COORDINATE CITATIONS BETWEEN AUSTRALIAN STATE SUPREME COURTS OVER THE 20TH CENTURY#

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This paper examines the evolution of coordinate citations between the Australian state supreme courts using data on decisions reported in the official state reports at decade intervals from 1905 to 2005. We find that coordinate citations as a proportion of total citations have increased in importance over time. We also find that the exchange of coordinate citations is asymmetric; specifically, some states are large 'suppliers' of coordinate citations, while other states are large 'consumers' of coordinate citations. The strength of citation flows and the influence of specific courts also vary between different pairs of courts. We explain these findings in terms of differences between the states along several dimensions. These dimensions relate to geographical proximity, socio-economic complexity and cultural linkages between states and the stock of precedent and reputation of each of the state supreme courts.

I INTRODUCTION

A large literature exists that examines judicial citations by courts in Canada and the United States.[1] A smaller, albeit growing, literature exists on judicial citations

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1 The seminal study was John Merryman, 'The Authority of Authority: What the California Supreme Court Cited in 1950' (1954) 6 *Stanford Law Review* 613. For relatively recent studies of the citation practice of courts in the United States, see William Manz, 'The Citation Practices of the New York Courts of Appeal: A Millennium Update' (2001) 49 *Buffalo Law Review* 1273; A Michael Beaird, 'Citation to Authorities by the Arkansas Appellate Courts, 1950–2000' (2003) 25 *University of Arkansas Little Rock Law Review* 301 and Dragomir Cosanici and Chris Evin Long, 'Recent Citation Practices of the Indiana Supreme Court' (2005) 24 *Legal Reference Services Quarterly* 103. Peter McCormick is the author of several studies on the citation practices of Canadian courts. See, eg, Peter McCormick, 'The Supreme Court of Canada and American Citations 1945–1994: A Statistical Overview' (1997) 8 *Supreme Court Law Review* 527; Peter McCormick, 'The Supreme Court Cites the Supreme Court: Follow-up Citation on the Supreme Court of Canada, 1989–1993' (1995) 33 *Osgoode Hall Law Journal* 453 and Peter McCormick, 'Second Thoughts: Supreme Court Citation of Dissents and Separate Concurrences' (2002) 81 *Canadian Bar Review* 369.

in Australian courts.[2] Judicial citations can take one of four forms.[3] *Consistency citations* are citations to previous decisions of the citing court. *Hierarchical citations* are citations to decisions of courts that 'stand above' the citing court and to which the litigants could seek leave to appeal. *Deference citations* are citations to decisions of courts that are not part of the immediate judicial hierarchy, but still have persuasive value. *Coordinate citations* are citations to other courts situated in the same tier in the court's hierarchy. These represent persuasive, rather than binding, precedent.

Coordinate citations represent an important form of communication between courts. Courts, like other actors, seek and use solutions from analogous situations when confronted with problematic choices.[4] The citation of coordinate authority represents one avenue through which judicial innovation is diffused between coordinate jurisdictions.[5] To the extent that such citations are important, they point to the non-hierarchical coordination of a relatively unified set of policies among independent actors.[6] In this sense, coordinate citations also constitute an important network between independent actors, which can play a key role in policy adoption. Shapiro has argued that courts in coordinate jurisdictions represent a network for the communication of information about the success and failure of policies.[7]

As a source of innovation and new ideas in the common law, coordinate citations are not just restricted to communication across states or provinces within national boundaries. There is a sizeable literature that examines coordinate citations across courts of last resort, so-called 'trans-judicial communication'.[8] Weiler has noted the growing influence of the European Court of Justice as reflected in the increase in coordinate citations to its decisions by national courts of last resort.[9] Ostberg and his colleagues consider the citation practices of the Supreme Court of Canada to

2 See, eg, Rebecca Lefler, 'A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada and the High Court of Australia' (2001) 11 *Southern California Interdisciplinary Law Journal* 165; Russell Smyth, 'Citations by Court' in Anthony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001) 98–99; Russell Smyth, 'Other than Accepted Sources of Law? A Quantitative Study of Secondary Source Citations in the High Court' (1999) 22 *University of New South Wales Law Journal* 19; Russell Smyth, 'The Authority of Secondary Authority: A Quantitative Study of Secondary Source Citations in the Federal Court' (2000) 9 *Griffith Law Review* 25; Russell Smyth, 'What do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian State Supreme Courts' (1999) 21 *Adelaide Law Review* 51 and Paul Von Nessen, 'Is There Anything to Fear in the Transnationalist Development of Law? The Australian Experience' (2006) 33 *Pepperdine Law Review* 883.

3 Peter McCormick, 'The Evolution of Coordinate Precedential Citation in Canada: Interprovincial Citations of Judicial Authority, 1922–1992' (1994) 32 *Osgoode Hall Law Journal* 271, 273–274.

4 Richard Cyert and James March, *A Behavioral Theory of the Firm* (1972).

5 McCormick, above n 3, 275.

6 Martin Shapiro, 'Decentralized Decision-Making in the Law of Torts' in Sydney Ulmer (ed), *Political Decision-Making* (1970).

7 Ibid.

8 Anne-Marie Slaughter, 'A Typology of Trans-judicial Communication' (1994) 29 *University of Richmond Law Review* 99.

9 J H H Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors' (1994) 26 *Comparative Political Studies* 510.

examine the degree of policy convergence between that Court and the United States Supreme Court and find evidence of doctrinal convergence in the jurisprudence of the two countries since the introduction of the Canadian *Charter of Rights and Freedoms* in 1982.[10] Trans-judicial communication has become controversial of late in the United States.[11] This is reflected in the debate about the merits of the United States Supreme Court's increasing propensity to cite international and foreign human rights law in death penalty jurisprudence, particularly with respect to the *United States Constitution* amend VIII.[12]

Being on the same rung in the court hierarchy, the state supreme courts in Australia are not bound by each other's decisions and have no control over one another's decisions. Nevertheless, they share the same common law tradition and, given the increasing importance of statute law, must interpret the same provisions in uniform national legislation, as well as provisions in state statutes that are often similar in wording to those found in legislation in other states. The state supreme courts cite each other's decisions almost on a daily basis and, as the results of our study will show, coordinate citations as a proportion of total citations by the state supreme courts have increased over the course of the 20th century. However, communication between the state supreme courts is not symmetrical. Some state supreme courts are large 'suppliers' of coordinate citations, while others are large 'consumers' of coordinate citations. Several factors potentially affect which state supreme courts are large suppliers or large consumers of coordinate citations as well as the strength of citation ties between specific pairs of state supreme courts. Those factors include cultural linkages between the states, geographical proximity, social complexity and the reputation of specific state supreme courts.[13]

That some state supreme courts are cited more often than others also provides insights into political leadership among the state supreme courts. Courts that are large suppliers of coordinate citations can be seen as exercising political leadership. It is well established in the political science literature that conversations between the courts, and between the courts and the legislature, act as cue-sending and cue-receiving devices with ramifications for public policy and mass behaviour.[14] States with more innovative courts also tend to have more innovative legislatures. This is because progressive state legal cultures spawn both innovative courts and innovative legislatures. Over time, legislators develop relatively well-articulated ideas about the propriety of certain jurisdictions as vantages for comparison

10 C L Ostberg, Matthew Wetstein and Craig Ducat, 'Attitudes, Precedent and Cultural Change: Explaining the Citation of Foreign Precedents by the Supreme Court of Canada' (2001) 34 *Canadian Journal of Political Science* 377.

