

# Quentin Skinner v. Charles Taylor: Explanation and Practical Reasoning in History, Philosophy, and Law

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## INTRODUCTION

One can ask two different questions about a given social, political, or legal practice. First, one can ask whether, and if so how, the ideas embodied in that practice explain its development or current prevalence. Second, one can ask whether the practice should be advanced, abandoned, or altered in some way. According to today's disciplinary conventions, the first question

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is an *historical* or explanatory one, whereas the second is a *philosophical* or normative one.<sup>1</sup>

This essay is about the relationship between these two questions. In particular, it asks the following: How, if at all, do the answers to these questions depend on each other? That is, to what degree, if any, must one evaluate or assess a practice in order to explain its social acceptance? And conversely, how, if at all, should the historical explanation of a practice bear on our normative evaluation of it?

These latter questions – which are really questions about questions – are large and deep ones. They have been long debated by philosophers and historians and are thus ones to which I cannot give conclusive answers. The task of the essay is therefore less to answer them definitively than to suggest what certain answers to them reveal about the modes of reasoning in the disciplines of history and philosophy—and law. It does so by examining a dialogue that took place over several years between the historian Quentin Skinner and the philosopher Charles Taylor. That dialogue nicely illustrates the assumptions of each scholar’s home discipline because both scholars give voice to, yet also challenge, those assumptions. Indeed, I will argue that Skinner and Taylor end up forging common methodological ground with respect to the relevance of historical explanation to philosophical evaluation and vice versa. More specifically, both scholars end up seeing a closer connection between the two disciplines than either historians or philosophers typically do.

But how can this exchange, between an historian and philosopher, say something about *law*? The reason, which I can only gesture at here, is that traditional common-law reasoning proceeds on the same methodological common ground occupied by Taylor and Skinner. And if that’s true, it may reveal something important about the nature of the reasoning implicit in common-law adjudication and, therefore, something about law’s status as a “discipline” of knowledge – a perennial matter of debate.<sup>2</sup>

The dialogue between Quentin Skinner and Charles Taylor is illuminating because in it one can see each of the participants relying on, but also struggling against, his home discipline’s norms and assumptions. Skinner criticizes Taylor for doing bad history and for ignoring the way in

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1. Throughout this essay, I use the phrases “normative” and “philosophical” somewhat interchangeably. When distinguishing between disciplines, “philosophy” stands as a better contrast to “history,” but when it comes to the nature of the arguments themselves, the contrast intended is one that distinguishes between historical *explanation*, on the one hand, and *evaluation* by reference to normative criteria, whether moral or epistemological, on the other.

2. See, e.g., FREDERICK SCHAUER, THINKING LIKE A LAWYER (2009); James Boyd White, *Establishing Relations Between Law and Other Forms of Thought and Language*, 1 ERASMUS L. REV. 3 (2008); THE AUTONOMY OF LAW: ESSAYS IN LEGAL POSITIVISM (Robert George ed., 1996); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 1-21 (1995); Richard A. Posner, *The Decline of Law As an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 762 (1987); Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981).

which the actual, contingent manner by which today's political practices arose undermines Taylor's philosophical commitments. Meantime, Taylor distinguishes his "interpretive" project from that of the historian interested in questions of causation. In that way, both scholars show their loyalty to their respective disciplines.

But once one looks more carefully, things become a bit more complicated. It turns out that Skinner, too, thinks one can mine the past for philosophical gems – and that Taylor, too, acknowledges that genealogical accounts showing the contingency of present philosophical practices discredit those practices. In these ways, each scholar reveals his discomfort with the assumptions that tend to dominate his home discipline about how to respond to certain kinds of arguments. That discomfort, I will argue, brings their views about the relevance of history to philosophy, and philosophy to history, so close together that I think it is fair to describe them as occupying common methodological ground.

A caveat before proceeding: although I describe below an actual exchange between two scholars, it is in some ways (though *only* in some ways) better understood as a rational reconstruction of that exchange than as a proper intellectual history of it. Because my goal is to bring out each participant's methodological views in a clear way, I proceed according to the logic of their arguments rather than chronologically. And where there are tensions or inconsistencies in their arguments, I ascribe to them the view I find more persuasive. Nevertheless, I mean to state the views of both scholars accurately, and I would consider it a devastating objection to my argument if they could not recognize as their own the positions I impute to them.

## I. A FIRST CUT: DISCIPLINARY IMPASSE?

### A. *Quentin Skinner*

Quentin Skinner's famous article, "Meaning and Understanding in the History of Ideas" provides a useful starting point. There Skinner articulates and defends the method of intellectual history with which he has become most associated.<sup>3</sup> The article has been the subject of much methodological debate,<sup>4</sup> and it raises deep and difficult questions about the nature of meaning.<sup>5</sup> To the extent possible, I want to put those issues aside in order

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3. Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HISTORY AND THEORY 3 (1969), reprinted in MEANING & CONTEXT: QUENTIN SKINNER AND HIS CRITICS 29 (James Tully ed., 1988) [hereinafter Skinner, *Meaning*].

4. Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 725-33 (2013) (summarizing some aspects of this debate).

