

# Worlds Reversed: Canadian Charter Discourse, Right-Wing Charter-Claiming, and the Mnemonics of Rights, Forty Years On

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*Once associated with the civic claims-making of feminists, antiracists, and LGBTQ2SIA+ activists, the Charter has found new life as a favoured symbol of far-right anti-lockdown protestors and conservative religious-freedom advocates. This article argues that the political significance and sources of this apparent transformation go beyond the formal world of Charter challenges and jurisprudence on which Canadian political science Charter scholarship tends to focus. Instead, the article highlights the possible weakening of the postwar “never again” memory culture that made entrenching human rights seem a necessary response to Nazi genocide and an antidote to authoritarian backsliding at home. This memory culture is now a target of authoritarian and far-right actors, who resent the so-called age of apology and its emphasis on historical regret, and who appear to be bringing more truculent and less introspective understandings of rights and freedoms to Canadian Charter discourse. This far-right assault on the age of apology also coincides with a general trend of right-wing Charter warming among parliamentary Conservatives, who seem now to share a relatively unburdened and sometimes quite aggressive understanding of the exercise of constitutional rights. Above all, the article argues that we need to treat the historical consciousness and memory lessons that actors bring to their Charter invocations seriously*

*Autrefois associée aux revendications des féministes, des antiracistes et des activistes LGBTQ2SIA+, la Charte a trouvé une nouvelle raison d’être, en tant que symbole de prédilection des manifestants d’extrême droite contre le confinement et des défenseurs conservateurs de la liberté religieuse. Cet article soutient que la portée politique et les sources de cette apparente transformation vont au-delà des contestations et de la jurisprudence relative à la Charte sur lequel la recherche en science politique canadienne a tendance à se concentrer. L’article souligne plutôt l’affaiblissement possible de la culture de la mémoire de l’après-guerre, du « plus jamais », qui a fait de l’enracinement des droits et libertés une réponse nécessaire au génocide nazi et un antidote aux possibles dérives autoritaires. Cette culture de la mémoire est aujourd’hui la cible d’acteurs autoritaires d’extrême droite, qui n’apprécient pas ce que l’on appelle « l’ère des excuses » et l’accent mis sur le regret historique, et qui semblent apporter au discours sur la Charte canadienne des conceptions plus truculentes et moins introspectives sur les droits et libertés. Cet assaut de l’extrême droite contre l’âge des regrets coïncide également avec une tendance générale de rapprochement de la Charte chez les parlementaires conservateurs, qui semblent maintenant partager une compréhension relativement libérée et parfois assez agressive*

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— as a vital but often unnoticed everyday constitutionalism that revolves around what the article calls the mnemonics of rights.

*de l'exercice des droits constitutionnels. Avant tout, l'article soutient que nous devons traiter sérieusement la conscience historique et les leçons de mémoire que les acteurs apportent à leurs invocations de la Charte – comme un constitutionnalisme quotidien vital, mais souvent inaperçu, qui tourne autour de ce que l'article appelle les mnémoniques des droits.*

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*“Part of our task is to recognize the injustice of the past, to say ‘never again shall rights be trampled upon.’ Part of our task is to ensure that the enormous evolution in our values is reflected in our Constitution.”*

Federal Justice Minister Jean Chrétien, February 1981<sup>1</sup>

*“I’m sure they’ll trump up some stupid Charter of Rights challenge.”*

Federal Citizenship and Immigration Minister Jason Kenney,  
December 2011<sup>2</sup>

*“Since when should governments start with an impairment of fundamental Charter-protected rights and freedoms rather than engage in such an impairment as a last and final resort?”*

Alberta Premier Jason Kenney, November 2020<sup>3</sup>

## I. Introduction

At least in their public invocations and rhetoric, red-meat conservatives once eschewed the *Charter*, which they associated with “women lawyers” who “packaged their causes as cases” in battle against representative government and common sense.<sup>4</sup> Yet at the time of this article’s writing, the *Charter* had become a favoured touchstone of anti-lockdown protestors, fundamentalist pastors, and even Alberta Premier Jason Kenney.

The apparent turnabout was no doubt hastened by the Covid-19 pandemic, which sparked *Charter* litigation and an insistent freedom-and-rights discourse from opponents of public health measures. However, deeper analysis is required. This article suggests that a trend of at least partial right-wing *Charter* warming predated the pandemic. The evidence presented here comes not from public opinion research or the official world of *Charter* litigation but rather from what law scholar Patrick Monahan, on the occasion of the *Charter*’s 10th anniversary, called “*Charter*-claiming behaviour” — rhetoric invoking the *Charter* in

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1 *House of Commons Debates*, 32-1, vol 7 (17 February 1981) at 7374 (Hon Jean Chrétien) cited in Jordan Sherbino, *Redress through Constitutional Change: Reimagining the Canada Round for its Reparative Potential* (MA Thesis, University of Victoria, 2022) [unpublished].

2 Quoted in Judith Timson, “I Don’t Like Segregation in Any Religion”, *The Globe and Mail* (16 December 2011).

3 Quoted in Sammy Hudes, “Following Weeks of Pressure, Kenney Declares State of Emergency, Closes High Schools”, *Calgary Herald* (25 November 2020).

4 FL Morton, “The Charter Revolution and the Court Party” (1992) 30:3 *Osgoode Hall LJ* 627 at 645, 649. Of course, conservatives did not eschew *Charter* litigation itself, as cases such as *Harper v Canada (Attorney General)* 2004 SCC 33 indicate.

the service of some kind of political position or goal.<sup>5</sup> With rare exceptions, the scholarly community from which I hail, Canadian political science, does not study *Charter*-claiming behaviour outside of the courts or indeed pay much attention to the *Charter* as a civic symbol, discursive field, or legitimator of political claims.<sup>6</sup> Because Canadian political science scholarship focuses almost exclusively on the formal legal politics of *Charter* challenges, litigation, intervenors, and court decisions, it is ill-equipped to interpret the possible changed meanings and attractions of *Charter* symbolism and discourse.

Understanding the import and significance of these meanings and attractions requires studying and locating *Charter*-claiming behaviour in historical context. As this article will argue in more detail, although the point may seem at first glance obscure, such understanding also requires studying the historical invocations and indeed the historical consciousness of *Charter*-claiming actors. As an example, consider the case of the Canada Unity organization, the self-declared “voice of Canadians who desire to have the [*Charter of Rights*] upheld,” and one of the main groups behind the 2022 occupation of Ottawa in protest against pandemic-related public health restrictions.<sup>7</sup> The first lines of the group’s so-called Unity Manifesto proposed both a historical context and a historical consciousness for the occupation. It proclaimed: “We are in a moment of history where all of us, together, are falling in love with our country. People are forgiving each other for their past transgressions. We are wiping the slate clean. This is a time in history where Canadians can forget about their past differences ... Unite Canada with us.”<sup>8</sup>

By referencing this “moment of history,” this time of “wiping the slate clean” and “forget[ting] about ... past differences,” the Manifesto invoked not only the occupation’s supposed present-day happiness of clean slates and unity, but also an unhappier era of burdened slates and the too-avid remembering of differences. The invocation thus disdained a time past and that past time’s particular way of engaging its past. In doing so, the Manifesto raised the spectre of the so-called Age of Apology and its public culture of regretful remembrance,

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5 Patrick Monahan, “The Charter Then and Now” in Penny Bryden et al, eds, *The Charter Ten Years After* (Toronto: University of Toronto Press, 1993).

6 As an exception to this trend, see Emmett Macfarlane, “Terms of Entitlement: Is There a Distinctly Canadian Form of ‘Rights Talk?’” (2008) 41:2 Can J of Political Science 303.

7 Rachel Parent, “Protest Organizer: No Intent to Topple Government”, *National Post* (10 February 2022), online: <nationalpost.com/news/politics/protest-organizer-no-intent-to-topple-government-and-no-plan-to-leave-until-covid-mandates-lifted> [perma.cc/95UK-WZU9].

8 Canada Unity, “Convoy for Freedom 2020: Unity Manifesto”, online: *Canada Unity* <www.canada-unity.ca/bearhug?lightbox=dataItem-10soav5j> [perma.cc/7QEJ-4ZWC]. Thanks to Hannah Wyile for bringing the Manifesto to my attention.

which the US right, in particular, has long proscribed as “weak, emasculating, and unpatriotic.”<sup>9</sup> The same target appears in the first line of the “loyalty oath” of the far-right Proud Boys, a group now designated in Canada as a terrorist entity: “I’m a proud Western chauvinist[;] I refuse to apologize for creating the modern world.”<sup>10</sup>

Highlighting the right-wing distaste for the Age of Apology can help us to better understand the historical meaning and significance of the apparent pandemic-era embrace of the *Charter* by Canadian conservatives. Born near the end of the Cold War in the waning decades of the twentieth century, the Age of Apology was the period in which demands for historical redress first came to prominence in many of the world’s White-dominated advanced capitalist democracies. As the article will soon show in more detail, the beginnings of this period also coincided with Canada’s first years of *Charter* discourse and *Charter*-claiming behaviour. Like then-Justice Minister Jean Chrétien in the 1981 speech cited in this article’s first epigraph, entrenchment advocates framed the *Charter* as a “never again” commitment made in the shadow of remembered atrocities: the Nazi genocide, Canada’s “none is too many” refusal of wartime Jewish refugees, its internments of Japanese and Ukrainian Canadians, and more.<sup>11</sup> Today’s apparent trend of conservative *Charter* warming should be understood in light of the Age of Apology’s status as a significant target of the contemporary populist right and in light of the *Charter*’s possible detachment from the Age of Apology symbolism that informed its early development and birth.

