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## The Constitutionality of Same-Sex Marriage in Australia (and Other Related Issues)

Augusto Zimmermann

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*Symposium on Whether  
Legalization of Same-Sex Marriage  
Is Constitutionally Required—2012*

III.

INTERNATIONAL AND  
COMPARATIVE PERSPECTIVES ON  
CONSTITUTIONAL MANDATES FOR  
SAME-SEX MARRIAGE

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# The Constitutionality of Same-Sex Marriage in Australia (and Other Related Issues)

Augusto Zimmermann\*

## ABSTRACT

*The issue involving the constitutionality of same-sex marriage in Australia is about which level of government can legislate on the subject of marriage under the distribution of powers provided by the Constitution. The country has an express provision in the Constitution granting Federal Parliament the power to pass laws on the subject of marriage and other correlating issues. Hence, an amendment to the Marriage Act was enacted in 2004 so as to define marriage as the union between one man and one woman to the exclusion of all others. Firstly, this paper analyzes whether the Federal Parliament has the authority under the Constitution to legislate on same-sex marriage. Secondly, the paper discusses whether any Australian state could grant a right for same-sex couples to engage in marriage that is not recognized under the federal law.*

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I. INTRODUCTION

Section 51 of the Australian Constitution provides the Commonwealth (i.e., federal) Parliament with the authority to pass legislation on the subject of marriage. In 2004, the Commonwealth Parliament enacted the Marriage Amendment Act 2004,<sup>1</sup> defining marriage as the union between one man and one woman to the exclusion of any other arrangement. Australia’s express constitutional provisions indicate that the Marriage Amendment Act is legally valid, thus precluding any state or territory from introducing other same-sex marriage acts.

The advocates of same-sex marriage have not challenged the federal amendment to the Marriage Act<sup>2</sup> in court. Rather, they have continued to push for same-sex rights at the state and commonwealth levels. Naturally, any state law legalizing same-sex marriage would probably force the matter before the High Court of Australia. Moreover, if a State introduced same-sex marriage legislation, such legislation would almost certainly be struck down by the High Court. As a matter of fact, as I shall also explain in this paper, perhaps not even the Commonwealth Parliament itself is allowed under the provisions of the Australian Constitution to introduce legislation that authorizes same-sex marriage.

This article is therefore focused on a legal discussion about the constitutionality of legislation that provides for same-sex marriage in Australia, so that no conclusion will be drawn on the morality or justness of the issue. This being the case, I propose to explain why the Australian Federal Parliament has the power to pass any law dealing

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1. *Marriage Amendment Act 2004* (Cth) sch 1 (Austl.).  
2. *Marriage Act 1961* (Cth) (Austl.).

with the subject-matter of marriage. Such law would supersede contradictory state or territory law each time the matter of inconsistency arises. Under the Marriage Amendment Act 2004, the federal law has explicitly defined marriage as the union between a man and a woman to the exclusion of any other alternative. The existence of this provision implies that the Australian states have no power to legislate for same-sex marriages. Consequently, if any Australian state or territory passes a same-sex-marriage law, such an act must be struck down by the High Court as inconsistent with the federal legislation.

## II. THE AUTHORITY OF FEDERAL PARLIAMENT TO LEGISLATE ON MARRIAGE

The Commonwealth Constitution allocates the areas of federal legislative power in sections 51 and 52, with these powers being either concurrent with the States or exclusive. Furthermore, the federal Parliament has express and implied incidental powers to deal with any areas of law related to its own grants of power. Accordingly, the Commonwealth can enact laws with respect to “matters incidental to the execution of any power vested by this Constitution in the Parliament,” and it can also legislate on any matters which are incidental to the central purpose of any of its express heads of power.<sup>3</sup>

When a power to legislate on one or more topics is concurrently held by both the commonwealth and the states, as it is found with most grants of power conferred by section 51 of the Constitution, section 109 provides a solution to the problem: “the [federal law] shall prevail, and the [State] law shall, to the extent of the inconsistency, be invalid.” This inconsistency is said to arise whenever a State law cannot be obeyed at the same time as a commonwealth law,<sup>4</sup> when the federal law allows something that a state law prohibits,<sup>5</sup> or when a federal law

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3. The distinction between the express incidental power of s 51(xxxix) and the implied incidental power was referred to in *Gazzo v Comptroller of Stamps* (1981) 149 CLR 227, 236 (Austl.). There, Gibbs CJ explained that the express incidental power concerns matters which are incidental to the execution of one of the other substantive heads of constitutional power, while the implied incidental power concerns matters which are incidental to the subject matter of a substantive head of power. *Id.* Together they enable the parliament to make any law which is directed to the aim or object of a substantive head of power, and any law which is reasonably incidental to its complete fulfilment. See EITHNE MILLS & MIRKO BAGARIC, *FAMILY LAW* 12 (2d ed. 2005).

4. *Mabo v Queensland* (1988) 166 CLR 186 (Austl.).

5. *Colvin v Bradley Bros. Pty. Ltd.* (1943) 68 CLR 151, 158 (Austl.).

confers a right or immunity that the state law seeks to remove.<sup>6</sup> Furthermore, inconsistency may occur when the “cover the field” test is applied—meaning that a federal law, either expressly or impliedly, evinces the intention of being the only law applicable to the specific area of law, i.e., that it intends to “cover the field” on a particular area of law.

The areas listed in sections 51 and 52 of the Australian Constitution confer the federal Parliament with legislative power over forty specific areas, including marriage section 51. Since the *Engineers’* case in 1920,<sup>7</sup> the High Court has traditionally adopted a centralist approach to the interpretation of federal powers, thus reading the enumerated powers of the Commonwealth rather expansively.<sup>8</sup> As such, a federal law is often upheld by the High Court as being a law with respect to a subject matter of section 51 even if it also concerns matters falling within state residuary power.<sup>9</sup>

### III. MARRIAGE AMENDMENT ACT 2004 (CTH): WHY IT DOES NOT EXCEED THE COMMONWEALTH POWER

The Constitution provides the Federal Parliament, in section 51, with the power to “make laws for the peace, order, and good government of the Commonwealth with respect to . . . marriage.” As indicated above, the federal law is still binding upon all the States even if a state law conflicts with the former, since section 109 determines that “when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”

On May 27, 2004, then Prime Minister John Howard introduced a bill into Federal Parliament with the explicit intention of preventing the recognition of same-sex marriage in Australia. Later in that year, the Federal Parliament passed the Marriage Amendment Act 2004

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6. *Clyde Eng’g Co. Ltd. v Cowburn* (1926) 37 CLR 466, 491 (Austl.).