5. See *id.* at 730 (observing that Skinner said he revised some of his ideas based on new developments in the philosophy of language).

to focus on how Skinner sought to revise the methods of traditional histories of philosophy and on what philosophical lessons, if any, he thought his approach could yield.

Today Skinner's targets may seem like straw men (and they did tend to be *men*) because the histories they produced would hardly be recognized *as* history by professional historians these days.<sup>6</sup> They were historians of philosophy – in particular of political philosophy – who wrote about the texts comprising the philosophical canon of their day, and they focused almost exclusively on the philosophical content of those texts. As a result, today these scholars would more likely be found in philosophy departments than history departments.

According to Skinner, such histories contained and perpetuated various myths about how works of political philosophy are written. The *mythology of coherence* wrongly assumed that everything a given author wrote could be rendered coherent;<sup>7</sup> the *mythology of doctrines* assumed that each author studied had something to say on all of the various topics that the historian considered constitutive of the discipline of political philosophy;<sup>8</sup> and the *mythology of prolepsis* entailed anachronistically ascribing to an author intentions that he or she could not possibly have had – such as ascribing to Petrarch the intention to “open the renaissance.”<sup>9</sup> Worst of all was the central underlying assumption that one could study the history of an “idea” by looking at certain texts.<sup>10</sup> Since ideas do not exist in disembodied form, the proper task of an historian is instead to study how people in the past wrote particular sentences to communicate with one another.<sup>11</sup>

Once one sees that the historian's unit of analysis consists of what Skinner calls “speech acts,” rather than “ideas,” the scope of historical inquiry must broaden to include the social and ideological context in which the texts under analysis were written. Drawing on John Austin's philosophy of language, Skinner drew a distinction between the meaning of a given statement and its intended “illocutionary force.”<sup>12</sup> Whereas the meaning of a statement is something like its literal meaning or semantic content, its illocutionary force is what the speaker of the statement intends to *do* with it. To *understand* a given text is to know what its author was intending to communicate.<sup>13</sup> And it is not sufficient (though it is necessary) for such

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6. Cf. QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (1998) [hereinafter SKINNER, LIBERTY] (using as an epigraph for his essay this statement from F. W. Maitland: “Until I was thirty years old and upwards I rarely looked at a history – except histories of philosophy, which don't count.”) (quoting F. W. Maitland to Lord Acton, 20 Nov. 1896, Cambridge University Library, Add. MS 6443 / 197, fo. lv).

7. Skinner, *Meaning*, *supra* note 3, at 39.

8. *Id.* at 32.

9. *Id.* at 44.

10. *Id.* at 54.

11. *Id.* at 56.

12. *Id.* at 61.

13. *Id.* at 63.

understanding to know merely the text's meaning. One must also know the text's intended illocutionary force. And this requires looking to the historical context in which the statement was written. So, for instance, in order to understand a Renaissance tract that says, "a prince must learn how not to be virtuous," we must know something about the practices and conventions of the time. Was such advice commonly given? Was it intended to subvert that convention? We can only begin to know by looking to the meaning of the text *and* the rhetorical conventions of its time.<sup>14</sup>

The upshot of this approach to intellectual history is that the effort of traditional historians of philosophy to look to classic texts to learn "universal truths" about "perennial philosophical questions" is quixotic. Any statement from the past is, according to Skinner, "inescapably the embodiment of a particular intention, on a particular occasion, addressed to the solution of a particular problem, and thus specific to its situation in a way that it can only be naïve to try to transcend."<sup>15</sup> Instead, the primary philosophical lesson – and Skinner suggests it may even be a "moral" lesson<sup>16</sup> – one can draw from intellectual history is precisely the particularity and contingency of our own present practices. Looking to our history can "show the extent to which those features of our own arrangements which we may be disposed to accept as traditional or even 'timeless' truths may in fact be the merest contingencies of our peculiar history and social structure."<sup>17</sup> In other words, history teaches us that the only general truth is that there are no general truths.<sup>18</sup>

### *B. Charles Taylor*

Charles Taylor, meanwhile, seems to offer a very different vision of the use of history for philosophy. Taylor's sort of history is not exactly like the "histories of philosophy" that formed Skinner's targets in *Meaning and Understanding*, but the question is whether it is still vulnerable to Skinner's critique of such histories. At first blush, it seems to be.

Taylor argues that philosophy, properly understood, is an essentially historical inquiry. He argues as follows. Philosophy is an activity in which we aim to redescribe or reformulate what we are doing in order to see our own actions in a clearer light.<sup>19</sup> It is a process of trying to articulate to the

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14. *Id.* at 61-62.

15. *Id.* at 65.

16. *Id.* at 67.

17. *Id.* at 67.

18. *Id.* This calls to mind a line Neil Diamond used to use when opening concerts: "There's only one rule: there are no rules." See Jason Harper, *Concert Review: Neil Diamond at Sprint Center. Tuesday, December 16, 2008.*, THE PITCH (Dec. 16, 2008), <http://www.thepitchkc.com/concert-review-neil-diamond-at-sprint-center-tuesday-december-16-2008>.

