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“. . . Speak Now or Forever Hold Your Peace . . .”
—The Influence of Constitutional Argument on
Same-Sex Marriage Legislation Debates in Australia

*Neville Rochow**

I. INTRODUCTION

The bankruptcy of courtesy and respect in Australian public discourse represents one of the major inhibitors of free speech.¹ This has been particularly noticeable in recent debates regarding same-sex marriage. Accuracy was the first casualty, and the character of the opponent followed closely behind. Anticipation of public personal attacks by opponents discouraged some with strongly held values from speaking up publicly. Debate was thus less informed and less balanced. This lack of courtesy and respect stands in stark contrast with the best traditions and practices of institutional debate, such as those found in the courts and legislatures. A mechanism had to be found to bring the debate back from the brink of total abandonment of rational, respectful debate. The presentation of constitutional argument appears, in some measure, to have done that.

Correctly functioning, the adversarial systems manifested in both legal and parliamentary procedure, inherited from Britain, have proven in Australia to be effective means for weighing alternatives and giving opposing views equal opportunity to persuade. The

* SC, LLB (Hons), LLM (Adelaide), LLM (Deakin), Barrister. This article seeks to present the position as at March 2013. The writer is indebted to his colleague at the South Australian Bar, Christopher Brohier, who made significant contributions to the submissions we made together before parliamentary committees and to legislators.

1. Another potential inhibitor to free speech is anti-discrimination legislation, as exemplified in the now withdrawn federal *Human Rights and Anti-Discrimination Bill 2012* currently under committee review. There were fundamental questions as to its constitutional validity and clarity of drafting, as well as its departure from principles in relation to the standard of proof. See WILBERFORCE FOUND., SUBMISSION OF THE WILBERFORCE FOUNDATION TO THE SENATE INQUIRY IN RELATION TO THE *HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012*, (Dec. 21, 2012), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/anti_discrimination_2012/report/e01.htm; see also Augusto Zimmerman, *Religious Vilification Laws in Australia: Philosophical Underpinnings and Constitutional Implications*, 2014 BYU L. REV. (forthcoming 2013).

dialectic of properly regulated debate exposes both strengths and weaknesses of competing cases to the arbiter so that a reasoned decision is more likely than might have been possible through unilateral inquiry into that same issue.

Court processes, closely following English models, are, certainly in theory and largely in practice, respectful and courteous affairs. Between bar and bench, among the advocates appearing for the adversaries and in the examination of witnesses, communications in court, as a general rule order, are polite and respectful. This derives from long-held traditions and well-established rules as to court manner, content, and form.

In theory, though perhaps less so in practice, the Westminster parliamentary system is also governed by traditions, rules, and procedures for the orderly presentation of both sides of a debate. The system is marked by a separation of the judicial arm of government from the legislative and executive arms. However, the executive arm is kept in check by the legislature through the principle of “responsible government.”²

The concept of “responsible government” provides that the executive, represented through members who are also Ministers of

2. The concept of “responsible government” in a federal system, combining a governing lower house and a powerful elected Senate, was unique to Australia in 1901. The British Parliament had long practised this form of government, in a unitary system, with an appointed upper house, (the House of Lords), requiring Ministers of the Crown to be members of Parliament who were “responsible” to Parliament for their executive decisions and actions. The Ministers were permitted to govern only so long as the government had the confidence of the House—traditionally reflected in having a majority of members in the lower house. Once confidence was “lost,” Parliament would be prorogued by the monarch and a general election would be called. This was the system of parliamentary democracy with which the framers of the Australian federal constitution were most familiar. A deliberate decision was made during drafting to adopt and superimpose that system upon a federal structure rather than adopting a federal model such as that found in the United States and Switzerland. See Colin Howard & Cheryl Saunders, *The Blocking of the Budget and Dismissal of the Government*, in *LABOR AND THE CONSTITUTION 1972–1975: ESSAYS AND COMMENTARIES ON THE CONSTITUTIONAL CONTROVERSIES OF THE WHITLAM YEARS IN AUSTRALIAN GOVERNMENT* 251, 266, 274–79 (Gareth Evans ed. 1977); see also R. J. Ellicott, *Commentaries*, in *LABOR AND THE CONSTITUTION 1972–1975: ESSAYS AND COMMENTARIES ON THE CONSTITUTIONAL CONTROVERSIES OF THE WHITLAM YEARS IN AUSTRALIAN GOVERNMENT* 288 (quoting OWEN DIXON, *JESTING PILATE* 107 (1944)) (“We, under our conception of democracy, so far separating the executive and the legislature, insist on the dependence of Cabinet upon Parliament. We insist too that if a difficulty arises between the executive government and Parliament, it shall be resolved by an appeal to the people, and we place on the representative of the Sovereign the responsibility of saying whether the case is one for the dissolution of Parliament and general election. This we do because we have proudly preserved the monarchy at the apex of our constitutional system.”).

the Crown, responds and accounts to Parliament on the floor of Parliament, by honest and frank answers to questions posed by members of the legislature.³ In fact, one of the boasts of the Westminster system is holding the executive to account through “question time.”⁴ During question time, non-government ranks, particularly the opposition, are permitted to ask of members of Cabinet, representing the executive, questions on matters of governance and policy. Question time is at its finest when “questions on notice” are answered at Westminster.⁵ The questions are given some weeks in advance to the executive with respect to issues in a particular portfolio.⁶ Under current practices, each question is assigned a number and, when Parliament is in session to answer questions on notice, the members of the opposition stand and call out the assigned numbers in sequence. The relevantly responsible secretary then approaches the dispatch box and gives the answer. Debate is thus informed and orderly, allowing little need or opportunity for personal attack or insult in either the question or the answer.

However, outside the courts and parliament, the tone of debate is quite different, particularly with respect to same-sex marriage. It is regrettable that the tenor of public discourse in Australia has degenerated into the *ad hominem* attack. Instead of dealing with issues, too often and too readily there is name calling. Opponents of same-sex marriage have had their views unfairly reported and inaccurately represented, and have been personally vilified and denigrated so readily that the debate has quickly become personal, shrill, and vicious. Points under debate and relevant facts become secondary. Too easily are labels like “bigot,” “fanatic,” “homophobe,”

3. The Governor-General, as the monarch’s representative, acts on the “advice” of Cabinet while it maintains confidence of the House. The constitutional conventions that define this relationship have come through British practices and procedures, modified over time to suit the federal structure. See H. V. EVATT & LESLIE ZINES, *THE ROYAL PREROGATIVE* (1987); see also AUSTRALIAN CONSTITUTION s 62, 64.

4. HOUSE OF REPRESENTATIVES, *HOUSE OF REPRESENTATIVES PRACTICE* 543 (6th ed. 2012) available at <http://www.aph.gov.au/~media/05%20About%20Parliament/53%20HoR/532%20PPP/Practice6/PDF/Chapters/6Chap15.ashx>.

5. In Australia, question time is still embarrassingly marred by personal insult and invective on both sides of the chamber. See Peter Costello, *Standard of Debate Nothing to Laugh About*, SYDNEY MORNING HERALD (Sept. 12, 2012), <http://www.smh.com.au/opinion/politics/standard-of-debate-nothing-to-laugh-about-20120911-25qet.html>.

6. UK PARLIAMENT, <http://www.parliament.uk/about/how/business/questions/> (last visited Aug. 9, 2013).

and “*misogynist*” employed to gain perceived forensic advantage when they serve no useful or proper purpose in the dialectic of informed argument.⁷

How could both sides be heard fairly in this climate of verbal pugilism? Value-neutral arguments, based upon the constitution, were needed. Groups of lawyers concerned that the debate over the constitutionality of same-sex marriage legislation was being suppressed decided to focus on the legislation’s constitutional validity.⁸ Submissions made to legislatures opposing such legislative measures were careful to distinguish between the constitutional arguments and those based upon values. While constitutional argument has not muted all vitriolic attack, or guaranteed either accuracy or balance in reporting of the debate, it has provided a logical framework upon which debate can proceed. It has, at least,

7. See, e.g., Neville Rochow, *Turning the Tide on Same-Sex Marriage*, 33 AUSTRALIAN FAMILY LAW JOURNAL 5 (2012) available at <http://www.family.org.au/index.php/afa-journal/116-afa-journal-vol-33-no-3-2012/204-turning-the-tide-on-same-sex-marriage-a-case-study-of-the-arguments-presented-in-tasmania>; Katherine Spackman, *Abuse and Demonisation of Gay Marriage Opponents Must Stop*, AUSTRALIAN CHRISTIAN LOBBY (July 14, 2011), <http://www.acl.org.au/2011/07/mr-abuse-and-demonisation-of-gay-marriage-opponents-must-stop/>; Heath Aston & Dan Harrison, *Christian Groups Welcome Gay Marriage Referendum*, SYDNEY MORNING HERALD (April 29, 2013), <http://www.smh.com.au/opinion/political-news/christian-groups-welcome-gay-marriage-referendum-20130429-2io0q.html>; Peter Wicks, *To the Extreme with “Hard” Cori Bernardi*, INDEPENDENT AUSTRALIAN (Dec. 11, 2012), <http://www.independentaustalia.net/2012/politics/to-the-extreme-with-hard-cory-bernardi/>; see also *Tony Abbott will never be Prime Minister*; FACEBOOK, <https://www.facebook.com/pages/Tony-Abbott-will-never-be-prime-minister/274330505796> (last visited Aug. 9, 2013).