11 See Ryan Black and Lee Epstein, '(Re-)Setting the Scholarly Agenda on Trans-judicial Communication' (2007) 32 *Law and Social Inquiry* 791.

12 See Bharat Malkani, 'The Judicial Use of International and Foreign Law in Death Penalty Cases: A Poisoned Chalice' (2007) 42 *Studies in Law, Politics and Society* 161.

13 Peter Harris, 'Ecology and Culture in the Communication of Precedent Among State Supreme Courts' (1985) 19 *Law and Society Review* 449.

14 Gregory Caldeira, 'The Transmission of Legal Precedent: A Study of State Supreme Courts' (1985) 79 *American Political Science Review* 178, 179 and references cited therein.

in making new public policy.[15] Policies flow from states with more innovative courts and more innovative legislatures to states with less innovative courts and less innovative legislatures, so that the latter end up taking their cues from the former.[16]

The literature on judicial citations in Canada and the United States contains an increasing subset of studies focusing specifically on coordinate citations. The literature on coordinate citations consists of three strands. The first strand is composed of studies of inter-provincial or inter-state citations that examine the reputation of courts, inter alia.[17] A second strand of the literature studies patterns of judicial activism across state supreme courts in the United States.[18] A third strand of the literature uses coordinate citations to examine policy diffusion across state supreme courts in the United States.[19] The objective of this paper is to extend the literature on coordinate citations to examine trends in coordinate citations, and the reasons for these trends, by the Australian state supreme courts over the course of the 20th century. Specifically, we examine coordinate citations in reported decisions of each of the state supreme courts at decade intervals beginning in 1905 and finishing in 2005. Foreshadowing our main results, we find that coordinate citations as a proportion of total citations have increased from 3-4 per cent in the first decades of the 20th century to 14-15 per cent in 1995 and 2005. Secondly, we find that the Supreme Courts of New South Wales and Victoria are the biggest suppliers of coordinate citations to the other states, while the Supreme Court of Tasmania is the largest consumer of coordinate citations. Thirdly, in

15 Jack Walker, 'The Diffusion of Innovations Among the American States' (1969) 63 *American Political Science Review* 880.

16 Harris, above n 13, 453.

17 The one study of coordinate citations across Canadian provincial courts of appeal is McCormick, above n 3. The other studies are of coordinate citations across state supreme courts in the United States. See, eg, Gregory Caldeira, below n 53; Caldeira, above n 14; Caldeira, below n 43; Jake Dear and Edward Jessen, 'Followed Rates and Leading State Cases, 1940–2005' (2007) 41 *UC Davis Law Review* 683; Peter Harris, 'Structural Change in the Communication of Precedent Among State Supreme Courts, 1870–1970' (1982) 4 *Social Networks* 201; Harris, above n 13; Rodney Mott, 'Judicial Influence' (1936) 30 *American Political Science Review* 295 and Stuart Nagel, 'Sociometric Relations Among American Courts' (1962) 43 *Southwestern Social Science Quarterly* 136.

18 See Lawrence Baum and Bradley Canon, 'State Supreme Courts as Activists: New Doctrines in the Law of Torts' in Mary Cornelia Porter and G Alan Tarr (eds), *State Supreme Courts: Policymakers in the Federal System* (1982) 83–108; John Hagan, 'Patterns of Activism on State Supreme Courts' (1988) 18 *Publius* 97; Henry Glick, *Supreme Courts in State Politics: An Investigation of the Judicial Role* (1971) and Mary Cornelia Porter, 'State Supreme Courts and the Legacy of the Warren Court: Some Old Inquiries for a New Situation' in Mary Cornelia Porter and G Alan Tarr (eds), *State Supreme Courts: Policymakers in the Federal System* (1982) 3–21.

19 See Lawrence Baum and Bradley Canon, 'Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines' (1981) 75 *American Political Science Review* 975; Marsha Puro, Peter Bergson and Steven Puro, 'An Analysis of Judicial Diffusion: Adoption of the Missouri Plan in the American States' (1985) 15 *Publius* 85; Henry Glick and Scott Hays, 'Innovation and Reinvention in State Policymaking: Theory and the Evolution of Living Wills Laws' (1991) 53 *Journal of Politics* 835; James Lutz, 'Regional Leaders in the Diffusion of Tort Innovations Among the American States' (1997) 27 *Publius* 39 and Robert Savage, 'Diffusion Research Traditions and the Spread of Policy Innovations in a Federal System' (1985) 15 *Publius* 1. For a study of policy diffusion on the United States Courts of Appeals see Rorie Solberg, Jolly Emrey and Susan Haire, 'Inter-court Dynamics and the Development of Legal Policy: Citation Patterns in the Decisions of the US Courts of Appeals' (2006) 34 *Policy Studies Journal* 277.

terms of pair-wise comparisons, we identify persistent patterns of leadership and dependency across the intellectual relationships resulting from interstate 'trade' in judicial citations.[20]

II THE RATIONALE FOR COORDINATE CITATIONS

While the decisions of state supreme courts are not binding on other state supreme courts, the accepted position in each of the state supreme courts is that the decision of another state supreme court on point should be followed unless the court is convinced that it is 'plainly wrong'.[21] As explained by Fitzgerald P of the Queensland Court of Appeal in *R v Morrison*,[22] there are at least two reasons why a state supreme court should follow a decision on point of another state supreme court. The first is that where the decision concerns the effect of a Commonwealth Act or uniform or similar legislation, it would be unsatisfactory for such legislation to have different meanings across states.[23] In the New South Wales Court of Appeal in *Regina v NZ*,[24] Howie and Johnson JJ stated that this principle does not apply 'where it is not the proper construction of legislation that is under consideration, but rather issues of practice and procedure involving the operation of the relevant statutory provisions in their local context'.[25]

The second reason why a state supreme court should follow a decision on point of another state supreme court is that Australia has a single common law. As stated by the High Court in *Lange v Australian Broadcasting Commission*,[26] 'the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations'.[27] The point is emphasised by the High Court's constitutional role as the final appellate court for state and Commonwealth matters as well as other constitutional provisions.[28] As such, the common law

20 See also McCormick, above n 3, 275.

21 *Australian Securities Commission v Marlborough Gold Mines* (1993) 177 CLR 485, 492. For similar statements by the state supreme courts see *Regina v NZ* (2005) NSWLR 628, [157]–[162]; *Attorney General for the State of New South Wales v Quinn* [2007] NSWSC 873 (Unreported, Hall J, 10 August 2007) [66]–[67]; *Borg v Muscat* [1972] Qd R 253, 256; *R v Mayberry* [1973] Qd R 211, 289; *R v Lowrie* [1998] 2 Qd R 579; *R v Morrison* [1999] 1 Qd R 397, 400–401 (Fitzgerald P), 402 (Davies JA); *Higgins v Comans, Acting Magistrate & DPP (Qld)* (2005) 153 A Crim R 565; *Swetnam Brothers Pty Ltd v Grundy* (Unreported, Supreme Court of Tasmania, Wright J, 14 March 1997); *R v Winfield, Chandler and Lipohar* (1995) 65 SASR 121; *Bassell v McGuiness* (1981) 29 SASR 508; *Australian Securities Commission v Macleod* (2000) 22 WAR 255, [94]; *Mustac v Medical Board of Western Australia* [2007] WASCA 128 (Unreported, Supreme Court of Western Australia Court of Appeal, Martin CJ, Wheeler and Buss JJA, 21 June 2007) [37]–[46].

