The *Charter* at 40: An Overview

Special Issue Editors: Yasmeen Abu-Laban & Catherine Kellogg***

> *"The pandemic has forced many people to live online during lockdowns. And it is at times like these that lies and conspiracies spread like wildfire. As we have seen around the world, disinformation poses a real threat to democratic institutions."*
>
> The Right Honourable Richard Wagner, Chief Justice of Canada
> June 2022[1]

I. Introduction

In 1982 the Canadian Constitution was patriated from Britain, complete with a new amending formula and an entrenched bill of rights known as the *Canadian Charter of Rights and Freedoms*.[2] The milestone 40th anniversary of the *Charter* is unique in relation to other decennial anniversaries because it took place during a global pandemic. This distinctive reality formed the backdrop to the public online conference held at the University of Alberta on November 8-10, 2021, entitled *The Charter at Forty — From Isolation to Inclusion: Navigating the Post-COVID World*. This special double issue of the *Review* is a collection of select scholarly papers first delivered at the *Charter at Forty* conference, against that fraught backdrop.

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1 Translated from French and quoted in Martha Jackman, "Protesters Need to Understand: Canada's *Charter* is not the US Bill of Rights", *The Globe and Mail* (22 February 2022), online: <www.theglobeandmail.com/opinion/article-protesters-need-to-understand-canadas-charter-is-not-the-us-bill-of/> [perma.cc/N4XT-WCFR]. For the original French version see "The Right Honourable Richard Wagner: Judicial Independence for the Health of Democracies" (speech given 9 June 2022), online: *Montreal Council on Foreign Relations* <www.corim.qc.ca/en/event/971/2022-06-09-richard-wagner> [perma.cc/K2JA-7K8K].

Our conference stemmed from a unique community-university partnership involving Canadians for a Civil Society, the University of Alberta's Department of Political Science (in the Faculty of Arts), and the Centre for Constitutional Studies (in the Faculty of Law). We initially worked from a common understanding that critically assessing the *Canadian Charter of Rights and Freedoms* at its 40th anniversary would be a core focus of interest to scholars, policy-makers, and citizens alike. Indeed, it is important to remember that in the early 1980s, constitutional debates in Canada engaged not only federal and provincial governments, but also civil society groups — including Indigenous peoples, women's groups, and ethnic, linguistic, and racialized minorities — groups who had long felt a significant stake in how rights would be articulated and understood in Canada.[3]

We drew inspiration from accounts highlighting the relevance of civil society actors in shaping the provisions of the *Charter*, as well as the influence of the living tree principle in Canadian constitutional interpretation (which potentiates an evolving as opposed to static understanding of constitutional law and by extension constitutional rights).[4] Our plans took further shape as the brutal and uneven consequences of the COVID-19 pandemic were felt across the world, across the country, and in local communities. This impacted and reinvigorated our work in relation to the value of public education and research about the *Charter* as well as critical scholarship concerning its goals and accomplishments.

In relation to public education and research, we agreed from the start that this conference would produce both scholarly work (as exemplified by the articles in this issue) and a host of other educational recordings and materials that could be used in a variety of fora. To this end, many of the key digital proceedings and publications from the conference can be found on our dedicated website, www.charteratforty.ca. One such resource is our keynote opening for the conference, delivered by the Right Honourable Beverley McLachlin, the longest serving Chief Justice of Canada's Supreme Court, which emphasized the importance of a commitment to education and engagement with questions arising from the *Charter* on its fortieth birthday. Our sense of the importance

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

3 Yasmeen Abu-Laban & Tim Nieguth, "Reconsidering the Constitution, Minorities and Politics in Canada" (2000) 33:3 Can J Political Science 465 at 465-497. See also Matt James, *Misrecognized Materialists: Social Movements in Canadian Constitutional Politics* (Vancouver: UBC Press, 2006).

