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Against Interpretation as an Alternative to Invalidation: A Response

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When the legislature enacts a statute that violates people's civil rights, courts can prevent the statute's operation in one of two ways: they can declare the statute to be in violation of the constitution, or they can interpret it in a way that avoids the abusive effect. Interpretation is often preferred, since it is seen as a more modest exercise of judicial power. Dr Stephenson argues—counterintuitively—that interpretation may constitute a *less* modest exercise of judicial power, and also that it is less transparent. The issue is one of considerable importance for all legal systems having the power of judicial review (including the American system, which informs my personal perspective). For the reasons explained below, I disagree with Dr Stephenson's thesis.

I Interpretation Is Not Less Modest Than Invalidation

Dr Stephenson's main argument is that interpretation 'allows the judiciary to implement its preferred method for rectifying the incompatibility with rights, while invalidation typically sends the task of rectification back to the legislature'.[1] Accordingly—writes Stephenson—interpretation 'allows the judiciary to exercise a greater degree of power in relation to the operation of statutes'.[2]

The conclusion is surprising. After all, even at its most expansive, interpretation must remain consistent with the fundamental features of the statute. (Stephenson recognises that 'interpretation . . . is not available . . . if [it] would be inconsistent with . . . a "fundamental feature" of the original statute or . . . [with] "its essential principles"'.[3]) Invalidation, by contrast, does away with the entire statute—fundamental features and principles included. Surely that is a greater exercise of judicial power.

The argument that with interpretation 'the legislature does not even have to worry about deciding what to do . . . because the judiciary will take care of the task of rectification' adds little

1. Scott Stephenson, 'Against Interpretation as an Alternative to Invalidation' 2020 48(1) *Federal Law Review* 46, 65.
2. Ibid.
3. Ibid 50.

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to the analysis. The degree of power exercised by one branch over another is not a function of how 'worried' they make one another, but of who has the final authority, and how difficult it may be to exercise that authority. Measured against these benchmarks, interpretation is clearly more modest.

With interpretation, the legislature always has the final authority, and it gets to exercise that authority by a simple majority vote: if the legislature disapproves of an interpretation, it can simply amend the statute. The legislature can also block the very possibility of interpretation *in advance*, by evincing a clear intent to burden the right in question. (As Stephenson acknowledges, rights-protective interpretations are unavailable against an unambiguous legislative intent to burden a right.[4]) Indeed, as we saw, with rights-protective interpretations the judiciary cannot interfere with the essential parts of statutes, only with their unessential parts.

By contrast, it is much harder to overcome a constitutional invalidation: that may require a constitutional amendment. But even if the legislature possesses an override authority, invalidation is still harder to overcome because, as Stephenson himself writes, 'it may be more politically difficult to override a judicial invalidation . . . than a judicial interpretation'.[5] Moreover, the legislature may not be able to block the possibility of invalidations in advance; and even if it can, because it possesses the controversial power of pre-emptive overrides found in the Canadian Charter, that Charter limits pre-emptive overrides only to five years. Finally, invalidation is less modest because—unlike interpretation—it can cancel the essential parts of statutes, not only their unessential parts.

In short, interpretations are clearly more modest than invalidations when assessed by the extent of judicial power, the legislature's authority to overrule or block judicial action, and the ease with which the legislature can exercise that authority; and this remains true even if the legislature possesses an override authority over constitutional invalidations, including pre-emptive override authority.

Obviously, it is possible to design a system that would make interpretations less modest than invalidations (eg by removing all restrictions on interpretation and imposing onerous restrictions on invalidations). But that goes without saying. Rather, I take Dr Stephenson's thesis to be that interpretation is less modest than invalidation under some specified (and hopefully defensible) institutional design: namely, the design discussed in his paper—which includes the sort of limitations on interpretation one finds in Australia or the UK, and may incorporate a Canadian-style override authority (that may even include temporary pre-emptive overrides). But under such a system, it seems inaccurate to claim that interpretation is less modest than invalidation.