22 [1999] 1 Qd R 397, 401.

23 Ibid 589.

24 (2005) NSWLR 628.

25 Ibid [166].

26 [1997] 189 CLR 520.

27 Ibid 563.

28 *R v Morrison* [1999] 1 Qd R 397, 401.

should evolve in a consistent manner.[29] In the United States context, Friedman and his colleagues wrote in terms of the '[s]tate supreme courts [regarding] themselves as siblings of a single legal family, speaking dialects of a common law language'.[30] In Australia, we can go further than this and state that there is a single common law language with the same dialect, or at least a number of dialects pronounced in more similar terms than in the United States.

The above principles are most fully enunciated in relation to state courts of appeal. However, the same general principles apply to a single judge sitting on a state supreme court. A judge sitting alone is expected to follow the full court of the supreme court of another state unless persuaded it is clearly wrong.[31] A judge sitting alone should also normally follow a single judge sitting in another state supreme court unless convinced the decision is wrong.[32] There is contrary authority in Western Australia, however, suggesting that a single judge of the Supreme Court of Western Australia need not follow a single judge of another state supreme court because further appeal to the state court of appeal is possible.[33] As Simmonds J put it in *Australian Securities Investment Commission v Emu Brewery Mezzanine*:[34]

> I must give due respect to the Queensland judgment, particularly as it is in the area of national legislation. However, in the end, I must apply the law as I believe it to be. The possibility of an appeal from my view provides a mechanism by which the point can be resolved at a higher level, a matter that itself promotes the proper and orderly development of the common law.[35]

III THE DATASET

The database consists of all reported decisions in the official state reports of each of the six state supreme courts at decade intervals between 1905 and 2005. Covering one year in each decade, rather than all 10, is a straightforward and legitimate method of compiling a large random sample from a broader universe.[36] A similar approach has been adopted in previous studies of the citation practices

29 In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, [135] the High Court stated that given the existence of a unified Australian common law, Australian intermediate courts must follow common law principles expounded in other jurisdictions unless they are plainly wrong.

30 Lawrence Friedman, Robert Kagan, Bliss Cartwright and Stanton Wheeler, 'State Supreme Courts: A Century of Style and Citation' (1981) 33 *Stanford Law Review* 773, 801.

31 *Jomann Enterprises Pty Ltd v Sagasco Resources Ltd (No 2)* (1993) 2 Tas R 11.

32 *Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd (No 2)* [2008] WASC 11 (Unreported, Supreme Court of Western Australia, Martin CJ, 1 February 2008) [8].

33 *Walker v Midlink Nominees Pty Ltd (Provisional Liquidator Appointed) & Ors* (2000) 22 WAR 318, [23] (Owen J); *Australian Securities and Investment Commission v Emu Brewery Mezzanine Ltd* (2004) 187 FLR 270, [49]–[51] (Simmonds J).

34 (2004) 187 FLR 270.

35 Ibid [51].

36 McCormick, above n 3, 277.

of North American courts that have covered large time spans.[37] We restrict the sample to decisions reported in the official state reports for two reasons. One is to ensure that the data is comparable across states because unreported decisions for some of the state supreme courts are not readily accessible for the early decades of the 20th century. Secondly, from a pragmatic perspective, it ensures that the cost of compiling such a large dataset is manageable. Even restricting the sample to decisions reported in the official state reports, we ended up with a rather large sample. Altogether, our sample contains 3 863 cases and over 64 500 citations. For each decade, we calculated the number of coordinate citations by each state supreme court, defined as citations to decisions of one of the other five state supreme courts, as well as the number of total citations by each state supreme court. Total citations are defined as the sum of consistency citations, hierarchical citations, deference citations, coordinate citations and citations to secondary authorities. Secondary authorities refer to journal articles, learned texts, legal encyclopaedias, law reform reports, dictionaries and the like.[38] In calculating total citations, citations to administrative regulations, constitutions, court rules, executive orders, parliamentary committee reports, parliamentary debates and statutes were not included.[39]

When deciding how to count the citations, several 'rules of thumb' were employed that are consistent with previous studies of the citation practices of Australian and North American courts.[40] These rules can be briefly summarised as follows. First, in the event that a case or secondary authority was cited twice in the same paragraph, it was counted only once on the assumption that if cited more than once in the same paragraph, it was being cited for the same proposition. Secondly, citations in joint judgments were attributed to each judge who participated in the judgment, but not to a judge who wrote a separate concurring judgment agreeing with the reasons. Thirdly, citations in the text and citations in footnotes were counted equally as the use of footnotes has varied across state reports and across time. Fourthly, no distinction was drawn between positive and negative citations. This approach seems reasonable since, unlike academics, few judges cite other judges in a negative fashion.[41] For example, McCormick reports that in the Supreme Court of Canada, less than 1 per cent of judicial citations are negative,[42]

37 See McCormick, above n 3; Friedman, Kagan, Cartwright and Wheeler, above n 30; Harris, above n 13 and William Manz, 'The Citation Practices of the New York Court of Appeals, 1850–1993' (1995) 43 *Buffalo Law Review* 121.

38 Wes Daniels, 'Far Beyond the Law Reports: Secondary Source Citations in United States Supreme Court Decisions, October Terms 1900, 1948 and 1978' (1983) 76 *Law Library Journal* 1.

39 This is consistent with the approach in previous studies: see Daniels, above n 38.

40 See the references cited in above n 1 and 2.

41 See Richard Posner, 'An Economic Analysis of the Use of Citations in the Law' (2000) 2 *American Law and Economics Review* 381; William Landes and Richard Posner, 'The Influence of Economics on the Law: A Quantitative Study' (1993) 36 *Journal of Law and Economics* 385 and William Landes, Lawrence Lessig and Michael Solimine, 'Judicial Influence: A Citation Analysis of Federal Courts of Appeal Judges' (1998) 27 *Journal of Legal Studies* 333.

42 Peter McCormick, 'The Supreme Court Cites the Supreme Court: Follow-up Citation on the Supreme Court of Canada, 1989–1993' (1995) 33 *Osgoode Hall Law Journal* 453, 462.

while previous research in the United States suggests that 'appellate judges ... seldom use interstate references in a negative fashion'.[43]

IV THE RESULTS

A *Overall Trends in Coordinate Citations*

To establish that coordinate citations are sufficiently important to be worth studying, we begin by examining the extent to which the state supreme courts cited each other over the course of the 20th century. The results are presented in Table 1. In each of the first four decades of the 20th century, coordinate citations constituted less than 5 per cent of total citations. In 1945, coordinate citations increased to 8.4 per cent of total citations and hovered between 5 per cent and 10 cent of total citations up to and including 1985. The enactment of the *Australia Acts 1986* (UK & Cth) represented a structural break or turning point in judicial citation practice in Australia. Prior to the commencement of the *Australia Acts 1986* (UK & Cth), the state supreme courts cited a high proportion of English cases.[44] Writing with respect to the effect of the *Australia Acts 1986* (UK & Cth) in *Cook v Cook*,[45] Mason, Wilson, Deane and Dawson JJ stated that 'while courts [in Australia] will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts', those decisions 'are useful only to the degree of the persuasiveness of their reasoning'.[46]

43 Gregory Caldeira, 'Legal Precedent: Structures of Communication Between State Courts' (1988) 10 *Social Networks* 29, 32. Nagel, above n 17, also presents evidence that appellate courts almost always cite other jurisdictions in a positive or neutral manner. For a contrary view see Dear and Jessen, above n 17.