4 Bradley W Millller, "Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada" 22:3 (2009) *Canadian Journal of Law and Jurisprudence* 331 at 331-354.

of scholarly and educational materials in relation to the *Charter* also increased as backlash and protest against COVID-19 public health measures reached a crescendo in the early weeks of 2022, when the "Freedom Convoy" made its way across Canadian cities to Ottawa. This was particularly so because of the way that protesters invoked pseudo-legal language relating to the *Charter*, raising issues of both misinformation and even deliberate and manipulative disinformation about the law.[5]

It is stunning, in this respect, that fully forty years after the *Charter*'s enactment, legal scholars felt it necessary to remind Freedom Convoy protesters not to conflate it with the American Bill of Rights, and to highlight the legality of reasonable, section 1 limits on *Charter* rights.[6] Still further, it is alarming and chilling that there were instances of threats to judges involved in hearings arising from the Freedom Convoy protests.[7] Such threats to the judiciary and democratic institutions underscore that a peaceable civil society requires the continued promotion of human rights, literacy, the rule of law, meaningful economic opportunity, and mutual respect — commitments that are especially central to the work of our *Charter at 40* partners, Canadians for a Civil Society.

We also agreed from the outset that the 40th anniversary was a time for critical scholarly examination of the *Charter*, and the context of the COVID-19 pandemic was central to this orientation. The pandemic introduced new public health measures of social distancing, quarantine, and isolation, which sharply exposed the various ways in which certain groups are especially vulnerable to inequities, exclusion, and even death. This is particularly true for individuals in long term care facilities, on reserves, in prisons, in detention centers, in homeless shelters, and in precarious work, insecure housing, or social isolation. Additionally, as the World Health Organization Director-General Tedros Adhanom Ghebreyesus avers, the "pandemic has shone a light on the intimate and delicate links between humans, animals and our environment."[8]

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5 Jeffrey B Meyers, Emily Dishart & Rose Morgan, "Canada's Legal Disinformation is Exposed by the 'Freedom Convoy'", *The Conversation* (18 February 2022), online: <theconversation.com/canadas-legal-disinformation-pandemic-is-exposed-by-the-freedom-convoy-176522> [perma.cc/6JXV-L63C].

6 Jackman, *supra* note 1; *Charter*, *supra* note 2, s 1.

7 Brigitte Bureau, "'It's Intimidation': Judge Faces Threats After Freedom Convoy Hearings", (29 June 2022), online: *CBC News* <www.cbc.ca/news/canada/ottawa/freedom-convoy-hearings-judge-threatened-1.6502747> [perma.cc/3G6X-4Y4A].

8 World Health Organization, News Release, "WHO's 10 Calls for Climate Action to Assure Sustained Recovery from COVID-19" (11 October 2021), online: <www.who.int/news/item/11-10-2021-who-s-10-calls-for-climate-action-to-assure-sustained-recovery-from-covid-19> [perma.cc/3RJE-3CHU].

There is of course now four decades worth of scholarly assessment of the *Charter*, particularly in the fields of law and political science. Some of this has involved general assessments which are contested. On one side, some have suggested the *Charter* has had a negative role in relation to Canadian democracy and inclusion. For instance, the entrenchment exercise and content of the *Charter* has been argued to reflect the will of governments much more than people.[9] Moreover, the *Charter* has been portrayed as both Americanizing and judicializing Canadian politics by working to undermine the role of democratically elected legislatures.[10] It has also been seen to have strengthened various social inequities,[11] and it remains an important symbol of Quebec's ongoing alienation, given that its government refused to sign on to the patriation package but has nonetheless been subject to the *Charter* from the start.[12]

On the other side, an alternative body of work engaging a general assessment suggests the *Charter* empowered citizens in relation to the state,[13] and empowered specific groups, such as LGBTQ2+ communities, through court rulings.[14] It has also been noted that the longstanding struggles and input of civil society groups played a key role in shaping the patriation process and its aftermath.[15] From this angle, constitutional politics provided citizens and social movements with a means to put pressing issues like state harassment and discrimination firmly onto the national agenda.

As a package, articles in this special issue reflect on these debates by considering both the deep historical roots and implications of section 33 (the not-

9 Edward McWhinney, "The *Canadian Charter of Rights and Freedoms*: The Lessons of Comparative Jurisprudence" (1983) 61:1 Can Bar Rev 55 at 55-68.

10 Ronald I Cheffins & Patricia A Johnson, *The Revised Canadian Constitution: Politics as Law* (Toronto: McGraw-Hill, 1986); James B Kelly & Christopher Manfredi, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009).

