of the law societies, there were two competing conceptions of public interest, constituting an antagonism.

The first conception was more consistent with TWU’s argument for a narrow interpretation of the public interest. Benchers making this argument referred to the *TWU v BCCT* decision and the idea that this case still stood as precedent. For example, in the first meeting of the Law Society of Upper Canada on April 10, 2014, Bencher Callaghan drew from the majority opinion in the case, suggesting that the meaning of the public interest for the College of Teachers was the same as for the law society:

I don't quite see that the public interest in the teaching [*TWU v BCCT*] is different than the public interest we have, and I don't think that the public interest, making sure our children are educated in a secular society with the tolerance of a secular society, is different than our rule of law at that level, and the Supreme Court of Canada acknowledged that's [*sic*] (LSUC April 10 Transcript at p. 140).

A theme in the arguments of Benchers who concluded that *TWU v BCCT* applied in the context of the law societies' decision was that the public interest consideration should be the same for the law societies as for the BCCT. As I discussed in chapter one, in *TWU v BCCT*, the majority concluded that as part of its public interest mandate, the BCCT had jurisdiction to consider issues of discrimination in assessing TWU's teacher training program application, but this was limited to assessing whether graduates of TWU would practice discrimination in the course of their professional duties as teachers. In this context, the Covenant (then called the Community Standards) on its own was not sufficient evidence that TWU graduates would discriminate against LGBTQ persons in their teaching, and therefore not a justification to deny approval to TWU's teacher training program (*TWU v BCCT*). In this view, the existence of the Covenant and the personal religious beliefs of graduates who might choose to attend TWU's law school did not serve as evidence of discrimination in a way that would harm the public interest.

This relatively narrow framing of the public interest signifier suggests a more limited mandate that only considers the standards of education and the competence of lawyers graduating from TWU. For example, near the beginning of the Law Society of British Columbia's meeting on April 11, 2014, a Bencher referred to in the LSBC's transcript as ER argued that the LSBC's public interest mandate did not extend to considering "a particular school based solely on the characteristics of a school and not on the quality of the education provided in the school or the competency of the graduate" (LSBC April Transcript at p. 1169). Some Benchers advanced this narrower meaning of the public interest in both law societies' decision-

making processes, and it aligns with the public interest as articulated in Trinity Western's discourse.

Benchers who viewed the public interest narrowly, only in relation to graduates' standards of education and competence, were drawing on a meaning of the signifier of the main question that asked only whether TWU Law would competently train graduates to practice law and excluded consideration of the Covenant. In this framing, one could consider the public interest in relation to the standards of education of law school graduates, but the act of signing the Covenant was taken as a personal expression of religious belief and did not provide evidence that a graduate's religious beliefs would cause discriminatory conduct against LGBTQ persons in their role as a lawyer. As the decision to sign the Covenant was an individual expression of religious belief, approving of lawyers who had signed it was not contrary to the public interest. Linked together, these signifiers produce a version of religion that was individual and therefore did not challenge constitutional law's conceptualization of religion as centred on individual consciousness and personal commitments (Berger, 2015, pp. 100–101). Notably, this discourse, which implied the approval of TWU Law, did not become hegemonic. Rather, as I will show next, the law societies articulated an antagonistic meaning of the public interest that suppressed this interpretation and offered a different rendering of religion.

Several Benchers argued for a broader meaning of the law societies' public interest mandates that included consideration of the Covenant and the effect it would have on LGBTQ individuals and their access to legal education, as well as on the legal profession. Benchers in both law societies made this argument using phrases such as "preserving and protecting the rights of all peoples," "advancing the cause of justice and the rule of law," and "facilitating access to justice." They drew these phrases intertextually from sections of their respective law

societies' founding legislation that stipulate that law societies are to protect the public interest (*Law Society Act*, RSO 1990, c L. 8, (as in force 2014) < <https://canlii.ca/t/527j8>> [*Law Society Act*]; *Legal Profession Act*, SBC 1998, c 9 (as in force 2014)< <https://canlii.ca/t/527wc>>) [*Legal Profession Act*]). The BCCT's public interest mandate as laid out in the *Teaching Profession Act* charged the BCCT to uphold the standards of education, professional responsibility, and competence of its members (RSBC 1996, c 449, s. 4).

However, several Benchers argued that the law societies' public interest mandates were broader. One LSUC Bencher, Leiper, specifically stated that "our statutory duties are arguably broader than those of the BCCT" (LSUC April 24 Transcript at pp. 254–255). Several Benchers referred to specific principles and duties listed in Ontario's *Law Society Act* and British Columbia's *Legal Profession Act*. For instance, during the LSUC Benchers' April 10, 2014, meeting, Bencher Mercer stated,

Section 4.2 [of Ontario's *Law Society Act*] commands that we have regard to our duty to maintain and advance the cause of justice and the rule of law and that we observe our duty to protect the public interest. I believe that the importance that the Law Society has placed on diversity in the profession and equality of access to the profession reflects in substantial part these duties. Our focus is in part on the rights of applicants to the profession and licensees, but I think our focus on diversity in the profession and equal access to the profession is more important than that (LSUC April 10 Transcript at pp. 59–60).

This quotation is representative of a common theme in the arguments of Benchers in both law societies who argued against TWU's law school: their public interest mandates involved maintaining equality of access and diversity in the legal profession, as well as protecting the public from discrimination. This argument emphasizes certain principles, specifically, sections 4.2.1 (advancing the cause of justice and the rule of law) and 4.2.2 (equality of access to the legal profession) of Ontario's *Law Society Act*. Another key phrase in the quote above, promoting diversity in the legal profession, does not directly originate from the *Act* itself, but LSUC

Bencher Mercer nonetheless identifies it as central to the Law Society of Upper Canada's duty to protect the public interest.

Similarly, during the LSUC's first meeting to consider TWU's law school, Bencher MacKenzie contemplated how much attitudes on LGBTQ rights had changed between 2001, when *TWU v BCCT* was decided, and 2014, when the law societies were making their decisions on TWU's law school. MacKenzie noted that since 2001, the Law Society of Upper Canada had established various committees and advisory groups, like the Equity and Aboriginal Issues Committee and the Equity Advisory Group,¹² intended to promote equity and diversity in the practice of law in Ontario. It had also adopted a rule into its *Complete Rules of Professional Conduct*¹³ stating that lawyers have a "special responsibility to honour the obligation not to discriminate on grounds that include sexual orientation" (LSUC April 10 Transcript at pp. 28–9). Benchers advocating for a broad meaning of the public interest made these and similar intertextual arguments, essentially suggesting that law societies have a special responsibility and duty as protectors and gatekeepers of the legal profession to shield the public from discrimination and advance equality.

An additional argument by some Benchers for a broader interpretation of the public interest recognized that TWU's religious beliefs were protected by the Charter. However, these Benchers found that when those beliefs cause harm to a segment of the population by denying them equal access to education because they are LGBTQ, it was in the public interest to protect

¹² The Equity and Aboriginal Issues Committee is now called the Equity and Indigenous Issues Committee. It is tasked to develop policy and practices to promote equality and diversity in the legal profession, specifically related to equality-seeking groups and Indigenous and Francophone peoples. The Equity Advisory Group acts as an expert advisory body to the Committee, identifying issues affecting equity communities and providing input on policy and practices related to equity (Law Society of Ontario, 2025b; O'Hagan, 2024)

¹³ The *Complete Rules of Professional Conduct* lay out the professional and ethical obligations of lawyers in Ontario and the way they are enforced by the Law Society of Ontario (Law Society of Ontario, 2024b).

LGBTQ equality. At the April 11 meeting of the LSBC Benchers, for example, the Bencher referred to in the transcript as LO argued,

Nobody is ... denying TWU the right to have the right to religious beliefs, but there is an attack I think on a minority, and I think that I am persuaded by the oath I've taken for the Law Society to protect all persons And I think it is, for me it is in the public interest to shield that part of the population I think there is harm, there's harm in just that the bar, the door is closed to a segment of the population that are gay (LSBC April Transcript at p. 1178).

This quote reflects an understanding that appeared often in the argument of Benchers who disapproved of TWU's law school: the Community Covenant would effectively bar access to TWU's law school for the LGBTQ population and thereby create a barrier to the legal profession. In other words, if TWU discriminates against LGBTQ people and opens a law school, those law school spots will essentially be inaccessible to LGBTQ people, or if they do access them, they will need to submit to discrimination. These Benchers argued that as the gatekeepers to that profession, the law societies should ensure that all positions at law schools (the entryway into the legal profession) remained open to a diversity of people (LSBC April Transcript).

Framed this way, the Community Covenant is not simply an expression of private belief because it both discourages LGBTQ individuals who might have been interested in applying to TWU's law school and, because signing the Covenant was a requirement for all students entering TWU, has a broader effect on limiting access to legal education and the legal profession for LGBTQ people as a group. As a result of these effects, which go beyond simply expressing individual religious beliefs, the Covenant becomes part of the law societies' assessment of the public interest.

As such, this broader public interest signifier takes account of the Community Covenant's impact on LGBTQ equality and is linked with the main question signifier, which is interpreted to

account for how the Covenant impacts equal access to education and the legal profession. Centred on promoting diversity and protecting equality, the broad public interest signifier is antagonistic to the more limited version of the public interest discussed above, articulated by some other Benchers and centred on graduates' education and competence. These antagonistic meanings within the law societies' discourses make the public interest an internal floating signifier, in addition to its status as an external floating signifier in relation to the narrow public interest signifier articulated in TWU's discourse.

As administrative decision-makers charged to balance Charter rights and values, the Benchers who argued for the broad interpretation of the public interest mandates gave a meaning to the public interest that also aligned more closely with the Charter value of LGBTQ equality than with freedom of religion. Specifically, while these Benchers recognized TWU's right to freedom of religion, they found that it would be contrary to the public interest not to protect LGBTQ people from discrimination and unequal access to legal education. This broad interpretation of the public interest was also linked with that interpretation of the main question signifier that takes the impact of the Covenant into account in the approval process of TWU Law. In this view, the religious beliefs of the TWU community, as represented in the Covenant, operate as an institutional policy that limits both the equality rights of LGBTQ individuals interested in the law school and the access of LGBTQ people as a group to the legal profession. As such, the meaning of the Covenant would not be confined to expressing the beliefs of individual TWU students but would also impact on the public sphere in a way contrary to the public interest.

Linked together, this argument produced a version of religion with both individual and institutional aspects. It was this discourse that became hegemonic but, importantly, through the

rejection of the law school, the version of religion that was rendered tolerable to the law was again centred on “the rights associated with freedom of individual conscience,” marking the institutional elements of religion as intolerable through the rejection of the law school (Berger, 2015, p. 72).

In this section, I have assessed and compared how Trinity Western and the law societies produced divergent and overlapping understandings of the public interest signifier. I conclude that as both an internal and external floating signifier, the public interest served as a major and important point of antagonism in the law societies’ overall decision-making processes. Specifically, in TWU’s discourse, the public interest mandates of the law societies only extended to the quality of its legal program and the competency of graduates. Aligning with TWU’s signifier, one argument made in the law societies’ decision-making processes also understood the law societies to have narrow public interest mandates limited to assessing the law curriculum and the competence of graduates. In contrast, a second argument, evident in both law societies’ discourses, offered a conflicting, broader meaning of the public interest that included consideration of the discriminatory nature of the Community Covenant. As I have shown, Benchers put forward antagonistic meanings of the public interest, yet both are part of discourses that produce versions of religion ultimately centred on the individual.

I will next consider how the broad and narrow framings of the public interest shifted the way the discrimination was framed, that is, how the signifier of the public interest impacted the meaning of discrimination. This shift meant that a hegemonic intervention in relation to the public interest signifier had a downstream effect on the meaning of discrimination.

Discrimination Based on Religion or Sex(uality)?

Competing to define discrimination within the decision-making processes of both law societies are antagonistic arguments regarding the Charter rights of religious freedom and LGBTQ equality. In this section, I examine the different ways Trinity Western University and the law societies define discrimination. One meaning of discrimination evident in TWU's discourse and advanced by some Benchers from both law societies viewed denying the law school as religious discrimination. Another argument made by Benchers of both law societies, however, framed discrimination as filtering out prospective LGBTQ students and making TWU Law a hostile environment for such students. Therefore, as I will show, within Trinity Western's discourse, one can consider discrimination a nodal point. When viewed in relation to the meanings given to discrimination within the law societies' discourses, however, it becomes both an external and internal floating signifier.

At the heart of the debates over the meaning of discrimination within the law societies' decision-making processes are the Charter-protected rights to equality and freedom of religion. Section 15 of the *Charter of Rights and Freedoms* provides that

every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or physical disability [Charter s. 15].¹⁴

Section 2(a) of the Charter, meanwhile, guarantees that everyone has a fundamental "freedom of conscience and religion," meaning they are free to follow the religion of their choice without

¹⁴ Although sexual orientation is not expressly enumerated in section 15 of the Charter, the Supreme Court held in *Vriend v Alberta*, [1998] 1 SCR 493, that its exclusion from Alberta's human rights legislation violated section 15. The Court "read in" sexual orientation as a protected Charter ground to ensure equal protection and benefit of the law for LGBTQ individuals.

interference from profound personal beliefs (Charter). However, Trinity Western and the Benchers of the law societies held different understandings of what qualified as discrimination and would be a violation of Charter rights.

In the discourse of Trinity Western, denial of the law school was understood as interference with the religious beliefs of both TWU's community and the potential graduates of its proposed law school. Toward the end of his speech to LSUC Benchers on April 24, 2014, TWU President Kuhn argued in defence of graduates who were at risk of having their religious rights infringed upon:

So, what's at stake? What's the decision here? What's at stake here today is the critically important question, does an evangelical Christian educational community, TWU and its members, have freedom of religion such that its law school graduates will be permitted to practice law in Ontario? Is there a willingness, in the words of former Chief Justice Dickerson [*sic*], to accommodate Trinity Western's code of conduct, definition of marriage and the religious belief upon which they are based [?] (LSUC April 24 Transcript at p. 214).

TWU's discourse consistently understood denial of its law school as interference with the freedom of religion of the TWU community and its graduates. For TWU, there was no conflict over which values and whose rights were at risk in the law societies' decision-making processes. Only the religious beliefs of TWU's community and graduates were in danger of infringement, making the specifically religious definition of discrimination an internal nodal point for TWU. TWU constructed religious discrimination such that graduates would face discrimination and denial of their degrees not because of individual character or competence but based on their religious beliefs and those of their community and institution. In his April 24, 2014, speech to LSUC Benchers, President Kuhn stated,

Opponents of TWU's law school would have you judge those students as being inadequately prepared to practice law in this province. They would have you bar the door to entry, regardless of their personal qualifications. And why would they condemn those young lawyers? Because they attended a law school that

maintained the traditional religious marriage as being between one man and one woman, a belief that is protected by law and is still widely held in Canada (LSUC April 24 Transcript at p. 214).

In TWU's discourse, discrimination was a nodal point, which means no internal antagonistic meaning was attributed it. TWU consistently argued that it would be discriminatory to reject graduates based on the mandatory Covenant. In TWU's discourse, the meaning attributed to discrimination was denying TWU Law graduates access to the legal profession based on their religious beliefs. In this framing, it was the law societies, not TWU and its Covenant, that were engaging in discrimination by barring the door of entry to the legal profession for religious law students.

In TWU's discourse, this meaning of discrimination as a signifier is linked to the meanings of the main question and the public interest. TWU argued that the main question to be answered by Benchers in the law societies' decision-making process was only if its law graduates would be adequately trained to practice law. It was only in the context of this question that the Benchers could consider if it would be in the public interest to approve TWU Law. If TWU's law students were properly trained, it would not be contrary to the public interest for the law societies to recognize their degrees. Without concrete evidence that TWU's graduates would engage in discriminatory conduct as a result of the Covenant, it was outside the scope of the law societies' public interest mandates to consider it.

That is, TWU argued that the main question Benchers had to answer could only take account of the religious beliefs and practices of the TWU community and graduates if discriminatory conduct could be proven and it became relevant to the public interest. As such, if it was not against the public interest to approve the law school, then denial of the law school and the graduates would be based not on concerns about competency but on the religious beliefs of

the graduates and the TWU educational community. While TWU's framings of these signifiers centre on the individual, its discourse about discrimination renders a version of religion that has both individual and communal elements. Specifically, denying the law school because of religious belief would violate the freedom of religion of graduates and TWU as an institution.

Similar to TWU's discourse, some Benchers from both law societies argued that rejecting TWU's law school would violate the religious freedom of prospective TWU law students based on their personal religious beliefs. Several Benchers from both law societies agreed that the religious belief that marriage was only between a man and a woman was on its own protected by the Charter and recognized in the *Civil Marriage Act*, S.C. 2005, c. 33 [*Civil Marriage Act*]. The belief, although exclusive of same-sex couples, was not in itself proof of harmful conduct and did not justify denying recognition of TWU's law degrees. These Benchers found that rejecting TWU Law because of the religious beliefs presented in the Covenant would be discriminatory and make the law societies, rather than Trinity Western, responsible for unequal access to the legal profession. During the Law Society of Upper Canada's second meeting on April 24, 2014, for example, Bencher Doyle stated,

Are we not discriminating against these students because their law school happens to be an educational institution that requires students and faculty to sign a Covenant that mandates an adherence to a conduct that many of us may find abhorrent, that requires sexual intercourse only between a man and woman who are married and is discriminatory in its sense (LSUC April 24 Transcript at pp. 292–293).

