Path Dependency, the High Court, and the Constitution

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Path dependence is a concept that originally arose in the field of economics before gaining currency with political scientists and historians. The essence of path dependency is that temporality matters: once a decision is made, it often becomes "locked-in" and persists despite the existence of more efficient or otherwise better alternatives that could become apparent later. The tentative hypothesis advanced here is that the concept of path dependency is useful for understanding why some doctrines of Australian constitutional law have changed dramatically since first developed while others remain largely the same. An example of one arguably path-dependent line of doctrine and one arguably non-path-dependent line of doctrine are discussed and analysed to demonstrate the possibilities and limitations of the theory.

I. Introduction

Imagine that a lawyer jumped into a time machine with a copy of the *Constitution* and the newest constitutional law textbook. If she jumped back 60 years, or a 100 years, she would find that our copy of the *Constitution* matches up almost perfectly with one from the past, barring a handful of amendments. But our constitutional law textbook would prove quite different, even astonishingly so, when compared to one from an earlier age. Certain elements and core concepts would certainly be recognisable, but could someone from 1910 or even 1950 have predicted the legal and political dominance of the Federal Government, the application of doctrines like the implied freedom of political communication, or the roller-coaster ride of High Court jurisprudence on State excise taxes? The *Constitution* remains essentially the same, but constitutional law changes – sometimes dramatically.

Yet, to confuse and complicate the scenario, one can also easily find examples of High Court cases and doctrines that have remained in place, changing only cosmetically if at all, throughout the decades. The High Court's interpretation of the grants power, for example, is almost exactly the same today as it was in 1926[1] despite its contribution to the well-known problem of vertical fiscal imbalance. Continuity and change are both facets of constitutional law, but how could an observer explain (or predict) which will manifest in any particular strand? The concept of path dependence may hold some explanatory power.

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[1] See *Victoria v Commonwealth* (1926) 38 CLR 399.

[2] See Paul A David, "Clio and the Economics of QWERTY" (1985) 72(2) *American Economic Review* 332.

[3] A contested point in the economics literature. See SJ Liebowitz and Stephen Margolis, "The Fable of the Keys" (1990) 33 *Journal of Law & Economics* 1.

The tentative hypothesis advanced here is that the concept of path dependency is useful for understanding why some doctrines of Australian constitutional law have changed dramatically since first developed while others remain largely the same. The next part addresses path dependency in more detail. Part III provides an example of a High Court case that illustrates path dependency along with a second example that shows why path dependency is not inevitable. Part IV explores the role of path dependency in Australia's constitutional jurisprudence and discusses why particular features of its judicial system allow path dependency to have a stronger effect here than in countries like Canada or the United States. Part V offers some concluding thoughts.

II. Path Dependency

An excellent starting point to illustrate the concept of path dependency is a metaphor from Mark Roe that involves, quite literally, a path – a trail that eventually becomes a road:

> We are on a road and wonder why it winds and goes here instead of there, when a straight road would be a much easier drive. Today's road depends on what path was taken before. Decades ago, a fur trader cut a path through the woods, and the trader, bent on avoiding a wolves' den and other dangerous sites, took a winding indirect route. Were the fur trader a better hunter of wolves, the trader might have chosen a straighter path. Later travelers dragged wagons along the same winding path the trader chose, deepening the grooves and clearing away some trees. Travelers continued to deepen and broaden the road even after the dangerous sites were gone. Industry came and settled in the road's bends; housing developments went up that fit the road and industry. Local civic promoters widened the path and paved it into a road suitable for today's trucks.[4]

Roe continues the metaphor by asking what should be done with the road now. Its placement is inefficient because today, there is no need to fear the wolves' den of centuries past: a new, simple straight road would no doubt shave minutes off of everyone's driving time, and this benefit would last for future drivers in perpetuity. But, to straighten the road would necessitate tearing out much of the old road, razing housing developments, altering intersections, and more. Under what Roe calls "semi-strong form path dependence", observers *know* the road is sub-optimal but decide it is better to leave it in place because the costs of doing anything about it outweigh the potential benefits.[5] Under "strong-form" path dependence, however, it *would* be worth it in the long-run to straighten the road, but the sunk costs fallacy and behavioural inertia are enough to keep people from doing anything about it.[6]

The concept of path dependence arose in the field of economics to help explain why arguably inferior technologies, just like inferior roads, sometimes triumph over their better competitors: QWERTY keyboards over Dvorak keyboards, VHS videotapes over Betamax, and DOS-based computers over Macs.[7] The concept was eventually carried over to explain other seeming discrepancies, such as why (fairly homogenous) American beers dominate the United States (US) market despite the existence of better-crafted alternatives, or why many physicians were slow to take up electronic medical record-keeping despite the obvious advantages it holds over paper records.[8] The reason why one narrow geographical location might receive the lion's share of a country's activity in a particular industry (like Hollywood for American movies, or Silicon Valley for technology) might be explained through path

[4] Mark J Roe, "Chaos and Evolution in Law and Economics" (1996) 109 *Harvard Law Review* 641, 643.

[5] See Roe, n 4, 648 ("once a society has invested in its institutions, it has many reasons not to change them radically, or at all, because the costs of change might outweigh any advantages from change.").

[6] See Roe, n 4, 650. Roe also discusses "weak-form" path dependence in which one standard is adopted but that standard is not appreciably more or less efficient than its competitors. This type holds historical explanatory value, but is not important in a present-day decision-making sense. See 647. A similar discussion of different types of path dependency can be found in Lawrence B Solum, "Constitutional Possibilities" (2008) 83 *Indiana Law Journal* 307, 313-314 (citing SJ Liebowitz and Stephen E Margolis, "Path Dependence, Lock-in, and History" (1995) 11 *Journal of Law, Economics, and Organization* 205).

[7] See Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics" (2000) 94(2) *American Political Science Review* 251, 254.