19. Charles Taylor, *Philosophy and its History*, in PHILOSOPHY IN HISTORY 18 (Richard Rorty, J. B. Schneewind & Quentin Skinner eds., 1984).

best of our abilities our reasons for thinking and acting as we do, even though we are not always entirely aware of those reasons. But the process of articulation often will require the recovery of past articulations because we can only see alternatives to today's unquestioned premises by looking to the arguments that were made on behalf of those premises when they were not unquestioned assumptions but instead advanced as novel and controversial theses.<sup>20</sup>

Taylor's opus, *Sources of the Self*, offers an example of this sort of history.<sup>21</sup> In it Taylor attempts to trace the philosophical sources of our modern sense of individual identity using a method he has described elsewhere as one of "philosophical anthropology."<sup>22</sup> He begins by describing various ethical commitments that he suggests are today largely accepted as given by philosophers, and by modern western culture generally, and which constitute modern identity. These include the sense that the self has an inner depth, the value placed on the "ordinary life" of production and reproduction, and the idea that nature affords an "inner moral source."<sup>23</sup> Taylor then traces the development of these ideas, through the writings of Plato, St. Augustine, Locke, Descartes, Rousseau, various Romantic poets, and many others, in order to show how we arrived at our current understandings of the self and the ethical commitments that constitute it.

The result of Taylor's expansive survey of philosophers and poets is part affirmation, part criticism. It is meant to affirm the validity or worthiness of the ultimate values – or what he calls "hypergoods" – which frame the moral, political and philosophical debates of our age. But it is also meant to show that those who embrace these hypergoods today refuse to accept the sort of ontology necessary to make sense of those commitments.<sup>24</sup> They insist on a "naturalist" ontology that sees all such hypergoods and frameworks of meaning as "gratuitous inventions" thrust upon an otherwise meaningless world.<sup>25</sup> He thus concludes his book with the suggestion that a theological ontology of the kind articulated by at least some of those earlier thinkers more plausibly explains our present ethical commitments.<sup>26</sup>

### C. *Skinner v. Taylor*

I raised earlier the question of whether Taylor's use of history in service of philosophy is vulnerable to Skinner's critique of the historians of

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20. *Id.* at 19.

21. CHARLES TAYLOR, *SOURCES OF THE SELF* (1989) [hereinafter TAYLOR, *SOURCES*].

22. Charles Taylor, *The Hermeneutics of Conflict*, in QUENTIN SKINNER AND HIS CRITICS 223 (James Tully ed., 1988) [hereinafter Taylor, *Hermeneutics*]

23. TAYLOR, *SOURCES*, *supra* note 21, at x.

24. *Id.* at 69.

25. *Id.* at 19.

26. *Id.* at 521.

philosophy of an earlier era. Skinner himself seems to think it is. In a comment on *Sources of the Self*, Skinner challenges both Taylor's historical claims and his philosophical ones.<sup>27</sup> He points out that as a matter of cultural history, Taylor's account of the development of the modern self is filled with omissions and distortions. It ignores, for instance, the influence of various important medieval religious and natural-law thinkers.<sup>28</sup> Moreover, it offers strained interpretations of the thinkers he does cover, such as Locke and Rousseau.<sup>29</sup> He thus accuses Taylor of engaging in what legal historians would condemn as "law-office history" if Taylor were writing about the history of law. "Here and elsewhere," Skinner concludes, "it is sometimes hard to resist the suspicion that Taylor is prompting his leading characters to speak the lines that the thrust of his narrative imposes on them."<sup>30</sup>

Taylor anticipates this criticism in *Sources*, where he responds to it by distinguishing his project from that of traditional historians. He is not trying to answer the question of what brought about the modern identity as a matter of what he calls "diachronic causation."<sup>31</sup> That project is a much more ambitious one, which would require looking to the rise of modern capitalism, among many other social, economic, and political events and developments.<sup>32</sup> Instead, his task is an "interpretive" one that aims to provide "an account of the new identity which makes clear what its appeal was."<sup>33</sup> Such an inquiry, Taylor maintains, "can, up to a point, be explored independently of the question" of historical explanation.<sup>34</sup>

But Skinner rejects this distinction between interpretive and historical projects.<sup>35</sup> He insists that insofar as Taylor means to affirm the ethical commitments of our current practices, such an affirmation is vulnerable to historical critique. Take Taylor's endorsement of the modern tendency to find value in the activities of production and reproduction. Skinner points out that powerful groups, including absolutist monarchs, had an interest in propagating the idea that life's meaning could be found in the mundane world of work and family because it allowed them to gain more political

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27. Quentin Skinner, *Who Are "We"? Ambiguities of the Modern Self*, 34 INQUIRY 133, 133-35 (1991) [hereinafter Skinner, *Ambiguities*].

28. *Id.* at 135.

29. *Id.* at 135-36.

30. *Id.* at 136.

31. TAYLOR, *SOURCES*, *supra* note 21, at 202.

32. *Id.*

33. *Id.* at 203. See also Taylor, *Hermeneutics*, *supra* note 22, at 223 (observing that "one could construct a single unified justification [of a practice], from one coherent theory of philosophical anthropology, even though historically we all know that liberal democracy didn't arise that way").