8. The lawyers making the submissions were a loose association. Among the lawyers groups that made submissions were, initially, *Lawyers for the Preservation of the Definition of Marriage* (which included the author). This group grew to include a number of senior barristers, solicitors, and leading academic lawyers from across the country. They were joined in federal Parliamentary submissions by the *Ambrose Centre*. Others joined as part of the Tasmanian group, the *Save Marriage Coalition*, formed by former Senator Guy Barnett, which included lawyers, church, social and business groups. The lawyers made the first round of submissions in order to delineate between the constitutional arguments and those that were contestable on the basis of evidence or values. See Rochow, *supra* note 7, at 5–6. Upon invitation from the New South Wales Legislative Assembly, a submission was made by *Lawyers for the Preservation of the Definition of Marriage*. That submission was supportive of the submissions made by the other groups. Those expressing a view against the constitutionality of the proposed law included eminent constitutional lawyer David Jackson QC, who submitted on behalf of the New South Wales Attorney General’s Department. New South Wales Department of Attorney General and Justice, *Inquiry into Same Sex Marriage Law in NSW*, Submission 1240 (Mar. 8, 2013), available at <http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/28F03B123C7637C1CA257B2D000652DC>.

diluted the effect of *ad hominem* attacks as a distraction from principal issues.

Originally, the public debate concentrated principally on whether legislation permitting same-sex marriage *should* be passed.⁹ These arguments could largely be advanced in any jurisdiction. And it seemed a debate destined to be won by the loudest and last to speak. Introduction of constitutional arguments, however, raised the less obvious but logically anterior question: whether same-sex marriage laws *could* validly be passed. Submissions before a federal House of Representatives select committee,¹⁰ a federal Senate select committee,¹¹ the Tasmanian Legislative Council,¹² members of the South Australian Legislative Council, and the New South Wales Legislative Council committee¹³ have shown that arguments as to why legislation *should* not be passed are not effective in persuading undecided legislators unless combined with reasons why the legislation *could* not be validly passed.

This Article first deals with constitutional arguments at the federal legislative level and then at the state level as to why same-sex marriage legislation *could not* be validly passed. The Article then deals with how those arguments relate to why the legislation *should not* be passed. Finally, the Article makes some observations about the significance of constitutional arrangements in the way that western democracies can and should be governed.

The broad range of arguments that were advanced against state same-sex legislation in Tasmania has been the subject of treatment by this author elsewhere.¹⁴ Similar arguments were advanced

9. Mary Anne Neilsen, *Same-sex Marriage*, PARLIAMENT OF AUSTL. (Feb. 10, 2012), http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/SameSexMarriage.

10. *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, PARLIAMENT OF AUSTL., HOUSE OF REPRESENTATIVES COMMITTEES, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill%20marriage/index.htm (last visited Aug. 9, 2013).

11. *Marriage Equality Amendment Bill 2010: Submissions Received by the Committee*, PARLIAMENT OF AUSTL., SENATE COMMITTEES, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/marriage_equality_2012/submissions.htm.

12. Rochow, *supra* note 7.

13. *Same Sex Marriage Law in NSW (Inquiry)*, PARLIAMENT OF NEW S. WALES, <http://www.parliament.nsw.gov.au/samesexmarriage> (last visited Aug. 9, 2103).

14. Rochow, *supra* note 7, at 5. Those arguments can be summarized as follows: The legislation was in breach of an electoral promise not to introduce it.

subsequently, though less formally, with members of Parliament in South Australia, where no parliamentary inquiry has been held. They were also presented to the New South Wales Legislative Council inquiry.¹⁵ In Tasmania, the arguments were not confined to the constitutional arguments under consideration here, but included value-based arguments as well. However, the presence of the constitutional arguments lent strength to the other value-based arguments that were presented.¹⁶

Before turning to the constitutional arguments as outlined, it is useful to make a few observations concerning one of the arguments advanced in opposition to legislation permitting same-sex marriage. Opponents argue that passage of the legislation undermines freedoms of religion, speech, thought, and practice according to conscience.¹⁷ The implicit premise in this argument (and the concern underlying it) is that once passed, the same-sex marriage legislation will combine with anti-discrimination legislation¹⁸ to produce new legal burdens on religion. Specifically, it would become unlawful for those with strongly held beliefs concerning the wrongness of homosexual relations to refuse to solemnize such marriages or to preach against them.¹⁹ The counter has been the promise by proponents of same-sex marriage to exempt religions from any obligation to perform same-sex ceremonies. This promise of exemption has been regarded with suspicion by opponents as either a temporary sop in exchange for passage and that, in practice, will not go far enough to protect their rights.²⁰

There would be considerable doubt as to the constitutional validity of a state Act. If there were to be any such legislation, it should be a matter to be resolved federally and not state by state. If necessary, a national referendum should be held to amend the constitution and to test the will of the electorate under section 128 of the federal Constitution. The Tasmanian bill had serious drafting and logical flaws. The passing of an invalid law would give rise to potentially expensive constitutional litigation involving both the state and individuals. Marriage is a bed-rock social institution worthy of protection. Claims that same-sex marriage is a human right have no foundation. The asserted international trend is illusory. The legislation posed a threat to free speech when combined with anti-discrimination legislation. The law has an educative role and this form of legislation sends a wrong message to the community.

15. *Same Sex Marriage Law in NSW (Inquiry)*, *supra* note 13.

16. *See* Rochow, *supra*.note 7.

17. *See* WILBERFORCE FOUND., *supra* note 1; Zimmerman, *supra* note 1; Rochow, *supra* note 7.

18. *See* Zimmerman, *supra* note 1.

19. *Id.*

20. *See* WILBERFORCE FOUND., *supra* note 1; Zimmerman, *supra* note 1; Rochow, *supra* note 7.

At first blush the argument that same-sex legislation would impair liberties previously enjoyed by individuals appears to derive from a perception as to how anti-discrimination legislation might be used to enforce a new dimension of political correctness if same-sex marriage were to be accorded the same legal standing as existing heterosexual marriage. Any new right to have a same-sex relationship solemnized as a marriage would inevitably impact, in some way, upon previously existing rights to preach against change to the status quo on marriage. The new right may even be designed in such a way as to trump previously held rights, particularly if the retention of those previous rights is seen to be inappropriate. In this sense, this argument is a slippery-slope style appeal to retention of status quo and could be advanced against any reform to marriage.

On closer analysis, however, this argument contains an added sting that raises constitutional and political issues unique to Australia. In Australia, the right to religious liberty is at best tenuous as a matter of federal constitutional law. For peculiar historical, social, and political reasons, Australia is one of the few advanced democracies that has no federal bill of rights, entrenched or otherwise.²¹ Neither do the laws of the respective States and Territories provide any constitutional guarantees of religious liberty. While some jurisdictions have enacted religious anti-vilification laws, the rights conferred are fraught with controversy as to how they operate, what freedoms are conferred, and whether they, in turn, are constitutionally valid.²²

21. Neville Rochow, *Paying for Human Rights Before the Bill Comes: Towards a More Comprehensive Domestic Implementation of International Human Rights Norms in Australia*, UNIV. OF ADELAIDE L. SCH. (Mar. 9, 2009), available at <http://ssrn.com/abstract=1356382>; Paul Babie & Neville Rochow, *Feels Like Déjà vu: An Australian Bill of Rights and Religious Freedom*, 2010 BYU L. REV. 821 (2010) [hereinafter *Déjà vu*]; Paul Babie & Neville Rochow, *Protecting Religious Freedom under Bills of Rights: Australia as a Microcosm*, in FREEDOM OF RELIGION UNDER BILLS OF RIGHTS (2012).

