A 'NEW HISTORIOGRAPHY' FOR AN OLD TALE: RE-READING THE CLASH OF JURISDICTIONS[1]

LISA SARMAS[†]

> Too often history, along with other subjects in the humanities, has succumbed to a postmodern culture of relativism where any objective record of achievement is questioned or repudiated.
>
> (John Howard, former Prime Minister of Australia)[2]

> When we attempt to answer the question, What is History?, our answer, consciously or unconsciously, reflects our own position in time, and forms part of our answer to the broader question what view we take of the society in which we live.
>
> (E H Carr on the nature of History)[3]

I INTRODUCTION

As Prime Minister of Australia, John Howard lamented the way that History was being taught in Australian schools. He criticised what he called 'a postmodern culture of relativism' and indicated that he would prefer History to be taught through a more 'structured narrative' and a greater emphasis on important dates and events such as the Battle of Hastings and the European 'discovery' of Australia.[4]

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[†] LLB(Hons) LLM(Melb) BA(Melb); Barrister and Solicitor of the Supreme Court of Victoria, Lecturer in Law, University of Melbourne. This article draws, in part, on the author's LLM thesis.

[2] Stephanie Peatling and Justin Norrie, *Howard aims to make ancient history of modern learning* (2006) Sydney Morning Herald, <http://smh.com.au/news/national/making-ancient-history-of-modern-learning/2006/01/26/1138066867536.html> at 16 July 2008.

[3] E H Carr, *What is History?* (2nd ed, 1986) 2.

[4] Peatling and Norrie, above n 2.

The former Prime Minister's willingness to engage in a secondary school curriculum debate, while holding the highest office in the land, may at first blush appear somewhat surprising; an extreme exercise in micro-management. But on closer analysis, it indicates that there is far more at stake here. The elevation of the debate to the top echelons of national political discourse indicates that the meaning and practice of History is not merely an issue of pedagogy, but a highly contested political and ideological battleground for which Howard sought to 'enlist a coalition of the willing…to bring about a change in attitudes'.[5]

The 'enemy' against which this 'coalition of the willing' must do battle is history that has been influenced by the so-called 'New Historiography'.[6] This genre of history scholarship draws heavily on

[5] AAP, 'PM calls for history teaching overhaul', *The Age* (online), 25 January 2006 <http://theage.com.au/news/National/PM-wants-overhaul-of-history-teaching/2006/01/25/1138066843328.html>.

[6] See, eg, Franklin R Ankersmit, 'Historiography and Postmodernism' (1989) 28 *History and Theory* 137; Derek Attridge, Geoff Bennington and Robert Young (eds), *Post-Structuralism and the Question of History* (1987); Homi Bhabha, *The Location of Culture* (1994); Kathleen Canning, 'Feminist History after the Linguistic Turn: Historicizing Discourse and Experience' (1994) *Signs* 368; Dipesh Chakrabarty, 'Postcoloniality and the Artiface of History: Who Speaks for "Indian" Pasts?' (1992) 37 *Representations* 1; Forum, 'Martin Jay and Jane Flax on *Postmodernism*' (1993) 32 *History and Theory* 298; Michel Foucault, *History of Sexuality Volume I: An Introduction* (1990); Jan Goldstein (ed), *Foucault and the Writing of History* (1995); David Goodman, 'Postmodernism and History' (1993) XXXI *American Studies International* 17; Patrick Joyce, *Visions of the people: Industrial England and the Question of Class 1848-1914* (1991); Patrick Joyce, 'The end of social history?' (1995) 20 *Social History* 73; Patrick Joyce, 'History and Post-Modernism' (1991) 133 *Past and Present* 204; Donna Merwick, 'Postmodernism and the Possibilities for Representation' (1993) XXXI *American Studies International* 4; Joan Scott, *Gender and the Politics of History* (1988); Gayatri Spivak, 'The Rani of Sirmur: An Essay in Reading the Archives' (1985) 24 *History and Theory* 247; Hayden White, *Metahistory: The Historical Imagination in Nineteenth Century Europe* (1973); Hayden White, *Tropics of Discourse* (1978); Hayden White, 'Response to Arthur Marwick' (1995) 30 *Journal of Contemporary History* 233; Hayden White, *Figural Realism: Studies in the Mimesis Effect* (1999); Lewis Wurgaft, 'Identity in World History: A Postmodern Perspective' (1995) 34 *History and Theory* 67; Robert Young, *White Mythologies: Writing History and the West* (1990). There are numerous critics of the New Historiography from within the History academy. See, eg, Eric

postmodern theory[7] and includes feminist[8], Indigenous[9] and post-colonial histories[10], and other work encompassing a variety of emphases.[11] It is highly critical of the 'modernist' or enlightenment conception of history that posits a coherent grand narrative about historical change. This notion is forsaken for the view that there 'is no singular logic to history, no single organizing social relation or human activity.'[12] Traditionally accepted notions of 'historical fact' and 'historical evidence' are also subjected to sustained critique. Facts, and hence *historical* facts, are viewed as socially and linguistically constructed, rather than as accurate representations of 'what happened in the past'. Similarly, the meaning and significance attributed to historical evidence differs markedly from the modernist historian's conception. F R Ankersmit contrasts the modernist approach to that of the New Historiography:

> For the modernist, within the scientific world-picture, within the view of history we all initially accept, evidence is in essence the evidence that something happened in the past. The modernist historian follows a line of reasoning from his [sic] sources and evidence to an historical reality hidden behind the sources. On the other hand, in the postmodernist view, evidence does not point towards the past but to other interpretations of the past.[13]

For those engaged in the New Historiography then, there is no unmediated access to 'what happened' in the past. Historians construct stories. Moreover, those involved in the New Historiography consider modernist historical narratives to be highly political. Joseph Mali, for example, argues that:

Hobsbawm, *On History* (1997) and Richard J Evans, *In Defence of History* (revised ed, 2000).