This quote reflects a common sentiment that emerged in the arguments of Benchers from both law societies who argued that TWU's law school should be approved: although Benchers might dislike the Covenant, it would be discriminatory toward prospective students to deny the law school simply because of their religious beliefs. This is similar to Trinity Western's framing of discrimination. However, the Benchers that argued denying recognition of TWU's law school

would be religious discrimination did not completely align with TWU's discourse. Unlike TWU, these Benchers acknowledged that the Community Covenant as a religious code of conduct had a definition of marriage that excluded same-sex couples and therefore treated LGBTQ people differently. However, they concluded that without proof that the religious beliefs expressed in the Covenant caused individual harmful conduct, blocking graduates from practicing law because they would be required to sign the Covenant would be a violation of law graduates' freedom of religion.

Several Law Society of British Columbia Benchers also made an additional argument as to why denying TWU's law school would be religious discrimination. Agreeing that to reject the law school would bar access to the legal profession for TWU law school graduates, some Benchers also pointed out that the law school essentially already existed. For example, in the April 11, 2014, meeting of the LSBC Benchers, the Bencher referred to as CR in the transcript stated,

The Ministry of Advanced Education also gave TWU their approval as did the Federation of Law Societies of Canada. Trinity Western now has the right, under the law, to have a law school. We are talking about whether or not the Law Society of British Columbia will recognize the graduates of TWU or deny them the right to practice in British Columbia. This would truly be a case of discrimination (LSBC April Transcript at p. 1162).

Although only by a select number of Law Society of British Columbia Benchers asserted this point, it is relevant that during the April debates of the LSBC (and LSUC), Trinity Western's law school had approval from the Ministry of Advanced Education of B.C. and the Federation of Law Societies of Canada. In this view, TWU Law as a religious law school already had approval to operate. The law society's decision would therefore be to approve or reject graduates' ability to practice law in British Columbia. This argument emphasized that since the law school had already been approved by the FLS and the B.C. government, denial would be motivated by

dislike of its religious nature. A handful of Benchers raised this point during the LSBC's decision-making process, though Benchers in the Law Society of Upper Canada did not (CBC News, 2014; LSBC September Transcript).

During the LSBC Bencher debates, and before the members' intervention, Trinity Western's law school had approval from the B.C. Minister of Advanced Education. Rejection of the law school's graduates or refusal to recognize their degrees, the argument ran, would mean treating these graduates as less worthy of recognition based on their religious beliefs and the characteristics of their school rather than any standards of learning; this would be discriminatory. Discrimination understood as religious discrimination is thus a floating signifier within the discourses of the law societies and in relation to TWU's discourse. Specifically, while each argument concludes that the discrimination in question is against religion, there are differences in how they articulate that meaning.

Benchers who argued that denying the law school would be discriminatory to prospective TWU law school students and the TWU as a religious educational institution produced a version of religion that had both individual and institutional aspects. To be precise, Benchers from both law societies made an argument originating from a main question signifier framed as whether graduates would be competent to practice law, linked to a limited framing of the public interest considered only in relation to these graduates' education and competence. Together, these signifiers lead to the conclusion that denial of the law school would be due to religious beliefs and therefore would be religious discrimination.

Some Benchers of the Law Society of British Columbia made an additional argument that also produced a version of religion with both individual and institutional aspects. The LSBC Benchers concluded that in denying the law school, the law society would be discriminating

against the religious beliefs and violating the religious freedom of both TWU and the law school graduates. As such, the version of religion produced by the Benchers of the Law Society of Upper Canada who were in favour of approving TWU's law school remained centred on individual religious beliefs, while the version rendered by the arguments of those Benchers of the Law Society of British Columbia in favour of approval added an institutional element. However, neither of these discourses, which would have both tolerated the approval of the law school, were ultimately made hegemonic by the decisions of the law societies.

Instead, some benchers from both law societies made another argument that competed with that about religious discrimination to fill the discrimination signifier with meaning. These Benchers argued that what was at stake in their decision was not religious discrimination but discrimination against LGBTQ people. In the April 24 debate of the Law Society of Upper Canada, for example, Bencher Campion argued

that the Covenant has nothing or little to do with religious freedom. The Covenant has to do with sexuality, sexual practices. Some may say that is a religious matter. I don't think it is, but that's my view and we're not here to discuss my view when I come to analyze at the point of signing what the implications are for the person who has to sign it. If it's discriminatory in a way that's contrary to the public policy of Ontario we are obligated to reject the accreditation (LSUC April 24 Transcript at p. 244).

This quote represents a dominant theme in the arguments of Benchers who opposed the approval of TWU's law school, which was that the Covenant had a discriminatory effect on LGBTQ people because it sent the message that they were unwelcome at TWU unless they renounced their identity and abstained from intimate relationships (LSBC April Transcript).

In the processes of the law societies of both Upper Canada and British Columbia, Benchers also considered how the Covenant operated as university policy that affected the diversity of the legal profession by filtering out potential LGBTQ students and giving preference

to students from one religious denomination. Only students graduating from accredited law schools can commence a law society licencing process. At the time of the law societies' debates in 2014, this was unrestricted by religion, gender, marital status, or sexual orientation; approving TWU's law school would thus change who entered the law societies' licensing processes by creating some law school spots that discouraged LGBTQ persons and gave preference to evangelical students (LSUC April 24 Transcript at p. 321). This framing makes discrimination an internal floating signifier within the discourses of the law societies.

This meaning of discrimination came to dominate in the discourses of the law societies, particularly following the hegemonic intervention by the LSBC members directing Benchers to reject TWU's law school and both law societies' final decisions to reject TWU Law. Benchers who argued that approving the law school would be contrary to the public interest because of the LGBTQ discrimination resulting from the Covenant gave a meaning to the public interest more closely associated with the Charter value of LGBTQ equality. This answers my second research question, as to if the law societies, as administrative decision-makers, aligned the meaning of public interest more closely with freedom of religion or LGBTQ equality.

The Benchers making this argument linked together a series of signifiers that included a version of the main question framed to consider the impact of the Covenant on the public interest, which was itself understood as protecting the public from discrimination and advancing diversity; discrimination, in turn, was understood as LGBTQ discrimination. Specifically, in this framing, discrimination was understood as the unequal access to the legal profession for LGBTQ people as a group resulting from the Covenant, as well as the differential treatment for LGBTQ individuals enrolled at TWU. Linking these signifiers together, the Benchers' arguments produced a version of religion with both individual and institutional aspects. Both law societies

made this discourse hegemonic by rejecting the law school, and thus also the institutional element of religion. In other words, rejecting the law school rendered a version of religion that did not allow the religious beliefs in the Community Covenant to have an impact beyond individual TWU graduates and their community into the legal profession.

In this section, I have assessed and compared the signifiers of discrimination in the discourses of the law societies and Trinity Western. As I have shown, in TWU's discourse, there was no internal conflict over the meaning of discrimination. Denying the law school was understood as a violation of freedom of religion for the TWU community and its graduates, making it an internal nodal point. Although some Benchers agreed that to deny the law school would be religious discrimination, they reached that conclusion differently from TWU. These Benchers acknowledged the discrimination represented in the Covenant but concluded they could not reject the law school without concrete proof of discriminatory behaviour by graduates. Framed differently, discrimination becomes a floating signifier within these law societies' arguments and in relation to TWU's discourse.

Additionally, another argument about the meaning of discrimination that arose during the law societies' processes was antagonistic to discrimination understood as a violation of religious freedom. Benchers making this argument framed discrimination as a violation of LGBTQ equality. The meaning of discrimination pertaining to LGBTQ people thus conflicted internally in each law society's discourse with arguments about religious discrimination, as well as conflicting externally with TWU's discourse. However, while TWU's discourse rendered a version of religion that was individual and communal, with the rejection of the law school, both Benchers' arguments produced versions of religion that were ultimately individual.

A Series of Hegemonic Interventions

The decisions of the Benchers of the law societies functioned as hegemonic interventions made with the power to temporarily settle an antagonism and make one conflicting meaning of a signifier dominant. Put another way, a hegemonic intervention intercedes at a point of antagonism, such as in the conflict between TWU and the law societies over TWU's law school, to settle the meaning of a discourse—for example, if it is against the public interest to approve that law school—and exclude any alternative discourses (Jørgensen & Phillips, 2002). Chronologically, the Law Society of Upper Canada began deliberations over TWU's law school first, on April 10, 2014, but it was the Law Society of British Columbia that made the first hegemonic intervention in the approval process of the law school, with a vote of the Benchers following its meeting on April 11, 2014.

The LSBC Benchers' initial hegemonic intervention approved TWU's law school. This fixed the meaning of the main question so that the only issue before the Benchers was assessing the quality of the training provided by TWU, not unequal treatment or access to the legal profession for LGBTQ people. Co-productively, the LSBC Benchers' decision solidified the meaning of the public interest, narrowly and temporarily centring it on the standards of education and the competence of lawyers, and not on the impact of the Covenant on the public sphere. At the same time, the signifier of discrimination stabilized to mean religious discrimination, where to deny the law school based on the Community Covenant would have been discriminatory to TWU's law school graduates.

In contrast, the first hegemonic intervention in the process of the Law Society of Upper Canada came on April 24, 2014. The LSUC Benchers voted to reject TWU's law school, defining the main question as including a consideration of the Covenant. This hegemonic intervention also fixed the meaning of public interest broadly, to include not only the training

TWU would provide to law students but also the discriminatory nature of the Covenant. At the same time, it fixed the floating signifier of discrimination as referring to LGBTQ discrimination. The LSUC Benchers understood the Community Covenant to infringe LGBTQ equality. The law society's hegemonic intervention crystalized the discourse that it was against the public interest to approve TWU's law school as the Covenant unjustly infringed on LGBTQ equality.

Interestingly, stemming from the way each signifier is co-productive, the initial hegemonic intervention by the Law Society of British Columbia Benchers and that made by the Benchers of the Law Society of Upper Canada fixed their respective discourses in opposing ways. For example, the Law Society of Upper Canada's discourse had settled on LGBTQ discrimination, while that of the LSBC took discrimination to be religious in nature. However, as I explore in chapter eight, the decision of the Law Society of British Columbia's Benchers became unfixed with a second hegemonic intervention in the form of the LSBC members' vote in June 2014. In voting to direct Benchers to reject the law school, the members destabilized signifiers that had previously been fixed.

In the LSBC Benchers meeting on September 26, 2014, the Benchers decided to be held to the results of the members' referendum vote on whether to approve the law school. This was a hegemonic intervention of the LSBC members to reject TWU's law school. It destabilized and refixed the main question signifier as one considering if approving the law school with the Covenant in place would be contrary to the public interest. The meaning of the public interest was thus reformulated and refixed in response to the members vote, to an interpretation that had to assess the impact of the Community Covenant. As such, the meaning of discrimination also shifted from religious discrimination to LGBTQ discrimination, understood as the Covenant creating differential treatment and unequal access to the legal profession.

Conclusion

In this chapter, I have shown how the final decisions of the law societies echo the pattern found at other levels of Canadian constitutional law, such as the Supreme Court, wherein law renders religion as individual. However, I have also shown how the Benchers made hegemonic a discourse that produced a version of religion with both individual and institutional aspects. It was their final decisions to reject the law school that produced a version of religion that did not tolerate institutional elements, thus bringing their interpretations into alignment with Berger's (2015) understanding of how constitutional law renders religion. In making hegemonic this individual version of religion, the law societies' Benchers also suppressed TWU's discourse, which rendered religion with both individual and communal elements. To make this determination, I have examined how Trinity Western University and the law societies framed the signifiers of the main question, the public interest, and discrimination in the TWU law school's approval process. I conclude that a series of hegemonic interventions by the law societies fixed a shared meaning of the main question, public interest, and discrimination signifiers.

Drawing from this chain of signifiers, the Benchers produced a version of religion that included both individual and institutional elements. Specifically, approving the law was against the public interest due to the religious beliefs expressed in the Community Covenant, which created differential treatment for LGBTQ individuals and LGBTQ people as a group. Within this network of signifiers, rejecting the law school did not allow religion to extend beyond the personal religious beliefs of individual graduates of TWU's law school; religion thus remained individual, in alignment with how Canadian constitutional law renders it. Finally, I find an answer to my second research question, in that the law societies' hegemonic interventions stabilized a meaning of the public interest where LGBTQ discrimination that impacted the public

sphere was contrary to the public interest, so that, in the context of the TWU law school controversy, the public interest more closely aligned with the Charter value of LGBTQ equality than with freedom of religion. Next, I explore how the signifier of the Community Covenant operated in the discourses of Trinity Western University and the law societies, and whether signing the Covenant was an autonomous choice or a form of coercion.

Chapter Six: Signing the Covenant as a Choice or Coercion?

“And the core of this issue ... is that the code ... or the Covenant embodies discriminatory practices. It’s not a proxy for religious belief” (LSUC April 24 Transcript at p. 276).

In this chapter, I consider if the law societies’ decisions in the approval processes of TWU’s law school produced a version of religion as an autonomous choice similar to that observed by Berger (2015) at other levels of constitutional law. To do so, I assess and compare the different ways Trinity Western University and the law societies framed the Community Covenant. Specifically, using the methodology I developed in chapter four, I examine how TWU and the law societies’ Benchers attributed different meanings to signing the Covenant—either as an autonomous choice and expression of religious belief, or as coercion into agreeing with the TWU’s community’s religious beliefs in order to enroll at the university. I also explore an argument from the Law Society of British Columbia that emphasized that those who supported same-sex unions would choose not to attend TWU’s law school. Therefore, for those that did attend, the TWU community’s religious beliefs were not a form of coercion.

I examine the Community Covenant as a signifier because my analysis revealed the Covenant was framed antagonistically as either an individual choice or a form of coercion. Each of these framings led to a different rendering of religion. I will demonstrate how, within the processes of both law societies, a discourse that would have rendered religion as a form of coercion was advanced but rejected through the denial of the law school.

The Community Covenant

In this section, I examine how the Community Covenant was framed in the arguments of Trinity Western and the law societies. Three arguments worked to fill the signifier of the Community Covenant with meaning. One meaning attributed to the Covenant, articulated in

TWU's discourse, framed signing the Covenant as an autonomous choice through which individuals agreed to follow the behavioural expectations in TWU's code of conduct and participate in the community. An argument advanced by some Benchers from both law societies shared a similar element, in that they understood signing the Covenant as an autonomous choice but, specifically, an individual expression of religious belief. In contrast, a second framing, evident in arguments made by other Benchers of both law societies, understood the Community Covenant as a discriminatory admissions policy. In this sense, while there was a shared meaning attributed to signing the Covenant in TWU's discourse and in one of the arguments articulated by Benchers, both of which framed it as an autonomous choice, it also functioned as an external floating signifier between TWU's discourse and the two arguments advanced by Benchers, as well as internally between the different arguments made by Benchers.

In TWU's discourse, signing the Community Covenant and joining the TWU community was understood as a voluntary or autonomous choice made by individual prospective members. In exercising their autonomy to sign the Covenant, members entered into a solemn pledge, placing themselves under obligation to TWU as an institution and to other members of the community (TWU Community Covenant at p. 401). For example, in his report on the Community Covenant commissioned by TWU's legal Counsel, Dr. Gerald Longjohn,¹⁵ a researcher of college student spiritual formation, explained that the Covenant encouraged "individual participation in and responsibility for the campus community. The Covenant places a high emphasis on mutual moral responsibility for the desired campus community" (*Trinity*

¹⁵ At the time of his report, Dr. Longjohn was the Vice President for Student Development at Cornerstone University, in Grand Rapids, MI, USA. He holds an M.A. in Christian Education and a Doctorate of Ethical Leadership. His doctoral dissertation focused on college student spiritual formation and student codes of conduct (*Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 (Evidence, Respondent Vol. I, *Report of Dr. Gerald Longjohn*)).

Western University v Law Society of Upper Canada, 2018 SCC 33 (Evidence, Respondent Vol. I, *Report of Dr. Gerald Longjohn* at p. 50) [Longjohn Report]). As this quote reveals, a dominant theme in TWU’s discourse was that it was the individual who made a choice to enter and participate in the TWU religious community, but in doing so, they agreed to follow the religious behaviour expectations represented in the Covenant. Specifically, in TWU’s discourse, the individual was understood to surrender to God’s will; all teaching, learning, thinking, and scholarship took place under the direction of Scripture (*Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 (Evidence, Respondent Vol. I, *Introductory Statement of TWU Core Values Series* at p. 189) [Introduction to TWU Core Values]).

In this framing, the Covenant was a central element that bound the community together by holding the faculty, staff, and students who chose to join Trinity Western accountable to certain behaviour, practices, and beliefs of its version of evangelical Christianity. For example, during the Law Society of Upper Canada meeting on April 24, 2014, TWU President Kuhn quoted sections of the Community Covenant to Benchers, describing signing the Covenant as a way for administrators, faculty, staff, and students to come “together to form a community that strives to live according to biblical precepts” (LSUC April 24 Transcript at p. 217). In TWU’s discourse, the Covenant expressed the biblical foundations of the community, in which,

in keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions. Communication that is destructive to TWU community life and interpersonal relationships, including gossip, slander, vulgar, obscene language and prejudice. Harassment of any form, verbal physical, intimidation (LSUC April 24 Transcript at p. 219).

As the above quotations show, TWU framed the Community Covenant as a religious code of conduct that helped create a positive environment on campus by requiring certain evangelical behavioural expectations and Christian virtues, such as supporting other members of the

community and banning drunkenness, substance abuse, and tobacco (TWU Community Covenant at pp. 402–403).