22. As to the difficulties in invoking the anti-vilification legislation, see the decision of the Court of Appeal in *Catch the Fire Ministries Inc. v Islamic Council of Victoria* (2006) 15 VR 207 (Austl.). See also Nicholas Aroney, *The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation* 34 FED. L. REV. 287 (2006); Zimmerman, *supra* note 1; Neil Foster, *Anti-Vilification Laws and Freedom of Religion in Australia- Is Defamation Enough?*, Presentation at the Conference of the J. Reuben Clark Law Society and the Research Unit for the Study of Law, Society and Religion (June 8, 2013). For general a commentary of the protection of religious freedom in Australia, see CAROLYN MAREE EVANS, *LEGAL PROTECTION OF RELIGIOUS FREEDOM IN AUSTRALIA* (2012), particularly chapter 8, which discusses cases, including *Catch the Fire*.

The only constitutional guarantee of religious liberty under Australian law is contained in section 116 of the federal Constitution.²³ Although section 116 bears a close resemblance to the United States' First Amendment from which it was drawn, because it is not found in a bill of rights,²⁴ it has been given a very narrow construction:

[Section 116] does not form part of a Bill of Rights. The plaintiff's claim that it represents a personal guarantee of religious freedom loses much of its emotive and persuasive force . . . s. 116 is a denial of legislative power to the Commonwealth, and no more.²⁵

As observed by Paul Babie and me in our article, "Feels Like Déjà Vu,"²⁶ opponents of a bill of rights commonly argued that existing common law rights were sufficient protection of individual rights. These opponents argued that a bill of rights would confer too much power on unelected judges and would lead to a wave of "US-style" rights litigation.²⁷ It may seem ironic to some that the same conservative religionists who were ardent opponents of a bill of rights are arguing that their religious freedom would be compromised by same-sex legislation. On one view, it would be those very opponents of a bill of rights who now would stand to benefit most from a properly drafted set of guarantees of religious freedom. A bill of rights could have stood as a bulwark against the most feared effects of the new cocktail of rights that could result if same-sex marriage legislation and the new changes to discrimination laws proposed by the *Human Rights and Anti-Discrimination Bill 2012*²⁸ were to be passed. The feared "US-style" rights litigation, of which opponents of bills of rights are so wont to warn,

23. AUSTRALIAN CONSTITUTION s 116 ("The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.").

24. See *Williams v Commonwealth* (2012) 86 ALJR 713; *Krygger v Williams* (1912) 15 CLR 366; *Adelaide Company of Jehovah Witnesses Inc. v Commonwealth* (1943) 67 CLR; *Attorney General (Victoria); ex rel. Black v Commonwealth* (1981) 146 CLR 559; *Church of the New Faith v Commissioner for Payroll Tax* (1983) 154 CLR 120; *Kruger v Commonwealth* (1997) 190 CLR 1; *Grace Bible Church v Reedman* (1984) 36 SASR 376; *Harkianakis v Skalkos* (1999) 47 NSWLR 302; see also Rochow, *supra* note 21, at 16–17.

25. *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGS Case)* (1981) 146 CLR 559, 652.

26. *Déjà vu*, *supra* note 21.

27. See, e.g., Patrick Parkinson, *Christian Concerns about an Australian Charter of Rights*, in FREEDOM OF RELIGION UNDER BILLS OF RIGHTS 117 (Paul Babie & Neville Rochow ed., 2012).

28. See WILBERFORCE FOUND., *supra* note 1.

may well be upon us in any event with none of the protections that might have otherwise existed.

All attempts to date to enact same-sex legislation have failed and current state based bills seem likely to fail as well. The bills presented in federal Parliament were overwhelmingly defeated, including the most recent attempt to have internationally contracted same-sex marriages recognized as being lawful in Australia.²⁹ The Tasmanian bill was defeated in that State’s upper house, the Legislative Council.³⁰ Additionally, from discussions that the author has had with State political leaders and members of the respective houses, current South Australian attempts to pass a state-based law seem likely to be headed for defeat. Although it is uncertain whether other States will attempt to pass bills, there are equivalent bills being mooted in New South Wales and Western Australia.³¹ The most likely jurisdiction to pass a same-sex marriage bill is the Australian Capital Territory because of the strength of the leftist coalition of the Australian Labor Party and the Greens.³² The tenure of that legislation will be subject to federal territories power.³³

Because no bills have been passed, the validity and consequences of same-sex marriage legislation remain contestable. Constitutional arguments, experience teaches, have the capacity to sway undecided legislators who oppose same-sex legislation but need an acceptable value-neutral reason to vote against the bills. Thus, the constitution operates as a brake on certain types of reform well before matters are contested in court.

29. Chris Uhlmann, *Parliament Votes Down Same-sex Marriage*, ABC NEWS, <http://www.abc.net.au/news/2012-09-19/parliament-votes-down-same-sex-marriage/4270700> (last updated Sept. 19, 2012); *Foreign Same Sex Marriage Recognition Bill Defeated*, AUSTRALIAN CHRISTIANS (June 20, 2013), <http://australianchristians.com.au/foreign-same-sex-marriage-recognition-bill-defeated/>.

30. *Tasmania’s Upper House Votes Down Gay Marriage*, ABC NEWS, <http://www.abc.net.au/news/2012-09-27/tasmania-upper-house-votes-down-gay-marriage/4284538> (last updated Sept. 28, 2012).

31. See, e.g., *Same Sex Marriage Law in NSW (Inquiry)*, PARLIAMENT OF N.S.W., <http://www.parliament.nsw.gov.au/samesexmarriage> (last visited Aug. 12, 2013); *Same-Sex Marriage Bill Set For Western Australia / Advocates Say Momentum ‘Unstoppable’*, AUSTRALIAN MARRIAGE EQUAL. (Sept. 13, 2012), <http://www.australianmarriageequality.com/wp/tag/western-australia/>.

32. See, e.g., *ACT Marriage Equality and the Constitution*, AUSTRALIAN MARRIAGE EQUAL. (Dec. 12, 2012), <http://www.australianmarriageequality.com/wp/tag/australian-capital-territory/>.

33. AUSTRALIAN CONSTITUTION s 122.

II. COULD VALID FEDERAL LEGISLATION BE PASSED PERMITTING SAME-SEX MARRIAGE IN AUSTRALIA?

With only minor administrative exceptions, marriage has, since 1961, been regulated nationally by a single federal statute, the *Marriage Act 1961* (Cth). Passed to overcome the confused condition of matrimonial law when each state had its own laws, the *Marriage Act* would seem to constitute the most significant barrier to same-sex marriage legislation. However, if that Act were amended to redefine marriage to embrace same-sex marriages, there would be no impediment. If that Act has not driven state laws on the subject from the legislative field entirely, then states could pass individual laws permitting such marriages.

The *Marriage Act* operates to impede state-based marriage legislation. Section 109 of the federal Constitution³⁴ provides that if there are two otherwise valid state and federal enactments that “cover[] the field,” the federal law will render the state law invalid to the extent of that state law’s inconsistency. Prior to 1961, marriage was a state matter and interstate recognition of matrimonial status was a matter determined by a combination of private international law and state-to-state comity. In 1961, the *Marriage Act* was passed federally with the intention of creating a single marriage law for Australia, with only very limited exceptions relating to the registration of marriages. By this enactment, it would appear that the federal parliament “covered the field” on the topic of marriage.

In 2004, the *Marriage Act* was amended to contain a definition of marriage—the union of a man and a woman to the exclusion of all others, voluntarily entered into for life—and to prohibit recognition of same-sex marriages contracted overseas.³⁵ This amendment came at a time when state-based same-sex marriage laws were not even in contemplation. By this enactment, it would appear that the federal parliament “covered the field” on the topic of the *definition of marriage* for Australia.

34. AUSTRALIAN CONSTITUTION s 109 (“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.”).

35. *Marriage Act 1961* (Cth) s 88EA (introduced by the *Marriage Amendment Act 2004* (Cth)). As to its effect, see 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 (2006).

The ability to amend the *Marriage Act* is therefore pivotal in the constitutional debate as to whether same-sex marriage legislation could be validly passed.

The debate over whether the Commonwealth Parliament *should* legislate to allow same-sex marriages largely proceeded on an assumption that it could; that is that the federal Parliament had the power so to legislate. As is apparent from submissions made by legal professional bodies,³⁶ the legal profession as a whole was not prepared to challenge that assumption. Lawyers were simply not putting the contrary case to the respective committees. As a consequence, the “*should*” arguments were prevailing, almost by default over arguments as to what the Parliament could do.