7 Postmodernism has influenced a wide variety of disciplines over the last few decades, including law. For an interesting account of the encounter between postmodernism and a variety of disciplines see, eg, Canning, above n 6.

8 See, eg, Scott, above n 6.

9 See, eg, Patrick Wolfe, 'Nation and Miscegenation: Discursive Continuity in the Post-Mabo Era' (1994) 36 *Social Analysis* 93.

10 See, eg, Bhabha, above n 6; Chakrabarty, above n 6; Spivak, above n 6.

11 See, eg, Ankersmit, above n 6; Joyce, above n 6.

12 Forum, (Jane Flax) above n 6.

13 Ankersmit, above n 6.

> [T]he representation of past events and processes in the form of a coherent story turns history into mythology, which is (or serves) conservative ideology. This is so because the fabrication of organic continuity and unity between the past and the present (as well as the future) of society depicts its most fundamental laws and institutions as divine-natural rather than human creations...[14]

Part of the project of the New Historiography then, is to reveal the cracks, gaps and silences in the veneer of coherence in traditional historical narratives, and to expose the political messages they reinforce.

In this context, Howard's attack on this type of History is hardly surprising. His call for a 'structured narrative' and a greater focus on dates and events is no more and no less than a call to arms in defence of a story about Australia's past that unquestioningly celebrates the achievement of the current status quo.

Just as Howard's Australia finds vindication and celebration through the historical methods he advocates, the law too has relied on certain historical versions of its development that serve to uncritically justify and celebrate its current forms. In recent years a diverse body of critical legal history scholarship has begun to question some of these versions. In broad terms, this scholarship has echoed the themes of the New Historiography.[15]

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[14] Joseph Mali, 'Narrative, Myth, and History' (1994) 7 *Science in Context* 121.

[15] An increasing number of legal scholars have engaged with, or at least anticipated, the New Historiography in their historical work: see, eg, Constance Backhouse, Ann Curthoys, Ian Duncanson and Ann Parsonson, 'Race, Gender and Nation in History and Law' in Kirkby and Coleborne (eds), *Law, History, Colonialism: The Reach of Empire* (2001) 277; Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory* (2nd ed, 2002) 33-66; Ian Duncanson and Christopher Tomlins, 'Law, History, Australia: Three Actors in Search of a Play', in Ian Duncanson and Christopher Tomlins (eds), *Law and History in Australia Volume I* (1982); Peter Hoffer, 'Text, Translation, Context, Conversation: Preliminary Notes for Decoding the Deliberations of the Advisory Committee That Wrote the Federal Rules of Civil Procedure,' in David Sugarman (ed), *Law in History: Histories of Law and Society* (1996) 505; Robert Gordon, 'Critical Legal

In this article I aim to contribute to this body of legal scholarship through a critical analysis of that well-known event in English legal history known as 'the clash of jurisdictions'.[16] Through a critical re-reading of the work of four key liberal historians of the clash,[17] I will demonstrate that traditional legal histories can work to vindicate and uncritically celebrate the legal status quo through the ideological

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Histories' (1984) 36 *Stanford Law Review* 57; Shaunnagh Dorsett and Lee Godden, 'Tenure and Statute: Re-conceiving the Basis of Landholding in Australia' (1999) 5 *Australian Journal of Legal History* 29; Peter Goodrich, 'Poor Illiterate Reason: History, Nationalism and the Common Law' (1992) 1 *Social and Legal Studies* 7; Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (1995); Peter Goodrich, 'Erotic Melancholia: Law, Literature and Love' (2002) 14 *Law and Literature* 103; Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000); Costas Douzinas, Peter Goodrich and Yifat Hachamovitch (eds), *Politics, Post-Modernity and Critical Legal Studies: The Legality of the Contingent* (1994); Costas Douzinas and Lynda Nead (eds), *Law and the Image: The Authority of Art and the Aesthetics of Law* (1999); Penelope Pether, 'Measured Judgment: Histories, Pedagogies and the Possibility of Equity' (2002) 14 *Law and Literature* 489; Rosemary Hunter, 'Australian Legal Histories in Context' (2003) 21 *Law and History Review* 607.

[16] The clash culminated in a 1616 decree by King James which stated that the Court of Chancery was supreme over the common law courts in cases of conflict between the two jurisdictions. The rule that equity should prevail over the common law is now enacted in the Supreme Court Act 1986 (Vic) s 29(1) and similar provisions in other Australian states. It should be noted that the common law courts also clashed with prerogative courts and institutions other than the Chancery, for example, the Court of Requests and the High Commission. This article will focus only on the conflict between the common law courts and the Chancery. For an analysis of the clash involving these other bodies, see John Dawson, 'Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616' (1941) 36 *Illinois Law Review* 127.

[17] William Holdsworth, Frederic Mailtland, J H Baker and John Dawson. The aim of this article is to provide a close reading of a sample of traditional work in this area, rather than to 'cover the field' by way of a broader historiographical analysis. These four historians have been chosen for two reasons: first, because they have each written at some length about the clash; and second, because they each provide a good example of a traditional liberal historical account of the clash. For other substantial histories of the clash within the traditional liberal tradition, see, eg, Charles M Gray, 'The Boundaries of the Equitable Function' (1976) 20 *American Journal of Legal* History 192 and G W Thomas, 'James I, Equity and Lord Keeper John Williams' (1976) 91 *English Historical* Review 506.

reiteration of certain dominant themes and premises about our legal heritage. I argue that although the clash is an event that is potentially disruptive of certain dominant legal narratives – specifically those involving the legitimacy of the origins of our current system as well as its organic continuity - traditional historians nevertheless manage to impose interpretations on it that work to reinforce and reiterate these narratives. They do this through the use of what Alan Sinfield[18] has called 'faultline stories'. Faultline stories are conservative interpretative tools that:

> address the awkward, unresolved issues; they require most assiduous and continuous reworking; they hinge upon a fundamental unresolved ideological complication that finds its way, willy-nilly, into texts.[19]

In this article I provide an analysis of the 'awkward' and 'unresolved issues' raised by the clash as well as the faultline stories invoked to address them. Before doing so, I set the scene for this analysis by providing a traditional narrative of the clash in the section that follows.