[8] See William Barnes et al, "Old Habits Die Hard: Path Dependency and Behavioral Lock-in" (2004) 38(2) *Journal of Economics Issues* 371, 374–376.

dependency,[9] as could questions of public policy such as the development of agricultural policy in the European Union or public housing reform in the United Kingdom.[10]

In order for path dependency to have robust application as an explanatory concept, it needs to be more than simply a vague proxy for the commonsense intuition that "history matters". A key part of path dependency is the idea of increasing returns processes. Political scientist Paul Pierson explains it well:

> In an increasing returns process, the probability of further steps along the same path increases with each move down that path. This is because the *relative* benefits of the current activity compared with other possible options increase over time. To put it a different way, the costs of exit – of switching to some previously plausible alternative – rise. Increasing returns can also be described as self-reinforcing or positive feedback processes.[11]

Characteristics of an increasing return process include "nonergodicity" (small, even random or accidental events at the beginning of a path create consequences down into the future), inflexibility (it becomes increasingly harder to shift out of the path), and potential inefficiency compared to untaken alternatives.[12] To return to the road metaphor, the chance encounter of the fur trader with the wolves' den illustrates nonergodicity (his decision on what path to tread is not cancelled out by other intervening events); the fact that the trail becomes increasingly smooth and well-marked through repeated use illustrates inflexibility (and eventually other infrastructure is built with the assumption that the trail is fixed in its current location); and the hypothetical possibility of a new, straight road that would be faster for travellers illustrates potential inefficiency.

A term often used in the context of inflexibility is "lock-in". Lock-in refers to the fact that once a single decision is made, a host of smaller choices can follow that have the cumulative effect of making the original decision very hard to change.[13] If a consumer buys a VHS videocassette player, every purchase they subsequently make of a movie on VHS makes it less likely they will switch to Betamax (even if persuaded it is a somewhat better system) because they need to not just replace the player but also (perhaps) each of the videocassettes. A related concept, "behavioural lock-in", draws on human psychology: "once consumers or users have invested time or money in learning a particular system or becoming comfortable with a traditional practice, they will be less likely to try a rival process, even if over time it proves superior."[14] For example, in the 21st century, most Americans still think in terms of yards instead of metres, and miles instead of kilometres. Old habits die hard.

But if path dependence is a "real" phenomenon, how can anything change? If increasing returns or behavioural lock-in, for example, tend to keep a standard in place even if more efficient alternatives exist, why is it that sometimes standards *do* change? Why are electric cars (slowly) becoming more viable and less expensive despite over a century of infrastructure built with the gasoline engine in mind, or, to return to the measurements example, why did *most* countries that used the Imperial system (perhaps for centuries) eventually shift to metric? A viable theory needs to be able to explain its own limits.

For path dependency, different explanations may apply in different fields. Political scientists studying the development of institutions and policies, for example, often discuss two different models of change: (1) a "punctuated equilibria" model where an opportunity to change a long-established institution or policy is created by a sudden or dramatic external event (a national emergency, a political shake-up,

[9] See Pierson, n 7, 255.

[10] See citations in Adrian Kay, "A Critique of the Use of Path Dependency in Policy Studies" (2005) 83(3) *Public Administration* 553, 558.

[11] Pierson, n 7, 252.

[12] See Pierson, n 7, 253 (drawing from W Brian Arthur, *Increasing Returns and Path Dependence in the Economy* (University of Michigan Press, 1994) 112–113).

[13] See Taylor C Boas, "Conceptualizing Continuity and Change: The Composite-Standard Model of Path Dependence" (2007) 19(1) *Journal of Theoretical Politics* 33, 37 (discussing the mechanisms of lock-in in greater detail).

[14] Barnes et al, n 8, 372. See also John Bell, "Path Dependence and Legal Development" (2013) 87 *Tulane Law Review* 787, 794 ("[T]he basic idea is that we get used to something and organise the future, treating it as a fixed point. As a result, we compound the embeddedness of this feature of life. It becomes difficult to change direction. Both inertia and self-interest tend to lead to minimal change, even when, from an objective point of view, it becomes necessary.").

etc);[15] and (2) a "layering and conversion" model where the cumulative effect of very small changes over time gradually remake an institution or policy into something very different than what it was originally.[16] Pierson writes:

> [P]ath dependent analyses need not imply that a particular alternative is permanently locked in following the move onto a self-reinforcing path. Identifying self-reinforcing processes helps us understand why organizational and institutional practices are often extremely persistent – and this is crucial, because these continuities are a striking feature of the social world. Asserting that the social landscape can be permanently frozen is hardly credible, and that is not the claim. Change continues, but it is bounded change – until something erodes or swamps the mechanisms of reproduction that generate continuity.[17]

Until this point, this article has deliberately avoided any reference to how law could be impacted by path dependency, but the potential is clear. Constitutions are the most obvious example: once enacted, they become the legal foundation for everything else. Because constitutions are (usually) very difficult to change, particular mechanisms of governance or principles of legality that they set in place can persist for centuries even if later thought to be misguided or inefficient. The Electoral College created by the American *Constitution*, for example, is roundly criticised every four years as an undemocratic institution and has never been an influential model for the drafters of constitutions elsewhere in the world. The Electoral College, like the QWERTY keyboard, is not ideal: but both work *just* well enough that they are not replaced. They persist, despite the existence of better alternatives, because it is too difficult for people today to deviate from the path set by their long-dead ancestors.

The heart of the common law itself – the notion of precedent – is seen by some scholars in terms of path dependency.[18] Contrary to the evolutionary model favoured by many law and economics scholars, in which inefficient rules are eventually displaced by more efficient ones over time, a path-dependent view of precedent contests the idea that law inevitably "works itself pure". As Oona Hathaway explains:

> Applying path dependence theory to the law leads to both striking insights and troubling conclusions. It reveals, for example, that courts' early resolutions of legal issues can become locked-in and resistant to change. This inflexibility can lead to inefficiency when legal rules fail to respond to underlying conditions. Path dependence theory also indicates that final outcomes will be difficult to predict ex ante, because they are highly dependent upon early decisions, which are in turn difficult, if not impossible, to predict. The theory further suggest that the opportunities for significant change in a common law system are brief and intermittent, occurring during critical junctures when new legal issues arise or higher courts or legislatures intercede. Moreover, it leads to the unsettling conclusion that the order in which cases arrive in the courts can significantly affect the specific legal doctrine that ultimately results.[19]

If path dependence holds explanatory power in understanding common law doctrines, it will be even more robust in understanding constitutional jurisprudence: after all, the only things that can overrule a constitutional precedent is changed thinking from the highest court in the land or an amendment to the constitution itself. The hypothesis examined in this article is that particular features of High Court jurisprudence in Australia are best explained through the theory of path dependence. In the next part, two well-known doctrines from Australian constitutional law are briefly examined with a discussion of why one of them displays path dependence and the other does not.