The following section argues for the importance of understanding constitutionalism through the prism of social memory. It also introduces the concept of the mnemonics of rights, which it uses analytically to highlight the memories of past wrongs that, by informing *Charter*-claiming behaviour, may help to lend particular kinds of public significance and meaning to the document’s otherwise abstract text. The article then turns to examine the mnemonics of rights and the broader context of citizenship and constitutionalism in which the act of entrenchment and the nascent *Charter* assumed relatively progressive, “never again,” Age of Apology connotations.

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9 Mark Gibney et al, eds, *The Age of Apology: Facing up to the Past* (Philadelphia: University of Pennsylvania Press, 2008); Nick Smith, “Should Biden Apologize for Trump? National Remorse and the 2020 US Presidential Election” (2020) 57 *Society* 698 at 701.

10 “Proud Boys”, online: *Wikipedia* <en.wikipedia.org/wiki/Proud\_Boys> [perma.cc/B77T-ZMGQ].

11 For an analysis, see Matt James, “*Charter* Politics as Materialist Politics” in *Misrecognized Materialists: Social Movements in Canadian Constitutional Politics* (Vancouver: University of British Columbia University Press, 2006) 67 [James, “Charter Politics as Materialist Politics”].

In its penultimate sections, the article highlights the demise of the latter context, noting the rise of neoliberalism, the end of Canada's megaconstitutional politics era, and the development by the global far right of a truculent, post-9/11 mnemonics. It also examines evidence from House of Commons debates that shows that the parliamentary Conservative Party has largely abandoned the *Charter*-phobic rhetoric of the Stephen Harper years. The point is to understand a number of intersecting transformations, occurring on the terrain of historical remembrance and social memory, that make the *Charter* a more invocable right-wing symbol than it was upon entrenchment. These transformations reflect and help to motivate and license particular corresponding visions of community and ways of distinguishing between the proper and improper uses of public power. At the time of writing, these visions and understandings seemed to be gaining ground against their predecessors of the earlier *Charter* era.

## II. Memory Studies, Constitutional Studies, and the Mnemonics of Rights

Illuminating civic discourses and symbols via their historical touchstones and referents means analytically foregrounding collective or social memory as crucial terrain on which political actors and communities forge and contest shared lines of meaning and belonging.<sup>12</sup> Actors navigate their worlds with skills, knowledges, and expectations that come from various materials, kinds, and genres of recollection.<sup>13</sup> Knowing this, political communities and institutions dedicate considerable pedagogic energy — in ritual commemorations, museum exhibits, school curricula, monuments, and more — to shaping the terms and substance of recollection.<sup>14</sup> Nation states, as much as they are geographically demarcated places, are also memory-forged spaces shaped, redefined, and reproduced through what Hobsbawm and Ranger famously called the “invention of tradition.”<sup>15</sup>

Eras of intense political conflict and transformation will thus tend to involve intense social memory activity as well. Virtually alone among his disci-

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12 For example, Jeffrey K Olick, *States of Memory: Continuities, Conflicts, and Transformations in National Retrospection* (Durham, NC: Duke University Press, 2003).

13 Barbara A Misztal, *Theories of Social Remembering* (Maidenhead: Open University Press, 2003).

14 Paul Connerton, *How Societies Remember* (Cambridge: Cambridge University Press, 2010).

15 EJ Hobsbawm & Terence Ranger, *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983); Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, 2nd ed (London: Verso, 1991). On the Canadian case, see the special issue of *Citizenship Studies*: Michael Nijhawan, Daphne Winland & Jenny Wüstenberg, eds, *Contesting Memory and Citizenship in Canada* (2018) 22:4 *Citizenship Studies*.

plinary peers, political scientist Alan Cairns used this understanding to illuminate Canada's high-stakes megaconstitutional conflicts of the 1980s and 90s. Consider Cairns's argument that the dramatic and unanticipated failure of the 1987-90 Meech Lake Accord reflected the decisive, post-*Charter* displacement of constitutional assumptions, such as elitism and parliamentary sovereignty, that had been eroding gradually for decades.<sup>16</sup> A crucial and underappreciated theme in this argument is the role of social memory as a key medium of this constitutional displacement. Defenders presented Meech Lake as an act of historic reconciliation, necessitated by Quebec's betrayal when the 1982 *Charter* was imposed against its will and without its consent. Thus, informed acceptance of the Accord tended to entail accepting the version of constitutional memory forwarded by the betrayal thesis.<sup>17</sup> Yet Meech Lake's backers proved disastrously unattuned in their memory work to the heightened civic importance of other memories, memories that were not their own: "memories of racism ... humiliation ... rebuffs, exclusions, and [of] occasional heady triumphs."<sup>18</sup> Among the triumphs, of course, none loomed larger than the 1982 success of equality-seeking groups in securing "constitutional [equality] clauses [and an] evocative constitutionally sanctioned rhetoric of rights."<sup>19</sup> These remembered triumphs, as well as the remembered exclusions from which the triumphs derived their meaning, were precisely what Meech Lake in its core provisions and process appeared to snub. In Cairns's account, then, Meech's unexpected defeat was a victory for subaltern constitutional memories and a reflection of the failure of Canadian political scientists and political elites to understand the transformed, post-entrenchment field of public memory.

This brief discussion illustrates the role of social memory as a medium of national identity, constitutionalism, and political change. Drawing on Cairns, it emphasizes the important role in the Meech Lake affair of social-movement memories of the 1982 entrenchment and of the injustices that entrenchment was seen to repudiate: the relevant past was one of disregard and rightlessness; the *Charter*, a fragile symbol of potential transition. This discussion, then, provides a historical benchmark from which to begin thinking about the social-memory environment of *Charter*-claiming behaviour today. Analytically, it

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16 Alan C Cairns, "The Constitutional World We Have Lost" in Douglas E Williams, ed, *Reconfigurations: Canadian Citizenship and Constitutional Change* (Toronto: McClelland and Stewart, 1995) [Cairns, "Constitutional World"].

17 Alan C Cairns, "Passing Judgment on Meech Lake" in Douglas E Williams, ed, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake* (Toronto: McClelland and Stewart, 1991).

18 Cairns, "Constitutional World", *supra* note 16 at 116-17.

19 *Ibid* at 117.

enjoins us to trace the sociopolitical meanings of constitutional rights back to their salient remembered histories.

Further guidance on this analytical point comes from the somewhat unlikely source of right-wing law scholar Alan Dershowitz's 2004 book, *Rights from Wrongs*.<sup>20</sup> Dershowitz presents his book as a solution to the well-worn antinomy between positivist approaches, which see rights simply as one kind of overriding lawful injunction among others, and natural law visions, which treat rights as transcendent moral commands. For his part, Dershowitz understands rights as historically contingent and historically situated articulations of justice forged through notable shared experiences of grave wrongs.

To be clear, I find Dershowitz's legal advocacy on behalf of tyrants and white-collar rapists abhorrent, and I am not even interested in joining the positivism-versus-natural law debate. What interests me are the implications for *Charter* research, forty years after entrenchment, of Dershowitz's basic claim that we get rights from wrongs.

Rights derive historically contingent meanings from shared social memories of notable wrongs: this proposition should direct the attention of *Charter* and constitutional scholars to what I call the mnemonics of rights. By mnemonics of rights, I mean the shorthand historical memories of injustice and suffering with which actors buttress particular understandings of constitutional protections and freedoms. As already suggested by Cairns's scholarship, rights mnemonics, at least in a polity that professes to take rights seriously, are not rhetorical ephemera. Rather, as participants in past megaconstitutional battles sensed well, they reflect and may even help to change larger understandings of the political community's nature and purpose.

The next section examines the mnemonics of rights in early Canadian *Charter* discourse in order to illuminate the underappreciated importance of the politics of social-movement injustice remembrance that infused the *Charter* with its originary significance and meaning. By grasping the deep historical specificity of that significance and meaning, we can advance constitutional self-understanding so that scholarly, activist, and policy communities might better address the transformed landscape of Canadian rights invocations that faces us today.

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20 Alan Dershowitz, *Rights from Wrongs: A Secular Theory of the Origins of Rights* (New York: Basic Books, 2004).