44 See Dietrich Fausten, Ingrid Nielsen and Russell Smyth, 'A Century of Citation Practice on the Supreme Court of Victoria' (2007) 31 *Melbourne University Law Review* 733; Ingrid Nielsen and Russell Smyth, 'One Hundred Years of Citation of Authority on the Supreme Court of New South Wales', to be published in a forthcoming edition of the *University of New South Wales Law Journal*; Russell Smyth, 'Citation to Authority on the Supreme Court of South Australia: Evidence From a Hundred Years of Data', to be published in a forthcoming edition of the *Adelaide Law Review* and Russell Smyth, 'The Citation Practices of the Supreme Court of Tasmania, 1905–2005', to be published in a forthcoming edition of the *University of Tasmania Law Review*.

45 (1986) 162 CLR 376.

46 Ibid 390.

Table 1: Frequency of Coordinate Citations by Decade

(Reported Decisions of the State Supreme Courts of Australia, 1905–2005)

	Coordinate citations	Total citations to judicial authority	% of coordinate authority
1905	49	1235	4%
1915	27	863	3.12%
1925	37	1507	2.46%
1935	96	2201	4.36%
1945	200	2388	8.38%
1955	221	3488	6.34%
1965	328	4620	7.10%
1975	544	6920	7.86%
1985	1186	12869	9.22%
1995	2020	14080	14.35%
2005	2049	14368	14.26%

Previous studies suggest that since the commencement of the *Australia Acts 1986* (UK & Cth), there has been a sharp decline in the proportion of deference citations to decisions of English courts by the Australian state supreme courts.[47] This trend intensified following the enactment of the *Human Rights Act 1998* (UK), which increased the influence of the *European Convention on Human Rights and Fundamental Freedoms* on English law, making English cases less relevant to Australia.[48] In recent decades, citations of English authorities by the state supreme courts have been replaced by hierarchical citations to decisions of the High Court[49] and coordinate citations to decisions of other state supreme courts. In 1995 and 2005, coordinate citations jumped to just below 15 per cent of total citations. This figure is similar to the Canadian provincial courts of appeal where coordinate citations constituted just over 15 per cent of total citations over the period 1972 to 1992[50] and higher than the United States state supreme courts where coordinate citations constitute 7-8 per cent of total citations.[51] Overall, Table 1 suggests that coordinate citations represent an important share of the state supreme courts' total citations and that the share of coordinate citations has increased since World War II.

47 See studies cited above n 44.

48 Michael Kirby, 'Precedent, Law, Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243, 244.

49 See the studies cited abve n 44.

50 McCormick, above n 3, 284.

51 John Merryman, 'Towards a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960 and 1970' (1977) 50 *Southern California Law Review* 381, 401–404. See also Friedman, Kagan, Cartwright and Wheeler, above n 30, 802.

B *Who are the Consumers of Coordinate Citations?*

The aggregate figures in Table 1 mask considerable differences across state supreme courts. Not all state supreme courts are equally prepared to turn to their colleagues on coordinate benches as sources of inspiration or insight.[52] Table 2 shows how the state supreme courts differed over the course of the 20th century as consumers of persuasive precedent generated by their counterparts in other states. For most decades, the state supreme courts fall neatly into three categories. At one end of the spectrum, the Supreme Court of New South Wales and, to a lesser extent, the Supreme Court of Victoria, are small consumers of coordinate authority. The Supreme Court of New South Wales is the only state supreme court for which coordinate citations have represented less than 10 per cent of total citations in each decade of the study. At the other end of the spectrum, the Supreme Court of Tasmania is a large consumer of coordinate authority. In 2005, coordinate citations represented just below one-third of all citations made by the Supreme Court of Tasmania. The Supreme Courts of Queensland, South Australia and Western Australia have been mid-range consumers of coordinate authority, although there are isolated years in which these courts have experienced a sharp but short-lived increase in the number of coordinate citations. Examples are Queensland in 1915, 1935 and 1945 and Western Australia in 1975.

Table 2: Citations to Co-ordinate Authority as a Percentage of Total Judicial Citations by Each Court

(Reported Decisions of the State Supreme Courts of Australia, 1905–2005)

	VIC	NSW	QLD	WA	SA	TAS
1905	0.03%	3.79%	5.32%	4.81%	1.32%	13.91%
1915	2.30%	1.28%	11.71%	2.82%	0.00%	4.30%
1925	0.07%	0.47%	4.79%	1.32%	5.52%	0.00%
1935	1.59%	2.95%	10.74%	0.00%	6.82%	3.70%
1945	4.82%	3.98%	22.31%	14.29%	8.83%	21.33%
1955	7.17%	3.89%	9.20%	8.42%	6.40%	12.57%
1965	5.38%	3.74%	8.32%	6.69%	9.41%	15.40%
1975	7.96%	4.48%	12.86%	29.80%	11.98%	19.91%
1985	9.29%	4.88%	18.36%	17.06%	10.60%	15.77%
1995	12.69%	9.26%	15.52%	21.91%	16.16%	24.58%
2005	16.74%	8.95%	15.16%	17.69%	14.51%	30.69%
Average	6.19%	4.33%	12.21%	11.35%	8.32%	14.74%

52 McCormick, above n 3, 280.

C *Who are the Suppliers of Coordinate Citations?*

A natural extension of the results presented in Table 2 is to examine which courts are the suppliers of coordinate citations. These results are presented in Table 3. The findings are a virtual mirror image of the results presented in Table 2. Caldeira writes that in the United States, the relative position of state supreme courts as suppliers of coordinate citations changed little over time.[53] This is also true for the results presented here. The Supreme Court of New South Wales and Supreme Court of Victoria were the biggest suppliers of coordinate citations in each decade under examination. In each decade of the study, these courts together supplied at least two-thirds of coordinate citations and in several decades this figure was as high as three-quarters or more of coordinate citations. As a supplier of coordinate citations, the Supreme Court of New South Wales is on par with the Ontario Court of Appeal in Canada[54] and the Supreme Courts of California, Massachusetts, New Jersey, New York and Washington in the United States,[55] which supply the bulk of coordinate citations in those countries.