While Kuhn acknowledged that the point of contention for many people was that the Covenant also asked students to voluntarily abstain from sexual intimacy except between a married man and woman, he insisted this served as a mechanism to help create relationships within the community and produce a shared understanding of faith. In this view, students who signed the Covenant and agreed to follow TWU’s religious beliefs were doing so voluntarily, making a choice and fulfilling their individual responsibility to help foster the TWU community. The Covenant, as a religious code of conduct, was understood to bind the community together with shared religious values that produced positive, desirable behaviour rather than any discriminatory conduct. There was no internal conflict in TWU’s discourse over the meaning of the Community Covenant, making it a nodal point.

In TWU’s discourse, while signing the Covenant could be framed as an individual voluntary choice, the Covenant functioned to produce a version of religion that was shared or communal. As I will show, this version of religion does not sit comfortably with how the Benchers of the law societies understand religion. There was an “experiential gap” or a point of miscommunication between the culture of TWU’s religion and the law societies’ culture of Canadian constitutional law about the question of what it meant for religion to be a voluntary choice (Berger, 2015, p. 22). Specifically, while both understood religion to be an individual’s autonomous choice, TWU framed signing the Covenant as both voluntary and a point of entry into a community with shared religious guidelines. On the other hand, the various arguments advanced by Benchers worked to find ways to render a version of religion where signing the Covenant remained solely an autonomous choice and an individual expression of religious belief.

For instance, rather than considering the function of the Community Covenant within the TWU community from a faith perspective, one argument made by the Benchers of the law societies focused on it in relation to issues of individual autonomy. Benchers were aware that if a prospective student chose to enroll at the university, they would need to sign the Community Covenant. However, the option not to enroll existed, so for some Benchers, this meant that signing the Covenant was an individual choice, with students making an independent decision to enter the TWU religious community and uphold or, at minimum, coexist with TWU's religious beliefs. One LSBC Bencher, referred to in the transcript as Bencher MF, stated during the April 11, 2014, meeting,

The subject covenant is a voluntary one that is undertaken by TWU students. Participation in the TWU academic community is a matter of choice. As the Supreme Court of Canada has observed, it may not be for everyone and it may not be to everyone's... taste (LSBC April Transcript at p. 1167).

A theme in the arguments of Benchers who supported the approval of TWU's law school was that signing the Covenant was an individual choice each student made when they entered the TWU community. Deciding to both enroll at TWU and follow the religious beliefs and practices of TWU's community was a voluntary choice made by an individual and guided by their "taste" or personal beliefs. Having chosen to sign, it was up to the student to decide whether to follow the behavioural expectations laid out in the Covenant, although Benchers making this argument generally accepted that those who attended or worked at TWU agreed with the religious beliefs officially expressed in the Covenant (LSUC April 10 Transcript).

In this view, prospective students applying to and deciding to enroll at TWU's law school were exercising their autonomy to follow their own religious beliefs and deeply held personal convictions. In these Benchers' arguments, the meaning of the Community Covenant as a signifier agreed with that proposed by TWU, in that both saw the act of signing the Covenant as

autonomous or voluntary. However, it was also a point of antagonism, in that the Benchers framed signing as an individual expression of religious belief. In TWU's discourse, signing the Covenant functioned to bring members into the TWU community and as a religious code of conduct to bind the TWU community together. This makes the Covenant an external floating signifier between TWU's discourse and the Benchers' arguments.

Additionally, some Benchers from the Law Society of British Columbia emphasized an argument suggesting that prospective students who did not agree with the religious beliefs enumerated in the Covenant would not be tempted to apply to the law school. In this framing, those who approved of same-sex unions would choose not to attend law school at TWU. For example, during the LSBC April 11, 2014, meeting, the Bencher referred to in the transcript as BM argued,

Students are free to apply and enroll in any university across Canada. Simply put, if you don't like what Trinity is offering, why would you seek admission? If there is a facility that tends to attract students who strongly believe in their views of same-sex unions, by all means, that's where you should seek admission (LSBC April Transcript, p. 1165).

This quote represents a theme in the argument of a number of Law Society of British Columbia Benchers that was not explicitly articulated by Benchers from the Law Society of Upper Canada: prospective students who approved of LGBTQ relationships would not apply to TWU. As such, students who applied and agreed to sign the Covenant were making a deliberate decision to attend a religious university.

The Benchers advancing this argument contended that having made the deliberate choice to attend TWU Law, signing the Covenant could not be seen to impose TWU's religious beliefs on incoming students. They supported this framing of the Covenant signifier intertextually by referencing the Supreme Court's decision in *TWU v BCCT*, where the Court maintained, as the

Bencher referred to in the transcript as MM pointed out during the LSBC's April 11, 2014, meeting, that

“...a homosexual student would not be tempted to apply for admission and... can only sign the so-called student contract at considerable personal cost.” The Court considered that cost yet the Court focused on the fact that TWU was a private religious institution that was not a fit for everyone and that ultimately students were free to apply to TWU or choose to go elsewhere for their education. TWU's students choose to go to TWU knowing the beliefs that are espoused by the university. This is a matter of choice not an imposition (LSBC April Transcript at p. 1174).

Again, this quote highlights the theme in the argument of some LSBC Benchers that LGBTQ people and those who disagreed with TWU's stance on same-sex relationships would not choose TWU's law school. While an LGBTQ person could sign the Covenant at “considerable personal cost” and hide their sexuality, those that did so would also have been free to choose another university (*TWU v BCCT* at para. 25). Therefore, the religious beliefs of TWU's community were not imposed on the individual upon signing the Covenant but adopted as a matter of choice.

Benchers who framed signing the Covenant as a choice made by an individual as an expression of religious belief were drawing on an argument that rendered a version of religion as an autonomous choice. This argument originated, as I showed in chapter five, from a framing of the main question that focused on the competency of graduates and excluded assessment of the impact of the Covenant on LGBTQ persons' access to education and the legal profession. As such, the public interest was framed narrowly as concerned with graduates' preparedness to practice law and therefore it would be discriminatory to deny recognition to the law school because of the religious beliefs of the TWU community and the law school graduates. As such, in this framing, signing the Covenant is understood as an individual exercising their autonomy to express religious beliefs and choosing to enroll at TWU Law.

Linked together, these signifiers produce a version of religion that is an individual, autonomous choice, which falls in line with how constitutional law has conceptualized religion at other levels (Berger, 2015, p. 82). Nevertheless, this discourse, which approved of the law school and understood signing the Covenant as a choice, did not become hegemonic. Instead, as I will prove, an antagonistic meaning attributed to signing the Covenant came to dominate the law societies' debates and rendered a different version of religion.

This second argument made by Benchers from both law societies understood signing the Community Covenant to be a university entry requirement, and therefore an institutionally imposed obligation and mechanism of coercion that violated an individual's autonomy and choice. These Benchers saw the Community Covenant as a discriminatory admissions policy and filtering process imposed on potential members who might have wanted to enter the legal profession. For instance, in the first meeting of the Law Society of Upper Canada on April 10, 2014, Bencher Campion reasoned,

If the covenant is exclusionary, it must be reviewed as an admission criteria [*sic*] or policy that impacts on our accreditation in Ontario. If the exclusion is based upon sexual orientation or personal intimate practices, it must be judged against our analysis of public interest in Ontario. My present analysis is that the public interest is overwhelmingly in favour of eliminating all exclusion, direct or indirect based on sexual orientation or private, intimate practices (LSUC April 10 Transcript at pp.144–145).

This quote is representative of a theme that emerged in arguments of Benchers from both law societies who were against approval of the law school, namely that the Covenant set an admissions criterion based on sexual conduct rather than merit. Framed this way, the Covenant worked by filtering out LGBTQ people from applying to the law school based on sexual orientation and restricted the autonomy and choice of prospective LGBTQ students by limiting their selection of law schools (LSBC April Transcript).

Interestingly, Benchers who framed the Community Covenant as a discriminatory admissions policy argued that they were not intolerant of the TWU Community's religious beliefs as expressed in the Covenant. The issue, as they saw it, was the imposition of those beliefs on non-believers, a category that included both prospective students and students enrolled at TWU Law. For example, during the Law Society of British Columbia's meeting on April 11, 2014, the Bencher referred to in the transcript as JA held that they had no issue with a religious law school or even a law school with a core religious belief that same-sex marriage and intimacy was a sin. However, JA stated,

What I take issue with is that belief being imposed on those who do not share that belief. No one is asking any of their religious students or faculty to abandon their beliefs.... But TWU is requiring LGBTQ students and faculty as an effective condition of entry to the law school to hide their sexual orientation and reenter [*sic*] the closet that they have been told by the Supreme Court of Canada they no longer need to hide in (LSBC April Transcript at p. 1149).

As this quote indicates, a common element in the argument of Benchers who were against the approval of the law school was that while they supported TWU's right to freedom of religion, they would not support coercing others to follow those beliefs in order to enroll at TWU Law. In this argument, the Covenant was framed as a form of coercion that restricted an individual's freedom to express their sexuality. While these Benchers were tolerant of TWU's private religious beliefs, they were unwilling to accommodate the imposition of those beliefs on incoming students.

For Benchers making this argument, incoming TWU law school students might sign the Covenant in order to secure a position at law school and in the process be forced to adopt religious beliefs that restricted their sexuality. For example, at the Law Society of Upper Canada's April 24, 2014, meeting, Bencher Campion stated that they supported TWU's freedom of religion and would defend it but also questioned the pressure this placed on students who

found themselves at the point of signing. Benchers Campion asked about LGBTQ students who would be forced to hide their sexuality in order to enroll at the university:

But the question is, at the point of signing does that lead to... a position where the person who has to sign, and I'm assuming they're signing it with all solemnity, do they feel a sense of guilt, humiliation, restriction, feelings of inferiority when they have to sign it if they happen to be of a particular community or sexual persuasion or sexual activity. What if they're common-law married or living common-law? Do they have to not tell the truth and go to the university in any event because they're so desperate to do it? (LSUC April 24 Transcript at pp. 245–246).

This quote highlights a theme in the argument of a number of Benchers from both law societies, namely that at the point of signing, the Covenant functioned to restrict LGBTQ people's ability to express their sexuality. Law school spots in Canada are very limited, with approximately three applicants competing for every available seat across the country (Semple, 2020). In this context, choosing to attend TWU's law school might not be a choice of religious preference; TWU might simply be the only law school where an applicant was accepted. Framed this way, signing the Covenant was not an individual expression of religious beliefs but an admissions criterion that violated an individual's freedom.

This argument from Benchers, which articulated the Covenant as a discriminatory admissions policy, was antagonistic to that articulated by TWU, which framed it as a voluntary choice and a communal expression of religious belief. It was also antagonistic to the Benchers' argument that framed signing as an autonomous choice and individual expression of religious belief. In this sense, the Community Covenant is an external floating signifier in relation to TWU's discourse and an internal floating signifier in relation to the argument advanced by other Benchers, which understood signing the Covenant to be an autonomous choice and individual expression of religious belief.

Benchers who argued that the Covenant functioned as a discriminatory admissions policy and understood signing it to be an infringement on autonomous choice were advancing an argument that rendered a version of religion that was non-voluntary. To be specific, as signing was an entry requirement for all students, the Covenant institutionalized a set of religious beliefs that excluded LGBTQ persons from admittance to TWU Law. These Benchers also argued that the mandatory nature of the Covenant functioned to both restrict an individual's ability to express their sexuality and filter out LGBTQ people as a group from enrolling at TWU's law school. This interpretation, in which signing the Covenant was a form of coercion, was linked to a framing of the main question that included consideration of the impact of the Covenant on access to education and the legal profession, linked to a broad public interest signifier. Therefore, discrimination was framed as discrimination against LGBTQ people individually and as a group, so that, when taken together, signing the Covenant attained the meaning of a discriminatory admissions policy that spread beyond the individual into the public sphere.

Within this network of meaning, signing the Covenant was framed to both restrict access to legal education for LGBTQ people as a group and coerce those who enrolled at TWU into conforming with the TWU community's religious beliefs as a condition of entry to the university. As such, tied together, the argument advanced by these Benchers rendered a coercive version of religion. Only by rejecting the law school could a version of religion as an autonomous choice be produced. That is, in denying the law school, the Benchers maintained law's fear that an individual's choice of religion was not truly a free choice. Rather, "[if] choice is not truly free, then the authenticity of autonomy is imperilled" (Berger, 2015, p. 89). The rejection of the law school, then, marked as intolerable an element of religion that the law comprehended as non-voluntary and coercive.

In this section, I have assessed and compared the meanings attributed to the Community Covenant in the discourses of Trinity Western and the law societies. I found that the Covenant was a key antagonism in the conflict between TWU and the law societies, as well as within the law societies' decision-making processes. In TWU's discourse, signing the Covenant was an individual voluntary choice through which one became a participant in TWU's religious community, such that that signing was a communal expression of religious belief. Similarly, some Benchers argued that signing the Covenant was also an autonomous choice, though doing so was seen as an individual expression of religious belief. In contrast, other Benchers framed the Covenant as a discriminatory admissions policy that filtered out LGBTQ persons from applying to TWU's law school and functioned to coerce students into following the TWU community's religious beliefs. Although these arguments framed signing the Covenant in antagonistic terms, both rendered a version of religion that remained a voluntary choice.

Cascading Hegemonic Interventions

At the conclusion of the Law Society of British Columbia's meeting on April 11, 2014, Benchers voted to approve Trinity Western University's proposed law school. In doing so, they made a hegemonic intervention that solidified the meaning of the Community Covenant signifier as an expression of autonomous choice and individual religious belief. Several British Columbia Benchers had also made an argument emphasizing that LGBTQ people and those who did not agree with TWU's exclusion of same-sex couples from marriage would not apply to or enroll at TWU's law school. This gave the LSBC's signifier of the Covenant a meaning whereby if an LGBTQ person chose to sign anyway, the Covenant could not be said to coerce them to follow TWU's religious beliefs.

However, the hegemonic intervention represented by the LSBC Benchers' decision did not hold for long. The Law Society of British Columbia's broader membership vote directed Benchers to reject the law school. This constituted a second hegemonic intervention, one that destabilized the signifier of the Community Covenant. Reconvening on September 26, 2014, the LSBC Benchers voted to be bound by the members' referendum vote, which eventually resulted in the rejection of the law school. In doing so, the meaning of the Covenant changed. In accepting the outcome of the referendum vote, the Benchers' decision this time understood the Covenant as a discriminatory admissions policy that would filter out LGBTQ people from entering the legal profession and that imposed religious beliefs on those who enrolled in TWU's law school. It would also restrict the ability of LGBTQ persons to express their sexuality.

Similarly, the Law Society of Upper Canada's vote to reject the law school on April 24, 2014, was a hegemonic intervention that solidified the signifier of the Community Covenant into a nodal point that framed it as a discriminatory admissions policy. This hegemonic intervention suppressed the argument advanced by some Benchers that had framed the Covenant as an expression of free choice and individual religious belief. It also rejected TWU's framing of signing the Covenant as an individual voluntary choice and a way to enter and be bound to the TWU community. The law society's decision fixed the framing of the Covenant as a form of coercion that enforced the TWU's religious beliefs on incoming students and discouraged prospective LGBTQ students from applying, solidifying it into a nodal point and hegemonic discourse.

Conclusion

In this chapter, I have demonstrated how the decisions of the law societies produce a version of religion that follows the same pattern seen at other levels of Canadian constitutional

law, where law takes religion as an autonomous choice. Specifically, I have demonstrated that the Benchers produced a hegemonic discourse that rendered a version of religion that was non-voluntary and coercive. In denying the law school, Benchers marked these coercive and non-voluntary elements as intolerable and instead rendered a version of religion as an autonomous choice. To reach this conclusion, I assessed and compared the different ways in which the discourses of Trinity Western University and the law societies framed the Community Covenant. I conclude that the Benchers' final decisions understood the Covenant as a discriminatory admissions policy that enforced religious beliefs on non-believers, who would have to either sign it in order to enroll at TWU's law school or be filtered out.

In rejecting the law school, Benchers drew from a network of signifiers, including the main question framed to include the impact of the Covenant, a broad public interest, and LGBTQ discrimination. Drawing upon these signifiers, Benchers rendered a version of religion where approving the law school would have produced an institutional and non-voluntary form of religion. Specifically, they found approving the law was against the public interest due to the religious beliefs expressed in the Community Covenant, which created differential treatment for LGBTQ individuals and LGBTQ people as a group. Required for entry at the university, the Community Covenant filtered out LGBTQ people from TWU Law and restricted the expression of LGBTQ sexualities at the law school. Within this network of signifiers, only by rejecting the law school could religion be rendered voluntary in order to preserve Canadian constitutional law's conceptualization of religion as an autonomous choice.

Next, I will examine the signifier of the boundary between the private and public spheres in relation to TWU's law school to analyze the point at which religious beliefs and practices transition from the private to the public sphere. I also explore how the law societies recognized

TWU Law as private but positioned in a public role as a gateway and filter to the legal profession. Additionally, I examine the signifier of the denial of the law school to explore how TWU and some Benchers understood rejection of the law school as a way to impose secular values on TWU and restrict prospective TWU law graduates' access to the public sphere, versus a non-imposition that would not block access to the public sphere or legal profession.

Chapter Seven: What Counts as the Private Sphere or the Public Sphere?