### III. The Mnemonics of Rights in Canada's Postwar Citizenship Regime

From early calls for a bill of rights after the Second World War to the heady entrenchment decade of the 1980s, *Charter* advocacy developed in tandem with what political scientist Jane Jenson calls Canada's postwar citizenship regime. Jenson's concept refers to temporally distinct national complexes of institutions, discourses, and assumptions that coalesce to shape political claims, political identities, and public policy in particular historical eras. Jenson characterizes Canada's postwar citizenship regime this way: "It assigned an active role to the state, in order to promote social justice; accepted a guiding role for the state in economic development; recognized a single Canadian community, albeit one composed of francophones and anglophones, as well as individuals of diverse ethnic origins."<sup>21</sup> These postwar commitments departed significantly from the regime's prewar predecessor, which was *laissez-faire*, indifferent to social justice, and tethered to the watertight compartments of classical federalism.<sup>22</sup>

Jenson does not explicitly consider how or what kinds of historical consciousness and remembrance might inform particular citizenship regimes. Although there is no space here to argue for making social memory an explicit component of the citizenship regime concept, Canada's postwar regime certainly exhibited a distinctive temporal sensibility. Perhaps most notably, for example, its discourses of social welfare and, eventually, of citizen rights, were couched in a rhetoric of progress and improvement that rested on fearful engagements with memories of Depression and war.<sup>23</sup> Consider the mantric pledge of "Reconstruction," which Allied governments used to sustain morale in the waning years of the Second World War, and which progressive Canadian movements leveraged into a broader ethos of transformative disavowal. In the new mnemonics of the welfare state, for example, national medicare was a response to the brutalities of a time when paying one's bills was said to forge character and when obeisance to the jurisdictional boundaries of classical federalism trampled over social need.<sup>24</sup> In much the same way, postwar rights advocates presented a domestic *Charter* as the antidote to a racist and sexist past governed by the heedless chauvinism of parliamentary supremacy.<sup>25</sup>

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21 Jane Jenson, "Fated to Live in Interesting Times: Canada's Changing Citizenship Regimes" (1997) 30:4 *Can J of Political Science* 627 at 634.

22 On this point, also see Janine Brodie, "We Are All Equal Now: Contemporary Gender Politics in Canada" (2008) 9:2 *Feminist Theory* 145.

23 Michael Howard, *War and the Liberal Conscience* (New Brunswick, NJ: Rutgers University Press, 1978).

24 C Howard Shillington, *The Road to Medicare in Canada* (Toronto: Del Graphics, 1973).

25 Cairns, "Constitutional World", *supra* note 16; Leslie A Pal, *Interests of State: The Politics of Language, Multiculturalism, and Feminism in Canada* (Montreal: McGill-Queen's Press, 1993).

These early rights mnemonics were also of international origin, shaped by an emergent liberal cosmopolitanism that, from the late 1940s, stressed human rights as the best defence against the racial purity obsessions and ethnic cleansing policies that had caused the preceding Age of Catastrophe.<sup>26</sup> Leading this cosmopolitanism, the United Nations enjoined signatories of the 1948 Universal Declaration of Human Rights to entrench domestic bills of rights as their contributions to the postwar order's new "never again" goal. Canada's first parliamentary hearings to consider the *Charter* idea, the 1947 Special Joint Committee on Human Rights and Fundamental Freedoms and the 1950 Senate Special Committee on Human Rights and Fundamental Freedoms, were premised explicitly on this point.<sup>27</sup>

To better understand the mnemonics that informed early Canadian *Charter* advocacy, let us take a closer look at the Japanese-Canadian campaign for redress for the Second World War internment. Decades before the movement began in earnest, community representatives engaged in a nascent mnemonics of rights at the 1950 hearings on Human Rights and Fundamental Freedoms. Then, after a long abeyance period, they brought rights mnemonics in more elaborated form to the 1980-82 parliamentary deliberations on the *Charter*. This Japanese-Canadian movement elicited Canada's first, precedent-setting package of political apology and financial redress just six years later.<sup>28</sup>

From 1942 to 1949, the entire ethnic Japanese population of coastal British Columbia, numbering approximately 24,000 persons, was treated as an enemy collaborator group. For decades prior, Japanese Canadians had been denied the franchise, harassed with measures restricting their endeavours, and excluded from the liberal professions. During and indeed until five years after the war, group members were interned in the province's interior, dispersed and subjected to unfree labour in other provinces, or "deported" to Japan. Concerted lobbying by Vancouver officials, who became keen advocates of ethnic cleansing, also led Ottawa to seize and sell Japanese-Canadian homes, properties, and businesses at fire-sale prices to White Canadians.<sup>29</sup>

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26 Heinrich August Winkler, *The Age of Catastrophe* (New Haven: Yale University Press, 2015).

27 Walter Tarnopolsky, *The Canadian Bill of Rights*, 2nd ed (Toronto: McClelland and Stewart, 1975).

28 The following discussions of Japanese-Canadian presentations at the 1950 and 1980-81 parliamentary hearings rely on: Matt James, "The Postwar Identity Emphasis: Rights, Universalism, and Virtue" in Matt James, *Misrecognized Materialists: Social Movements in Canadian Constitutional Politics* (Vancouver: University of British Columbia University Press, 2006) 41; James, "Charter Politics as Materialist Politics", *supra* note 11.

29 Jordan Stanger-Ross, ed, *Landscapes of Injustice: A New Perspective on the Internment and Dispossession of Japanese Canadians* (Montreal: McGill-Queen's University Press, 2020).

Less than a year after the revocation of these policies, the National Japanese-Canadian Citizens' Association (NJCCA) appeared before the 1950 Senate Special Committee on Human Rights, Canada's main response to the 1948 Universal Declaration. NJCCA Executive Secretary George Tanaka denounced the internment as a violation of the new global norms to which Canada was suddenly claiming commitment, namely, "moral and juridical equality."<sup>30</sup> He repeatedly cited the Japanese-Canadian experience to argue that Canada needed "a greater citizenship," which a domestic *Charter* could help to forge by serving as a "constant teacher [of] fundamental rights and liberties ... for all."<sup>31</sup> However, although his Committee was mandated to promote human rights, the Chair reprimanded Tanaka for dwelling on "the past," while other members chimed in with undisguised racism, insisting, for instance, that "the Japanese always had two loyalties."<sup>32</sup>

The environment and reception were different in November 1980, when the National Association of Japanese Canadians (NAJC) appeared at the extensively covered public hearings of the 1980-81 Special Joint Committee on the Constitution of Canada — hearings that were central to Trudeau's "people versus powers" strategy for overcoming provincial resistance to the *Charter*. The hearings showcased a parade of witnesses — Japanese, Jewish, and Ukrainian Canadians, settler anglophone women's groups, lesbians and gay men, and others — emphasizing the unchecked oppression of the *Charter*-less past. The NAJC expressed the historical sensibility of these presentations perfectly. Past President Roger Obata framed the *Charter* as both a form of redress and an institutionalization of the postwar, "never again" commitment: "A [*Charter*] of Rights entrenched in the constitution to prevent what we have gone through is the least that Canada can do to make amends for what has happened to us and to ensure that such injustices will never be repeated."<sup>33</sup>

By the late 1970s, the Holocaust had emerged as the "global memory imperative" of international liberalism.<sup>34</sup> This new mnemonic context appeared

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30 Senate, Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Evidence*, 21-2, vol 1 (10 May 1950) at 269-270 (George Tanaka on behalf of the National Japanese-Canadian Citizens Association).

31 *Ibid.*

32 *Ibid* at 272-273 (Hon Mr Roebuck and Hon Mr Kinley).

33 Senate and House of Commons, Special Joint Committee on the Constitution of Canada, *Evidence*, 32-1, vol 2, No 13 (26 November 1980) at 5, 9 (Roger Obata, President of National Association of Japanese Canadians) [Special Joint Committee].