34. TAYLOR, *SOURCES*, *supra* note 21 at 203.

35. Skinner, *Ambiguities*, *supra* note 27, at 143 (ascribing to Taylor the view that "[t]he two forms of narrative, while obviously complementary, are almost entirely 'distinct' and 'independent' of each other" (quoting TAYLOR, *SOURCES*, *supra* note 21, at 2023) and then denying that "this thesis can be sustained").

power without ordinary people paying much attention.<sup>36</sup> Thus, even if we acknowledge that the new priorities of work and home held some intrinsic appeal to those who embraced them, we must still acknowledge the “disquieting implication that our forebears may to some degree have been hoodwinked into exchanging their traditional picture of spirituality and citizenship for the very different one they in turn bequeathed to us.”<sup>37</sup> In this way, history undercuts the moral of Taylor’s story. “The more we acquaint ourselves with the kind of causal story that historians like to tell – but Taylor elects to ignore,” Skinner explains, “the more does such an affirmative stance seem impossible to uphold.”<sup>38</sup>

We thus seem to reach an impasse that often occurs when historians and philosophers try to engage with one another. The philosopher draws on texts from the past to support a particular philosophical thesis or vision premised on present-day moral or epistemological assumptions. The historian then shows how a “causal story” displays the contingency of those assumptions and thereby undermines the philosopher’s view. To this the philosopher responds that he is not concerned with historical explanation or causation – that his task is an interpretive one and so is immune to such objections. Not surprisingly, we see the same dynamic at work between *legal* historians and *legal* philosophers.<sup>39</sup>

## II. PHILOSOPHICAL HISTORY AND HISTORICAL PHILOSOPHY: COMMON METHODOLOGICAL GROUND?

It turns out, though, that things are not so simple. Skinner is too sophisticated an historian, and Taylor too sensitive a philosopher, for the debate to remain stuck in such a stalemate. Instead, both scholars concede far more to the other side than the above description suggests, opening up the possibility that they may both conceive of philosophy and history as part of the same historical-philosophical enterprise.

### A. *Ideas in History*

Let’s begin with the role of ideas in historical explanation. To say that “ideas” matter – or at least *sometimes* matter – in history is to assert that

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36. *Id.* at 144.

37. *Id.* at 145.

38. *Id.* at 144.

39. Compare MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977) and Robert W. Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017 (1981) with RONALD DWORKIN, *LAW’S EMPIRE* 273 (1986) [hereinafter DWORKIN, *EMPIRE*] (criticizing, among other historians, Gordon on the ground that critical histories, “describe law genetically,” and so “reflect a serious misunderstanding of the kind of argument necessary to establish a skeptical position: the argument must be interpretive rather than historical”). I have discussed Dworkin’s response to the critical-history critique elsewhere. See Charles L. Barzun, *Inside-Out: Beyond the Internal-External Distinction in Legal Scholarship*, 101 *Va. L. Rev.* 1203, 1228-32 (2015); Charles L. Barzun, *Causation, Legal History and Legal Doctrine*, 64 *Buff. L. Rev.* 81, 97-99 (2016).

those ideas have played a causal role because they are *true*.<sup>40</sup> Take, for instance, the set of legal and constitutional practices protecting the rights of individuals to contract for their own labor. If those practices came to be accepted within American society only because powerful actors managed to manipulate the ignorant masses into embracing that ideology in spite of the fact that doing so undermined their own interests, then there is a sense in which the “ideas” of individual liberty and freedom of contract matter in how American society has developed. But it would be odd to call that an *intellectual* explanation of the rise of free-market capitalism. The driving force in this account is the social, economic, or political power of the elites propagating that message. Instead, what those who insist that ideas matter in history typically mean to assert is that the historical actors who accepted or embraced those ideas did so at least partly because the ideas were *true*—i.e., they really did conform to the deeper moral principles they purported to or produced the benefits promised.

Both Taylor and Skinner seem to accept this stronger view. Taylor argues explicitly that ideas matter when it comes to explaining our current practices. In an essay criticizing what he understands to be Skinner’s thesis in his “Meaning and Understanding” essay,<sup>41</sup> Taylor reads Skinner as arguing that whether some set of political ideas or practices comes to dominate a society or not depends almost entirely on whether those who advocate for those ideas win on the battlefield.<sup>42</sup> Its success or failure, under this view, depends not at all on whether the underlying theories expressed by the texts in question are true or not.<sup>43</sup> In Taylor’s view, this thesis is wildly implausible because big political ideas, such as political individualism, are causally connected to other practices, such as modern conceptions of marriage and the family, human fulfillment, the value of individual difference, and the idea of being “true to oneself.”<sup>44</sup> Those institutions and practices seem only loosely connected to actual military battles. Therefore, the relevant battle is not literally a military one; instead, it is “the struggle of daily life, in which individuals and couples strive to make sense of their lives and give shape to their hopes, fears, and aspirations.”<sup>45</sup>

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40. Whether the notion of “truth” here is a timeless one or one relative to the historical context is a question taken up below.