There has always been, however, a real question as to whether Parliament possessed the power to legislate same-sex marriage in section 51 (xxi) and (xxii) of the Constitution. The question is whether the divorce and matrimonial power, though a separate and distinct power,³⁷ could support a law allowing same-sex couples to marry if that power were not found in section 51 (xxi). Section 51 (xxii) provides Parliament power to make laws with respect to “*divorce and matrimonial causes*,” that is, causes arising out of marriage.³⁸

If the power to legislate for same-sex marriage is not allowed under the marriage power, unless another power can be found, Parliament does not have the power to so legislate. Without an express power, the matter has to be made the subject of a referendum to amend pursuant to section 128 of the Constitution.

A. Constitutional Interpretation: Marriage Power and the Originalist Approach

The High Court has recently reiterated:

[T]he task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning

36. See *Inquiry into the Marriage Amendment Bill 2012 and Marriage Equality Amendment Bill 2012*, HOUSE STANDING COMMITTEE ON SOC. POL’Y AND LEGAL AFF., http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=spla/bill%20marriage/index.htm (last visited Aug. 12, 2013).

37. AUSTRALIAN CONSTITUTION s 51(xxii); *Re F; Ex Parte F* (1986) 161 CLR 376, 401.

38. *Re F; Ex Parte F* (1986) 161 CLR 376, 401; see also *id.* at 407 (matrimonial causes are “those matters which are subsidiary and consequential to marriage and divorce”).

of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.³⁹

When interpreting section 51 (xxii) of the Constitution, the meanings of the “*matrimonial cause*” and “*divorce*” have no potential for ambiguity. These phrases have been applied consistently without question over at least a century.⁴⁰ In that time, they have never been applied to any legal relationship other than traditional heterosexual marriage. Nothing in the wording of the power suggests of anything broader.

Even if one were to concede that those terms were ambiguous and it became necessary to embark upon an originalist interpretation of the constitutional phrases through a “search for the intention of its makers,”⁴¹ the result would not differ. In interpretation by reference to historical context, the High Court distinguishes between connotation and denotation, or the difference between meaning and application.⁴²

In *Ex parte Professional Engineers Association*, Justice Windeyer said:

We must not, in interpreting the Constitution, restrict the denotation of its terms to things they denoted in 1900. The denotation of words becomes enlarged as new things falling within their connotations come into existence or become known. But in the interpretation of the Constitution the connotation or connotations of its words should remain constant. We are not to give words a meaning different from any meaning which they could have borne in 1900. . . . It is not to be changed as language changes.⁴³

39. *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46 (footnote omitted).

40. Australian courts have accepted the definition current since at least the nineteenth century when Lord Penzance pronounced his famous dictum in the divorce case of a polygamous wife in *Hyde v Hyde* (1866) 1 P.D. 130, 133 (Eng.) (“I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.”). See also *Fisher v Fisher* (1986) 161 CLR 438, 456 (Austl.).

41. *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511, 551.

42. *Id.* at 552.

43. (1959) 107 CLR 208, 267.; see also *R v Brislan; Ex Parte Williams* (1935) 54 CLR 262, 282 (Rich & Evatt, JJ).

Parliament cannot deem what meaning may be given to a particular power in the Constitution so as to expand its content. Further, as was observed by Justice McHugh in *Re Wakim*:

[T]he judiciary has no power to amend or modernise the Constitution to give effect to what the judges think is in the public interest. The function of the judiciary, including the function of this Court [the High Court], is to give effect to the intention of the makers of the Constitution as evinced by the terms in which they expressed that intention. *That necessarily means that decisions, taken almost a century ago by people long dead, bind the people of Australia today even in cases where most people agree that those decisions are out of touch with the present needs of Australian society.*⁴⁴

Further, in *Cormick v Cormick*,⁴⁵ Chief Justice Gibbs observed:

It would be a fundamental misconception of the operation of the Constitution to suppose that the Parliament itself could effectively declare that particular facts are sufficient to bring about the necessary connexion with a head of legislative power so as to justify an exercise of that power. It is for the courts, and not for the Parliament, to decide on the validity of legislation⁴⁶

Justices Mason, Wilson, Deane, and Dawson concurred in Chief Justice Gibbs’s reasoning.⁴⁷ Two members of that unanimous court (Justices Mason and Brennan) went on to later become Chief Justices.⁴⁸ Of those two, Justice Brennan added additional reasoning, “The scope of the marriage power conferred by section 51 (xxi) of the Constitution is to be determined by reference to what falls within the conception of marriage in the Constitution, not by reference to what the Parliament deems to be, or to be within, that conception.”⁴⁹

With particular reference to the marriage power, Justice Brennan (as his Honour then was) observed in *Fisher v Fisher*:⁵⁰

44. *Re Wakim*, 198 CLR at 549 (emphasis added).

45. (1984) 156 CLR 170.

46. *Id.* at 177.

47. *Id.* at 182.

48. Sir Anthony Mason was Chief Justice of Australia from 1987 to 1995. Sir Gerard Brennan succeeded him as Chief Justice in 1995 and retired in 1998.

49. *Id.*

50. (1986) 161 CLR 438.

Marriage is a social and legal institution. . . . The nature and incidents of the legal institution which the Constitution recognises as “marriage” and which lie within the power conferred by section 51(xxi) are ascertained not by reference to laws enacted in purported pursuance of the power but by reference to the customs of our society, especially when they are reflected in the common law, which show the content of the power *as it was conferred*. The words “with respect to” in section 51 in their application to the marriage power are not needed to bring the customary incidents of marriage within the power. On the other hand, those words do not empower the Parliament to legislate upon the customary incidents of marriage so as to *affect the nature of the marriage relationship*.⁵¹

Justices Mason⁵² and Deane, in *Re F; Ex Parte F* observed, “Obviously, the Parliament cannot extend the ambit of its own legislative powers by purporting to give to ‘Marriage’ an even wider meaning than that which the word bears in its constitutional context.”⁵³

Justice Dawson said, in relation to the provision of the *Family Law Act* under consideration in *Comick*, deeming certain children to be children of a marriage, “It is well established that the reach of a legislative power cannot be extended by this means.”⁵⁴

From these *dicta*, it seems clear that Parliament cannot *extend* its marriage power by mere definition.⁵⁵

A critical question to determine whether the Commonwealth Parliament has power to legislate to permit same-sex couples to marry is what was meant by “*marriage*” in 1900. Parliament has power to make laws with respect to that relationship, but does not have power to alter the nature of that relationship.

B. Analogies With Other Legal Concepts Receiving Originalist Interpretation

1. Analogy in trade mark law

In 1908, shortly after federation, in *Attorney-General for the State of*

51. *Id.* at 455–56 (emphasis added).

52. As his Honour then was.

53. (1986) 161 CLR 376, 389.

54. *Id.* at 465.

55. This is opposed to defining the content of a valid exercise within existing power, which, arguably, is what it has done in defining marriage in the 2004 amendment to the *Marriage Act 1961* (Cth).

New South Wales v Brewery Employees' Union of New South Wales and Ors,⁵⁶ the High Court considered the meaning of the words “trade mark” in the phrase “worker’s trade mark” to determine whether it was subject matter within the legislative power with respect to trademarks under section 51 (xviii). The majority approached the question by, first, ascertaining what was meant by “*trade mark*” in 1900.⁵⁷ It then considered whether the mark in issue, a “worker’s trade mark,” was a trade mark within the meaning as understood at that time.⁵⁸ As a “worker’s trade mark” was not within the connotation of legal meaning for the species of property known as “trade marks” in 1900, the marks under consideration were held not to be “trade marks” for the purposes of the legislative power.⁵⁹

Chief Justice Griffith, after identifying the elements of a trademark in 1900, said:

With regard to this species of property the power of the Parliament is absolute. They can prescribe the conditions on which it may be acquired, retained, or enjoyed; they may possibly even prohibit its enjoyment altogether; but they cannot, by calling something else by the name of “trade mark,” create a new and different kind of industrial property.⁶⁰

Additionally, Justice Barton said:

[I]t is to the meaning in 1900 that we must look, for the plain reason that the Constitution previously framed in Australia became law in that year, and the framers cannot, of course, have had in their minds meanings which had not then come into existence.⁶¹

Justice O’Connor also discussed the essential features of a trade mark in 1900 and said:

I take it, therefore, as established that the concept covered by the legal expression “trade mark,” as used by the legislature, the Courts, and the commercial community in England and Australia at the time of the passing of the Constitution, necessarily involved the two essentials I have mentioned. It would follow that the power

56. (1908) 6 CLR 469.

57. *Id.* at 500–03, 508–13 (Griffith, CJ); *id.* at 521–25, 529–30 (Barton, J.); *id.* at 531, 534–38 (O’Connor, J.).

58. *See* sources cited *supra* note 57.

59. *See* sources cited *supra* note 57.