34 Daniel Levy & Natan Sznajder, "Memory Unbound: The Holocaust and the Formation of Cosmopolitan Memory" (2002) 5:1 *European J of Soc Theory* 87, cited in Nijhawan, Winland & Wüstenberg, *supra* note 15 at 352.

to amplify the “never again” message that had infused Canadian *Charter* advocacy from the start. Rather than hectoring the witnesses, as their counterparts had done in 1950, parliamentarians congratulated the NAJC on a “very moving” and “most effective” presentation, the “far-reaching implications” of which could “be studied over and over.” They thanked the NAJC for “remind[ing] us of ... the heavy burden that we have to make sure that such things will not happen again.” They asked, “can you give us any guidance as to what ought to be done[?]” and “[d]o you think that you ought to be able to view [future drafts of the *Charter*], to consider whether in fact it has met your objections?”<sup>35</sup>

The point is not that the subsequent path for Japanese-Canadian redress was smooth. Participant memoirs detail a litany of setbacks, rebuffs, duplicity, and indifference.<sup>36</sup> But the 1980s redress campaign persevered in amplifying the “never again” mnemonics of the young *Charter* and appealing to the integrative ethos of the postwar citizenship regime. Its message was that Canada’s process of national rights-based integration could be furthered by grasping the opportunity for civic introspection that redress provided. As the campaign’s main publication, *Democracy Betrayed*, put it, “it is as an act of citizenship and because we refuse to see democracy betrayed that we seek an honourable resolution to the injustices of the war years.”<sup>37</sup> Reflecting decades later on the processes that culminated in the September 1988 Japanese Canadian Redress Agreement, the redress leader and literary critic Roy Miki explained this approach as a product of the citizenship orientation of his generation of activists and as an instrumental appeal to a “liberal nation” ready to confront its racist past. The approach won “the approval of mainstream Canadians.”<sup>38</sup>

Similar, “never again,” rights-and-citizenship mnemonics were central to the campaign that sought and, in 2006, belatedly won, limited financial redress and an official apology for Canada’s 1885-1921 Chinese “head tax” and its 1921-49 “Chinese exclusion” policies. In 1983, Dak Leon Mark brought his \$500 head-tax receipt to the constituency office of his Vancouver East MP, the NDP’s Margaret Mitchell, demanding that “Prime Minister Trudeau reimburse him since this discriminatory tax was contrary to the new [*Charter*

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35 Special Joint Committee, *supra* note 33 at 13-25 (Mr Robinson; Mr Mackasey; Senator Williams; Joint Chairman Mr Joyal; Mr Fraser).

36 Roy Miki, *Redress: Inside the Japanese-Canadian Call for Justice* (Vancouver: Raincoast Books, 2004); Maryka Omatsu, *Bittersweet Passage: Redress and the Japanese Canadian Experience* (Toronto: Between the Lines, 1992).

37 National Association of Japanese Canadians, *Democracy Betrayed: The Case for Redress* (Ottawa: National Association of Japanese Canadians, 1984) at 1.

38 Miki, *supra* note 36 at 313.

of Rights].”<sup>39</sup> The ensuing redress struggle rested on a view of entrenchment as the founding moment of a new citizenship premised on “never again.” As the Chinese Canadian National Council put it, “[w]ith the enactment of the [Charter], Canadians are also awakening to the reality of discrimination and racism that exist in our society ... It is therefore our constitutional right and duty to redress the wrongs ... and to prevent similar wrongs from being committed in the future.”<sup>40</sup>

It may seem quixotic to link the Canadian *Charter* to historical redress. After all, it was the progeny of Pierre Elliott Trudeau, a notable opponent of Indigenous sovereignty and land claims and Japanese-Canadian redress, who argued famously in both cases that we can only be “just in our time.”<sup>41</sup> However, outside the realm of debates over constitutional special status for Quebec, Trudeau was almost wholly unable to control the civic meanings of the *Charter* idea.<sup>42</sup> As Cairns explains, groups with histories of Canadian oppression responded to the “constitutional affirmation of our present and future equality” by turning the *Charter* into a “searchlight to expose past inequalities.”<sup>43</sup>

To use law scholar Eric Adams’s words, these early *Charter*-claiming redress activists were telling “constitutional stories,” grassroots historical narratives for influencing Canadian approaches to community membership, political belonging, and the appropriate uses of political power.<sup>44</sup> To quote Adams again, these activists had developed a “constitutionalism operating in the shadows of law’s formal grandeur.”<sup>45</sup> Amplifying the progressive-yet-regretful logic of the postwar citizenship regime, they gave meaning to the nascent *Charter*, explaining why the new constitutional equality commitments were important, and showing Canadians how to begin forging a society that might redeem those commitments.

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39 *House of Commons Debates*, 33-2, vol 10 (25 January 1988) at 12272 (Margaret Mitchell). This account is repeated in the early redress publication of the Chinese Canadian National Council, *Then, Now, and Tomorrow* (Ottawa: Chinese Canadian National Council, 1988) (photocopy on file with author).

40 Chinese Canadian National Council, *It is Only Fair! Redress for the Chinese Head Tax and Exclusion Act* (Toronto: Chinese Canadian National Council, 1988) at 21 (photocopy on file with the author).

41 For example, see “Prime Minister Trudeau: Remarks on Aboriginal and Treaty Rights” in Peter A Cumming & Neil H Mickenberg, eds, *Native Rights in Canada*, 2nd ed (Ottawa: Indian-Eskimo Association of Canada, 1972).

42 On the Quebec issue, see Guy Laforest, *Trudeau and the End of a Canadian Dream*, translated by Paul Leduc Browne & Michelle Weinroth (Montreal and Kingston: McGill-Queen’s University Press, 1995).

43 Alan C Cairns, “Whose Side is the Past On” in Douglas E Williams, ed, *Reconfigurations: Canadian Citizenship and Constitutional Change* (Toronto: McClelland and Stewart, 1995) 15 at 22.

44 Eric M Adams, “Constitutional Stories: Japanese Canadians and the Constitution of Canada” (2018) 35 *Australasian Can Studies* 1.

45 *Ibid* at 4.

#### IV. Memory Politics After the Postwar Citizenship Regime

With the collapse of the postwar citizenship regime in the neoliberal 1990s, different regretful memories began to dominate Canadian politics: stagflation, “state overload,” and public debt.<sup>46</sup> Neoliberal policy changes also weakened equality advocates by depriving their organizations of core funding and putting them in a competitive race for survival via one-off federal grants competitions.<sup>47</sup> A further factor was the 1992 collapse of the Charlottetown Accord, which brought with it a posture called “constitutional fatigue.”<sup>48</sup> The posture was really a euphemized taboo against the so-called “special interests” whose post-*Charter* prominence the Canadian right bitterly resented.<sup>49</sup>

These antecedents and contexts informed the December 1994 decision of the Chrétien Liberal government to refuse to compensate or even negotiate with redress-seeking groups; Ottawa now preferred to “invest in the future” rather than “attempt to address the past.”<sup>50</sup> This return to what Adams might call Trudeau Senior’s “just in our time” constitutional story was perfectly in tune with the neoliberal, post-Charlottetown era; it signaled a hoped-for transition to a citizenship regime in which constitutional stories of historical injustice and redress would be *verboten*.<sup>51</sup>

Neoliberalism also shaped the reemergence of redress politics in the mid-2000s. After determined movement advocacy made both Liberals and Conservatives realize that the partisan and electoral implications of historical justice were too important to ignore, a cross-party consensus emerged in support of what I have called “neoliberal heritage redress.”<sup>52</sup> The eventual result was the Harper government’s 2008-13 Community Historical Recognition Program, which used the device of grants competitions to impose remarkably

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46 Stephen Gill, “Globalisation, Market Civilization, and Disciplinary Neoliberalism” (1995) 24:3 Millennium 399.

47 Yasmeen Abu-Laban & Christina Gabriel, *Selling Diversity: Immigration, Multiculturalism, Employment Equity, and Globalization* (Peterborough: Broadview Press, 2002).

48 For example, see “Constitutional Fatigue”, *Maclean’s* (2 April 1990).

49 Alexandra Dobrowolsky, “Of ‘Special Interest’: Interest, Identity, and Feminist Constitutional Activism in Canada” (1998) 31:4 Can J of Political Science 707; cf. Anthony A Peacock, ed, *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* (Oxford: Oxford University Press, 1996).

50 See “Letter from Secretary of State for Multiculturalism Rejecting Redress Claims” in Jennifer Henderson & Pauline Wakeham, eds, *Reconciling Canada: Critical Perspectives on the Culture of Redress* (Toronto: University of Toronto Press, 2013) at 419-20.

51 Adams, *supra* note 44.

52 Matt James, “Neoliberal Heritage Redress” in Jennifer Henderson & Pauline Wakeham, eds, *Reconciling Canada: Critical Perspectives on the Culture of Redress* (Toronto: University of Toronto Press, 2013) 31 at 31.

tight program eligibility restrictions and other rules to prevent recipients from using program funds for anything resembling activist purposes.<sup>53</sup>

The new mnemonic context was not only shaped by neoliberalism and so-called constitutional fatigue, though. Particularly in the US, right-wing memory entrepreneurs responded to the terrorist attacks of September 11, 2001 by essaying a new gloss on “never again.” Dershowitz’s *Rights from Wrongs* is in fact sympathetic to this gloss, which rejected the proscriptions against torture and wars of belligerence associated with the human rights-oriented memory work of the postwar era.<sup>54</sup> Globally, the far right responded as well. Writing of online alt-right English-speaking youth in the era of Trump, journalist Angela Nagle observed a gleeful mockery of post-Second World War norms against deliberate cruelty, as well as constant transgressions of “the taboo against racial politics that [had] held since WWII.”<sup>55</sup> By the time of the Trump presidency, therefore, the “never again” politics of human-rights injustice remembrance faced significant competition. Notice, for example, the chain of mnemonic superimpositions chronicled in journalist David Renton’s rendering of the “new authoritarianism.” In a chapter titled, “The Subordination of the War,” Renton depicts a gradual right-wing convergence around a kind of anti-Second World War memory politics, in which post-9/11 obsessions with Western civilizational vulnerability displaced concerns about state cruelty; Islam superseded fascism as the exemplar collective enemy; and martial vigilance trumped penitent introspection.<sup>56</sup>

We saw at the outset of this article that the far-right “freedom convoy” embraced the *Charter* in its war against pandemic-related restrictions, heralding a new, militantly difference-blind Canadian nationalism that rejected the Age of Apology. We also saw that the Age of Apology’s regretful, “never again” mnemonics had shaped earlier Canadian understandings of the meaning and significance of entrenchment. And lastly, we observed that these mnemonics had been weakened by neoliberalism, by the taboo on constitutional debate, and, most recently, by the post-9/11 advent of a globally emboldened far right, with which the so-called freedom convoy was in fact closely linked.<sup>57</sup>

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53 Matt James, “Degrees of Freedom in Canada’s Culture of Redress” (2014) 19:1 *Citizenship Studies* 35.