“This is not a school for kindergarten children in the religion itself, which is much closer to the private. This is the preparation and the gatekeeping function for entrance to the profession of becoming a judge” (LSUC April 10 Transcript at p. 81).

In this chapter, I explore if the law societies’ decisions in the approval process of TWU’s proposed law school produced a version of religion like that rendered by Canadian constitutional law as something private. To do so, I examine the signifier I call *the boundary*, or how Trinity Western and the Benchers framed the boundary and point of transition between the private or personal sphere and public or secular sphere, in which lawyers would be filling a professional role. I then examine the *denial* signifier, or how the threat of the denial of the law school was framed either as pressure to conform to secular values or be denied access to the public sphere or as not stopping TWU from opening a law school and therefore not restricting graduates’ access to the public sphere.

I examine the meaning of the boundary between the private and public spheres and the denial of the law school as signifiers because of the way in which antagonistic meanings were attributed to these issues. Specifically, analyzing these signifiers emphasizes different points of transition between the public and private spheres in relation to TWU’s law school and its graduates. It also reveals how the denial of the law school either would or would not block access to the public sphere. These discourses render different versions of religion, and by analyzing the law societies’ decision-making processes, it is possible to identify which version of religion becomes hegemonic and which elements of religion are marked as intolerable. I will demonstrate how, in the decision-making processes of both law societies, a discourse that rendered religion as public developed but was (temporarily) suppressed through the law societies’ final decisions to reject the law school.

The Boundary of the Private & Public Spheres

Within Canadian constitutional law, religious belief and practice are accommodated within the public sphere but discriminatory conduct due to religious beliefs is not. Recall from my discussion of the private and public spheres in chapters two and three that what is determined to be the private or public sphere helps define what is considered private religious belief and practice and what is public conduct. This then plays a role in determining the context in which the public interest applies. In addition, the law societies, as administrative decision-makers, must balance Charter rights and values with their statutory objective to protect the public interest (Brown, 2000; Daly, 2023). Specifically, they must consider how to advance their statutory mandates while protecting both freedom of religion and equality. To do so, it is necessary in the context of specific decisions to delineate the boundary between the private sphere, where religious belief and conduct are protected, and the public sphere, where discriminatory behaviour motivated by religious beliefs from someone in a professional role is not tolerated. In the context of the decision regarding TWU's law school, this meant interpreting when the religious beliefs and practices of TWU's law graduates might cross from the private sphere and impact the public sphere.

As such, in this section, I examine how Trinity Western University and the law societies defined the private and public spheres in relation to TWU's law school. I will demonstrate that while TWU and the Benchers both acknowledged Trinity Western as a private institution, in TWU's discourse, the university, the law school, and the lawyers who graduated from it were framed not only as part of TWU's private religious community but also as religious ambassadors whose conduct should be guided by religious beliefs, both personally and in their professional lives. In contrast, one argument made by some Benchers of both law societies highlighted the

division between private religious belief and public professional conduct. These Benchers considered signing the Covenant a form of private conduct, concluding it was a personal expression of religious belief and therefore could not be public discriminatory conduct. Alternatively, another argument from some Benchers focused on the law school as a gatekeeper to the legal profession, holding that the requirement to sign the Covenant was a condition of admission to TWU's law school that impacted the public sphere by affecting the diversity of the legal profession. In this sense, the boundary between the private and public spheres functioned as an antagonism and a floating signifier both between the different arguments advanced by the Benchers and in relation to TWU's discourse.

Trinity Western University presented the law school as an extension of TWU as a Christian university and part of a private religious educational community. TWU described itself as a "religiously based educational community," specifically created as such by an act of legislation¹⁶ (*Reply Submission* at para. 2). In TWU's discourse, the law school was Christian and private, like the rest of the university, and guided by religious values and beliefs:

The Community Covenant is an expression of the sincerely held religious beliefs of TWU and its community that is necessary for TWU to live out its *[sic]* purposes as a Christian university. It is critical that TWU, as a private religious educational community, be able to define its important religious values consistent with its biblical beliefs. TWU is a Christian university that primarily serves the evangelical Christian community (which may also include others who agree to and are prepared to learn in an environment governed in part *[sic]* by the Community Covenant) (*Reply Submission* at para. 140).

This quote is indicative of a theme in TWU's discourse, namely that TWU and the law school were part of a private religious community whose beliefs and practices were guided and governed by biblical beliefs such as those in the Community Covenant. Specifically, in

¹⁶ *An Act Respecting Trinity Western University*, originally passed in 1969, incorporated Trinity Western College, amended to Trinity Western University in 1985, with the goal of providing Christian university education to persons of any race, colour, or creed (SBC 1969, Chapter 44).

explaining the position and status of the university, TWU included the law school as part of the wider TWU community, thus not situating the law school differently in relation to the boundary between the public and private spheres.

Notably, however, while they may have presented the law school as part of TWU's private religious community, TWU was also clear that there is no concrete boundary between the personal and private sphere, where a person's religious beliefs guide their conduct, and the public and professional sphere, where conduct is guided by non-religious guidelines. For TWU, no matter what career its graduates go on to enter—be it a doctor, lawyer, or entrepreneur—they should ensure that their place of work is also a place of service as a Christian believer. In the *Introductory Statement to TWU Core Values Series*, TWU explained that

A sound theology of work includes the concept that all believers are called to be ambassadors of Jesus Christ within a dying world, wherever they go and whatever they do. As it has been said in other words, “Nothing is secular where Jesus Christ is Lord” (*Introductory Statement of TWU Core Values* at p. 188).

As this quote reveals, in TWU's discourse, there was no true boundary between the private sphere, where conduct was guided by religious beliefs, and the public or professional sphere, where a person followed non-religious guidelines for conduct. There was no division between what a law graduate does in their roles as a lawyer and as an evangelical Christian. Instead, TWU argued, there should be a “ministry of the doctor”—or in the case of law school graduates, a ministry of the lawyer—where a TWU community member's place of work was also their place of ministry (*Introductory Statement of TWU Core Values* at p. 188). TWU consistently presented the university and law school as part of a private religious educational community, where members' religious beliefs guided their conduct within the private as well as public and professional spheres. As such, there was a consistent meaning attributed to the boundary signifier within TWU's discourse, making it a nodal point.

However, as I explained earlier in this chapter, the law tolerates conduct motivated by religion in the public sphere only if that conduct is not discriminatory in nature. If, on the other hand, the conduct of someone in a professional public role becomes discriminatory, it will not be tolerated. This division between what is tolerable in private and public collapsed in TWU's framing of the boundary signifier to render a version of religion that was public. This framing of religion as collapsing the distinction between private and public is another point of misalignment or "experiential gap" between how the culture of TWU's religion and the culture of Canadian constitutional law and the law societies understood what it meant for religion to be private (Berger, 2015, p. 22). For TWU, there was no compartmentalization between the personal and religious and the public and professional; rather, there should be a seamless integration of the two (*Introductory Statement of TWU Core Values*). On the other hand, as the Supreme Court explained in *TWU v BCCT*, the law draws a line between belief and conduct and between private and public (at paras. 36–37). As I will show in the following pages, the Benchers' arguments echoed this distinction and found a way to render a version of religion that was private.

To start with, some Benchers from both law societies argued that without proof of concrete harm caused by the discriminatory conduct of TWU law school graduates, TWU could not be barred from opening a law school. Drawing intertextually from the Supreme Court decision in *TWU v BCCT*, these Benchers referred to the division between potentially discriminatory private religious belief and actively discriminatory public conduct and the necessity to have proof of harmful conduct before denying approval to the law school. For instance, at the April 11, 2014, meeting of the Law Society of British Columbia, the Bencher referred to in the transcript as MK concluded that

the Supreme Court of Canada has clearly held that ... private educational institutions formed by religious groups can have their constitutional rights

recognized and we have to balance equality rights and religious beliefs. I'm strongly persuaded ... by the Civil Liberties submission on how that should be done and that we look at belief versus conduct, that we look at actual harm versus what people might believe (LSBC April Transcript at p. 1161).

This demonstrates a theme in the arguments of several Benchers from both law societies who supported the approval of the law school: as in *TWU v BCCT*, without proof of actual harmful discriminatory conduct toward LGBTQ people by graduates in the practice of law, the Covenant would not disqualify TWU Law and its graduates from approval. In this view, there was a division between potentially discriminatory private religious beliefs, such as that marriage is exclusively between one man and one woman, and the manifestation of those beliefs in public conduct. Benchers concluded that signing the Covenant alone was not proof of discriminatory conduct and that law school graduates would be able to separate their personal religious beliefs from their professional obligations as lawyers (LSBC April Transcript; LSUC April 10 Transcript).

Notably, as I mentioned in chapter five, Benchers also concluded that lawyers trained at TWU Law would not be any more likely to discriminate against LGBTQ persons in their professional roles than any other lawyer. Nonetheless, in these Benchers' argument, the meaning attributed to the boundary signifier was antagonistic to that articulated in TWU's discourse; TWU's framing collapsed the division between belief and conduct, integrating personal religious into conduct in the public sphere. In relation to TWU's discourse, therefore, the boundary signifier functions as an external floating signifier.

Benchers who argued that there was a boundary between personal and private religious beliefs that may be discriminatory and the manifestation of those beliefs as discriminatory conduct by someone in their professional role were drawing on an argument that rendered a

private version of religion. In particular, they framed signing the Covenant as an individual and private expression of religious belief. This interpretation of the boundary signifier is linked to a network of signifiers anchored in a restricted interpretation of the main question, limited only to whether TWU's law school would competently train law graduates, and in a narrow understanding of the public interest that takes the mandates of the law societies to be limited to considering only the educational training of law school graduates. Within this chain of meaning, to reject the law school due to the religious beliefs of the TWU community and its law school graduates would be discrimination based on religious belief by the law societies.

As such, there is a division between the private sphere, where individuals are free to hold discriminatory religious beliefs, and the manifestation of those beliefs as public misconduct. Linked together, these signifiers render a version of religion that is private and upholds constitutional law's association of religion with the realms of the personal and private (Berger, 2015, p. 94). In particular, the religious beliefs and practices represented in the Covenant are rendered as personal and private and understood not to extend to the public sphere and legal profession. As I have noted when discussing arguments put forward in support of the law school, however, this discourse did not become hegemonic. Instead, other Benchers offered an alternative interpretation of the boundary signifier, which did become hegemonic and produced a different version of religion.

These Benchers made an argument that focused on the role of the law school as a gateway to the legal profession rather than on whether signing the Covenant was a form of belief or conduct. They argued that because of its unique position preparing lawyers to practice law, and as a gateway to the legal profession, TWU's law school could not be considered simply a private educational institution; rather, it was very close to the public sphere. For example, LSUC

Bencher Backhouse argued that access to the law school was a public good that should be equally available to everyone. During the April 24, 2014, meeting, Bencher Backhouse contended that

Students who receive acceptance to a law school obtain a public good. Trinity Western defines itself as private, but all law school positions cross over into the public domain. As a result, when we approve a law school for admission to our bar, we must ensure that we keep access to those important law student positions open to the full diversity of our population (LSUC April 24 Transcript at p. 240).

As this quote shows, this argument insisted that the legal profession, which includes the law school, should be equally accessible to everyone, without the discriminatory effect of the Community Covenant. Thus, the Covenant, as an admission requirement, was interpreted as a discriminatory filter to the legal profession.

In another example, one LSBC Bencher, referred to in the transcript as JA, argued during the April 11, 2014, meeting that in *TWU v BCCT*, the Supreme Court had made only a passing reference to what they thought was the real issue before the law society: “the sign at the gate,” or TWU’s admissions policy. JA argued, “That admission and hiring policy perpetuate prejudice against LGBT students and faculty and it is irrelevant that this may not be the motive or purpose of the community covenant; all that matters is that it has this effect or impact” (LSBC April 11 Transcript at p. 1148). This supports a theme in the arguments of some Benchers against the approval of the law school: although TWU was a private institution and the Covenant was not unlawfully discriminatory, the law societies had to consider it in their decisions because of its effect as a filter on entry to the law school for LGBTQ persons, and subsequently on the law school’s position as a gateway to the legal profession. As such, the boundary signifier functioned as an internal floating signifier between the different arguments advanced by Benchers of both law societies and as an external floating signifier in relation to TWU’s discourse, which

presented TWU as a private religious community and collapsed the division between private religious belief and the way in which it might motivate public conduct in a person's professional role.

The Benchers who argued that the law school was functioning as a gateway to the legal profession were making an argument that rendered a version of religion that was public. More precisely, despite the law school being a private institution, because of its position as an entrance to the legal profession, these Benchers framed access to the law school as a public good that affected the diversity of the legal profession. This framing of the boundary signifier drew from an interpretation of the main question signifier that asked Benchers to consider the discriminatory nature of the Covenant in deciding whether to approve TWU's law school, with the broad public interest framed as protecting the public from discrimination and advancing diversity. It was also linked to discrimination taken as LGBTQ discrimination, with the Covenant understood as a discriminatory admissions policy against LGBTQ persons.

Within this string of signifiers, the law school is positioned very close to the boundary of the public sphere in a way that would affect the diversity of the legal profession through the enforcement of the Community Covenant. As such, these Benchers' argument produced a version of religion that was public. Only by deciding to reject the law school could Benchers render a version of religion that remained private. In denying the law school, Benchers indicated an unease similar to that found at other levels of Canadian constitutional law about those in positions of (nearly) public authority being guided by religious principles in their decision-making. Only by rejecting the law school could the Benchers keep TWU Law and its graduates from filling such positions (Berger, 2015, p. 95). Significantly, it is this discourse, which rejected the law school, that became dominant.

In this section, I have examined and compared the signifier of the boundary between the private and public sphere in the discourses of the law societies and Trinity Western. I found that in TWU's discourse, the law school, like the larger university, was understood as part of a private religious community. However, there was also no true division between the private sphere, where conduct was motivated by religious beliefs, and the public sphere, where a lawyer was expected to follow non-religious guidelines. In contrast, one argument from the Benchers, despite supporting approval of the law school, relied on a distinction between belief and public conduct, arguing that without concrete proof that signing the Covenant would result in public misconduct towards LGBTQ persons, the Covenant alone did not justify rejecting the law school.

Meanwhile, another argument from the Benchers offered an alternative interpretation of the boundary signifier, focused on the position of the law school in relation to the public sphere. These Benchers argued that as a gateway to the legal profession, the law school filled a unique role that affected the diversity of this profession, which should remain accessible to everyone. As such, the meaning attributed to the boundary signifier conflicted internally among the different arguments put forward by Benchers, as well as externally in relation to TWU's framing of the boundary signifier. While TWU's discourse rendered a version of religion that was public, the Benchers' arguments both rendered versions of religion that, although different, were private.

To Impose or Not to Impose: Denial of the Law School as an Imposition of Values

In this section, I examine and compare the meanings given to the denial of the law school within the discourses of Trinity Western and the law societies. I will show how TWU framed the denial of the law school as pressure to make signing the Covenant voluntary and to conform to secular values, as denying the law school would limit the access of potential TWU Law graduates to the public sphere. Similarly, one argument made by Benchers framed the threat of

denying the law school as a way to impose secular values on TWU and its law school graduates, again because rejecting the law school would limit the access of TWU Law graduates to the public sphere and legal profession. Alternatively, however, other Benchers focused on how the denial of the law school would not unnecessarily infringe on TWU and the law school graduates' freedom of religion or stop the opening of the law school. Specifically, they argued that graduates would be able to practice law in jurisdictions where TWU Law was an approved faculty of law, while individual graduates would likely be able to apply to the LSBC's bar admission program through the process used by lawyers trained at foreign law schools. Rejecting the law school would therefore not block access for law graduates to the public sphere and legal profession. As such, while TWU's discourse and one argument articulated by Benchers attributed a similar meaning to the denial signifier, it was also an external floating signifier between the other Benchers' arguments and TWU's discourse.

In Trinity Western's discourse, religious worldviews were understood as unwelcome in the public sphere unless they aligned closely enough with secular values. For example, during his address to the Law Society of Upper Canada Benchers on April 24, 2014, TWU President Kuhn described the Law Society of Upper Canada's potential decision to deny TWU's law school as discrimination. Kuhn asked Benchers to consider who would be harmed by the denial of the law school:

Is it an unidentified couple involved in a same-sex marriage who might apply to Trinity Western law school, but only if the six offending words in the Community Covenant were deleted, or is it the Trinity Western community which is being pressured into abandoning its beliefs about human sexuality and the sacred state of marriage? (LSUC April 24 Transcript at p. 224–225).

As this quote shows, Kuhn suggested that the implication of denying recognition to TWU's law school unless the university amended the definition of marriage in the Covenant was that if TWU

wanted to open a law school, they had to conform to secular values and accept same-sex marriage. In TWU's discourse, the price of their law graduates gaining access to the public sphere and legal profession was forced compliance with a secular morality held by public institutions. From TWU's perspective, this resulted in the marginalization and exclusion of religious communities and individuals:

If opponents of Trinity Western's law school are committed to impose their value judgements on the minority as proposed, then religious communities, organizations and individuals who dare to maintain their religious principles will be excluded from public—full participation in our pluralistic society, and that, ladies and gentlemen, would be a travesty in a free and democratic society, which is committed to pluralism, diversity and mutual respect (LSUC April 24 Transcript at pp. 215–216).

The above excerpt reveals a consistent theme in TWU's discourse, which was that in denying—or implying they would deny—the law school, the law societies' Benchers were excluding those with religious worldviews from a public profession. Framed this way, TWU was being forced to either amend its definition of marriage and accept secular values or hold to their religious beliefs and principles and have access to the public sphere be limited for potential TWU Law graduates.