7. *Amalgamated Soc’y of Eng’rs v Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129, 171 (Austl.).

8. *Polyukhovich v. Commonwealth* (1991) 172 CLR 501, ¶12 (“[T]he grants of legislative power contained in s 51 [which includes marriage] be construed with all the generality which the words used admit and be given their full force and effect.”).

9. See *Murphyores Inc. Pty. Ltd. v Commonwealth* (1976) 136 CLR 1, 22 (Austl.); *Actors & Announcers Equity Ass’n v Fontana Films Pty. Ltd.* (1982) 150 CLR 169, 184, 193–94 (Austl.); *Commonwealth v Tasmania* (1983) 158 CLR 1, 151, 270 (Austl.); *Alexandra Private Geriatric Hosp. Pty. Ltd. v Commonwealth* (1987) 162 CLR 271, 279 (Austl.).

(Cth), which had the effect of amending the Marriage Act 1961 in several substantial respects.<sup>10</sup> In section 5(1), the Amendment inserted a text determining that “[marriage] means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.” At the end of section 88B, the amendment added: “(4) To avoid doubt, in this Part (including section 88E) marriage has the meaning given by subsection 5(1).” And lastly, after section 88E, the amendment stated: “Certain unions are not marriages. A union solemnized in a foreign country between: (a) a man and another man; or (b) a woman and another woman; must not be recognized as a marriage in Australia.”

The definition of marriage has been statutorily defined ever since. The statutory definition as provided by federal legislation means that, to be lawful in Australia, a marriage has to be solemnized in accordance with the provisions of section 5(1) of the Marriage Act, which recognizes the institution of marriage as only “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.” A paraphrase of the same definition is located in section 46(1) of the same act, which then declares the following:

[B]efore a marriage is solemnized by or in the presence of an authorized celebrant, not being a minister of religion of a recognized denomination, the authorized celebrant shall say to the parties, in the presence of the witnesses, the words: “I am duly authorized by law to solemnize marriages according to law. Before you are joined in marriage in my presence and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter. Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

The federal “marriage power” derived from the text of the Constitution extends to the regulation of marriage and all other correlated matters. To be a law with respect to marriage, it is therefore sufficient that the law deals with the circumstances or things that may, either directly or indirectly, affect the institution of “marriage” as qualified by the federal legislation. Accordingly, once the Commonwealth has explicitly defined the meaning of the institution of marriage, any state law that conflicts with the definition provided by federal law shall be held invalid to the extent of any inconsistency. In other words, any attempt by a state parliament to introduce legislation providing for

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10. *Marriage Amendment Act 2004* (Cth) sch 1 (Austl.).



same-sex marriage will almost certainly be declared constitutionally invalid by the High Court on the grounds of conflicting with sections 5 and 46(1) of the federal Marriage Act. This is obvious insofar as the federal law evinces a clear intention to “cover the field” and ban same-sex marriage. As Katy A. King correctly explains:

[I]t is clear that Parliament had an intention to cover the field with the addition of specific language defining marriage. The Marriage Act 1961 was fully functional and operational prior to the Amendment in 2004, which sought only to limit the definition of marriage to cover unions between a man and a woman. The existence of the amendment itself is a strong indication of Parliament’s intent. The provisions added to the Marriage Amendment Act that expressly prohibit recognition of same-sex marriages solemnized in other nations is an indication that Parliament intended to prohibit any same-sex marriage solemnized in Australia as well. The Commonwealth’s legislative intention to cover the field gives strong indication that the High Court will determine that section 109 applies; any state laws that attempt to define marriage as other than between a man and a woman will be invalidated.<sup>11</sup>

Since the Australian Constitution allows the Federal Parliament to enact legislation to both regulate and protect marriage, it would be imprudent for supporters of same-sex marriage to force a judicial determination on the constitutional validity of the Marriage Amendment Act. After all, it seems evident that the amendments are constitutionally valid and that any judicial challenge to the Act could lead to the further clarification of the plenary power of Federal Parliament to exercise its express authority to regulate on marriage and family. As a matter of fact, such challenge could potentially result in the Australian states being further precluded from creating laws which provide same-sex couples with legal benefits that are either equal or similar to those granted to heterosexual couples.<sup>12</sup> Indeed, as King points out:

[A] ruling upholding the legality of the Marriage Amendment Act

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11. Katy A. King, *The Marriage Amendment Act: Can Australia Prohibit Same-Sex Marriage?*, 16 PAC. RIM L. & POL’Y J. 137, 162 (2007).

12. Naturally, same-sex marriage is not the only way same-sex couples may obtain equal rights vis-à-vis married heterosexual couples. There are other and perhaps more viable options than “marriage” for legal recognition under state and federal laws of same-sex relations. As a matter of fact, the law in Australia already provides equal benefits for both same-sex and heterosexual couples in a great variety of different ways. Indeed, both federal and state laws currently provide same-sex couples a status which is basically the same as that provided for married couples under nearly all aspects of the law, including property transfers and superannuation.

from the High Court would not only eliminate same-sex marriage at the commonwealth level, but also eliminate same-sex marriage at the state level. Section 109 of the Australian Constitution likely prevents individual states and territories from legalizing same-sex marriage, as commonwealth legislation supersedes any conflicting state legislation. A ruling upholding the commonwealth's exclusive jurisdiction on marriage could lead to legislation that even further curtails equality of same-sex couples.<sup>13</sup>

Unlike the United States Constitution, the Australian Constitution does not contain an equal rights provision such that same sex marriage advocates could use to argue the Marriage Amendment Act is not constitutionally valid. This Constitution is entirely devoid of a bill of rights because its framers believed that a federal constitution, which brings about a division of power in actual practice, would be a more secure protection for basic political freedoms than a bill of rights.<sup>14</sup> Since we are dealing with a federal document of considerably limited powers, the Commonwealth Parliament has only the powers explicitly granted by the Constitution, and no more. One such power is the power of Commonwealth Parliament to make laws with respect to marriage and divorce.

In this sense, there is nothing in the text of the Australian Constitution that would prevent the Federal Parliament from passing legislation prohibiting same-sex marriage. Because of the framer's perception that a bill of rights could be used as a pretext for the expansion of federal powers, including the federal judicial powers, Sir Anthony Mason, then Chief Justice of the High Court of Australia, explained that "[t]he prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens . . . was one of the unexpressed assumptions on which the Constitution was drafted."<sup>15</sup> Under the system of government established in the country, one proceeds on the assumption of full individual rights and liberty, and then turns to the positive law just to see whether there are any exceptions to the general rule. After comparing this constitutional model with the American one, the late Australian constitutional lawyer W. Anstey Wynes commented:

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13. King, *supra* note 11, at 140.