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[18] Alan Sinfield is part of a movement within British literary studies known as 'Cultural Materialism'. The Movement draws on postmodernist theory but remains heavily influenced by Marxism. Its adherents, however, go beyond the traditional Marxist concern with class. Their broader political project is 'to discern the scope for a dissident politics of class, race, gender, and sexual orientation': Alan Sinfield, *Faultlines: Cultural Materialism and the Politics of Dissident Reading* (1992) 9-10. Marxist theorist Raymond Williams actually coined the term 'Cultural Materialism', and current theorising within the movement continues to draw heavily on his work: see, eg, Raymond Williams, *Marxism and Literature* (1977). Other work within this genre includes: Alan Sinfield, *Cultural Politics: Queer Reading* (1994); Jonathan Dollimore, *Sexual Dissidence* (1991); Jonathan Dollimore and Alan Sinfield (eds), *Political Shakespeare* (1985).

[19] Sinfield, *Queer Reading*, above n 18, 4.

II THE CLASH OF JURISDICTIONS: A 'STRUCTURED NARRATIVE' – THE EVENT, DATES AND KEY CASES

One of the more common approaches to writing the history of the clash adopted by traditional legal historians is to describe 'what happened' by tracing the course of events through case analysis and the events and personalities surrounding the cases. What follows is a 'structured narrative' of the event pieced together from a number of existing historical accounts.

A *The Clash of Jurisdictions*

The conflict between the jurisdictions can be traced back to the fifteenth century. It was at this time that it became clear that equity could only modify common law principles if the Chancellor had the power to restrain the parties from going to the common law courts, or, if they had already gone there, to stop them from enforcing the common law judgment.[20] The Chancellor would issue injunctions against parties and their counsel to this effect, and he would imprison those who did not obey. Eventually the common law judges began to object to this practice.[21] In the sixteenth century the conflict worsened and the ultimate clash between the jurisdictions was played out in a series of cases.[22]

In *Finch v Throgmorton* (1598)[23] the issue of whether the Chancellor could reopen a matter already decided at common law was referred to 'all the judges of England', except the Chancellor himself.[24] All except one of the judges decided against such a power in the Chancellor.[25] One of the major grounds for their decision was the

[20] See William Holdsworth, *History of English Law* Vol 1 (1972) 459.
[21] Ibid.
[22] Ibid 461.
[23] Third Instit 124.
[24] See Louis Knafla, *Law and Politics in Jacobean England* (1977) 158-9.
[25] Ibid.

existence of the statute of praemunire (1354)[26] and the statute of 1403,[27] both of which provided penalties for suing in another court after a judgment had been given at law.[28]

The decision in *Finch v Throgmorton* did not finalise the issue. The conflict continued as the Chief Justice of the King's Bench, Sir Edward Coke, and the Chancellor, Lord Ellesmere, each began to assert the supremacy of their respective courts.[29]

In *Heath v Rydley* (1614)[30] the King's Bench, headed by Coke, relied on the statute of praemunire and the statute of 1403 as the basis for refusing to defer to a Chancery injunction.[31] Ellesmere, however, insisted that these statutes were never intended to apply against the Chancery,[32] and, moreover, that the Chancery was not actually interfering with common law judgments at all, but merely correcting the bad conscience of the parties seeking to enforce such judgments.[33]

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[26] 27 Edward III c 1. Dawson gives a description of the statute of praemunire: [It] commenced with a recital of the grievances of persons "who had been drawn outside the kingdom to answer for matters concerning which cognizance belongs to the king's court," so that judgments in the king's court were interfered with....The statute then visited the penalties of praemunire on any one who should draw another out of the kingdom on a matter within the cognizance of the king's court or who should "sue...to defeat or impeach the judgments rendered in the king's court": Dawson, above n 16, 136.

[27] 4 Henry IV c 23. Holdsworth describes the statute of 1403: [It] recited that after a judgment in the king's courts, parties were summoned anew sometimes before the king himself, sometimes before the King's Council, and sometimes before the Parliament. It then enacted that after such judgment the parties and their heirs should be in peace, unless the judgment were reversed by attaint or error: Holdsworth, above n 20 (Vol 1), 462.

[28] See Knafla, above n 24, 159.

[29] See J H Baker, 'The Common Lawyers and the Chancery: 1616' (1969) 4 *The Irish Jurist* 368, 372-3.

[30] Cro Jac 335.

[31] See Dawson, above n 16, 135; Holdsworth, above n 20 (Vol I), 461.

[32] Holdsworth, above n 20 (Vol I), 462 states that: Lord Ellesmere had little difficulty in showing, from the wording of the Statute of Praemunire, and from its connexion with preceding legislation, that it referred to those who sued in ecclesiastical courts, not to those who sued in the king's courts....[But] [t]he statute of 1403 caused more difficulty.

[33] Ibid 461.