Additionally, however, TWU also pointed out that holding religious beliefs that could be perceived as discriminatory did not mean a person would act in a discriminatory manner, nor should TWU and its members be pre-emptively penalized for potential future conduct. In its *Reply Submission*, TWU used manifest intertextuality to make this point by drawing from the decision of the Supreme Court in *TWU v BCCT*, in which the majority had held that the Community Covenant did not provide enough evidence to conclude that TWU graduates would act in a discriminatory or harmful manner. In that decision, the Court concluded that the religious freedom of TWU's graduates “is not accommodated if the consequence of its exercise is the denial of the right of full participation in society” (TWU Community Covenant; *TWU v BCCT* at

para. 35). In other words, TWU graduates were free to hold their religious beliefs, and denying their ability to become teachers based only on those beliefs would be a violation of their religious freedom. In analogizing the law societies' decisions not to recognize its proposed law school and the BCCT's refusal to accredit TWU's teacher training program, TWU suggested that the law societies could not deny TWU Law graduates access to society, or the legal profession, without violating their religious freedom in a way the Supreme Court had already rejected. Internally, in its discourse, TWU attributed a consistent meaning to the denial signifier, making it a nodal point.

Similarly, several Benchers in both law societies agreed that denying the law school would infringe religious freedom by restricting potential TWU law school graduates' full access to Canadian society. As LSUC Bencher Callaghan maintained at the April 10, 2014, meeting, part of the guarantee of freedom of religion was to hold religious beliefs, congregate together, and participate in public activities:

And the Supreme Court of Canada, again back in the TWU case said: "It cannot be reasonably concluded that private institutions are protected but that their graduates are de facto considered unworthy of fully participating in public activities." but are we not limiting the participation of those who have the right to congregate in accordance with their beliefs, who have the right to educate them in that while congregating, to participate in our society? (LSUC April 10 Transcript at pp. 140–141).

This quote reflects a theme voiced by some Benchers who supported approval of TWU's law school. They argued that graduates could not be denied the right to participate in the public sphere—the legal profession—because of their religious views. Employing manifest intertextuality, like TWU, these LSUC Benchers also cited the majority in *TWU v BCCT*. In this view, TWU's graduates had the right to participate in the public sphere without conforming to secular values. For example, during the Law Society of British Columbia's April 11, 2014,

meeting, a Benchers referred to in the transcript as LD contended that “social norms have changed but just because someone or some group is out of step with these changes does not mean the Charter should be used as a sword to force everyone to fall into line” (LSBC April Transcript at pp. 1152–1153). Again, this quote represents the sentiment of some Benchers in favour of approving the law school that denying approval unless the Covenant was amended would force those who held religious beliefs to align with secular values in order to participate in the legal profession. In other words, Benchers LD was saying that the Charter should protect citizens from the government, not force them into alignment with its values. In this argument, if recognition of the law school was understood as allowing access to the legal profession, then the graduates of TWU’s law school had a right to that participation without having wider social norms imposed on them. As such, the argument made by Benchers from both law societies that framed the denial of the law school as pressure to comply with secular values aligned with TWU’s discourse.

These Benchers, who framed denial of the law school as limiting potential TWU Law graduates’ access to the legal profession and the public sphere, were advancing an argument that rendered a version of religion with both public and private elements. Specifically, individual law school graduates could not be denied the right to participate in the legal profession because of their personal, and private, religious views. This argument was anchored to the interpretation of the main question signifier that was limited to considering the competence and education of graduates, linked with a narrow interpretation of the public interest as including only the adequacy of TWU’s law school curriculum, discrimination understood in terms of religion, and signing the Covenant as an autonomous choice and individual expression of religious beliefs.

As such, denying the law school would restrict individual TWU law school graduates from accessing the public sphere and legal profession. These signifiers, when linked together,

produce a version of religion with both public and private elements. That is, there was room for participation in the public sphere for individual TWU law school graduates who may have held religious beliefs. However, this space was limited to the personal, and therefore more private, religious beliefs of individual graduates. This is consistent with law's higher level of comfort with religion conceptualized as a person's private beliefs, which tends to become "discomfort with religion as (potentially) public practices" (Berger, 2015, p. 93). Notably, however, this discourse, which approved of the law school and created space in the public sphere for an individual's religious values, was suppressed by an alternative discourse. As I explore next, an antagonistic meaning of the denial signifier came to be hegemonic.

Unlike those expressing the above argument, some Benchers from both law societies argued that denying the law school would not hinder the TWU community and its law school graduates' religious beliefs and practices. More specifically, where TWU and some Benchers had argued that rejecting the law school was an attack on TWU's freedom of religion, the counter argument held that having a law school was not central to TWU's religious beliefs or practices. For example, at the Law Society of British Columbia's April 11, 2014, meeting, the Bencher referred to in the transcript as JM argued that the LSBC's refusal to approve TWU's law school

would not circumscribe their beliefs nor prohibit their religious rights or practices. It would not stop them from living by the terms of the covenant or from holding views about homosexuality. It would not prevent TWU from operating a law school and issuing law degrees. It would only deny our profession's approval and endorsement of discrimination involved in the covenant (LSBC April Transcript at p. 1151).

This quotation reveals a theme present in the arguments of some Benchers in both law societies: rejecting the law school would not stop the TWU community from believing and practicing their religion. Benchers making this argument saw the teaching of law and the law school as only incidentally connected to freedom of religion (LSUC April 24 Transcript at p. 254). In this

interpretation, the law societies refusing to approve the law school would not restrict TWU's freedom of religion, only indicate disapproval of the Covenant. Significantly, in this argument, denial of the law school by the law societies would also not prevent the opening of TWU Law and the participation of its law graduates in the public sphere and the legal profession.

In fact, having approval from the Federation of Law Societies of Canada and, at the time, the B. C. Minister of Advanced Education, TWU could still open a law school, even though the process of passing a bar admission program would have been more complicated for graduates as they would most likely have had to apply individually through the Federation of Law Societies of Canada's National Committee on Accreditation¹⁷ (Federation of Law Societies of Canada, 2024; LSBC April Transcript at 1158). In this view, refusing to approve the law school was a trivial infringement on the religious freedom of TWU community members because they could still choose to follow their religious beliefs and practices. TWU could choose to open a law school without the approval of the law societies, and members would still be able to participate in public activities, just with some additional steps.

Therefore, the denial functions as an internal floating signifier between the Benchers' argument that rejecting the law school was a serious violation of religious freedom, because graduates had to adopt a secular definition of same-sex marriage or be denied the right to participate in the public sphere, and the counter-argument that it was a trivial infringement, because TWU could still operate its law school while following its own religious beliefs and there remained a pathway for its graduates to practice law. It is also an external floating signifier

¹⁷ The exact process through which an individual graduate of TWU's law school could have been approved to practice law by the relevant law society without TWU's law school being approved was unclear to Benchers. A possibility was that graduates would go through the same process as lawyers trained in civil law or at foreign law schools (Federation of Law Societies of Canada, 2025; LSBC April Transcript).

in relation to TWU's discourse, which understood the denial of the law school, unless the Covenant was amended, as an imposition of secular values on TWU.

Moreover, Benchers who argued that denial of the law school would not unduly hinder TWU's freedom of religion were making an argument that rendered a version of religion that had both private and public elements. In particular, as a law school was not central to TWU's religion, this argument stated that the rejection of the law school would not hinder the TWU community or the graduates' private religious beliefs and practices. It would also not stop TWU from opening a law school or its graduates from participating in the public sphere and legal profession. This interpretation of the denial signifier was linked to a framing of the main question that considered the discriminatory impact of the Covenant and involved a broad conception of the public interest as protecting the public from discrimination and advancing diversity. Discrimination was understood as the differential treatment of LGBTQ people created by the Community Covenant, while the Covenant itself was framed as a discriminatory admissions policy and a form of coercion into following the TWU's community's religious beliefs.

Within this sequence of signifiers, the law societies' denial of the law school was understood not to prevent TWU from opening a law school but only as a trivial infringement of the TWU community's freedom of religion. When linked together, these Benchers' argument rendered a version of religion with both private and public elements. Specifically, rejecting the law school would not have prevented TWU from opening a law school or its graduates from participating in the public sphere; rather, by denying approval, the Benchers were merely refusing to accept a public version of religion. In this sense, Benchers making this argument declined to endorse the law school with the mandatory Covenant and demonstrated law's

discomfort with religion as conduct that “might seep into the realm of the public where interest and preference have a troublesome status” (Berger, 2015, p. 94). In denying the law school, then, Benchers withheld approval of the public elements of religion and rendered a version of it that was private.

In this section, I have examined and compared the meanings given to the denial of the law school as a signifier in the discourses of the law societies and Trinity Western University. TWU framed the threat of denying the law school as pressure to conform to secular values. One argument from Benchers also contended that the law school and its graduates had the right to participate in the public sphere without conforming to secular values. Alternatively, however, in another argument, Benchers framed the denial of the law school as a justified infringement of freedom of religion, framing this infringement as trivial because it would not stop TWU from opening a law school and therefore would not restrict graduates’ access to the public sphere and legal profession. Significantly, both Bencher arguments advance a version of religion with both public and private elements. Yet it was the argument that relegated religion to the private sphere that ultimately became hegemonic.

A Handful of Hegemonic Interventions

With its initial vote to approve TWU’s law school on April 11, 2014, the Law Society of British Columbia made a hegemonic intervention that temporarily settled the antagonisms over the meanings of the boundary signifier and the nature of the infringement of religious freedom. With this vote, TWU’s Covenant was defined as a personal expression of religious belief and something protected by freedom of religion, which would be infringed upon by denying recognition to the law school and its graduates.

Shortly after this, on April 24, 2014, the Law Society of Upper Canada voted to reject the law school. Some months later, on September 26, 2014, the Law Society of British Columbia's Benchers adopted its members' vote. These interventions destabilized and (re)fixed the meanings outlined in the previous paragraph. The boundary signifier was reconfigured, and the law school's role as a point of access to the legal profession was foregrounded, such that it was understood as part of the public sphere. Finally, the Benchers concluded that rejecting the law school would not unjustifiably infringe TWU's freedom of religion, nor would it stop TWU from opening a law school or its graduates from participating in the legal profession.

Conclusion

In this chapter, I have shown how the decisions of the Law Society of Upper Canada and the Law Society of British Columbia replicate a version of religion that is, like that found at other levels of Canadian constitutional law, private. More precisely, I have demonstrated that the Benchers produced versions of religion that were public but ultimately rendered religion as private through their hegemonic interventions. To reach this conclusion, I assessed and compared the meanings attributed to the signifiers of the boundary between the private and public spheres and the denial of the law school. I conclude that the Benchers' final decisions fixed shared meanings for these signifiers.

By denying the law school, Benchers drew from a network of signifiers, including the main question framed to consider the Covenant, the broad public interest, LGBTQ discrimination, and the Covenant as a discriminatory admissions policy. In so doing, Benchers rendered religion such that approving the law school would have produced a version of religion that was public. That is, approving the law school would have allowed and endorsed the requirement of signing a Covenant and filtered out LGBTQ people's entry into the law school,

thus impacting the diversity of the legal profession. In rejecting the law school, Benchers demonstrated disapproval of the discriminatory effect of the Covenant and rendered a version of religion that was personal and private.

In the next chapter, I briefly introduce Laclau and Mouffe's (2001) concepts of politics, the political, and power. I examine the meanings attributed to the signifiers of *the authority* and *the votes* to explore the Law Society of British Columbia's members' resolution and referendum votes and the following decision by Benchers to adopt this members' resolution.

Chapter Eight: A Legal or Political Decision?

“But in many ways, this is really no longer an issue that deals with the accreditation of a law school. This has become an issue that affects the relationship the British Columbia lawyers have with their Law Society and with their Benchers” (LSBC September Transcript at p. 274).

I begin this chapter by exploring the intersection between law and politics as fields of analysis. I also introduce and explain Laclau and Mouffe’s (2001) concepts of the political, politics, and power in relation to the Law Society of British Columbia’s Benchers’ and members’ decisions. I examine the Law Society of British Columbia process, in particular, because of its unique aspects, specifically the members’ resolution and referendum, as well as the subsequent decision by the Benchers. My goal is to explore the decision-making process of the LSBC and the issue of whether the involvement of the LSBC members in the decision-making shifted it from the legal field to the political or if it was already a political process. To do so, I first examine the signifier I call *authority*, or whether the Benchers or the LSBC members held the authority to approve the law school. Next, I show how the meaning of the authority signifier was linked to the meaning given to the signifier I call *the votes*, or how the Law Society of British Columbia Benchers framed the meaning of the resolution and referendum votes as either keeping the decision a legal one made by the Benchers or shifting it to a political decision that could be reached by the members through a referendum.

Examining the signifiers of authority and the votes reveals kinds of arguments and discourses related to but different from those analyzed in previous chapters. Specifically, I examine the signifiers of authority and the votes because when these signifiers are linked together, they produce discourses that give a meaning to the law society’s decision that is framed as both legal and political, as always having been part of a political process reached through an administrative decision, whether made by Benchers or by referendum. In analyzing the different

arguments, I will demonstrate that the Benchers' ability to decide to shift the question of the law school from a legal to a political one indicates that the legal question was also a part of politics. That is, through my analysis of these arguments, I will show that the process of approving TWU's law school was a political process that (re)articulated a discourse the LSBC members made hegemonic through a process that was part of managing the discursive, or cultural, antagonism arising between TWU and the law society.

The Law Society of British Columbia Resolution & Referendum Votes

As I have discussed throughout the previous chapters, the Benchers of the Law Society of British Columbia initially voted on April 11, 2014, to approve TWU's proposed school of law. In response, the general membership of the LSBC held a special general meeting (SGM) on June 10, 2014, and voted on a resolution that directed the Benchers to reverse their decision. The SGM resolution passed, and on September 26, 2014, Benchers met and voted on a motion (the September motion) resolving that a referendum of LSBC members be held as soon as possible to decide if the SGM resolution would be approved, declaring TWU not an approved faculty of law. Importantly, the September motion also specified that the results of the referendum would be binding on the Benchers. The referendum was held in October 2014, with the members voting to reject the law school and Benchers meeting a final time to implement the results of the referendum and reverse their approval of the law school. In December 2014, the B.C. Minister of Advanced Education responded to the LSBC's decision by revoking TWU Law's prior approval (CBC News, 2014; *TWU v The LSBC*, 2015 BCSC 2326 at paras. 12–15). As I will discuss next, although the LSBC may have appeared to shift from one mode of decision-making to another, there is no hard division between the legal and political fields. Rather, as processes and areas of study, the two overlap.

Law and Politics as Intertwined Fields

The overlap between law and politics is clear. In academics, for example, the origins of the study of the intersections of politics and several forms of law, including constitutional and administrative law, courts, and lawyers, originated in political science. Columbia University's School of Political Science began teaching a course on the "science of jurisprudence" in 1880, while the University of Toronto similarly founded its department of Political Science in the 1880s (University of Toronto, 2024; Whitaker, 2013; Whittington et al., 2008). Whittington et al. (2008) found that in the study of law and politics, even as early as the 1900s, the focus was shifting away from research examining constitutional law toward an analysis of juridical politics. New focus was put on the behaviour of judges, juridical recruitment, administrative law, and the policymaking role of courts outside constitutional law. Although the fields of law and political science have changed over the years, the study of law and of politics share disciplinary origins, and while some of the literature and aspects of the fields remain unique, others overlap. As such, using a method, as I will show, that understands law as part of the political process is both feasible and can provide interesting insights.

Outside of academia, it is just as easy to see that law is a part of political processes. The common understanding of the operation of the law, and of the courts as one of its primary mechanisms, is one of neutrality. Courts are structurally designed to protect and promote judicial independence—that is, to stop political influence from impacting the selection, work, conditions, or removal of judges—so they can function without political sanction (Do & Schertzer, 2023; Hogg & Wright, 2024). Carl Baar (1998) argued that for a fairly extended period, the commonly accepted view in Canada was that the courts held a narrower and more restricted role, something that changed with the introduction of the *Charter of Rights and Freedoms* in 1982. Specifically,

prior to the enactment of the Charter, the courts' power was more limited by the legislatures and Parliament. For example, while courts could make changes to the common law, the legislatures retained the power to annul or reverse those changes (McLachlin, 1990).

A number of scholars argue that following the implementation of the Charter, the courts become more involved in politics and policymaking. While it has been met with both support and criticism, it is clear that the Charter involved the Supreme Court in what is popularly called judicial activism (Kelly, 2002; Morton & Knopff, 2000). Canadian politics underwent what F. L. Morton and Rainer Knopff (2000) called the "Charter Revolution," transforming from an era of parliamentary supremacy to one dominated by, as they argued, the political power of the Supreme Court and the "Court Party" (p. 24). Comparing the impact of the *Canadian Bill of Rights*, SC 1960, c 44, and the Charter, for example, Morton and Knopff found that between 1960 and 1982, only five of 35 rights claimants won their cases [*Bill of Rights*]. However, after the passage of the Charter, between 1982 and 1998, the Supreme Court ruled in favour of rights claimants in 125 out of 373 cases. There was also a shift from the Court instituting only negative remedies, for example declaring a federal statute invalid, to affirmative remedies.¹⁸ The Court began to influence policy by telling policymakers not only what they could not do but also what they should do (Morton & Knopff, 2000, p. 14–15).¹⁹

¹⁸ Negative remedies, such as invalidating a section of legislation that violates the Charter, restrict government action. Positive remedies, on the other hand, require the government to take an action, such as providing a specific service, funding, or other benefits (David, 2014).