Table 3: Citations of Specific Supreme Courts, by Decade, as a Percentage of all Coordinate Citations

(Reported Decisions of the State Supreme Courts of Australia, 1905–2005)

	VIC	NSW	QLD	WA	SA	TAS
1905	50.00%	26.00%	18.00%	0.00%	6.00%	0.00%
1915	33.33%	48.15%	11.11%	0.00%	3.70%	3.70%
1925	37.84%	59.46%	2.70%	0.00%	0.00%	0.00%
1935	51.04%	26.04%	7.29%	3.13%	11.46%	1.04%
1945	34.50%	38.00%	5.00%	9.00%	12.00%	1.50%
1955	35.75%	41.63%	6.79%	2.71%	10.86%	2.26%
1965	30.49%	40.85%	13.11%	2.74%	6.71%	6.10%
1975	31.46%	34.27%	18.35%	2.25%	10.11%	3.56%
1985	31.19%	35.05%	12.08%	5.40%	13.36%	3.00%
1995	21.85%	41.07%	14.78%	5.60%	14.78%	1.92%
2005	21.51%	44.71%	14.00%	7.57%	10.78%	1.43%
Average	34.45%	39.57%	11.20%	3.49%	9.07%	2.23%

The Supreme Court of Tasmania has consistently been the smallest supplier of coordinate citations. Over the entire study it supplied on average just 2.2 per cent of coordinate citations. In eight of the 11 decades considered in the study, it supplied 3 per cent or less of coordinate citations and in only one decade supplied in excess of 5 per cent of coordinate citations. The Supreme Court of Western

53 Caldeira, 'On the Reputation of State Supreme Courts' (1983) 5 *Political Behavior* 83, 91–93.

54 Ibid 283.

55 See Friedman, Kagan, Cartwright and Wheeler, above n 30, 804; Caldeira, above n 53, 88–90; Dear and Jessen, above n 17; Manz, above n 37, 130 and Merryman, above n 51, 401.

Australia was also a relatively small supplier of coordinate citations, supplying an average of 3.5 per cent of coordinate citations over the entire time span of the study. The low figure for the Supreme Court of Western Australia partly reflects the fact that it got off to a slow start. For the first three decades of the study it was not cited at all by the other state supreme courts. In most decades the Supreme Courts of Queensland and South Australia were mid-level suppliers of coordinate citations, together supplying an average of 20 per cent of coordinate citations over the period of the study.

D *Strength and Direction of the Relationship Between Paired Courts*

The patterns suggested in Tables 2 and 3 – the dominance of the Supreme Court of New South Wales and, to a lesser extent, the Supreme Court of Victoria, and the dependence of the Supreme Court of Tasmania – represent, in the evocative phrasing of McCormick, 'the tip of the influence iceberg'.[56] As McCormick notes, what really matters are the bilateral relationships between the state supreme courts, that is, the relationships between each of the six state supreme courts, in terms of how strong the bilateral influence is and in what direction it tends to run.[57]

Table 4: Direction and Strength of Paired Relationships

(Reported Decisions of the State Supreme Courts of Australia, 1905–2005)

	VIC	NSW	QLD	WA	SA	TAS
VIC		balanced very strong	balanced strong	influential medium	influential strong	influential medium
NSW	balanced very strong		balanced very strong	influential strong	influential very strong	influential medium
QLD	balanced strong	balanced very strong		influential weak	balanced medium	influential very weak
WA	dependent medium	dependent strong	dependent weak		dependent weak	balanced very weak
SA	dependent strong	dependent very strong	balanced medium	influential weak		influential weak
TAS	dependent medium	dependent medium	dependent very weak	balanced very weak	dependent weak	

Notes: The first line in each cell indicates "direction" and the second line indicates "strength" of the relationship. If A cites B more than twice as often as B cites A, the relationship is characterised as influential/dependent; if not the relationship is characterised as balanced. <100 combined citations = very weak; 100–200 combined citations = weak; 200–400 combined citations = medium; 400–600 combined citations = strong; >600 combined citations = very strong.

56 McCormick, above n 3, 288.

57 Ibid.

Table 4 characterises the strength and direction of the relationship between dyads of state supreme courts. Coordinate citations between pairs of states (A citing B plus B citing A) can be depicted as strong (with a lot of coordinate citations linking the courts), medium or weak (with few coordinate citations linking the courts). While any classification scheme is ultimately arbitrary, a reasonable characterisation of citation patterns over the time span of the study identifies less than 100 combined coordinate citations as a very weak relationship; 100–200 combined coordinate citations as a weak relationship; 200–400 combined coordinate citations as a medium relationship; 400–600 combined coordinate citations as a strong relationship and more than 600 combined coordinate citations as a very strong relationship.[58] The ratio between linked pairs of citations can be used to characterise the relationship as dependent (A cites B far more often than B cites A), balanced (A and B cite each other in roughly comparable amounts) or influential (B cites A far more often than A cites B). In characterising the relationship between pairs of courts as balanced, influential or dependent, we use the rule of thumb employed by McCormick.[59] If a court cites another court more than twice as often as it is cited by that court then the relationship is dependent; if a court cites another court half as often as it is cited by that court then the relationship is influential and otherwise the relationship is characterised as balanced.

Several points are worth observing from the results presented in Table 4 in relation to the balance of precedential trade. The first is that the two big states of Victoria and New South Wales are joined by Queensland in a 'balanced citation' block. The citation relationship between each pairing of the three states is balanced and either strong or very strong. Second, as expected given that Victoria and New South Wales are large suppliers and small consumers of coordinate citations, these two states are influential with respect to Tasmania, South Australia and Western Australia. The strength of the relationships vary from medium (Victoria-Western Australia, Victoria-Tasmania and New South Wales-Tasmania) through to very strong (New South Wales-South Australia). Third, Queensland is also influential with respect to Western Australia and Tasmania, although the strength of the relationship is weak or very weak. Meanwhile, the citation relationship between Queensland and South Australia is balanced and of medium strength. Fourth, Tasmania and Western Australia are dependent on each of the four other states and in a balanced, albeit very weak, relationship with each other.

V DISCUSSION OF RESULTS

There are numerous and often subtle reasons for interaction between appellate courts. Thus, a reasonably comprehensive explanation for the patterns observed above involves consideration of a raft of possible influences.[60] In this section we discuss several factors that potentially explain the influential position of Victoria,

58 In his study of coordinate citations among the provincial courts of appeal in Canada, McCormick, above n 3, sets the bar lower to qualify for each of the categories, but he has a smaller sample size.

59 McCormick, above n 3, 288.

60 Caldeira, above n 14, 181.

New South Wales and, to a lesser extent, Queensland, and the dependent position of Tasmania and Western Australia. These factors relate to the broad areas of the stock of precedent, geographical proximity, socio-economic complexity, cultural linkages and reputation. Our discussion draws on the literature on coordinate citations in the United States, as many factors considered in those studies are relevant in the Australian context.

A *Stock of Precedent*

As a general proposition, the larger the stock of legal precedent a state supreme court possesses, the higher the likelihood that it will be cited by other state supreme courts.[61] As Merryman puts it:

> Assuming some sort of even, if random, distribution of different fact situations and legal questions among the reported decisions, the probability that one will find a case in point in the decisions of a given state should be a function of the number of published decisions. ... Thus, the more published decisions the more citations.[62]

This general proposition can be refined. If we assume that courts prefer to rely on their own prior decisions whenever possible,[63] the more legal precedent a court has, the less it will need to borrow the legal precedent of its sister courts and the more it will be cited by its sister courts which have few precedents of their own.[64] In studies of the state supreme courts in the United States, the state supreme courts which received the highest number of coordinate citations, such as California and New York, also had more cases that could be cited.[65]

To measure the stock of legal precedent, studies in the United States use the number of running feet of legal reports produced by each state supreme court.[66] We have a more accurate measure, which is the number of cases reported in the official state reports at decade intervals from 1905 to 2005 – the sample cases analysed in the study. The number of cases reported in the official state reports at decade intervals is shown in Table 5. At one end of the spectrum, the Supreme Court of New South Wales and Supreme Court of Victoria together account for 50 per cent of the cases, while at the other end of the spectrum the Supreme Court of Tasmania and Supreme Court of Western Australia produced just 17 per cent of the cases. This suggests that one reason why the Supreme Courts of Victoria and New South Wales possess a favourable balance of trade in coordinate citations is that their own precedents constitute a substantial share of the total stock of precedents available for citation while the reverse is true for Tasmania and Western Australia.

