

The Lessons of History

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I. INTRODUCTION

Discuss any salient political controversy among friends and inevitably someone will gravely intone about the ‘lessons of history.’ Perhaps they’ll go a step further and deploy the hackneyed Santayana (1905, p. 77) quote that “those who cannot remember the past are condemned to repeat it.” Is there any substance to this shopworn phrase? Does ‘history’ have any lessons to teach us? Or, to avoid reifying an abstraction, can the practice of history enlighten minds and guide practical actions?

A straightforward assertion regarding the ‘lessons of history’ obfuscates more than enlightens. This is not to say that there can be no practical import from the practice of history, but it requires we first be clear what the practice of history entails. Once we see the limited character of history and the play element inherent in it, we can then inquire into the relationship between history and practical endeavors. By engaging in a limited inquiry that eschews grand teleological designs, we can appreciate a variety of limited spheres of engagement necessary for a modern liberal society. We can further appreciate the dignity in man’s self-directed action independent of its contribution to any particular enterprise.

I argue that historical inquiry, if it is to constitute an independent inquiry, must separate itself from practical considerations, in particular moral considerations. A historical fact can only be ‘inconvenient’ in that it runs contrary to what seemed to be an otherwise coherent picture, not because the historical fact ‘suggests’ that someone or something has been less than morally pure. Simply put, historical facts suggest nothing: the historian must fulsomely embrace the fact-value distinction. This paper seeks to develop a positive case for historical inquiry and the fact-value distinction. More specifically, this paper proposes that embracing the fact-value distinction, and the play element inherent in discrete inquiries, helps sustain the modern liberal state. The play element helps generate a dynamic and textured culture. It is the play element, not a recourse to eternal verities, that can generate a culture of liberty that can, in turn, revitalize or sustain modern liberalism.

I turn to Michael Oakeshott to better understand the nature of historical inquiry and the preservation of the modern liberal state. Just as the practice of history is qualitatively different from the remaining ‘histories’ of antiquity, governance of the modern liberal state necessarily diverges from the statesman’s activities in the ancient world. The citizens of the polis, as has been long recognized, defined freedom by participating in governance (Constant 1988, pp. 308-328). Similarly, Roman citizens, even during the Republic, were not modern individuals but agents imbedded within a patron-client system (Martin 2012, p. 21). Throughout antiquity, slavery constituted not merely a component of an economic system of production, but social death (Siedentop 2014, p. 13). As Oakeshott (1975, p. 236), among others, recognized, the statesman of the modern liberal state must grapple with a fundamentally different creature altogether—the modern individual. This modern individual is characterized by the acceptance of “a reading of the

human condition in which the race of men is recognized to be saddled with an unsought and inescapable ‘freedom’ which in some respects they are ill-equipped to exercise; namely, the recognition of this condition as the emblem of human dignity and as a condition for each individual to explore, to cultivate, to make the most of, and to enjoy as an opportunity rather than suffer as a burden.” Correlatively, a state’s foisting of a telos upon this individual constitutes not merely an imposition, but a negation of the modern individual’s defining characteristic. Such individuals cannot be defined merely by the exercise of will, or by their accomplishments, but by the enjoyment of their freedom. Similarly, the attempt to enlist historical inquiry into mythmaking—or teaching clear moral ‘lessons’—negates history as a distinctive activity and makes it subservient to an unworthy master. In defending history as a distinct inquiry from the claims of the practical world, one cultivates the habits of mind that embrace freedom as the foundation of human dignity and resist those seeking to undermine the liberal state in the name of a teleological enterprise.

In Section II, I first explore what are the defining characteristics of history. In particular, I focus on the separation between history and practical considerations. Special attention will be paid to the role of the play element in the activity of being a historian, and to the development of the sphere of historical inquiry. In Section III, I elaborate on the distinction between history and the practical world by inquiring into the relationship between history and law. I argue that while a knowledge of the law might be required to conduct good history, and while proper historical studies may provide fodder with which a lawyer can ascertain the meaning of the law, the two inquiries are not merely separable, but separate. In Section IV, I then explore how the practice of history cultivates the moral restraint necessary to recognize the validity of and dignity in activities that do not contribute to our own substantive desires and ends. Such a recognition comes not from some rational calculation, but from the moral respect for the free acts of agents at the basis of the modern liberal state.