The common law courts saw this as an explicit attack on their supremacy, and the battlelines were now clearly drawn.[34] The common lawyers began to make good use of the old writ of habeas corpus. From the fifteenth century, people had started using this writ as a means of securing release from unlawful imprisonment. The common lawyers knew that if they could attack the Chancellor's power to imprison those who would not obey his injunctions, then they would be giving his jurisdiction a severe blow, given that imprisonment was the main means by which the Chancery could force compliance with its decrees.[35]

In *Glanvill's Case* (1614),[36] a jeweller (Glanvill) misrepresented the value of a number of jewels to Courtney, who ended up buying them at a price well above their worth. Glanvill took an obligation, or bond, from Courtney, for the payment of the price. He then obtained judgment on the bond without litigation, through the supposed 'consent' of Courtney, which was based on a fraudulently obtained 'confession'. The common law courts affirmed this judgment. Courtney then went to the Chancery to seek relief.[37]

The Chancery issued an injunction against enforcement of the common law judgment. Glanvill, however, did not obey the injunction, so the Chancellor sent him to prison. The King's Bench subsequently stepped in and set him free on the basis of habeas corpus. The reason given by the King's Bench was that the 'return' (the document in which the imprisoning official sets out the grounds for imprisonment), did not actually state any grounds for imprisonment.

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34 Holdsworth, above n 20 (Vol I), 461.

35 See Dawson, above n 16, 138-40.

36 Cro Jac 343, 79 ER 294.

37 Baker, above n 29, 374 states that: Some of the cases which came before the King's Bench were most unmeritorious, but a judge cannot prearrange cases on which to make a point of principle. Coke's duty, as he saw it, was to see that the law had been observed in cases which came before him, regardless of their merits.

The Chancery again committed Glanvill to prison, but this time the reasons for doing so were stated on the return. Despite this, the common law judges released him *again* on a habeas corpus application, stating that the return was still invalid because this time it was too general. It was by then mid 1615, and for a while, Glanvill left the drama, only to join it again later.[38]

Reference should also be made to *Allen's Case* (1615),[39] in which Allen, 'the archetype inhumane creditor',[40] recovered judgment at common law against an Edwards, and then sued in Chancery for possession of Edwards' lands. Chancery granted a decree in his favour. Allen then evicted Edwards and his family, and Edwards and his wife died of plague. As the children were left homeless, the Chancellor reheard the case 'out of humanity'[41] and made another, 'more just decree'. When Allen refused to obey it he was sent to prison. He applied for a writ of habeas corpus that was refused by the common law courts, and he remained in prison for the meantime.[42]

The whole issue finally culminated in *The Earl of Oxford's Case* (1615),[43] where the Earl challenged the execution of a common law judgment in ejectment against him, on the basis that he had expended money on the disputed land in the belief that his title was secure. The Chancery granted an injunction restraining the common law plaintiffs from executing the judgment, and on the plaintiffs' refusal to obey the decree, they were committed to prison.[44] Ellesmere used the occasion

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38 At around the same time as *Glanvill's Case* two other cases were debated: *Aspley's Case* (1615) Moore 839, 72 ER 939 and *Ruswell's Case* (1615) Rolle Rep 218, 81 ER 443. Aspley had been in prison for seven years for contempt of a Chancery decree and Ruswell was imprisoned in 1614 for disobeying a Chancery decree. They applied for writs of habeas corpus in the common law courts and were released on the basis that the returns for their imprisonment were insufficient: see Baker, above n 29, 375-6; Knafla, above n 24, 171; Dawson, above n 16, 141-5.

39 Moore 840, 72 ER 940.

40 Baker, above n 29, 376.

41 Ibid.

42 See Dawson, above n 16, 137; Baker, above n 29, 376.

43 1 Chan rep 1, 21 ER 485.

44 See Baker, above n 29, 377-8; Knafla, above n 24, 171-2; Roderick Meagher,

of this case to clearly pronounce that the Chancellor's decree was supreme.[45]

The imprisoned plaintiffs at law then petitioned the King's Bench to release them on a writ of habeas corpus.[46] This time, however, the return which committed them to prison was specific and comprehensive, and the case ended inconclusively.[47] During the case before the King's Bench, Coke repeated his view that common law judgments could not be questioned by the Chancery. His claim was based partly on the statute of praemunire and the statute of 1403, both of which had been successfully relied on in the earlier case of *Finch v Throgmorton* (1598).[48]

Glanvill, the jeweller who had earlier been released from prison by the King's Bench, then visited the prisons spreading news to the inmates that they could be released if they took out a writ of habeas corpus. He had an indictment for praemunire drawn up against Courtney and Courtney's legal advisers, who had initially brought the case against him before the Chancery. A grand jury threw out the indictment.[49]

Glanvill then joined with Allen, the 'inhumane creditor', and together they had an indictment for praemunire drawn up against a number of Chancery officials, on the ground that they had disturbed common law judgments. But again, a grand jury did not accept the indictment.

Dyson Heydon and Mark Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, 2002) 8. Baker sees this case as being about 'the power of the Chancery to interfere with legal title to land, contrary to statute, on the basis that a person who built houses on another person's land ought to be compensated in equity': Baker, above n 29, 377.

45 See *The Earl of Oxford's Case* (1615) 1 Chan rep 1, 21 ER 485.

46 *Dr Googe's Case* (1615) 1 Rolle Rep 277, 81 ER 487. See Baker, above n 29, 377; Knafla, above n 24, 172.