61 Caldeira, above n 14, 183; Caldeira, above n 53, 84 and Harris, above n 13, 452.

62 Merryman, above n 51, 403.

63 Martin Shapiro, 'Toward a Theory of Stare Decisis' (1972) 1 *Journal of Legal Studies* 125.

64 William Landes and Richard Posner, 'Legal Precedent: A Theoretical and Empirical Analysis' (1976) 19 *Journal of Law and Economics* 249.

65 Friedman, Kagan, Cartwright and Wheeler, above n 30, 805.

66 See, eg, Caldeira, above n 14, 181 and Merryman, above n 51, 403.

Table 5: Cases Reported in Official State Reports 1905–2005

	1905	1915	1925	1935	1945	1955	1965	1975	1985	1995	2005	Total
NSW	119	65	76	66	48	54	33	152	187	101	117	1018
VIC	104	90	66	69	52	79	101	89	84	77	84	895
QLD	34	31	34	23	30	30	51	46	122	130	53	584
SA	10	13	54	79	40	45	57	44	155	94	105	696
WA	53	42	35	40	13	15	45	32	37	77	40	429
TAS	41	54	15	13	6	16	24	11	15	31	15	241
TOTAL	361	295	280	290	189	239	311	374	600	510	414	3863

For most of the 20th century, prior to decisions being published online, another factor influencing the propensity of state courts to cite their sister courts was whether the law reports of their sister courts were made available in a punctual fashion. This consideration might help to explain the small number of coordinate citations to decisions of the Supreme Court of Tasmania. Not only did the Supreme Court of Tasmania have relatively few cases in their state reports, but for certain periods prior to the early 1990s, the method of indexing judgments of the Supreme Court of Tasmania was haphazard and the published law reports were up to five years behind the times.

B *Socio-Economic Factors*

Empirical research in the United States suggests that demographic, economic and social differences between states are likely to affect communication between state supreme courts.[67] There are two avenues through which the demographic, economic and social features of a state will influence the form of 'conversation' between state supreme courts. First, to the extent that the common law is a vehicle for solving problems emerging from specific socio-economic conditions, the higher the degree of economic and social similarity between a pair of states, the more likely it is that their courts will face common problems that form a basis for communication.[68] Secondly, certain socio-economic characteristics – such as high levels of industrialisation, population and urbanisation – create a milieu ripe for complex litigation and new claims for rights that are conducive to judicial innovation.[69] There will therefore be a flow of innovative precedent from the more populous, industrialised and urbanised states to the less populous, industrialised and urbanised states. Caldeira summarises the diffusion of innovation from more innovative to less innovative states as follows:

67 See Caldeira, above n 14 and Harris, above n 13.

68 Harris, above n 13, 454.

69 See Joel Grossman and Austin Sarat, 'Litigation in the Federal Courts: A Comparative Perspective' (1975) 9 *Law and Society Review* 321 and Richard Schwartz and James Miller, 'Legal Evolution and Societal Complexity' (1963) 70 *American Journal of Sociology* 159.

> [W]e know that if and when a new issue comes to the fore, it most often arises in the most populous, diverse, industrialized localities. State supreme courts at work in more diverse milieus, possessing more cases of first impression, have the opportunity to contrive precedents that, if not always adopted intact, at the very least merit the rapt attention of jurists who follow in the wake. Or, in an alternative formulation of the relationship, supreme courts in the least modern should invoke the previous decisions of the benches in the more modern states .... the parochials should follow the cosmopolitans.[70]

Population size is a critical factor in determining the volume of litigation in a state.[71] Large populations translate into more litigation and, in turn, more 'problematic' issues that require more innovative judicial solutions.[72] The opposite side of the coin is that 'sparse populations reduce opportunities for judicial innovation'.[73] Population size and judicial reputation are also related. Discussing the fact that the California Supreme Court is a large supplier of coordinate citations while the South Dakota Supreme Court is a large consumer of coordinate citations in the United States, Friedman and his colleagues note:

> California Supreme Court decisions establish the law for an empire of 20,000,000 people; for that reason alone, California decisions may be regarded as more significant than the decisions of the state Supreme Court of South Dakota, a state with a population 4 per cent that of California.[74]

Table 6: Mid-Year Population Estimates (millions)

	VIC	NSW	QLD	WA	SA	TAS
1905	1.205	1.470	0.529	0.247	0.359	0.183
1915	1.432	1.889	0.696	0.321	0.444	0.195
1925	1.671	2.293	0.840	0.373	0.539	0.214
1935	1.837	2.645	0.968	0.447	0.588	0.229
1945	2.007	2.918	1.077	0.488	0.627	0.249
1955	2.517	3.491	1.350	0.657	0.820	0.314
1965	3.164	4.172	1.634	0.814	1.065	0.368
1975	3.719	4.884	2.084	1.145	1.252	0.405
1985	4.123	5.476	2.548	1.408	1.363	0.442
1995	4.517	6.127	3.265	1.734	1.469	0.474
2005	5.022	6.774	3.964	2.010	1.542	0.485

Source: Australian Bureau of Statistics, Cat No. 3105.0.65.001, Australian Historical Population Statistics, Table 2, Population by sex, states and territories, 30 June 1901 onwards.

70 Caldeira, above n 14, 186.

71 Gerhand Casper and Richard Posner, *The Workload of the Supreme Court* (1976); Gregory Caldeira, 'A Tale of Two Reforms: On the Work of the Supreme Court' in Philip Dubois (ed), *The Politics of Judicial Reform* (1982), 137–152.

72 Robert A Dahl and Edward R Tufte, *Size and Democracy* (1973).

73 Baum and Canon, above n 19, 980.

74 Friedman, Kagan, Cartwright and Wheeler, above n 30, 806.

Table 6 presents population size for each of the six states at decade intervals between 1905 and 2005. Throughout the 20th century, Victoria and New South Wales have been the most populous states with Queensland in third place and Tasmania as the least populous state. Until 1975, Western Australia was the second least populous state, but spurred on by the mining boom, its population moved ahead of South Australia over the last three decades. The population distribution in Table 6 is consistent with the pattern of coordinate citations suggested by Tables 2–4. The most influential states – New South Wales, Queensland and Victoria – are also the most populous states, while the most dependent states – Tasmania and Western Australia – have been the least populous states for most of the period under consideration. There is also a reasonably balanced flow of coordinate citations between the three populous states on the one hand and the two least populous states on the other.