41. Taylor here takes as his target an essay written by another author who summarizes and endorses Skinner’s approach. See Taylor, *Hermeneutics*, *supra* note 22, at 218 (“Here I want to confine myself to raising some issues about [Skinner’s] methodology, starting in fact not from Skinner’s own statements, but from the useful and concise summary that James Tully has offered.”) (citing James Tully, *The Pen is Mightier than the Sword: Quentin Skinner’s Analysis of Politics*, in *MEANING & CONTEXT: QUENTIN SKINNER AND HIS CRITICS* 29 (James Tully ed., 1988)). Skinner’s short response to Taylor’s essay makes no effort to distinguish Tully’s account of Skinner’s thesis from his own.

42. *Id.* at 223.

43. *Id.* at 219.

44. *Id.* at 225-26.

45. *Id.*

According to Taylor, if this view is right, it has methodological implications for the historian. For once one accepts the idea that an idea's truth may sometimes play a causal role in explaining some practice in which it figures, then it seems to follow that the historian must make judgments about the truth of the ideas under scrutiny.<sup>46</sup> The historian, in other words, becomes in part a political philosopher who has to grapple with, and make judgments about, the political issues that the actors in his historical account face.

In a short response to Taylor's essay, Skinner more or less concedes this point. While insisting that historians must be on guard against bringing their own society's standard of truth to bear when offering historical explanations, Skinner acknowledges that if Taylor means only that the historian must make judgments about what is true "in relation to the needs of the people who live under them," then he agrees with him.<sup>47</sup> "If we encounter an ideology, which we find to be true to the needs of the society living under it," Skinner explains, "we are sure to treat that very fact as part of the explanation for its success."<sup>48</sup>

Moreover, Skinner is no Marxist historian who sees only material forces at work. As he explains in an essay published many years after *Meaning and Understanding*, to recognize that works of political theory are often written with concrete political purposes in mind – purposes which can only be known by looking to the context in which the work was written – does not preclude the judgment that the more general principles articulated in those texts figure in the best historical explanation of them. The reason is that even if those principles are mere rationalizations for particular positions, the rationalizations chosen indicate the sorts of ideas that are perceived to be legitimate at the time and place the work was written. In that way, they serve as evidence of the rhetorical constraints placed on the author.<sup>49</sup> Skinner thus concludes that "we cannot avoid invoking the presence of such principles if we wish to explain why certain policies are chosen at particular times and are then articulated and pursued in particular ways."<sup>50</sup> So ideas do matter when it comes to explaining historical change, even if only as constraints on political action, rather than as motives for it.

Skinner does not consider his recognition that the intellectual historian must make judgments about what the "needs of the people" are to be much of a concession. The reason is that he considers that definition of "truth" to be so broad as to make the requirement "unhelpfully wide."<sup>51</sup> But it is

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46. *Id.* at 226-27.

47. Quentin Skinner, *A Reply to my Critics*, in *MEANING & CONTEXT: QUENTIN SKINNER AND HIS CRITICS* 236-237 (James Tully ed., 1988) [hereinafter Skinner, *Reply*] (quoting Taylor, *id.* at 223).

48. *Id.* at 236-7.

49. SKINNER, *LIBERTY*, *supra* note 6, at 105.

50. *Id.* at 106.

51. Skinner, *Reply*, *supra* note 47, at 237.

sufficient, I think, to establish Taylor's point, which is that whenever an historian advances an explanation of past actors' actions that renders a verdict as to whether the ideas articulated by those actors are properly included in the explanation or not, she cannot avoid making a philosophical judgment of sorts. The reason is that in order to conclude that those ideas do or do not figure in the best explanation of the actions under scrutiny, the historian must determine whether or not those ideas had the rational force the actors ascribed to them at the time—i.e., whether those actors were right to find them “appealing.” But how else can the historian reach that conclusion other than by assessing, at least in part, what kind of rational force those ideas possess (or would possess for someone in the historical actors' position)? In other words, determining whether an idea or ideology was, in Skinner's phrase, “true to the needs of the society living under it,” requires making judgments as to what the needs of the society *really were* and whether the idea or ideology was a proper response to those needs.<sup>52</sup> And those entail normative judgments, not merely empirical ones.

To see why, consider again the example of laissez-faire ideology in late nineteenth-century America. If the historian wants to know whether the truth of that ideology or set of ideas helps explain why people, beyond the capitalists who directly benefited from its popularity, endorsed and espoused it, then she must decide whether that ideology was “true to the needs of the society living under it” or not.<sup>53</sup> But how can she make that judgment without (a) sorting through, and assigning priority to, the various moral, material, spiritual, social needs of late-nineteenth century Americans and (b) determining whether a largely free-market system really served whatever needs are judged to be most important?

To be clear, the point is not that one must take the historical actors' word for it when it comes to the question of whether the ideas they espoused really mattered in the way they thought they did. Rather, the point is that any judgment to the contrary requires grappling with the ideas themselves and their fit (or lack thereof) with the forms of life out of which they grew. As Taylor put it:

That one must confront one's language with that of one's subjects doesn't involve accepting [their] language. It may of course. But the upshot can also be that one judges oneself to have a perspective that they couldn't share, and so far forth revises their beliefs. The point is the issue must be faced, one way or another, or muddle will prevail.<sup>54</sup>

So the nineteenth-century historian may conclude that many of those who embraced laissez-faire ideology were indeed “hoodwinked” by the monied

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52. Skinner, *Ambiguities*, *supra* note 27, at 145.