14. Harry Gibbs, *A Constitutional Bill of Rights*, in Ken. Baker, AN AUSTRALIAN BILL OF RIGHTS: PRO AND CONTRA, 325 (1986).

15. *Australian Capital Television Pty. Ltd. v. Commonwealth* (1992) 177 CLR 106, 136.

The performance of the Supreme Court of the United States has become embroiled in discussions of what are really and in truth political questions, from the necessity of assigning some meaning to the various “Bill of Rights” provisions. The Australian Constitution . . . differs from its American counterpart in a more fundamental respect in that, as the . . . Chief Justice of Australia [Sir Owen Dixon] has pointed out, Australia is a “common law” country in which the State is conceived as deriving from the law and not the law from the State.<sup>16</sup>

Naturally, since the Federal Parliament has the authority to define marriage so as to exclude same-sex marriage, arguably this power could also be extended to further protect its own definition of the institution. This would be done through, among other things, new legislation which would prohibit the states from enacting same-sex legislation that mimics heterosexual marriage. State laws which then provided alternative arrangements for the federal regulation and definition of marriage would be invalid on the grounds of inconsistency with the federal law.

To achieve their goal, the advocates of “marriage equality” should not attempt to get the states to introduce same-sex marriage legislation. Rather, the best approach is to convince the federal government to further amend the federal Marriage Act 1961 so that at this time same-sex marriage can be legalized at federal level. Curiously, this would by no means represent a guarantee of ultimate victory for such advocates, since the method of interpretation traditionally adopted by the courts in Australia may actually require an amendment to the Constitution for the legalization of same-sex marriage.

#### IV. WHY THE COMMONWEALTH MAY NOT HAVE THE POWER TO LEGALIZE SAME-SEX MARRIAGE

On September 19, 2012, the House of Representatives overwhelmingly voted against federal legislation that would have legalized same-sex marriage in Australia. Just forty-two members of Parliament (MPs) supported the private member’s bill put forward by Labor backbencher Stephen Jones, while ninety-eight MPs voted against. MPs from the Labor minority government were given a conscience vote on the legislation, whereas Coalition (Liberals/Nationals) MPs were expected to follow the party’s position on the issue—not supporting any

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16. WILLIAM ANSTEY WYNES, *LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA* vii (1955).

change to marriage laws. As a result, all Coalition MPs and a significant number of Labor MPs, including Prime Minister Julia Gillard, voted against the bill.<sup>17</sup> On the following day it was the time for the Senate to vote on a separate bill, co-sponsored by four Labor Senators.<sup>18</sup> The Senate joined the House of Representatives by also voting down this proposed legislation, the final vote being twenty-six in favour and forty-one against.<sup>19</sup>

The debate about same-sex marriage has prompted an auxiliary discussion regarding whether the Federal Parliament has authority under the constitution to legalize same-sex marriage. Of course, it is undeniably within the limits of this Parliament to pass legislation that provides for the definition of marriage in its traditional terms.<sup>20</sup> And yet, it is not entirely clear if the Federal Parliament could legislate otherwise, since the word “marriage” may actually need to be interpreted in the same way as it was interpreted when the Australian Constitution was enacted. Indeed, the High Court of Australia has repeatedly confirmed its own traditional understanding that the meaning of a given word should remain fixed as it was established at the time the legal text was enacted. According to the “orthodox rules” of Australian legal interpretation that are both established and traditionally adopted by the High Court, “the essential meaning which constitutional terms had as at the date when the constitution was enacted in 1900 . . .”<sup>21</sup> According to Professor Jeremy Kirk:

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17. Curiously, ten of the seventeen Cabinet Ministers in the lower house, plus Greens MP Adam Bandt, and three independent MPs, (Andrew Wilkie, Rob Oakeshott and Craig Thomson) voted for the legislation. See *Lower House Votes Down Same-Sex Marriage Bill* ABC NEWS (Sept. 19, 2012), <http://www.abc.net.au/news/2012-09-19/same-sex-marriage-bill-voted-down/4270016>; see also *Gay Marriage Bill Defeated*, THE AGE (Sept. 19, 2012), <http://www.theage.com.au/national/gay-marriage/bill-defeated-20120919-266a8.html>.

18. Labor Senators: Trish Crossin, Carol Brown, Gavin Marshall and Louise Pratt.

19. The Senate is also considering another bill to legalize same-sex marriage. Sponsored by Greens Senator Sarah Hanson-Young, this bill will be left on the table until there is enough support in Parliament to see it passed. Simon Cullen, *Australian Senate Votes Down Same-Sex Marriage Bill*, ABC NEWS (Sept. 21, 2012), [www.abc.net.au/news/2012-09-20/an-senate-votes-down-second-bill/4272428](http://www.abc.net.au/news/2012-09-20/an-senate-votes-down-second-bill/4272428); see also *Gay Marriage Bill Defeated in Senate*, THE AUSTRALIAN (September 20, 2012), <http://www.theaustralian.com.au/news/breaking-news/lib-senator-breaks-ranks-for-gay-marriage/story-fn3dxiwe-1226477960806>.

20. The traditional definition of marriage is that given by Lord Penzance in *Hyde v Hyde* as “the voluntary union for life of one man and one woman, to the exclusion of all others.” *Hyde v Hyde* (1866) FAM LR 1 P & D 130, 133 (Aust.).

21. Geoffrey Lindell, *Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey—North America and Australasia*, 30 SYDNEY L. REV. 27, 38 (2008); *King v Jones* (1972) 128 CLR 221, 229 (Austl.); *Bonser v La Macchia* (1969) 122 CLR 177 (Austl.); *Attorney-Gen. (Vic) ex rel. Black v Commonwealth* (1981) 146 CLR 559, 578 (Austl.).

The Australian literalist orthodoxy falls within the realm of originalism . . . [which] indicates that constitutional words are to be given their full, natural or literal meaning as understood in their textual and historical context . . . Provisions are to be understood according to their essential meaning at the time they were enacted in 1900.<sup>22</sup>

This is obviously a question that involves principles of constitutional interpretation and how the courts should interpret the meaning of a constitutional term or provision. Of course, the interpretation of a law varies from individual judge to individual judge, according to his or her own jurisprudential approach. In other words, how a judge decides a case depends greatly on the way in which he or she interprets the law that must be applied to the case. While there are several competing theories regarding legal interpretation, the search for legislative purpose is generally said to be the only one that provides the historical evidence of what was, in actual fact, the real intention of the legislator. This being so, in the *Cross-Vesting Case* Justice McHugh commented that “[t]he starting point for a principled interpretation of the Constitution is the search for the intention of the makers.”<sup>23</sup> Such “intentionalism” is commonly called originalism, and it may be described as a method of interpretation which aims at discovering the original meaning of the legal text. It does so by critically observing and analyzing the “intention” to be gathered from the law. Originalism thus rests on the general assumption that the intention of the legislator is a fundamental tool to legal interpretation. Such method looks to the historical evidence of what was, in actual fact, the intention of the legislator and not merely to the letter of the law.