II Interpretation Is Also Not Less Transparent Than Invalidation

Dr Stephenson's second point is that interpretation is less transparent than invalidation. As with his understanding of judicial power, Dr Stephenson's understanding of transparency is rather unusual. We usually think of the transparency of judicial decisions as a function of their honesty and forthrightness—that is, as a function of the reader's ability to comprehend the reasons for the legal conclusion. But Stephenson means by transparency something quite different: he writes that interpretation is less transparent because its 'public message' is less sharp than the public message of invalidation. Whereas the public message of invalidation is 'the legislature enacted a statute

4. Ibid 50, 56.
5. Ibid 60.

that, in the court's view, violates rights', the public message of interpretation might be something like 'a court has rendered a statute compatible with rights'.[6] 'For politicians, the media and members of the public'—writes Stephenson—'the difference is crucial because the former assigns agency to the legislature (it enacted a statute that violates rights) while the latter does not'.[7]

But whereas honesty and forthrightness are indisputable judicial virtues, it is not at all clear why a sharp 'public message'—or a sharp attribution of blame—is also such a virtue, especially if a less sharp attribution is the correct message of the decision. And with interpretations, a message less sharp than 'the legislature acted to violate civil rights' is indeed warranted—since the very availability of rights-protective interpretations means (as we saw) that the legislature may not have intended to violate any rights.

Stephenson's unusual understanding of transparency also informs his related argument that interpretation is less transparent because 'invocations of the power of invalidation are more easily identifiable than invocations of the power of interpretation. It is difficult to miss a judicial decision declaring a statute . . . invalid'.[8] But then again, the lesser salience of interpretations is perfectly justified, given that interpretations leave the essential operation of statutes intact. So once again, where is the problem? Perhaps Stephenson's argument collapses into his previous one.

Dr Stephenson has some additional arguments about transparency,[9] but the short of the matter is this: for Dr Stephenson, invalidations are more transparent because they are sharper and more salient than interpretations—in the same way that killing a patient is sharper and more salient than having an operation. When we kill a patient, the patient is 100% dead and the resulting situation is perfectly clear. When we merely operate, the resulting situation is often less certain, it may be more difficult to know whether the blame for the situation lies with the surgeon or with the disease, and the situation may also be easier to miss since the patient's name will not appear in the obituaries. But an operation need not be less transparent than a killing—and is certainly not a more modest exercise of surgical instruments.

III The Distinction Between 'As-Applied' and 'Facial' Invalidations

A final note: Stephenson's articulation of the dichotomy between invalidation and interpretation sits uncomfortably with one of the most common forms of constitutional invalidation.

Faced with a constitutional challenge to a statute, courts can sustain the challenge by doing one of two things: they can declare the statute null and void; or they can declare only the specific application of the statute void, while the statute remains valid. (American courts speak of the former as a 'facial' invalidations, and of the latter as 'as-applied' invalidations.)

For example, take a group of terminal cancer patients challenging a statute that criminalises assisting suicide, on the ground that the statute prevents their doctors from helping them die with dignity and without unnecessary pain. Courts can sustain the challenge by declaring the statute

6. Ibid 65.
7. Ibid 65–6.
8. Ibid 65.
9. Dr Stephenson also claims that invalidation is more transparent because 'It is not possible for a court to invalidate a statute without first having determined that the statute violates a right': Stephenson (n 1) 63. But rights-protective interpretations are also premised on such determinations, since they are deployed only where courts decide that, in their absent, a right would be 'abrogated or curtailed'. See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

invalid; or, more reasonably, they can hold that the application of the statute to terminally ill patients and their doctors is invalid, but that the statute is otherwise constitutional.[10]

Such 'as-applied' invalidations upend Stephenson's distinctions between interpretations and invalidations: like interpretations, these invalidations mean that 'the legislature does not even have to worry about deciding what to do'; their 'public message' is not as sharp as that of invalidations; and since they leave the statute in place, they are also more 'difficult to miss' than 'a judicial decision declaring a statute invalid'. Stephenson's analysis misses this common form of constitutional invalidation.

In fact, if—as Stephenson argues—interpretations were less modest exercises of judicial power than invalidations, that would have meant that 'as-applied' invalidations—which are more common than facial invalidations precisely because of their purported modesty—may be less modest than facial invalidations.[11] That would have come as a big surprise, at least to many American jurists.

10. See, eg, *Compassion In Dying v State of Washington*, 49 F 3d 586, 596 (9th Cir, 1995), *on reh'g en banc*, 79 F 3d 790 (9th Cir, 1996), *amended* (May 28, 1996), *as amended* (May 28, 1996), *rev'd sub nom; Washington v Glucksberg*, 521 US 702 (1997).

11. See *Washington State Grange v Washington State Republican Party*, 552 US 442, 1190–1 (2008) (explaining the preference for as-applied invalidations).