11 Michael Mandel, *The Charter of Rights and the Legalization of Politics*, revised, updated & expanded ed (Toronto: Thompson Educational, 1994).

12 Guy Laforest, *Trudeau and the End of the Canadian Dream* (Montreal: McGill-Queen's University Press, 1995); Gilles Bourque & Jules Duchastel, "Les identités, la fragmentation de la societé canadienne et la constitutionnalisation des enjeux politiques" (1996) 14 Intl J Can Studies 77 at 77-94*;* Alain-G Gagnon & Alex Schwartz, "Canadian Federalism since Patriation: Advancing a Federalism of Empowerment" in Lois Harder & Steve Patten, eds, *Patriation and its Consequences: Constitution Making in Canada* (Vancouver: UBC Press, 2015) 244 at 244-266.

13 Alan Cairns & Cynthia Williams, "Constitutionalism, Citizenship and Society in Canada: An Overview" in Alan Cairns & Cynthia Williams, eds, *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) 1 at 1-50.

14 Miriam Smith*, Political Institutions and Lesbian and Gay Rights in Canada and the United States* (New York: Routledge, 2008).

15 Lois Harder & Steve Patten, "Looking Back on Patriation and its Consequences" in Lois Harder & Steve Patten, eds*, Patriation and its Consequences: Constitution Making in Canada* (Vancouver: UBC Press, 2015) 3 at 3-24.

withstanding clause) in relation to parliamentary supremacy and rights, and by assessing the *Charter*'s role in the protection and limitation of rights.[16] The critical engagement of contributors not only takes the form of assessing what the *Charter* has done (including with respect to Canadian values and discourse) but also what the *Charter* has *not* done. Not least, contributors also address what the *Charter* might potentially still do in relation to some of the most pressing issues of our time, from the rights of Indigenous peoples to the environment and the future of the planet.

According to Joanna Harrington "[b]ills of rights, by their nature, contain abstract statements of guarantee that inevitably require interpretation."[17] As she goes on to say, for the *Canadian Charter of Rights and Freedoms*, the most significant influence for guiding that interpretive process is "the national context."[18] The eleven articles in this special double issue of the *Review of Constitutional Studies*, devoted as they are to assessing the *Charter* at its fortieth birthday, take up what is meant by "the national context" in Canada. Contributions are situated and reviewed in more detail below.

II. Special Double Issue

In the first four articles (by Patzer and Ladner, Rocher and Carpentier, Dobrowolsky, and Smith) the orienting questions concern the logic or values that the *Charter* purports to hold up. If those values are widely understood to be liberalism, inclusion, universalism, and a progressive understanding of state-society relations, what do they underwrite or amplify, and what kind of politics do they authorize? What is meant by Canada, and maybe more importantly, who is — and who is not — really "Canadian"? Has the *Charter* interrupted the social divisions that exist across Canadian society, or has it merely consolidated a vision of Canadian society that remains firmly white-settler and English speaking, even if less heteronormative than it was historically?

In the opening article, Jeremy Patzer and Kiera Ladner's joint work deals with Indigenous peoples. In "Charting Unknown Waters: Indigenous Rights and the *Charter* at Forty," Patzer and Ladner take up the question of how the "distinctive collective rights of Indigenous peoples," which are affirmed by section 35 of the *Constitution Act, 1982*, have fared in the *Charter* case

16 *Charter*, *supra* note 2, s 33.

17 Joanna Harrington, "Interpreting the *Charter*" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 621 at 621.

18 *Ibid*.

law.[19] As they show, the path has been an ambivalent one, because the logic guiding the *Charter* was significantly different for First Nations than for other civil society groups pursuing rights recognition. While other civil society groups seek protection and inclusion, Indigenous groups have often sought "to shield and protect their distinct, collective rights from the *Charter* and from the liberal nationalism that it embodied."[20]

As Patzer and Ladner point out, the backdrop to Indigenous people's mobilization around the writing of the *Charter* was the 1969 White Paper, an attempt "to bring a 'final solution' to Canada's so-called 'Indian problem'" insofar as it called for "the elimination of the *Indian Act*, the disbanding and dismemberment of reserves, the termination of 'special status,' privileges, and rights, and the unilateral cession of treaties."[21] While the mobilization that ensued eventually led to section 35, there remain notable pitfalls for "Indigenous litigants [who] variously seek, depending upon their circumstances, the protections *of* or protections *against* the *Charter*."[22]