In Australia, traditional principles of legal interpretation rest on a literal-originalist approach that concentrates on the essential meaning that the term possessed as of the date the law was enacted.<sup>24</sup> As a matter of fact, in their standard commentary on the Australian Constitution, John Quick (one of the drafters of the Constitution) and Robert Garran (who played a significant role in the Australian federation movement) comment that the intention of the framers was to prevent the Federal Parliament from expanding its limited and specified powers at

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22. Jeremy Kirk, *Constitutional Interpretation and a Theory of Evolutionary Originalism*, 27 FED. L. REV. 323, 324–25 (1999).

23. *Re Wakim; Ex parte McNally* (Cross-Vesting Case) (1999) 198 CLR 511, 551 (Austl.).

24. See Lindell *supra* note 21.

its own convenience by simply changing the meaning of the words of the Constitution. As stated by them:

Every power alleged to be vested in the National government, or any organ thereof, must be affirmatively shown to have been granted. There is no presumption in favour of the existence of a power; on the contrary; the burden of proof lies on those who assert its existence, to point out something in the Constitution which, either expressly or by necessary implication, confers it. Just as an agent, claiming to act on behalf of his principal, must make out by positive evidence that his principal gave him the authority he relies on; so Congress, or those who rely on one of its statutes, are bound to show that the people have authorized the legislature to pass the statute. The search for the power will be conducted in a spirit of strict exactitude, and if there be found in the Constitution nothing which directly or impliedly conveys it, then whatever the executive or legislature of the National government, or both of them together, may have done in persuasion of its existence, must be deemed null and void, like the act of any other unauthorized agent.<sup>25</sup>

Also in their standard commentary, Quick and Garran provide the original meaning of the term “marriage” as properly understood by the framers of the Australian Constitution:

Marriage is a relationship originating in contract, but is something more than a contract. It is what is technically called a status, involving a complex bundle of rights, privileges, obligations, and responsibilities which are determined and annexed to it by law independent of contract. According to the law of England a marriage is a union between a man and a woman on the same basis as that on which the institution is recognized throughout Christendom, and its essence is that it is (1) a voluntary union, (2) for life, (3) of one man and one woman, (4) to the exclusion of all others.<sup>26</sup>

The search for original meaning is commonly recognized in Australia as the starting point for matters of legal interpretation.<sup>27</sup> Strict originalism, as Professor Jeffrey Goldsworthy indicates, is motivated “by a proper respect for people in the present—namely, the electors of Australia and their elected representatives, who, pursuant to [section] 128 of the [Australian] *Constitution*, have exclusive authority to change

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25. JOHN QUICK & ROBERT RANDOLPH GARRAN, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* 795 (1901).

26. *Id.* at 608.

27. See King, *supra* note 11, at 154.

their own *Constitution*.”<sup>28</sup>

Accordingly, originalism may be applied to determine whether the federal Parliament would have the power to legislate on same-sex marriage. In 1901, the word “marriage” meant the “voluntary union for life between one man and one woman to the exclusion of all others.”<sup>29</sup> If such interpretation were to be accepted today, this would effectively deny the Federal Parliament the power to legislate for same-sex marriages, since such determination would be regarded as going outside of the scope of the term’s original meaning.<sup>30</sup> Indeed, as Professor Geoffrey Lindell points out:

At the time of federation the meaning of the term ‘marriage’ most commonly acknowledged was that contained in the cases which refused to recognise foreign polygamous marriage because such unions did not satisfy the traditional meaning of marriage now explicitly embodied in the *Marriage Act* 1961 (Cth). Not surprisingly this will make it difficult for the Court to accept that same-sex marriages now come within the meaning of the term “marriage” in [section] 51(xxi) of the Commonwealth Constitution—a view that has already attracted some judicial support.<sup>31</sup>

Under the traditional principles of Australian legal interpretation, the meaning of a word is limited to what the word meant at the time the legal text was enacted. Thus, not even the Federal Parliament would have the authority under the Constitution to redefine the institution of marriage, but rather only the power to reinforce such a meaning—namely, the one that does not encompass same-sex relations. Therefore, as Professor Lindell also explains, it is very likely that the term “marriage” was already confined to unions between persons of the opposite sex, with such a term being consequently defined as a “union of a man and a woman to the exclusion of all others” even before it was amended in 2004.<sup>32</sup> “The amending legislation was designed to put this beyond any doubt.”<sup>33</sup>

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28. Jeffrey Goldsworthy, *Constitutional Law: Interpreting the Constitution in Its Second Century*, 24 MELB. U. L. REV. 677, 683 (2000).

29. *Re Wakim; Ex parte McNally* (Cross-Vesting Case) (1999) 198 CLR 511, 553 (Austl.).

30. King, *supra* note 11, at 154. See also Dan Meagher, *The Times Are They a-Changing?: Can the Commonwealth Parliament Legislate for Same Sex Marriages?*, 17 AUSTL. J. FAM. L. 1, 3 (2003) (“If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages . . .”).

31. Lindell, *supra* note 21, at 39 (footnote omitted).

32. See *id.* (discussing the origin of the proposed definition).

33. *Id.* at 42.

As can be noted, one significant issue derived from the consequences of “originalism” is whether it is constitutionally valid for the Federal Parliament to legalize same-sex marriage.<sup>34</sup> Again, in 1900, “the word ‘marriage’ meant a union of a man and a woman—and this would almost certainly have been regarded as an essential part of the connotation, and not merely the denotation, of the word.”<sup>35</sup> Such interpretation would exclude the Federal Parliament from legislating for same-sex marriages.