54 Dershowitz, *supra* note 20; Jenny Edkins, “The Rush to Memory and the Rhetoric of War” (2003) 31:2 *J of Political and Military Sociology* 231.

55 Angela Nagle, *Kill All Normies: Online Culture Wars from 4chan and Tumblr to Trump and the Alt-Right* (Hants, UK: Zero Books, 2017) at 39.

56 David Renton, *The New Authoritarians: Convergence on the Right* (London: Pluto Press, 2019) at ch 1.

57 “The Freedom Convoy is Nothing but a Vehicle for the Far Right”, *Antihate.ca* (27 January 2022), online: <[www.antihate.ca/the\\_freedom\\_convoy\\_is\\_nothing\\_but\\_a\\_vehicle\\_for\\_the\\_far\\_right](http://www.antihate.ca/the_freedom_convoy_is_nothing_but_a_vehicle_for_the_far_right)> [perma.cc/DB53-YFN7].

It is beyond this article's scope to offer a full-blown analysis of *Charter*-claiming behaviour and rights mnemonics in Canada today. Instead, the next section suggests that the preceding decade saw a trend of right-wing *Charter*-warming that predated the pandemic and the fevered cries of the 2022 freedom convoy. The section does not mount a naturalist, causal argument that purports to explain by the canons of mainstream political science why Canadian conservatism has changed its *Charter* stance, a stance that is doubtless overdetermined. The section's purpose is rather to argue that the demise of the postwar citizenship regime and the erosion of "never again" *Charter* mnemonics has created a context that opens Canadian rights discourse and symbolism to meanings quite at odds with those that informed the *Charter*'s entrenchment and early discursive and symbolic development.

## **V. *Charter*-Warming on the Right: *Hansard* Evidence**

The *Charter* antipathies of Harper-era post-Progressive Conservatism are well known. The Harper government, in which the transformed, *Charter*-invoking Jason Kenney of this article's third epigraph served as a lead minister, refused even to commemorate the document's 30th anniversary.<sup>58</sup> But these antipathies appear to have diminished. To illustrate the change, this section evaluates the remarks catalogued under the subject index for "*Charter of Rights and Freedoms*" in the *Hansard* database for the 41st (2011-15), 42nd (2015-19), and 43rd (2020-21) Parliaments. Choosing this 2011-21 period allows us to compare, over time, the parliamentary *Charter*-claiming of the Conservatives, moving from the first *Charter*-skeptical Harper majority to the party's opposition stints under the Justin Trudeau Liberals.

Quantitatively, the analyzed remarks appear to indicate a shift in the relative *Charter* enthusiasms of the parties. I gauged these enthusiasms by grouping the *Charter* subject index entries in each of the three parliaments by party and then dividing each party's entries over each parliament by the party's number of MPs at the time of that parliament's opening. By factoring in the sizes of the different party caucuses in this way, it is possible to speak not just of raw numbers of invocations but of the relative likelihood that an individual MP from a given party would have made remarks caught in the *Hansard* index under the subject, "*Charter of Rights and Freedoms*."<sup>59</sup>

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58 See "Constitution's 30th Birthday to be Marked by News Releases", *CBC News* (12 April 2012), online: <[www.cbc.ca/news/politics/constitution-s-30th-birthday-to-be-marked-by-news-releases-1.1157248](http://www.cbc.ca/news/politics/constitution-s-30th-birthday-to-be-marked-by-news-releases-1.1157248)> [perma.cc/5P96-GSXA].

59 In this analysis an "invocation" means one entry catalogued in *Hansard* under the Subject heading "*Charter of Rights and Freedoms*." Each entry is the full text of a Member's remarks judged by the



The scores reveal that what was once a significant gap between the tendencies of individual Liberal and Conservative MPs to invoke the *Charter* has narrowed considerably. In the most recent parliament, individual Conservative members were even slightly more likely to *Charter*-claim than Liberals. In the 41st Parliament, that of the 2011-15 Harper majority, the Conservative score was a reluctant 0.49, while the *Charter*-loving Liberals had a robust 3.5 *Hansard* subject index entries per member.<sup>60</sup> In the 42nd Parliament, that of the 2015-19 Trudeau Liberal majority — which ended before the Spring 2020 onset of the pandemic — the gap between the Conservative and Liberal scores had shrunk, placing the two parties at 0.57 and 0.78 entries per member, respectively.<sup>61</sup> To put it differently, when in government, Conservative MPs were less likely than Liberals to invoke the *Charter* by a factor of 7.14, while in their first post-Harper opposition stint that likelihood factor had diminished to 1.36. Turning to the most recently concluded, the 43rd Parliament, although the numbers are small because that parliament was short and sat infrequently, the Conservatives (at 0.12 invocations per MP) actually managed to out-*Charter* the Liberals (0.10).<sup>62</sup>

At this point, it should be emphasized that the individual party scores across different parliaments are not comparable. The varying lengths of the parliaments and the differing incidences and durations of their sittings and sessions mean that the scoring procedure (dividing the party's number of *Charter* subject index entries in a parliament by the party's number of MPs at the time of opening) can only give us a sense of which party's MPs *in each parliament* were, compared to those of the other parties, more or less likely to invoke the *Charter*. After all, changes in the number and durations of sittings and sessions across parliaments will affect the opportunities of MPs to invoke the *Charter*. Thus, we can only use the scores to compare the parties in individual parliaments and to track changes in relative party rankings over the three parliaments. The fact that a parliamentarian made remarks catalogued in the *Hansard* index under "*Charter*" does not guarantee that they spoke in loving enthusiasm, either.

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*Hansard* indexer to be relevant to the subject "*Charter of Rights and Freedoms*." Sometimes these remarks are of some length, which means that what is classified as an invocation may in fact contain numerous mentions of the "*Charter of Rights and Freedoms*."

60 The party *Charter* invocations in the 41st Parliament were as follows: Liberals, 119 entries and 34 members (at opening); NDP 143/103; and Conservatives 81/166.

61 The party *Charter* invocations in the 42nd Parliament were as follows: Liberals, 144 entries and 184 MPs (at opening); NDP 62/44; Conservatives 56/99.

62 The party *Charter* invocations in the 43rd Parliament were as follows: Liberals, 15 entries and 157 MPs (at opening); Conservatives 14/121; NDP 7/24.

Nevertheless, qualitatively analyzing invocations of the *Charter* across these three parliaments provides strongly suggestive evidence of Conservative *Charter*-warming. In government, Harper's Conservatives tended to mention the *Charter* only when forced by opposition questioning: the vast majority of Conservative entries for the 41st Parliament involve party MPs responding to complaints about their government's alleged hostility to *Charter* values and to taunts about its remarkable string of constitutional defeats in the courts. Indeed, Conservative *Charter* reticence produced some quite tortuous locutions. Consider then Justice Minister Rob Nicholson, who, in a speech defending his government's approach to vetting prospective legislation for *Charter* compliance, mentioned the document by name only five times in remarks that spanned over 163 lines of text. Nicholson spoke instead of "the reporting requirement"; "legalities"; "compliance"; "certification"; "inconsistency"; "constitutionality"; and so on.<sup>63</sup> Further, he attempted to pair his *Charter* mentions with references to the 1960 *Bill of Rights*, a document not known for having a disciplining effect on government legislation, but perhaps preferred by the minister for having been created under a Conservative government and for lacking connotations of progressive activism. Nicholson insisted that "this government has never introduced any legislation that I believe was inconsistent with the Canadian [*Charter of Rights and Freedoms*] or the Canadian [*Bill of Rights*]."<sup>64</sup> He observed that the "[*Canadian Bill of Rights*] requires me to conduct a ... review for inconsistency," although he soon qualified that statement by admitting that a review for inconsistency would "be triggered only if I, as the minister, formed the opinion that the government bill in question was ... inconsistent with the [*Charter*] or the [*Canadian Bill of Rights*]."<sup>65</sup>

In some instances, Conservative members even managed to speak pejoratively of the *Charter* without uttering the document's name. Kerry-Lynne Findlay, then Parliamentary Secretary to the Minister of Justice, parried accusations that the expanded police powers in the *Protecting Children from Internet Predators Act* were unconstitutional by insisting, "[w]e are not those who speak of harming those who have already been convicted of criminality, as we often hear on the other side."<sup>66</sup> Public Safety Minister Vic Toews responded similarly, offering in his own, nominally *Charter*-free remarks that he always "put the rights of victims ahead of the interests of criminals."<sup>67</sup>

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63 *House of Commons Debates*, 41-1, vol 146, no 224 (18 March 2013) at 14854 (Hon Rob Nicholson).