47 See Baker, above n 29, 378. Cf Knafla, above n 24, 172.

48 Third Instit 124. See Knafla, above n 24, 172; Baker, above n 29, 377.

49 See Baker, above n 29, 379-80; Knafla, above n 24, 172-3.

The grand jury's decision made Coke extremely angry. He threatened the jury and sent the jurors back several times to reconsider their decision. They did not, however, change their decision.[50] Later on the same day, Coke threatened to end the King's Bench career of any barrister who took part in a proceeding in another court that dealt with the same matter that had been judged at common law.[51]

Ellesmere complained to King James about Coke's behaviour and the indictments, and asked him to finally resolve the question of whether the Chancellor could issue decrees in relation to matters which had been decided at common law. The King asked Francis Bacon, his Attorney General, and other counsel, for advice, and they advised that the Chancery *could* issue decrees in these circumstances.[52]

Finally, on 20 June 1616 the King made his famous speech in the Star Chamber affirming the supremacy of the Chancellor's decree.[53] In July, this decision, together with Ellesmere's own arguments, was put in writing under seal.[54] The rule that equity should prevail over the common law still persists today and is now enacted in the *Supreme Court Act 1986* (Vic) s 29(1) and similar provisions in other Australian states.[55]

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50 See Knafla, above n 24, 173; Baker, above n 29, 380. Baker argues that the 'accounts of what took place in court are biased': Baker, above n 29, 380.

51 See Knafla, above n 24, 173; Baker, above n 29, 380.

52 See Knafla, above n 24, 173-7; Baker, above n 29, 381-5.

53 Ibid.

54 Holdsworth, above n 20 (Vol I), 463; Baker, above n 29, 385; Knafla, above n 24, 177. Note that the King dismissed Coke in November, following the urgings of Bacon: see Knafla, above n 24, 177; Baker, above n 29, 387.

55 *Law Reform (Law and Equity) Act 1972* (NSW) s 5; *Supreme Court Civil Procedure Act 1932* (Tas) s 11(10); *Supreme Court Act 1995* (Qld) s 249; *Supreme Court Act 1935* (WA) s 25(12); *Supreme Court Act 1935* (SA) s 28.

III FAULTLINES

Apart from narrating the above events, most histories of the clash tend to focus on some minor variations to a number of common themes. For example: Who was to blame for the antagonism between the courts, Coke, Ellesmere or Bacon? Was Chancery endangering the common law or was it the other way around? How close was the link between the Chancery and King James' royal absolutism, and what would such a link mean? Was Coke the great defender of the rule of law and the personification of the principle of political and economic freedom? If so, what did Ellesmere and the Chancery stand for? Whatever the differences in perspective taken on these issues, one can discern a common underlying thread of discomfort and tension in traditional histories of the clash. In the following section, I argue that this tension results from the fact that the clash is an event that is potentially disruptive of certain dominant and legitimising narratives about our legal system – specifically, those narratives that purport the legitimacy of its origins and its organic continuity.

A *The Clash as a Threat to Legal 'Pedigree' and 'Organic Continuity'*

Margaret Davies has noted that currently dominant positivist thinking in relation to law justifies and legitimises legal authority by reference to the law's origins or 'pedigree', that is, 'whether it has been created in the correct [legal] way'.[56] Davies correctly points out that one of the problems with this concept is that it is circular:

> [I]t relies on law to explain law .... [and] eventually there has to be some non-legal reason for saying that something is law: it tends to look like mere political or ideological force which distinguishes a legal rule from any other. The people who are dominant in society…are those who make the laws….but positivists have avoided stating the logical conclusion of their position this bluntly – they tend to reflect the position of the reasonable lawyer who likes to …keep politics and morality out of it altogether.[57]

[56] Davies, above n 15, 67, 91, 111.
[57] Ibid 91-92 (footnote omitted).

The outcome of the clash – equity's win via King James' decree – exposes the myth of legitimate 'legal' origins by rather bluntly suggesting that the foundation of the current relationship between law and equity is based on 'mere political or ideological force'; in fact, that it is based on the triumph of royal absolutism. Within a positivist paradigm, this suspect 'pedigree' is a potential threat to the legitimacy of the system.

Davies also identifies an additional theoretical basis for the law's authority. In 'classical common law theory'[58] the basis of the law's authority and legitimacy derives from its timelessness and its organic continuity with the past.[59] Like the notion of legitimate legal pedigree, the notion of organic continuity is also threatened by the clash. A *conflict* between jurisdictions suggests rupture and discontinuity - a troubled 'inorganic' relationship between rival jurisdictions in the system.

In the discussion that follows, I take a closer look at the analyses of the clash provided by William Holdsworth, Frederic Mailtland, J H Baker and John Dawson. I show that, despite the clash's potentially disruptive qualities, these authors invoke 'faultline stories' in an attempt to neutralise and explain away the clash in ways that do not threaten dominant and legitimising narratives about the legal 'pedigree' and 'organic continuity' of our legal heritage.

B *Faultline #1: The Outcome of the Clash as the Triumph of Royal Absolutism?*

In each of their accounts, Holdsworth, Maitland, Baker and Dawson attempt to justify equity's 'win' in the clash in the context of its obvious connection with the political power of the monarch. For each of them, this connection is embarrassing, as it suggests that our

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[58] Davies notes that 'classical common law theory' was prominent in the 16th to 18th centuries but that it continues to hold some sway in contemporary legal circles: see Davies, above n 15, 35, 63.

[59] Ibid 43, 57-58.

current system of law and equity is based on suspect historical foundations, foundations tainted by absolutist political interference.