Said most starkly, section 35 poses a dilemma: do Indigenous people work with the logic of the *Charter*, and seek the protection *of* the state, or, as collective actors with a distinct history and politics, do they seek protection *from* the state? If Indigenous peoples are supposed to be in a nation-to-nation relation with Canada, how can they negotiate using the *Charter*? Can self-determination be negotiated? Patzer and Ladner's answer is necessarily ambivalent: how can national self-determination be negotiated, they ask, by way of a mechanism that is internal to the national state which claims exclusive sovereignty?

In François Rocher and David Carpentier's article, "On a Differentiated Reading of Rights: Systemic Francophobia Invites Itself to the Debate," another important national self-determination project comes into view: that of the *Quebecois*.[23] Rocher and Carpentier turn the lens away from the juridical implications of the *Charter* and towards its vision of Canadian identity by narrowing in on English Canadian interpretations of language policy over the last fifty years in Quebec. These various language policies — from Bill 22 and 101 in

19 Jeremy Patzer & Kiera Ladner, "Charting Unknown Waters: Indigenous Rights and the Charter at Forty" (2022) 26:2 Rev Const Stud 15; *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

20 *Ibid* at 18.

21 *Ibid*.

22 *Ibid* at 20.

23 François Rocher & David Carpentier, "On a Differentiated Reading of Rights: Systemic Francophobia Invites itself to the Debate" (2022) 26:2 Rev Const Stud 39.

the 1970s to Bill 21 in 2019 — were meant to protect the French language and culture in the context of a country and a continent with an English-speaking majority.[24] Their careful examination of debates in the National Assembly and media representations of those debates in the Rest of Canada (ROC) lead them to conclude that these interpretations are steeped in Francophobia — a term they define as the simultaneous differentiation and inferiorization of a French speaking Quebec in relation to a larger liberal and universal ROC. They argue that recent language laws passed by the Quebec legislature are consistently read in terms of a logic that suggests that French speaking Quebecois are "priest ridden," backwards, and anti-pluralistic, and therefore do not conform to the liberal, universalist, secular, and progressive vision that is at the heart of the *Charter* version of Canadian identity. In terms that essentialize and naturalize the Quebecois as backwards, non-pluralistic, and regressive — and therefore resistant to universalist norms — these various attempts to protect the continued durability of the French language in Quebec are read as implicitly anti-Canadian.

Alexandra Dobrowolsky and Bethany Leal-Iyoupe's article — "Shame Face? The Justin Trudeau Blackface Scandal, Multicultural Performativity, Privilege, and Power" — addresses section 27, the multiculturalism clause of the *Charter*.[25] Section 27 invokes a vision of Canadian society fundamentally committed to multicultural pluralism. Making use of media responses to the so-called blackface/brownface scandal that dogged Justin Trudeau in the run-up to the 2019 federal elections, Dobrowolsky and Leal-Iyoupe conclude that the Canadian commitment to multiculturalism is *performative*. As they put it, the young, dynamic, attractive Prime Minister, putatively committed to various forms of diversity (and thus, a near perfect symbolic condensation of section 27 of the *Charter*), was discovered to have worn dark makeup in a send up of the Arabian nights while teaching at a prestigious private high school in Vancouver in his 20s. Other similar images from his youth followed.

One might have thought that this scandal would unravel Trudeau's brand, and along with it, the vision of Canadian society that section 27 represents, with its commitment to "the multicultural heritage of Canadians."[26] However, as Dobrowolsky and Leal-Iyoupe point out, while the immediate response to the discovery of these photographs was one of outrage and a kind of voyeuristic

24 *Official Language Act*, SQ 1974, c 6 [Bill 22]; *Charter of the French Language*, CQLR c C-11 [Bill 101];

25 Alexandra Dobrowolsky & Bethany Leal-Iyoupe, "Shame Face? The Justin Trudeau Blackface Scandal, Multicultural Performativity, Privilege and Power" (2022) 26:2 Rev Const Stud 73; *Charter*, *supra* note 2, s 27.