The issue seems rather simple, but it is actually far more complicated than one might expect; for Goldsworthy also reminds us that it is actually “possible to make a respectable argument consistent with originalism that leads to the opposite conclusion.”<sup>36</sup> An originalist approach may embrace a non-literalist approach that, as such, could regard any future developments as being “unanticipated by the founders.”<sup>37</sup> In this sense, the example of the American Constitution may be provided. Goldsworthy reminds us that the American Constitution gives Congress the power to raise “Armies” and a “Navy.”<sup>38</sup> Of course, the Air Force is not mentioned because such a branch of the military forces was unknown at the time the Constitution was drafted.<sup>39</sup> However, since the underlying purpose was to give Congress the exclusive power to raise and regulate *all* the nation’s military forces, the Congress has been allowed to legislate on the Air Force.<sup>40</sup>

According to Goldsworthy, an analogous originalist argument could be mounted to conclude that the Australian Federal Parliament can legislate for same-sex marriages.<sup>41</sup> The term “marriage” would

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34. Goldsworthy, *supra* note 28, at 699.

35. King, *supra* note 11, at 150 n.106 (quoting Goldsworthy, *supra* note 28, at 699).

36. *Id.*

37. Goldsworthy, *supra* note 28, at 699.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 699–701. The same point is made by Lindell:

But even the orthodox approach is tempered by two major considerations. The first is that even that approach concentrates on the *essential* rather than *non-essential* meaning of terms. Secondly, it has long been acknowledged that there is a need to interpret constitutional powers broadly, given the difficulty of amending the Constitution and the need to ensure that it adapts to the new developments not foreseen by the framers. To take a hypothetical example, if the Commonwealth Parliament had been given the power to legislate with respect to ‘transportation’, new forms of transportation not contemplated at the time the power was first conferred, whether in the Constitution as originally enacted or as subsequently amended, would still be treated as coming within that power. Actual examples can be drawn from the power to make



therefore be interpreted as being wide enough to encompass same-sex marriage, a proposition that Goldsworthy notes has already been contemplated by some Australian judges and scholars, “some of whom subscribe to the orthodox principles of constitutional interpretation.”<sup>42</sup> It would be argued in such a case that some words of the Constitution “fail to give effect to their intended purpose,” so that such words could “be expanded or contracted in a simple and obvious way in order to remedy the failure.”<sup>43</sup> As a result, a court could eventually be justified in expanding the meaning of a legal term so as to encompass analogous or unpredictable situations that were not envisaged by the drafters of the legislation.

As Moens and Trone similarly point out, “[o]ne question which has not been clarified is whether the Commonwealth Parliament may legislate in a manner which departs substantially from th[e] traditional definition [of marriage].”<sup>44</sup> Former High Court judges have, in obiter dicta, expressed their personal opinions on the matter. Justice Brennan, for example, once argued that it is “beyond the powers of the Commonwealth Parliament to legislate for any other form of marriage besides that encompassed by its traditional definition.”<sup>45</sup> Conversely, Justice McHugh has adopted a much broader approach to the meaning of marriage:

Thus, in 1901 “marriage” was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages, although arguably “marriage” now means, or in the near future may mean, a voluntary union for life between two *people* to the exclusion of others.<sup>46</sup>

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laws with respect to ‘postal, telegraphic, telephonic, and other like services’ in [section] 51 (v) in relation to radio and television broadcasting and now almost certainly the internet as well.

What is different about the changes that may have occurred in relation to same-sex marriages is that those changes relate to cultural and social values in contrast to changes which involved scientific developments and inventions.

Lindell, *supra* note 21, at 38–39 (citation omitted).

42. Lindell, *supra* note 21 at 40. See also *Re Wakim; Ex parte McNally* (Cross-Vesting Case) (1999) 198 CLR 511, 553 (Austl.); *Singh v Commonwealth* (2004) 222 CLR 322, 343–344.

43. Goldsworthy, *supra* note 28, at 699.

44. GABRIËL A. MOENS & JOHN TRONE, LUMB, MOENS & TRONE’S THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA ANNOTATED 297 (8th ed. 2012).

45. *Id.*

46. *Re Wakim; Ex parte McNally* (1999) 198 CLR at 553 (Austl.). Likewise, the Full Court

According to Alastair Nicholson, a former family court judge, it is not entirely clear “whether, for the purposes of the *Constitution*, marriage should be given the meaning it had in 1901, when the *Constitution* came into effect, or in 1961, when the Marriage Act was passed, or whether it should have its contemporary, everyday meaning.”<sup>47</sup> For example, Michael Kirby, a former High Court Justice and an advocate of same-sex marriage, supports a “contemporary” approach to the Constitution which would set the document “completely free . . . from the intentions, beliefs and wishes of those who drafted it so that it is viewed by each succeeding generation of Australians with the eyes of their own times[.]”<sup>48</sup> Kirby advocates an “extreme and radical version of non-originalism, which concedes almost no relevance at all to either the *Constitution*’s original meaning or its founders’ intentions.”<sup>49</sup> Of course, his “living constitution” approach would allow the judicial elite to update the law in light of the “contemporary needs of society” as perceived by the courts.

Ironically, however, applied to its logical extreme, Kirby’s revisionist approach implies that the Federal Parliament has the power not just to create same-sex marriage but also to ban or prohibit it.<sup>50</sup> This would almost certainly be the case, because most grants of federal power enumerated in section 51, including the marriage power, are traditionally interpreted by the High Court as comprising “a plenary power, to be ‘construed with all the generality which the words used admit.’”<sup>51</sup> Indeed, the High Court has indicated that the words of the Constitution should be interpreted generously in the Commonwealth’s favor, meaning that this court would be likely to allow the Federal Parliament considerable discretion in defining the institution

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of the Family Court of Australia has supported an evolution in the definition of marriage in the context of today’s society:

[W]e think it plain that the social and legal institution of marriage as it pertains to Australia has undergone transformations that are referable to the environment and period in which the particular changes occurred. The concept of marriage therefore cannot, in our view, be correctly said to be one that is or ever was frozen in time.

*Attorney-Gen. (Cth) v Kevin* [2003] FamCA 94, ¶ 87.

47. Alastair Nicholson, *The Legal Regulation of Marriage*, 29 MELB. U. L. REV. 556, 563 (2005).

48. Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 MELB. U. L. REV. 1, 4 (2000).

49. Goldsworthy, *supra* note 28, at 679.

50. King, *supra* note 11, at 156.

51. *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 353 (Austl.) (citing *R v. Pub. Vehicles Licensing Appeal Tribunal* (Tas) (1964) 113 CLR 207, 225 (Austl.).

of marriage.