Holdsworth admits that the King's decree in favour of Chancery may have been 'slightly tinged with political considerations' because of the fact that the common law judges, especially Coke, 'were already tending to manifest an independence opposed to James' absolutist claims' whereas 'the Chancellor, as a minister of state, was more favourable to these claims.'[60]

Maitland, on the other hand, indicates that the King's decision in the Chancery's favour may have been *more* than slightly tinged with such political considerations. He points out that the Chancery was closely linked to the royal prerogative, which was increasingly usurping the independence of the common law.[61]

Interestingly, however, despite their acknowledgement of equity's connection with royal absolutism, both Holdsworth and Maitland ultimately view equity's 'win' in the clash as a positive outcome. For Holdsworth, the clash was 'a fight for the existence of equity as an independent system', and the result 'was fortunate for the future development of English law' because 'the need for a court of equity was so clear.' In fact, it 'was fortunate even for the common law that this was so', because if 'the common law had succeeded in reducing all its rivals to insignificance it would have been in considerable danger of becoming hide bound'.[62]

Maitland basically agrees with this conclusion. For him, even though 'Bacon could tell King James that Chancery was the court of

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60 See Holdsworth, above n 20 (Vol I), 463.

61 See F W Maitland, *Selected Historical Essays* (1957) 109. See also Geoffrey de Q Walker, *The Rule of Law* (1988) 103, who sees the dispute as being essentially about the relationship between the royal prerogative and the rule of law.

62 Holdsworth, above n 20 (Vol V), 236-238 (footnotes omitted).

his absolute power,'[63] there is some truth in the paradox that 'equity saved the common law'.[64] He states:

> Somehow or other England, after a fashion all her own, had stumbled into a scheme for the reconciliation of permanence with progress. The old medieval ... law could be preserved because the Court of Chancery was composing an appendix to it .... And so our old law maintained its continuity .... [I]f we look abroad we shall find good reason for thinking that but for [the Chancery]...our old-fashioned national law, unable out of its own resources to meet the requirements of a new age, would have utterly broken down, and the 'ungodly jumble' would have made way for Roman jurisprudence and for despotism.[65]

Thus, despite the fact that Holdsworth and Maitland admit that absolutist political considerations may have played a part in equity's win,[66] they are able to conclude that this was a positive outcome by invoking the claim that paradoxically, equity actually saved the common law by defeating it.[67] The suggestion is that the outcome of the clash was systemically necessary, inevitable and favourable. This move allows them to smooth over the unsavoury implications of that outcome: that the relationship between law and equity in our system is built upon the victory of royal absolutism.

In their historical narratives, Dawson and Baker also have to confront the fact of the connection between equity's win and the political power of the monarch. Dawson admits that 'political issues … loomed so large'[68] in the clash and that 'fundamental problems of political theory and the vital issues of contemporary politics … were raised in this great debate'.[69] Baker also notes that there *was* some basis for Coke's fears about the independence of the common law as

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63 F W Maitland and F C Montague, *A Sketch of English Legal History* (1978) 127.
64 Ibid 128.
65 Ibid 127-8.
66 Maitland, above n 61, 109; Holdsworth, above n 20 (Vol I), 463.
67 See the discussion above.
68 Dawson, above n 16, 152.
69 Ibid 130.

against an encroaching Chancery and a usurping monarch.[70] These 'political' themes in their accounts bring both Dawson and Baker dangerously close to the conclusion that the clash was riddled with considerations relating to political power. This suggests that the legal system itself might be similarly infected, given that the clash is an important formative event in the system's history.

In order to deal with this dangerous suggestion, or faultline, Dawson and Baker take a different tack to Maitland and Holdsworth. They are rather less optimistic about the results of the clash. Baker, for example, views the fact of the clash as quite unfortunate in the short-term, especially as it resulted in Coke's dismissal.[71] He goes so far as to describe 1616 as a 'catastrophic year.'[72]

Dawson questions whether the actual independence of the Chancery from the common law courts was really necessary for the survival of an equity jurisprudence, and therefore, for the healthy growth of the legal system as a whole.[73] His argument is that equity would have survived even if the common law courts had been allowed to control its administration. For him, the independence of the Chancery, which was established as a result of its victory in 1616, has delayed what could have been an earlier beneficial fusion of law and equity, which could have avoided what he considers to be the 'basic bipartition of English law, with [its] resulting confusion in doctrine'[74]. He argues that the common law judges could have gradually taken over equity's administration if it had not been for Coke antagonising the matter and bringing about a situation in which the King had to decide one way or the other.[75] For him, the clash, and equity's win in it, did not 'save the common law'. Rather, it was an unfortunate event that has delayed the beneficial fusion of the system and led to confusion in doctrine.

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70 Baker, above n 29, 368-71.
71 Ibid 368.
72 Ibid 391. Baker describes Maitland's view that the clash was 'necessary' as 'an exaggeration'.
73 Dawson, above n 16, 146.
74 Ibid.
75 Ibid 146-151.

Thus, Dawson and Baker do not share Holdsworth's and Maitland's view that equity's win in the clash 'saved the common law'. Their move is to minimise the political implications of the clash by explaining the event away largely in terms of a clash of *personalities*.[76] Baker blames Coke's adversaries: Ellesmere, Bacon and King James himself, for fuelling the clash. He argues that Coke's own views have been largely 'glossed over by most writers'[77], who, he says, have generally concluded that Coke was wrong on the Chancery issue. He concludes that:

> [equity,] by its very nature prevails over law in appropriate circumstances, but the difficulties which had troubled Coke...had been practical problems of judicial comity and personality, rather than theoretical problems of conflicting notions of justice. The battle had been fought not so much between equity and law, as between the Chancellor and the common lawyers. As Bacon himself said, 'When the men were gone, the matter was gone'.[78]

Baker's reference to the clash being about 'personality, rather than theoretical problems of conflicting notions of justice', suggests that the clash was not a sign of any significant ideological conflict imbued in the social and political upheavals of the time. Further, his assertion that the battle was really between the Chancellor and the common lawyers rather than between equity and law, suggests that the clash does not represent a fundamental clash of systems. His focus on personality allows him to minimise the significance of the clash and to smooth over the unsavoury implications to which it alludes. The message is: the historical basis of our system of law and equity is not tainted by the politics of royal absolutism; the clash does not reveal any fundamental problem with the *system*. As he put it, '[t]he trouble in 1616 was largely caused by a clash of strong personalities'.[79]

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[76] Dawson, above n 16, 152; Baker, above n 29, 392. See also Gray, above, n 17, who describes the clash as a 'quarrel': at 192 and 225. Cf Thomas, above n 17, 521.