60. *Brewery Employees' Union*, 6 CLR at 513.

61. *Id.* at 521.

conferred upon the Commonwealth Parliament to make laws in respect of trade marks extends only to trade marks having these essential qualities, and that it cannot extend to any mark used in trade which is wanting in any of those essentials. Nor can the Commonwealth Parliament give itself jurisdiction merely by declaring that a mark created by its authority for use in trade is a trade mark within the meaning of the Constitution. It cannot thus expand its powers by its own legislative act and so assume a larger control over the internal trade of a State than the Constitution has conferred on it.⁶²

Justice Higgins, (who, with Justice Isaacs, was in the minority), took a broader view of the powers available to the Commonwealth Parliament. His Honour reasoned that power to make laws with respect to trade marks is not the same as power to regulate or enforce trade marks.⁶³ Relevantly, his Honour observed by way of analogy, “Under the power to make laws with respect to ‘marriage’ I should say that the Parliament could prescribe what unions are to be regarded as marriages.”⁶⁴

This minority view that would support an ability to change the connotation of a power has not been accepted, as appears from the more recent authority cited above. However, even acceptance of this approach would still place legislation with regard to homosexual marriages beyond the scope of the marriage power. This appears from what follows the dictum cited above:

No doubt, we are to ascertain the meaning of “trade marks” as in 1900. But having ascertained that meaning, we have then to find the extent . . . of the “power to make laws with respect to trade marks.” The usage in 1900 gives us the central type; it does not give us the circumference of the power. To find the circumference of the power,

62. *Id.* at 541. While there is a flavor of the reserved powers doctrine in the majority judgments, which was overturned in *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129, the fall of that doctrine does not affect the validity of the reasoning in relation to constitutional interpretation. This is made apparent by *Davis and Ors v The Commonwealth of Australia* (1988) 166 CLR 79 in which case Chief Justice Mason, Justice Deane, and Justice Gaudron accepted, by way of illustration, that the denotation of trade marks had increased, but did not doubt the correctness of the majority’s approach to the connotation of the power. *Id.* at 96–97. For a treatment of the reserved powers doctrine, see GABRIEL MOENS & JOHN TRONE, LUMB AND MOENS’ THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA ANNOTATED 203–05 (6th ed. 2001).

63. *Brewery Employees’ Union*, 6 CLR at 610.

64. *Id.*

we take as a centre the thing named - trade marks - with the meaning as in 1900; but it is a mistake to treat the centre as the radius.⁶⁵

His Honour further stated that the proponents of the majority view were treating the power to deal with trade marks like a power to deal with cattle.⁶⁶ If a beast did not come within the term “cattle,” as it was understood in 1900, there was no power to make laws with respect to it. His Honour reasoned that the difference between cattle and trade marks was that the boundaries of the class “cattle” was fixed by external nature, while the concept of “trade marks” is a social construct.⁶⁷

2. *Analogy with the institution of the jury*

There is also an analogy to be drawn between the institution of marriage and that of the jury. In *Cheatle and Another v The Queen*⁶⁸ the High Court considered the meaning of “jury.” Section 80 of the Constitution requires that the trial on indictment of an offence against any law of the Commonwealth must be by jury.⁶⁹ Section 57(1) of the *Juries Act 1927* (SA) allowed for majority verdicts.⁷⁰ However the High Court held that section 80 of the Constitution required a jury verdict to be unanimous.⁷¹ After examining the history of the institution of trial by jury the Court said:

It follows from what has been said above that the history of criminal trial by jury in England and in this country up until the time of Federation establishes that, in 1900, it was an essential feature of the institution that an accused person could not be convicted otherwise than by the agreement or consensus of all the jurors. It is well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to

65. *Id.* The center or essence of marriage in 1900 was “the voluntary union for life of one man and one woman, to the exclusion of all others.” *R v L* (1991) 174 CLR 379, 391 (quoting *Calverley v Green* (1984) 155 CLR 242, 259–60). A law expressly contrary to that essence, would, in the reasoning of Justice Higgins, be a law that sought to change the center of the power and would, therefore, be beyond power.

66. *Brewery Employees’ Union*, 6 CLR at 611.

67. *Id.* 611–16 (referring to several social abstractions to illustrate the point).

68. (1993) 177 CLR 541.

69. AUSTRALIAN CONSTITUTION s 80.

70. *Juries Act 1927* (SA) s 57(a).

71. *Cheatle*, 177 CLR at 560–61. *See also Katsuno v R* (1999) 199 CLR 40 (adopting the reasoning of *Cheatle*).

be read in the light of the common law's history. In the context of the history of criminal trial by jury, one would assume that [section] 80's directive that the trial to which it refers must be by jury was intended to encompass the requirement of unanimity.⁷²

C. *The Legal Nature and Essence of Marriage*

On the legal nature of marriage, Justice Brennan⁷³ did not consider marriage to be a social construct. Rather, in *The Queen v L*,⁷⁴ his Honour cited with approval eighteenth and nineteenth century dicta⁷⁵ in support of the observation that marriage is “a contract according to the law of nature, antecedent to civil institution, . . . a contract of the greatest importance in civil institutions”⁷⁶

In that case, his Honour also observed that the definition of marriage as ‘the voluntary union for life of one man and one woman, to the exclusion of all others’ was one that had been

followed in this country and by this Court” and that it was “the definition adopted by the *Family Law Act*, [section] 43(a) [] which requires a court exercising jurisdiction under that Act to have regard to ‘the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life.’⁷⁷

In *Attorney-General for the State of Victoria v The Commonwealth of Australia*,⁷⁸ Justice McTiernan made the following observation on ‘marriage’:

The term marriage bears its own limitations and *Parliament cannot enlarge its meaning*. In the context – the Constitution – the term “marriage” should receive its full grammatical and ordinary sense: plainly in this context it means only monogamous marriage. In my view, the term in par. (xxi.) refers to marriage as a social transaction: but as the term marks the outer limits of the power conferred by par. (xxi.) its meaning is not imprecise. In my view,

72. *Chealte*, at 552 (citations omitted).

73. As His Honour then was.

74. (1991) 174 CLR 379.

75. *Lindo v Belisaro*, [1795] Eng. Rep. 4123, (1795) 1 Hag. Con. 216 at 230–31 (Eng.); *Hyde v Hyde* (1866) 1 P.D. 130, 144 (Eng.).

76. *R v L*, 174 CLR at 391–92.

77. *Id.*

78. (1962) 107 CLR 529.

the term cannot be extended further than to embrace uniting in marriage and the status of marriage.⁷⁹

Also, Chief Justice Dixon said:

It may be said at once that the power conferred by [section] 51 (xxi.) should receive no narrow or restrictive construction. In *Quick and Garran* at p. 608 a wide connotation of the words “with respect to marriage” is suggested by a reference to a denotation which perhaps needs a little explanation. For it covers “consequences of the relation including the status of the married parties, their mutual rights and obligations, the legitimacy of children and their civil rights.” These are indefinite and highly abstract words but the status of the married parties evidently refers to the particular legal position . . . which unmarried persons do not share; their mutual rights and obligations means those arising out of the married state and the legitimacy of children refers to the status of *children born to them in wedlock*.⁸⁰

There seems no room for doubt that in 1900 marriage was “the voluntary union for life of one man and one woman, to the exclusion of all others.”⁸¹ That definition has been accepted by the High Court in *Calverley v Green*,⁸² where Justice Mason and Justice Brennan (as they both then were) said, “The exclusive union for life which is undertaken by both spouses to a valid marriage . . . remains the foundation of the legal institution of marriage.”⁸³

In *Re F; Ex parte F*⁸⁴ the High Court unanimously disallowed section 5(1)(e) of the *Family Law Act* which deemed a child of one of the parties to a marriage who was ordinarily a member of the household of the husband and wife to be a child of the marriage. Justice Brennan (as he then was), with whom Chief Justice Gibbs and Justice Wilson generally agreed, made the following observation:

“Marriage” as a subject of legislative power embraces those relationships which the law (leaving aside statutes enacted in

79. *Id.* at 549 (emphasis added).

80. *Id.* at 543. It is clear that his Honour considered that the connotation of the power was that the parties to a marriage were a man and a woman.

81. *Hyde v Hyde*, (1866) 1 P.D. 130 (Eng.); see also *Harrod v Harrod* (1854) 1 K.&J. 4, 15, 16 (Eng.); HALSBURY'S LAWS OF ENGLAND VOL. 13, 351 (3d ed. 1951); BOOK OF COMMON PRAYER, FORM OF SOLEMNIZATION OF MARRIAGE (1662); *Genesis* 1:24–25.

82. (1984) 155 CLR 242.