II. WHAT IS HISTORY?

Michael Oakeshott (1962, p. 151) writes that “activities emerge naively, like games that children invent for themselves. Each appears, first, not in response to a premeditated achievement, but as a direction of attention pursued without premonition of what it will lead to.” Such is the case with history. A historian, then, like any participant in an activity, “comes to be recognized not by the results he achieves but by his disposition to observe the manners of the ‘practice.’” Importantly, an individual’s subscription to a sphere of inquiry’s mores must be distinguished from a ‘practical’ outlook. In the practical realm of our lives, we seek substantive ends and engage in self-disclosure, expecting responses from those with whom we interact.¹

For instance, in *The Histories*, Polybius sets out for himself the task of writing a universal history, positing that “it is only by connecting and comparing *all* the parts [of the histories of the Mediterranean], by seeing their similarities and differences—it is only such an overview that puts one in a position to derive benefit and pleasure from history.” There, we can see his contradictory thoughts about the practice of history: is it done for the pleasure or the benefit of the activity? Polybius writes history because he believes that “there is no better corrective of human behavior than knowledge of past events.” For those events without an earthly cause, Polybius (2010, p. 286) makes use of the concept of *Fortuna*, as in the case of the ephors butchered in Sparta after deceiving others. As has been recognized elsewhere (Dilthey 1988, p. 287), the decoupling of inquiries into human conduct from grander moral or metaphysical systems has allowed such inquiries to flourish. Precisely because he seeks to give a practical understanding of history, Polybius is required to find cause and meaning in history.

Abstracting away from history for the moment, what might be the disposition of one who happens to subscribe to the manners of a sphere of inquiry without regard to a broader vision? Without a ‘serious’ focus on the practical import of his actions and findings? We may characterize them by analogy to children playing games—as *Homo Ludens* (Huizinga 1955). Huizinga (1955) writes that “in play there is something ‘at play’ which transcends the immediate needs of life and imparts meaning to the action.” If

Homo Ludens embodies the practice of history, as well as any other sphere of inquiry *not* focused on substantive ends, what are the key features of this game? First, “all play is a voluntary activity. Play to order is no longer play: it could at best be but a forcible imitation of it. By this quality of freedom alone, play marks itself off from the course of the natural process.” (p. 7). Second, play is not ‘ordinary’ or ‘real’ life. It is rather a stepping out of ‘real’ life into a temporary sphere of activity with a disposition all its own” (p. 8). The “third main characteristic of play [is] its secludedness, its limitedness. It is ‘played out’ within certain limits of time and place. It contains its own course and meaning” (p. 9). Finally, “we come across another, very positive feature of play: it creates order, *is* order” (p. 10). Indeed, this order may produce a ‘ritual’ creating an order transcending the mere practical aspects of the order, as we shall discuss.

Highlighting each of those key characteristics, we may provisionally describe the activity of the historian as the free pursuit of the understanding of a historical event, context, or activity that recognizes the limitedness of the inquiry and, therefore, eschews generating lessons for ‘real life.’ Whether a historian limits himself to doing history alone is a separate matter, but in attempting to understand the activity, we should seek to understand those features which characterize the core of historical research. Perhaps now we have properly characterized the ‘historian’, but we have yet to address the nature of his subject. What precisely is history?

As Oakeshott (1983, p. 2) defines it, “the adjective ‘historical’ denotes an enquiry which, whatever we may think about the truth or reliability of its conclusions, is recognized in terms of certain characteristics to be historical enquiry and not one of another sort; and it denotes the kind of understanding reached in the course of such an enquiry. And here ‘history’ is recognized to be ‘made’ not by those whose words or deeds are investigated but by an historian.” All of that is to say that history is not an object to be discovered, but a thing created in a particular manner. Historical understanding, much like scientific understanding, “is an autonomous understanding, specifiable in terms of exact conditions, which is logically incapable of denying or confirming the conclusions of any other mode of understanding, or indeed of making any relevant utterance in respect of it” (p. 3). Importantly, “[t]he conditions which may constitute it a mode of understanding are not formulae for conducting an historical enquiry or premeditated norms to which it should subscribe; they are its theoretical postulates and they are reflected in a piece of historical writing only as presuppositions which specify it as an enquiry of a certain sort and distinguish it from other sorts of enquiry” (p. 4). So far, our provisional definition of history holds.