¹⁹ For example, in *The Queen v Drybones*, 1969 CanLII (SCC), [1970] SCR 282 [*Drybones*], the Supreme Court held that s. 94(b) of the *Indian Act*, RSC., 1985, c. I-5 [*Indian Act*], which made it an offense for "status Indians" to be intoxicated off reserve, was inoperative as it violated the right to equality before the law under the *Canadian Bill of Rights*, SC 1960, c. 44 [*Bill of Rights*]. In response, Parliament repealed s. 94(b) of the *Indian Act*. In general, under the *Bill of Rights*, courts tended to more narrowly interpret rights, so that, for example, equality under the law wasn't violated (See British Columbia Court of Appeal case *R. v Gonzales*, 1962 CanLII 348 (BA CA)). After the implementation of the Charter, however, courts often include positive remedies. For example, in *Eldridge v British Columbia*, [1997] 3 SCR 624, the Supreme Court held that the decision of a B.C. hospital not to provide sign language interpreters for deaf patients violated their equality rights and ordered interpreters be provided (Morton & Knopff, 2000, p. 168).

Peter H. Russell (1982), however, contended that even before the *Charter of Rights and Freedoms* came into force, politics and law could not so easily be separated, and that below the surface, the Canadian courts operated with more political power and policymaking influence than often appeared. Russell argued, for example, that in relation to shaping policy, the decisions of provincial criminal court judges were central to shaping conceptions of crime and punishment, as well as who went to prison in Canada. While Parliament set the maximum penalties in the *Criminal Code*, RSC, 1985, c. C-46, provincial court judges were left with very broad discretion to decide appropriate sentencing [*Criminal Code*]. Russell argued that in exercising this discretion, these judges would have received no clear policy direction from the legislature or a higher court because, at the time,²⁰ Canada had no articulated national policy on the purpose of punishment. The decisions rendered by the local criminal court judges thus served to constitute Canada's policies on punishment (p. 6). Russell found that the idea that the judiciary's role was confined to applying laws passed by the legislature assumed that all important public policies were in statutes passed by the legislature and failed to recognize how often judges shaped policies expressed in statutes. Even before the passage of the Charter, then, the courts affected policymaking.

Politically and academically, there have been those both for and against the increased political power of the courts, also known as the judicialization of politics. Some scholars have stressed that rights are best guarded by political avenues such as legislation rather than juridical means (Bellamy, 2007; Waldron, 2006). Others have responded by suggesting that courts have always been political but that there are ways that they can act as facilitators rather than umpires

²⁰ Sections 718–718.2 of the *Criminal Code*, RSC 1985, c. C-46, were enacted in 1996 and set out the fundamental purpose of sentencing. They provide six objectives that should be used in pursuing that purpose and six principles that a judge must apply to a sentence (Department of Justice Canada, 2023).

when handling highly political questions such as Indigenous sovereignty (Dixon, 2007; Do & Schertzer, 2023). Whichever side of the debate scholars come down on, however, there is no question there is an intertwining between law, politics, and legal and political processes, rather than a definitive separation.²¹

Ran Hirschl (2006) found that this has resulted in a process he calls “juridification,” or the expansion of legal discourse and procedure into social and political fields where it was previously minimal (pp. 723–724). This includes increased judicial involvement in the development and regulation of public policy, as well as the establishment of robust systems of judicial review of administrative decisions. Judicialization and juridification also tend to involve decision-making processes being shaped and constrained by principles articulated by judges. According to Tom Ginsburg (2008), an institution or agency “that refrains from certain conduct, or provides extensive legal justification for actions that it does take, or introduces trial-like processes to defend itself from claims of arbitrariness, may be acting to avoid being brought before courts” (p. 3). The expansion and permeation of judicial power and processes into the processes of governance is visible in the way the law societies’ Benchers were guided by their awareness of judicial review and by the principles or values of the Charter, and in the influence the question of legal precedent had on each law society’s decision. As I will discuss next, this makes Laclau and Mouffe’s (2001) discourse theory particularly apt as my choice of methods. For Laclau and Mouffe, law is a part of political and legal institutions, and processes like the

²¹ Ran Hirschl (2023) found that this intertwining of the domains of law and politics is a global pattern, in part due to the proliferation of justiciable constitutional rights based on moral ideals such as human dignity, which often clash and lead to more adjudication and the expansion of judicial power. Hirschl noted that in 1910, less than a quarter of the world’s constitutions included judicial review; in 2008, conversely, 158 of 191 national constitutions authorized it, while in 2020, 171 or 88% of 195 national constitutions did so, with 181 or 93% having entrenched constitutional interpretation by courts (p. 6).

courts and the law societies are parts of politics or of the political processes that seek to manage the antagonisms that arise within the political field.

Analytical Concepts

In this section, I introduce three additional concepts from Laclau and Mouffe's (2001) discourse theory, as interpreted by Jørgensen and Phillips in *Discourse Analysis as Theory and Method* (2002), and from Mouffe's *On the Political* (2005) and "Democratic Politics and Conflict: An Agnostic Approach" (2016). I find these concepts particularly useful in examining the Law Society of British Columbia's decision-making process and the ways the members' resolution and referendum are situated in the legal and political fields.

The Political and Politics

Although the political and politics are central concepts for Laclau and Mouffe in *Hegemony and Socialist Strategy* (2001), Mouffe's later work more clearly and concisely explains the differences between the concepts of the political and politics. Specifically, Mouffe found that the political refers to the ontological level and the antagonistic dimension present and constitutive of all human societies. This dimension of antagonism "can take many forms and can emerge in diverse social relations, [but it] ... can never be eradicated" (2005, 2016, para. 1). The political, then, is the dimension or field in which conflicts or antagonisms between cultures, identities, and worldviews take place. As I suggested in chapter four, an alternative conception to Berger's (2015) concept of law as a culture understood as a "system of symbols" or pattern of meaning is law as a discourse struggling to become hegemonic (Berger, 2015, pp. 35–38; Jørgensen & Phillips, 2002; Masuzawa, 1998). For Laclau and Mouffe (2001), cross-cultural

interactions, or antagonism, between discourses or cultures take place in the political over the meaning and framing of fundamental legal concepts like equality, discrimination, and justice.

Politics, on the other hand, refers to the ontic level and has to do with practices of conventional politics and “the ensemble of practices, discourses and institutions which seeks to establish a certain order and to organize human coexistence in conditions which are always potentially conflicting because they are affected by the dimension of ‘the political’” (Mouffe, 2005, 2016, para. 1). Politics, then, includes the practices and institutions through which the antagonisms that develop in the political are channelled to allow societies to manage conflict. From Mouffe’s perspective, as institutions and processes that are part of establishing social order, organizing society, and managing conflict, courts and administrative decision-makers like the law societies are part of politics. The law societies’ decision-making processes, for example, included managing conflicting meanings of freedom of religion and equality. As such, I suggest that conflict over TWU’s law school was a cross-cultural interaction between the law societies and Trinity Western University that took place in the political field and manifested or was channelled through the law societies’ decision-making processes, which are a part of politics.

However, although law is situated as part of both its own domain and that of politics, most research using Laclau and Mouffe’s (2001) discourse theory falls within the field of political studies. A handful of scholars have looked beyond its traditional use to examine the fields of education and healthcare, as well as the intersection of politics and gender studies (Aavik, 2019; Matthys et al., 2021; Pracilio et al., 2023; Talves, 2016). Very little research, however, has used Laclau and Mouffe’s discourse theory to examine content originating from the legal field. Nonetheless, I suggest that the concepts I have extracted are uniquely suited to examining legal discourse and the points at which law and politics intertwine. The concept of

antagonism, for example—the place where discourses collide—is exemplified at the level of administrative decision-makers throughout the legal system, as both sides involved in a legal case make their discursive arguments. A case advances through or hierarchically up the legal field to the Supreme Court by a series of hegemonic interventions, (temporarily) resolving a discursive struggle so that one perspective comes to dominate for a time (Jørgensen & Phillips, 2002; Laclau & Mouffe, 2001). Therefore, I find that the concepts I have selected and refined to be fitting and useful for analyzing the discourses emerging from the law societies as administrative decision-makers.

Power

Jørgensen and Phillips (2002) suggest that in Laclau and Mouffe's (2001) discourse theory, politics (they do not differentiate politics from the political), and power are “two sides of the same coin” (p. 31). By this, they mean that power refers to the production of objects such as identity, social orders, or, for example, the meanings given to signifiers like discrimination. The political, as I have discussed, is the dimension of antagonism where worldviews or social orders clash, and the meaning of these objects is always unfixed or contingent (p. 31).

To explore how law intertwines with politics, it is helpful to understand what Laclau and Mouffe (2001) mean by power. As Jørgensen and Phillips explain in *Discourse Analysis as Theory and Method* (2002), Laclau and Mouffe's (2001) concept of power is similar to Michel Foucault's, in that power is not a force held only by those in positions of authority and exercised to oppress others. Rather, power is spread across social practices and throughout social processes, such that it is not only an oppressive force but also a productive one. Specifically, power is constitutive of discourse and functions as a “force and processes which create[s] our social world and make[s] it meaningful for us”; importantly, however, Laclau and Mouffe (2001)

hold that “power emphasizes the contingency of our social world” (p. 37). Power is therefore productive of things such as knowledge, identities, subjects, and institutions that take on a particular form but are always at risk of being reformulated differently. For Laclau and Mouffe, power produces the conditions of possibility for the social orders and worldviews that emerge, while also excluding alternative possibilities (2001, pp. 11–12; 31).

An example of this, as I will explore later in the chapter, is how the LSBC members exercised power to revoke TWU Law’s approval from the Law Society of British Columbia, thus reshaping TWU’s ability to open a law school. In doing so, the members opened up the possibility of a legal challenge to the LSBC’s decision. Another example of the power relations at work within the TWU law school conflict is the power dynamic between TWU and the law societies, in that TWU was required to apply for permission to the law societies to open its law school but could also appeal to the courts to reverse the Benchers’, and members’, decisions. There is also the relationship of the law societies to the public, which weighed in both for and against approval of TWU’s law school.

In this section, I have introduced and explained three concepts drawn from Laclau and Mouffe’s (2001) discourse theory as interpreted by Jørgensen and Phillips (2002), as well as from Mouffe’s later work (2005; 2016). I find these concepts helpful for analyzing the decision-making process of the Law Society of British Columbia and the intertwining of law and politics in their decisions. In the next section, I examine the different ways the Benchers attributed meaning to who held authority to approve TWU’s law school and how that was related to the way the LSBC members leveraged their power over the question of the law school’s approval.

Analysis

Authority and Political Power

In this section, I examine and compare the different meanings attributed to what I name the *authority* signifier, or who held the legal authority and political power to approve or reject TWU's law school. Specifically, some Benchers argued it was their own duty to assess and decide whether to approve the law school. In this framing, the authority to approve the law school was in the hands of the Benchers, with reference to the decisions of the courts. An alternative argument from other Benchers was that they could elect to be bound by the results of a referendum in which all members of the LSBC were eligible to vote, so the authority to approve the law school was initially held by the Benchers but then shifted to the LSBC members. However, a vast majority of Benchers agreed that at some point, the political power and authority to approve TWU's law school would come down to the courts, ending with the Supreme Court of Canada. I will argue, however, that the LSBC members' resolution and referendum vote are examples of the exercise of political power to create circumstances in which the existence of TWU'S law school was challenged, and it lost its approval.

During the Law Society of British Columbia's second meeting on September 26, 2014, several Benchers argued against the idea of following the resolution from LSBC members directing them to reject TWU's law school. Instead, they advocated for a proposed motion allowing them to wait for a decision from a trial court²² that would indicate how the courts would assess TWU Law and the Community Covenant. While Benchers were almost unanimous in acknowledging the members and their displeasure with the Benchers' approval of TWU Law, a

²² At the time of the law society's second meeting, litigation was in process in British Columbia (*Loke v British Columbia (Minister of Advanced Education)*, 2015 BCSC 413 (CanLII)), Ontario (*Trinity Western University v Law Society of Upper Canada*, 2014 ONSC 5541 (CanLII)), and Nova Scotia (*Trinity Western University v Nova Scotia Barristers' Society*, 2014 NSSC 331) related to the approval of TWU's proposed law school, which was expected to be heard before the end of that year (LSBC September Transcript at p. 268).

number argued that the Benchers had already made their decision and should not reassess it because of the resolution. For example, Bencher Richmond concluded,

We made our decision in April, and I can't think of one good reason why we should revisit our decision. Are we going to change our mind? Were you not sure of the decision we made in April? I was. I think we made the right decision then so why should we be changing it now? As many learned people here have said, there are several court cases pending. Why don't we just let the issue unfold as it should? (LSBC September Transcript at pp. 324–325).

As this quote demonstrates, for a number of Benchers, the members' resolution directing them to reject the law school did not invalidate their decision or authority to approve TWU's law school during their meeting on April 11, 2014 (LSBC April Transcript). In this view, the LSBC members' resolution did not serve as a reason for the Benchers to reverse their decision or implement a referendum that would allow the LSBC members to vote directly on TWU Law. For example, Bencher Petrison, discussing the members' special general meeting on June 10, 2014, and the participation of members in the resolution vote, argued that the members had already made their opinion clear and a referendum would not be necessary:

The results of the meeting made two things very clear I think. First, our members think -- a significant number of our members think we decided this wrongly. Second, a significant number of our members are very upset with us. I don't think a referendum is needed to make those points again. I think this matter will ultimately be decided by the courts It is my view that the petition that's currently before the Supreme Court of British Columbia [*Loke*] does squarely address the Trinity Western University covenant and its effect on GLBT people. A decision from a court - - from our Supreme Court [of British Columbia] certainly would be an important factor for me in any consideration or reconsideration of our decision in April (LSBC September Transcript at p. 345).

This quote represents a theme in the argument of a number of Benchers who were in favour of the motion to wait for a decision from a trial court, namely that the LSBC membership had already communicated disapproval of the Benchers' initial approval of TWU's law school with the resolution, and a referendum was thus not necessary. From this perspective, while the

Benchers recognized the opinion of the members, the resolution alone was not enough to reconsider the approval of TWU's law school. In this framing, Benchers had the authority to approve the law school but also deferred to the opinions of the courts rather than the will of the membership. Specifically, while all Benchers suspected that the question of TWU's law school would end up decided by the Supreme Court of Canada, Benchers making this argument contended that in light of member opposition, the LSBC should wait to render a decision until they could consider the opinions of the courts. Importantly for this argument, Benchers had discretion under Rule 2-27 (4.1) (now 2-54(3)) of the *Law Society Rules*²³ to adopt the resolution at any point, declaring the proposed law school not an approved faculty of law. Legally speaking, Benchers had clear authority to decide the question of the law school, either through their normal decision-making process, as they did on April 11, 2014, or by implementing the resolution. Therefore, the authority to approve the law school was understood to belong to the Benchers.

However, other LSBC Benchers made the alternative argument that Benchers should implement the results of the members' resolution and reject TWU's proposed law school. In this argument, Benchers concluded that they should respond to the resolution and the desires of the membership. For example, considering the resolution and referendum, Bencher Ongam commented,

We heard from the members. We have a process. That process is working right now. It worked as soon as the members a few days after our decision started that process in motion. And so, the referendum will happen by the members if we don't act and govern. They will take over that responsibility they have. However, in this particular case I don't think we need to wait (LSBC September Transcript at p. 311).

²³ The *Legal Profession Act* is the founding legislation of the LSBC, which provides a framework for regulating the legal profession in B.C. The *Law Society Rules* provide more detailed rules and requirements set by the law society under the authority of the *Legal Profession Act* (See Law Society of British Columbia. (2025). *Law Society Rules*. <https://www.lawsociety.bc.ca/for-lawyers/act-rules-and-code/law-society-rules>).

This quote represents a theme in the argument of several Benchers that they should respond to the clear desire of members and reject TWU's law school. In this argument, the resolution should be implemented without waiting for the opinions of the trial courts. Delaying the rejection of the law school to complete a referendum process would shift the question of who could approve or reject the law school to the members, who had already made their disapproval of TWU's law clear. Making this argument, Benchers referred to section 13 of the *Legal Profession Act*, which allows that a referendum must be conducted if a resolution has not been implemented by the Benchers within 12 months following the general meeting in which it was adopted, and if at least 5% of members sign a petition requesting a referendum on the resolution.²⁴

The question, then, became about governance and who would implement the members' resolution. Bencher Avery, for example, contended that the question before Benchers during the September 26, 2014, meeting was no longer about rights and freedoms but about governance and democracy. While during the Benchers' initial meeting, their duty was to govern the legal profession in the public interest, the resolution changed that:

The Act [*Legal Profession Act*] allowed our members to consider our decision, and a very significant number rejected it. At this point the resolution is not strictly binding on us but because it represents more than one-third of the profession voting and more than one-thirds of which who voted to reverse our April 11 decision, it is deserving of the highest degree of deference. And indeed as much that would occur were there to be a referendum. Indeed, [in] my view there has in effect been that referendum (LSBC September Transcript at p. 302).