83. *Id.* at 259–60; see also *Khan v Khan* [1963] VR 203, 204.

84. (1986) 161 CLR 376.

purported exercise of the power) recognizes as the relationships which subsist between husband, wife and the children of the marriage. Statutes enacted in purported exercise of the power cannot extend the scope of the power: only those relationships which are already embraced within the subject are amenable to regulation by a law enacted in exercise of the power. The subject does not embrace the relationship between, on the one hand, the spouses and, on the other, a child born of an extra-marital association of a spouse with another person. To treat such a child as a child of the marriage of the spouses when he or she has not been adopted by them is to exclude or diminish the relationship between the child and the parent who is not one of the spouses.⁸⁵

In *Fisher v Fisher*⁸⁶ Justice Brennan said, “The relationships between husband, wife and the children of a marriage, which are at the heart of the marriage power, are essentially personal, not proprietary.”⁸⁷

In *Re Cormick*,⁸⁸ Chief Justice Gibbs said,

It is now well settled that “marriage” in [section] 51(xxi) includes the relationship or institution of marriage and, since the protection and nurture of the children of the marriage is at the very heart of the relationship, that the power to make laws with respect to marriage enables the Parliament to define and enforce the rights of a party to the marriage with respect to the custody and guardianship of a child of the marriage. The rights and duties of the parties to a marriage, with respect to the children of the marriage, arise directly out of the marriage relationship, and a law defining, regulating or modifying the incidents of the marriage relationship is a law with respect to marriage.⁸⁹

It would appear then on an originalist interpretation, references to “marriage” and “matrimonial causes” in the text of section 51 would most likely be construed to refer to the legal relationship between a man and a woman as it was known in 1900. Such an interpretation makes federal same-sex marriage legislation questionable at best and most likely invalid if passed.

85. *Id.* at 399.

86. (1986) 161 CLR 428.

87. *Id.* at 454–55.

88. (1984) 156 CLR 170.

89. *Id.* at 175–76.

D. External Affairs as a Source of Legislative Power

There is the possibility that the external affairs power, found in section 51 (xxix) of the federal Constitution, could allow the Commonwealth Parliament to legislate for same-sex marriage.⁹⁰ To invoke this head of power, a binding international covenant to so legislate needs to be identified.

To date, no covenant sufficient for that purpose has been identified by proponents of same-sex marriage. It seems that a clear obligation to legislate for same-sex marriage can be identified. At best, it would seem that proponents might identify wording in a covenant that might permit such marriages, but not to oblige Australia, as a covenanting state to so legislate.

The Universal Declaration of Human Rights (UDHR) works upon the same assumption underlying the marriage power, namely that marriage is the union between a man and a woman.

Article 16 of the UDHR provides:

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.⁹¹

If there is no apparent support for an obligation to provide for same-sex marriage under the UDHR, neither does there seem to be any support in other international covenants. Article 23(2) of the International Covenant on Civil and Political Rights, for example, similarly recognizes the right of men and women of marriageable age to marry and found a family but does not extend to same gender couples.⁹² Neither does there seem to be any

90. IAN IRELAND, LAW AND BILLS DIGEST GRP., INFO. AND RESEARCH SERVS., RESEARCH NOTE: THE HIGH COURT AND THE MEANING OF ‘MARRIAGE’ IN SECTION 51 (XXI) OF THE CONSTITUTION (Feb. 12, 2003), *available at* <http://www.aph.gov.au/library/pubs/m/2001-01/02m17.pdf>.

91. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), *available at* <http://www.un.org/en/documents/udhr/>.

92. The Law Council of Australia Submission to the Senate of April 2, 2012, LAW

potential support from European human rights provisions or the treatment of claims to particular marriage rights claims made in the European Court of Human Rights.⁹³

Without a clear international obligation to legislate for same-sex marriage, there is simply no basis for use of the external affairs power.

E. Conclusion on the Federal Ability to Pass Legislation Permitting Same-Sex Marriage

One can never predict the outcome of constitutional litigation in a court of last resort with absolute certainty. However, unless the High Court were to depart from a considerable body of precedent and refuse to adopt either an approach to the construction of the relevant power that departed radically from its previous approaches to the relevant powers and the meaning of marriage, it would seem that there are very strong arguments as to why any federal Act may well be declared as being beyond Parliament's power.

III. COULD VALID STATE LEGISLATION BE PASSED PERMITTING SAME-SEX MARRIAGE IN AUSTRALIA?

It seems generally accepted that prior to 1961, states could likely have passed valid laws permitting same-sex marriage because they were not tied to express heads of legislative power in the same way as the federal Parliament.⁹⁴ The question now is whether the

COUNCIL OF AUSTRALIA, LAW COUNCIL SUBMISSION TO THE SENATE INQUIRY ON MARRIAGE EQUALITY AMENDMENT BILL 2010 74-75 (Apr. 2, 2012), available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/completed_inquiries/2010-13/marriage_equality_2012/submissions.htm, seems to acknowledge as much in its reference to *Joslin v New Zealand*, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002), where it was held that states were only required to recognize the union between a man and a woman who wanted to marry each other.

93. See, e.g., European Convention on Human Rights arts. 8, 12, 14, Nov. 4, 1950, 213 U.N.T.S. 221 (identifying a right to respect for private and family life, prohibiting discrimination, and identifying a right to marriage, respectively); *Schalk & Kopf v Austria*, App. No. 30141/04, Eur. Ct. H.R. 995 (2010) (finding no breach of Articles 12 and 14 of the European Convention on Human Rights and holding that states have no obligation to provide marriage for same-sex couples); *Gas & Dubois c. France*, App. No. 25951/07 (2012), available at [http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-109571#{"itemid":\["001-109571"\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-109571#{) (finding no breach of Articles 8 and 14 of the European Convention on Human Rights when a lesbian couple was refused an adoption).

94. There is an argument, along originalist lines, that could be advanced that the state

Marriage Act 1961, including the 2004 amendments to confirm the definition of marriage as being between a man and a woman and to exclude recognition of foreign same-sex marriage, prevents the passage of state laws permitting such marriages.

Although there have been various state bills drafted, to date, the Tasmanian bill is the only bill to have passed any legislative chamber and to have been the subject of extensive debate in the chamber in which it was defeated.⁹⁵ Therefore, the Tasmanian bill will be the focus of this section. In voting against the Bill, several opponents cited constitutional arguments and the consequent costs of litigation as reasons to vote the Bill down.

The Tasmanian *Same-Sex Marriage Bill 2012* (the Bill) provided at clause 3 that “same sex marriage means the lawful union of two people of the same sex to the exclusion of all others, voluntarily entered into for life.”⁹⁶ It should be noted that the definition mimics the definition of marriage in the federal *Marriage Act 1961* with the difference that rather than a union between a man and a woman, the Bill purported to provide for same-sex marriage as a union between two people of the same-sex.

The Bill then purported to establish a regime for same-sex “marriage.”⁹⁷ In essence, the Bill clearly intended to create a complete system parallel to that created by the *Marriage Act*, but to apply exclusively to same-sex marriages.

legislative power is commensurately constitutionally impaired by section 106 of the federal Constitution. If the definition of marriage is restricted to what was known as marriage in 1900, the state constitutions are likewise restricted. Section 106 provides, “[T]he Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.” AUSTRALIAN CONSTITUTION s. 106.

95. *First Step For Gay Marriage Laws*, ABC NEWS (Aug. 29, 2012, 8:56 AM), <http://www.abc.net.au/news/2012-08-28/first-step-for-gay-marriage-laws/4227122>; Dylan Carmichael, *Same Sex Marriage Act 2012 (Tasmania) Debate, Day 1*, DYLAN CARMICHAEL’S BLOG (Sept. 26, 2012), <http://dcarm85.wordpress.com/2012/09/>.

96. *Same-Sex Marriage Bill 2012* (Tas).