III. Examples

A. Grants

A clear example of the concept of path dependency at work in Australian constitutional law can be found in the doctrine surrounding s 96, the grants power. The nearly limitless scope the High Court has

[15] See Ian Greener, "The Potential of Path Dependence in Political Studies" (2005) 25(1) *Politics* 62, 64.

[16] See Boas, n 13, 35 ("incremental changes in political institutions can cumulate into a fundamental transformation over time, even as increasing returns render an institution resistant to wholesale change at any given moment.").

[17] Pierson, n 7, 265.

[18] See especially Oona A Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2001) 86 *Iowa Law Review* 601. See also Bell, n 14; Roe, n 4; Michael J Gerhardt, "The Limited Path Dependency of Precedent" (2005) 7 *University of Pennsylvania Journal of Constitutional Law* 903.

[19] Hathaway, n 18, 605.

given to the grants power has allowed the Federal Government to offer money to the States: as much money as the Federal Government wants, when it wants, and with whatever conditions it wishes to attach. In practice, this has significantly contributed to the well-known phenomena of the "vertical fiscal imbalance":[20] although the States, constitutionally speaking, have plenary legislative powers while the Commonwealth has only enumerated ones, it is the latter that raises the bulk (80%) of the tax revenue[21] and thus makes the real policy decisions in any area it wishes, including vocational schools, health care, primary and secondary education, housing, and more.[22] Through the grants power and modern statutory mechanisms like the GST, the Commonwealth redistributes money to the States with strings attached, and the amount of money involved is so large that, realistically, no State can turn it down and forge its own course. A constitution designed with federalism in mind has instead turned towards centralisation, and a large part of the blame can be attached to the expansive interpretation that the High Court has given to the grants power.

Section 96 reads:

> During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

Section 96 is problematic in both conception and execution.[23] The first clause is simply a case of poor drafting, as it essentially states that Parliament can do a particular thing until it no longer wishes to do a particular thing; from a strictly legal perspective, everything before the comma could be omitted and the power given to Parliament would be exactly the same. As an aid to interpretation, however, those first words are vital: they show that the drafters assumed that s 96 would be a sort of transitional or emergency provision, allowing the Commonwealth to help the States through the disruptive effects of Confederation and other crises that may arise thereafter.[24] If the provision is envisioned as a mechanism for co-operative federalism rather than as a lever that the Commonwealth could pull to get the States to do whatever it wants, its interpretation can change accordingly. One could, just at first glance, plausibly read the provision as applying in only a narrow set of circumstances: such as when the States demonstrably need "financial assistance" or when the "terms and conditions" set by Parliament relate directly to the assistance that is being given.[25]

The discussion above is familiar to students of constitutional law. My purpose here is to show how the High Court's interpretation of the grants power, and the problems it has caused for federalism in modern Australia, can all be traced back to a single case from almost a century ago in a classic instance of path dependency: the *Federal Roads Case*.[26] Two remarkable things about the case are how short the Court's opinion is (just 56 words!) and how it pays absolutely no attention to the problems that would result.

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[20] See, eg, Robert Dalton, "The Adverse Attributes of Specific Purpose Payments in Australia" (2006) 10 *Southern Cross University Law Review* 43, 45 ("The inability of States to produce the revenue that they require, and their subsequent reliance on grants, has led to what is known as 'vertical fiscal imbalance', that is, minimal correlation between what governments earn and what they spend. In Australia's case, the Federal Government uses tied grants to influence State spending decisions.").

[21] See Shipra Chordia, "Section 96 of the Constitution: Developments in Methodology and Interpretation" (2015) 34 *University of Tasmania Law Review* 54, 54–55.

[22] See Chordia, n 21, 56 ("the majority of [specific purpose grant] funding has the effect of influencing Commonwealth objectives in areas of State constitutional responsibility.").

[23] See Cheryl Saunders, "Towards a Theory for Section 96: Part II" (1988) 16 *Melbourne University Law Review* 699, 699 ("[S]ection 96 is conceptually flawed, and therefore sits uneasily with the constitutional principles on which the *Constitution* is based and with other provisions of the *Constitution* itself."); Greg Taylor, "On the Origin of Section 96 of the Constitution" (2016) 39 *University of New South Wales Law Journal* 1438, 1438 ("In so many ways Australian federalism has been a study in unintended consequences – never more so, perhaps, than in relation to section 96 of the federal *Constitution*.").

[24] See Enid Campbell, "The Commonwealth Grants Power" (1968) 3 *Federal Law Review* 221, 225 ("When section 96 was drafted no attempt was made to fetter Parliament in its prescription of terms or conditions, but it was generally assumed that Parliament would use its discretion sparingly and that grants under section 96 would be exceptional.").

[25] See, eg, Taylor, n 23, 1461–1462; Campbell, n 24, 223.

[26] *Victoria v Commonwealth* (1926) 38 CLR 399.