What historical inquiry focuses on is the past, wherein events or actors are related to each other and which grapples with the flow between events. Yet, the past is not merely like one observed by a detective, hoping to piece items together to help determine his next steps. Instead, the historian approaches the past like “a mistress of whom he never tires and whom he never expects to talk sense” (Oakeshott 1962, p. 182). This is not to set forth an unrealistic standard. Old school Marxist historians seek excellence in historical inquiry because they believe that excellence helps further the proletarian struggle. An individual might seek to understand the meaning of the Compact Clause of the United States Constitution because he believes there could be salutary results. Yet, the moment must come, if the individual is to pursue historical inquiry, where he must fully engage the play element of the inquiry—to recognize the inquiry as independent of his pursuit of substantive ends, secluded and lovely in its own right.

In the present, “[o]bjects of attention and concern are recognized as examples of some handy universal (or ideal character) and are recognized in terms of their qualities and of the expectations they evoke, that is, they are understood in relation to ourselves as agents” (Oakeshott 1983, p. 12). An agent’s understanding of those objects and their qualities, how they may be used and combined to fabricate further objects in pursuit of substantive desires, is what defines the present. In a passage that deserves to be quotes at length, Oakeshott (1983, pp. 13-14) writes:

[t]he objects which compose this present are not, then, the mere furnishings of the abode. They are themselves the language in which we compose our wants and conduct the transactions designed to satisfy them, the terms of our habits, the steps of our wanderings to and fro. Every

such object noticed and attended to is a distinct happening recognized in relation to ourselves as agents, responded to, valued, used, put by, ignored or rejected. Self as agent and object as concretion of qualities are counterparts of one another, distinguishable but inseparable. There may, of course, be moments of half-release when we walk for the pleasure of it and jump for joy (not to clear a hedge), when a tree is a marvel, the moon a mystery, the sea a miracle, a wheatfield holy, a fish sacred, and the sound of the flute in the market place a reconciliation; but these are objects of another kind. Among the constituents of this universe of practical discourse are other persons related to ourselves in terms of usefulness and convenience but also in terms of moral (that is, non-instrumental) considerations and compunctions, but not in the poetic terms of affection, friendship and love which belong to another world.

Unsurprisingly, then, one finds the practical present to be a world of motion—but significantly, a world of motion with a *telos*. Individuals strive to obtain this or that. Therefore, the present is always tainted with a touch of the future, a question about how an agent can obtain a desired end. The present, what Oakeshott calls the ‘present-future,’ has a particular relationship to the past. In exploring the nature of the practical world’s ‘past,’ we can come to understand the nature of the ‘historical’ past that is the subject of historical inquiry. As Oakeshott recognizes, “each of us as an agent concerned with a present-future is related to the past which this present encapsulates: a past composed of all that has happened to us (often without our being aware of it at the time), of all we have suffered, done, imagined, thought, believed (and perhaps long since ceased to believe), and known to us in the residue it has left behind” (p. 16). Yet, beyond this accretion of personal experiences and memories are the external artefacts with which we may interact, including purported moral lessons for how one can act. This includes Polybius’s anecdote on the just desserts served to the perfidious ephors, or any number of tales he sets forth purporting to demonstrate how a statesman ought to act. If the emphasis is on the lesson and how it might be applied to one’s own situation, then such artefacts “mean to us [...] whatever they may be made to mean” as “we are not concerned to determine their provenance in the past” (p. 18). In recognizing this folk wisdom, we do not denigrate the knowledge as such. Indeed, “[e]very society has an inheritance, rich of exiguous, of such survivals from the past and to know one’s way about it is a condition of articulate practical activity” (p. 19). Among these stories may be those about national character—the ‘Dunkirk spirit’ of the English or the noble, unsullied actions of George Washington, America’s Cincinnatus.

What sort of past is this? By its nature, agents construct this past in relationship to themselves in pursuit of a substantive end. As the agents change, this ‘past’ changes with them. Notions about an honor-bound Southern culture played a part in the reconciliation of North and South in the aftermath of the American Civil War. That ‘past’ certainly has fallen out of favor in recent years, and is no longer a ‘past’ on which one may draw to justify one’s beliefs and actions. We can recognize that such a past “is a ‘living’ past which may be said to ‘teach by example,’ or more generally to afford us a current vocabulary of self-understanding and self-expression” (p. 21). In this ‘past’ we find the so-called lessons of history. Yet, such a past, correlated with practical engagements, is not the only form of knowledge.