53. *Id.*

54. Taylor, *Hermeneutics*, *supra* note 22, at 228.

classes.<sup>55</sup> But even that conclusion entails a judgment that those historical actors misunderstood their own needs or interests—a judgment that the relevant empirical facts are not alone sufficient to establish.

*B. Historical explanation and philosophical evaluation*

Taylor and Skinner thus agree that ideas sometimes matter for the purposes of historical explanation and that that fact requires the intellectual historian to be part political theorist or philosopher. Now let's consider the influence going the other way: How do historical explanations of certain practices bear on our assessment of them? To what extent ought philosophers be historians?

*i. Debunking genealogies*

We may begin again with Taylor. It turns out that he draws a far weaker contrast between interpretive projects like his own and those of historical explanation than either the above description suggests or than Skinner ascribes to him. Indeed, he characterizes the difference primarily as one of degree of ambition, rather than as one of divergent purposes.<sup>56</sup> Although he suggests that the two projects may “*up to a point*, be explored independently” of one another, the qualifier “up to a point” demonstrates his recognition that the two cannot be separated entirely.<sup>57</sup> That is because the interpretive question, as we have seen, aims to provide “an account of the new identity which makes clear what its appeal was.”<sup>58</sup> But to say that a set of ideas held appeal for a society or culture implicitly suggests that such appeal is *why* it came to be embraced by that society or culture – and that is a question of historical explanation.<sup>59</sup> In other words, the interpretive project must make implicit judgments about whether the ideas whose appeal it investigates play a causal role in how a culture or society develops. What it need not assert is that the appeal of such ideas is “*sufficient* to answer the causal-diachronic question.”<sup>60</sup> To that extent – and only to that extent – does he accept a Marxist critique that emphasizes material conditions as causal forces. In short, contrary to what it earlier appeared, Taylor sees an interpretive enterprise like his own, which looks to the intrinsic “appeal” of ideas to a certain community, as part of (even if *only* a part of) the project of historical explanation.

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55. Skinner, *Ambiguities*, *supra* note 27, at 145.

56. TAYLOR, *SOURCES*, *supra* note 21, at 203.

57. *Id.*

58. *Id.* See also Taylor, *Hermeneutics*, *supra* note 22, at 223 (observing that “one could construct a single unified justification [of a practice], from one coherent theory of philosophical anthropology, even though historically we all know that liberal democracy didn’t arise that way”).

59. *Id.*

60. *Id.* at 204 (emphasis in original).

Taylor also accepts the negative implication of this view, which is that if the best explanation of a practice does *not* involve its intrinsic value or appeal, then that's a problem for the practice. Pointing to the causal genesis of an idea, he explains, will help us "identify its spiritual center of gravity."<sup>61</sup> That is why genealogical accounts that purport to show that an idea became popular only because it rationalized entrenched social or economic interests are properly disconcerting. "When Nietzsche wants to launch his out-and-out attack on morality," he explains, "he does this by offering an account of the transition to it, the rise of slave morality. 'Genealogy' is the name for this kind of probing. No one can fail to recognize that, if true, Nietzsche's genealogies are devastating."<sup>62</sup> Thus, just as an understanding of certain ideas is necessary to do good history, history properly bears on our evaluation of those same ideas.

We have already seen that Skinner draws precisely the same inference from historical explanations. Recall Skinner's critique of Taylor's endorsement of what he calls the "affirmation of daily life." Skinner worries that the relevant history shows the way in which the common people were "hoodwinked" into accepting those values.<sup>63</sup> He thus implicitly contrasts such an account with one that sees the common people as having come to embrace those values through some more rational or healthy process – as a result, for instance, of their gradually adopting those values on the basis of their own lived experience and their reflection on that experience. Such a process would help ensure that the values embraced satisfied their true "needs."

## ii. *Intellectual history as philosophical anthropology*

What is less obvious, though, is that Skinner also turns to history for philosophical inspiration in the way Taylor does. In *Liberty Before Liberalism*, Skinner describes a political theory, which he calls the "neo-roman" theory of liberty and which he sees as an alternative to modern liberalism.<sup>64</sup> According to this view, which Skinner finds in the works of various seventeenth-century English thinkers, individual liberty consists mainly in living within a self-governing political community. It analogizes the state to an individual and asserts that people cannot be truly free unless they have a right to participate in the governing of their community – even if the substantive laws under which they live do not constrain their

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61. *Id.* at 203.

62. *Id.* at 72. For reasons mentioned below, I think Taylor is wrong about this as a descriptive claim. Many people, especially philosophers, might fail to recognize the force of Nietzsche's genealogy. They might dismiss any suggestion that it could have such an effect as an example of the genetic fallacy. See *infra* note 75.