[77] Baker, above n 29, 368.

[78] Ibid 392.

[79] J H Baker, *An Introduction to English Legal History* (4th ed, 2002) 108.

Dawson, too, stresses the personalities involved in the conflict. But, unlike Baker, who places the blame on Coke's adversaries, Dawson blames Coke for fuelling the clash. His conclusion is that:

> the fusion of law and equity … would have required patience, statesmanship, and creative imagination. Perhaps Coke was not the man....In calmer times, after the Restoration, the contest of jurisdictions might have been divorced from the political issues that loomed so large....The personal antagonisms aroused by Coke might have seemed a temporary disturbance in the working partnership, already established, between common law and equity. That this working partnership was not by gradual stages transformed into union is a misfortune for which Coke may be partly blamed.[80]

This passage works at a number of levels to deal with the historical taint of royal absolutism. The criticism of Coke is juxtaposed against the benign image of the 'working partnership, already established, between common law and equity', to suggest that it was the 'man', and not the system, that was the problem. This suggestion is reiterated in the final sentence of the extract. The emphasis away from politics/system and towards personality works to ensure that, while the clash may be viewed as unfortunate, it does not bear witness to a legal system and legal outcome infected by the politics of royal absolutism; Simply put, we can blame it on Coke.

Thus, despite the differences in their interpretations of the clash, the accounts by Holdsworth, Maitland, Baker and Dawson are all consistent with the conclusion that the system of law and equity which resulted was, and is, basically sound and based on legitimate historical foundations ('pedigree'). The taint of royal absolutism is minimised or removed altogether from the legal historical landscape.[81]

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[80] Dawson, above n 16, 152.

[81] Compare this attempt to de-politicise the clash with the view of right-wing legal theorist Geoffrey de Q Walker, who places the clash squarely within the context of the connection between the common law and what he views as the political struggles for individual liberty in the seventeenth century: De Q Walker, above n 61. According to De Q Walker, Bacon and the Chancery lawyers were amongst those who supported an absolutist monarchy at the time, and it was largely as a

C *Faultline #2: The clash as Rupture – English Legal Discontinuity?*

The second ideological complication brought up by the clash is the viability of the notion of organic legal continuity. This notion is articulated most explicitly by Holdsworth in the following passage:

> From the point of view of modern law, this period of the sixteenth and seventeenth centuries is the most important of all periods in ... legal history....During this period the course of English legal development was unique in its continuity....The constitutional and legal struggles...of the seventeenth century, left their marks.... [but] the...common law...still possessed many medieval traits [and] [at] the same time, the establishment of the rival bodies of law administered in the Chancery...prevented any approach to uniformity in the rules which made up the English legal system. But, though the institutions of the English state, and the machinery of English law, at the end of this period, were the reverse of logical, they were proving themselves to be workable.[82]

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result of Coke's efforts that this trend towards absolute monarchy and continental Roman law was put into reverse. De Q Walker argues that Coke's struggles during the clash of jurisdictions and later, against King Charles, eventually 'won acceptance of the rule of law as the basic constitutional principle and laid the foundations for the modern liberal democratic state': at 105.

This minimisation of the 'political' by Holdsworth, Maitland, Baker and Dawson also stands in marked contrast to the approach of Marxist historians. Michael Tigar and Madeleine Levy, for example, argue that from about the end of the sixteenth century, the emergent merchant class formed a political alliance with the common lawyers to oppose the centralized monarchy, which had become a hindrance to the merchants and which the common lawyers found offensive. They view the clash as a legal prelude to the revolutionary struggles of the seventeenth century which abolished the prerogative courts and which went some way towards abolishing the Tudor state which the merchants no longer needed. They argue that although the Chancery itself eventually survived, it was no longer viewed as a threat to the new order because the obstructionist monarchy with which it had been allied had been destroyed: see Michael Tigar and Madeleine Levy, *Law and the Rise of Capitalism* (1977) 226-227, 266; See also Samuel Thorne, *Essays in English Legal History* (1985), especially chapter 14.

[82] Holdsworth, above n 20 (Vol IX), 408-10.

Maitland also ascribes to this notion of continuity:

> The old Medieval….law could be preserved because the Court or Chancery was composing an appendix to it….And so our old law maintained its continuity…[83]

The invocation of the notion of English legal continuity in these texts is consistent with classical common law theory which finds a basis for law's authority and legitimacy in its organic continuity with the past. It is also a highly political move that, in the language of the New Historiography,

> [serves] conservative ideology…. because the fabrication of organic continuity… depicts [society's]… most fundamental laws and institutions as divine-natural rather than human creations…[84]

As noted above, the occurrence of the clash sits uneasily with the continuity claim. It suggests conflict, rupture, political and human interference and *dis*continuity.[85] Holdsworth's and Maitland's use of the 'equity saved the common law' narrative, identified above, is also used to manage this serious faultline in their texts. Through this narrative, the clash is transformed from a sign of serious rupture to a symbol of the system's inherent ability to do what is needed to *ensure* continuity. The suggestion is that without the clash (which brought about equity's win), the common law could have become 'hide bound'[86] (Holdsworth) or turned into an '"ungodly jumble" [that] would have made way for Roman jurisprudence and for despotism'[87] (Maitland).