Industrialisation and urbanisation, which tend to occur at the same point in time, have an effect on litigation similar to an increase in population.[75] As the rate of industrialisation and urbanisation accelerates, socio-economic complexity increases. This will result in higher levels of litigation since industrialisation and urbanisation produce the conditions for increased demands and conflict in the political system, which in turn generates more legal conflict.[76] As Jaros and Canon describe it:

> [Urbanisation] is an appropriate indicator of social heterogeneity for as populations become more concentrated in cities, most forms of human activity become more complex. Concentration and industrialization are associated with a more diverse economy and thus with greater specialization. This produces a basis for a large number of relatively specific interests. The resultant configuration of demands upon government agencies becomes more varied.[77]

Industrialisation and urbanisation produce innovative solutions which flow from more industrialised/urbanised states to less industrialised/urbanised states. As colourfully summarised by Caldeira, 'involving new technologies and forms of work, industrialisation revolutionised both the common law and statutory schemes; too often flesh met steel and iron and so courts and legislatures had to adapt age-old formulae'.[78] Fischer proposes that due to the size and concentration of city populations, cities are society's main source of material and organisational innovation.[79] He suggests that there is an urban-

75 See Grossman and Sarat, above n 69 and Robert Kagan, Bliss Cartwright, Lawrence Friedman and Stanton Wheeler, 'The Business of State Supreme Courts 1870–1970' (1977) 30 *Stanford Law Review* 121.

76 Paresh Narayan and Russell Smyth, 'Temporal Causality and the Dynamics of Judicial Appellate Caseload, Real Income and Socio-Economic Complexity in Australia' (2006) 38 *Applied Economics* 2209.

77 Dean Jaros and Bradley Canon, 'Dissent on State Supreme Courts: The Differential Significance of Characteristics of Judges' (1971) 15 *Midwest Journal of Political Science* 322.

78 Caldeira, above n 53, 96. See also Lawrence Friedman, *Law and Society* (1977).

79 Claude Fischer, 'Toward a Subcultural Theory of Urbanism' (1975) 80 *American Journal of Sociology* 1319.

rural diffusion of culture that occurs in stages – from large cities to small cities and from small cities to rural areas.[80] If Fischer's theory can be extended to state supreme courts, it suggests that more urban states will have more innovative courts and that the diffusion of precedent will occur from courts in more urban states to courts in more rural states.[81]

Table 7: Gross State Product ($millions)

(Figures in parentheses are as a % of Australian Gross Domestic Product)

	VIC	NSW	QLD	WA	SA	TAS
1990	150,360 (25.89)	200,925 (34.60)	89,636 (15.44)	61,831 (10.65)	44,753 (7.71)	12,928 (2.23)
1995	160,979 (24.73)	221,331 (34.00)	108,514 (16.67)	75,909 (11.66)	46,784 (7.19)	14,112 (2.17)
2000	200,123 (24.86)	276,161 (34.31)	137,121 (17.03)	93,231 (11.58)	55,039 (6.84)	16,000 (1.99)
2005	230,516 (24.53)	309,117 (32.90)	172,294 (18.34)	114,754 (12.21)	63,640 (6.77)	18,322 (1.95)

Source: Australian Bureau of Statistics, Cat No. 5220.0, Australian National Accounts, State Accounts.

Table 8: Contribution of States to Total Manufacturing 2005–2006

VIC				NSW				QLD			
EMP	W&S	SSI	IVA	EMP	W&S	SSI	IVA	EMP	W&S	SSI	IVA
29.9	31.6	29.0	30.3	30.1	31.5	31.2	31.2	19.0	16.8	17.9	17.3
WA				SA				TAS			
EMP	W&S	SSI	IVA	EMP	W&S	SSI	IVA	EMP	W&S	SSI	IVA
9.0	8.5	11.9	10.0	9.1	8.8	7.6	7.9	2.0	1.8	1.7	2.2

Notes: EMP = Employment in Manufacturing as of June 2006 (% of national total)
W&S = Manufacturing Wages and Salaries (% of national total)
SSI = Sales and Service Income (% of national total)
IVA = Manufacturing Value Added (% of national total)

Source: Australian Bureau of Statistics, Cat No. 8221.0, Manufacturing Industry.

Table 7 presents data on the size of the various state economies at five-year intervals between 1990 and 2005. Differences in the sizes of the state economies reflect differences in population size. The three most populous states also have the largest

80 Claude Fischer, 'Urban to Rural Diffusion of Opinions in Contemporary America' (1978) 84 *American Journal of Sociology* 151.

81 Harris, above n 13, 454–455.

economies while Tasmania has the smallest economy. Table 8 presents data on the contribution of each state to total manufacturing in 2005–6. New South Wales and Victoria have the largest manufacturing bases, followed by Queensland. The manufacturing base in South Australia and Western Australia are smaller than Queensland, while Tasmania has the smallest manufacturing base. The size of the state economies and their respective manufacturing bases are related to the level of litigation generated and the complexity of the legal issues considered. The three states with the largest, more industrialised, economies have the most influential state supreme courts in terms of the flow of coordinate citations while Tasmania, which has the smallest and least industrialised economy, has the least favourable balance of trade in coordinate citations.

A similar picture emerges with respect to the commercial influence, size and urbanisation of each state's capital city. At the beginning of the 20th century, Melbourne and Sydney were the largest and most urbanised of the capital cities. As early as the 1880s, Melbourne had established itself as Australia's major port. Melbourne's commercial institutions organised trade and investment in areas as far afield as Broken Hill in South Australia, northern Queensland, Fiji and New Zealand.[82] Sydney grew relative to Melbourne through the 1880s and 1890s, overtaking Melbourne to become Australia's largest and most urbanised city by 1911. In 1901, the populations of Melbourne and Sydney – almost half a million each – placed them among the 30 largest cities in the world.[83] At the beginning of the 20th century, Adelaide and Brisbane were 'middling size', while Perth and Hobart were the smallest of the capital cities with the lowest rate of urbanisation.[84] Over the course of the 20th century, Brisbane and Perth grew in relative terms. However, the gap between Melbourne and Sydney, as the largest capital cities, and Hobart, as the smallest and least urbanised of the capital cities, remained wide throughout the 20th century and tended to increase.[85] The relative positions of the capital cities in terms of commercial and demographic clout, with Melbourne and Sydney in a dominant position throughout the 20th century, Adelaide, Brisbane and Perth of mid-level importance and Hobart with the lowest level of urbanisation and least commercial influence, are generally consistent with the pattern of coordinate citations flowing between the state supreme courts.

C *Geographical Proximity and Cultural Linkages*

Geographers emphasise that physical distance between individuals, organisations and jurisdictions represents an important determinant of human behaviour. The probability of interaction between neighbours increases not only because of physical proximity, but also because entities located near each other are more

82 Lionel Frost, 'The Contribution of the Urban Sector to Australia's Economic Development Before 1914' (1998) 38 *Australian Economic History Review* 42.

83 David Merrett, 'Australian Capital Cities in the Twentieth Century' in J W McCarty and C B Schedvin (eds), *Australian Capital Cities: Historical Essays* (1978) 171–198.

84 J W McCarty, 'Australian Capital Cities in the Nineteenth Century' in J W McCarty and C B Schedvin (eds), *Australian Capital Cities: Historical Essays* (1978) 9–25.