The case involved federal legislation designed to give States a certain amount of money, on the condition that they use it to build specific roads. Obviously, there is no "Roads" head of power in the *Constitution*, so unless another head of power is plausibly invoked the effort could be seen to fall outside the legislative competence of the Commonwealth and therefore be invalid. The plaintiffs, two States arguing for invalidity of the legislation, argued that s 96 could not be used to "attach as conditions to its grant any conditions which amount in substance to the exercise of any legislative power which is not within s. 51 of the *Constitution*".[27] The Commonwealth defended itself by reference to the defence power (arguing that better roads meant the easier sell of exports, which in turn was needed to pay off war debts from World War I) and the immigration power (suggesting that better roads were needed to lure settlers from Great Britain in an explicit invocation of the White Australia policy, because otherwise "such policy will be difficult to maintain against outside pressure unless the population of Australia is largely increased by suitable migration").[28]

But the High Court did not want to hear about heads of power, and even cut off the Commonwealth's barrister just one sentence into his oral argument.[29] According to the High Court in its *per curiam* opinion, the answer was easy:

> The Court is of opinion that the *Federal Aid Roads Act* No. 46 of 1926 is a valid enactment. It is plainly warranted by the provisions of sec. 96 of the *Constitution*, and not affected by those of sec. 99 or any other provisions of the *Constitution*, so that exposition is unnecessary. The action is dismissed.[30]

Rarely in Australian legal history has such a momentous decision been communicated in such a pithy manner. There is no attempt to limit the decision to the precise facts in front of the court, to link the decision to the purported heads of power supporting the legislation (however dubious the defence and immigration rationales seem in isolation), or to acknowledge that although the decision may be justified on the bare words of s 96, there will be serious consequences for the federal nature of Australia if the Commonwealth uses its "new" power without restraint.

However, the point here is not whether the *Federal Roads Case* was correctly decided, but instead (as will be seen) that every subsequent decision on the scope of the grants power followed along with the principle established in that case.

This first becomes apparent 13 years later when the High Court next entertained a case involving s 96.[31] Instead of building roads, in *Moran's Case* the Commonwealth sought to nationalise prices on flour and wheat in order to stabilise the markets and subsidise wheat farmers.[32] This was achieved by a tax on flour and wheat, which would then be redistributed to the States for disbursement to its farmers.[33] But because Tasmania was the only State that had to import wheat, special dispensation had to be made for it in the scheme.[34] Because the Commonwealth's power over taxation does not allow it to discriminate between States, a separate piece of legislation was passed under s 96, enabling the Commonwealth to essentially refund all the money collected in Tasmania back to Tasmania.[35] In other words, this was constitutional formalism: each State was taxed to the same degree to satisfy the taxation head of power, but one State received more money back under the grants power.

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[27] *Victoria v Commonwealth* (1926) 38 CLR 399, 405 (as summarised by headnote). The connection to the defence power seems tenuous, but a more plausible argument along the same lines could perhaps have invoked the interstate trade head of power (depending on where the road construction was in relation to state borders and the flow of commerce).

[28] *Victoria v Commonwealth* (1926) 38 CLR 399, 404.

[29] See *Victoria v Commonwealth* (1926) 38 CLR 399, 406.

[30] *Victoria v Commonwealth* (1926) 38 CLR 399, 406.

[31] *Deputy Federal Commission of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735.

[32] See *Deputy Federal Commission of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735, 752–773 (describing the scheme).

[33] See *Deputy Federal Commission of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735.

[34] See *Deputy Federal Commission of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735, 754–755.

[35] See *Deputy Federal Commission of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735, 756–757.

The High Court, with Latham CJ writing for the majority, found no constitutional impediment to this legislative manoeuvre. In regards to s 96, Latham wrote:

> The words of this section show that Parliament may grant financial assistance to a single State under this power and may therefore discriminate between States in making grants. They also show that the Parliament has the fullest power of fixing the terms and conditions of any grant under the section. … [T]he case of *Victoria v. The Commonwealth* (the *Roads Case)* is conclusive … upon this point.[36]

Whether s 96 allowed for discrimination between the States was an open question, and the High Court could have qualified the power it had given the Commonwealth. But already, the *Federal Roads Case*, despite its incredible brevity and failure to discuss its reasoning, had become a fixed point for judicial interpretation of s 96. The path of unfettered federal power was set by the *Federal Roads Case*, and this case about taxation and a subsidy scheme on wheat would have to follow it.

The effect of path dependency in this context reaches its most visible and startling point with the *First Uniform Tax Case*.[37] Under this well-known case, the Commonwealth successfully gained total control over income taxation in Australia by making it practically impossible for the States to stay in the field.[38] It did this through a complex statutory scheme, but a key enabler was s 96: the Commonwealth would levy income taxes and return some of it to a State as a grant, on the condition that the State abolish its own income taxes.[39] Here is the famous statement by Latham CJ that:

> The *Grants Act* offers an inducement to the State Parliaments not to exercise a power the continued existence of which is recognized – the power to impose income tax. The States may or may not yield to this inducement, but there is no legal compulsion to yield.[40]

This "temptation is not compulsion"[41] rationale underlies everything the Commonwealth has done with the grants power ever since. There is never a *legal* requirement that the States give up income taxation or accept federal policy intervention in education, aged care, health care, and many other sectors. There is no stick, just a carrot so large and juicy that it cannot possibly be refused.[42] When the Commonwealth tells a State that every school must have a flag pole or it will lose out on all primary and secondary school funding for the year, those flag poles get built![43] When some States balked at the notion that all public school chaplains must have religious affiliations, those States fell in line quickly when the Commonwealth threatened to cancel chaplaincy grants altogether.[44] At least in the *First Uniform Tax*

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[36] *Deputy Federal Commission of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735, 763 (Latham CJ). There was one dissenting opinion in the case, as Evatt J attacked the "very thinly disguised … breach of the provision against discrimination" and suggested that s 96 should be interpreted to have expired. See 778, 803.

[37] *South Australia v Commonwealth* (1941) 65 CLR 373.

[38] See *South Australia v Commonwealth* (1941) 65 CLR 373, 405 (Latham CJ) ("This Act, it is said, makes it practically impossible for any State to impose a State tax upon income.").

[39] See *South Australia v Commonwealth* (1941) 65 CLR 373, 416 (Latham CJ).

[40] *South Australia v Commonwealth* (1941) 65 CLR 373, 417 (Latham CJ).

[41] *South Australia v Commonwealth* (1941) 65 CLR 373.