The ultimate question, however, relates on whether there might be “a sufficient connection between the law and the subject matter to be able to say that the law is one with respect to that subject matter.”<sup>52</sup> As mentioned earlier, section 51 gives plenary power to the Commonwealth to make laws with respect to marriage. Each of the heads of power in section 51 “can support not only laws which operate directly on the subject matter of the paragraph in question but also laws which do not operate directly but which can be seen as incidental to the power.”<sup>53</sup> Hence, it appears that the High Court would almost certainly construe the federal marriage power broadly and generally enough so as to provide the Federal Parliament with the power to legalize same-sex marriage.

In any case, the constitutional question is still unsettled and the opponents of same-sex marriage may embrace a literal-originalist approach that opposes any attempt towards the legalization of same-sex marriage. Given the ongoing push by the homosexual lobby for same-sex marriage, supporters of traditional marriage may opt for taking the definition of marriage out of the hands of Parliament and placing it directly in the hands of the people.

When considering the need for a referendum on the extent of section 51(xxi), it may be argued that “[t]he founding fathers recognised [sic] that the specified powers set out in the Constitution should not be immutable forever, but provided a mechanism in section 128 to ensure that any change to the powers set out in the Constitution should be subject to the will of the people and not the mere convenience of the Parliament from time to time.”<sup>54</sup> Arguing from this position, Neville Rochow has contended that any change in the institution of marriage should be considered by the Australian people by way of popular referendum, as provided in section 128 of the Constitution. According to him, legal uncertainty can only be bypassed by a referendum, and “a referendum is the only respectful way in which to treat the people by taking the matter to them.”<sup>55</sup>

A further alternative for the advocates of traditional marriage

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52. *Id.* at 353.

53. *Id.* at 352.

54. Senate Legal and Constitutional Affairs Legislation Committee, *Dissenting Report by Coalition Senators* (2012) 77 (Austl.).

55. *Inquiry into the Marriage Equality Amendment Bill 2010 Before the Senate Legal and Constitutional Affairs Legislation Committee*, 25 (May 3, 2012) (Austl.).

would be to ask Parliament to further amend the Marriage Act along the lines of the Flag Act 1953, which requires any change to the Australian National Flag to be approved by “a majority of all electors voting.”<sup>56</sup> According to James Bowen, a Victorian lawyer and former Crown Prosecutor, “[s]uch a referendum would be likely to ensure that the issue of significant change to a fundamental Australian institution was widely debated in the context of a federal election and not in a back-door manner of a vote on an amendment initiated by private Member’s bills.”<sup>57</sup>

#### V. ATTEMPTS BY THE AUSTRALIAN STATES TO LEGISLATE SAME-SEX MARRIAGE

The recent defeat of same-sex marriage legislation in Federal Parliament made its supporters shift their focus to legalizing it at the state level. Around Australia, a number of states and the Australian Capital Territory have considered bills to legalize state same-sex marriage. In Western Australia, for example, the Greens have announced their plan to introduce a same-sex marriage bill in the state parliament.<sup>58</sup> Such a bill will have little prospect of being passed, because the ruling (Liberal-Nationals) coalition does not support the proposal.<sup>59</sup>

In New South Wales, a same-sex bill has been prepared by a “cross-party working group” made up of Nationals MP Trevor Khan, Liberal MP Bruce Notley-Smith, the Greens Cate Faehrmann, Labor Penny Sharpe, and Sydney independent Clover Moore. It has been recently announced that all political party leaders—Liberal Premier Barry O’Farrell, Nationals Leader Andrew Stoner, and Labor Opposition Leader John Robertson—would allow their members to have a conscience vote on the proposed legislation.<sup>60</sup>

In Victoria, a same-sex marriage bill has been moved by the Greens

56. *Flags Act 1953* s 3(2)b. (Austl.).

57. James Bowen, *Same-Sex Marriage Is Not a Basic Human Right*, ENDEAVOUR FORUM INC. (Vict. Austl.), May 2012, at 9.

58. *Same-Sex Marriage Bill Set for Western Australia*, AUSTRALIAN MARRIAGE EQUALITY (Sept. 13, 2012), <http://www.australianmarriageequality.com/wp/2012/09/13/same-sex-marriage-bill-set-for-western-australia-advocates-say-momentum-unstoppable>.

59. Laura Tomlinson, *McGowan Leaves Door Open for Gay Marriage*, IN MY COMMUNITY (Oct. 5, 2012), <http://www.inmycommunity.com.au/news-and-views/local-news/McGowan-leaves-door-open-for-gay-marriage/7632927>.

60. Toby Mann & Sophie Tarr, *NSW Same-Sex Marriage Bill Likely to Pass*, THE AUSTRALIAN (Sept. 19, 2012, 4:58 PM), <http://www.theaustralian.com.au/news/breaking-news/nsw-to-draft-same-sex-marriage-bill/story-fn3dxiwe-1226477000596>.

MLC Sue Pennicuik into the State Legislative Council, which is similar to those recently introduced in Tasmania and South Australia.<sup>61</sup> However, Liberal Premier Ted Baillieu is not planning to allow a conscience vote.<sup>62</sup> Premier Baillieu reportedly opposes same-sex marriage, and the ruling Liberal-Nationals coalition “regard[s] marriage as a matter for the Commonwealth.”<sup>63</sup>

In Tasmania, there has been a much greater chance for a same-sex marriage bill to be passed. A recent bill, which was co-sponsored by Labor Premier Lara Giddings<sup>64</sup> and Greens leader Nick McKim, passed the Lower House (with all Labor members and all the Greens members voting for it) but it was defeated in the Upper House,<sup>65</sup> where the President of Chamber, independent member Sue Smith, expressed her opposition to same-sex marriage.<sup>66</sup>

Finally, in South Australia Upper House Greens member Tammy Franks has recently moved a same-sex marriage bill, which is co-sponsored by Labor MP Ian Hunter and Labor Premier Jay Weatherill. The Parliament is likely to debate the matter in early 2013, and Premier Weatherill has indicated that all Labor MPs will be allowed a conscience vote on the issue.<sup>67</sup>

The problem with these attempts to push for State-based same-sex marriage is that any such attempts would probably be subject to disallowance by the High Court were a challenge to be mounted. Section 51(xxi) of the Constitution explicitly provides the Commonwealth with

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61. Alex Dunkin, *Gay Marriage Bill Introduced in Victoria*, GAY NETWORK NEWS (June 6, 2012), <http://gaynewsnetwork.com.au/news/national/6977-gay-marriage-bill-introduced-in-victoria.html>.

62. Farrah Tomazin, *Premier Accused of Reneging on Gay Marriage Pledge*, THE AGE (Sept. 30, 2012), <http://www.theage.com.au/victoria/premier-accused-of-reneging-on-gay-marriage-pledge-20120930-26t0j.html>.