85 Merrett, above n 83, 172–173.

likely to share common traits.[86] If courts follow these social laws, it is conceivable that supreme courts in neighbouring states will be more likely to cite each other's cases.[87] Caldeira finds support for this proposition using data on interstate citations in the United States,[88] but the United States has many more states than Australia and is more prone to regionalism. In the United States, the propensity for state supreme courts to cite the decisions of neighbouring supreme courts is also reinforced by the West Publishing reporting system, in which reported cases of the state supreme courts are grouped into seven regions defined more or less geographically. The strength of the paired relationships in Table 4 provides mixed support for the proposition that geographically proximate states are more likely to cite each other's cases. The coordinate citation relationship between Victoria and New South Wales and between New South Wales and Queensland is very strong. The coordinate citation relationship between Victoria and South Australia is also strong, but the coordinate citation relationship between South Australia and Western Australia is weak.

Elazar contends that in the United States, migration flows and especially the settling of the frontier were important factors in shaping the outlines of a state's political culture.[89] Successive internal migration waves in the United States in the late 19th and early 20th centuries reinforced, and in some cases modified, the initial distribution of values.[90] The argument goes that where migration flows from A to B, A influences the political culture of B. Caldeira suggests that

> if patterns of migration have a profound effect more generally on politics, it is plausible to expect that at least a minimal cultural linkage should increase communication among state supreme courts. If citizens of one state move to a second and if this reasoning is correct, the state supreme court of the second should on average choose from among the stock of legal precedent of the first's courts more often.[91]

Caldeira[92] and Harris[93] both find support for this proposition using data on interstate citations in the United States.

There is some evidence to support the view that migration flows have been important in the evolution of coordinate citations among the Australian state supreme courts. Brosnan provides estimates of internal migration flows within Australia for each decade over the period 1911 to 1961.[94] His study suggests the

86 Caldeira, above n 14, 182.

87 Ibid.

88 Ibid 182–183.

89 Daniel Elazar, *American Federalism: A View From the States* (1966); Daniel Elazar, *Cities of the Prairie* (1970).

90 Raymond Gastil, *Cultural Regions of the United States* (1975).

91 Caldeira, above n 14, 188.

92 Ibid.

93 Harris, above n 13.

94 Peter Brosnan, 'Australian Net Interstate Migration 1911 to 1961' (1984) 24 *Australian Economic History Review* 150.

following: first, the largest outward migration flows over this period were from Victoria and New South Wales. Second, the major destinations for migrants from Victoria were New South Wales and Queensland, while the major destinations for migrants from New South Wales were Victoria and Queensland. Third, there were large migration flows from Queensland to Victoria and New South Wales. More recent data from the Australian Bureau of Statistics for the period 1997–8 to 2006–7 suggests that strong population flows between the eastern seaboard states have continued.[95] Over this decade, 61.9 per cent of permanent interstate arrivals in Victoria came from New South Wales and Queensland; 66.9 per cent of permanent interstate arrivals in New South Wales came from Victoria and Queensland and 72.5 per cent of permanent interstate arrivals in Queensland came from New South Wales and Victoria. Based on Elazar's reasoning, strong migration flows between these three populous eastern seaboard states reinforce their cultural and political ties and help explain the strong flow of balanced coordinate citations between the supreme courts of the three states.

D *Reputation*

The reputation of a specific state supreme court may result in judges of other state supreme courts citing its case law more than they would otherwise.[96] While factors such as the size of a state's population and the reputation of its supreme court are interrelated, Caldeira found that in 1975, state courts of last resort in the United States cited the California Supreme Court more often than the size of its population or stock of precedent suggested should be the case, pointing to the existence of a reputation premium.[97] Harris found that over the period 1870 to 1970, the state Supreme Courts of California, Massachusetts and New York were cited more often than other state supreme courts, controlling for a host of factors including geographical proximity, population size, cultural linkages and the stock of legal precedent.[98] McCormick suggests that the dominant position of the Ontario Court of Appeal in the flow of coordinate citations in Canada reflects its 'longstanding reputation as a powerful court drawn from a very strong bar'.[99] He notes that in the early decades of the 20th century, the reputation of the Ontario Court of Appeal rivalled (and for some periods may even have exceeded) the Supreme Court of Canada itself.[100]

That the Supreme Court of Victoria and the Supreme Court of New South Wales have been large suppliers of coordinate citations throughout the 20th century undoubtedly reflects in part the reputation of these courts. Both Courts have always had well-respected benches drawn from a strong bar. New South Wales

95 Australian Bureau of Statistics, Cat No. 3412.0, Migration Australia, 2006–7.

96 Mott, above n 17 and Caldeira, above n 53.

97 Caldeira, above n 53.

98 Harris, above n 13.

99 McCormick, above n 3, 291.

100 Ibid, citing Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (1992) 93, 164, 181.

and Victoria have supplied a disproportionate number of High Court judges. H V Evatt served as Chief Justice of New South Wales following his retirement from the High Court. The Supreme Courts of Victoria and New South Wales have also had several strong judges who were never elevated to the High Court, but who nevertheless had outstanding reputations. For example, Sir Owen Dixon once stated that the failure to appoint Sir Leo Cussen (from Victoria) and Sir Frederick Jordan (from New South Wales) to the High Court were the two tragedies in the life of the Court.[101]

VI CONCLUSION

In the 21st century, the state supreme courts stand to play a vital role in making public policy across a broad set of issues.[102] Litigants no longer have a right of appeal from the state courts of appeal to the High Court so, except in the limited number of cases where the High Court grants special leave to appeal, the state courts of appeal are the final courts of appeal for matters brought within their jurisdiction.[103] While there is much research on state supreme courts in the United States from a social science perspective,[104] the state supreme courts in Australia remain comparatively under-researched. The purpose of this study was to begin to fill this gap by documenting and examining communication patterns between the state supreme courts and exploring alternative explanations for the form the conversation takes. Innovative policies diffuse in different forms between courts and legislatures.[105] Like their American counterparts, state supreme courts in Australia tend to choose the precedent of 'leaders' along a variety of dimensions.[106] The state supreme courts which are regarded as leaders and which exhibit a favourable balance of trade in coordinate citations are located in the more industrialised, urbanised and populous states and have reputations for judicial innovation reflected in the strength of their bar and bench. Consistent with the findings from studies for the United States, the present investigation documents that in Australia, legal precedent flows from the more industrialised, urbanised and populous states which have a larger stock of legal precedent to the states which rank lower along these dimensions.[107]

101 See Troy Simpson, 'Appointments That Might Have Been' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001).

102 Cf Caldeira, above n 43, 51–52.

103 For judicial recognition of this point in Western Australia, see *Re Full Board of the Guardianship and Administration Board* (2003) 27 WAR 475, [33] (Heenan J, Anderson, Steytler, Miller and McLure JJ agreeing). For discussion as to the effect of the special leave to appeal provision on the State Supreme Courts, see Sir Anthony Mason, 'The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal' (1996) 15 *University of Tasmania Law Review* 1; David Solomon, 'Controlling the High Court's Agenda' (1993) 23 *University of Western Australia Law Review* 33 and David Jackson, 'Leave to Appeal' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001).

104 For a review of much of the literature up to the mid-1990s, see Paul Brace and Aubrey Jewett, 'The State of State Politics Research' (1995) 48 *Political Research Quarterly* 643.

105 See Baum and Canon, above n 19.

106 Cf Caldeira, above n 14.

107 Ibid.