64 *Ibid* at 14855 (Hon Rob Nicholson).

65 *Ibid* at 14856 (Hon Rob Nicholson).

66 *House of Commons Debates*, 41-1, vol 146, no 85 (28 February 2012) at 5570 (Kerry-Lynne D Findlay).

67 *Ibid* at 5548 (Hon Vic Toews).

Finally, on the few occasions when Harper-era Conservatives engaged in pro-*Charter* rhetoric they focused on the *Charter*'s section 2 "Fundamental Freedoms,"<sup>68</sup> showing disdain for the presumably less fundamental rights found further from the text's beginning. For example, when defending free votes for MPs on matters related to abortion, backbench MP Ed Komarnicki spoke of the "freedoms that we cherish: freedom of expression, freedom of the press, peaceful assembly, and freedom of association."<sup>69</sup> Komarnicki did not find his way to the section 7 rights to life, liberty, and security of the person<sup>70</sup> associated with reproductive freedoms in Canada.<sup>71</sup> Conservative MP Brian Storseth took the same approach when defending his government's decision to remove internet hate speech from the purview of the *Canadian Human Rights Act*. Minimizing section 15<sup>72</sup> equality concerns as a matter of "hurt feelings," Storseth insisted that "[f]reedom of expression is one of the cornerstones of our great democracy, a cornerstone which is eroding away due to unnecessary censorship by an overzealous bureaucracy."<sup>73</sup>

Although the *Hansard* search procedure itself did not reveal this, Jason Kenney was a particularly keen ranker of *Charter* rights during his time as a Harper minister. He spoke often in media interviews of "our undeniably fundamental and universal rights, like freedom of religion and conscience," observing that "freedom of conscience and freedom of religion are fundamental according to the [*Universal Declaration of Human Rights*] and the first right[s] listed in the [*Charter of Rights*]."<sup>74</sup> When asked about Quebec's attempts to deny public servants the right to wear "conspicuous" religious symbols, Kenney promised that his government "would challenge any [provincial] law ... that violates the fundamental constitutional guarantees to freedom of religion."<sup>75</sup> An evidently different case was his government's move to restrict health-care access for refugee claimants, which the Federal Court of Canada found contrary to the *Charter*'s section 12 prohibition of "cruel and unusual punishment."<sup>76</sup> Kenney called the group of doctors behind the case "activists," their challenge

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

69 *House of Commons Debates*, 41-2, vol 147, no 219 (28 May 2015) at 14318 (Ed Komarnicki).

70 *Charter*, *supra* note 68, s 7.

71 *House of Commons Debates*, *supra* note 69 at 14318 (Ed Komarnicki).

72 *Charter*, *supra* note 68, s 15.

73 *House of Commons Debates*, 41-1, vol 146, no 259 (30 May 2012) at 1813 (Brian Storseth).

74 Interview of Jason Kenney (15 September 2013), television: *CTV Television Network*; Interview of Jason Kenney (10 March 2013), television: *CTV Television Network*.

75 Quoted in Daniel Leblanc & Gloria Galloway, "In Ottawa, the Conservatives Ready a Constitutional Fight", *Globe and Mail* (11 September 2013) at A1.

76 *Charter*, *supra* note 68, s 12.

“stupid,” and opined that media interest in “illegal migrants” was a “dog-bites-man story.”<sup>77</sup>

In summary, the qualitative evidence of Harper-era Conservative *Charter*-loathing is convincing. Chafing against *Charter* compliance as the ultimate metric for evaluating state legislation and conduct, Conservatives during the Harper majority tended only to mention the *Charter* when forced by opposition questioning to do so, often attempting circumlocutions that allowed them to avoid speaking the document’s name. In some instances, Harper-era Conservatives presented the Diefenbaker *Bill of Rights* as the *Charter*’s normative and constitutional equal, and when they did occasionally speak positively of the *Charter*, it was almost always of the section 2 Fundamental Freedoms.<sup>78</sup> In short, Harper-era Conservatives conspicuously disliked the *Charter*.

However, Liberal *Charter* enthusiasms appeared to wane on key occasions, too. For example, although Liberal leader Justin Trudeau chided the Conservatives on 17 April 2013 for failing to observe the *Charter*’s 31st anniversary, his caucus became *Charter*-wary just a week later when Bill S-7, the *Combating Terrorism Act*, came back from the Senate for a final House vote.<sup>79</sup> Among other things, the *Combating Terrorism Act* created the new crime of entering or leaving Canada for the purposes of committing a terrorist offence and included penalties for assisting a person “likely to carry out a terrorist activity.”<sup>80</sup> Perhaps fearing the electoral repercussions of being “soft on terror,” the Liberals supported the legislation. Rehearsing the chant, “Liberal, Tory, same old story,” NDP MPs seized the opening.<sup>81</sup> Pat Martin said that “Canadians deserve a party that will fight to protect the sanctity of the [*Charter*] in all circumstances.”<sup>82</sup> Mike Sullivan needled, “[t]he [Liberals] might have put the [*Charter*] in, but that was a different Trudeau and a different party,”<sup>83</sup> while Malcolm Allen returned to Trudeau’s *Charter* anniversary remarks of the week before: “The other day I remember my colleagues complaining about the fail-

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77 Quoted in Christopher Holcroft, “Restored Care for Refugees Affirms Canadian Values”, *Halifax Chronicle Herald* (2 March 2016) at A10 [Holcroft]; quoted in Timson, *supra* note 2; quoted in Carol Goar, “Court Challenge to Callous Refugee Policy”, *Toronto Star* (1 March 2013) at A19.

78 *Charter*, *supra* note 68, s 2.

79 *House of Commons Debates*, 41-1, vol 146, no 234 (17 April 2013) at 15532 (Justin Trudeau).

80 For background on Bill S-7 and the context of Canadian anti-terrorism legislation, see “About the *Anti-Terrorism Act*” (7 July 2021), online: *Canada* <[www.justice.gc.ca/eng/cj-jp/ns-sn/act-loi.html](http://www.justice.gc.ca/eng/cj-jp/ns-sn/act-loi.html)> [perma.cc/4QTS-UBCL].

81 *House of Commons Debates*, 41-1, vol 146, no 240 (25 April 2013) at 15910 (Pat Martin).

82 *Ibid.*

83 *House of Commons Debates*, 41-1, vol 146, no 237 (22 April 2013) at 15749 (Mike Sullivan).

ure to celebrate the [*Charter*], yet here they are today suggesting they should break the [*Charter*] that they wanted to celebrate last week.”<sup>84</sup>

The only Liberal MP who attempted to square his party’s support for the *Combating Terrorism Act* with its fondness for *Charter* rhetoric was Francis Scarpaleggia, who argued, somewhat tendentiously, that “to be free of intimidation, to be safe is also at the core of the values of individual dignity and one of the core values in the [*Charter of Rights and Freedoms*].”<sup>85</sup> In any event, the terror attacks in Saint-Jean-sur-Richelieu on 20 October 2014 and in Ottawa on 22 October 2014 appeared to contribute further to Liberal *Charter*-reluctance in these matters. After his 31st *Charter* anniversary foray, Liberal leader Justin Trudeau, as opposition leader in the 41st Parliament and as Prime Minister in the 42nd and 43rd, never again made remarks that were caught in the *Hansard* search which might qualify as instances of *Charter*-claiming. When it came to the war on terror, parliamentary *Charter* invocations were left almost entirely to the NDP.<sup>86</sup>

Let us now examine the relative *Charter* enthusiasms of the parties in the 42nd Parliament, that of the Trudeau Liberals’ 2015-19 majority. Recall that the party MP likelihood scores during the Harper majority were 3.5 for Liberals, 1.39 for NDP members, and 0.49 for Conservatives. In the Liberal majority, the NDP led at 1.41, followed at some distance by the Liberals at 0.78 and the Conservatives at 0.57. These figures may even overstate the rhetorical enthusiasm of the Trudeau Liberals for the *Charter* after the 2014 attacks; many of the Liberal remarks caught in the *Hansard* search for this period were merely “*Charter* statements,” declarations that legislation had been vetted for *Charter* compliance by Department of Justice lawyers. To take just the first page of the *Hansard* search results for the 43rd Parliament as an example, four of the 11 Liberal entries were *Charter* statements.<sup>87</sup>

At this point, Conservative MPs still appeared to prefer the section 2 Fundamental Freedoms.<sup>88</sup> Note, for example, their response when confronting

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84 *Ibid* at 15750 (Malcolm Allen).