63. Terri M. Kelleher, *Labor/Greens Push for Same-Sex Marriage*, NEWS WEEKLY, Aug. 18, 2012, at 14.

64. Lara Giddings is ‘proud to be a founding member of Emily’s List,’ Labor’s radical feminist network which raises funds to support [pro-abortion] female Labor candidates,” and says that “the time has come to act decisively on this issue.” *Id.* at 14.

65. Matt Smith, *MPs Vow New Gay Unions Bid*, THE MERCURY (Sept. 29, 2012, 12:01 AM), [http://www.themercury.com.au/article/2012/09/29/362845\\_tasmania-news.html](http://www.themercury.com.au/article/2012/09/29/362845_tasmania-news.html).

66. Kelleher, *supra* note 63, at 14.

67. See Sarah Hanson-Young, *Tasmania Misses Marriage Opportunity*, GREENSMPS.ORG (Sept. 28, 2012), <http://bit.ly/10ynkU4> (citing Greens Senator Sarah Hanson-Young as also calling on the Labor Prime Minister not to challenge any “state-based same-sex marriage” law in the High Court); Mark Schlibs, *South Australia Takes Centre Stage in Gay-Marriage Debate*, THE AUSTRALIAN (Sept. 29, 2012, 12:00 AM), <http://bit.ly/14GrYod> (quoting Mr Hunter as saying the “Gillard government” is unlikely to challenge the law in the High Court).

the authority to make laws with respect to marriage. According to Goldsworthy, “[t]he purpose of granting power to the Commonwealth Parliament to legislate with respect to marriage was to make possible uniform national regulation of a vitally important legal relationship that underpins family life, child rearing, and therefore social welfare throughout the nation.”<sup>68</sup> Indeed, Quick and Garran explain that paragraphs xxi and xxii in section 51 were conceived by the Australian drafters out of a “sense of the desirability of uniform laws of marriage and divorce.”<sup>69</sup> For them, the main goal of such provisions was to enable the Commonwealth to abolish any conflicting state laws, and so establish “uniformity of legislation on subjects of such vital and national importance as marriage and divorce.”<sup>70</sup> The purpose was therefore to provide Federal Parliament with the authority to create a *legal code* with respect to marriage (and divorce), as explained by Justice Jacobs in *Russell v. Russell*:

The reason for their inclusion appears to me to be twofold. First, although marriage and the dissolution thereof are in many ways a personal matter of the parties, social history tells us that the state has always regarded them as matters of public concern. Secondly, and perhaps more importantly, the need was recognized for a uniformity in legislation on these subject matters throughout the Commonwealth. . . . Differences between the States in the laws governing the status and the relationship of married persons could be socially divisive to the harm of the new community which was being created.<sup>71</sup>

In *Russell* the court held that the marriage power of section 51 is not restricted by implications flowing from section 51, which deals with matters of divorce and marital causes.<sup>72</sup> In addition to matters of marriage, divorce, and parental rights, the Federal Parliament has incidental powers to protect and regulate marriage. There are two types

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68. Goldsworthy, *supra* note 28, at 700.

69. QUICK & GARRAN, *supra* note 25, at 608.

70. *Id.* at 610.

71. *Russell v Russell* (1976) 134 CLR 495, 546 (1976) (Austl.) (Family Law Act case).

72. *Id.* Under Section 51(xxii) the Commonwealth Parliament has the power to make laws with respect to “divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.” “Under this head of power,” Moens and Trone explain, “the Commonwealth Parliament may legislate with respect to the dissolution of marriage by divorce and annulment. The Commonwealth may also legislate with respect to other actions associated with marriage, such as petitions for judicial separation and restitution of conjugal rights. The Commonwealth may also legislate with respect to ancillary matters associated with divorce proceedings, that is, custody, maintenance, and property settlements. MOENS & TRONE, *supra* note 44, at 160.

of incidental powers related to the heads of powers enumerated in section 51: “express incidental power” and “implied incidental power.” The distinction between express incidental power and the implied incidental power was referred to by Chief Justice Gibbs in *Gazzo v Comptroller of Stamps (Vic)* (1981).<sup>73</sup> There he explained that while the express incidental power concerns matters that are incidental to the execution of any of the other substantive heads of power, the implied incidental power concerns matters which are incidental to the subject-matter of a substantive head of power.<sup>74</sup> Together they enable the Federal Parliament to make any law which is directed to the aim or object of a substantive head of power, as well as any law which is reasonably incidental to its fulfilment.<sup>75</sup> Hence, in *Attorney-General for Victoria v Commonwealth*, the High Court upheld the validity of provisions prohibiting bigamy as a matter intrinsically related to the validity of marriage.<sup>76</sup>

As referred to above, the Federal Parliament has amended the Marriage Act 1961 in several substantial respects. An amendment was inserted into section 5(1), determining that marriage, to be lawful in Australia, has to be solemnized in accordance with section 5(1). When the Marriage Act was amended, the intention was to provide a standardized definition of marriage for the whole nation. Section 109 of the Constitution resolves any conflict between federal and state laws in favor of the former, thus confirming the supremacy of the Commonwealth to regulate all matters related to marriage, children of the marriage, welfare of those children, matrimonial property, etc.

Importantly, section 6 of the Marriage Act preserves the validity of state and territory laws relating only to the registration of marriage, which obviously signals the intention of the federal legislator to cover the field of all aspects of marriage besides mere registration.<sup>77</sup> In addition, the new section, 88EA, of the Marriage Act states that same-sex marriages conducted overseas are not recognized as marriages “in Australia.”<sup>78</sup> It is significant that the law uses the word “Australia” rather than the phrase “under the Commonwealth law,” which is therefore another clear indication that the Commonwealth intended for its law

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73. *Gazzo v Comptroller of Stamps (Vic)* (1981) 7 CLR 675, 680 (Austl.).

74. *Id.*

75. MILLS & BAGARIC, *supra* note 3, at 12.

76. *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 (Austl.).

77. *Marriage Act 1961* (Cth) s 6 (Austl.).