26 *Charter*, *supra* note 2, s 27.

sensationalism both nationally and even internationally, in the end, they made no appreciable difference to the outcome of the 2019 election.

If performativity is understood in the terms of linguistic theory — wherein a statement enacts the thing it says (as in, "I now pronounce you man and wife") — the multiculturalism widely vaunted by Canadian elites is here seen to *perform* multiculturalism *without* enacting it. It is worth noting here that performances are meant to be enjoyable, and Saidiya Hartman's analysis of the place of enjoyment in blackface performance can productively illuminate Dobrowolsky and Leal-Iyoupe's analysis of the Justin Trudeau scandal.[27] On Hartman's view, it is no mistake that enjoyment is both a term of affect and a term of property, and she argues that enjoyment defines the meaning of subjection since ownership is literally the right of "exclusive enjoyment." For the performance of blackface, then, the fantasy is that the subject imagined to be enjoying is the Black or brown person, whose enjoyment is variously envied, hated, and repossessed.[28]

Seen in this light, Trudeau's performance of blackface (or brownface) is a *quotidien* enactment of that very fantasy of envy and hatred. If the "Other" is imagined to enjoy, then performances of black/brownface are effectively attempts to "wrestle back" that fun (and when blackface is featured in Halloween parties, minstrel events, and the like, they are typically defended as "just fun"). What Dobrowolsky and Leal-Iyoupe hint at, is that part of the fun also *includes* the media response, the "false" scandal, its sensationalism, and its ultimate insignificance to politics. Blackface — performed as "harmless fun" or vicious mockery — always has an audience, who are variously sensationalized, titillated, and invited into circulating the constructed, envied, and hated enjoyment of the racialized and marginalized Other as their "fun." The fascinating question remaining here, is how section 27 works — if it does — in this performative enactment of multiculturalism. Indeed, Dobrowlosky and Leal-Iyoupe present section 27 a tool that has "problematic and strategic resonance" with "highly selective scope and reach."[29]

For much of Canada's history LGBTQ2+ rights were far from supported, and *Charter*-based interpretations may accordingly be seen as a significant turning point. However, Miriam Smith's article, "LGBTQ2 Rights and the Charter at 40: Recent Critiques of the Liberal Rights Model," analyzes how

27 Sadiya V Hartman, *Scenes of Subjection: Terror, Slavery and Self-Making in Nineteenth Century America* (Oxford: Oxford University Press, 1997).

28 *Ibid* at 25.

29 Dobrowolsky, *supra* note 25 at 100.

even clear rights victories in jurisprudence — specifically those supporting LGBTQ+ rights — can sour if used to create invidious distinctions between "us" and "them."[30] In the post-9/11 environment, expressions of anti-Muslim racism (or what some call Islamophobia) create an Other that falls outside of "Canadianness" and "Canadian values." Through a careful reading of the history of LGBTQ+ *Charter* victories, and a sharp intersectional lens addressing racial and ethnic divisions within LGBTQ communities, Smith shows how the increasing acceptance of certain forms queer life, especially those that mimic heterosexual monogamy, such as marriage, comes at the peril of imagining and marginalizing a new societal Other. This is: the "terrorist" who is understood as Muslim and/or Arab and is opposed to hard fought rights seen to define post-*Charter* Canada.

Eric Adams and Erin Bower's work "Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the *Charter*" turns away from the question of *Charter* values, and towards "constitutional meaning in an interplay of text, purpose, and context."[31] Against the widely accepted view that section 33 was an awkward, last-minute addition to the *Charter*, added in order to broker a deal with the provinces, Adams and Bower trace the origins of section 33 to the common law, and the Latin term *non obstante*.[32] The latter began as a recognition of the power of the sovereign prerogative to "carve exceptions, narrow legal applications, and create hierarchies in the legal order."[33] It is thus linked to what Giorgio Agamben (and others) have identified as the "state of exception,"[34] a state in which government can legally derogate from otherwise binding rights commitments. Adams and Bower argue, however, that the clause is more usefully understood in the context of its history, which indicates that it was actually devised for the purposes of rights protection. As they say, "[i]t is striking just how many of [section 33's] conceptual proponents foregrounded the protection of rights — not their override, derogation, or denial — as the rationale for [its] existence."[35] However, even if the history and context of the notwithstanding clause are suggestive of its rights protecting purposes, Adams and Bower suggest that more recent uses of section 33 are suggestive of a new, less protective constitutional culture that is now emerging.