As this quote again highlights, there were Benchers who argued in favour of responding to the opinion of the members by implementing the resolution and referendum. Benchers could respond

²⁴ The resolution is binding on the Benchers if at least one third of members vote in the referendum and two thirds of those vote in favour of the resolution (*Legal Profession Act* at s. 13 (3)). However, Benchers cannot be bound to implement a resolution if doing so would violate their statutory duties (*Legal Profession Act* at s. 13 (4); *LSBC v TWU* at paras. 49–50).

by deciding to follow the resolution themselves or wait for the members to implement the process themselves. As such, in this argument, the authority to approve the law school was understood to rest precariously with the Benchers, until the members began the process of implementing the resolution themselves. Benchers making this argument gave a meaning to authority where, if they did not exercise their authority, act, and govern, authority to govern would shift to the membership. As such, in this argument, while Benchers have the initial authority to approve or reject the law school, the members also have that authority. Framed this way, the authority signifier functions as an internal floating signifier in relation to the other Benchers' argument, which frames the authority to approve the law school as resting with the Benchers, albeit with respect to the opinion of the courts.

Ultimately, Benchers adopted the September motion, which proposed the implementation of the referendum, at the conclusion of the September 26, 2014, meeting. No matter which motions a Bencher argued for, however, the Benchers were consistent in acknowledging the importance of the special general meeting and that the membership had communicated their disagreement with the initial approval of TWU's law school with the resolution vote. For example, as Benchers Wilson and Riddell noted, with a membership of around 13,000 members, 4,178 had taken the time to attend the SGM, with 3,210 voting to direct Benchers to reverse their decision while 968 voted in support (LSBC September Transcript at pp. 274; 317; *TWU v LSBC*, 2015 BCSC 2326 at para. 42).

The resolution destabilized the decision to approve the law school and put the question of whether TWU's law school was an approved faculty of law back into debate. Notably, the question Benchers were considering was not if the Covenant should be included in the assessment of TWU Law or if that assessment should focus only on graduates. Instead, the

question was if the law school should be rejected based on the resolution of the LSBC members, if an answer should be delayed to hear the opinion of the courts, or if the decision should go to the members as a referendum. The Benchers voted 20-1 to send the question to a referendum, where the members voted strongly against approving the law school (*TWU v LSBC*, 2015 BCSC 2326 at paras. 46–47).

I argue that through the resolution and referendum, the members were exercising their political power to change the circumstances in which the law school could exist. The resolution vote destabilized the nodal points of the approval of TWU's law school (taking the place of the main question), the public interest, discrimination, the Community Covenant, the boundary between the private and public spheres, and value imposition, putting their respective meanings back into debate. It produced the authority signifier, which, as I will show, was given a meaning whereby members had the authority to approve or reject TWU's law school through the political process of the referendum. The referendum functioned to create the circumstances through which TWU Law lost its accreditation in British Columbia and created the circumstances in which the courts heard *Law Society of British Columbia v Trinity Western University*.

Specifically, prior to the resolution and the following referendum, TWU's law school existed in British Columbia as an approved faculty of law. The resolution and subsequent referendum reversed that approval, first from the law society and then from the B.C. Minister of Advanced Education, such that TWU could not operate a law school without challenging the law society's decision in court. By exerting the ability to hold a resolution and referendum, the members exercised their political power to create the discourses that became temporarily hegemonic through the referendum that rejected the law school.

In this section, I have examined and compared the different ways in which the Benchers of the Law Society of British Columbia framed who had the authority to approve TWU's law school. Benchers agreed that the decision about TWU Law's approval would ultimately be made by the Supreme Court of Canada, but the issue of who held the authority to approve the law school in the meantime functioned as an internal floating signifier between the Benchers' different arguments.

In one argument, the authority to approve the law school rested with the Benchers, who argued that although the LBSC should wait to hear the decisions of the trial courts before reaching their final decision, it was the Benchers who would make that decision. Other Benchers, however, contended that they, themselves, were the ones who should implement the resolution immediately, in response to the members' resolution to reject the law school. According to this argument, the authority to approve the law school lay precariously with the Benchers but could easily shift to the members. That is, as I have argued, the members exercised political power through the resolution vote to change the circumstances governing the existence of the law school and reopen the debate on its approval. The resolution and referendum were pivotal moments in the law society's decision-making process, serving to create the conditions in which TWU lost the approval of its law school in British Columbia. Next, I will examine how these different authority signifiers were linked to the various ways the decision-making process of the law society was framed as either legal or political.

Law, Politics, and the Political

In this section, I examine the meanings the arguments of the Law Society of British Columbia Benchers gave to the resolution and referendum votes of the Law Society of British Columbia members. I will show how these different meanings are linked to the meanings given

to the authority signifier discussed above. Specifically, some Benchers argued that the decision to approve or reject the law school could only be made by Benchers and that it should be a legal decision, as Benchers are administrative decision-makers who balance Charter values in their decision-making process. In contrast, other Benchers argued that the referendum vote was a democratic political process through which members could participate in the approval process of TWU's law school. I will also show how the legal and political fields overlapped in the LSBC's decision-making process. Overall, the votes function as an internal floating signifier between the arguments of the law society Benchers.

During the Law Society of British Columbia Benchers' second meeting on September 26, 2014, Benchers debated whether the approval of TWU's law school must be a legal decision, made by the Benchers in their role as regulators of the legal profession, or whether approval of the law school could be a political decision, made by the wider membership of the law society via referendum. One argument articulated by some Benchers in this meeting was that the decision on TWU's law school should not be made by a majority vote but in a way that protected and balanced Charter rights and values. For example, Bencher Morellato stated,

this is a fundamental and very important question of constitutional law. This is not a political question, and it ought not be, and it is more than a governance issue. At stake is the protection of Charter values and principles that lie at the heart of our democracy, a democracy that embraces diversity and to -- protects competing minority rights (LSBC September Transcript at p. 350)

This quote represents of a theme in the arguments of a handful of Benchers who argued that the views of the majority of the members of the law society could not dictate if TWU's law school would be approved. Instead, they argued, the Benchers must decide according to legal principles, such as balancing Charter rights. Deciding the question of the law school with a vote would bypass that process and might violate the TWU community's freedom of religion (LSBC

September Transcript at p. 338). Benchers Morellato concluded, “This is not a question in my view that can be decided by referendum. The courts will and must ultimately decide the question and it’s a legal one” (LSBC September Transcript at p. 352). Framed this way, deciding the approval of the law school by referendum would shift the decision-making process from a legal one to a political one. Benchers making this argument insisted that the politics of the law society must be separate from a legal decision about the law school. In this framing of the votes signifier, shifting the approval process of TWU Law from an administrative decision made by the Benchers to a process driven by the opinion of the members would make it political (LSBC September Transcript, p. 338). This meaning of the votes signifier is linked with the signifier that frames the authority to approve or reject the law school as resting with the Benchers and the courts.

In contrast, however, a second argument that some Benchers advanced during the September 26, 2014, meeting agreed with the members about deciding the question of TWU’s law school by referendum. These Benchers framed the referendum positively, with Benchers Finch describing it as “the brilliance of democracy” (LSBC September Transcript, p. 343). In this framing, whether to uphold the approval of the law school was not a strictly legal matter but a way to engage in democratic politics. For example, Benchers Riddell concluded that holding the referendum was “good governance.” Considering the resolution and referendum, he stated,

Fundamentally what I believe members are voting for is they want a voice in the litigation. They are upset with the TWU covenant and really, I look at a vote to disaccredit TWU by the membership as a vote saying we want to be an active part of the litigation because quite clearly if TWU is disapproved by the Law Society, we will be subject to a review and we will be part of the litigation (LSBC September Transcript at p. 319).

As this quotation reveals, a theme in the argument of some Benchers who supported a referendum was that the approval of TWU’s law school could be decided through a political

process. In this view, the governance and internal politics of the law society were not separate from the TWU Law approval process. Thus, in discussing the need for the Benchers to respond to the members' resolution vote, Bencher Kresivo argued that the resolution "needs to be recognized. It means it needs a -- that a significant portion of the membership has spoken. It means that therefore doing nothing is inappropriate" (LSBC September Transcript at p. 280). As this quote shows, the internal governance and politics of the law society affected whether TWU Law would be approved, and the resolution and referendum were both framed politically as ways for members to voice their opinion on the law school and participate in the approval process.

This framing shifted the approval process of TWU Law from an administrative decision made by the Benchers to a decision made by members through a democratic political process. In this case, there was no clear separation between the internal politics of the law society and the legal question of whether to approve TWU's law school. That Benchers could decide whether the question would be determined through their administrative process or by referendum also demonstrates the intertwining of the legal and political fields. Unlike those who had framed this shift as a potential violation of Charter rights, however, Benchers making this argument framed it as a move toward a democratic decision-making process. This meaning attributed to the votes signifier is linked with the framing of the authority signifier as giving precarious authority to the Benchers to approve the law school, but the authority to implement the resolution potentially shifting to the members. As such, the votes are a floating signifier between the different arguments articulated by the Benchers.

Although the arguments made by the Law Society of British Columbia Benchers constructed an understanding of the members' resolution and referendum votes that saw them as shifting or blurring the division from a legal decision to a political one, I suggest that the law

society's decision-making process was already part of politics. To be clear, one argument articulated by Benchers does frame the decision to approve the law school as a legal one that should be made by the Benchers in their role as administrative decision-makers. However, as I argued earlier in this chapter, this is an example of judicialization. Specifically, it is an example of decision-making constrained by an awareness of judicial review, or a "judicially policed process" where administrative decision-making is guided by principles articulated by judges, such as the Charter values Bencher Morellato argued lay at the heart of Canadian democracy (LSBC September Transcript at p. 31). Judicialization also involves taking specific actions or refraining from certain conduct, such as allowing approval of the law school to be decided by vote, in order to avoid being brought before the courts in judicial review (Ginsburg, 2008).

Also, while arguments made by Benchers who viewed the resolution and referendum votes as a way for the members to participate in the approval process did not construct law as separate from politics, they still operate as an example of judicialization. Specifically, the judicialization of governance includes the expansion of judicial power at the expense of administrative power in the form of judicial review. In the argument advanced by these Benchers, this was evident in Bencher Crossin's assumption that if the law school was not approved, no matter what process was followed, the final decision would be made by the courts:

The fact is that ultimate fate of TWU will be decided in Ottawa [with the Supreme Court], not in Vancouver [with the law society]. And we know that, and the members know that, but I think we must respect the fact that the members and the public want to decide this issue, whatever the future court processes may bring in the years to come (LSBC September Transcript at p. 298).

A dominant theme in the argument of many Benchers was that there would be a judicial review of any decision by the law society. This is indicative of judicialization, or the intertwining of the fields of law and politics. I also note that both Benchers' arguments include juridification, or the

use of legal jargon, rules, procedures, and quasi-judicial norms. Rather than negotiation as a form of decision-making, the law society's decision-making process is dominated by law-like rules and procedures. More specifically, the LSBC's move to decide the question of the law school by referendum vote relied on section 13 of the *Legal Profession Act*, which allows that Benchers can elect to be bound to implement the results of a referendum held by members (*TWU v LSBC* at para. 49). This is another example of the intertwining of law and politics: the Benchers had the ability to legally decide to make the decision to approve the law school a political one. In both arguments advanced by Benchers, then, despite constructing the interaction of law and politics differently, there is a clear overlap between the legal and political fields.

Additionally, the process of decision-making advanced in both arguments, which Benchers framed as either legal or political, is a part of what Laclau and Mouffe (2001; Mouffe, 2016) call politics, or the processes, practices, and intuitions that work to manage the conflicts that arise in the political dimension. Stated another way, in terms of discourse theory, both a decision reached through an administrative process and a referendum are processes of politics that channel and manage an antagonism that originated in the political. A decision made either by the Benchers or by a vote requires choosing between conflicting alternatives and (re)articulating a hegemonic discourse (Mouffe, 2005, p. 10). Thus, while the debate between the Benchers was about whether the approval of the law school should be a legal or political decision, from the perspective of Laclau and Mouffe, the law societies' decisions to approve or reject TWU's law school were always part of politics.

In this section, I examined how the Law Society of British Columbia Benchers framed the resolution and referendum votes signifier. I conclude that both arguments framed the resolution and referendum as either shifting or blurring the boundary between law and politics in

the law society's decision-making process. However, one argument articulated by Benchers argued that the decision to approve TWU Law should be a legal one and could not be decided by majority vote but must be made by Benchers balancing Charter rights and values. In this view, the Benchers framed law and politics as separate and argued that the referendum would make the decision political. In contrast, in an alternative argument, Benchers understood the resolution and referendum votes positively, as good governance and a way for LSBC members to participate in the approval process of TWU's law school. In this view, the Benchers did not frame law and politics as separate and saw the referendum as form of democratic politics.

In this sense, while both arguments conclude that approving the law school by referendum would be a political decision, the arguments are antagonistic, making the votes a floating signifier. Both arguments also demonstrate decision-making policed by an awareness of judicial power and the increase in judicial review of administrative decisions, as well as the expansion of legal language and discourse into other fields (Ginsburg, 2008; Hirschl, 2006). In Laclau and Mouffe's (2001) terms, as I have argued, a decision reached either through an administrative process or by referendum would have been reached through a process meant to manage antagonisms arising in the political by (re)articulating a particular discourse and making it temporarily hegemonic.

The Members' and Benchers' Hegemonic Interventions

As I have explained throughout this dissertation, and more in-depth in this chapter, in response to the initial hegemonic intervention of the LSBC's Benchers to approve TWU's law school, the general membership held a special general meeting on June 10, 2014, and voted on a resolution directing Benchers to reject TWU Law. This was another hegemonic intervention that, as I have explained in previous chapters, unsettled the nodal points of the narrow public interest,

religious discrimination, the Community Covenant, the boundary between the private and public spheres, and value imposition. In response to the members, on September 26, 2014, the Benchers met and voted to pass the September motion, which resolved that a referendum of LSBC members be held to decide whether to declare that TWU's law school was not an approved faculty of law. This was itself a hegemonic intervention that solidified the signifier of authority framed such that the authority to approve the law school initially lay with the Benchers but could be passed or shift, if not invoked, to the members via the implementation of a referendum. Linked to this signifier of authority, the signifier of the resolution and referendum votes also solidified in its framing by Benchers as a form of democratic political engagement by members with the approval of TWU's law school.

The floating signifiers of the public interest, discrimination, the Community Covenant, the boundary between the private and public spheres, and denial were also resolidified by the Benchers' hegemonic intervention in the respective forms of the broad public interest, LGBTQ discrimination, the Covenant as a discriminatory admission policy, the boundary signifier solidified to refer to the law school's role as an entrance to the legal profession and part of the public sphere, and denial framed as not unduly restricting TWU's freedom of religion. In a consequent rearticulation of these hegemonic discourses, on October 31, 2014, the LSBC Benchers voted 25-1, with 4 abstentions, to implement the resolution based on the results of the referendum and revoked the approval of the law school (*LSBC v TWU*, 2015 BCSC 2326 at para. 47–48).

Conclusion

In this chapter, I have shown that the arguments advanced by the Benchers of the Law Society of British Columbia framed the resolution and referendum votes as shifting the law

society's decision-making process from the legal field to the political one. However, I have also demonstrated that as an area of study, as a decision-making process, and methodologically, in terms of Laclau and Mouffe's (2001) discourse theory, the law society's decision was already political. No matter the process used to render their decision, the approval or rejection of TWU's law school was guided by an awareness of Charter values, filled with legal jargon, and conscious of the possibility of judicial review, resulting in the (re)articulation of one worldview that became (temporarily) dominant through a hegemonic intervention.

To reach this conclusion, I examined how the Law Society of British Columbia Benchers framed the signifiers of authority and the resolution and referendum votes during the September 26, 2014, meeting. Specifically, the vote to adopt the September motion at the conclusion of the second meeting meant the authority to approve TWU's law school rested initially or precariously with Benchers but would shift to the members with the adoption of the resolution and referendum. Benchers therefore understood the referendum as a process of politics through which members could participate in the approval process of TWU's law school.

Significantly, in holding their SGM meeting, adopting the resolution, and eventually passing the referendum, the LSBC members employed their political power to create the discourses and conditions in which TWU Law could not exist. Specifically, without the members' SGM meeting on June 10, 2014, the resolution directing Benchers to reject the law school, the adoption of the motion allowing for the referendum, and the results thereof, TWU Law would have been an approved law school in British Columbia. That the members disapproved of the law school and the Community Covenant and voted to withdraw approval was a pivotal moment in the law society's decision-making process that emphasized how a law

society decision always made dominant one worldview or set of discourses and was always part of the process of politics.

Chapter Nine: Conclusion

Although my research questions have developed and evolved over the last several years, my area of interest has stayed primarily the same. The research questions I examined in the previous chapters have roots in my reading about *Trinity Western University v British Columbia College of Teachers* and my curiosity about the conflict of rights and Charter values in the case. As I read, I began to wonder how religion shaped the development of law and how courts balanced what I understood to be the conflict between freedom of religion and sexual orientation equality rights. My research fundamentally remains about the tensions and cross-cultural interactions between religion and law. It also still focuses on interactions between the religious beliefs and practice of Trinity Western University and Canadian law. However, it focuses on the decisions of the law societies of British Columbia and Ontario in the approval process of TWU's proposed law school rather than the subsequent court cases. I adopted this focus because it was within the law societies' decision-making processes that the cross-cultural interaction between TWU's religion and the culture of Canadian constitutional law first formally emerged. Many of the key legal principles, such as the public interest and the meaning of discrimination, that would be fundamental to the courts' later analyses initially developed within the administrative context of the law societies' decisions.