63. Skinner, *Ambiguities*, *supra* note 27, at 145.

64. SKINNER, *LIBERTY*, *supra* note 6, at 22 n.67. Of course, it's possible that this reflects a change in Skinner's view, but he does not describe it that way in the essay itself.

individual actions in onerous ways.<sup>65</sup>

Much of *Liberty Before Liberalism* is devoted to articulating the neo-roman theory of liberty and identifying its assumptions. But toward the end Skinner makes quite clear what motivates his project. It is an effort to improve our self-knowledge. Today we often speak of the state as a kind of person, he explains, but we tend not to give much thought to what that might mean or why we do so. We have “inherited a theory which we continue to apply, but which we do not really understand.”<sup>66</sup> He thus suggests that we improve our understanding of our current practice by looking to the past. One of the ways, he explains, “of improving our understanding will be to go back to the historical juncture at which this way of thinking about politics was first articulated and developed.”<sup>67</sup> It is for that reason that he describes his essay as a work of “excavation” and the role of the intellectual historian “as a kind of archaeologist, bringing buried intellectual treasure back to the surface, dusting it down and enabling us to reconsider what we think of it.”<sup>68</sup>

It seems, then, that Taylor and Skinner end up voicing views more methodologically consonant than they first appeared. Earlier we saw Taylor acknowledge the critical force that historical accounts may carry for our present practices in just the way Skinner had insisted. We now see Skinner endorsing the use of history as an aid to philosophical inquiry in a more constructive manner, along the lines of what Taylor had advocated.

Indeed, Skinner’s intellectual historian is not unlike Taylor’s philosophical anthropologist. Taylor insists that the philosopher’s task involves the “recovery of previous articulations,” to which we must return in order to better understand our present practices, and Skinner speaks of returning to the “historical juncture” at which a particular way of thinking “was first articulated and developed” in order to “enable us to acquire a self-conscious understanding of a set of concepts that we now employ unselfconsciously.”<sup>69</sup> In both cases, we turn to history for the philosophical purpose of improving our own self-knowledge.

None of this is to deny that Skinner and Taylor disagree. But the point is that, under the reading I am offering, they disagree about the historical facts. No surprise, then, that in a subsequent exchange, we see precisely such disagreement. Skinner argues once again that an historian’s attention to the “causal processes” that led to the embrace of modern values undermines those values because it demonstrates their contingency. For instance, he argues that monasticism disappeared as a meaningful social ideal primarily because it was “in the interests of . . . ruling groups to promote the view that

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65. *Id.* at 84.

66. *Id.* at 110.

67. *Id.* at 111.

68. *Id.* at 112.

69. *Id.*

monastic spirituality embodied a misuse of human labour and wealth.”<sup>70</sup> Taylor then responds not by denying the validity of the inference drawn, but rather by denying the plausibility of Skinner’s historical account. Although Taylor recognizes “the presumption involved in a philosopher challenging an historian,” he questions whether the ruling powers’ suppression of the monks is really adequate to explain the decline of monastic spirituality more generally.<sup>71</sup> “Can the whole impact of English Protestantism on politics and culture,” he rhetorically asks, “be laid at the door of the Tudor regime?”<sup>72</sup>

In short, Skinner and Taylor seem to find common ground with respect to the answers to the two questions with which this essay began. First, the truth of the ideas used to justify and articulate a given social, political, or legal practice may sometimes, but not always, explain why that practice has become accepted or dominant in society. For that reason, the historian must make some philosophical judgment in order to determine whether the ideas embodied in it played a significant explanatory role. Second, and relatedly, whether a practice is in fact best explained by the truth of the ideas it embodies properly bears on the question of how we should evaluate that practice when it comes to deciding whether it should be advanced, abandoned or revised in some way. In other words, the historian of a practice must also be a philosopher, and the philosopher of a practice must also be an historian.

#### CONCLUSION

The discussion above may all seem very remote from law and adjudication, but I don’t think it is. The reason is that judges occupy the same methodological common ground that Skinner and Taylor do. They are constantly put in the position of having to make practical decisions about what to do (how to decide a case) based on texts from the past (e.g., constitutions, statutes, and cases). In other words, they are practical reasoners who have a professional duty to use history in service of rendering normative judgments about past and current practices.

No surprise, then, that both of the inferences just discussed – using historical facts to support philosophical conclusions and relying on philosophical convictions in offering historical explanations – are quite common and conventional features of judicial argument. For instance, the logic of judicial opinions treats the reasoning of past courts as the explanations for the decisions they purport to justify, as evidenced by the

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70. Quentin Skinner, *Modernity and disenchantment: some historical reflections*, in *PHILOSOPHY IN AN AGE OF PLURALISM: THE PHILOSOPHY OF CHARLES TAYLOR IN QUESTION* 43-44 (James Tully ed., 1994).

71. Charles Taylor, *Replies*, in *PHILOSOPHY IN AN AGE OF PLURALISM: THE PHILOSOPHY OF CHARLES TAYLOR IN QUESTION* 224-25 (James Tully ed., 1994).