78. *Id.* s 88EA.

to cover the field, to be the sole law on the topic in Australia.<sup>79</sup> Given that Section 88EA explicitly declares that the field is to be confined to the Commonwealth definition of marriage, it is wrong to suppose that the field is confined only to heterosexual marriage, because the legislator clearly wanted to make sure that marriage for federal purposes means the union between a man and a woman.<sup>80</sup>

On the other hand, it could be said that no inconsistency arises if both federal and state laws were capable of coexisting and the former did not enable people to be married under both laws. Arguing from this position, Professor George Williams has suggested that the field of federal law is not “marriage” in general, but rather “different-sex marriage.”<sup>81</sup> According to him, the explicit reference in the Commonwealth act of the institution of marriage as meaning the union between a man and a woman was designed to head off arguments that the Act allowed for same-sex marriage.<sup>82</sup> Those amendments in 2004 to the Marriage Act would have the effect of reducing the field of federal law, hence leaving the field of “same sex marriage” open for the States. According to Williams, the federal act now seeks to prevent only the recognition of same-sex marriage conducted overseas, and it would say nothing about the recognition of same-sex marriage conducted in Australia, which would indicate that the field was simply vacated for the States.<sup>83</sup> “The consequence,” he concludes, “is that, while the federal and state acts both refer to what they call ‘marriage,’ they are two laws that operate in different fields.”<sup>84</sup>

Williams’s argument is unconvincing for a couple of reasons. First of all, he claims that the Tasmanian bill does not conflict with the federal Marriage Act because section 40 of the state bill renders a same-sex marriage void if either party contracts a marriage under the federal Marriage Act; i.e., with a person of the opposite sex.<sup>85</sup> But surely, the interpretation of the intended scope and meaning of the federal legislation cannot turn on the contingencies of what a state legislation might happen to say. Thus, what *if* a state law authorized same-sex

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79. *Id.*

80. *Id.*

81. George Williams, *Advice re Proposed Same-Sex Marriage Act*, TASMANIAN GAY & LESBIAN RIGHTS GROUP (March 2005), [http://tgllrg.org/more/82\\_0\\_1\\_0\\_M3/](http://tgllrg.org/more/82_0_1_0_M3/).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*



marriage but it did not contain a non-bigamy clause? Would that imply that people could be married under the federal law and subsequently married under the state law? Such a result would be contrary to the intent of sections 23B and 94 of the Commonwealth act, which is intended to prevent bigamy of all kinds regardless of how marriage is defined.

Of course, the matter can only arise on the assumption that the Commonwealth act is limited to the field of traditional marriage. And yet the Commonwealth act does effectively intend to cover the field, which is premised on the determination that every marriage in Australia, of all possible kinds, must be defined solely and exhaustively by the Commonwealth act. In other words, the Marriage Act operates in order to create a federal code in relation to the institution of marriage in Australia. Indeed, when the Marriage Act was introduced into Federal Parliament in 1961, then Attorney General, Sir Garfield Barwick, explained that the purpose of the legislation was to “produce a marriage code suitable to present-day Australian needs.”<sup>86</sup> That the purpose behind the Marriage Act was to provide uniformity so as to rid the legal landscape of the different pieces of state legislation is made evident in the following observations of the Attorney General:

At the present time, the marriage laws of the several States and of the Territories to which this bill applies are diverse. The recognition in one State of the marriage status acquired in another rests entirely upon the rules of private international law worked out over many generations to regulate such questions as between independent, and in relation to each other, foreign States. The bill would replace this diverse body of statutory law and render unnecessary any resort to the rules of private international law to determine, in the Commonwealth or in any Territory, the efficacy and validity of a marriage solemnized or a legitimation effected within the Commonwealth and the Territories to which the bill applies, or indeed outside the Commonwealth if the marriage is celebrated under Part IV.<sup>87</sup>

The bills aiming at legalizing same-sex marriage at the state level seek to alter that regime. They seek to provide a definition of marriage that is explicitly rejected by the federal legislation. Of course, it is entirely open to the Federal Parliament to introduce legislation which

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86. Garfield Barwick, *The Commonwealth Marriage Act 1961*, 3 MELB. U. L. REV. 277, 277 (1961).

87. Cth, Parliamentary Debates, House of Representatives, 19 May 1960, 2001 (Garfield Barwick, Attorney General) (Austl.).

prevents “marriage” from being confused with, or mistaken about, a relationship which was not described as such for the purposes of federal legislation.<sup>88</sup> In the words used in the Minister’s second reading speech, the Marriage Amending Act was specifically designed to “provide certainty to all Australians about the meaning of marriage in the future.”<sup>89</sup> The concern was to curb a perceived judicial activism and enable the federal legislature to exclusively define the meaning of marriage in Australia. As Professor Lindell notes, “[w]hatever may have been the position before, there can be no doubt that the Marriage Act as amended now manifests a clear intention not to recognise same-sex marriages as *marriages*, whether entered into in Australia or in any other country.”<sup>90</sup> And as he also explains,

The Commonwealth Parliament used its powers to put the traditional meaning of “marriage” beyond judicial doubt in its marriage legislation and perhaps also to ensure that any civil unions provided by State legislation would not be confused with marriage as a national legal institution. . . . But if the subject matter is construed broadly and generously to accommodate same-sex marriages . . . this will ironically make it easier for a national Parliament to ban not only same-sex marriages but also civil unions, even if they do bear the label of “marriage.”<sup>91</sup>

## VI. CONCLUSION

In conclusion, one can comfortably sustain the following positions on the matter: a) the Commonwealth Parliament has the power to pass any law dealing with the subject-matter of marriage; b) Commonwealth law supersedes contradictory state or territory law; c) under the *Marriage Amendment Act 2004*, the Australian states have no power to legislate for same-sex marriages; d) if a State or Territory passes a same-sex marriage law, such an act would be struck down by the High Court as inconsistent with the Commonwealth legislation.

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88. Lindell, *supra* note 21, at 43.

89. Cth, Parliamentary Debates, House of Representatives, 24 June 2004, 31460 (Philip Ruddock, Attorney General) (Austl.); *see also* Cth, Parliamentary Debates, Senate, 12 August 2004, 26504 (Ian MacDonald, Minister for Fisheries, Forestry, and Conservation) (Austl.); Cth, Parliamentary Debates, Senate, 12 August 2004, 26555 (H.L. Coonan, Minister for Communications, Information Technology and the Arts) (Austl.).

90. Geoffrey Lindell, *State Legislative Power to Enact Same-Sex Marriage Legislation, and the Effect of the Marriage Act 1961 (Cth) as Amended by the Marriage Amendment Act 2004 (Cth)*, CONST. L. & POL’Y REV. 25, 28 (2006).

91. Lindell, *supra* note 24, at 58.

In addition, those who support traditional marriage may well contend that same-sex marriage could only be legislated by means of constitutional amendment, and pursuant to section 128—popular referendum. After all, a literal-originalist interpretation of the Australian Constitution would indicate that the term “marriage” should have the same meaning as it had when the document was enacted, in 1901, a position that actually does not contradict the “orthodox rules” of Australian legal interpretation, rather quite the contrary.