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Hayekian Statutory Interpretation: A Response to Professor Bhatia

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Introduction

In this Essay, I challenge Professor Bhatia’s recent claim that a Hayekian worldview offers the most rational framing of the philosophical vision underlying Justice Scalia’s jurisprudence. I argue that Hayek’s conception of law, more properly understood, emphasizes the context of social interaction patterns, rather than focusing exclusively on individual autonomous agents. I subsequently trace the resulting implications for interpretive methodology that flow from this distinction, and ultimately address the discontinuities between the normative visions of liberty espoused by Hayek and Scalia.

I. Lawmaking as Group Selection of Norms

Bhatia’s article conflates the Hayekian emphasis on the non-coercion of individuals with a civic framework that, in taking the individual as the foremost unit of analysis, does not move beyond to consider the social phenomena arising from individuals as aggregated. Bhatia paraphrases Hayek as observing, “[a] free society is precisely a spontaneous ordering of individual actions.”1 While not incorrect per se, Bhatia’s uncritical citations to The Constitution of Liberty render the article an incomplete

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characterization of the Hayekian project, which reached a fuller expression in the later

*Law, Legislation & Liberty*. As Hayek scholars Todd Zywicki & Anthony Sanders point out:

Hayek probably saw the argument of [*Law, Legislation & Liberty*] as an elaboration of *The Constitution of Liberty*, not a repudiation, in that it explains how the rules exist independent of the will of individual law-makers. Thus, it is fully consistent to say that rules may be the result of human action (methodological individualism) but not human design (group selection).  

Here, “group selection” refers to the process by which *aggregations* of autonomous actors set norms; this process is necessarily dynamic over time. Such dynamism stands in diametric opposition to the vision of static, democratically legitimated laws espoused by Justice Scalia. Indeed, Hayek hints at a theory of interpretation emerging from a conception of *original public values*, as opposed to the *original public meaning* favored by Justice Scalia.

It seems to me that judicial decisions may in fact be more predictable if the judge is also bound by generally held views of what is just, even when they are not supported by the letter of the law, than when he is restricted to deriving his decisions only from those among accepted beliefs which have found expression in the written law.  

In effect, Hayek advances a rudimentary conception of “dynamic statutory interpretation,” by recognizing the precedential effects of normative evolution over time. Charges of judicial activism are sidestepped by contending that “when a judge decide[s] a case he simply articulate[s] the inchoate principles embedded in the law and d[oes] not

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affirmatively make law.”⁴ Law, then, is an expression of a larger social value set, not merely a text to be subjected to circumstantially isolated exegesis.

II. Methodological Implications

Bhatia ascribes to Justice Scalia an affinity for textualism on the grounds that it stabilizes reliance interests.⁵ Directly linking this to Hayekian ideology, however, is to rely upon an incomplete portrait of the Hayekian view. “For Hayek, the rule of law is not simply the non-arbitrary enforcement of preexisting rules. It is also the enforcement of rules that have been formed through a spontaneous process.”⁶ (Emphasis added). In other words, Hayekianism entails more than a “settled background of principle”; it also contains an affirmative recognition of norms that arise via the spontaneous functioning of the polity.

Naturally, internal coherence between potentially conflicting norms is a prerequisite for the effective operation of laws established within a Hayekian construction. A strictly textualist interpretive methodology demands reliance on interpretive canons, which Scalia and Garner detail in their book Reading Law. Yet for Hayek, stressing as he does the social structures through which norms spontaneously arise, the identification and exposition of canons misses the point of the interpretive project.

⁴ Zywicki & Sanders, supra note 2, at 40.

⁵ Bhatia, supra note 1, at 548.

⁶ Zywicki & Sanders, supra note 2, at 47.

⁷ Anthony O’Hear, Criticism and Tradition in Popper, Oakeshott and Hayek, 9 J. APPLIED PHIL. 65, 72 (1992)
Hayek sees the proper role of a judge as focusing on seeking to harmonize and create internal consistency among the constituent rules of the legal system. To focus on the properties of any given rule in isolation is to miss the larger point, which is how the rules that comprise the system of legal rules mesh with one another.\footnote{Zywicki & Sanders, supra note 2, at 30.}

From a Hayekian standpoint, the chief weakness of the Scalia-Garner project must be its failure to weave the articulable canons into a coherent interpretive fabric: the litany of canons lacks a second-order choosing/prioritization principle for selecting between conflicting canons. A Hayekian interpretive methodology, for its part, may inquire into the original public values undergirding a given text (including by means of legislative history) without cannibalizing its own philosophical underpinnings.

### III. Divergences Respecting the “Normative Vision of Liberty”

Bhatia concludes by briefly sketching a particular social vision, which he attributes to Hayek and argues that Justice Scalia shares. “In other words, subject to the abstractly worded, general rules outlined above, individuals ought to be left to their devices in an entirely unregulated economic and social environment . . . a deeply conservative vision of a minimalist state as the best guardian of individual freedom.”\footnote{Bhatia, supra note 1, at 555.}

Here again, surface-level areas of convergence between Justice Scalia’s jurisprudence and Hayekian thought are present, but the devil remains in the details. Accepting Bhatia’s assessment that Justice Scalia’s jurisprudence is derived chiefly from a presumption favoring liberty for autonomous actors,\footnote{Id. note 1, at 555.} this jurisprudence correlates closely with

\footnote{Zywicki & Sanders, supra note 2, at 30.}
William Blackstone’s strictly minimalist understanding of state-individual relations. “The right of personal security consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.”\textsuperscript{11} This strict negative-liberty view, however, sits in contrast with Hayek’s own, which understands “law” not merely via its immediate coercive effects upon the person, but rather as a broader normative phenomenon emerging from a landscape in which autonomous agents pursue their ends. In order to render such autonomy possible, this view (for example) might “involve some level of financial support that the state, impersonally conceived, will grant to all of its citizens.”\textsuperscript{12} Both Hayek and Justice Scalia appear to share a particular set of liberty values, but Hayek’s are socially contextualized in a way that Bhatia does not address.

\textbf{Conclusion}

In summary, the parallel Bhatia seeks to draw between Hayekian political philosophy and the jurisprudence of Justice Scalia stems from an erroneously narrow reading of Hayek. By rooting interpretive theory in a dynamic understanding of evolving public norms, the Hayekian perspective sharply diverges from Justice Scalia’s textualism. An alternate explanation of the roots of Justice Scalia’s social vision is, accordingly, warranted.

\textsuperscript{11} \textbf{William Blackstone, Commentaries *129.}