30 Miriam Smith, "LGBTQ2 Rights and the *Charter* at 40: Recent Critiques of the Liberal Rights Model" (2022) 26:2 Rev Const Stud 101.

31 Eric M Adams & Erin RJ Bower, "Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the *Charter*" (2022) 26:2 Rev Const Stud 121.

32 *Charter*, *supra* note 2, s 33.

33 Adams & Bower, *supra* note 31 at 126.

34 Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005).

35 Adams & Bower, *supra* note 31 at 43.

This brings us to the next three articles wherein a new constitutional culture is a unifying frame for what on the face of it are some very different foci. This is because each of these articles addresses the *Charter* in the contemporary context of the rise of the right and the neoliberal restructuring of modern societies. If the *Charter* can be seen as a document emerging out of the last breath in the early 1980s of a firm commitment to the Keynesian welfare state and the protection of those who are most vulnerable, the current political moment features the *Charter* being mobilized more squarely by state and societal actors associated with the right. Emmett Macfarlane's "Beyond the Hate Speech Law Debate: A 'Charter Values' Approach to Free Expression" is the first of two articles that deal with the important and timely issue of free speech and its limitation.[36] His discussion is framed by recent firestorms surrounding the limits of speech on social media and on campuses, and by controversies and debates about what kinds of speech rise to the level of "hate." At issue in these controversies is a deep antipathy to limitations of any kind on what can be said or expressed, and thus a seeming alignment with section 2(b) of the *Charter*, which guarantees the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[37] In short Macfarlane seeks a political path in these debates that outflanks the right by avoiding any false equivalence between "equality concerns and freedom of expression" — an approach he describes in terms of *Charter* "values."[38]

The kinds of arguments mobilized by the right elide the harms associated with hate speech, which take aim at personal dignity. As Macfarlane says, though, the right's "free speech absolutism" is an illusion, given that "[t]he vast majority of people routinely accept limitations on speech, be they perjury laws, requirements that food manufacturers provide nutritional information on packaging, or the expectation that students in the classroom avoid disrupting a lecture."[39] However, debates about laws prohibiting hate speech are complicated by the many forms of hate speech. To quote Macfarlane: "Most commentators readily accept restrictions on incitement to violence or targeted harassment of individuals. By contrast, restrictions on generalized hateful utterances are more controversial, in part because of the considerable challenges in identifying a causal effect between such speech and harm to specific individuals."[40]

36 Emmett Macfarlane, "Beyond the Hate Speech Law Debate: A 'Charter Values' Approach to Free Expression" (2022) 26:2 Rev Const Stud 145.

37 *Charter*, *supra* note 2, s 2(b).

38 Macfarlane, *supra* note 36 at ?????????.

39 *Ibid* at 151.

40 *Ibid*.

Getting around the holes in these debates requires that legislatures be guided by the most fundamental principle of the *Charter*: respect for the dignity of the human being. Macfarlane thus argues that policies grounded in *Charter* values "can be implemented in a way that enhances expressive freedom while mitigating the capacity of hateful speech to erode equality or damage the human dignity of its targets."[41]

Related debates are taken up in Dax D'Orazio's article, "What's Public About Publicly-funded Universities? The Law and Politics of Extending Charter Protections to Campus Expression."[42] Here D'Orazio narrows in on the flashpoint of university policies and the *Charter* regarding free speech. The framing question for D'Orazio is whether the campus is "public" (in the sense of "for all") or private (in the sense of "exclusively for the client"). When universities attempt to justify decision-making that restricts expression, sometimes explicitly rejecting *Charter* applicability, they inevitably portray their campuses as essentially private fora in which the relationship between institution and individual is of a contractual nature. This is at odds with both the self-declared mission of the university and the foundation of the university's legitimacy in the eyes of the public. For D'Orazio then, the university is both essentially public and contingent upon expressive protections. Free expression (rather than simply free inquiry) is an academic value, but it requires judgment to distinguish opinions and arguments on their merit. That is to say, while "free expression is meant to promote a diversity of opinion without hierarchical power being invoked to make distinctions upon merit … not all arguments, ideas, and voices are equal and/or equally deserving of attention and scarce academic resources."[43]