97. Part 1 of the Bill contains the interpretation section, which contains the definition of same-sex “marriage.” *Id.* Part 2 sets up a scheme in relation to same-sex “marriages” and deals with marriageable age, procedure for solemnisation of same-sex marriages, marriage certificates and offences. *Id.* Part 3 deals with dissolution and annulment of same-sex “marriages”, Part 4 with proceedings for financial adjustment and maintenance and, Part 5 with financial arrangements. *Id.* Part 6 addresses recognition of same-sex “marriages” under corresponding laws, Part 7 with authorized celebrants, and Part 8 with miscellaneous matters. *Id.*

A. *The Marriage Act*

The *Marriage Act* established a regime for dealing with marriage in Australia. Part I of the Act deals with preliminary matters. This part defines marriage as “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.”⁹⁸

Part I also contains section 6, which provides that the *Marriage Act* does not exclude the operation of State laws with respect to the registration of marriages. It seems clear that this provision is intended to permit only limited concurrent operation for state laws.⁹⁹ Part VA deals with the recognition of foreign marriages.¹⁰⁰ Section 88B (4), which is part of Part VA, adopts the *Marriage Act* definition of marriage in relation to the question of the recognition of foreign marriages.¹⁰¹ Section 88EA, which is also in Part VA, provides:

A union solemnised in a foreign country between:
a man and a another man; or
a woman and another woman:
must not be recognised as a marriage in Australia.¹⁰²

While it may be pointed out that section 88B does not seek to deal with State “marriage” relationships, it is a fair response to make that no such legal institution was in contemplation at the time because the states had acquiesced in the Commonwealth plenary exercise of power. As is apparent from the earlier discussion, there never has been any other legal institution described as “marriage” in Australia other than as between man and a woman.

It seems clear that the *Marriage Act* operates to create a code in relation to the institution of marriage in Australia other than in respect of registration. Indeed, when the *Marriage Act* was introduced

98. *Marriage Act 1961* (Cth) s 5(1).

99. Other Parts of the Act deal with matters relating directly or indirectly with marriage. Part IA addresses marriage education, Part II the question marriageable age and the marriage of minors, Part III deals with void marriages and Part IV with the solemnization of marriages in Australia. Part V addresses marriages of members of the Defence Force Overseas. Part VI deals with the legitimation of children by virtue of marriage of parents, Part VII with offences, Part VIII with transitional provisions and Part IX with miscellaneous matters.

100. *Marriage Act 1961* (Cth) s VA.

101. *Id.* s 88B(4).

102. *Id.* s 88EA.

to Parliament in 1961, the then-Attorney-General, Sir Garfield Barwick, said that the purpose of the legislation was to “produce a marriage code suitable to present-day Australian needs.”¹⁰³

It appears a part of that purpose was to rid the legal landscape of the different pieces of State legislation on the topic of “marriage.” In this regard, the observations by the Attorney-General as to state laws in 1961 are pertinent now:

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 solemnised 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 4.¹⁰⁴

*B. Validity of the Bill if Passed into Law: The Inconsistency Question –
Section 109 of the Constitution*

There is an obvious question of inconsistency between the *Marriage Act* and the Bill under section 109 of the federal Constitution. Section 109 states, “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.”¹⁰⁵ “Invalidity” in the context of section 109, means that the state law is rendered inoperative as long as the Commonwealth law is effective. If the Commonwealth law were to be repealed, then the State law would revive.¹⁰⁶

103. Olivia Rundle, *An Examination of Relationship Registration Schemes in Australia*, 25 AUSTL. J. FAM. L. 121, 126 (2011) (quoting Garfield Barwick, *The Commonwealth Marriage Act 1961*, 3 MELBOURNE UNIV. L. REV. 277, 277 (1962)).

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

105. AUSTRALIAN CONSTITUTION s 109.

106. *Butler v Attorney General (Vic)* (1961) 106 CLR 268.

There are two tests that the High Court has developed in order to determine whether a State law is inconsistent with a Commonwealth law. The first is whether there is a direct inconsistency between the laws.¹⁰⁷ The second is whether the Commonwealth law evinces an intention to ‘cover the field’ and so an indirect inconsistency is created in the event that a State law purports to enter that field.¹⁰⁸

For section 109 to come into play, there must first be a valid law enacted by the Commonwealth parliament and an otherwise valid law passed by the particular state parliament.¹⁰⁹ If one or the other law is otherwise invalid there is no need for recourse to section 109.

Since there has never been any doubt expressed that the *Marriage Act* (including the amendment to introduce the definition of “marriage” made by the *Marriage Amendment Act 2004*) is a valid enactment of the Commonwealth Parliament, there is a question of invalidity whenever a state act purports to enter the legislative fields of marriage and the definition of marriage.¹¹⁰

In a unanimous decision concerning section 109, *Telstra v Worthing*,¹¹¹ the High Court elucidated the tests for invalidity under the section:

The applicable principles are well settled. Cases still arise where one law requires what the other forbids. It was held in *Wallis v Downard-Pickford (North Queensland) Pty Ltd* that a State law which incorporated into certain contracts a term which a law of the Commonwealth forbade was invalid. However, it is clearly established that there may be inconsistency within the meaning of s

107. That is, it is impossible to obey both laws, such as where one law requires or permits what the other prohibits. Examples are discussed in GABRIEL MOENS & JOHN TRONE, LUMB AND MOENS’ THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA ANNOTATED 360–362 (2007) and include *R v Brisbane Licensing Court ex parte Daniell* (1920) 28 CLR 23; *Telstra Corp Ltd v Worthing* (1999) 197 CLR 61; *Clyde Engineering v Cowburn* (1926) 37 CLR 466; *Viskauskas v Niland* (1983) 153 CLR 280; *Dao v Australian Postal Commission* (1987) 162 CLR 317.

108. The Commonwealth statute may evince such an intention either by express words or by necessary implication. The intention to legislate exhaustively in a particular legislative field to the exclusion of any State legislation will, if found, produce an indirect inconsistency, referred to as “covering the field”. Examples are discussed in GABRIEL MOENS & JOHN TRONE, LUMB AND MOENS’ THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA ANNOTATED 360–362 (2007) and include *Ex Parte McLean* (1930) 43 CLR 472; *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128; *Commercial Radio Coff’s Harbour Ltd v Fuller* (1986) 161 CLR 47; *The Queen v L* (1991) 174 CLR 379.

109. *Bayside Council v Telstra Corp.* (2004) 216 CLR 595, 628.

110. *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 519.

111. (1999) 197 CLR 61.

109 although it is possible to obey both the Commonwealth law and the State law. . . .

In *Victoria v The Commonwealth*, Dixon J stated two propositions which are presently material. The first was:

“When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid.”

The second, which followed immediately in the same passage, was:

“Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent.”

The second proposition may apply in a given case where the first does not, yet, . . . if the first proposition applies, then s 109 of the Constitution operates even if, and without the occasion to consider whether, the second proposition applies.¹¹²

Thus, the test as to whether there is a direct inconsistency between the *Marriage Act* and the Bill if it had been enacted is whether the Bill would “alter, impair or detract” from the operation of the *Marriage Act*. There is a strong argument that it would detract from the creation of a single legislative code created to deal with the legislative topic of “marriage.” The *Marriage Act* created a single regime for marriage in Australia. With respect to legal relations between same-sex couples, the express effect of the definition of “marriage” contained in the Act is that such relationships are not within the definition of “marriage.” Moreover, the Act would appear to fortify that definition by forbidding recognition of foreign marriages between same-sex couples in Australia. The Bill sought to alter that regime. It also sought to disrupt the universal operation of the federal Act throughout Australia as a code in relation to “marriage.” By creating an exceptional enclave, it would have impaired and detracted from the *Marriage Act*. The Bill sought to provide recognition for state “marriages” that, with respect to foreign “marriages” are forbidden by section 88EA. This supports a

112. *Id.* at 76–77.

view that the Bill, if passed into law, would have been found to be inconsistent with the *Marriage Act*.¹¹³

It may be argued that the saving of certain state laws in relation to the registration of marriages in section 6 of the *Marriage Act* detracts from the argument that the *Marriage Act* “covers the field.” However, section 6 closely circumscribes the field in which a state law may operate—that is, only in relation to the registration of marriages as opposed to their solemnization. Indeed the provision strengthens the “covering the field” argument as it strongly implies, by the absence of an express preservation in respect to solemnization, that any state powers for creating a new and alternative regime for solemnization of “marriage” are *not* preserved.

If the argument for saving state laws had any weight, one would expect there to be express saving provisions in the *Marriage Act* itself. As an example of legislation that contains state law saving provisions, a clear intention is expressed in both the *Trade Practices Act 1974* (Cth) (TPA) and its successor, the *Competition and Consumer Act 2010* (Cth) that state laws in relation to certain specified matters have continued valid operation. One of those was cited by the High Court in *Master Education Services v Ketchell* where the Court made reference to section 51AEA of the TPA:

Section 51AEA states:

“It is the Parliament’s intention that a law of a State or Territory should be able to operate concurrently with this Part unless the law is directly inconsistent with this Part.”

The legislative purpose apparent in s 51AEA is to deny any intention to “cover the field” in the sense of the authorities concerning s 109 of the Constitution.¹¹⁴

It has been argued that because section 88EA expressly repudiates foreign same-sex “marriages,” but does not expressly

113. This is consistent with the opinion published in 2006 by Professor Geoffrey Lindell in relation to a similar Bill previously before the parliament in Tasmania. 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)*, 9 CONST. L. & POL’Y REV. 25 (2006). He was of the view there was a direct inconsistency between the 2005 Bill and the *Marriage Act*. *Id.* at 26–28.