[42] See Jonathan Crowe and Peta Stephenson, "Reimagining Fiscal Federalism: Section 96 as a Transitional Provision" (2014) 33 *University of Queensland Law Journal* 221, 226 ("Conditional grants made by the Commonwealth to the states under s. 96 are theoretically 'consensual,' in that the states are under no legal obligation to accept them. However, in practice and as a result of Australia's vertical fiscal imbalance, the states have little choice but to accept these grants and the conditions attached."); Chordia, n 21, 55–56 ("while the High Court has proscribed legal compulsion, it has not prohibited the Commonwealth from making s. 96 grants in practical circumstances, frequently of the Commonwealth's own design, that have left the States no real choice but to accept.").

[43] See Dalton, n 20, 60–61 (discussing 2004 *Schools Quadrennial Funding Agreement*).

[44] See Chordia, n 21, 56–57. School chaplaincy is a perfect example of the distortion caused by the Court's interpretation of s 96. Twice, Ron Williams went to the High Court to have federal funding of school chaplaincy invalidated as unconstitutional. Twice, he won. See *Williams v Commonwealth (No 1)* (2012) 248 CLR 156; [2012] HCA 23; *Williams v Commonwealth (No 2)* (2014) 252 CLR 416; [2014] HCA 23. But in response to the defeats, the Commonwealth simply changed from directly funding school chaplaincy to indirectly funding it through a s 96 grants scheme. Nothing has changed in practice. The words of AJ Myers, although written 50 years ago, are on point: "But about the whole subject [of the grants power] there is an air of unreality. Not only are the legal powers of the Commonwealth ample, but as the dominant government of the federation it [can] now ensure the

Case, the High Court acknowledged how the unrestricted scope it has given to s 96 could distort, damage, and ultimately undermine the system of federalism envisioned by the *Constitution*.[45]

The *First Uniform Tax Case* was decided in 1941, during the darkest days of Australia's participation in World War II, and much of the discussion in the case centred around the defence power and the necessity of Commonwealth control over revenue and expedition to aid in the war effort. In the middle of the 1950s, the scheme was challenged again by States hoping that a peacetime High Court would reach a different result. But instead, the *Second Uniform Tax Case*[46] reiterated the High Court's full support for an unrestricted interpretation of s 96. Dixon CJ's opinion is important for present purposes, because it demonstrates how strong of a hold the *Federal Roads Case* had on the issue despite subsequent qualms by members of the High Court. Dixon CJ writes:

> There has been what amounts to a course of decisions upon s. 96 all amplifying the power and tending to a denial of any restriction upon the purpose of the appropriation or the character of the condition. The first case decided under s. 96 was [the *Federal Roads Case*]. The enactment there in question … did not express its reliance on s. 96 either in terms or by reference to the grant of financial assistance. … The validity of the legislation was upheld by this Court as authorised by s. 96. This means that the power conferred by that provision is well exercised although (1) the State is bound to apply the money specifically to an object that has been defined, (2) the object is outside the powers of the Commonwealth, (3) the payments are left to the discretion of the Commonwealth Minister, (4) the money is provided as the Commonwealth's contribution to an object to which the State is also to contribute funds.[47]

Crucially, Dixon CJ notes that:

> If s. 96 came before us for the first time for interpretation, the contention might be supported … that the true scope and purpose of the power which s. 96 confers upon the Parliament … did not admit of any attempt to influence the direction by the State of its legislative or executive powers. It may well be that s. 96 was conceived by the framers as (1) a transitional power, (2) confined to supplementing the resources of the Treasury of a State … when some special or particular need or occasion arose, and (3) imposing terms or conditions relevant to the situation which called for special relief or assistance[.] *But the course of judicial decision has put any such limited interpretation of s. 96 out of consideration*.[48]

The "course of judicial decision" Dixon CJ is referring to is later explicitly noted as starting with the *Federal Roads Case*,[49] and other members of the Court invoked it as decisive authority as well.[50]

In her examination of the grants power, Cheryl Saunders wrote about the *Federal Roads Case* that:

> It has been relied upon as the first step on an inexorable path to a conclusion that a grant of financial assistance under section 96 can be used to induce a State to refrain from exercise its powers … It has been the foundation case on which the edifice of argument has been built in relation to every issue.[51]

The High Court's interpretation of the grants power that started with the *Federal Roads Case* may not be the right one, but it is far too late now to change things.[52] This "cavalier and dismissive" opinion that

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fulfilment of its polices in any event by extra-legal means." AJ Myers, "The Grants Power Key to Commonwealth State-Financial Relations" (1969–1970) 7 *Melbourne University Law Review* 549, 566.

[45] See *South Australia v Commonwealth* (1941) 65 CLR 373, 429 (Latham CJ) ("It is perhaps not out of place to point out that the scheme which the Commonwealth has applied to income tax of imposing rates so high as practically to exclude State taxation could be applied to other taxes so as to make the States almost completely dependent, financially and therefore generally, upon the Commonwealth.").

[46] *Victoria v Commonwealth* (1957) 99 CLR 575.

[47] *Victoria v Commonwealth* (1957) 99 CLR 575, 605–606.

[48] *Victoria v Commonwealth* (1957) 99 CLR 575, 609.

[49] See *Victoria v Commonwealth* (1957) 99 CLR 575, 610.

[50] See *Victoria v Commonwealth* (1957) 99 CLR 575, 656 (Fullagar J), 659 (Taylor J).

[51] Cheryl Saunders, "Towards a Theory for Section 96: Part I" (1987) 16 *Melbourne University Law Review* 1, 29–30.

[52] See Crowe and Stephenson, n 42, 222 ("There is, of course, no real chance of either the Commonwealth Parliament or the High Court treating s. 96 as a spent provision. It is too deeply entrenched in federal arrangements."); Myers, n 44, 559 ("It is settled law that section 96 is a permanent part of the *Constitution*. Equally well settled is that few, if any, limits can be set on the power of the Commonwealth to impose terms and conditions.").

"prematurely rigidif[ied] the development of the law concerning the grants power" cannot be easily undone.[53] It is safer to follow the "course of judicial decision". As with keyboards and QWERTY, it is often easier to keep going on the wrong path than to start over on the right one.