Instead, suppose that after a walk in the woods, we returned to our campsite and found our possessions on fire. We might inquire how this occurred. We might discover that someone had left out a magnifying glass that had concentrated incident rays from the sun into converging rays, setting fire to dry tinder that spread to the broader campsite. The inquiry into how a magnifying glass concentrates incident rays, what a convex lens is and how the concentration of incident rays concentrates light energy, are independent of practical concerns. While we might draw a lesson from the scientific inquiry—e.g., in the future we should take care to make certain that convex lenses are not left out—that ‘lesson’ is a practical reflection independent of the scientific inquiry. The scientific facts regarding convex lenses and incident rays are no mere brute facts that an agent immediately receives along with the necessary lessons. The scientific stage is conceptually distinct and coloring it with practical considerations will not further the scientific inquiry. Historical examples, such as the requirement that Soviet science be consistent with the commu-

nist doctrines of class struggle, so-called Lysenkoism, amply show the failures that may arise when other considerations intrude into science. This is because practical understanding must be “recognized as a conditional mode of understanding and the present-future of practical engagement to be an abstract universe of discourse” (p. 28). and there are other forms of knowledge that do not center on the relationship between the object and the agent’s potential actions.

If practical consideration cannot assert primacy in human knowledge over scientific understanding, then perhaps we can similarly construct a ‘historical past’ independent of practical considerations. Here, the historian is exclusively concerned with the past. Yet, as this past does not merely exist, but is generated by the historian, we inevitably must start in the present. Here, we must recognize that the

present in practical understanding is composed of objects distinguished and identified in terms of their worth in a current engagement to satisfy a want, and this is no less the case when they are also recognized to have survived from the past; but the present in historical understanding is composed of objects recognized, not merely to have survived, but solely and expressly as survivals, vestiges, remains, fragments of a conserved past (p. 30).

The historian must be on guard against “the insinuating voice of practical understanding, recalling us to the present, not of survivals from the past as such, but of objects recognized in terms of their practical use,” (p. 31), as to invoke practical considerations and potential futures is to cease the historical inquiry. One must embrace the *game* of historical inquiry and the limited realm encompassed by the engagement.

Faced with artefacts and utterances, how should the historian understand them? These objects are not accepted as gospel, but as

constituents of the performative utterances (addressed, not to posterity or to some future historian, but to contemporaries) in which their authors were responding to their current situations. And although some of these performative utterances may be notable for some *ex tempore* quality of wisdom, or (like the Athanasian Creed) have survived to occupy a place in a current present-future of practical engagement, this is no part of their historical character: they are what they are in terms of the transactions to which they belonged (p. 33).

The historian faces objects that are neither true nor false, but difficult to interpret in reconstructing the past. This grand puzzle may be missing pieces or not readily cohere. For instance, in the course of reading a letter regarding a sermon just heard, the agent, who otherwise seemed to revere the sermon, might describe it as ‘awful.’ Yet, it is

the first concern of an historical enquiry [...] to assemble [the artefacts] from where they lie scattered in the present, to recover what may have been lost, to impose some kind of order upon this confusion, to repair the damage they may have suffered, to abate their fragmentariness, to discern their relationships, to recognize a survival in terms of its provenance, and thus to determine its authentic character as a bygone practical or philosophical or artistic etc. performance (p. 35).

Upon further inquiry, the historian might discover that at the time of writing the offending letter, ‘awful’ meant full of awe, something which inspires, not something which repels. From there, having arranged the pieces and investigated as best he can, he then generates a past—the historian’s past is the culmination of his historical inquiry. An inquiry that looks to generate a coherent picture of the past, not to generate something usable in the present.

III. HISTORY AND LAW

At first, my account of historical inquiry may seem too simple. After all, do we not find people engaged in historical inquiry all the time in executing upon practical affairs? The relevance of history seems to shine brightest in law, or Anglo-American law at least. Yet, I want to show that in law, facts about the past may be ‘used,’ but the relevant activity is that of practicing law. Once more, we can see that history proper cannot teach us lessons.