72. *Id.* at 225.

fact that when courts offer a new rationale for an old decision, they typically call attention to that fact.<sup>73</sup> At the same time, implicit in virtually every decision is a judgment that the sources of law relied on are authoritative at least in part because of how those sources came into existence – either because those sources passed through some process that validated them as law or because they represent important principles of political morality that have formed part of the legal tradition.<sup>74</sup>

This fact about judicial reasoning is striking since many historians and philosophers would deny the plausibility of inferences from philosophical evaluation to historical explanation and vice-versa. Historians these days tend to be skeptical of overly intellectualized historical narratives.<sup>75</sup> Meantime, many philosophers condemn the use of historical explanation in normative evaluation as an instance of the “genetic fallacy.”<sup>76</sup> We must instead engage substantively with the implications of whatever that doctrine or practice now entails.

Judges thus seem to differ from philosophers in allowing this second sort of inference, from historical explanations to normative conclusions. Why is that? The most straightforward answer is that legal decision-making entails the use of authoritative materials, which means that *who* or *what* pronounced some rule or directive matters greatly to its status as law. In my view, this answer, which looks to a legal source’s “pedigree” is not fully adequate because courts even seem to use something like this reasoning when choosing to ignore, revise, or overrule a traditional legal authority. I cannot defend that claim here (though I have elsewhere<sup>77</sup>), but the basic idea

73. See, e.g., Crawford v. Washington, 541 U.S. 36, 59-60 n.9 (2004) (invoking a distinction between “testimonial” and “nontestimonial” forms of hearsay for the purpose of interpreting the Sixth Amendment’s Confrontation Clause and responding to the dissent’s objection that the distinction was entirely absent from prior decisions, *id.* at 71-2 (Rehnquist, C.J., dissenting), by pointing out that the results of those decisions are consistent with the distinction, so that “the test we announce is an *empirically accurate explanation* of the results our cases have reached”) (emphasis added). In other words, “the exception proves the rule,” as they say.

74. These two methods of determining law roughly correspond to the two the models of law advanced by H. L. A. Hart and Ronald Dworkin, respectively. See H. L. A. HART, *THE CONCEPT OF LAW* (3rd ed., 2012); DWORKIN, *EMPIRE*, *supra* note 39. See Nicola Lacey, *Jurisprudence, History, and the Institutional Quality of Law*, 101 VA. L. REV. 919, 922 (2015) (“The reference point of legal reasoning in modern Western legal systems being (depending on one’s broader legal theory) either law-creating acts in the past (as in legal positivism) or preexisting reasons or principles (as in natural law), the core operation of law entails an invocation and interpretation of the past.”).

75. See, e.g., James T. Kloppenberg, *Thinking Historically: A Manifesto of Pragmatic Hermeneutics*, 9 MOD. INTELL. HIST. 201, 202 (2012) (“Even if we want to examine texts in relation to other texts, either earlier, contemporaneous, or later, we must acknowledge that every text came into being through a specific historical process and emerged and survived as a result of the actions of one or more individuals.”).

76. Kevin C. Klement, *When is Genetic Reasoning Not Fallacious*, 16 ARGUMENTATION 383, 384 (2002) (explaining that the term “genetic fallacy” is often used in a general way to refer to the fallacy of “confusing something’s origins with its nature, whether or not that something is a belief or theory”). See also Charles L. Barzun, *The Genetic Fallacy and a Living Constitution*, 34 CONST. COMM. 101 (2019) [hereinafter Barzun, *Genetic*] (arguing that genetic reasoning is not fallacious in the legal context for reasons similar to those noted above in the text).

77. Barzun, *Genetic*, *supra* note 76.

is that the a premise of the common law (as well as the idea of a “living Constitution”) is that the process of case-by-case adjudication is itself “truth-tracking” in the sense that it is likely to generate produce good results (one’s that are likely to satisfy, we might say, the “needs of society”).<sup>78</sup>

For now it is sufficient to observe that legal decisionmaking seems to depend on assumptions that many historians and philosophers would reject, though for different reasons. True, that fact may just reveal that legal practice trades on shoddy reasoning and superficial history, thereby undermining its status as a “discipline” of knowledge at all.<sup>79</sup> But the methodological convergence of Taylor and Skinner described in this essay may suggest just opposite: that legal decisionmaking involves a model of practical reasoning that draws from, but remains distinct from, the resources of its close disciplinary cousins in philosophy and history. As we have seen in the work of both Taylor and Skinner, it is a model of practical reasoning that subjects our current practices to scrutiny by bringing normative criteria to bear on those practices *and* by inquiring into what historical facts best explain them.

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78. I think something like this idea is conveyed by the idea that the common law “works itself pure” over time. See *Omychund v. Barker*, 26 Eng. Rep. 15, 23 (Ch. 1744) (Mansfield, L.J.) (“[T]he common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.”). See also LON L. FULLER, *LAW IN QUEST OF ITSELF* 140 (1940) (concluding his book with the observation that the common-law judge “is playing his part in the eternal process by which the common law works itself pure and adapts itself to the needs of a new day”).

79. Professors Epstein and King seem to draw something like this skeptical conclusion. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 9-10 n. 23 (2002) (“As actors who lack the power of enforcement, judges attempt to enhance the legitimacy of their actions by persuading the parties to lawsuits, the executive branch, the public, and so on, that judicial decisions have a firm basis in the established prior authority of law rather than in the personal discretion of judges—even when that authority is inconsistent, illogical, historically inaccurate, or nonexistent.”).