I used the framework provided by Benjamin Berger (2007, 2015), who takes both law and religion as cultures, specifically because this provided me with a way to frame law not as neutral but as something with its own norms, values, and structures. Applying Berger's framework reformulated the way I considered the Trinity Western law school controversy, transforming it from merely a conflict about rights into a cross-cultural interaction with resulting tensions (and as Laclau and Mouffe (2001) would suggest, an antagonism). In "Law's Religion:

Rendering Culture,” Berger (2007) suggests that while the discourse of the Supreme Court of Canada rendered religion as individual, an expression of autonomy and choice, and private, other branches of government might produce a different version of religion (p. 281). I decided to narrow my focus to the decisions of the Law Societies of Upper Canada and British Columbia to explore if, as administrative decision-makers who hold delegated government power to regulate the legal profession, rather than a branch of government, they render religion in the same pattern as reflected in the decisions of the Supreme Court of Canada.

Discussion

Restating the Research Questions

At the beginning of this dissertation, I outlined the overarching research question of this project and its two supporting questions. My main question investigated if, as administrative decision-makers, the law societies’ decisions echoed the pattern found at other levels of Canadian constitutional law of religion produced as individual, an autonomous choice, and private. If they did, how did this framing emerge in the law societies’ decision-making processes? Second, as administrative decision-makers charged with balancing Charter values and their statutory objectives to protect the public interest, did the law societies associate the public interest more closely with freedom of religion or LGBTQ equality? Third, was the LSBC’s decision-making process always political, or did it become so through member participation?

Methodological Contributions

The choice of methods I used in my analysis, based on Laclau and Mouffe’s (2001) discourse theory, was, in part, based on practicality. After determining that I wanted to use discourse analysis, one of my criteria for selecting Laclau and Mouffe’s discourse theory was

that I needed a toolset that provided me with concrete steps for conducting this analysis. This is in many ways ironic, as I discovered that *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (2001) does not easily lend itself to practical application. What does, however, is Jørgensen and Phillips' *Discourse Analysis as Theory and Method* (2002), which includes explanations, a set of analytical tools to which I later added, and useful examples.

The method toolset I employed lent itself well to analyzing legal discourse. Although I found the full toolset I identified in my methods chapter useful, I think the concept of antagonism has proven particularly valuable for explaining and exploring the larger overarching conflict between TWU and the law societies that evolved into the Supreme Court cases *TWU v LSUC* and *LSBC v TWU*, as well as the smaller antagonisms between the discourses of the law societies and TWU. The idea of the hegemonic intervention is also particularly appropriate for examining how a decision-maker, such as a court or law society, can temporarily stabilize the meanings of concepts like discrimination and public interest.

A key contribution of this project is the development of conceptual tools to better explore these antagonisms. Specifically, I found it necessary to distinguish between different levels of discourse—whether a discourse had a stabilized meaning or if conflict over meanings remained. To do so, I introduced the term *arguments* to describe the proposed meanings of a given signifier advanced by each organization, which might conflict internally or externally with other positions on the possible meaning of the same signifier. My use of the concept of arguments is related to the development of the concepts of internal and external signifiers. I also found it necessary to be able to indicate when the meaning of a signifier was internally stable—a nodal point—in the discourse of one organization but externally antagonistic with the meaning given to that signifier by another organization. In that instance, the signifier would be an *internal* nodal point but an

external floating signifier. Alternatively, if the arguments within an organization conflict over the meanings of a signifier, it is an *internal* floating signifier.

Although external and internal are not terms used by Laclau and Mouffe (2001), they are indicators I developed to deepen my analysis of the relationships between arguments and discourses, and of the process by which a discourse becomes hegemonic. I believe these concepts offer more nuanced contributions to analyzing the antagonisms that occur within the decision-making processes of the law societies.

Findings

Research Question One. Through an analysis of these decision-making processes, I have demonstrated that the version of religion rendered by the law societies mirrors that produced at other levels of Canadian constitutional law. While Benchers articulated multiple versions of religion in their arguments—including institutional and public elements—the religion ultimately produced by the law societies’ decisions was individual, an autonomous choice, and private. Central to this finding is the conclusion that the final rejection of TWU Law was necessary to maintain a version of religion comprehensible to the culture of Canadian constitutional law. Approval of the law school would have required accommodation of an institutional, non-voluntary, public form of religion.

This pattern is evident throughout the chapters of this dissertation. In chapter five, I showed that the Benchers’ primary concern was not any potential discriminatory conduct by individual TWU Law graduates but the institutionalized discrimination produced by the Community Covenant and its impact on LGBTQ people as a group. By rejecting the law school, the Benchers refused to render an institutional version of religion. Similarly, in chapter six, I demonstrated that the hegemonic understanding of the Covenant was as a discriminatory

admissions policy that enforced religious beliefs on non-believers. As such, approving the law school would have produced a version of religion that was non-voluntary or coercive.

Again, in chapter seven, I found that religion was produced with both public and private elements, but ultimately, was rendered private. Specifically, Benchers recognized that the law school was a private institution, yet one filling a unique role that affected the diversity of the legal profession or public sphere. They also understood that, even without law society approval, TWU could still open a law school. However, Benchers also saw approving the law school as endorsing the requirement for students to sign the Covenant, and in turn a version of religion that impacted the public sphere. In refusing to approve the law school, the law societies produced a version of religion that was private.

These findings are significant because they highlight the limits of the accommodation of religious beliefs and the importance of their relationship with such concepts as the public interest and the private and public spheres. While there is space for various forms of religion within decision-making processes like those of the law societies, these societies' final decisions demonstrate that law consistently renders religion individual, an expression of autonomy, and private. This project shows how the culture of Canadian constitutional law extends beyond the courts to influence broader decision-making processes as a dominant form of culture.

Research Question Two. My second research question examined how the law societies, as administrative decision-makers with delegated governmental authority, interpreted the public interest. Specifically, I investigated if they associated the public interest as more closely aligned with the Charter value of freedom of religion or with LGBTQ equality. As discussed in chapter five, my findings indicate that while Benchers acknowledged TWU's right to freedom of religion, they found that it would be contrary to the public interest not to protect LGBTQ people

from discrimination and unequal access to legal education. In the context of the TWU law school controversy and the law societies' decisions, I conclude that the public interest is more closely associated with the Charter value of LGBTQ equality than with freedom of religion.

Driving this research question was a curiosity about how the law societies understood and interpreted discrimination and consequently equality. By focusing on the law societies' decision-making processes, this project illuminates how administrative decision-makers define these concepts and, more importantly, how these definitions align with their statutory objectives—to protect the public interest. Understanding these definitions is crucial, as the meanings developed in the law societies' processes often reappeared in the reasoning of the courts.

Research Question Three. My final research question explores the intersection of law and politics. In chapter eight, I argue that the two are intertwined or overlapping fields. Specifically, I consider whether the LSBC's decision-making process was always political, or whether it became so through the participation of members in the law school approval process. Drawing on Laclau and Mouffe's (2001) discourse theory, I argue that the law society's decision-making process was itself a process of politics. This is evident in the Benchers' ability to shift the question of the law school from a legal question to political one. It can also be seen in the leveraging of political power by the LSBC members through the resolution and referendum votes to create the conditions in which TWU Law lost its approval from the B.C. Minister of Education. Significantly, I also note that both law societies' decision-making processes were antagonistic, in that one worldview was always going to be suppressed while another became hegemonic. In this sense, both processes were always a part of politics.

This finding contributes to research about the judicialization of politics and the politicization of law. Using Laclau and Mouffe's (2001) discourse theory, originally developed

for the analysis of political discourse, I showed that there is no clear separation between law and politics. Instead, the two are closely entwined, both as areas of study and as institutions and processes that manage social conflict. Additionally, as a political process, the approval of TWU's law school remained antagonistic, as law rendered its own version of religion while suppressing that put forward by TWU. This is a signature feature of a process of politics.

From the Law Societies to the Supreme Court

In many ways, the legal principles and key concepts that emerged in the discourse of the law societies and Trinity Western—as well as their meanings—extended into and were (re)articulated by the Supreme Court of Canada. In related judgements, the majority concluded that promoting diversity within the bar, preventing harm to LGBTQ people, and ensuring equal access to the legal profession all fell within the scope of protecting the public interest, thereby giving the concept of the public interest a broad rather than narrow meaning (*TWU v LSUC* at paras. 19–21; *LSBC v TWU* at paras. 39–44). Notably, the majority also emphasized that the law societies' duty to protect the public interest included upholding a positive public perception of the legal profession (*TWU v LSUC* at para. 20; *LSBC v TWU* at para. 40).

The majority also found that the law societies' decisions not to approve the law school limited the religious freedom of TWU's community members but agreed with the law societies that rejection of the law school was not a significant limitation, only restricting TWU's ability to operate a law school with a mandatory Covenant (*TWU v LSUC* at para. 38). I suggest that this reasoning indicates a more private version of religion, like that rendered by the law societies' final decisions.

In contrast, the dissenting opinion shared similarities with arguments advanced by Benchers in favour of TWU's law school. For example, the dissent argued that the Law Society

of Upper Canada's *Law Society Act* granted only a limited public interest mandate. Regarding the approval of law schools, the dissent concluded that the public interest related only to ensuring that applicants were competent for licensing (*TWU v LSUC* at paras. 62–66).

The dissent found that rejecting TWU's proposed law school infringed the religious freedom of its community members in a more than trivial way. Central to their argument was that even after adopting a broad interpretation of the public interest, approving TWU Law would not be contrary to the public interest. Instead, accommodating religious freedom aligned with the public interest of a "liberal, pluralistic society" (*TWU v LSUC* at para. 81; *LSBC v TWU* at paras. 323–336). The dissent argued that allowing religious communities to flourish promoted diversity and pluralism in public life. Interestingly, while their conclusion is linked to a broad interpretation of the public interest, it can also be read to suggest a version of religion that is more public.

Extending the arguments raised during the law societies' debates, the Court in *Law Society of British Columbia v Trinity Western University* concluded that the Benchers had not improperly fettered their discretion in holding a referendum. The majority found that the *Legal Profession Act* did not restrict the circumstances under which Benchers could choose to implement a referendum and that the mechanism was intended to allow the LSBC's decision to be guided by the views of its membership in certain circumstances (paras. 48–49).

The dissent disagreed with the view that the Benchers had not fettered their discretion, echoing arguments made by Benchers in favour of the law school that had expressed concern that adopting the referendum failed to properly balance Charter rights with the law society's statutory objectives (paras. 294–297). Both arguments can be understood to suggest that the process of approving the law school was a process of politics, since the decision to hold a referendum rested

with the Benchers. For the dissent, however, this required Benchers to properly balance Charter rights and their statutory objectives.

Overall Contributions

This research contributes to our understanding of how the culture of Canadian constitutional law, as identified at the level of the Supreme Court, extends to law societies. It emphasizes how law societies, as administrative decision-makers, render religion as individual, an expression of autonomy and choice, and private, while alternative interpretations—institutional, non-voluntary, and public—also emerge through the ways meaning is assigned to signifiers. Building on Berger (2015), this study advances knowledge about the boundaries of religious accommodation and shows how these boundaries are often connected to interpretations of the public sphere, the private sphere, and the public interest. It also contributes to scholarship on law and politics by demonstrating the way the two fields are often linked in administrative decision-making. Methodologically, the use of internal and external signifiers provides a more nuanced conceptual tool for identifying how discourses become hegemonic within and across organizations.

Limitations

I will note here that the discourses in the law societies' decisions, which worked to make religion individual, autonomous, and private, are specific to the processes of the Law Society of British Columbia and the Law Society of Upper Canada. Several other law societies across Canada also made decisions about TWU Law, but I have not examined the specific processes that led to these and offer no conclusions about whether they match the patterns I observed in British Columbia and Ontario. The Law Society of New Brunswick, for example, went through a

similar series of events to that in British Columbia (though it is important to note the key difference that New Brunswick is not the province in which Trinity Western University is based), where Benchers initially approved TWU Law but a members' resolution then asked for a rejection of the law school. The ensuing council vote on whether to withdraw approval from TWU's law school ended in a tie, and the law society upheld the approval of the law school (Cohen, 2015; New Brunswick Law Society, 2015). While examining the New Brunswick Law Society's process could reveal similar arguments to those made in Ontario and British Columbia, my analysis looked specifically at the latter two cases and is thus specific to those law societies. Additionally, I will again note that as Laclau and Mouffe's (2001) discourse theory holds, meaning is always precarious. The meanings given to nodal points such as discrimination and the public interest were specific not only to the legal facts involved in the law societies decisions but, importantly, to the time period, the mid 2010s, in which the law societies rendered their decisions.

I will also note that in addition to examining the law societies' decisions, I initially intended to do a deep analysis of the discourse of the Supreme Court of Canada in *TWU v LSUC* and *LSBC v TWU*. I learned through my first stages of close analysis, however, that I would need a narrower scope for my project. Additionally, having initially intended to analyze the discourse of the Supreme Court of Canada, I excluded from my analysis the decision-making process of the Nova Scotia Barrister's Society, which debated and rejected TWU's law school—a case that did not make it to the Supreme Court but was denied by the Nova Scotia Court of Appeal due to a procedural issue (See footnote 1).

As to reviewing the Supreme Court decisions, while this would have proved interesting and fruitful for future research, my decision to exclude the Supreme Court documents was driven

by the volume of material that would have required analysis. Such an examination would also have resulted in another set of signifiers and discourses and added substantial complexity to my analysis, making it outside the scope of this project.

In deciding to exclude the material from the courts, I was able to focus specifically on the administrative context of the law societies' decision-making processes. As such, I chose as sources the transcripts of the law societies' debates and documents submitted by Trinity Western. This provided a rich variety of data on the law societies and Trinity Western in this cross-cultural interaction between law and religion. These sources provided the overarching discursive trends and excerpts I coded for further analysis, which then developed into signifiers.

Focusing on specific signifiers guided my second stage of analysis, particularly through a consideration of how often codes such as LGBTQ or religious discrimination were applied to excerpts. However, emphasizing the significance of other codes, such as a Benchers' duty and obligation to uphold the rule of law, could have led to a different focus for my analysis. Similarly, if I had approached *Trinity Western University v British Columbia College of Teachers* not as a settled legal fact but as a floating signifier, the focus of my analysis likely would have shifted. For example, this may have resulted in more emphasis on how the Benchers understood their role as administrative decision-makers in relation to following legal precedent. To maintain focus on my research questions, I chose to exclude *TWU v BCCT* as a floating signifier.

Future Research

However, using the same methods based on Laclau and Mouffe's (2001) discourse theory that I employed in my analysis and exploring how understandings of the applicability of *TWU v BCCT* as precedent for the TWU law school controversy shaped both law societies' decisions to respectively approve and reject the law school could prove interesting for future research.

Another potential avenue for future studies is an analysis of the different court decisions in the TWU law school decision-making processes. Exploring if and how the signifiers and hegemonic discourses identified in the law societies' decisions extended into the decision-making processes of the courts could prove a compelling area of investigation. For example, one could examine how the Supreme Court majority and dissent constructed meanings of the public interest in *TWU v LSUC* and *LSBC v TWU*, and how these constructions relate to freedom of religion and LGBTQ equality. Comparing the differences in how the majority and dissent construct these meanings could reveal varying versions of religion produced by the Supreme Court's arguments and demonstrate how their final decisions either uphold or suppress the law societies' renderings. I believe continuing to apply and develop the methods I used in my analysis can provide interesting insights into how the meanings of legal discourses develop, shift, stabilize, and change.

Building on Berger (2015), this project explored the way that law renders religion in this meeting of the TWU community's religion and the law societies' culture of Canadian constitutional law. Another interesting direction for future research would be to explore how a religion renders Canadian law and what that might tell us about tensions between law and religion(s) in Canada today. Alternatively, another question is how law renders equality and the limits of LGBTQ rights. Specifically, it would be interesting to explore how law produces LGBTQ rights, if there are similarities with law's rendering of religion(s) as individual and private (though not a choice, in this instance), and if queerness challenges the limits of legal accommodation.

Conclusion

This research has examined the cross-cultural interaction between religion and law during the controversy surrounding Trinity Western University's proposed law school, with a specific focus on the decision-making processes of the Law Society of Upper Canada and the Law Society of British Columbia. Unlike much of the existing research and scholarship on the TWU law school controversy, which tends to focus on the decisions of the courts, this project centres the decision-making processes of the law societies. Additionally, it analyzes both law society decisions that would later be challenged at the level of the Supreme Court of Canada. In doing so, this project provides a comparative analysis of the discourses produced by both law societies and TWU and identifies the shared meanings, as well as the antagonisms, within their discourses.

I found that the law societies rendered a version of religion consistent with that produced at other levels of Canadian constitutional law: individual, an autonomous choice, and private. Specifically, the law societies' decisions did not accommodate a version of religion that would be institutional, coercive, and public. I found that the disapproval of the LSBC members—through the resolution and referendum votes—played a pivotal role in rendering this version of religion. It was a key moment in the LSBC's decision-making process and highlighted how the law societies' decision-making processes would always have made one worldview hegemonic as part of a process of politics.

I conclude that in the context of the law societies' decisions over the approval of TWU's proposed law school, finding that approving the law school would be against the public interest because of the LGBTQ discrimination created by the Community Covenant attached a meaning to the public interest associated with the Charter value of LGBTQ equality. While discussions of TWU's law school did centre on LGBTQ equality and freedom of religion as rights, how religion and these rights and values were understood was tied up in a web of meaning that could not be

separated from questions about how to determine the boundary between the public and private spheres and what it meant to act in the public interest.

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