85 *Ibid* at 15745 (Francis Scarpaleggia).

86 Outside of the House, Liberal MP and noted human rights expert Irwin Cotler was an exception. For example, see Irwin Cotler, “The Conservative Mockery of the Charter: Let’s Count the Ways”, *Huffpost Canada* (17 June 2014), online (blog): <[www.huffpost.com/archive/ca/entry/charter-anniversary\\_b\\_5166751](http://www.huffpost.com/archive/ca/entry/charter-anniversary_b_5166751)> [perma.cc/AX65-2SFZ].

87 *House of Commons Debates*, 43-2, vol 150, no 94 (4 May 2021); *House of Commons Debates*, 43-2, vol 150, no 95 (5 May 2021); *House of Commons Debates*, 43-2, vol 150, no 100 (12 May 2021); *House of Commons Debates*, 43-2, vol 150, no 112 (7 June 2021).

88 *Charter*, *supra* note 68, s 2.

a Liberal government measure that would have required employers seeking funding under the Canada Summer Jobs program to declare their support for reproductive rights. MPs Bergen, Blaney, Brassard, Cooper, Falk, and Viersen all spoke at length about the section 2 freedoms.<sup>89</sup> However, MP Steven Blaney went further, evidencing a new Tory *Charter* enthusiasm. Blaney taunted Justin Trudeau: “former [P]rime [M]inister Pierre Elliott Trudeau must roll over in his grave sometimes when he sees the current Prime Minister renouncing the [*Charter*] by imposing his ideological agenda.”<sup>90</sup>

Conservative MPs also invoked the Fundamental Freedoms to reject Liberal backbench MP Iqra Khalid’s motion condemning Islamophobia. Khalid’s motion had been prompted by a White supremacist gunman’s killing of six Muslims in a Quebec City mosque on 29 January 2017. Speaking just two weeks later, Conservative MP Michelle Rempel argued that the Islamophobia motion violated the requirement that “the state ... not ... defend the tenets of any particular faith.”<sup>91</sup> In Rempel’s view, the motion defended a particular faith, threatened the rights of other adherents “to practise their faith,” and thus violated the “covenant ... formalized in our [*Charter of Rights and Freedoms*].”<sup>92</sup> Conservative MP Harold Albrecht contributed by reading aloud the “Fundamental Freedoms” section of the *Charter*,<sup>93</sup> followed in the same by his colleague Marilyn Gladue, who then launched an Islamophobic *Charter*-claiming attack on the Islamophobia motion: “Religions that promote discrimination and are in conflict with our [*Charter*] cannot be permitted to promote such views in Canada.”<sup>94</sup>

Conservative MPs in the 42nd Parliament also departed from Harper-era form by finding *Charter*-claiming grist in sections beyond the Fundamental Freedoms. For example, while they were happy to support new mandatory roadside screening measures targeting cannabis impairment, MPs Larry Maguire and Stephanie Kusie bristled at extending the measures to drivers suspected of drinking alcohol, arguing — without attempting to address the alcohol-versus-cannabis discrepancy — that such a move would violate sec-

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89 *House of Commons Debates*, 42-1, vol 148, no 269 (1 March 2018) at 17527 (Arnold Viersen), 17529 (Honourable Steven Blaney), 17509 (Honourable Candice Bergen), 17558 (Ted Falk), 17561 (Michael Cooper), 17521 (John Brassard); *Charter*, *supra* note 68, s 22.

90 *House of Commons Debates*, *supra* note 89 at 17529 (Honourable Steven Blaney).

91 *House of Commons Debates*, 42-1, vol 148, no 142 (16 February 2017) at 9022 (Honourable Michelle Rempel).

92 *Ibid.*

93 *Ibid* at 9028 (Harold Albrecht); *Charter*, *supra* note 68, s 2.

94 *Ibid* at 9056 (Marilyn Gladue).

tions 8 (unreasonable search and seizure)<sup>95</sup> and 9 (arbitrary detention) of the *Charter*.<sup>96</sup> Finally, Conservative MPs also invoked section 15 equality rights<sup>97</sup> to protest the government's move to make it an aggravating factor in criminal sentencing if the victim were an Indigenous woman. Amplifying the earlier remarks of her Conservative colleague Michael Cooper,<sup>98</sup> Cathy McLeod argued that the proposal ignored "the [*Charter*, which] guarantees to all individuals equality before and under the law and the right to equal protection and equal benefit of the law without discrimination."<sup>99</sup>

The 43rd Parliament, that of the 2019-21 Trudeau minority, was brief and involved short, infrequent sittings; there were only 39 *Hansard Charter* subject entries caught in this paper's search and they can be dealt with quickly here. The *Charter* enthusiasms of the two major parties were now roughly equal, at 0.10 Liberal references per member and 0.12 for the Conservatives, while the NDP led at 0.29. Perhaps most importantly, the Conservative *Charter* references did not, as one might suppose, reflect the libertarian opposition to pandemic-related public health measures seen often on the right during this period. Instead, Conservative MPs focused on Liberal proposals to ban conversion therapy and to regulate internet and social media expression, which they saw as threats to the Fundamental Freedoms.<sup>100</sup> Lastly, some Conservative MPs also invoked the section 7 rights to life, liberty, and security of the person to protest the government's move to ease access to medical assistance in dying, even though the move itself had been prompted by court rulings reached under that section.<sup>101</sup>

In summary, Conservative *Charter* rhetoric changed both in frequency of occurrence and in character as the party moved from government to opposition. In government, a Conservative MP was 7.14 times less likely to be found in the *Hansard Charter* subject index than a Liberal. In the Conservatives' first post-Harper stint in opposition, that figure had become 1.36, and in the most recently concluded 43rd Parliament, Conservative MPs were even slightly more

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95 *Charter*, *supra* note 68, s 8.

96 *House of Commons Debates*, 42-1, vol 148, no 184 (31 May 2017) at 11793 (Larry Maguire), 11799 (Stephanie Kusie); *Charter*, *supra* note 68, s 9.

97 *Charter*, *supra* note 68, s 15.

98 *House of Commons Debates*, 42-1, vol 148, no 358 (26 November 2018) at 23887 (Michael Cooper).

99 *Ibid* at 23888 (Cathy McLeod).

100 *House of Commons Debates*, 43-2, vol 150, no 19 (26 October 2020) at 1214 (Scott Aitchison); *House of Commons Debates*, 43-2, vol 150, no 94 (4 May 2021) at 6626 (Rachael Harder; Alain Rayes).

101 *Charter*, *supra* note 68, s 7; *House of Commons Debates*, 43-1, vol 149, no 25 (27 February 2020) at 1660 (Tako Van Popta); *House of Commons Debates*, 43-2, vol 150, no 39 (30 November 2020) at 2694 (Tom Kmiec).

*Charter*-prone than Liberals, abandoning their past practices of finding substitute locutions for the word, “*Charter*,” and of pairing *Charter* references with offsetting mentions of the Diefenbaker *Bill of Rights*. Conservatives’ *Charter* rhetoric in these periods became particularly fulsome when confronting measures associated with “wokeism” and “political correctness”: hate-speech regulation; withholding public funds from anti-abortion employers; stiffening penalties for violent offences against Indigenous women; banning conversion therapy; and condemning Islamophobia.

To some extent, the changes chronicled here reflected the replacement of the Conservatives in government by the Liberals. Other things being equal, the typical House *Charter* invocation would surely involve an opposition member complaining about government conduct or legislation. However, as the second and third epigraphs of this article show, Alberta Premier Jason Kenney changed his *Charter* rhetoric after the Harper years, even though he remained in government. In any event, the pro-*Charter* rhetoric of the federal parliamentary Conservatives marked a significant change in posture. Conservatives invoked the *Charter* as a fundamental Canadian symbol: as a protective “covenant”<sup>102</sup> against “religions that promote discrimination”<sup>103</sup> and governments with “ideological agenda[s].”<sup>104</sup> There were no parallel parliamentary invocations in the Harper years. Indeed, the changed Conservative posture should itself be understood as part of the new *Charter*-claiming context chronicled in this article: namely, the demise of the postwar citizenship regime and the gradual detachment of Canadian rights discourse from Age of Apology symbolism.

## **VI. *Charter*-Warming on the Right: Extra-Parliamentary Illustrations**

It is worth underscoring the emergence of possible rightward trends in extra-parliamentary rhetoric and *Charter* litigation as well. Where Morton and Knopff complained in the 1980s and 90s of the dominance of the left-wing “Court Party,” Alexandra Dobrowolsky dates a “new reality of equality backsliding in the courts” to the late 2000s.<sup>105</sup> Whereas the “reigning champions”<sup>106</sup>

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102 *House of Commons Debates*, *supra* note 91 at 9022 (Hon Michelle Rempel).