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[83] Maitland and Montague, above n 63, 127-128.

[84] Mali, above n 14, 121.

[85] The 'continuity thesis' contrasts sharply with the view of Marxist historians who argue that the period in question was marked by enormous social and economic upheaval, which was reflected in the legal and political system: see, eg, Tigar and Levy, above n 81, 272; Thorne, above n 81, 187-195.

[86] Holdsworth, above n 20 (Vol V), 236-238.

[87] Maitland and Montague, above n 63, 128.

The theme of English legal continuity is less obvious in the narratives of Dawson and Baker. Baker's description of 1616 as a 'catastrophic year'[88] and Dawson's view that equity's win is to blame for a 'basic bipartition in English law' and 'resulting confusion',[89] initially evokes an image of the clash that seriously threatens any sense of 'organic continuity' in the law's historical development. These authors nevertheless attempt to deal with this serious faultline through their 'personality clash' faultline stories, discussed above.

Baker, for instance, shifts from a description of the clash as 'catastrophic' to the conclusion that:

> Equity by its very nature prevails over law…. The battle had been fought not so much between equity and law, as between the Chancellor and the common lawyers…. "When the men were gone, the matter was gone".[90]

The move from 'catastrophe' to the *naturalness* of equity's prevalence and the contention that the whole thing was merely a *personality* conflict, works to defuse the clash's dangerous disruptive overtones. It suggests that the clash was only a temporary blemish on the historical landscape, caused by a defect of *personality* rather than any fundamental conflict or defect within the *system*. This serves to minimise the sense of rupture and reassert the systemic integrity and organic continuity of the legal system.

Dawson's narrative requires a particularly 'assiduous and continuous reworking'[91] in order to deal with this apparently insurmountable faultline in his text. As noted above, Dawson's view is that equity's victory in 1616 has delayed what could have been an

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88 Baker, above, n 29, 368.
89 Dawson, above n 16, 146.
90 Baker, above n 29, 392 (emphasis added).
91 Sinfield, *Queer Reading,* above n 18, 4.

earlier beneficial fusion of law and equity.[92] He asserts that the common law judges could have gradually taken over equity's administration had it not been for Coke antagonising the matter and bringing about a situation in which the King had to decide one way or the other.[93] He points out that procedural techniques available within the system, such as habeas corpus and prohibition, had effectively been used in the years before the clash to appropriately control the *lower* prerogative courts.[94] But he asserts that:

> We shall never know whether habeas corpus, and perhaps later prohibition, could have been developed against the Chancery to enforce a similar policy. The first tentative movement in that direction was abruptly cut short by the sudden aggression of the King's Bench in 1616.[95]

This strategy of blaming Coke for the delay in fusion, together with the suggestion that by 1616 the law already possessed within itself the necessary procedural techniques to enable fusion, works to salvage the *system* at the expense of the *person*. The suggestion that the law itself is not to blame, works to reassert the system's integrity. Dawson also reassures his readers that the damage caused by Coke in 1616 was not permanent. He asserts that:

> [the] artificial division [between law and equity] is being slowly obliterated, by conscious effort and through many detailed adjustments.[96]

Dawson's assurance that the problematic division between law and equity is both artificial and temporary implies that there is an inherent organic unity within the legal system that is gradually reasserting itself *despite* Coke's interference in 1616. The implication is that Coke may have slowed the system's organic development towards this end, but we will get there eventually, because the system itself is moving towards fusion anyway.

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92 Dawson, above n 16, 146.
93 Ibid 146-151.
94 Ibid 128-151.
95 Ibid 151.
96 Ibid 146 (emphasis added).

For Dawson as well as Baker, then, the focus on personality suggests that any discontinuity or rupture represented by the clash is not symptomatic of any fundamental problem with the *system*, whose development remains *basically* smooth and coherent. Moreover, any disruption that may have been caused by the clash is only temporary.

Thus, each of these traditional histories of the clash invoke classic faultline stories. The notion that equity's win saved the common law, or that the clash was largely the result of a conflict of personalities, serves to efface the suggestion that law (even 'our' law) is sullied by suspect political foundations or that the development of our legal system is marked by discontinuity, rupture and contradiction. In the words of Alan Sinfield, these narratives attempt to address 'the[se] awkward, unresolved issues';[97] They 'retell its story, trying to get it into shape'.[98]

IV CONCLUSION

In this article I have engaged in a critical re-reading of the clash of jurisdictions using the methods and insights of the New Historiography. My own history of the clash has differed from the historical accounts I have analysed. I have not attempted to discover the 'truth' about whether equity saved the common law, or whether the clash was the fault of Coke or Ellesmere, or even whether equity's win was purely the product of King James' absolutist tendencies.

Rather, my history of the clash has involved analysing other histories. As such, many would say that this does not really constitute 'history' at all. In this context, I am reminded of Michel Foucault's astute observation that:

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[97] Sinfield, *Queer Reading,* above n 18, 4.
[98] Ibid.

> Each society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true...the techniques and procedures accorded value in the acquisition of truth.[99]

As discourses that are 'accorded value', the accounts by Holdsworth, Mailtland, Baker and Dawson reinforce the naturalness, coherence, neutrality, inevitability and, ultimately, the legitimacy of the current system of law and equity that we have inherited. It is hoped that, by engaging with history in a way that challenges the claim that we can 'know' the past,[100] we can challenge the authority of historical discourses that invariably use the past to justify the present status quo. In this context, a prime minister's interest in our history classes is hardly surprising.

[99] Michel Foucault, 'Truth and Power' in Colin Gordon (ed) *Power/Knowledge: Selected Interviews and other Writings 1972-1977* (1980) 131.

[100] Forum, (Jane Flax) above n 6, 210.