It has long been recognized that the nature on the Anglo-American legal tradition poses challenges for the legal historian. As F. W. Maitland (1888, p. 6) put it, while “the early centralization of justice gives to our history a wonderful unity; we have not to compare the customs of divers provinces, or the jurisprudence of rival schools, our system is a single system and revolves round Westminster Hall,” that “no attempt has ever been made to write the history of English law as a whole”. It is worth citing at length why Maitland thought that this history remained unwritten, namely, because

of the traditional isolation of the study of English law from every other study, an isolation which is illustrated by the fact that it is only of late years, late years to us who have been dealing in centuries, that English law has had a home in the Universities. In 1850 when my predecessor Professor Amos came to the chair, the class of English law in this University consisted of one M.A., one B.A. and two undergraduates. At another time it may be interesting to account for this, to observe the formation of law schools in London while the Universities are teaching to ever fewer students a kind of law, Roman and Canon Law, which is not the law of the King’s Courts, and becomes of ever less and less importance to the bulk of Englishmen. This process had momentous results and, all things considered, we cannot regret them. If the Universities had taught English law, English law would sooner or later have ceased to be English. But as it was, the education of the English lawyer—I speak of the later middle ages and of the Tudor time—was not academic; it was scholastic. It would be a great mistake to suppose that the lawyers of that age got their law in the haphazard hand-to-mouth fashion that is familiar to us under the name of ‘reading in chamber.’ They went through an elaborate scholastic course which if not severe was at least prolonged—ten or twelve years of ‘readings’, ‘mootings’ and ‘boltings’, of hearing and giving lectures, and the path of scholastic success was the path to profit and to place. The law which this school evolved stood us in good stead: it was the bridge which carried us safely from medieval to modern times and we will speak well of it. But one thing it could not do, it could not possibly produce its own historian. History involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history. And when the old scholastic plan of education broke down no other plan took its place. It is hardly too much to say that nobody taught law or attempted to teach it, and that no one studied law save with the most purely practical intentions. Whatever may be the advantages of such a mode of study it will never issue in a written history of English law (Maitland 1888, p. 10).

This pronouncement was made over a century ago. Has much changed, including with the supposed Originalist revolution or restoration and a focus on ‘text, history and tradition’ in the US context? Have law and history become fused in such a way that one cannot disentangle them? Or does it remain the case that while historical methods may help lawyers find indicia of meaning, as well as practices and precedents, a lawyer’s focus remains on those practices and mores that relate to syllogistic reasoning? It is decidedly the latter, and two recent examples help highlight how the conceptual separation between ‘history’ and practices underscores the limited character that history must always retain.

First, among the more contentious cases in recent years, the Supreme Court’s use of history in *Dobbs v. Jackson Women’s Health Organization* helps underscore the limited nature of historical inquiry. There,

the Court was asked to determine whether the United States Constitution's Due Process Clause protects a women's right to obtain an abortion, that is, to voluntarily terminate a pregnancy at any stage of the pregnancy. Among the complicated legal issues addressed, including the precise contours of *stare decisis*, the court was required to apply the *Glucksberg* standard, derived from *Washington v. Glucksberg*, to determine whether a right not otherwise enumerated in the Constitution is protected by the Due Process Clause because it is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.' While the latter inquiry is obviously not a historical inquiry, perhaps the former might be. Indeed, upon learning the result of *Dobbs*, certain commentators decried the decision as a product of 'cherry-picked history.'

Certainly, Sections 2.B1 through 2.B.3 of Justice Alito's majority opinion and Section 1.B of the joint dissent address certain historical disputes. Specifically, they inquire into how abortion was treated by English common law courts and by early U.S. state courts and legislatures. The dispute focuses upon the fact that an abortion before 'quickening', when the unborn child begins to move in the womb, was not subject to criminal penalty. Justice Alito attempts, in part, to address this fact by looking at various examples of courts penalizing third parties for harming the unborn child without regards to quickening, such as the prosecution of doctors for prescribing abortifacients that result in the death of both the mother and unborn child. Further, Justice Alito notes that the rule regarding pre-quickenings abortions was largely replaced in the 19th Century by full bans.

But the 'historical' inquiry was mere window-dressing for both sides and the practical application of legal reasoning remains the center of the dispute. Does the mere lack of criminalization constitute the recognition of an affirmative right? Or would we expect there to be some historical document that recognized the special solicitude accorded to the action, such as enumeration in the English Bill of Rights? Ultimately, the 'historical' inquiry merely provides fodder with which the legal reasoning plays. No comprehensive attempt was made to develop a coherent picture of previous eras' views about the nature and start of life and its implications for the legal regime. Facts were assessed in relation to their practical value for buttressing legal arguments and the ultimate judgment of the court. Yet, the failure to engage in history proper was not a failure upon the court's behalf, because the primary task before a judge is that of legal reasoning, for which assorted facts and artefacts do not 'lead the dance' but are used.