While MacFarlane and D'Orazio address claims made by the right against the state's limitations on freedom, Matt James' article, "Worlds Reversed: Canadian Charter Discourse, Right-Wing Charter-Claiming, and the Mnemonics of Rights, Forty Years On," takes up another puzzling new move to invoke the *Charter* from the right.[44] Moving from an analysis of the values and symbolic meaning internal to the document itself, James turns towards the less studied but no less important issue of the civic and public meaning of the *Charter*. As we have seen very recently, the Freedom Convoy protesters,

41 *Ibid* at 147.

42 Dax D'Orazio, "What's Public about Publicly-funded Universities? The Law and Politics of Extending *Charter* Protections to Campus Expression" (2022) 26:2 Rev Const Stud 169.

43 *Ibid* at 182.

44 Matt James, "Worlds Reversed: Canadian *Charter* Discourse, Right-Wing *Charter*-Claiming, and the Mnemonics of Rights, Forty Years On" (2022) 26:2 Rev Const Stud 199.

fundamentalist pastors, and white nationalists have begun to use the *Charter* as a symbol of resistance. While much of this right-wing *Charter* claiming emerges from those decrying the use of the state to implement public health measures during the COVID-19 crisis, James argues that these moves predate the pandemic. In this respect, James draws our attention to the fact that state limitations, rights protections, and inclusion, as mechanisms of liberal democracy, must be understood against another grain of the *Charter*, which is a call to move past a time of grievances. On this view, rights are understood to be a response to grievous wrongs, and a call for a brighter future where those wrongs will "never again" happen. James' argument is that the underlying claim of right-wing *Charter* enthusiasts is that the time of righting those wrongs is now over. Drawing on memory studies and political economy, James' notices that the posture of apology is understood by right-wingers to be weak, and therefore feminized. In this articulation, "wiping the slate clean" and "forgetting about past differences" is seen as the reorienting of politics towards something vital, masculine, and unapologetic.

Drawing on Hansard debates, James shows that Conservative parties — in their federal and provincial iterations — have shifted their allegiance to the *Charter* in the past decade or so, as has the Canadian far right. As he argues, the post-war citizenship regime — which was grounded in a welfare state that supported marginalized groups — came to be underpinned by progressive *Charter* discourse, but the new culture of *Charter*-claiming by the right suggests this citizenship regime is now evolving if not eroding.

The final three articles in this issue — by Lynda Collins, by Johanne Poirier and Colleen Sheppard, and lastly by Robert Hamilton — focus on the environment, federalism, and Indigenous peoples respectively. While the topics vary, what they share is a strong sense that the *Charter*, depending on how it is contextualized, might still do more when it comes to environmental rights, the cumulative impact of rights protection at sub-national levels, and Indigenous rights.

In "Constitutional Eco-Literacy in Canada: Environmental Rights and Obligations in the Canadian Constitution," Lynda Collins reminds us that despite all the entitlements that the *Charter* may have given Canadians, Canada is in fact amongst a minority of nations which have thus far refrained from explicitly recognizing constitutional environmental rights.[45] The salience of this absence has only grown over the past forty years, given the extensiveness

45 Lynda M Collins, "Constitutional Eco-Literacy in Canada: Environmental Rights and Obligations in the Canadian Constitution" (2022) 26:2 Rev Const Stud 227.

of the current ecological crisis. However, she notes that this does not preclude Canadian courts from taking an "ecologically literate" approach to the Constitution by recognizing what she calls "the absolute dependence of all constitutional rights on ecological services such as breathable air, drinkable water, and a climate that is viable for human communities."[46] Carefully reviewing the *Charter* jurisprudence, Collins suggests that such rights as freedom of religion, equality, and life, liberty, and security of the person are in conflict with grave, state-sponsored environmental harm.