103 *Ibid* at 9057 (Marilyn Gladu).

104 *House of Commons Debates*, *supra* note 89 at 17529 (Hon Steven Blaney).

105 FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000); Alexandra Dobrowolsky, “Mobilizing Equality through Canada’s Constitution and *Charter*: Milestones, or Missed and Even Mistaken Opportunities?” in Manon Tremblay & Joanna Everitt, eds, *The Palgrave Handbook of Gender, Sexuality, and Canadian Politics* (Cham: Palgrave Macmillan, 2020) 123 at 139.

106 Geoffrey D Callaghan, “Intervenors at the Supreme Court of Canada” (2020) 43:1 Dal LJ 33.



among *Charter* intervenors at the turn of this century were the Canadian Civil Liberties Association (CCLA) and the Women's Legal Education and Action Fund (LEAF), avowedly right-wing intervenors now appear to be gaining public profile. Although the CCLA has clearly continued its prominent position amid this shift, LEAF has not. In 2011, there were 11 references in the Canadian Business and Current Affairs (CBCA) news database to LEAF including the word "*Charter*," followed by a steady downward trend culminating in 7 references in 2020. By contrast, although there was only one reference in 2011 to the Justice Centre for Constitutional Freedoms (JCCF), "a Canadian legal advocacy organization specializing in a social conservative approach to Canadian constitutional law," there were 18 in 2020. Lest readers attribute the increase to the circumstances of the pandemic, we can observe that the JCCF numbers for the pre-pandemic years of 2017, 2018, and 2019 were 17, 16, and 7, respectively.<sup>107</sup> For its part, the right-leaning Canadian Constitution Foundation averaged 2.6 CBCA "*Charter*" entries per year in the period 2011-18 (inclusive), finishing with 7 in 2019 and 4 in 2020, none of which were pandemic-related.

I conducted preliminary research for this article after being surprised to encounter Alberta Premier Jason Kenney invoking the *Charter*. Kenney, as we saw in this article's second epigraph, associated *Charter* challenges with "stupid" activists while serving in the Harper government.<sup>108</sup> As Alberta premier, however, he rejected calls for stronger public health measures on the ground that he was unwilling to contemplate an "unprecedented violation of fundamental constitutionally protected rights and freedoms."<sup>109</sup>

## VII. Conclusion

Perhaps the 2022 freedom convoy will be remembered, too, for its ideologically and historically novel turn to *Charter*-claiming behaviour. The occupiers spoke adamantly and repeatedly of *Charter* rights. They distributed and brandished copies of the document in downtown Ottawa, where the *Charter* then commingled with other symbols, such as the Nazi swastika and the Confederate flag.<sup>110</sup> While the latter were clearly minority expressions, this article showed at

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107 "Justice Centre for Constitutional Freedoms", online: *Wikipedia* <en.wikipedia.org/wiki/Justice\_Centre\_for\_Constitutional\_Freedoms> [perma.cc/EUG7-9KJ3].

108 Quoted in Timson, *supra* note 2; quoted in Holcroft, *supra* note 77.

109 Quoted in Hudes, *supra* note 3.

110 "Justin Trudeau and his Family Flee Ottawa Capital", *Daily Mail* (30 January 2022), online: <www.dailymail.co.uk/news/article-10456147/Justin-Trudeau-flees-secret-location-50-000-Freedom-Convoy-truckers-hit-Ottawa.html> [perma.cc/7VB3-NPMS]; "Updates: Officials Condemn 'desecration' of Monuments, Hateful Signs on Display at Ottawa Protest", *The Globe and Mail* (29

the outset that convoy organizers, many of whom had far-right links and histories, framed their movement in the anti-Age of Apology discourse favoured by the Trumpist right and its noxious paramilitaries.<sup>111</sup>

This *Charter*-claiming behaviour is constitutionally significant. It partook in an ongoing movement against human-rights oriented, “never again” constitutionalism — the constitutionalism that brought the principles of the *United Nations Universal Declaration of Human Rights* to domestic orders around the world, including Canada’s. Against this backdrop, the convoy’s anti-Age of Apology *Charter*-claiming aimed to push visions of national belonging and membership in a very different direction. It aimed to shape how citizens and governments understand and distinguish between legitimate and illegitimate uses of state power, rejecting the originary meanings of the *Charter*’s entrenchment and proposing new ones in their place.

This article has sought to emphasize for Canadian constitutional and *Charter* scholars the extent to which the political behaviour in which we should be interested occurs on the fields of history and memory. Visions of desirable and undesirable political futures, after all, are dreamed and articulated through the public remembrance of happy and unhappy pasts. This article has accordingly proposed the mnemonics of rights as a heuristic lens that directs us to think more deeply about the experiences and representations of wrong and injustice that inform rights claims. More than mere rhetoric, *Charter* discourse has constitutional meaning and significance that we can excavate and examine by studying the recursive interactions of history and memory in *Charter*-claiming behaviour.

*Charter*-claiming was anathema to Conservatives in the Harper years. By the time of the 2022 freedom convoy, though, times had changed. Expert-mandated pandemic restrictions, the post-Harper status of the Conservatives as an opposition party battling Liberal depredations, and the slow detachment of the *Charter* from its Age of Apology symbolism all combined to create a more favourable context for right-wing *Charter*-claiming. The document’s text may stay the same. Perhaps the jurisprudence will not markedly change. But the *Charter* that Canadians wield today is not the same as the *Charter* they did forty years ago.

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January 2022), online: <[www.theglobeandmail.com/politics/article-truck-freedom-convoy-ottawa-live-update/](http://www.theglobeandmail.com/politics/article-truck-freedom-convoy-ottawa-live-update/)> [perma.cc/HWB3-JECH].

111 Smith, *supra* note 9; *Antihate.ca*, *supra* note 57.

The underlying citizenship regime and its mnemonics of rights have changed. The collective memories that animated the *Charter* idea, from the end of the Second World War to the early 1980s entrenchment debates, have weakened in the face of unprecedented competition from post-9/11 mnemonics. The postwar citizenship regime — a regime that helped to anchor early *Charter* discourse in a broader ethos of progressive citizenship development and that premised itself on saying “never again” to Depression and legislated racism — is no more.

Some of the most crucial and divisive political issues of our age appear to encourage right-wing discourses of freedom and rights. With these discourses may come a new, constitutionally significant mnemonics of remembered wrongs: freedom-crushing public health dictates; the strangling of the oil and gas industry; the demise of internet freedom under the guise of hate-speech prevention; the sacrificing of religious freedom and parental autonomy to LGBTQ2S+ rights. These possible transformations in Canadian rights mnemonics undoubtedly demand the attention of *Charter* scholars across the coming years.

## Coda

The research concerns of this article seem almost entirely absent in contemporary Canadian political science scholarship on the *Charter*. Searching the *Canadian Journal of Political Science* index for articles with “*Charter*” in the title, I found six that could generously be catalogued as articles about *Charter* discourse or small-c constitutionalism, almost all of them dating from the 1980s or early 1990s. There were, by contrast, 23 articles on *Charter* litigation, court decisions, and policy responses.

Robert Vipond introduced the landmark 2008 edited collection, *The Comparative Turn in Canadian Political Science*, with a broadside against the “insular, introspective, and atheoretical” character of earlier Canadian political science scholarship.<sup>112</sup> Against this scholarship, Vipond urged Canadianists to take the comparative turn: to lose their “anti-Americanism,” join the “cutting-edge” of mainstream social science, and become “makers” not “takers” of comparative theory.<sup>113</sup> Writing just under a decade later, and focusing explicitly on the Canadian political science literature on the *Charter*, Dave Snow and Mark

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112 Robert Vipond, “Introduction” in Linda A White et al, eds, *The Comparative Turn in Canadian Political Science* (Vancouver: University of British Columbia Press, 2008).

113 *Ibid* at 7, 5, 10.

Harding reported success in this endeavour.<sup>114</sup> As they put it, Canada's *Charter* literature had become "more methodologically rigorous ... and explicitly drawn from comparative (primarily American) approaches"<sup>115</sup>: "advanced quantitative methods" and "comparative theories of decision-making" were now the order of the day.<sup>116</sup> The shift has been significant, and it is not this article's intent to reject it. Rather, the point is to observe that, while the *Charter* literature that employs these approaches has many virtues, understanding changes in *Charter* discourse and their deep civic significance would not appear to be among them.

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114 Dave Snow & Mark Harding, "From Normative Debates to Comparative Methodology: The Three Waves of Post-Charter Supreme Court Scholarship in Canada" (2015) 45:4 *American Rev of Can Studies* 451.

115 *Ibid* at 460.

116 *Ibid* at 457, 459.