Still, one might suggest that disputes centered upon *Glucksberg* are not representative of the role history plays in legal reasoning. *Glucksberg*, after all, is often seen as a compromise by Justice Rehnquist to weaken so-called 'substantive due process' claims while accommodating other Justices who did not want to abandon the doctrine altogether, particularly in relationship to abortion. In other words, we might see *Glucksberg* as a matter of judicial statesmanship or compromise, somewhat fair afield from traditional legal interpretation. Yet, even within the core domain of legal interpretation—understanding textual mandates within their historical context—history does not play a determinative role.

Take another recent case. In *Trump v. CASA, Inc.*, the Court was called upon to address the narrow question of "whether Congress has granted federal courts the authority to universally enjoin the enforcement of an executive or legislative policy..." (CASA 2025, p. 4). Specifically, the Court set out to determine whether the Judiciary Act of 1789, which grants federal courts jurisdiction over all suits in equity, allows courts to universally enjoin the enforcement of an executive or legislative policy. Specifically, a US district court enjoined the Trump administration from enforcing an executive order purporting to deny citizenship to persons born in the United States, inconsistent with long-standing practice. The relief was not limited to the party who sued, but prevented the Trump administration from implementing the executive order against anyone.

In the U.S. constitutional system, where courts are to address specific 'cases and controversies,' may courts intentionally benefit or bind non-parties to a lawsuit? At first glance, here we might find history determinative. After all, the Court's prior decisions had held that "the statutory grant encompasses only those sorts of equitable remedies 'traditionally accorded by courts of equity' at our country's inception," and that "the equity jurisdiction conferred on Federal courts is the same that the High Court of Chancery

in England possesses” (CASA 2025, pp. 5-6). While Justice Barrett’s majority opinion addressed subsequent history, trying to reconcile the Court’s opinion with existing precedent and noting the lack of historical pedigree of the universal injunction, the ultimate ‘historical’ inquiry focused whether ‘bills of peace’ available during the Founding era were sufficiently analogous to the modern universal injunction.

As a historical matter, while a bill of peace allowed “courts of equity to adjudicate the rights of members of dispersed groups without formally joining them to a lawsuit,” it was “confined to limited circumstances,” covering “a small and cohesive” group instead of resolving “a question of legal interpretation” (CASA 2025, pp. 12-13). Further, in looking at the evolution of the forms of action in US courts, it appears that the bill of peace informed the development of the modern class action lawsuit (Spence 2005). While these ‘bare’ historical facts serve as objects with which the Court reasoned to determine whether a universal injunction was a permissible remedy, the key inquiry related to whether the ‘bill of peace’ was ‘sufficiently analogous’ was a legal inquiry, not a historical inquiry. Somewhat muddying the conceptual waters, we find Justice Barrett note that “[t]he bill of peace lives in modern form, but not as the universal injunction. It evolved into the modern class action, which governed in federal court by Rule 23 of the Federal Rules of Civil Procedure” (CASA 2025, p. 13). Is she saying that because the bill of peace ‘evolved’ into the modern class action, it cannot also serve as a historical analogue for the universal injunction? As the dissent rightly noted, “[t]hat bills of peace bear some resemblance to modern day Federal Rule of Civil Procedure 23 class actions does not mean they cannot also be a historical analogue to the universal injunction” (CASA 2025, p. 26). However, once we move past the ‘historical evolution’ language, we find Justice Barrett noting:

while Rule 23 is in some ways ‘more restrictive of representative suits than the original bill of peace’, it would still be recognizable to an English Chancellor. Rule 23 requires numerosity (such that joinder is impracticable), common questions of law or fact, typicality, and representative parties who adequately protect the interests of the class. The requirements for a bill of peace were virtually identical. None of these requirements is a prerequisite for a universal injunction (CASA 2025, pp. 13-14; internal citations omitted).

In the last analysis, what matters is the tightness of the analogy, not the historicity of the claim. The dissent’s claim of ‘ahistorical’ analysis sidesteps the particular test set forth in the Court’s prior decisions. It is undoubtedly the case that one could study bills of peace from both a historical and practical perspective. A lively history could be written about a chancellor using a bill of peace to make sure a vicar received his tithe and what that said about the state of religion, law and society at the time; but such a comprehensive view is independent of the practical, teleological inquiry that is law. Similarly, how American courts have subsequently developed causes of action and forms of equitable relief, relying on analogies to previous forms, has no import for the study of bills of peace.