To reinforce the prescience of Collins' argument, we observe that as we went to press in July 2022, the United Nations General Assembly voted in favour of recognizing a human right to a healthy environment. Collins' analysis notably also suggests that decisions linking Indigenous rights with environmental protection in settler-colonies such as New Zealand, Ecuador, and Columbia are instructive for Canada. This is because Indigenous rights under section 35 of the *Constitution Act, 1982* arguably include the right to ecological self-determination.[47] Collins' analysis accordingly goes a long way in showing how contemporary efforts of reconciliation between Indigenous peoples and non-Indigenous Canadians, as well as the existential issue of environmental sustainability, can be enhanced through constitutional eco-literacy.

Writing jointly, Johanne Poirier and Colleen Sheppard address and turn on its head the long-held assumption that Canadian federalism (with its focus on subnational units) and the *Charter* (with its "pan Canadian" rights protections) are in tension with each other. As they remind us in their article, "Rights and Federalism: Rethinking the Connections," prior to the *Charter* there was limited pan-Canadian constitutional protection of rights and freedoms.[48] Indeed, the overarching focus of the *Constitution Act, 1867* (originally enacted as the *British North America Act*) was on federalism, and rights were therefore secured for the most part through provincial, territorial, or federal legislation focussed on specific jurisdictions.[49] As they point out, in this context Saskatchewan passed a Bill of Rights in 1947, and in 1977 Quebec became the first province to prohibit discrimination based on sexual orientation through its *Charter of Human Rights and Freedoms*.[50] In an analysis of Canada's *Charter* rulings, Poirier and Sheppard show that in a number of cases the Supreme

46 *Ibid* at 230.
47 *Constitution Act, 1982*, *supra* note 19, s 35.
48 Johanne Poirier & Colleen Sheppard, "Rights and Federalism: Rethinking the Connections" (2022) 26:2 Rev Const Stud 249.
49 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.
50 *Charter of Human Rights and Freedoms*, CQLR c C-12.

Court has been responsive to provincial diversity, and that, conversely, judicial rulings relating to the federal division of powers show sensitivity to vulnerable groups. In their judgment, an analytical conceptual shift is required in the way we think about federalism and rights. As they suggest, rights can actually be further enhanced by the decentralized and multi-scalar governance inherent in federal systems.

Finally, Robert Hamilton's article, "Self-Governing Nation or Jurisdictional Ghetto? Section 25 of the *Charter of Rights and Freedoms* and Self-Governing First Nations in Canada," returns to where we started with a focus on Indigenous peoples.[51] Hamilton echoes the opening article by Patzer and Ladner in noting that the vast majority of litigation that emerged from the inclusion of Aboriginal and treaty rights in the *Constitution Act, 1982* has made use of section 35 — which is not technically part of the *Charter* — as opposed to section 25, which prevents the *Charter* from being interpreted in ways that narrow or limit Aboriginal rights.[52] Hamilton invites us to consider section 25 and its possibilities through the 2020 case of *Dickson v Vuntut Gwitchin First Nation*.[53] In *Dickson*, the Yukon Supreme Court and Court of Appeal addressed the role section 25 plays in relation to Indigenous self-governance. While not without problems when it comes to the question of the application of the *Charter* and Indigenous nations exercising inherent authority, Hamilton's analysis of the *Dickson* rulings does also suggest that section 25 may allow for significant protection of Indigenous laws for nations with self-government agreements.

Taken together, the articles in this issue demonstrate the multidimensional and varied issues that come to the fore when we consider what the *Charter* has and has not done in the last forty years, as well as what it might do in future. We thank all the special issue contributors for their timely submissions as well as the numerous other scholars that supported the peer review process with their feedback. This labour by so many was especially remarkable given the added and extraordinary demands on time and energy resulting from the COVID-19 pandemic. It is however the same pandemic that has underlined the importance of both scholarly and critical work on the *Canadian Charter of Rights and Freedoms* for our collective knowledge, understanding, and aspirations.

51 Robert Hamilton, "Self-Governing Nation or 'Jurisdictional Ghetto?' Section 25 of the *Charter of Rights and Freedoms* and Self-Governing First Nations in Canada" (2022) 26:2 Rev Const Stud 279.

52 *Constitution Act, 1982*, *supra* note 19, s 35; *Charter*, *supra* note 2, s 25.

53 2020 YKSC 22, rev'd 2021 YKCA 5 [*Dickson*].