5-12-2016

Super Strong Clear Statement Rules Down Under

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Dan R. Meagher, *The Principle of Legality and a Common Law Bill of Rights—Clear Statement Rules Head Down Under*(2015), available on SSRN.

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I decided to think outside the box this year with my recommendation, or more accurately, outside of our Country's academy. About a year ago, an Australian Law Professor Dan Meagher contacted me about presenting his paper to our faculty at Mercer University School of Law. I'm very grateful that he did. Professor Meagher ended up visiting with us for a week this past fall as a visiting scholar. During that time, he provided one of the best development presentations that I have seen. His topic was interesting yet completely outside of most of our expertise. His presentation style was relaxed and fostered the interaction of the entire faculty. Perhaps the relaxing part should not be surprising: Australians are not necessarily known for being uptight. I chose to recommend his article to Jotwell readers because I found the topic interesting, the paper well-written, and the application of the legal doctrine a bit contradictory to the way we do things here in the U.S.

The title of his paper is *The Principle of Legality and a Common Law Bill of Rights—Clear Statement Rules Head Down Under.* In his article, Professor Meagher traces the evolution of the Australian Courts' approach to protecting fundamental rights. This evolution is fascinating, controversial, and directly connected to both our Constitution and statutory interpretation principles. This history lesson begins with a simple point: "the Australian Constitution is a redraft of the American Constitution of 1787 with modifications found suitable for the more characteristic British institutions and for Australian conditions." Our system of a government with separated powers was adopted. Importantly, however, the Australian framers consciously rejected, even deleted from a draft version, the American Bill of Rights. The framers rejected the American approach, believing that common law and a parliamentary form of government offered a superior and more democratic way to protect these rights. Professor Meagher describes the Australian Constitution's development and the strong role that our Constitution played in the drafting process. That part of the paper should be interesting enough to Administrative Law Scholars who teach this aspect of the Constitution. But the story is much more interesting.

Despite this deliberate rejection of a bill of rights, Australia's High Court (the equivalent of our Supreme Court) has morphed an old friend, the clear statement rule, to temper and invalidate legislation openly hostile to fundamental rights. This judicial response has been both remarkable and controversial.

Let me provide just one example: immigration. Beginning in the early 2000s, the Australian Government sought to limit and even prevent immigrants arriving in Australia by boat from accessing the courts to seek asylum. The government intercepted the boats at sea, transported those on board to processing centers in small pacific nations, refused to resettle them in Australia, and enacted legislation specifically prohibited legal challenges by these individuals.

Despite the clear legislation, the asylum seekers flooded the Australian courts. The Australian Constitution contains a mandamus/original jurisdiction provision (that arose in response to the U.S. in *Marbury v. Madison*, 5 U.S. 137 (1803)). That provision provides: "[i]n all matters…in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth . . . the High Court shall have original jurisdiction." The High Court concluded that Parliament could not restrict the Court's jurisdiction in this area absent unmistakably clear statutory language (a super strong clear statement rule, if you will). Even though Parliament was relatively clear in the legislation that it intended to abrogate the Court's jurisdiction, the Court required Parliament to be "crystal clear;" a standard that despite its best efforts, Parliament seems unable to reach.

Professor Meagher concludes that as a result of this morphed clear statement rule, the High Court has turned "an historically loose collection of rebuttable presumptions [regarding fundamental rights] . . . into a common law bill of rights that is strongly resistant to legislative encroachment, maybe defiantly so." The fight between Parliament and the High Court reminds me of a wonderful statutory interpretation piece Professor Hillel Y. Levin wrote. The fictional piece begins with the Supreme Lawmaker, MOTHER, proclaiming that "I am tired of finding popcorn kernels, pretzel crumbs, and pieces of cereal all over the family room. From now on, no food may be eaten outside the kitchen." Litigation then arose, and the "courts" issue a series of cases culminating in a number of exceptions; to which, MOTHER once again decries:

> Over the past few months, I have found empty cups, orange juice stains, milkshake spills, slimy spots of unknown origin, all manner of crumbs, melted chocolate, and icing from cake in the family room. I thought I was clear the first time! And you've all had a chance to show me that you could use your common sense and clean up after yourselves. So now let me be clearer: No food, gum, or drink of any kind, on any occasion or in any form, is permitted in the family room. Ever. Seriously. I mean it!

Hillel Y. Levin, *Everything I Needed to Know About Statutory Interpretation I Learned by the Time I was Nine*, 12 **The Green Bag** 357 (2009). In the case, Parliament has tried to be clear; the High Court ignores the clarity.

Professor Meagher argues that the Australian courts have applied the clear statement canon not to discern congressional intent, as that canon is arguably used in the U.S., but rather to thwart legislative intent. Reminiscent of Justice Scalia, the High Court has concluded that "legislative intention . . . is a fiction which serves no useful purpose." *Lacey*, 242 CLR 573, 592 (2011). But the Court then does something that would surprise even Justice Scalia. The Court suggests that legislative intent is not something that exists independently of judicial interpretation, but rather is the product of the court's process of construction. The High Court reconceptualized the interpretive duty of judges as one of determining legislative intent as the product of rather than the goal of statutory interpretation.

Professor Meagher concludes his paper by noting that the High Court has transformed the clear statement canon into a principle of legality that acts as a protector of fundamental rights and grounded its new principle in that Country's constitution. In so doing, the Court has constructed (and then robustly protected from legislative encroachment) a quasi-constitutional common law bill of rights. While he may support the idea that

fundamental rights are important, the High Court's approach "has shaken the very foundations of—and the principles that attend to—the proper judicial role in the construction and application of statutes in a constitutional system of separated powers."

Cite as: Linda Jellum, *Super Strong Clear Statement Rules Down Under*, JOTWELL (May 12, 2016) (reviewing Dan R. Meagher, *The Principle of Legality and a Common Law Bill of Rights—Clear Statement Rules Head Down Under*(2015), available on SSRN), http://adlaw.jotwell.com/super-strong-clear-statement-rules-down-under/.