All of this is not to say that there is *no* relationship between historical inquiry, such as into bills of peace, and practical endeavors, such as determining what equitable relief a modern court can provide to a litigant. Indeed, further historical inquiry could complicate our understanding of the meaning of a term or the ambit and form of a specific cause of action or remedy. Yet, a historian, if he is to be faithful to his craft, must arrange the facts before him and let the inquiry take him where it may. As in the example of the campsite fire above, improving one’s understanding of incidental rays may affect how a camper stores or places his lenses, but that practical effect is independent of the scientific inquiry. We can then accept history as the free pursuit of the understanding of a historical event, context, or activity that recognizes the limited character of the inquiry and, therefore, eschews generating lessons for ‘real life.’

IV. HISTORY AND LIBERALISM

Despite historical inquiry being detached from ‘real life,’ the historian finds himself enmeshed in it. He has passions, interests and values. Some he may hold very dearly. Some he feels are essential to the preservation of, or further progress of, society. How could he possibly forget about those ‘practical’ concerns? How might he sever his inquiry from some *telos* derivable from his values? Not merely by rules or guidelines will the historian effect the fact-value separation. But through *play*, through fully throwing himself into his inquiry, he may achieve his goal. For

[t]hough play as such is outside the range of good and bad, the element of tension imparts to it a certain ethical value in so far as it means a testing of the player’s prowess: his courage, tenacity, resources and, last but not least, his spiritual powers—his ‘fairness’; because, despite his ardent desire to win, he must stick to the rules of the game (Huizinga 1950, p. 11).

In a dispute over a historical inquiry, the person who imputes vile, present motives to another does not merely play ill, he shatters the play-world itself.

What might we learn from historical inquiry? In a spirit of fair play, we learn to set aside our present concerns, abide by the rules and pursue the unmarked path. Yet historical inquiry, as with all forms of play, need not be pursued in solitude. To engage in a historical dispute with another, one must not impose one’s own practical *telos* upon another. The criteria by which we judge another’s contribution cannot be whether it furthers our own pursuits, but whether it generates a coherent picture of the past. In the spirit of fair play, we acknowledge the other individual’s pursuit, consistent with the rules of historical inquiry, as valid. Failure to promote a ‘Declarationist’ understanding of the relationship between the U.S. Declaration of Independence and U.S. Constitution is not a valid criticism. Failure to grapple with important primary sources or address obvious lacunae in our understanding is.

Here, the connection between the defense of historical inquiry and the defense of liberalism seems readily apparent. In broad brush strokes, both from a philosophical perspective and as a matter of historical reality, the modern liberal state has been characterized by resisting the impulse to impose a *telos* upon all aspects of an individual’s life. Instead, human pursuits such as law and politics, and indeed history, must remain voluntary and limited activities that cannot encompass all aspects of a citizen’s life or impose an overarching *telos*. As I have argued elsewhere (Cheeseman 2014), a politics characterized by incremental changes as opposed to grand ideological visions has *homo ludens* as its ‘animating spirit.’

Our resistance to the imposition of a *telos* on historical inquiry, or upon human conduct at large, must be cultivated. While we may perceive the desire to be ‘free’ to be natural, such a self-understanding reflects the depths to which the morality of freedom has taken root. And if our impulse to champion the dignity of free individual action, in the practice of history or in practical affairs, must be cultivated to be preserved, we must understand what might make the impulse appealing. Chanting about ‘eternal verities’ will not do. Instead, by cultivating respect for individual spheres, we can cultivate a general respect for the dignity of free conduct.

The assault on historical inquiry as an independent and limited activity not only deprives us of good history, it deprives individuals of the experience of participating in free historical inquiry. It deprives us of the experience of emptying the mind of present concerns and throwing oneself into play. It undermines a sphere of free activity and it imposes a *telos*, impresses one into an enterprise not of their choosing, and thus undermines our individuality. It is characteristic of a disposition that no longer values individuals, each with his own eccentricities and flaws. Let us then strive to inquire freely, to be free, and to dream—to embrace the spirit of play.

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NOTES

- 1 To help distinguish between 'practices' and the practical outlook, I will refer to practices as 'spheres of inquiry' and similar phrases. I would be tempted to use 'modes', following Oakeshott, but hesitate to out of concern of bringing with the terminology Oakeshott's entire idealist philosophy. He may be right. He may be crazy. It may be just the philosophy you're looking for.