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Articles

Abstract

Falsehood, says Aristotle, comes in two varieties: what does not exist at all, and those actual existences which appear as non-existent. It is in this second sense that Larry Tribe plumbs the truth of an "invisible" Constitution while Robert Bork decries the cultural and moral falsity of the Constitution we see. These perceptions of invisible truth and apparent falsehood do not so much reflect the Constitution itself as the constitutional judgments of a Supreme Court. Here Aristotle's first iteration of falsehood surfaces for, as Alexander Bickel plainly states "the authority to determine the meaning and application of a written constitution is nowhere defined or even mentioned in the document itself." If this non-existent judicial review is a fallacy who can truly say what the Constitution is? How are we to know it as it is? and to recognize ourselves there? The Framers, ex ante, could do little more than position themselves before a picture of justice as the end of government already imagined at the beginning, and then set off in hot pursuit through the looking glass of liberty; but they had no illusions about the process or the result. Citing David Hume they maintain that chance not "reason" will be determinative; that the true Constitution is not yet at hand but will rather, in the fullness of "time," emerge from "mistakes," failed "trials," and the "FEELING of inconveniences." The Constitution they thus "behold" – in extending the sphere of faction and counteracting ambition with ambition – is negation itself: "the republican remedy for the diseases most incident to republican government." This essay, ex post, aspires only to restate the Framers' inversion in the idiom of philosophy as Aristotle introduces it when he observes that "we say even of non-being that it is non-being."

Abstract

The Supreme Court of Canada's decision in Canada (Attorney General) v. Hislopreveals a significant disagreement over the nature of judicial precedents and the attendant costs of deviating from them. In the context of devising a test for remedial retroactivity, a majority of the Court rules that a "substantial change in law," even one short of overruling a precedent, can lead to a purely prospective remedy. In this view, the Court's reasoning in any particular case should be applied as broadly as possible and understood as modifying any existing precedents to the contrary. In dissent, Justice Michel Bastarache accuses his colleagues of conflating a change in judicial interpretation with a change in the Constitution itself. At the root of the disagreement between Bastarache and the rest of the Court are

differing conceptions of the Court's role in policy making. While Bastarache prefers a more traditional adjudicatory role, the majority's more policy-centric approach calls for increased flexibility and lower costs when the Court chooses to abandon precedents made in error.

Challenging English-Canadian Orthodoxy on Democracy and Constitutional Change
Patrick Fafard

Abstract

In English Canada it is routinely argued that constitutional change in Canada is neither desirable nor even possible. This article challenges this view. The decline of support among Québécois for sovereignty should not blind us to the fact that the official position of the Parti Libéral du Québec (PLQ) is that while Québec should remain in Canada, constitutional change will eventually be required. Some Aboriginal leaders take a similar position. Faced with the prospect of constitutional change, three claims are central to the prevailing orthodoxy in English Canada: that the constitution is now exceedingly difficult to amend, that private negotiations and elite accommodation have been replaced by a more open and democratic process, and that substantive change to the Canadian constitutional settlement must be by means of a constitutional "conversation." This article challenges this prevailing orthodoxy by arguing that the Canadian constitution is, in fact, amendable, often by means of bilateral amendments that continue to rely on traditional elite negotiations. Moreover, while an ongoing constitutional conversation is desirable in theory, this article presents a series of considerations that must be addressed if we are to construct the kind of constitutional conversation adequate to the task of achieving meaningful constitutional change in a multinational context.

Case Comment: Unfettered Religious Freedom Hangs by the Thread of Minority Dissent in Malaysia : A Review of the Dissenting Judgment of the Federal Court in the *Lina Joy* Case
A.L.R. Joseph

Abstract

The *Lina Joy* case has caused judicial and political disquiet and angst in Malaysia ever since it began legal life in the High Court of Malaya by way of originating summons in 2000. In May 2007, the Federal Court delivered a 2-1 majority judgment, which only further exacerbated the feeling of judicial crisis. The majority's (which, regrettably, included the then-Chief Justice) narrow adjudication of the matter, which largely turned on questions of pure administrative law, was a judicial affront to many Malaysian jurists who view the matter more expansively and as an encroachment on the very core of the fundamental liberties (especially freedom of religion) guaranteed under the Malaysian Federal Constitution. The powerful dissenting judgment of Chief Judge of Sabah & Sarawak Richard Malanjum celebrates the richness and tradition of the Constitution and its succoring application to ordinary citizens in trying circumstances of administrative abuse and prejudice.

Book Review

Book review of Margot Young, Susan B. Boyd, Gwen Brodsky and Shelagh Day, eds. Poverty: Rights, Social Citizenship, and Legal Activism

Margo Louise Foster