B. Interstate Trade and Commerce

If path dependency in the High Court's constitutional law jurisprudence can be exemplified with its approach to the grants power, the mirror opposite situation can be found with its history of interpreting s 92 of the *Constitution*. Section 92 provides in relevant part that "trade, commerce, and intercourse among the States … shall be absolutely free". In the famous quote by Robert Garran, a hypothetical law student trying to understand the High Court's first several decade of case law on the meaning of s 92 may as well "close his notebook, sell his law books, and resolve to take up some easy study, like nuclear physics or higher mathematics".[54] And to be clear, the reason is not because (like advanced physics and mathematics) the material requires high intellectual ability and rigorous logical reasoning skills, but instead because the Court's cases were, to put it kindly, an absolute mess. From the first case on s 92 in 1909[55] until a landmark change of direction in 1988,[56] the cases involved "extraordinary twists and turns of legal doctrine"[57] that were "fraught with disagreement and instability"[58] became "a judicial labyrinth"[59] and "caused many a judge … to give forth with a judicial *cri de coeur* that could not possibly be provoked by any other part of our body of law".[60] Indeed, the approximately 140 cases on s 92 decided during this period[61] means that it was probably the most frequently litigated provision in the *Constitution*.[62]

Everything started off fine. The High Court was unanimous in finding a violation of s 92 in its first case on the subject, 1909's *Fox v Robbins*.[63] The facts were about as simple as they could get: Western Australia legislation allowed vendors to sell liquor made with fruit grown in the state for a license that cost two pounds a year, but a license to sell liquor made with fruit grown outside the state cost a vendor *fifty* pounds a year.[64] All five members of the Court, writing seriatim, said the problem was the adverse differential treatment of interstate trade compared to intrastate trade. As Griffith CJ wrote, "This provision would be quite illusory if a State could impose disabilities upon the sale of the products of other States which are not imposed upon the sale of home products."[65] The other members of the Court agreed that this was the core defect in the law.[66]

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[53] Graham Fricke, "The Knox Court: Exposition Unnecessary" (1999) 27 *Federal Law Review* 121, 125, quoted in Chordia, n 21, 60 fn 42.

[54] Robert Garran, *Prosper the Commonwealth* (1958) 415, quoted in *Cole v Whitfield* (1988) 165 CLR 360, [20] (itself quoting LaNauze, *Absolutely Free*, 58).

[55] *Fox v Robbins* (1908) 8 CLR 115.

[56] *Cole v Whitfield* (1988) 165 CLR 360.

[57] Michael Coper, "Interstate Trade and Commerce, Freedom of" in Tony Blackshield et al (eds), *The Oxford Companion to the High Court of Australia* (OUP, 2001) 354.

[58] Amelia Simpson, "Grounding the High Court's Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone" (2005) 33 *Federal Law Review* 445, 446.

[59] Gozalo Villalta Puig, "A European Saving Test for Section 92 of the Australian Constitution" (2008) 13 *Deakin Law Review* 99, 100.

[60] Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 139.

[61] Andrew S Bell, "Section 92, Factual Discrimination and the High Court" (1991) 20 *Federal Law Review* 240, 240.

[62] PD Connolly, "Cole v Whitfield – The Repeal of Section 92 of the Constitution" (1991) 16 *University of Queensland Law Journal* 290, 290.

[63] *Fox v Robbins* (1908) 8 CLR 115.

[64] See *Fox v Robbins* (1908) 8 CLR 115, 118.

[65] See *Fox v Robbins* (1908) 8 CLR 115, 119–120 (Griffith CJ).

[66] See *Fox v Robbins* (1908) 8 CLR 115, 123 (Barton J) ("To impose one charge on the sale of the wines of other States, while allowing the sale of Western Australian wines at another and a lower fee, is discrimination of a kind which if lawful in this case

If path dependency had taken root with *Fox v Robbins*, as it did in regards to the grants power in the *Federal Roads Case*, the next several decades of s 92 case law would be very different. The primary question in each case would have been whether there was adverse discriminatory treatment towards interstate trade that thus favoured local, in-state traders – in other words, protectionism. And as with any judicial "test" of validity, one could imagine occasional hard cases and interesting questions about the difference between a law having a discriminatory purpose and it having discriminatory effects. But the through-line would be the presence or absence of adverse discrimination, and one could expect the courts to gradually give content and meaning to that standard in various factual scenarios.

Unfortunately, for generations of Australian law students, this is not what happened, of course. Within a decade of deciding *Fox v Robbins*, the High Court fractured and lost sight of adverse discrimination as the test for s 92.[67] In 1920's *McArthur's Case*,[68] for example, the Court invalidated a Queensland anti-profiteering law that set maximum prices for which certain products could be sold – and the maximum price was the same whether the goods were produced locally or imported from out of state. There was not, at least on the face of things, any attempt at protectionism at play, but a majority of the Court said the problem was simply that the law directly affected interstate trade (the movement of goods across state lines for sale), and that violated s 92's command that interstate trade "be absolutely free".[69] The fact that local products and out-of-state products were treated in the same way could not save the law.[70]

This view of s 92, often called the "individual rights" approach because it focused on whether an individual interstate trader was burdened by a State law,[71] was only one of several competing methods of interpretation that the Court and its various members would bounce back-and-forth between in succeeding years, with confusion only added by repeated interference from the Privy Council.[72] As one scholar explained, "The answer to the query as to which theory applie[d], was that no theory applied and all theories applied. No theory enjoyed majority support but behind majority outcomes all theories were used, from time to time, to support individual conclusions in particular cases."[73]

The High Court would not manage to extricate itself from this morass until the landmark decision in *Cole v Whitfield*[74] announced a new standard that every member of the Court agreed on: whether suspect legislation had discriminatory effects of a protectionist kind against interstate trade. In many ways, the new standard is simply an elegant elaboration of the principle at work in *Fox v Robbins*,[75] but the

is lawful in a thousand others – for this is a question of power. By burdens of this kind and that, whether under the name of licence fees or under any other name, the operation of inter-state free trade could be so hampered and restricted as to reduce the *Constitution* in that regard to mere futility."); 126 (O'Connor J) ("It is clear that the *Constitution* does not permit a State by such discriminating charges to place at a disadvantage the goods of other States passing into it for sale."); 127 (Isaacs J) ("Sec. 92 of the *Constitution* … prevents adverse discrimination from being lawful; so far as the Act can be effectively worked in conformity with the constitutional requirement it still stands; so far as it cannot it simply ceases to operate."); 131 (Higgins J) ("This [differential license fee] involves a discrimination in favour of Western Australian products, and an infringement of the provision of se. 92 of the *Constitution*[.]"). See also Coper, n 57, 354 ("The very early cases were consistent with the idea that a state should not erect protectionist barriers – whether in the form of monetary imposts or broader measures – against the trade of another state.").