114. (2008) 236 CLR 101, 108. See also section 75(1) of the TPA which also preserves the state legislative capacity to regulate conduct in relation to consumer market transactions. *Trade Practices Act 1974* (Cth) s 75(1).

repudiate domestic same-sex marriages, the *Marriage Act* leaves room for state same-sex marriage legislation.¹¹⁵ But there was good reason for the *Marriage Act* not to mention domestic same-sex marriages. First, the *Marriage Act*, as amended, provides national definition of marriage as being a union between a man and a woman for life.¹¹⁶ What reason was there for dealing with the possibility of domestic same-sex marriages¹¹⁷ when they had been expressly excluded in domestic law by the insertion of the definition?¹¹⁸

If the Bill were to recognize internationally contracted same-sex “marriages,” that recognition would run directly contrary to the provisions of section 88EA. If it did *not*, it would begin the very fragmentation of the concept of marriage that the *Marriage Act* seeks to avoid by creating at least three diverse species of legal marriage: marriage under the federal Act, defined as between a man and a woman and recognized in all states and territories and internationally; a form of same-sex marriage, recognized only in Tasmania; and internationally contracted same-sex marriages, not recognized in Tasmania, but in all respects appearing the same as those contracted in Tasmania. The validity of any “same-sex marriage” would invite inquiry as to the place it was contracted—an inquiry the *Commonwealth Act* currently precludes. The intention of the federal Act is that there be only one legally recognized form of marriage in Australia.

Professor George Williams, in an opinion in relation to the 2005 Tasmanian Bill, has expressed the view that the proposed state law would not have been rendered inoperative by the *Marriage Act* because they would operate in separate fields.¹¹⁹ Central to Professor Williams’s argument is that the *Marriage Act*, after the 2004 amendments, deals with “different type[s] of union[s]” leaving the way clear for the states to legislate in relation to same-sex marriage.¹²⁰ With respect, the fatal and obvious flaw in this

115. George Williams, *Advice regarding the proposed Same-Sex Marriage*, 9 CONST. L. & POL’Y REV. 21 (2006).

116. *Marriage Amendment Act 2004* (Cth) s 5(1).

117. See Cth, Parliamentary Debates, House of Representatives, 27 May 2004, 29356 (Philip Ruddock, Minister for Immigration), available at http://www.aph.gov.au/Parliamentary_Business/Hansard.

118. Lindell, *supra* note 113, at 31.

119. Williams, *supra* note 115, at 24.

120. *Id.* at 23.

argument is that it is contrary to the express terms of the *Marriage Act*. The *Marriage Act* does not purport to deal with “different sex marriage” at all. At the time of passage, there was no such legal institution in Australia. The adjectival phrase “different sex” begs the question of the possibility of “same sex” marriage, when it is clear that the intention has been to exclude such an institution from Australia.¹²¹ The phrase “different sex marriage” is tautological. In 2004, there was (and continues to be) only one legal institution described as “marriage” in Australia. The amended *Marriage Act* defines “marriage” as a union between a man and a woman for life.¹²² It deals with and establishes a complete statement of law in relation to marriage. Any union that is outside the terms of the *Marriage Act* is therefore not “marriage.”¹²³

To speak of “heterosexual” marriage in Australia is a legal tautology. It is a construct that is capable of providing neither logical legal space nor foundation for the concept of any other type of marriage—be it homosexual, trans-sexual, bigamous, polyandrous, polygynous, or otherwise.¹²⁴

C. Inconsistency with Respect to Maintenance and Property

The presence in the Bill of Parts 4 and 5, which dealt with the incidents of separation, divorce, and property disputes, created a further potential inconsistency between Commonwealth and state law.

By the *Commonwealth Powers (De Facto Relationships) Act 2006* (Tas), Tasmania referred powers to the Commonwealth in relation to financial matters between de facto partners. The definition of a de

121. *Id.*

122. *Marriage Act 1961* (Cth) s 5(1).

123. And the Commonwealth legislation was passed in the knowledge that forms of de facto union were the subject of legal recognition in the respective states, including same-sex relationships.

124. When testifying before the House of Representatives Standing Committee on Social Policy and Legal Affairs concerning two same-sex marriage laws, Professor Williams did not assert that his opinion was definitive in relation to state laws on same-sex marriage. Instead, he said that there was “no clear answer” to this issue. Cth, Parliamentary Debates, House of Representatives Standing Committee on Social Policy and Legal Affairs, 16 April, 2012 (George Williams) available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommrep%2Fd4627e5a-48ef-42e7-9297-d772ce9bdf14%2F0002;query=Id%3A%22committees%2Fcommrep%2Fd4627e5a-48ef-42e7-9297-d772ce9bdf14%2F0000%22>.

facto relationship in that Act was “a marriage-like relationship between two persons.”¹²⁵

In *Graham v Paterson*, Chief Justice Latham said:

[T]he reference of matters under s. 51 (xxxvii) does not deprive the State Parliament of any power. It results in the creation of an additional power in the Commonwealth Parliament. If the Commonwealth Parliament exercises such a power, s. 109 of the Constitution may become applicable, with the result that if a law of the State with respect to a matter referred was inconsistent with a law of the Commonwealth, the Commonwealth law would prevail and the State law to the extent of the inconsistency would be invalid. But unless the Commonwealth Parliament exercises the power to legislate with respect to the matter referred, no effect whatever is produced in relation to the operation of State laws.¹²⁶

The Commonwealth Parliament has now exercised the very powers referred to it by the States, including Tasmania, in enacting the *Family Law Amendment (De Facto Matters and Other Measures) Act 2008*.¹²⁷ That Act provides that *all* matters in relation to de facto financial matters will be dealt with by the Family Court, which includes all ‘marriage-like’ unions.¹²⁸ The Bill purported to set up a different regime without withdrawing the referred power. While clause 47 attempts to accommodate Family Court proceedings by providing that proceedings in the Supreme Court will be adjourned if there are concurrent proceedings in the Family Court, it entered into the field covered by the *Commonwealth Act* and, so, would likely be inconsistent and inoperative under section 109.

D. Conclusion on the State Capacity to Pass Same-Sex Marriage Laws

As observed previously, the outcome of constitutional litigation is notoriously difficult to predict. However, it would seem that section 109 and the *Marriage Act* most likely constitute insuperable barriers to state legislation on the subject of same-sex marriage while the *Marriage Act* remains in its current form.

125. *Commonwealth Powers (De Facto Relationships) Act 2006* (Tas) s 3(1).

126. *Graham v Paterson* (1950) 81 CLR 1, 19–20.

127. *Family Law Amendment (De Facto Matters and Other Measures) Act 2008* (Cth).

128. *Id.*

IV. CONCLUSION

Opponents of legislation permitting same-sex marriage in Australia have presented several species of argument to avoid an intolerable result. Opponents argue that an institution, central to the meaning of the community as they perceive it would have been irreversibly changed. Freedoms to speak and act upon beliefs in relation to marriage, as we currently know it, would have been forever lost or, at least, compromised.

They presented passionate arguments as to why the legislation *should* not be passed. But of all of the arguments presented, it was the constitutional arguments—reasons why the legislation *could* not be validly passed—that gave the opponents of the legislation a voice that could be heard, understood, and used to persuade.

Although Australia has no bill of rights guaranteeing any of the freedoms that might have been encroached by passage of same-sex marriage legislation, it does have a robust set of constitutional arrangements with courts to enforce them, the combination of which provides a brake upon exercises of legislative and executive power.

This is not a counsel of complacency. The protections could and should be stronger. But by a strange serendipity, those who opposed strengthening of the rights are the beneficiaries, on this occasion, of the protections that are in place.

In one of his recent novels, *1Q84*, Haruki Murakami describes two parallel universes that existed in 1984.¹²⁹ The first is the 1984 of history as we know it—the true 1984 of our world. The second is a world that in many respects closely resembles 1984, but on closer inspection has some strange differences. It is 1Q84—an Orwellian dystopia, illuminated at night by two moons. In the parallel universe that is 1Q84, characters apparently familiar to the protagonists from 1984 behave in strange, intimidating ways. What separates 1984 from 1Q84 is a mesh fence with a gap just large enough for the protagonists to pass through.

In a sense, the only separation that Australia might have from the world that might otherwise be is the mesh fence of its constitutional arrangements.

129. HARUKI MURAKAMI, *1Q84* (2009).