[67] See Gerard Carney, "The Re-interpretation of Section 92: The Decline of Free Enterprise and the Rise of Free Trade" (1991) 3 *Bond Law Review* 149.

[68] *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530.

[69] See *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530.

[70] See *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 552 ("[A] State cannot enact [a] prior restraint on inter-State trade, commerce and intercourse, whether it attacks inter-State trade, commerce and intercourse alone, or in company with its own domestic trade and commerce. … [T]he State cannot annul the protection given by sec. 92 by mingling the subject matter beyond its control with matter lawfully under its control.").

[71] See Zines, n 60, 141.

[72] The clearest history of this frankly exhausting morass is in Zines, n 60.

[73] Richard Cullen, "Section 92: Quo Vadis" (1989) 19 *University of Western Australia Law Review* 90, 109 (listing five different approaches).

[74] *Cole v Whitfield* (1988) 165 CLR 360.

[75] Compare Simpson, n 58, 447 ("After many decades of disagreement, the Court has in relatively recent times cemented section 92's status as a non-discrimination norm.").

decision has been (almost[76]) universally hailed as finally bringing clarity and order to a chaotic field of jurisprudence while simultaneously adhering to the framers' original intentions in including s 92 in the *Constitution*.[77]

The natural question that arises from this narrative is: why did *Fox v Robbins* not stick? Why did it take almost 80 years of the High Court wandering in the juridical wilderness of s 92 before returning very close to where it first started? If path dependency means anything, why did the Court so quickly and easily move on from the first case interpreting the section? The next part attempts to answer some of these questions.

IV. Analysis

Earlier, this article summarised various facets of path dependency as articulated in the economics and political science literature. Here, in the context of the examples (s 96 grants and s 92 interstate trade) discussed above, two of these concepts will be examined: (1) opportunity and exit and (2) lock-in and reliance. The reasoning that follows is necessarily tentative and speculative, but will hopefully illustrate some of the factors that affect why path dependency is often, but not always, seen at play in Australian constitutional law.

A. Opportunity and Exit

One of the hallmarks of a path dependent process is that deviating from the originally chosen course is difficult because the costs of exiting the current paradigm and switching to an alternative usually become higher the longer the status quo continues. But in some path dependent processes, exiting the current paradigm is not an option that is always available at any given time (even if desired). For example, if the Federal Government suddenly decided every employee should start using a Dvorak keyboard, it is going to have to wait for a dramatic ramp-up in production of those keyboards before it can make the switch. In other words, one cannot exit from a fixed path unless there is an opportunity to do so.

For Australian constitutional law, a part of understanding the effects of path dependency may involve these concepts of exit and opportunity. Specifically, the thesis here is that path dependency will be less likely to take hold in areas of constitutional law that are heavily and frequently litigated. The High Court cannot decide cases in the absence of adverse parties, and some provisions of the *Constitution* are naturally going to generate far less controversy than others. But each case the Court does have before it is an opportunity to exit the current paradigm; the more opportunities, the higher the likelihood of exit at some point in the course of jurisprudence.

This perhaps can be seen at work in the two examples discussed above. By 1988, there had been over 140 High Court and Privy Council cases discussing s 92,[78] compared to a mere handful discussing s 96. Every one of those 140 cases was an opportunity to "exit" from the discrimination standard used in *Fox v Robbins*, and every one of those cases was also an opportunity to propose, distinguish, and dissent from the variety of other theories that different members of the Court had as to what the guarantee in s 92 meant. If true, the next logical question is: why did s 92 generate far more cases than s 96? A possible argument is that s 92 is a provision that, if invoked successfully, directly affects the bottom line of those businesses and corporations with the economic resources necessary to mount an expensive constitutional challenge. In contrast, s 96 cases rarely generate standing for private interests and the very same States receiving monetary grants from the Federal Government are unlikely to challenge the constitutionality of those grants in court.

The reason that the sheer number of cases generated by a provision matters is that those provisions that generate future cases create fewer opportunities for the High Court to deviate from an established

[76] There have been some dissenters. For example, see the stringent opposition provided by Connolly, n 62, 293.

[77] See, eg, Bell, n 61, 240 ("The High Court's bicentennial contribution of *Cole v Whitfield* was warmly received by constitutional commentators, descending, in the colourful language of one, as some sort of judicial *deus ex machina*.") (quoting PH Lane, "The Present Test for Invalidity under s.92 of the Constitution" (1988) 62 ALJ 604, 614).

[78] See *Cole v Whitfield* (1988) 165 CLR 360, [8].

judicial standard; there are fewer opportunities for Justices to evaluate how the standard is working, fewer opportunities for dissenting judges to argue for different judicial tests, fewer opportunities for persuasive barristers to make subtle factual distinctions and cleverly distinguish prior cases, and, perhaps most importantly, fewer opportunities for lower courts to make decisions in hard cases that the High Court then has to resolve. The old adage is that "hard cases make bad law", but hard cases also often generate *new* law. But without cases, the High Court cannot make law – and without opportunity, it cannot exit from its original course of action.

It may be useful in this context to contrast the High Court of Australia with the Supreme Court of the United States. The High Court decides only a handful of constitutional cases every year, and particular provisions of the *Australian Constitution* may go decades without being meaningfully discussed. In contrast, the Supreme Court decides dozens of constitutional cases every year, and the federal circuit and district courts (not to mention state courts) decide, quite literally, thousands more. There is going to be much, much more grist for the judicial mill in the United States and thus far more opportunities, if the Supreme Court wants them, to announce a change in direction. In Australia, by contrast, opportunities are sometimes few and far between.[79]

By understanding each new case as an opportunity for exit, one can also begin to consider, in a legal context, the discussion in the path dependency literature about how exit can take place through two very different methods: (1) punctuated equilibria and (2) layering and conversion. When most people think of the classic common law, slowly changing and evolving over time to incorporate new problems into new understandings of legal rules, that paradigm follows the layering and conversion model. Observers might expect, over decades and centuries of cases on a particular topic, for the law to end up in a very difference place than it started, even if each individual change was relatively small in itself. It might also be expected that constitutional provisions that are frequently litigated would also follow this layering and conversion model, but that provisions rarely litigated would be more likely to change (if they change at all) suddenly and dramatically. However, this is not what one sees with s 92 – the discrimination standard in *Fox v Robbins* did *not* gradually evolve through interpretation in dozens of cases over decades – instead, it was almost summarily abandoned, and a host of contested theories vied for dominance in a slew of confusing cases and shifting court majorities. If anything, the s 92 jurisprudence followed the punctuated equilibria model when *Cole v Whitfield* "wipe[d] the slate clean".[80] This complication challenges a direct overlay of path dependency to constitutional law, and invites further analysis of whether and to what degree the concepts developed in other contexts are applicable here.

B. Lock-in and Reliance

One of the metaphors for a path dependent process known as "lock-in" used at the beginning of this article was that as a trail becomes a path and a path becomes a road, development builds up around it. Eventually the burdens of changing the road's course become so high that, even if the realisation eventually comes that the current situation is not ideal, it is just too late to go back and start another route. This metaphor can be applied to the concept of a "reliance interest" that is sometimes see invoked in judicial conversations about the importance of *stare decisis*: individuals, governments, and social groups have a right to know what the law "is" and to rely on its relative stability when making decisions.[81] This

[79] Compare, eg, the voluminous case law in the United States on the meaning of the Free Exercise and Establishment Clauses with the mere handful of cases in Australia on the same subjects. Although many have argued that the High Court's interpretation of s 116 in the *DOGS Case* has rendered the establishment clause an almost meaningless standard, there have been no opportunities for the Court to exit from the rule announced in that case, even if it wanted to.

[80] Bell, n 61, 240.

[81] See, eg, Murray Gleeson, "The Centenary of the High Court: Lessons from History" (Speech delivered before the Australian Institute of Judicial Administration, 3 October 2003). For a more general overview, see Randy J Kozel, "Precedent and Reliance" (2013) 62 *Emory Law Journal* 1459. A good example of perceived reliance interests affecting High Court decision-making in the constitutional law context can be found in the lengthy debate over whether state "licensing schemes" for alcohol and tobacco sales ran afoul on the s 90 prohibition on excise taxes. See, eg, Niclolee J Dixon, "Section 90 – Ninety Years On" (1993) 21 *Federal Law Review* 228. Of course, the High Court seized the opportunity when the States themselves invited the issue to be revisited in *Ha v New South Wales* (1997) 189 CLR 465.

concern over the impact of overturning settled expectations sometimes manifests as a greater reluctance to depart from precedent when more than just the discrete parties before the court would be affected. Similarly, decisions that announce new standards that have only prospective effects on behaviour are usually viewed as less problematic than new standards that would have retroactive effects.

This concept of a reliance interest may help explain why path dependency takes hold in some lines of jurisprudence but not others. In the context of the two examples used throughout this article, one might argue that, although changing the interpretation of "absolutely free" in s 92 creates some disruption for interstate traders and State legislatures, businesses large enough to afford litigation in the High Court are usually resilient enough to adapt to changing regulations and that States generally have a variety of methods at their disposal to attain their policy goals. In contrast, when talking about the grants power, imagine if the High Court suddenly announced that the *Federal Roads Case* was wrongly decided, and that the Court was going to instead adopt the more constitutionally faithful but also more restrictive interpretation of s 96 urged by many scholars critical of the vertical fiscal imbalance. There would be extreme and widespread disruption in sectors of the economy as crucial as health, education, social services, and more – not to mention the damage done to the current GST scheme. Such a result is almost unthinkable, which militates towards the idea that if change is ever to happen in regards to the grants power, it will come through gradual "layering and conversion" – not through the type of sudden change contemplated by the "punctuated equilibria" model.

But in any event, the larger point is that when courts discuss the reliance interest generated by *stare decisis* as a reason to stay the course, this can be understood, through the lens of path dependency, as a way of saying that lock-in is in effect. The costs of changing – which may be costs to the prestige, reputation, and political capital of the court – are just too high to be seriously contemplated.

V. Conclusion

This article has argued that the concept of path dependency operative in economics and other social science literature may have particular value in explaining certain features of Australian constitutional law. Specifically, the concept helps illuminate why early cases are of such great importance in determining the future of a line of jurisprudence, while also clarifying when deviations are likely to occur. Characteristic facets of path dependency, including lock-in and exit, can be related to and complicate the law's own invocation of concepts like *stare decisis* and the reliance interest.

The concept of path dependency could potentially be fruitfully applied to other aspects of law. For example, one could apply the concept in a statutory context and query whether the persistent refusal of some states to adopt the well-regarded Uniform Evidence Bill is an instance of path dependency, with antiquated State legislation persisting due to the difficulty in getting judges and practitioners to adopt something new ("behavioural lock-in"), just like retraining employees is a bar to the widespread adoption of the Dvorak keyboard.[82] Similarly, one might apply the concept to legal education and ask whether the "Priestly 11" has created a situation of lock-in that results in the core curriculum of most Australian law schools looking substantially the same through decades of change in the society (and legal profession) around them.

The preliminary nature of the thesis that path dependency has explanatory power in constitutional law must be kept in mind. Surely, additional examples need to be generated that do and do not seem to fit the model to see if it remains plausible. If path dependency *is* at work in Australian constitutional law, the importance of careful positioning and presentation of early litigation is even more crucial: since the *Constitution* is so hard to change, the first decision on an issue, whether right or wrong, may become "locked-in" for generations to come, with ramifications for all of us.

[82] The author is grateful to Dr Andrew Hemming for this example.